



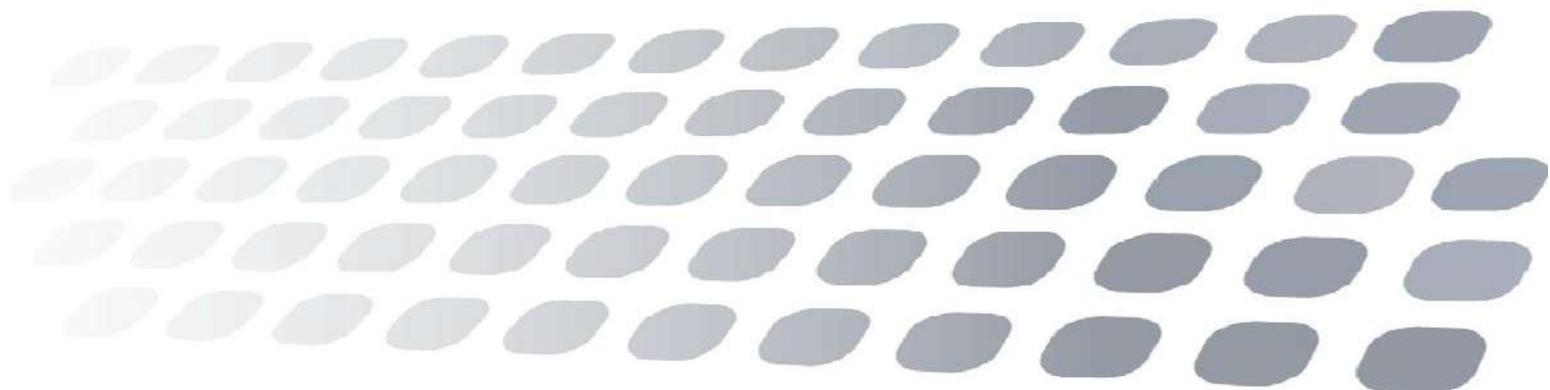
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TABLE OF CONTENTS

SPECIAL ISSUE

***Sixty Years Later. Rethinking Competing Paradigms for EU Law in Times of Crisis***

Edited by Marta Simoncini and Gert Straetmans

EDITORIAL

***How to Bridge the Gaps between Competing Paradigms for EU Law: An Introduction***

MARTA SIMONCINI AND GERT STRAETMANS

E- I-XIX

ESSAYS

COMPETING PARADIGMS FOR EU LAW AND THEORIES OF EU LEGAL INTEGRATIONS

***Reflections on the ‘Administrative, Not Constitutional’ Character of EU Law in Times of Crisis***

PETER LINDSETH

E- 1-17

***‘Top-down’ vs. ‘Bottom-up’: A Dichotomy of Paradigms for the Legitimation of Public Power in the EU***

SERGIO DELLAVALLE

E- 18-46

QUESTIONING PARADIGMS FOR EU LAW

***Paradigms for EU Law and the Limits of Delegation. The case of EU Agencies***

MARTA SIMONCINI

E- 47-71

***The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States***

MARTIN BELOV

E- 72-97

PARADIGMS UNDER STRESS

***Can the EU’s constitutional framework accommodate democratic politics?***

NICOLE SCICLUNA

E-98-118

***The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?***

LEONARDO PIERDOMINICI

E-119-153

PARADIGMS IN THE INTERNAL MARKET

***Single Market and Synchronized Mechanisms for the Exercise of Administrative Functions: Converging Pathways or New Pathways for Integration? The Case of the European Banking Union***

FABIO GIGLIONI

E-154-179

***The Interpretive Function of the CJEU and the Interrelationship of EU and National Levels of Consumer Protection***

GERAINT HOWELLS AND GERT STRAETMANS

E-180-215



PARADIGMS BEYOND THE EU

*Administration or Federation?  
Constitutional Self-Image and the World  
Political Order in Which the EU Finds  
Itself*

MING-SUNG KUO

E-216-239

*Constitutional and Administrative  
Paradigms in Judicial Control over EU  
High and Low Politics*

POLA CEBULAK

E-240-266



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# How to Bridge the Gaps between Competing Paradigms for EU Law: An Introduction

by

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## Abstract

For the first time since its creation, the European Union (EU) has been living its probably most significant identity crisis. This crisis has its roots in different critical situations that have hit the EU, have affected its functioning and have fundamentally questioned its legitimacy. The gaps in the EU integration process have been uncovered and the fragmentation of EU policies has become a source of different risks.

On the anniversary of sixty years of the Rome Treaties, this Special Issue aims to reflect on the paradigms for EU law looking beyond their competing accounts of EU integration. The analysis is developed through a series of contributions that challenge the paradigms in different directions. The discussion is articulated on two levels. On the one hand, a group of contributions focuses on the historical and legal analysis of the emergence and transformation of the EU legal order. These contributions delve deeper into the absence of a European identity and go beyond the inherent critique that the EU is a *demoi-*cracy that struggles with a democratic disconnect or even deficit. On the other hand, other contributions debate paradigms and their implementation in important policy domains. These contributions aim to give a more practical perspective on the constitutional and/or administrative character of the European Union, showing its implications and concrete questions.

## Key-words

European Union, EU law, paradigms, crises



## 1. The EU identity in crisis

For the first time since its creation, the European Union (EU) has been living its probably most significant identity crisis. This crisis has its roots in different critical situations that have hit the EU, have affected its functioning and have fundamentally questioned its legitimacy. The gaps in the EU integration process have been uncovered and the fragmentation of EU policies has become a source of different risks.

Firstly, the economic crisis has shown that the existence of a common monetary policy with national fiscal policies may be a boomerang for weak national economies. Austerity measures have induced EU citizens to forget the benefit of sharing an internal market and this produced a domino effect on other critical dimensions, such as the constitutional foundations of the EU, its institutional design, its political identity and its functioning.

Secondly, the fall-back of globalisation and the spread of protectionist sentiments has accompanied the pressure on unstable national economies and promoted anti-European feelings. Immigration has been particularly perceived as a burden on the citizens of the Member States and their unstable national economies. On the one hand, EU immigrants have been perceived as a burden on national welfare systems and as unfair competitors in national labour markets. The British referendum campaign on the withdrawal of the UK membership from the EU has legitimised in the political discourse the critics of free movement and has strongly questioned this fundamental freedom as a constituent element of the EU integration process. On the other hand, the refugee crisis has had a very significant impact on resources of the Member States, which are poorly equipped to face the historical exodus of people from the Middle East and Africa, trying to escape war scenarios, hunger and economic deprivation.

Thirdly, the contemporary spread of ISIS terrorism around Europe also promoted fear and suspicion of immigrants who are originally from Arabic countries but now are second-generation citizens of the EU. In addition, the capability of terrorists to cross national borders without any checks brought about some calls for the limitation of the free movement of people into the Schengen area and has been perceived as a negative externality of integration. In the claim for national security, the EU has been easily blamed for the dangers of free movement and has been weakly identified as a resource in the fight



against terrorism, through effective coordination between national intelligence services and police.

Against this backdrop, the consolidated discussion on the legitimacy of the EU has become a more and more pressing issue. Lacking good performance, the critics of the European projects and the goodness of its achievements have been flourishing. The anniversary of the sixty years of the Treaties offers a pertinent occasion to reconsider the achievements of the EU and to assess its failures. It calls on a rethink of the EU's own identity.

Historically, EU regulation has been characterised by the changeable willingness of Member States towards more or less integrated policies; however, the current coexisting crises have accelerated national second-thoughts about the integration process and potentially put the EU system at a crossroad. The need for more integration is an issue on the EU agenda, but at the same time, Member States are reluctant to further transfer their sovereign decision-making powers to the EU. The investigation on the nature of the EU integration process has therefore become a pressing need to give coherent answers to concrete problems. By shedding light on the reach of the EU legal order, law can effectively contribute to this debate.

## 2. The paradigms for EU law

Since the debate about the possibility of a constitution for the EU and the no *demos* theory (Grimm 1995; Habermas 1995), much has changed: the failure of the Constitutional Treaty has given new arguments to the discontent of EU constitutionalism; at the same time the proclamation, first, and the entry into force as a binding document, then, of the Charter of Fundamental Rights have given new blood to the debate on the constitutionalisation of the EU. Legal scholarship in the area of constitutional law has developed significant theories about the nature of EU constitutionalism and its effects on the functioning of the EU legal order (amongst others, Stein 1981; Weiler 1991, 1996; MacCormick 1993 and 1999; Eriksen, Fossum and Menéndez 2004; Poiares Maduro 2005, 2007 and 2009; Kumm 2005; Avbelj 2008; Menéndez and Fossum 2011; Martinico 2012; Avbelj and Komárek 2012). A growing number of new constitutional theories have emerged and the discussion has gone beyond the no *demos* theory (Weiler 1999; Walker



2002 and 2008; Krisch 2005; Maduro 2007, 2009 and 2010; de Búrca and Weiler 2011). In the line of the political science literature on the regulatory Europe (Majone 2005 and 2014), legal scholarship has also deepened the studies on governance and started to explore the EU as a phenomenon of administrative governance (Joerges 1996, 2001 and 2002; Joerges and Neyer 1997; Joerges and Dehousse 2002; Lindseth 1999 and 2010; Smismans 2004; Hofmann and Türk 2006; Azoulai 2011; Curtin and Mendes 2011; Joerges and Glinski 2014). In this framework, the legal literature has somehow produced two different paradigms for understanding the EU legal order, which gravitate towards a constitutional law approach to EU law and an administrative law one.

The administrative law paradigm aims to explain the EU as a phenomenon of administrative governance beyond the state. Lindseth (2010) has clearly explained this approach by emphasising that the EU has an ‘administrative, not constitutional’ legitimacy. In short, this means that EU institutions are conceived as regulatory powers, which have been delegated by its Member States. The EU therefore benefits from a ‘mediated form of legitimacy’, which stems from its Member States and their citizens. Member States are thus understood as the principals overseeing the EU, the agent. This approach considers EU integration as a functional process that affects sector-specific areas that the Member States have deliberately planned to join.

The constitutional law aims to explain the EU as an experience that contains and shapes the Member States’ constitutional values, with specific reference to fundamental rights in the EU, in its Member States and in the internal market. This idea of constitutional law goes beyond the traditional development of constitutional law in the national contexts. It is not based on the hierarchy of the sources of law and/or on sovereignty; it represents a kind of constitutionalism beyond the state and its institutional dimension, close to the idea of global constitutionalism. It is a common commitment to shared values and objectives. This approach emphasises the structural change in the concept of national sovereignty that the creation of an autonomous constitutional legal order has involved. This emerges with clarity in the discourse of the EU institutions. The way the Court of Justice defines the autonomy of EU law and its legal order is emblematic. Decisions like *Kadi* or the Opinion 2/13 on the access to the European Convention of Human Rights clearly show the strong constitutional discourse of the Court.



If one looks at the constitutional foundations of the EU and its polity, the legitimacy process is led by the recognition of (fundamental/human) rights and it works not only bottom-up (from the States to the EU), but also top-down (from the EU to the States) and with openness to international *fora* (e.g., standardisation process). So far, the same dynamics of legitimation that emerge in the international arena are reflected in the EU. The debate about the constitutionalisation of international organisations, as well as the development of global administrative law has created legal systems which go beyond the traditional functioning and categories of international law. For example, further development of fundamental rights within the EU is legitimised by the CJEU upon both the constitutional traditions of the Member States and international law.

The key difference between the two paradigms is the emphasis they put on specific aspects of the EU integration process: on the one hand, the existence of an uncuttable umbilical cord between the Member States and the EU and, on the other hand, the autonomous existence of the EU as a legal person not only with regard to its Member States, but also in the international arena.

Paradigms have easily been facing each other and have aimed to define themselves as exclusive with the effect of polarising the legal scholarship on two competing sides. The paradigm of *administrative* integration and the one of *constitutional* integration read in competing ways the concept of democratic legitimacy in the EU legal order. They both focus from their perspective on the genuine nature of the EU.

So far, the debate has focused on the apparent differences between these approaches, but possibly they also have a lot in common. This Special Issue aims to move the legal debate forward and reverse the logic of incompatible alternatives between constitutional and administrative integration. The innovative goal of this Special Issue is to reveal the complementarities of these paradigms. The goal is to understand to what extent each paradigm can contribute to the functioning and the identity-building of the EU and to find out how these commonalities affect the nature of the EU integration process.

Reflections from both perspectives on the European identity remain topical and can tell us a lot about the future directions of the European integration process. The European identity dilemma affects the content of EU policies and their legitimacy and is echoed in the political debate in opinions for more or less Europe. By focusing on these different interpretative models, the Special Issue aims to debate the very nature of the EU, its



legitimacy issues and the search for suitable regulatory solutions, with the aim of shedding light on the legal approaches to the EU and enabling them to concur to fill the gaps in the functioning of the EU.

### 3. The content of this Special Issue

On the anniversary of sixty years of the Rome Treaties, this Special Issue aims to reflect on the paradigms for EU law looking beyond their competing accounts of EU integration. The analysis is developed through a series of contributions that challenge the paradigms in different directions. The discussion is articulated on two levels. On the one hand, a group of contributions focuses on the historical and legal analysis of the emergence and transformation of the EU legal order. These contributions delve deeper into the absence of a European identity and go beyond the inherent critique that the EU is a *democracy* that struggles with a democratic disconnect or even deficit. On the other hand, other contributions debate paradigms and their implementation in important policy domains. These contributions aim to give a more practical perspective on the constitutional and/or administrative character of the European Union, showing its implications and concrete questions.

The Special Issue is divided into different Sections that structure the dialogue between the competing paradigms in a range of areas. Thanks to the expertise of well-recognised international scholars, the Special Issue also provides significant insights on different aspects of EU law. In the first section, Lindseth and Dellavalle discuss the paradigms for EU law and theories of EU legal integration. The second section questions paradigms in the justification of the institutional design of the EU (Simoncini) and in the development of the functions of constitutional identity (Belov). The third section analyses the resilience of constitutional pluralism as a paradigm for EU law in times of Euro crisis, and conflicting relationships between national and supranational legal systems, with specific regard to the Central and Eastern European political scenario (Pierdominici), and the challenges to the democratic principle stemming from the economic crisis (Scicluna). Under the fourth section, the discussion goes deeper into substantive law issues and focuses on the implications of paradigms in the construction of significant EU policies, such as the Banking Union (Gigliani) and consumer protection in the internal market (Straetmans and



Howells). The last section aims to discuss the effects of paradigms on the identity of the EU as a global actor: Kuo analyses the implications of the EU's interaction with other legal regimes, whereas Cebulak discusses the CJEU's ambivalent approach to the constitutionalisation of EU external relations.

Although the Special Issue challenges the current framework of EU law in different directions, we sketch three cross-cutting issues that the contributions highlight. Firstly, the dichotomic approach to EU law as either a constitutional or an administrative experience cannot definitively exhaust the comprehension of EU law. The Treaties themselves point to different directions. On the one hand, the European Union is based on the principle of conferral (art 5 (1) TEU). This original transfer of competences from the Member States is the basis whereupon the EU developed its own supranational legal order. On the other hand, article 2 TEU proclaims the respect for human rights, democracy and the rule of law as key values shared between the EU and the Member States. Already in the *Les Verts* case, the Court of Justice (CJEU) characterized the EU as a constitutional level of governance in its own right, with the EU treaties serving as a 'constitutional charter of a Community based on the rule of law'.<sup>1</sup> The implication is that the centralized rulemaking process in the EU is also of a constitutional character, serving as the EU's legislature. How the CJEU further brought human rights into the framework of the European Union need not be repeated. Yet, this case law suggests something else other than the protection of fundamental rights; the statement of the autonomy of the EU legal order and the CJEU's jurisdiction. Ever since its inception in *Van Gend en Loos*, the main goal of the constitutionalisation process has been to establish the autonomy of the EU legal system vis-à-vis its Member States (Halberstam and Stein 2009: 62; Mayer 2010: 20-21). To that end, the CJEU has endeavoured to build the EU legal order into a fully-fledged constitutional value system. The recent *Kadi* saga and the Opinion 1/13 on the EU accession to the European Convention of Human Rights (ECHR) further illustrate the CJEU's attachment to the autonomy of the EU legal order and its monopoly of jurisdiction. The ultimate goal of the CJEU-initiated process of constitutionalisation cannot be fully achieved without extending further to the external dimension of the EU legal order vis-à-vis the international legal system. It follows that the CJEU positions the EU legal order not only vis-à-vis the Member States, but also vis-à-vis the world (see Kuo 2017). The *Kadi* cases fulfill the promise first delivered in *Van Gend and Loos* by substantiating the



Union's constitutional identity (de Búrca 2010: 44; see also Avbelj, Fontanelli, Martinico 2014).

Although the constitutional nature of the European Union is regularly questioned, an important number of scholarly opinions tend to bestow on the EU legal order a constitutional nature. This is particularly due to the CJEU's tendency to understand the EU in autonomously democratic and constitutional terms. Lenaerts, for instance, points out that as a result of the 'constitutionalisation of the Treaties', which transformed the European Union from an international organisation into 'a composite legal order', the CJEU has continuously been called upon to uphold the 'rule of law' as provided for by Article 19 TEU (see Lenaerts 2015, 14-15). He distinguishes three strands in the CJEU's jurisprudence. The Court took a leading role in setting the founding principles of the EU legal order by having recourse to the general principles of law which provide a material constitutional content to the 'law' of the EU (the so-called gap-filling function)<sup>ii</sup>. Secondly, the CJEU aimed to safeguard the core of the European integration set out in the Treaty. Once the constitutional foundations of the EU legal order were put in place and the establishment and functioning of the internal market secured, the CJEU moved onto a new paradigm. As the constitutional court of a more mature legal order, it now sees its role primarily as one of upholding the 'checks and balances' built into the EU constitutional legal order of states and peoples, including the protection of human rights, displaying greater deference to the preferences of the EU legislator or to those of the Member States (Lenaerts 2015, 16).

Simoncini also highlights the significant institutional implications that this judicial interpretation has on the development of EU administration. The judicial evolution of the so-called *Meroni* doctrine concerning the non-delegation of powers to EU agencies unveils how, legally speaking, the enhancement of EU agencies' powers takes place in the autonomous constitutional framework of the EU legal order. Howells and Straetmans note the ways in which the Unfair Contract Terms Directive<sup>iii</sup> and the Unfair Commercial Practices Directive<sup>iv</sup> try to steer a path between imposing a common European standard and allowing national variation. The open textured norms and safeguard clauses in both directives allow room for flexible application. Central to this discussion is the role of courts in developing common norms. As was pointed out above, the primary role of the Court of Justice as the constitutional court of a more mature legal order is according to Lenaerts



(2015, 16) one of upholding the ‘checks and balances’ built into the EU constitutional legal order of states and peoples, displaying greater deference to the preferences of the EU legislator or to those of the Member States. The differentiated role between the Court of Justice as the interpreter of European law and the national courts as the party that applies it, ensures a release valve to prevent any direct clashes and allow a subtle way for national perspectives to be reflected. Although the CJEU has fiercely cracked down on national laws that seem to infringe the scope of the unfair commercial practices directive, Howells and Straetmans see this as a dialogue that allows for gradual convergence.

The constitutionalization process has however been shaped in an original manner. Article 4(3) TEU imposes the loyalty principle or principle of sincere cooperation on Member States but leaves open how much leeway Member States have in setting their own constitutional parameters. Scheppele has characterized Article 4 TEU as a “microcosmos of contradiction” (Scheppele 2017). On the one hand, Article 4(3) TEU commits the Member States to EU loyalty: they should refrain from any measure which could jeopardise the attainment of the Union’s objectives. On the other hand, Article 4 TEU also commits the EU to self-restraint in telling its Member States what specific sorts of constitutional orders they must observe (Scheppele 2017, 446). Article 4(2) TEU indeed sets out the EU’s obligation to respect “the equality of the Member States before the treaties as well as their national identities, inherent in their fundamental structures, political and constitutional”.

Article 7 TEU then emerges as a helpful provision and seeks to enforce the Member States’ commitment to the shared values (Articles 2 and 3 TEU). It allows the introduction of political sanctions against Member States that present ‘a clear risk of a serious breach (...) of the values referred to in Article 2’. Yet, Kochenov has criticized the shortcomings of this enforcement mechanism mainly because the EU values reflected in Article 2 TEU are not part of the so-called *acquis* of the Union, simply because the values have never been delegated to the Union (see Kochenov 2017; compare with Scheppele 2017, who speaks of the Member States’ constitutional coups that the EU was incapable of forestalling and the ‘quarantine mechanism of Article 7 TEU’, 449-458). On top of that, the several issues embedded in the use of this sanction power suggested the use of alternative instruments to ensure the commitment to the shared values. Besselink (2016) identified these alternative instruments in the prevention and prior monitoring powers in the ‘rule of law initiatives’ of the Commission and Council. The cases of Poland and Hungary are emblematic. To face



the systemic threat that the reforms of the judiciary posed to the enforcement of the rule of law in Poland, the Commission adopted two recommendations and then launched an infringement procedure against Poland for breach of EU law. The Commission only launched a formal warning to immediately trigger the Article 7 procedure. The response of the Commission to the constitutional coup in Hungary was different. The Hungarian government suddenly lowered the judicial retirement age for ordinary judges thereby threatening judicial independence (see in more details Scheppele, 459-467). Although commitment to the rule of law is a value protected under Article 2 TFEU, the Commission preferred to charge Hungary with age discrimination which led to a judgement of the CJEU on 2 November 2012<sup>V</sup>. Also, other constitutional changes in Hungary made the European institutions conclude that Hungary was engaged in serious violations of European values, but despite criticizing the constitutional changes, none of these criticisms was effective at stopping the constitutional coup and none of the harsher sanctioning mechanisms that were available to European institutions were used (see Scheppele 2017, 466-467). From this complex background, the constitutional identity and the legitimizing factors for the EU public power may legitimately diverge, navigating between the constitutional and administrative tensions. Pierdominici observes that crises questioned the normative validity, but confirmed the descriptive validity of the constitutional pluralism as a theory accommodating the plurality of constitutional sources and their inherent constitutional conflicts in the absence of a shared hierarchy of values. Discussing EU integration, Simoncini considers that only a wider public law approach can accommodate the composite nature of the EU as a Union of Member States, and justify institutional innovation. Analysing the role of the EU as a global actor, Kuo also defends that the CJEU's pivoting of the idea of constitutional identity on the autonomy of EU law coheres with its continuing effort to establish the autonomous and constitutional character of the EU legal order vis-à-vis national legal orders of the Member States in its case law. Cebulak has also recognised that especially in the domain of EU external relations, the CJEU adopts either the administrative law paradigm based on efficiency considerations or the constitutional paradigm based on human rights protection, according to the specific policy domain and the individual cases, suggesting a lack of a coherent approach to legitimizing the nascent judicial review in EU external relations.



Precisely on this point, Kuo points out that there is more at stake in the case law relating to external relations than this ‘intra-EU law’ distinction. He contends that the CJEU’s take on the Union’s constitutional identity suggests far-reaching implications from the CJEU’s identity-based defence of fundamental rights to the relationship between the Union and the world. In particular, the shortcomings of a purely administrative approach have brought Kuo to that conclusion. Global Administrative Law seeks to resolve inter-jurisdictional conflicts on a pragmatic, case-by-case basis in light of the idea of publicness (Kingsbury, Krisch and Stewart 2005; Krisch and Kingsbury 2006). Thereto the interrelationship between regulatory regimes is steered on the basis of principles such as the limitation of power, the requirement of justification and proportionality, the procedural mechanism for deliberate decision-making, and the protection of human rights in each governance sector etc. On the basis of these principles, the laws of the regulatory regimes are balanced against each other to decide which one to apply in each case (Krisch 2010: 277-278). Kuo objects to this in that the distinction between the constitutional and the administrative approach prevents GAL’ pragmatic answers to global governance from engaging in a value-based debate on the future of the world order.

In this discussion, Belov’s contribution takes a particular place. He attaches primary importance to the concept of constitutional identity, which he counts among the new normative ideologies of the post-Westphalian supranational constitutionalism. Going beyond the concept of sovereignty and hierarchy deeply rooted in state-like constitutionalism, Belov identifies in the constitutional identity a flexible concept that covers the different realities of global, supranational and post-national constitutionalism. Albeit from a completely different angle, Belov approaches like Kochenov and Scheppele the problem of the substantiation of the common values in the European Union, and is convinced that constitutional identity could serve as a mediator, capable of modelling the diversity and plurality of national constitutional orders into the composite constitutional framework of the EU with sufficient deference to national sensitivities. Like article 4 TEU, constitutional identity performs a legitimacy function and allows the transfer of constitutional competences from the Member States to the EU, but at the same time, recognises the limitations to the primacy of EU law.

Another relevant issue that the Special Issue points out is the role of technocracy in the EU, and how this affects the legitimacy of the EU integration process in the management



of crises. Lindseth considers the relationship of the Member States with the EU as a principal-agent relationship, wherein the EU has a functional legitimacy only since its institutions are administrative agents of decisions taken under the oversight of the nation states as principals. In particular, the EU's lack of autonomous legitimate compulsory mobilization powers, human and fiscal, demonstrates the lack of true constitutional foundations. Lindseth points out the risks of the nominal constitutionalism of the European Court of Justice as one of the major problems the EU is struggling with. In proceeding 'as if' the EU possesses a robust form of legitimacy in its own right, the CJEU seems to ignore the historically constructed connection between the people and their institutions.

When analysing the legitimacy of the EU public power in the light of the traditional divide between the justification 'from above' -namely on the basis of superior skills of those who exercise the power (output-oriented legitimacy/government for the people)- and the justification 'from below' -namely the legitimation of the EU public power by the European citizens so as to maintain the highest democratic standards within the EU institutions (input-oriented legitimacy/government by the people)- Dellavalle criticizes the widespread confidence in the competence of the EU institutions, the tacit consent of the EU citizens and their mainly accepting stance towards authority that is presumed to act in the common interest. In his view, the manner in which the EU governed the financial crisis demonstrates that the 'technocratic drift' of public affairs does not (necessarily) achieve better results.

Dellavalle's analysis is shared by Giglioni and Scicluna. When discussing the accountability and legitimacy of the European Banking Union, Giglioni emphasises that in the experimentation of original forms of administrative integration, financial stability has become the predominant factor to which all other (public) interests are subordinated. On the question of whether this evolution is paired with adequate safeguards for democratic control, Giglioni's answer is negative. Although a trend can be detected toward increased connections with parliamentary institutions, these strengthened bonds do not take place with important limitations and exceptions. On top of that, the judicial review of the CJEU seems very limited and in some cases even virtually absent. Hence, publicity and transparency are offered on the altar of confidentiality and secrecy so that the new power



relationships seem to coalesce according to the prevalent interests of certain Member States.

Scicluna's analysis of the EMU and the Greek debt crisis portrays a similar picture of a growing disconnection between formally democratic procedures and substantive choices in the EU. The recent crisis-driven turn to technocracy in the EMU management manifestly illustrates the absence of real, substantive choice in the Eurozone governance. In Scicluna's view, the euro crisis has privileged national executives, with the European Council becoming the Union's preeminent decision-making body, while the European Parliament is side-lined and effective cooperation is paralysed in the sovereignty paradox, which keeps national governments unable to succeed alone because they have already delegated many of their law-making competences, but at the same time are unwilling to give up further powers.

Only the democratic justification of the EU rules out technocratic governance. Dellavalle contends that democratic legitimacy shall not be exclusively understood as based on a social and political community which is assumed to be united by pre-political and pre-legal bonds that can take up the role of a political actor and guarantee ascending legitimacy. No European popular legitimation can be achieved if such historically cemented 'demos' is required. In his view, democratic legitimacy can also be the result of a political community of the people (some ethnic origin of nations) which deliberately decide to be part of a common 'demos' that legitimizes power and to organise themselves in democratic institutions that share 'a common democratic ethos'. European citizens are united by a common aspiration to meet common challenges with shared solutions.

If legitimacy 'from below' is the antidote to the undesired technocratic drift, the way to achieve this goal is not traced. Two opposite strategies may then be followed. We could express a profession of faith in the social and political conditions of nation states or we could opt for the radical democratization of EU institutions. As professed by Lindseth, in one way or another this would 'reconcile Europe and the nation-state', by reducing the 'as if constitutionalism' that the current EU legal order represents to his own eyes. According to Lindseth, this reconciliation could take either form. It can police the boundaries of the competences conferred on the EU with much greater rigour, temper significantly claims to EU law 'autonomy', take a much more demanding approach with regard to the principle of subsidiarity, both in terms of substance and procedure, and most importantly, abandon any



notion of constitutional supremacy, particularly with regard to the relationship between EU law and national constitutional law, and replace it by a principle of strong deference. Or, it can also experience democracy and constitutionalism in supranational terms.

As to the first strategy, it may be objected that nation states also struggle with democratic deficiencies. Scheppele pointed to the constitutional coups of some Member States (449-458) and Scicluna casts serious doubts on the democratic features of some Member States and the democratic content of decision making between the Member States in the Eurozone.

### 3. Bridging the gaps. The way forward

Several contributions to this Special Issue give further guidance on how the EU should proceed in the future. The common thread is the search for coherent developments that should bridge the gaps of both paradigms. It follows from the foregoing that none of the contributors exclusively reasons in terms of ‘the’ constitutional or administrative paradigms. They rather see the EU legal order as a genuine construct that objectionably can be reduced to one or another traditionally defined paradigm. Paradigms are not mutually exclusive and their prevalence depends on the specific angle from which the EU integration process is analysed.

This is not to say that the administrative/constitutional law divide has been redundant. On the contrary, the growing critiques on the predominant constitutional label of the European Union with its shortcomings has fuelled the academic debate and forced scholars to remodel traditional legitimizing concepts to adapt them to the original, unique nature of EU public law. As mentioned, the discussion about underlying paradigms pushed the debate beyond the traditional critiques. The contributions to this issue clearly transcend this stage and aim to provide useful insights for future development of the EU.

Recently Kochenov has defended a rather pessimistic view. He qualifies the CJEU’s attempts to deal with values like human rights and the rule of law as though these were part of the ordinary *acquis* as largely insufficient (Kochenov 2017: 425 and 441). Also Lindseth heavily criticizes the CJEU’s approach ‘as if the EU possesses a robust form of legitimacy in its own right’. Both authors analyzed the EU legal order from completely different angles but (un)surprisingly come to quite similar conclusions. Kochenov, like Lindseth, has



advocated a reform of the European Union. 'Instead of hiding behind the veil of procedural purity banners of autonomy, supremacy and the like, EU law should embrace the rule of law as an institutional deal, which implies, inter alia, eventual substantial limitations on the *acquis* of the Union, as well as taking Article 2 TEU values to heart in the context of the day-to-day functioning of the Union, elevating those values above the instrumentalism marking them today' (Kochenov 2017: 445). In the same vein, Scheppele has pleaded for a systemic infringement procedure whereby the systemic violation of the basic principles of EU law by a Member State (e.g., when national pluralism hits the hard egg of common values) would constitute a violation of Article 4(3) TEU (Scheppele, 477).

Lindseth's proposals to overcome the EU's democratic disconnect also point in the same direction: 'Unless and until Europeans begin to experience democracy and constitutionalism in supranational terms, EU governance will persist as a *gouvernement des juges* and *des experts* lacking in robust legitimacy of its own, at least to the extent commensurate with its increasingly ambitious goals (currency union, Schengen, defence and security cooperation)'. This critique to the EU as *gouvernement des juges* and *des experts* has been voiced in a number of contributions to this issue. It could have pushed the authors to opt for the repatriation of powers to the individual Member States, which could for instance be realised through the legalisation of the political principle of subsidiarity. Furthermore, concerns over the destination of the federalist development and the identity implications of the constitutionalist approach could have invigorated an interest in contemplating purely administrative alternatives to the conceptualization of the EU, such as the proponents of a Global Administrative Law. And yet, none of the contributors to this issue seem to see these alternatives as an effective way forward for the EU. They rather embark on a revitalised and refashioned EU constitutionalism.

The contributions to this Special Issue take the critique from the administrative paradigm proponents on recent developments within the EU seriously, and attempt to reform the constitutional character of the EU legal order in accordance with those critiques. The intensity with which these reforms are proposed evidently varies among the contributors, going from a new world *ordre public*-exception to solve inter-regime conflicts (Kuo) to a fully-fledged democratisation of the institutional architecture of the EU (Dellavalle). Nonetheless, they all seem to have in common the belief that the only way forward for the European Union is a renewed legitimacy 'from below'. In this process, the



disconnection of central concepts such as sovereignty, constitutional identity and demos from their traditional substance seems key. A new supranational constitutionalism may emerge and bridge the gaps between competing paradigms. On a more concrete level, both the more administrative and more constitutionalist authors invite the political European community to self-reflection with the aim of substantiating the real parameters of its constitutional tradition, its constitutional culture and the core of its transgenerational constitutional project.<sup>VI</sup> Sixty years later, innovation remains the key to the success of the European Union.

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<sup>I</sup> Case 294/83, *Parti écologiste Les Verts v. Parliament*, 1986 E.C.R. 1339, 1365 para. 23.

<sup>II</sup> In its original version, the EC Treaty commanded the Court of Justice to ensure that in the interpretation and application of the Treaties the law is observed, but did not define 'the law'. 'In order to honour that constitutional mandate in a self-referential and, in that sense, autonomous legal order, the ECJ could not limit itself to a formalistic understanding of the rule of law. Accordingly, it had no choice but to complete the constitutional lacunae left by the authors of the Treaties. In so doing, (...) EU law could not break away from the constitutional traditions of the Member States' (Lenaerts 2015, 15).

<sup>III</sup> Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993, L 95/29.

<sup>IV</sup> Directive 2005/29/EC of 2005 of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, *OJ* 2005, L 149/22.

<sup>V</sup> CJEU, 6 November 2012, case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687.

<sup>VI</sup> This invitation is also implied in the recent contributions, both referred to above, of Kochenov who advocates a reform of the EU and Scheppele, more indirectly, with his plea for the introduction of a systemic infringement procedure.

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## Reflections on the ‘Administrative, Not Constitutional’ Character of EU Law in Times of Crisis

by

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## Abstract

As is broadly recognized, the realm of administrative power greatly expanded over the course the twentieth century (particularly after 1945). This essay argues that this expansion, along with differential conceptions of legitimacy deeply bound up with it, are crucial to understanding not just the modern administrative state but also the nature of EU governance and the law governing its operation. Despite a dominant paradigm that seeks to understand EU governance in autonomously democratic and constitutional terms, the legitimacy of integration as a whole has remained primarily ‘administrative, not constitutional’. The EU’s normative power, like all power of an ultimately administrative character, finds its legitimacy primarily in legal, technocratic and functional claims. This is not to deny that European integration involves ‘politics’ or has profound ‘constitutional’ implications for its member states or citizens. The ‘administrative, not constitutional’ paradigm is meant only to stress that the ultimate grounding of EU rulemaking, enforcement, and adjudication comes closer to the sort of administrative legitimacy that is mediated through national executives, national courts, and national parliaments to a much greater extent than the dominant paradigm supposes. This is the reality that the ‘administrative, not constitutional’ paradigm on EU law has always sought to emphasize, and it is one that is particularly pertinent to the integration process in times of crisis. It is unsurprising, in these circumstances, that the public law of European integration has continually resorted to mechanisms of nationally mediated legitimacy in order to ‘borrow’ legitimacy from the national level. Unless and until Europeans begin to experience democracy and constitutionalism in supranational terms, the ‘administrative, not constitutional’ paradigm suggests that the EU’s judicial doctrines must be adjusted. The purpose should be to address the persistent disconnect between supranational regulatory power and its robust sources of democratic and constitutional legitimacy on the national level.

## Keywords

administrative power, democracy, constitutionalism, EU governance, mediated legitimacy





## Introduction

Allow me to ask the reader to reflect for a moment, by way of introduction, on the differences between the legitimacy of a ‘constitutional’ legislature (say, a national parliament) and that of a merely ‘administrative’ body (say, an executive department or, in more recent times, an independent agency). In modern governance, both types of institutions are generally experienced as legitimate producers of rules of general and prospective application, albeit in different contexts and under different constraints. The rules produced by administrative bodies are, legally at least, generally experienced as inferior to, indeed even dependent upon, the rules produced by legislatures. For lawyers, this is a straightforward question of the hierarchy of norms. But behind that sense of normative hierarchy is in fact a complex socio-historical phenomenon of legitimacy that is anything but straightforward. The rules produced by administrative bodies—‘regulations’, ‘ordinances’, ‘statutory instruments’, as the case may be—may in the lawyer’s mind be self-evidently subordinate to ‘legislation’. But we also know that, as an historical matter, the realm of administrative power greatly expanded over the course the twentieth century (particularly after 1945), in a way that has significantly altered, and perhaps even diminished, the role of national parliaments. What do these broader socio-historical shifts suggest about the differential legitimacy of rulemaking in these different types of bodies, administrative and constitutional?

As this essay seeks to show, this question is crucial to understanding not just the modern administrative state but also the nature of EU governance and the law governing its operation. The emergence of the EU over the last six and a half decades presents a fascinating case study in legal and political change in which varying conceptions of legitimacy—administrative, democratic and constitutional—have played a crucial role. As a consequence, to understand the nature of EU governance and law we must confront the variable nature of legitimacy in more theoretical depth. In particular, we must pay special attention to *mediated legitimacy*, which serves as a bridge between the modern administrative state and European integration.



## 1. Administrative versus democratic and constitutional legitimacy

Let us begin with a schematic overview of the possible types of legitimacy of administratively produced norms as a way of exploring the variable character of legitimacy in modern governance more generally.

First, administratively produced norms are generally experienced as at least *legally* legitimate when they are understood to remain within the substantive and procedural constraints of the enabling legislation and the constitution. Furthermore, these norms are often experienced as *technocratically* legitimate when they are seen as the product of administrative expertise derived from informed evidence gathering and reason-giving (by contrast, norms produced by constitutional legislatures are not, generally speaking, subject to the same expertise-based constraints). Additionally, administrative rules are experienced as *functionally* legitimate in the face of the perceived incapacity of constitutional legislatures to produce norms of the scope and depth needed to address ‘modern problems’—a claim often used to justify delegations of normative and regulatory power to supposedly more capable administrative actors.<sup>1</sup> This functional necessity is also often at the heart of the willingness to confer normative *autonomy and independence* on administrative bodies, at least when the technocratic justification combined with the desire to insulate from ‘politics’ is also strong (factors felt acutely but not exclusively in the realm of central banking, for example).<sup>11</sup>

Despite the force of these alternative claims of administrative legitimacy—legal, technocratic, and functional—they have arguably not been sufficient to give legitimacy to administrative rulemaking along one final dimension: *democracy*. The national legislature remains the presumptive expression of this particular form of legitimacy, a privileged role derived from eighteenth and nineteenth century developments and often inscribed in the constitution itself. This is not a normative claim – regarding the nature of democracy in some idealized or scholarly conception – but rather a socio-historical one, about the manner in which people actually *experience* democracy in a pragmatic, if admittedly imperfect sense. Over the course of the twentieth century, increasingly plebiscitarian ‘chief executives’ (heads of state or government) undoubtedly became a competing source of this sort of experiential democratic legitimation in many systems, particularly in providing hierarchical oversight or



control within the burgeoning administrative sphere. Nonetheless, nearly all constitutional systems continue to reserve at least one core normative domain to the legislature: *the power to define the precise circumstances of compulsory societal mobilization*, whether human (defence or policing) or fiscal (taxing, spending, and borrowing). In this crucial domain, robust democratic and constitutional legitimacy via the historically ‘constituted’ legislature continues to be experienced as essential; mere administrative or even plebiscitarian executive legitimacy would not be enough. Courts and court-like bodies, like the French *Conseil d’Etat*, also play an important democratizing role here, by policing the constitutional boundary between democratic politics (legislative and executive) and the realm of administrative actors, while also defending individual rights.

## 2. Mediated legitimacy and the boundary between democratic politics and administrative power

We live, or at least hope we still live, in an age where democracy is the ultimate legitimating baseline of modern governance. Administrative norms are generally not experienced as *democratically* legitimate in themselves, particularly if they are produced with some measure of autonomy and independence from hierarchical political control. Moreover, even if not legally mandated (as with independent agencies), such autonomy is in some sense unavoidable, simply by virtue of bureaucratic density and complexity. Lacking democratic and constitutional legitimacy of their own, administratively produced norms are normally experienced as at best *derivative* of the legitimacy of democratic and constitutional institutions that reside elsewhere in the system.

The struggle to define a workable, pragmatic boundary between democratic politics and administrative power – one cognizant of our underlying socio-historical experiences but yet sensitive to the functional demands of modern governance – was in fact central to the evolution of public law in the North Atlantic world over the course of the twentieth century (Lindseth 2004). The great achievement of postwar governance was to develop an institutional and legal formula that, on the national level at least, could help to reconcile the growth of administrative governance with a historically recognizable, if evolving, experience of democratic self-government grounded in the classic *trias politica*, and notably the elected legislature. Together the political summit of the executive, legislatures as well as courts and



court-like review bodies each played a crucial role in legitimizing the output of the administrative sphere in democratic terms. The term of art that we can use to refer to this legal-historical reconciliation is the *postwar constitutional settlement of administrative governance*.

The essence of that settlement was this: even as functional and technocratic demands continued to impel ever greater delegations of normative power to administrative bodies, [t]he branches of government that enjoyed constitutional legitimacy inherited from the past—whether democratic (i.e. executive or legislative) or judicial—became conduits through which the legitimacy of the new forms of administrative governance could be *mediated* (Lindseth 2004:1415). How did mediated legitimacy work? Not necessarily through direct control, particularly where claims or simply the realities of administrative autonomy have been strong. In fact, autonomy is often the very purpose of delegation, if not also its inevitable side-effect, given the diffusion and fragmentation of normative power in modern governance. We must thus dispense with an idealized understanding of a ‘Westphalian’ principal with unbridled control over administrative agents or power to direct regulatory outcomes within a particular territory. This is an ahistoric reading of state sovereignty if there ever was one (see Sheehan 2006), as well as a caricature of the principal-agent relationship that is far from the actual historical reality. Instead, mediated legitimacy in modern administrative governance is more often accomplished through looser forms of supervision, coordination, or what an American administrative lawyer would call ‘oversight’ (see, e.g., Strauss 2007).

Mediated legitimacy and associated forms of oversight have been deeply bound up with the changing nature of public law under the postwar constitutional settlement. Public law has become less a system of rules demarcating seemingly clear lines between ‘valid’ and ‘invalid’ exercises of authority, as classical understandings of the *Rechtsstaat*, *l’Etat de droit*, or the Rule of Law might have demanded (cf. Young 2000:1594). Instead, public law has evolved toward something more focused on ‘the allocation of burdens of reason-giving’ (Somek 2004:58), or, as European scholars are increasingly calling it, ‘accountability’. As Benz, Harlow, and Papadopoulos put it (2007:445), accountability is ‘a process of communication in which information is transferred and reasons for policies discussed’, which in turn serves as ‘a significant institutional element of effective and legitimate organisations...accepted by every discipline as an essential aspect of principal–agent theory’.



Such accountability mechanisms may be understood as a system of ‘resistance norms’, operating ‘as a “soft limit” which may be more or less yielding depending on the circumstances’, to borrow a powerful distinction first advanced by Ernest Young (2000:1504). Rarely do these norms prevent the exercise of delegated authority outright; rather, they serve to raise the costs to the agent of using that power (cf. Stephenson 2006, 2008), while having the added benefit of simultaneously reducing the information costs to the principal, thus enabling more effective oversight. In this way, oversight serves to maintain a legitimating connection between the burgeoning, often autonomous realm of administrative governance and the ‘paradigmatic function’ of the historical institutions of constitutional government—legislative, executive, and judicial—that we inherit from the past (Strauss 1987:493).

### **3. Relevance to the competing paradigms: the ‘administrative, not constitutional’ character of European integration**

At this point, the reader may want to press the question: What do these various forms of legitimacy in modern administrative governance—most importantly *delegation constraints* and *mediated legitimacy*—have to do with the topic of this Special Issue: understanding the competing paradigms in EU law in times of crisis?

The answer is simple, even if the theoretical argument is ultimately complex: Despite a dominant paradigm that seeks to understand the EU in autonomously democratic and constitutional terms, the legitimacy of EU governance as a whole remains primarily ‘administrative, not constitutional’ (Lindseth 2010). The EU’s legitimacy, in other words, is derivative of the member states, *qua* constitutional ‘principals’, which choose to delegate regulatory and disciplinary power to EU institutions to act as its ‘agents’. This is not to deny that European integration involves ‘politics’ or has profound ‘constitutional’ implications for its member states or citizens (so too did the expansion of administrative power on the national level over the course of the twentieth century, by the way). Indeed, it is important to remember that the postwar constitutional settlement of administrative governance was a tremendous achievement after the catastrophe of 1914-45 (Lindseth 2004). The ‘administrative, not constitutional’ label is meant only to stress that the legitimacy of EU rulemaking, enforcement, and adjudication comes closer to the sort of administrative



legitimacy that is mediated through national executives, national courts, and national parliaments to a much greater extent than is commonly supposed. In that respect, European integration can be said to build upon the postwar constitutional settlement, even as it also disrupts it in significant ways, by virtue of seeking to translate that settlement into workable supranational terms.

The strongest indicator of the EU's lack of autonomous democratic and constitutional legitimacy is so fundamental that it is puzzling why EU legal scholarship so often ignores it. I am referring to the unwillingness of Europeans to grant EU institutions *any macroeconomically or geopolitically significant powers of compulsory mobilization of fiscal or human resources*. These sorts of powers, as noted above, remain the core attribute of national parliaments even in the era of administrative governance and is also the strongest indicator of their privileged position as sources of democratic and constitutional legitimacy in modern governance. The EU's autonomous fiscal resources are limited to a supranational budget amounting to roughly one per cent of the aggregated Gross National Income (GNI) of the member states, and only a small portion that budget is derived from the EU's 'own resources' (most importantly, customs duties as well as a small percentage of the VAT collected at the national level). The remainder is derived from member state contributions, which are politically negotiated and derived from resources mobilized nationally. Beyond this limited fiscal dimension, there is the near total absence of any autonomous mobilization of human resources in the crucial domains of policing or defense, apart from limited staff available for border-control support via Frontex as well as even more restricted policing and defense coordination via entities like Europol and the European Defence Agency (EDA).<sup>iii</sup> All other mobilization of fiscal and human resources in the EU ultimately depends on the more robust democratic and constitutional legitimacy of national parliaments, a limitation that has had a real impact on EU capacities in the face of various recent crises—the Eurozone, refugees, and terrorism. Without such legitimacy, the EU becomes a primarily normative, regulatory entity—a powerful one to be sure, but nonetheless one whose authority depends almost entirely on the member states to mobilize the resources needed to enforce its norms.

The EU's normative power, like all power of an ultimately administrative character, finds its legitimacy primarily in legal, technocratic and functional claims. The EU benefits in particular from the need to coordinate a range of regulatory policies across multiple member states. This coordination demands delegation from the national to the supranational level in



order to produce rules to further the policy goals of integration among the member states themselves—what Fritz Scharpf (1999) effectively alluded to when he famously spoke of the EU’s ‘output legitimacy’. In this way, the EU’s supranational system of governance exists as a kind of hyper-powerful agency exercising delegated normative and regulatory power conferred upon it by multiple national constitutional principals. These principals have, for sound functional reasons, committed themselves to the surveillance of ‘pre-commitment’ agents at the EU level—e.g. the Commission, the Court of Justice of the European Union (CJEU), and the European Central Bank (ECB)—in order to make integration a functioning reality and not just a legal fiction.<sup>IV</sup>

In pursuing its mandate, the EU possesses a degree of electoral legitimacy through the European Parliament (EP), as well as some indirect electoral legitimacy through the Council (again, Scharpf’s ‘input legitimacy’). The EU’s problem, however, is neither inputs nor outputs but *demos*-legitimacy: Europeans have not yet come to experience its regulatory apparatus as the expression of an identity between a population—a historically coherent *demos*—and a set of institutions that is perceived as the *demos*’s ‘own’, constituted over time for the purposes of self-government. Again, the strongest indicator of this lack of *demos*-legitimacy is the EU’s lack of autonomous legitimate compulsory mobilization powers, human and fiscal. In this and in other crucial respects, the EU remains primarily derivative of national *demos*.

This sort of historically constructed identity between ruling institutions and the ruled is the ultimate foundation of democratic and constitutional legitimacy in modern governance, one that makes true solidarity (not to mention compulsory mobilization) possible on a socio-political scale. Whereas the EU’s output legitimacy might create a sense of ‘government *for* the people’ and its input legitimacy a sense of ‘government *by* the people’, what the EU lacks is a sense of an identity-based ‘government *of* the people’. As Kalypso Nicolaïdis has stressed (2004:102), the EU is thus primarily ‘a community of projects, not a community of identity’. It is *demosi*-cratic rather than democratic, with a democratic legitimacy polycentrically distributed among the member states.

It is unsurprising, in these circumstances, that the public law of European integration has continually resorted to mechanisms of nationally mediated legitimacy—executive, legislative, and judicial—in order to ‘borrow’ legitimacy from the national level. National executives were the primary source of this mediated legitimacy for much of integration history, by way



of the Council of Ministers and the European Council. However, over the last several decades, national high courts and eventually even national parliaments have become increasingly important sources as well (see generally Lindseth 2010). Indeed, EU public law has long heavily depended on cooperation of national courts, and this is something they have generally been willing to provide subject to more recent outer limitations designed to protect the democratic character of national government (very much in keeping with the judicial role under the postwar constitutional settlement).<sup>v</sup> As for national parliaments, establishing forms of mediated legitimacy—in the sense of information flows and oversight—have arguably been the principal motivation behind national parliamentary scrutiny mechanisms in the EU context.<sup>vi</sup> These mechanisms target not merely the actions of national executives operating at the EU level but also the supranational regulatory output of EU institutions themselves, through the so-called early warning mechanism (EWM) established in the Treaty of Lisbon.

The purpose of the mechanism of nationally mediated legitimacy is to address, *not* a democratic deficit as it is commonly called, but a *democratic disconnect* at the heart of the integration process. My insistence on this alternative conceptual vocabulary is deliberate. The ‘deficit’ view implies that the legitimacy challenge is simply one of institutional engineering: how to ensure broader powers for the elected EP (or perhaps for the electorate itself through the European Citizens’ Initiative) in order to make up for the legitimacy shortfall that prevents the EU from becoming an autonomous level of democratic and constitutional governance in a quasi-federal system (for a critique, see Weiler 2011). The ‘disconnect’ view, by contrast, stresses the dynamic at the heart of the EU’s ultimately ‘administrative, not constitutional’ character: the separation of regulatory *power* from democratic *legitimacy* in EU governance. The challenge facing the EU is not one of fixing a ‘deficit’ but overcoming, in a more socio-political way, the ‘disconnect’ between the EU’s regulatory power and its sources of democratic and constitutional legitimacy at the national level. The ‘disconnect’ view derives from an empirically based historical recognition that, at this point in Europe’s development, such democratic and constitutional legitimacy at the EU level is lacking. Consequently, European elites cannot easily engineer that legitimacy into existence, as the ‘deficit’ claim implies, at least in the short or intermediate term.



#### 4. ‘Coming to terms’ with EU law... *despite* what EU judges, lawyers, and law professors maintain

So how shall we ‘come to terms’ with this complex reality of governance in the EU? We should understand the phrase ‘coming to terms’ in two senses that play off each other in interesting ways. The first is nominal: Literally, how shall we name what we see? What is the conceptual vocabulary that best captures the character of the EU system of governance, with its fundamental disconnect of regulatory *power* and democratic and constitutional *legitimacy*?

If we regard this nominal challenge in strictly legal terms and, more importantly, give the pronouncements of the CJEU and sympathetic legal commentators the dispositive role in our determination, then the response is clear: The EU is a ‘constitutional’ level of governance in its own right, with the EU treaties serving as a ‘constitutional charter of a Community based on the rule of law’.<sup>vii</sup> The implication is that the centralized rulemaking process in the EU—in which the Commission ‘proposes’ and the Council and EP together ‘dispose’ in various ways—is also of a ‘constitutional’ character, serving as the EU’s ‘legislature’. In this view, the EU’s ‘administrative’ sphere begins where this ‘legislative’ sphere ends.

The other sense of ‘coming to terms’, however, looks beyond the nominal and legal and moves into the sociological and historical domains. It recognizes that ‘coming to terms’ entails a deeper process of reconciliation in which European public law at all levels (national and supranational) confronts a feature of EU governance that the nominal constitutional discourse either elides or outright ignores. The problem with the nominal constitutionalism of the Court of Justice and legal commentators is that it proceeds ‘as if’ the EU possesses this robust form of legitimacy in its own right, in defiance of the EU’s actual socio-historical character (Lindseth 2016). In ‘coming to terms’ with *this* reality, we must do more than name it; rather, we must also understand how European law, both national and supranational, has evolved as a consequence of the EU’s fundamentally ‘administrative, not constitutional’ character. From this socio-historical perspective, the analytical focus must necessarily move beyond the nominal constitutionalism of the CJEU and sympathetic legal commentators to a more comprehensive understanding of the EU’s legal and institutional development as a novel instance of regulatory power beyond the confines of the state.

What this less CJEU-centric analysis tells us is that, *despite* what EU judges, lawyers, and law professors maintain, there are numerous features of EU public law—notably, *nationally*



*grounded resource mobilization* and *nationally mediated legitimacy*—that are not merely in tension with, but also that directly contradict, the dominant constitutionalist paradigm of EU law. From its earliest articulation, the administrative perspective sought to understand EU law in terms of the tensions raised in this conflict between the EU’s constitutionalist logic and its administrative character:

Regardless of the scale or constitutionalist pretense of an international regulatory organization, without this cultural foundation of democratic legitimacy, all we are left with, from the standpoint of popular perception, is a technocratic body—a supranational administrative agency—with an attenuated relationship to the perceived ultimate source of the agency’s normative powers: the participating states severally as representatives of their ‘sovereign’ peoples. The temptation to ignore this attenuated relationship, perhaps to read it out of the problem ... in my view simply lays the groundwork for serious, on-going democratic-legitimacy problems in supranational bodies (Lindseth 1999:736).

Over the last decade and a half, it has become increasingly clear how much these ‘on-going democratic-legitimacy problems’ also directly negate the ‘constitutionalist pretense’ of the EU. The emergence of genuine constitutional legitimacy is, in the modern era, intimately linked to the socio-political and socio-cultural underpinnings of democratic sovereignty itself (Ackerman 1991; Rubinfeld 2001). As Neil MacCormick (1999:173) has taught us, this emergence is tied to the sense that a particular political community, as a collectivity, sees itself as ‘*entitled* to effective organs of political self-government’ through institutions that the community then constitutes for this purpose. At the heart of this peculiarly modern notion of democratic self-government is the legitimate capacity to extract and redirect fiscal and human resources on a societal scale. Constitutionalism is anchored in this capacity, dividing powers and protecting rights in order to subject compulsory mobilization to the rule of law.

Perhaps, then, it is time to abandon that ‘constitutionalist pretense’ of the EU, regarding it as an ‘infant disease’ à la Pescatore (1983). Where would that lead us? As the bullet points set out below suggest, this could certainly have a major impact on how the CJEU should approach its job. (Indeed, this has always been the primary purpose of the administrative perspective, not simply to change our descriptive understanding but also our legal framework for interpreting EU action.) To regard the EU as primarily administrative (or ‘sub-constitutional’) need not mean abandoning the functional concerns over legal diversity or weakening protection of fundamental rights. But it would involve heightened sensitivity to



the risks of supranational encroachments on national democracy, entailing a much more explicit balancing of the functional demands of ‘pre-commitment’ against the rights of the various European demoi to continuing democratic self-government.

This interpretive shift could manifest itself legally in several possible ways:<sup>viii</sup>

- Policing the boundaries of competences conferred on the EU with much greater rigour, in recognition that these sorts of constraints are a typical feature of modern administrative governance and must be enforced in the interest of democracy;
- Within the boundaries of power indisputably conferred on the EU, taking a much more demanding approach with regard to the principle of subsidiarity, both in terms of substance and procedure, enforcing the requirements of the Subsidiarity Protocol rather than following the CJEU’s own highly deferential jurisprudence on the question;
- As to any ambiguities with regard to the appropriate legal basis for EU legislation, favouring interpretations that maximize national democratic rights (i.e., unanimity bases—to the extent they still exist—over qualified-majority voting bases);
- Adopting a more cautious attitude toward further ‘agencification’, which, despite obvious functional benefits, also further attenuates the chain of democratic and constitutional legitimacy flowing from the national level (a concern that extends to Treaty-based expert bodies like the ECB);
- Tempering significantly claims to EU law ‘autonomy’, recognizing that a certain amount is necessary (and intended) in order for bodies like the CJEU to fulfil their ‘pre-commitment’ function but rejecting claims of autonomy as a license to ignore or modify constraints imposed by the member states in their role as constitutional principals in the EU legal system;<sup>ix</sup>
- Finally, and most importantly, abandoning any notion of constitutional ‘supremacy’—rhetorically or legally—particularly with regard to the relationship between EU law to national constitutional law. Supremacy should be replaced by a principle of ‘strong deference’ from the national to the supranational level, one that would recognize, on the one hand, national openness to EU law as well as the functional demands of supranational ‘pre-commitment’ but, on the other hand, enforce ultimate limits on any such deference/openness flowing from the need to



preserve the essence of democratic and constitutional government on the national level.

One can relate this argument to the debate over the impact of Article 4(2) TEU, which sets out the EU's obligation to respect member-state 'national identities, inherent in their fundamental structures, political and constitutional'. On the one hand, the call for a principle of 'strong deference' is in line with those who argue that Article 4(2), in exceptional circumstances, negates any claim to the 'absolute primacy' of EU law (Bogdandy and Schill 2011). On the other hand, it also concurs with those who argue that Article 4(2) should also deeply influence the resolution of more routine disputes, such as those dealing with the scope of EU competences relative to the member states or the application of the principle of subsidiarity (Guastaferrò 2012).

These proposals also find resonance in the European jurisprudence of the German Federal Constitutional Court, particularly in its elaboration of the so-called *Demokratieprinzip*,<sup>x</sup> most recently in the judgment disposing of the *Gauweiler* challenge to the ECB's OMT program.<sup>xi</sup> But we should not fall prey to the notion that such ideas are only the luxury for the emerging German hegemon in the integration process. Rather, as Kalypso Nicolaidis has rightly noted (2012:265), 'the key in this context is to develop the capacity for each "demos" to defend itself against domination through various representative, deliberative, and participatory channels'. The *Demokratieprinzip*, in both its substantive and procedural dimensions, is one of those demoi-cratic defence mechanisms. In the face of the dangers of juristocratic and technocratic overreach in an EU of a still fundamentally 'administrative' character, we should recognize that what is jurisprudentially good for the German 'goose' should also be good for the Greek, Irish, Portuguese, Italian, or Spanish, etc., 'gander'. The *Demokratieprinzip*, along with the administrative perspective it reflects, is particularly necessary today to counteract the claims of a '*gouvernement des juges (or des experts)*' in the EU (Tuori 2015:172).

## 5. Conclusion: beyond 'as if' constitutionalism in EU law

Dani Rodrik, a development economist, has in effect conceptualized some of the tensions we see in European integration through what he calls the 'Globalization Trilemma' (Rodrik 2011). This model holds that democracy is only compatible with global economic



integration if democracy can be supranationalized as well; otherwise, the form of governance that results will be experienced as fundamentally technocratic and the negation of democracy on the national level (see, e.g., Rodrik 2016; see also Bartl 2017). This is the reality that the administrative paradigm on EU law has always sought to address, and it is particularly pertinent to the integration process in times of crisis.<sup>xii</sup> Rather than indulging in an ‘as if’ nominal constitutionalism (Lindseth 2016), we should confront the EU as it actually is: ‘administrative, not constitutional’. Unless and until Europeans begin to experience democracy and constitutionalism in supranational terms, EU governance will persist as a *gouvernement des juges* and *des experts* lacking in robust legitimacy of its own, at least to the extent commensurate with its increasingly ambitious goals (currency union, Schengen, defence and security cooperation). It is function of the ‘administrative law, not constitutional’ paradigm to demand the adjustment of the EU’s judicial doctrines, to address this ‘new dimension to an old problem’ (Lindseth 1999:630)—the separation of regulatory power from its robust sources of democratic and constitutional legitimacy on the national level.

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<sup>i</sup> For classic statements of this type of functional legitimacy, see Landis 1938; Willis 1933. For more recent discussions, see Lindseth 2015; Loughlin 2005.

<sup>ii</sup> See, e.g., *Brunner v. European Union Treaty* (the German Maastricht Decision), 12 Oct. 1993, BVerfGE 89, 155, [1994] 1 CMLR 57, 33 ILM 388 [1994], specifically at 439 (rationalizing transfer of control over monetary policy to the European Central Bank ‘in order to ensure that currency is not vulnerable to pressure groups or to holders of public office seeking re-election’).

<sup>iii</sup> Just prior to the submission of this article, a cohort of nineteen member states (including France, Germany, Italy and Spain) announced efforts to create a Cooperative Financial Mechanism, or CFM, to provide funding for joint military projects. The details will be negotiated over the next year but according to published reports, contributions will be voluntary and the monies in the fund will be owned by national governments (Emmott 2017). Aside from the voluntary contributions, therefore, the contemplated model would seem to follow that of the European Stability Mechanism (ESM), which was established to financial assistance to member states of the Eurozone in financial difficulty. See generally ‘European Stability Mechanism’ <https://www.esm.europa.eu> accessed 19 May 2017.

<sup>iv</sup> This is in keeping with the role of delegation on the national level. On the relationship between national and supranational forms of delegation as pre-commitment mechanisms, see Majone 1998.

<sup>v</sup> For a review of some of the leading cases, see Lindseth 2010, ch 4. See also *Gauweiler (OMT)*, BVerfG, 2 BvR 2728/13 (June 21, 2016), para. 142 (surveying the case law) [http://www.bverfg.de/e/rs20160621\\_2bvr272813.html](http://www.bverfg.de/e/rs20160621_2bvr272813.html) accessed 19 May 2017.

<sup>vi</sup> For more detail, see the extended discussion in Lindseth 2017.

<sup>vii</sup> Case 294/83, *Parti écologiste ‘Les Verts’ v. Parliament*, 1986 E.C.R. 1339, 1365 para. 23.

<sup>viii</sup> These bullet points draw from the more detailed analysis set out in Lindseth 1999 and 2010, which include citations to cases whose outcome would have been different had the ECJ adopted this approach.



<sup>ix</sup> For a contrary view from a strongly constitutionalist perspective, see Halberstam 2015.

<sup>x</sup> For a brief analysis, see Lindseth 2014:553–55.

<sup>xi</sup> BVerfG, Urteil des Zweiten Senats vom 21. Juni 2016 - 2 BvR 2728/13 [http://www.bverfg.de/e/rs20160621\\_2bvr272813.html](http://www.bverfg.de/e/rs20160621_2bvr272813.html). For analysis, see Peter L Lindseth, 'Meanwhile, in Germany...the OMT Ruling of the German Constitutional Court', *EUTopia Law* (23 June 2016) <https://eutopialaw.com/2016/06/23/meanwhile-in-germany-the-omt-ruling-of-the-german-constitutional-court>.

<sup>xii</sup> As Yanis Varoufakis, the former Greek finance minister, famously reported of his meetings with the Eurogroup in 2015, Wolfgang Schäuble made clear, on behalf of the creditor countries, that 'we can't possibly allow an election to change anything. Because we have elections all the time, there are 19 of us, if every time there was an election and something changed, the contracts between us wouldn't mean anything' (Varoufakis 2015). Similarly, Jean-Claude Juncker, the Commission President, famously proclaimed in response to the Syriza election victory in January 2015: '*Il ne peut y avoir de choix démocratique contre les traités européens*'—'There can be no democratic choice against the European treaties' (Mevell 2015).

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**“Top-down” vs. “Bottom-up”:  
A Dichotomy of Paradigms for the Legitimation of  
Public Power in the EU**

by

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## Abstract

Public power has been justified by resorting to two different kinds of legitimation: one coming from above, the other emerging from the governed. While legitimation “from above” implies that those who are vested with executive power are qualified in their function because of their allegedly higher competences, “bottom-up” legitimacy always presupposes that only citizens can properly decide on their destiny. After giving a brief account of how both legitimation strategies have developed in the history of political ideas, attention is focused on the theories regarding the legitimacy of public power in the European Union. Indeed, both strands of legitimation of public power are represented here with original proposals, according to the specificity of the supranational condition. But even more interesting is that the research into the characteristics of supranational integration has been one of the most significant fields in which the legitimation “from above” has reappeared in Western thought after a rather long period of marginality, now taking the shape of a technocratic justification. In the main section of the article, the reasons in favour of a democratic “bottom-up” legitimation of the European public power are analyzed first, then those which recur to the so-called “output legitimacy” – in other words to technocratic arguments. The last section of the contribution is dedicated to an overall assessment of the different positions.

## Key-words

administrative legitimacy, comitology, democratic deficit of the EU, democratization of the EU, democracy, EU constitutionalism, European people, executive federalism, holism, individualism, input legitimacy, no demos thesis, output legitimacy, paradigms of order, renationalization, technocracy.



## 1. Introduction

The power of the European Union – like any other power in a social and institutional context – is characterized by different dimensions, all of which, however, are united by a common element, namely legitimacy. In fact, only a power which is recognized as legitimate can demand to be obeyed, while an authority without obedience is merely abstract and, in the concreteness of social life, factually void. An essential element of the legitimacy of power consists in its source: the claim to obedience is recognized as justified only if the foundation of authority – which I define, here, as the tangible expression of power – is generally regarded as well-grounded and thus accepted. Limiting the analysis to the public dimension of power and concentrating on its sources, we can identify two opposite conceptions. According to the first, public power originates “from above” as an expression of strength, tradition, natural order, or divine will. On the basis of the second conception, instead, legitimate power can only originate “from below”, i.e., from the free and reflexive will of those who decide to constitute a public power and to abide by its decisions. The dichotomy between the paradigm asserting the “descending” origin of the legitimacy of public power and its “ascending” counterpart is concisely presented in the next Section (2).

The analysis of characteristics and perspectives of public power in the European Union (EU) from the standpoint of the dichotomy between "descending" and "ascending" paradigms deserves attention in particular for one reason. In fact, over the last decades the debate on the EU has been a significant breeding ground for the renewal of the “top-down” understanding of the legitimacy of public power which had factually and theoretically disappeared from the political horizon of Western democracies. More specifically, it is precisely a certain interpretation of EU power and of its legitimacy that takes up the idea of an authority justified on the basis of an alleged superiority of elites, thus revitalizing a conception which was largely regarded as belonging to the pre-democratic past. Therefore, the third Section will focus on how the dichotomy between "top-down" and "bottom-up" power can be applied to the debate on the EU public power (3).



The current economic, institutional, political, social and – we could also add – ethical crisis of the EU has shed new light on the opposing paradigms as well as on the possible solutions that can be formulated on the basis of their conceptual frameworks. The final Section is dedicated to some considerations on the future of the EU from the perspective of the conflicting understandings of public power, as well as to a cautious, but nevertheless passionate defense of the “ascending” concept of legitimacy (4).

## 2. “Descending” and “Ascending” Understandings of the Legitimacy of Public Power

In classical political thought, the theory of the different forms of government was based on the number of rulers (Bobbio 1985: 129). Since Aristotle, we had three patterns of public power: the monarchy, or the government of one person; the aristocracy, or the government of the few; and democracy, or the rule of the many. It was Hans Kelsen who introduced a fundamental turning point: from a quantitative distinction – with a potentially unlimited number of typologies – he switched to a qualitative difference, based on a dichotomy and, thus, on only two ideal types of government (Kelsen 1949: 283). The discriminating element is identified in the method adopted for the creation and justification of the legal order. In the first case the process is “descending”, in the sense that power falls down from above to those who are vested with it, while the subjects are largely excluded from the decisions. Kelsen calls this form of government “autocratic”. In the second case the power “ascends” from the governed; in other words, it is originally vested in the individuals and arises from them to those who are chosen to govern the political community. This is the fundamental feature of what we call “democracy”. Kelsen’s novelty brought a significant simplification; furthermore, it introduced also an explicit normative dimension. According to Kelsen, indeed, in a society which is no longer characterized by a predetermined and passively shared idea of the good life, the legitimation of power can only proceed from those who are obliged to abide by its rules (Kelsen 1929: 102). Although only introduced relatively recently, the taxonomy of the forms of public power on the basis of its provenance – and of the sources of its legitimacy – can be easily applied backwards, allowing a dichotomous interpretation of the history of political thought.



## 2.1. The “Descending” Conception of Public Power

Insofar as the first term of the dichotomy is concerned, public power is regarded as "descending" for two reasons: first, the holders of power claim to derive it from above, mostly from natural or divine authority; secondly, the authority "descends" from the rulers to the ruled, whereby the marginal involvement of the latter is far from fulfilling the conditions for genuine autonomy. Examples of public power derived from the law of nature have accompanied us for most of the history of Western political thought. Starting from ancient times – and from the two most famous exponents of ancient political philosophy – in both Plato’s “justice”-based *politeia* (Plato 1901: IV, 433b) and Aristotle’s idea of the organic political community, which aims at realizing “happiness” (Aristotle 1967: I, 2, 1252b), the social functions of the citizens depend on the immediate expression of their natural qualities. Moreover, the identification of these qualities is ultimately a decision imposed from above and not the expression of a free individual preference. Therefore, if the tasks carried out in the community are directly derived from the natural abilities of individuals and the ruling class is seen as a specific component of the organic whole, connected to the rest but also functionally separate from it, then the holders of public power must be chosen by cooptation on the basis of alleged innate qualities that would predestine them for the exercise of authority.

After a period in which – during the Middle Ages – the "descending" character of authority was justified by resorting to a supposed divine will, the reference to natural order as the basis for legitimate power became central again in Jean Bodin’s theory of sovereignty. In the first of his *Six Livres de la République*, introducing the fundamental elements of his philosophy, he asserted that “sovereignty is the absolute and perpetual power present in a political community (*République*)” (Bodin 1579: 85). As a result, the sovereign is *legibus solutus* and the laws promulgated by him “only depend on his pure and free will” (Bodin 1579: 92). To justify sovereign power, Bodin relied on Aristotle’s theory of the familistic origin of the political community. According to this, the *République* “is the well-ordered government of many families and of what is common to them by a sovereign power” (Bodin 1579: 1). The premise, here, is twofold: first, in accordance with the law of nature the power within the family lies – or, I prefer to say, lied in Bodin’s times – in the hands of the *pater familias* and cannot – or could not – be contested by any of its members. Secondly, since the political community is nothing but an extended family, that same power



which is derived, in the family, from the order established by the law of nature, is legitimately placed – if the focus switches from the smallest natural community to that larger family which is the state – in the hands of the no less natural holder of public authority. Nor are the subjects entitled to require any kind of justification for this state of facts, which is supposed to be given by nature.

For a second strand of Western political thought, however, the reference to natural law is only the first step on the way that leads to an even higher truth, namely to the law of God. Public power, here, comes from God as the only true holder of sovereignty. The way in which sovereignty descends, then, from God to the temporal powers was differently interpreted by the Christian – and then Christian-Catholic – political theology between the Middle Ages and the early Modern Ages. In accordance with the first and most radical understanding, power was transferred by God to the Church and, only in a second step, from this to the secular power (Henricus Hostiensis 1250–1261). A later version still derived the power of mundane sovereigns from God, but directly and not going through papal mediation (Vitoria 1528: 58). The most progressive variant of the Catholic theology of the School of Salamanca went even further, stating that the transition of the legitimate power from God to the worldly rulers had to include the passage through popular sovereignty. Nonetheless, the people were actually excluded, after having transferred the government to the rulers, from the possibility of effectively influencing the decision-making-processes (Suarez 1612: 361). In general, all conceptions which derived public power from divine law can be regarded as belonging to the past, at least in the Western world. However, the idea that sovereign authority is legitimate only if it respects the higher law of God still survives to this day also within the context of Western political culture, in a broad sense, in the guise of the concept of dignity (McCrudden 2013; Cartabia/Simoncini 2015). In fact, if power has to protect human dignity in order to be considered legitimate and, on the other hand, the Catholic Church retains the competence to define what is to be human dignity, then the result can only be that the Church still maintains the claim to possess – however indirectly – the key to sovereign power, as well as that the interpretation of the divine law should continue to be the benchmark of the secular order.

After several centuries characterized by the progressive prevalence of the “revolutionary” concept of the ascendant legitimacy, a third form of “top-down” power was introduced at the beginning of the twentieth century, which is strictly connected with



the development of the bureaucratic-administrative state. It was Max Weber who distinguished, in his *Wirtschaft und Gesellschaft* of 1922, between three ideal types of legitimation of power (Weber 1922: 122). Beside the “traditional” legitimacy, which bears the traits of the “descendant” power of mythological and religious origin, and the “charismatic”, which focuses on personal leadership, we have here a third ideal type of legitimacy which is called by Weber “rational”. This is characterized by three factors: a) an effective legal system in order to regulate social relations and to give predictability to interactions; b) an efficient bureaucracy with hierarchical structure; and c) the presumption that the holders of power and, in general, the members of the bureaucratic apparatus are endowed with better skills and superior knowledge. Unlike the others, this form of legitimacy belongs explicitly and exclusively to modern society. Nonetheless, it is no less “descending” than the “traditional” or the “charismatic” forms of legitimacy for at least two reasons. Firstly, law does not primarily play the function of defining spaces for the development of the *positive* freedom of individuals, i.e., of their participation in the decision-making-processes. On the contrary, it focuses almost exclusively on specifying and protecting the perimeter of their *negative* freedom. Secondly, the identification with the political community is only expressed through passive obedience to law and authority. As a result, it is intrinsically pre-reflective and founded only on the belief in the superior competences of those who are vested with power (Weber 1922: 20). Most interestingly, the same features also characterize the technocratic justification of the legitimacy of public power in the EU.

## 2.2. The “Bottom-up” Interpretation of Public Power

In a second and opposite interpretation, the fundament of public power is instead located in the autonomy of the free individuals. By creating a political community and by constituting its powers, the individuals – now united to form a *societas civilis* – transfer their original autonomy, in part or completely, to the public authority so established, vesting it thereby with sovereignty.

The “bottom-up” conception of public power is the result of the transition from a holistic social order to the individualistic paradigm, which was initiated by Thomas Hobbes in the mid-seventeenth century (Dellavalle 2011). Hobbes reversed for the first time in history the traditional hierarchy between the individual and the community, placing



individuals – as holders of rights and as the fundamental source of all legitimate authority – at the centre of political life. The starting point of his political philosophy, therefore, was no longer the social community as a *factum brutum* based on the natural sociability of humans and organically organized in a hierarchical structure, but the individuals with their inherent endowment of rights, interests and reason (Hobbes 1642: Book I, Chap. I). In the original condition of the state of nature – a fictitious condition, constructed by Hobbes not to recall the historical beginning of social life, but to draw attention to the ontological foundation and the conceptual preconditions of a just order – individuals are free and equal (Hobbes 1642: Book I, Chap. III). On the other hand, they are constantly in danger of being attacked and suffering damage to their life, physical integrity or property by their peers, who always endeavour to seize the greatest possible amount of resources in order to improve their living conditions and, ultimately, their chances of survival (Hobbes 1642: Book I, Chap. I; Hobbes 1651: XIII). Therefore, it is the law of nature itself which commands the individual to leave the state of nature by forming a society in which life, physical integrity and property are adequately protected (Hobbes 1642: Book I, Chap. II; Hobbes 1651: XIV). According to Hobbes, the political community is thus not the original source of the ethical world, nor does it possess an axiological primacy in its context. Rather, it is a tool that individuals – the real axiological barycentre of the ethical world – give to themselves in order to improve social stability. In Hobbes's vision, power is ascending to the extent that it is no longer seen as an element that the given political authority deduces from divine law or from its own alleged natural superiority. Rather, it arises from the original freedom and independence of individuals, who create the sovereign authority by an act of free will, i.e., by transferring their rights to the newly established public power in order to ensure an adequate protection of the individual entitlements on the basis of the legitimacy emanating from the same fundament of social order. Sovereign power is, therefore, only legitimate if it aims – directly or indirectly – to safeguard fundamental rights and is based on a free, reflexive and explicit endorsement by the people. Within the strand of political philosophy originated by Hobbes, this approval takes the form of a contract, or *pactum unionis*; in liberal democracies, which are the legitimate heirs of this tradition of political thought, it is expressed through political participation both in elections as well as in practices of civic involvement and commitment outside the electoral schedule.



Differences emerge between the supporters of modern contractualism if we consider the extent of competences attributed to public power. This depends, ultimately, on how many rights are transferred to a sovereign authority by the individuals as the original rights holders in the moment of the creation of the *societas civilis*. Where the transfer of rights is minimized – as in the liberal theory of John Locke – public power has the sole task of ensuring compliance with the law, so that inter-individual transactions can develop peacefully. Individuals thus retain all their original capabilities, except the right to take the law into their own hands. The danger of an excessive concentration of competences in public authority is also prevented by means of a division of powers and by the creation of a powerful parliament (Locke 1690: Book II, Chap. 7, § 90; Book II, Chap. 11, § 134; Book II, Chap. 12, § 143; Book II, Chap. 13, § 150). In the pessimistic perspective of Hobbes, on the contrary, social order can only be safeguarded if individuals give up all their entitlements except the right to life and – very partially – to the safeguarding of an essential space of negative freedom. Within that space, individuals can pursue those activities that help to achieve “happiness”, but only insofar as such actions do not jeopardize the overall order of peace (Hobbes 1642: Book II, Chap. XIII; Hobbes 1651: XVII). It follows that Hobbes’s contractualism is characterized by the passage from the condition of free individuals to that of subjects deprived of almost all rights: by agreeing to the *pactum unionis*, the freedom of individuals in the *status naturae* goes through a process of voluntary quasi-annihilation, which vests the sovereign authority with virtually unlimited powers. In addition to both liberal contractualism and to that strand of contract theory that eventually comes to absolutist results, a third alternative is represented by Jean-Jacques Rousseau’s radical-democratic idea of the “social contract”. Here too, sovereign power is established by a transfer of original rights, which is, in some ways, even more uncompromising than in the variant advocated by Hobbes. Indeed, Rousseau’s social contract provides for the alienation of all natural rights, without exception (Rousseau 1762: 51). The difference compared to Hobbes is that, while in the view of the English philosopher individuals alienate their rights to a Leviathan, in Rousseau’s proposal they transfer them back to their original owners, namely to themselves, now transformed by the social contract into a sovereign political community, which is expressed by the *volonté générale*. Furthermore, although the radical-democratic vision of Rousseau shows an attitude which is – at least potentially – far more sympathetic to the rights of citizens than Hobbes’s contractualist



absolutism, it nevertheless encompasses a significant dark side. In fact, as a consequence of both the complete transfer of individual rights and an insufficient establishment of institutions with the task of counterbalancing such transfer, the sovereign authority of the *volonté générale* ends up neglecting the effective protection of the concrete individuality of citizens. It is no coincidence that Rousseau defines the members of the community founded on the “social contract” not only as “*citoyens*” but also as “*sujets*”, in particular in their relation to public power, deeming it acceptable that they are even “forced to be free” (Rousseau 1762: 54).

In conclusion, despite the limitations that emerge from all three “bottom-up” conceptions of public power that have been examined – from the self-denial of the citizens in Hobbes, to public power as a mere protection of private law property in Locke, and, finally, to the risks of authoritarianism in Rousseau – modern contractualism has been and still is the historical and conceptual reference point for all those who believe that power is justified only to the extent that it is at the service of interests and rational decisions of the citizens. More concretely, the proposals can be considered obsolete – as in the case of Hobbes – or warranting substantial corrections and even mutual integration – as for Locke and Rousseau. Nevertheless, the idea that the consent of the governed is the only source of the legitimacy of the rulers is still – and should be – the lodestar for anyone who does not want to become acquiescent by admitting that democracy is something belonging to the past.

### 3. The Legitimacy of EU Public Power

Having defined the main features of the two opposing conceptions of the origin of public power, it is now possible to apply this conceptual framework to the EU. This analysis is justified primarily by the considerable influence that EU public power has on national societies because of their deep integration into the EU institutional framework. Furthermore, the EU has developed its own specific public power, which may have been originally created by the transfer of competences from the member states, but has been – from the very beginning – largely independent of the exercise of sovereignty by member states (Dellavalle 2004/2005). Nor did the developments that followed the explosion of the sovereign debt crisis in late 2009 re-establish the centrality of the traditional decision-



making-processes of nation states: although extensively redesigning the settings of EU power, they merely transferred this from the supranational to the intergovernmental and technocratic-executive dimension.

The debate about the legitimacy of EU public power stands out, among other reasons, as the ideological and cultural terrain in which the old argument of the justification of the power “from above”, i.e., on the basis of allegedly superior skills of those who exercise that power, has found new impetus. Indeed, the “top-down” vision of public power – which had been marginalised, first, by philosophical criticism, then by the liberal and democratic revolutions, and, finally, by popular sovereignty – has been granted in the European context an unexpected revival. The fact that the debate on EU public power has been the context on which the elitist vision regained momentum does not mean, however, that this is the only way to interpret its reality and possible developments. To the contrary, EU public power can also be legitimated “from below”, to maintain the highest democratic standards within the EU institutions as well.

### 3.1. Democratic Legitimation

The view that EU public power needs autonomous democratic legitimation is essentially based on a simple syllogism, the premises of which are, respectively, a) that every public authority is legitimate only if it derives from the free and reflexive will of those who are subject to that power, and b) that the EU is characterized by its own public power. The conclusion, therefore, cannot but be that c) EU public power will be legitimate only if it ascends from its citizens. However, it is not enough to say that the legitimation of EU public power by the European citizens is *necessary*; it is also indispensable to demonstrate that it is *possible*. One could assert – along with the supporters of the so-called “no demos thesis” – that, although there is undoubtedly an EU public power, this cannot be subject to the traditional “bottom-up” democratic legitimation because of the lack of a European “demos” (Grimm 1995). The concept of “demos” refers to a social and political community which is assumed to be united by pre-political and pre-legal bonds. Due to the presence of a sufficient social and cultural uniformity, as well as of a strong communicative sphere, the “demos” can take the role of a political actor and guarantee ascending legitimacy. As a result, without a “demos”, or without a people characterized by a sufficient



degree of homogeneity, according to this powerful narration no popular legitimation can be achieved.

If we admit the inescapability of the “no demos thesis”, then two scenarios are possible: either supranational public power is to be drastically downsized by reallocating a large part of its competences to the nation states which are supposed to be appropriately legitimated through internal democratic procedures, or we should opt for a post-democratic legitimacy. But is the “no demos thesis” really inescapable? Not necessarily – at least if we follow the arguments of Jürgen Habermas, one of the most committed and influential advocates of the democratization of EU institutions (Habermas 1996: 185; Habermas 1998: 151; Habermas 2008: 106; Habermas 2011: 43; Habermas 2015: 552). According to his interpretation, which is based on a long tradition of studies on nationalism and on the history of nation states, the “people” in the Western tradition of the last two centuries is far from being an entity based solely or even primarily on pre-reflexive elements. Rather, it is the product of a complex operation by which national elites, especially during the nineteenth century, have forged a shared identity through the use of instruments and institutions both public and private, like the military, the school, the judiciary, the public administration, the press, and culture at large (Breuilly 1982; Gellner 1983; Hobsbawm 1990; Anderson 1991). Taking up the idea of the essentially *political* origin of the “people” does not imply, however, that the existence of some features which may distinguish a social community even before the start of the political process has to be utterly denied, or even less that the presence of a feeling of shared belonging once this process has been brought to completion should be ignored. What is stressed, here, is rather that the sense of collective identity is not the result of some “ethnic origin of nations” (Smith 1986), but a highly mediated cultural construct which is based on political decisions (Dellavalle 2002).

If the absence of a historically cemented “European people” should not be seen as an insurmountable obstacle to the consolidation of a democratic legitimacy at the supranational level, then the question arises as to the institutional arrangements that could give voice in the best way to the community of European citizens who are assumed to be united by a common aspiration to meet common challenges with shared solutions. Furthermore, the institutional arrangements should also help to consolidate the still fragile European identity by forging a common democratic ethos. On the other hand, EU



constitutionalism has also been interpreted as a rationalization of European national democracies insofar as it opens them up to a stronger awareness of the impact that national decisions may have on the interests of neighbouring countries (Maduro 2010). This surely makes sense, but only if the rationalizing institutional construct is itself democratic. Otherwise, it risks missing precisely those supranational legitimacy resources which are necessary to tame the arrogance of national selfishness. Going now more into detail as regards the institutional reforms which would allow the EU institutional system to align itself with the tradition of democratic “bottom-up” legitimacy, and resorting once again to Habermas’s suggestions, a central role has to be assigned to the European Parliament (EP). In particular, this should be elected according to a single procedure and have legislative initiative. In addition, the “ordinary legislative procedure”, in which the EP is on equal footing with the Council, should be extended to all areas of competence. As regards the European Council, this would merge with the Council, forming a “House of Nationalities”, comparable to the US Senate, but vested with more competences. As for the European Commission (EC), this would assume the task of a government accountable to both the EP and the Council (Habermas 2015: 554). Finally, the European Court of Justice (CJEU) would expand its field of intervention, taking on a similar role as the US Supreme Court.

As a consequence of the crisis, Habermas has recently introduced two significant integrations into his proposal. The first consists in a stronger emphasis on solidarity among the peoples involved in the project of European integration. To better delineate his idea, Habermas resorts to the distinction between moral and ethical uses of practical reason (Habermas 1991: 100). In short, the moral use of practical reason is implemented when we have to define what we owe to every other human being due to the mere fact that we share the same human condition, so that the duties, here, are strictly universalistic and independent of any guarantee of reciprocity. On the other hand, the ethical use of reason is realized within particular contexts, thus establishing our mutual obligation to solidarity. Therefore, moral duties involve everyone, but are substantially “thinner”, i.e., they are limited to guaranteeing fundamental rights, while including redistributive measures only insofar as essential requirements are safeguarded. In contrast, obligations to solidarity benefit only those who make up the particular social unit and are expected to extend expensive redistributive performances on the basis of reciprocity and of a shared political identity (Habermas 2013: 102). Traditionally, solidarity is nourished by a belonging to pre-



political social communities, the most significant example of which is the family. In the nation state, pre-political solidarity has expanded to be a mutual responsibility of civic character, though still shrouded within the almost naturalistic guise of the national community. If it is true, however, that the nation is largely a political construct, then nothing in principle prevents civic solidarity from developing in the context of European integration as well. To this end, full recognition must be given to European citizenship, so that European citizens achieve full awareness of the centrality of the European project for the constitution of their political identity (Habermas 2011: 75; Habermas 2015: 553).

The second innovation introduced by Habermas in recent years is conceptually more complex and displays a considerable impact in its overall political and philosophical conception. The starting points are, on the one hand, the revival of nationalistic feelings in many European countries, and, on the other, a legal paradox. As for the social and political dimension, it is striking that the muscular neo-nationalism of the member states comes along with a general increase in the trust that European peoples are keen to lay in their executives – but much less in their parliaments – as the best guarantors of the values of freedom and justice that are enshrined in national constitutions. The legal paradox lies in the fact that on the basis of the jurisprudence of the CJEU (Weiler 1999: 19), and now also of a statement added by the contracting parties to the Lisbon Treaty, EU law has been granted “primacy” over the law of member states in matters of EU competence – even, though with some limitations, over their constitutional law – but not an overall hierarchical supremacy. Therefore, while in the federal tradition a general priority of the law of the federation over that of the federated subunits is recognized, in the EU we are faced with a complex and stratified system in which the primacy of EU law in matters of supranational competence is matched by the ongoing centrality of national legal sources and practices as regards the safeguard of essential standards of freedom and justice. This paradox – at least from the point of view of the traditional unitary and hierarchical legal system – has been generally accepted by way of compromise, but was never resolved through a solid conceptual basis.

Habermas addresses the question through an original conceptual construction (Habermas 2011, 59; Habermas 2013: 80; Habermas 2015: 553), which bears some resemblance to the theory of *démocratie*, although maintaining a stronger federalist component (Nicolaidis 2003; Cheneval/Schimmelfennig 2013; Bellamy 2013). In particular,



he claims that in a traditional federal system the legitimation of central public authorities is guaranteed by the citizens of the federation *exclusively in this function*. In other words, insofar as they are called to give legitimacy to the central public power, the citizens of the federation suspend their status as citizens of the member states and come into action only in their political identity related to the central unit. In doing so, they are indeed the source of two forms of legitimacy – that of the federation and that of the federated state of which they are also citizens – but the two procedures of legitimation are strictly independent. In contrast, EU citizens do not suspend their status as citizens of the member states in legitimizing EU public power, so that legitimacy is here inherently twofold, coming at the same time from EU citizens and from the citizens of the member states. This dual legitimacy is expressed in the EU institutional structure through the ordinary legislative procedure, according to which a bill must be approved by both the EP and the Council, and therefore, even if indirectly, by the citizens of the member states. The specific EU system of shared sovereignty achieves two results: on the one hand, it ensures democratic legitimacy to EU institutions; on the other, since in the EU institutional context the member states are not constitutional organs – such as in the traditional federations – but remain constituent powers, national states would retain their original role of guarantors of the standards of freedom and justice which have been consolidated by domestic constitutions. The conceptual construction of dual legitimacy would also have the merit of solving the paradox of the sector-specific primacy of the EU without developing a general hierarchical supremacy. In fact, if nation states continue to be fully and independently legitimized in a democratic sense, then the law produced by them – in particular at the constitutional level – has full autonomy and equal legal status with respect to the more inclusive EU law. As a result, in a multilayered and stratified legal system conflicts between norms cannot be resolved by resorting to a hierarchy of sources that is missing and should not be established, but only through dialogue between institutions and, in particular, between courts.

The denunciation of the “democratic deficit” of the EU, as well as proposals to overcome it, have been part of the debate – with only marginal adjustments – for at least thirty years. In this sense, the assertion that “none other than Germany’s leading philosopher and public intellectual keeps designing the contours of a non-federal European democracy which would build upon the co-originality of European and national identities”



(Chalmers/Jachtenfuchs/Joerges 2016b: 17) should be understood, if not as a joke, then as a kind of low blow in a hard-fought ideological and political battle. In fact, although often sidelined by the predominant technocratic mainstream, proposals for a “bottom-up” democratization of the EU are present in a debate which goes even more into detail than Habermas’s suggestions (Franzius/Preuss 2012; The Spinelli Group 2013). Nor do they deserve to be ridiculed. Nevertheless, a substantial problem persists which should not be simply passed over in silence. Indeed, if the analysis is correct and solutions for a “bottom-up” democratization are feasible, why have these never been successfully implemented? Yet, the answer could be easier than many seem to assume – and not so negative for the outlook of EU democracy. Concretely, it might not be a question of *substantial and objective impossibility*, but of a *lacking of will*, whereby the latter is by far more prone to changing than the former. The reason for democratic stagnation should be sought, thus, in the fact that, for an institutional reorganization to be realized, a political will is needed which has been missing in the last decades of European integration. In reality, the centrifugal forces of parochial interests were not only always present, and powerful in slowing down the process of integration, but eventually gained the upper hand by sidelining efforts towards democratization, and by imposing an old-fashioned and ultimately inefficient intergovernmental method. The current crisis of the democratization impetus does not prove, however, that the idea was wrong. Rather, the poor results that have been achieved by applying the opposite approach should be a strong motivation to take up the supranational democratic perspective again. In fact, contrary to what Hegel thought, what is real is not always the perfect implementation of the rational.

### 3.2. Technocratic Legitimacy

The starting point of the second way to legitimate EU public power is the exact opposite to the approach analyzed in the previous section, namely that full democratic legitimacy would not be possible at the supranational level due to the absence of a European demos. Therefore, no alternative is given to the post-democratic legitimacy of EU public power, which – curiously enough – turns out to be quite similar to some pre-democratic forms of legitimacy. The core assumptions of this approach were perfectly synthesized by Fritz Wilhelm Scharpf in a seminal work which was published – almost as a kind of counter-proposal – during the most creative period of EU constitutionalism



(Scharpf 1999). Scharpf placed at the basis of his analysis the distinction between two forms of legitimacy: “input-oriented legitimacy”, and “output-oriented legitimacy”. The first refers to the participation of the citizens in the creation of the norms that govern their lives, corresponding therefore to what Abraham Lincoln defined as “government by the people”. In contrast, the second form of legitimacy addresses a largely passive acceptance of authority, due mainly to the belief that this acts in the common interest, thus accomplishing what has been called – again by Lincoln – “government for the people”. While the first understanding insists on the active involvement of the governed, the second focuses on their tacit consent, at least as long as the measures taken by the authorities are perceived as beneficial to the self-realization of individuals in the sphere of their negative freedom as well as to the improvement of their living conditions. In nation states, the two dimensions of legitimacy generally coexist, so that civic participation almost naturally leads to the implementation of shared interests, and the involvement by the citizens comes along, almost seamlessly, with a high degree of trust in institutional arrangements. However, this unity of purpose is – according to Scharpf – far from obvious; on the contrary, it is rooted in a pre-existing substrate of common historical, linguistic, cultural and ethnic elements. In other words, without a pre-political and pre-legal dimension, no guarantee is given that a legitimacy of public power that ascends from the will of the governed will lead to the benefit of all, and not just of a majority. Since Europe lacks a common pre-political and pre-legal substrate, the result cannot but be that the two dimensions of legitimacy no longer spontaneously overlap.

The conclusion drawn by Scharpf was that EU public power should be understood quite restrictively, and still depends essentially on the agreement of national governments. Moreover, since in a context devoid of a strong collective identity it cannot be guaranteed that decisions taken by a majority are perceived by all as aiming at the implementation of common interests, EU legitimacy cannot but be essentially “output-oriented”. Faced with the silent consent of the citizens, the legitimacy of EU public power is to be built – in consonance with Weber’s concept of “rational” legitimacy – on the assumption of a higher expertise implicitly attributed to the holders of public power. Therefore, if EU public power does not to find its *raison d’être* in the active consent of EU citizens, and in their democratic participation, but in the widespread confidence in the competence of the EU



institutions, then we will be faced with a kind of revival, although under a new and specific guise, of what has been defined before as the “descendant” understanding of public power.

Scharpf’s theory of output-oriented legitimacy as the only way to justify EU public power was flanked, and followed, by numerous similar attempts. Even Joseph H. H. Weiler – for decades probably the most refined expert of EU law at the international level – did not refrain from the effort to give reasons for the unjustifiable EU democratic deficit. Indeed, he introduced in his analysis of the specific features of supranational power the distinction between a “formal” and a “social” legitimacy, where the latter “connotes a broad, empirically determined, social acceptance of the system” (Weiler 1999: 80). Insofar as he admitted that one of the main problems of EU power lies precisely in its lack of legitimation, the solutions proposed, aiming primarily at ensuring greater transparency, were far from satisfying the fundamental epistemic principle of democracy, namely that *volenti non fit iniuria*, and from guaranteeing full democratic participation (Weiler 1999: 348). In fact, Weiler openly admitted that the quality of European integration should not be sought in the extension of democratic practices to the post-national constellation, but rather in the respect of the “other” and in “constitutional tolerance” (Weiler 2001: 62).

A further variant of the technocratic justification of EU public power underlines – in a way which may be surprising, at least at first glance – its deliberative dimension, in particular with reference to the phenomenon which has been described as “comitology”. This concept refers to the practice, specified by law, whereby the powers of the EC are exercised, in the application of EU law, by having recourse to committees composed of representatives of the member states. The procedure can be interpreted – with good reasons – as having the primary purpose of maintaining control by member states in areas deemed sensitive to national interests, thus limiting the autonomy of the EC as a supranational body. Nor is it to be assumed that the reform of comitology introduced by the Lisbon Treaty, albeit slightly strengthening the EP, really did change the intergovernmental setting (Savino 2011). Comitology, however, was also read in almost the opposite perspective, i.e., not as an instrument of governance implemented by the executives in order to circumvent parliamentary control, be it national or supranational, but as an expression of deliberative participation in Europe. Concretely, the comitology system would have the merit of creating a space where domestic interests, represented by national governments, can be mutually recognized, and thence finally reach a respectful agreement



between different positions (Joerges/Neyer 1997). In fact, it may be understandable that, once the dominance of the executive powers is accepted, the creation of spaces for dialogue between governments should be welcomed. A significant problem arises, however, when the advocates of comitology improperly apply to the phenomenon a conceptual framework which is explicitly derived from the theory of democracy. By interpreting intergovernmental confrontation as a deliberative sphere, they normatively ennoble the transfer of competences from the legislative to the executive. In other words, deliberation among citizens that characterizes democratic practice is replaced by deliberation among member states. As a result, the theory of comitology becomes an ideological tool to mask the technocratic expropriation of citizenry.

The same cloaking of technocratic rule by its merger with an alleged deliberative dimension characterizes the recent introduction of the new concept of “throughput legitimacy” (Schmidt 2010). If input legitimacy focuses on democratic procedures to guarantee the participation of citizens, and output legitimacy focuses on the performances that a political and legal system has to provide in order to be accepted, throughput legitimacy addresses what might be called “the interest consultation with the people” (Schmidt 2010: 7). In other words, attention is devoted here to what happens within EU governance processes and, in particular, to how these should be open to requests from the civil society. According to Vivien Schmidt’s analysis, “throughput legitimacy via interest-based intermediation and consultation with the people ... represents a way in which minority interests can gain a voice even without a majority vote” (Schmidt 2010: 20). These interests include not only the demands made by large and powerful economic actors but also “more diffuse difficult-to-organize majority interests such as consumer groups and public interest oriented groups such as environmental groups, policy think-tanks or even social movements” (Schmidt 2010: 20). In conclusion, a decision is legitimate insofar as it takes into account as many and various proposals emerging from the population as possible. Regardless of whatever good intention might have inspired it, the introduction of the new notion of throughput legitimacy is problematic for two main reasons. First, attention to processes that, in addition to participation in elections, allow an ongoing involvement of citizens and organizations of the civil society is in itself an inescapable feature of any serious theory of democracy. Thus, the introduction of a new concept turns out to be superfluous and in clear contradiction with the essential epistemological principle



contained in Ockham's razor. Nevertheless, it would be naive to believe that the problems of the theory of throughput legitimacy can be reduced only to a methodological dimension. In fact – and this is the second reason for criticism – democratic discourse and genuine participation are substituted, here, by a highly selective opening of institutions to the civil society, in which no guarantee of equal treatment is given. In doing so, however, one of the main features of a true democracy is cancelled, namely the neutralization of the social dimensions of power by political interactions within the democratic arena.

While the theories of comitology and throughput legitimacy ennoble the technocratic drift by masking it behind a curtain of democratic conceptualism, another form of the revival of the “descendant” justification of public power explicitly endorses the supremacy of the bureaucratic-administrative regime. By doing so, it turns back to the clear-cut alternative, proposed by Scharpf, between a democratic and a functional legitimacy. A first variant of this uncompromising apology of technocratic legitimacy is based on the application of the concept of “executive federalism” to the EU (Dann 2006: 237). This notion, which is derived from the *Exekutivföderalismus* of the German constitutional tradition, refers to a particular form of federalism where federated subunits take on the implementation of the decisions issued by federal institutions. As a result, federal administration is reduced to a minimum, and federated subunits, in return for their efforts to give direct effect to federal legislation, are granted a central role in the determination of common policies. The analogous supranational organ to the German *Bundesrat* would be the Council, although, because of deeper cultural and political differences, the competences of the latter are broader, the defense of parochial interests fiercer, and the resulting difficulty in reaching compromises greater. The application of the concept to the EU, however, may be misleading. In fact, while national “executive federalism” is moderated by robust parliamentary control mechanisms, in the EU no similar institutional arrangements exist, so that “political responsibility ... becomes diffused, until it vanishes in its entirety” (Oeter 2006: 79).

If the theory of “executive federalism” still shows some restraints in its defence of the technocratic legitimacy of EU public power, according to a second variant no room is left for doubt: the legitimacy of EU public power, here, is openly and unequivocally defined as a purely “administrative legitimacy”. After reiterating the “no demos thesis”, Peter Lindseth applies the conceptual construction of the relation between “principal” and



“agent” to the EU, arguing, as a result, that EU institutions cannot but have a “functional” legitimacy since they are administrative “agents” of decisions taken by the nation states as “principals”. In that sense, they are operating in a space located beyond the sphere in which democratic legitimacy takes place (Lindseth 2014: 534). Lindseth does not deny the autonomy of the decision-making-processes of EU institutions, but rather intends to identify and justify a decisional context which should be regarded as free from any obligation to legitimation by the citizens, in particular in their quality as EU citizens. If the source of identifiable and significant legitimacy is the nation state, but this is so far away that the legitimation chain becomes almost imperceptible, then the technocratic Golem has finally received its breath of life and its justification to move into the realm of a post-democratic autonomy.

#### 4. Which Scenarios for the Future?

At this point we must ask ourselves which scenarios for the future are reasonable and desirable on the basis of the conceptual framework presented in the previous sections. In this regard, we can see how the recent crisis has been dealt with according to procedures that have clearly favoured the “descendant” conception of public power. In fact, one of the most important measures – namely the Fiscal Compact of 2012, which came into force in 2013, compelling nation states as signing parties to insert into “provisions of binding force and permanent character, preferably constitutional” the rule that national budgets “shall be balanced or in surplus” – is an international treaty which, although signed by 25 EU member states, is outside the EU legal framework *stricto sensu*. The most obvious consequence is that the EP was set aside, for the benefit of the executive powers. Furthermore, the idea of a full democratic legitimacy through national parliaments also turned out to be illusory: in fact, if it is true that international treaties require parliamentary ratification, it is also undeniable that the parliamentary vote in this case did not allow amendments and was reduced to a “yes or no”, in which the pressures by the executive may prove to be decisive, nor was it possible for national parliaments to control the subsequent measures issued by executive institutions.

In contrast, both the Six-Pack of 2011 and the Two-Pack of 2013 – consisting, respectively, of five regulations and one directive, and of two regulations – are located



inside the legal framework of the EU. The seven regulations and one directive were all adopted jointly by the EP and the Council and aimed at strengthening control over budget deficit. However, since this control is exercised, once again, exclusively by the executive, the approval by the EP equated to a substantial self-disempowerment by the EU legislature, which is not balanced by any comparable possibility of intervention by national parliaments. The European Stability Mechanism (ESM), which replaced in 2012 the previous European Financial Stability Facility (EFSF) and the European Financial Stabilization Mechanism (EFSM), is similarly characterized by its technocratic quality: although generated through an amendment to art. 136 TFEU, which was also approved by the EP, it centers all powers in the hands of the executive as well, either to the EC, or to intergovernmental committees.

Therefore, no occasion would have been better to prove that “descending” public power is characterized by higher rationality and competence than the governance of the European financial crisis, which was fully in the hands of the executive and virtually autonomous from democratic control. On the contrary, instead of a perfect scenario, we are faced with an unstable and largely unsatisfactory situation for at least three main reasons. Firstly, the crisis of the Greek sovereign debt, despite having been stabilized, appears far from settled, as even acknowledged by the International Monetary Fund as one of its protagonists. Secondly, one of the justifications for European integration has always been the defence of the European welfare model. Contrary to what one might expect, however, the index that measures inequality – or Gini coefficient – has increased substantially in the last two decades, although in different degrees, in all EU countries, which provides sufficient evidence that the European technocracy was either unable or unwilling to defend the social benefits of continental welfare. Moreover, while the rise in inequality can be seen as a long-term phenomenon affecting more or less all Western countries and, therefore, not directly attributable to the “top-down” management of the debt crisis, another negative social trend, instead, has been worsening dramatically since 2009. Indeed, the share of the population in poverty has also increased significantly, but not uniformly in all countries, demonstrating that the promise to bring about convergence in the living conditions of the populations of the member countries has also not been fulfilled. Thirdly, output legitimacy of public power should be based on the trust in the superior skills of those who are called to exercise it, both at the national and EU level. Yet,



if Eurostat findings are used as a basis for judgement, such confidence – albeit relatively stable – rarely exceeds 50 %, with an average of around 40 %, as regards the EU, while domestic institutions get even worse average results.

In essence, then, the claim that technocratic governance of public affairs would achieve the best results due to the alleged higher rationality of power holders seems not to be substantiated by any evidence. Rather, it must be assumed that some of the problems that have emerged in recent years would have been better addressed using the fundamentals of a well-developed legitimacy “from below”, and of a stronger feeling of solidarity between citizens. Starting from the acknowledgement of this matter of fact, two opposite strategies – in line with the dichotomy that has informed the whole debate – are conceivable: the more or less far-reaching renationalization of European policies, or a decisive step forwards towards a convincing democratization of the EU institutions. Beginning with the renationalization strategy, what is striking, first, is the heterogeneity of the coalition that is vigorously pleading for it. At least three different groups – and interests – are gathered under a variegated banner. The first group – the location of which is less surprising – comprises those who, like Dieter Grimm, always warned against the risks of European integration going too far. In particular, the need is underlined to preserve the national political community as the only area in which democratic legitimacy can be fully implemented. In his more recent works, however, Grimm takes for granted what he had previously criticized, namely the “constitutionalization” of the EU. Yet, even if the EU is assumed to be a constitutional space *sui generis*, it is its presumed “overconstitutionalization” that Grimm now rejects (Grimm 2015). His proposal for a simplification of EU primary law, which should cover only the most properly constitutional contents, while many specific provisions now contained in the treaties should move into secondary law, surely deserves to be taken seriously. Nevertheless, what disturbs Grimm most seems to be that the “overconstitutionalization” of the EU would have led to an excessive amount of competences held by the EC and by the CJEU, with a further worsening of the democratic deficit. The need to counterbalance this shortcoming could not be entrusted, according to his perspective, to the EP because of the limits usually attributed to supranational democracy, namely the lack of an electoral system shared by all member states for the election of the EP, the disparity of representation in relation to population, the weakness of European parties, and the absence of a genuinely



supranational public opinion. Given that the diversity of representation in relation to the population is a feature not only of the EP, but of all federal systems due to the necessity to protect minorities, Grimm's analysis – as it is always the case for explicitly or implicitly eurosceptical authors – does not develop any feasible solution for the strengthening of supranational democracy. Rather, he moves on directly to solutions which are thought to deconstruct the supranational dimension. More concretely, he locates the bulwark against technocracy and depoliticization in the European sphere in national constitutional courts (Grimm 2014). Yet, it is at least optimistic, if not contradictory, that the judiciary, which is presented as an example of technocratic drift in the EU, might be called upon to play the precisely opposite role in the national context.

The presence of the second group of authors, in the midst of the renationalization movement, is altogether more surprising. This group consists of mainly progressive and leftist thinkers who have seen their hopes for a democratic and social Europe largely disappointed by what the Union has become. Surely, there are good reasons to be dissatisfied with the acquiescence of the EU towards the principles of ordoliberalism in general (Streeck 2014), and of capital owners in particular (Menéndez 2016a), or with its incapability to address the migrant crisis with a due sense of justice (Menéndez 2016b). Nonetheless, the quite convincing criticism against some EU policies turns out to be illusionary or even misleading when it ends up praising the unbroken virtues of nation states. As Wolfgang Streeck argues, the more we want to save what remains of the welfare state, the more competences the EU should give back to the member states (Streeck 2014; Streeck 2015). Therefore, the only kind of “more Europe” that we need would be the return to the continental constitutional tradition of the nation states, in which capitalism was tamed by the social dialectics of national politics (Somek 2013). Yet, it is curious that nation states, within this narrative, are not blamed for any social or political distortion, although the recently reintroduced intergovernmental method may have contributed to the shortcomings at least as strongly as – and probably more than – the supranational institutions. Moreover, it sounds like a profession of faith if the social and political conditions of nation states are regarded as essentially sound and intact, even though the current pathologies have originated largely in their context.

The most astonishing presence among the supporters of renationalization, however, concerns the third group, which includes scholars who have been for a long time among



the most committed apologists of EU governance. Though divided among themselves because of distinct conceptual premises – some come from the deliberative theory of democracy (Nicolaidis/Watson 2016), others from a rather functional understanding of social rationality (Scharpf 2016; Majone 2016) – they all share a plea for the partial disentanglement of the EU. This should happen, however, not primarily on the basis of considerations regarding democracy and justice – as in the former group – but for the purpose of maintaining some decisive functional performances, now to be re-located into an intergovernmental setting. According to these authors, the problem arose when European integration, and in particular monetary union, led to redistributive actions which were not covered by adequate legitimacy (Chalmers/Jachtenfuchs/Joerges 2016b: 3). To solve the problem, more intergovernmental cooperation should be envisaged through variable geometries of different associations of member states, or “club goods” (Chalmers/Jachtenfuchs/Joerges 2016b: 23; Majone 2016), whereas social and economic difficulties should be internalized and European governance should concentrate on the prevention of spillover-effects (Nicolaidis/Watson 2016: 75). In other words, poverty should be kept at home and dealt with by resorting to national means, while the intergovernmental level should protect the most influent shareholders – not exactly an attractive perspective for the future of European integration. Furthermore, it is interesting that the “Eurocrats” have become, here, the preferred target for criticism, whereas European technocracy had been generally defended for long time by the same authors. The reason might be that the “Eurocrats” seem to be now the most committed defenders of an essential level of continental solidarity against the selfish interests of the most powerful member states. Thus, since a further empowerment of the EP was never seen as a serious option by these scholars, the question is only about which institutional structure can best guarantee that the most powerful interests can have the most favourable stance. Until a couple of years ago, this appeared to be best ensured by the EU technocracy, as opposed to intergovernmental cooperation as advocated now. Under these premises, the belated reevaluation of input legitimacy by Scharpf – yet only at the national level – takes the shape of a rather captious argument (Scharpf 2015; Scharpf 2016).

The recent *White Paper of the Future of Europe* of the EC presents alternatives on the basis of two variables: the depth of European integration, and its inclusiveness (European Commission 2017). Following the first variable, we can aspire to *more integration* or accept a



*weakening of EU governance*, while according to the second we can aim at doing *all together what can be generally agreed on*, or take the way of a *two-speed Europe*, with an essentially federal core Union plus some more or less closely associated countries. Leaving aside the perspective of a weaker EU governance in the future, which would be nothing other than the acknowledgement of a failure with unpredictable results, all other solutions envisage some kind of progress in the integration process, albeit under the condition of a limited inclusion according to one variant. However, regardless of which option for improvement we may prefer, the *White Paper* does not mention democratic legitimacy and social solidarity as the crucial factors in the decisions on the future of EU integration. Against the background of the existential crisis of the EU project, it is time to show more courage, claiming explicitly that any resolution on how to go ahead should be taken on the basis of two fundamental criteria. The first is how the Union can be shaped in a more legitimate – in the sense of “bottom-up” legitimacy – and democratic way. The second criterion is how we can make it more socially just. As regards the first issue, if the EU “top-down” public power is in crisis, and the renationalization is either illusory or cynical, we cannot but resume the other option, namely the radical democratization of EU institutions. In this sense, it is not – or at least not only – about the democratization of the institutions of supranational governance, such as the EC, the European Central Bank (ECB) and the CJEU, as recently argued by Antoine Vauchez (Vauchez 2016). This step is indeed important, but it does not properly implement the fundamental tenets of democracy, which should be based on inclusion, participation and reflexive decisions by all involved. Transparency, though an essential condition, cannot do the job alone, replacing what is the inherent task of representative and participative democracy. Rather, as proposed in the Rome Manifesto of 2017, democratization should address the very institutional architecture of the EU by creating a strong legislative power made up of the EP – as the “house of the people” – and of a newly constituted Senate – as the “house of the states” – in which the European Council and the Council should merge. Furthermore, majority voting and qualified majority should be the rule, respectively, in the EP and in the Senate. Lastly, the President of the EU, as the head of the executive – or, more precisely, of a reformed Commission – should be directly elected through a democratic process. Yet, democratization alone cannot be enough if it does not come along with more solidarity and justice. EU citizens must feel again that the European project is about the improvement of their living conditions and that no one – no



individual or social group in the single states, and no single country among the member states of the EU – will be left behind. It is only under these conditions that the idea of a United Europe can hope to win the battle for the hearts and minds of the European citizens.

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# Paradigms for EU Law and the Limits of Delegation. The Case of EU Agencies

by

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## Abstract

This article questions the idea that the EU is a pure regulatory power based on supranational delegation of competence from the Member States. It claims the insufficiency of this single paradigm to explain the developments of EU law and the need to integrate it with recognition of the constitutional foundations of EU law.

The analysis demonstrates this by focusing on a specific case study of institutional design in the internal market integration: the delegation of powers to EU agencies. By recognising the judicial evolution of the so-called Meroni doctrine concerning the non-delegation of powers to EU agencies, the article unveils that, legally speaking, the enhancement of EU agencies' powers takes place in the autonomous constitutional framework of the EU legal order.

This constitutional foundation of EU law shall therefore complement the supranational delegation paradigm. Only in this wider approach can the legitimacy of EU agencies' powers be framed and accommodated in the composite nature of the EU as a Union of Member States. On these grounds, the final remarks highlight the need for a more comprehensive paradigm for EU law that can explain these different aspects of EU law under a common approach based on a wider public law discourse.

## Key-words

supranational delegation; principle of conferral; EU agencies; Meroni doctrine; accountability



## 1. Introduction

When understanding the potential and the limits of EU action, the identity of the EU legal order and the nature of the EU integration process matter. The debate about EU integration is a consolidated one. Political science scholarship has been a major contributor to understanding the integration process. The debate has developed also within legal scholarship and it has mainly concerned the legitimacy of the EU legal order. The legal debate has polarised the discussion between the search for the constitutional foundations of an autonomous legal order and the analysis of the cooperation and integration in the multilevel governance. Broadly speaking and simplifying the different aspects of the legal debate, legal scholarship has explored the EU either as a constitutional subject or as a phenomenon of regulatory governance.

When analysing the supranational law framework of the EU, however, these competing approaches do not appear mutually exclusive as the legal debate may have indirectly suggested so far. This article claims that these approaches are complementary and that, individually taken, none of them can capture the real nature of the EU law, but can only contribute to highlighting specific aspects of the EU experience. EU law offers many examples of this hybrid nature of the EU, caught between the constitutional and the regulatory dimensions. I will demonstrate this by focusing on a specific case study concerning of the EU institutional design: the delegation of powers to EU agencies. Despite their governance vocation, EU agencies are conceived and developed as fully supranational actors under EU secondary legislation. They operate in the regulatory sphere, but they require constitutional justification. Their powers are the expression of a specific constitutional experience that finds its roots in the composite nature of the EU legal order.

As the evolution of the Court of Justice (CJEU)'s case law points out, legally speaking the evolution of administrative powers at the EU level cannot be explained through the pure lenses of the supranational delegation from the Member States. The administrative law relationship that EU agencies develop presupposes the development of an autonomous supranational order that constitutionally frames EU agencies' powers. Only the existence of a constitutional principle at the EU level concerning the conditions for the delegation of powers conferred upon the EU institutions to EU agencies explains if and how EU agencies



may legitimately retain regulatory powers. This principle known as the Meroni doctrine shows the autonomous foundation of the responsibilities and tasks of EU agencies at the supranational level.

The resulting legal framework goes beyond the paradigm of supranational delegation from Member States without disregarding it. A wider paradigm shall cover the complementarities of the different approaches and explain the integration process without losing important aspects of the EU identity. As Cassese (2015) has shown, the openness of public law can create new frameworks for law by combining different levels of regulation and meaningful interactions that generate institutional changes. The recognition of the complementarity of paradigms in the characterisation of the EU legal order may generate this wider public law approach to EU law that includes and reinterprets them in a composite framework.

EU agencies' powers and the guarantees of their exercise need to be designed by considering the original character of the EU legal order, as a Union of Member States. Accountability and legitimacy issues, therefore, shall be addressed not only at the supranational framework of EU powers, but also within the multilevel structure of the EU. This means that not only the Meroni doctrine, but also the supranational delegation paradigm may contribute to re-connecting the EU administrative developments to the legitimate functioning of the EU legal order.

The article is structured as follows. Firstly, it introduces the paradigm of supranational delegation and points out its limits. Subsequently, the constitutional foundations of the Meroni doctrine in the EU legal framework are presented (sec. 3) and the analysis shows how EU law goes beyond the direct link to supranational delegation (sec. 3.1). A wider approach based on the composite nature of EU public law emerges (sec. 4). Political accountability and legal accountability are thus analysed with regard to both the EU and the Member States and their citizens (sec. 5). The final remarks emphasise the need for a more comprehensive public law paradigm to understand the powers of EU agencies and, more generally, the nature of EU law.



## 2. The slippery nature of the EU integration process

The EU integration process has been explained in different ways. Theories of EU integration have developed different approaches to the issues and the evolution of the EU. Since the 1970s, theories of governance have been developed to explain that specific aspect of the integration process; that is, the supranational integration in the internal market.

When conceiving EU integration as a phenomenon of governance, emphasis is put on the regulatory role of EU institutions and bodies which operate at the EU level. The EU integration process is considered as being based on the delegation of regulatory powers from the Member States to the EU institutions as the result of a broader process of fragmentation and diffusion of normative powers. This reading of EU integration conceives the idea that EU institutions retain regulatory powers, which have been conferred by the Member States with the aim of satisfying functional demands, but upon the condition of retaining oversight over the exercise of the conferred powers.

This approach was first developed by political science scholarship, which emphasised that the technocratic power of the EU was a means for Member States to insulate themselves from political pressures and commit to implementing EU policies (Majone 1990, 1994: 23; 1995 and 1996). Subsequently, the legal scholarship has further explored the governance approach to integration and distinguished the EU as a form of deliberative supranationalism from a constitutional experience. In his scholarship on legal history, Lindseth (2010 and 2014) has particularly described EU integration as an ‘administrative’ phenomenon, as it regards the conferral of specialised regulatory powers not on the basis of the expression of a general democratic will, but on the grounds of a delegation of powers from nation state institutions.

The rejection of the constitutional foundations is based on a political approach to constitutionalism that emphasises the primacy of the politics embedded in the democratic process (Goldoni 2012: 928-937). The administrative approach to EU integration aims to reconcile the functional demands of economic interdependence for supranational regulatory solutions with the state-based concepts of democratic and constitutional legitimacy. It points out that the construction of the EU lacks political autonomy as it derives its legitimacy from the constitutional systems of its Member States. From this point of view, this approach is linked to the theories which have discussed the political legitimacy of the EU as based on



the national democratic circuits (Moravcsik 1998; Weiler 1982 and 1991; Nicolaidis 2004 and 2010).

Lindseth considers the political-cultural nature of such an administrative integration and he presupposes and implies the absence of autonomy of the EU as a (constitutional) legal order. The EU benefits from a ‘mediated form of legitimacy’, which stems from its Member States and their citizens. Member States are thus understood as the principals overseeing the EU, the agent. European integration is not conceived as a phenomenon of constitutional law, because the EU legal order excludes a ‘true’ constitutional foundation, which remains in the domain of the single Member States and is entrenched in the national populations and in the national democratic institutions. According to this paradigm, EU is the expression of administrative governance beyond the state based on the voluntary decision of national states to delegate powers and pre-commit to the law that such delegation entails (Lindseth 2014: 534 and 549). From a political-historical standpoint, the EU results in something different from a constitutional phenomenon as it rests upon the transfer of powers to supranational institutions from the Member States which democratically retain them.

Building upon the same bottom-up approach to EU integration, however, different theories of constitutionalism can reverse these conclusions. Admitting that the legitimacy of the EU rests upon the democratic constitutions of the Member States, EU law may appear as an experiment of multilevel constitutionalism based on a plurality of national constitutions committed to a supranational constitutional experience (Pernice 1999; Walker 2009). It has also been considered as a process of constitutional synthesis, founded on the supranational reinterpretation of Member States’ constitutional and institutional structures (Menéndez and Fossum 2011; Milwald 1992; for a critical approach see Goldoni 2014).

When claiming that the EU and particularly the European Monetary Union (EMU) is not based on ‘political constitutionalism’, but rather on ‘republican intergovernmentalism’, Bellamy and Weale (2015: 269-270) share Lindseth’s interpretation of EU governance. These scholars consider that the commitment to EMU rests upon political democracy at national levels which provide governments with the necessary (democratic) legitimacy to enter into credible commitments. They also observe that this is confirmed by the decisions of the German Constitutional Court: the legitimacy of the German state’s commitment to EU goals and policy is legitimate as long as it is consistent with the principles of the German Basic Law, the *Grundgesetz*.<sup>1</sup> The conclusion of these scholars, however, is that the EMU is an



experiment of legal constitutionalism -rather than one of administrative governance- because it provides a set of legal rules which ‘constrain the action of politically responsible decision-makers’ and ‘disregard [...] the existence of reasonable differences in political judgment over the principles that should govern a monetary union made up of different sovereign states, each with their own traditions of economic and monetary policy’ (Bellamy and Wale 2015: 259-260).

This variety of interpretations highlights the intrinsic difficulty of classifying the construction of the EU from a single legal point of view. If the theory of supranational delegation can describe EU integration in the internal market from a political and historical perspective, it cannot capture the development of the EU as an autonomous legal order in the discourse of its own institutions. Legally speaking, the comprehension of European integration cannot be clearly reduced and limited to a manifestation of a specific area of national law. Interferences between different law domains are at the heart of the slippery legal nature of the EU legal order. When looking at EU law as a supranational experiment of administrative governance beyond nation states, some autonomous developments of the EU institutional design and regulatory framework cannot be easily reconnected to this approach. Through the Principal-Agent theory ‘supranational autonomy is primarily a function of the control mechanisms established by member states to control their international agents’ (Pollack 1997: 119). As Pollack highlighted, however, this theoretical framework is not fully supported by institutional developments which jeopardise the model by presenting unexpected situations where supranational institutions can creatively exercise their autonomy (Pollack 1997: 106-107 and 128-130).<sup>11</sup> As the scholarship of historical institutionalism has observed, EU institutional design depends on the choices that Member States are willing to make, both at the supranational level and in intergovernmental settings, but then it produces autonomous effects - also unintended - which bind the Member States themselves and their future options (Pierson 1996: 147-148; Scharpf 1998; Verdun 2015: 230-232). Scholarship of intergovernmentalism also noted that Member States negotiate and decide within an integration framework which is path-dependent from an institutional setting with endogenous interdependency and preferences (Schimmelfenning 2015: 192).

Legally speaking, the theory of supranational delegation may build upon an administrative law assumption, but then it produces significant constitutional effects at the



EU level. This clearly emerges when analysing how EU law has embodied the delegation principle in the principle of conferral, as set in art. 5 TEU:

‘1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.’

The principle rests upon the transfer of competences from sovereign Member States to the EU, but within the domain of the devolved competences then the EU is only committed to the implementation of the Treaties and the exercise of its powers is only limited by the principles of subsidiarity and proportionality as set in EU law. The oversight of Member States is therefore constrained by the rule of the Treaties which thus founded the constitutional legitimacy of the EU legal order and its institutions. If the oversight of Member States is mediated by the Treaties and their institutions, the linearity of the supranational delegation paradigm is not able by itself to explain the developments in the interpretation and the autonomous evolution of EU powers within the framework of the Treaties.

As Weiler (1991: 2407) has observed, the EU appears to be as a ‘specified interstate governmental structure defined by a constitutional charter and constitutional principles’. Legally speaking, EU case law clearly affirms the constitutional nature of the EU as an autonomous community based on the rule of law and the protection of fundamental rights.<sup>iii</sup> It also shows that when applying the principles of proportionality and subsidiarity, as well as when recognising the competences falling within the EU domain, the Court of Justice of the EU has adopted a standard of review which favours further developments of EU action and responsibilities (Craig 2012: chapters 14, 19-20; Weatherill 2011; Harbo 2010; Schütze 2009: 250; Tridimas 2006: chapters 3-4; Kumm 2006; Estella 2002; de Búrca 1999). Without this peculiar constitutional nature of the Treaties, the further development of EU powers beyond the supranational delegation from the Member States cannot be legally explained.

When understanding EU law, the idea of a supranational administrative governance shall be complemented by and adjusted to the existence of an autonomous dimension of the EU



legal order which cannot be explained by the delegation of administrative powers from the Member States, but needs to be understood within the particular categories of EU law. These are two faces of the same coin: if you look from the perspective of the Member States, you must admit that they have politically accepted to confer part of their powers upon supranational institutions and you can conceive the transferred powers as regulatory in nature; but if you look from the perspective of EU institutions then you see an autonomous supranational legal order which is committed only to the goals set in the Treaties and which binds Member States and shapes their individual legal orders according to the framework of the Treaties. When doing this, unforeseen legal instruments and new regulatory solutions can be autonomously developed under the framework of EU law.

The legal potential embedded in the EU legal order shows that a gap exists between the political dimension of the EU integration and the legal one. The political sovereignty of the Member States does not correspond to their legal sovereignty. EU law creates effective constraints and allocates fundamental rights which affect both states and individuals. The challenge is how to reconcile the political and legal dimensions. Administrative governance as such is not able to effectively fill this gap. Only a broader understanding of how to reconnect the supranational delegation of competences from the Member States and the autonomous supranational developments of EU law can do that.

### 3. EU agencies in the supranational foundations of EU

The autonomous development of the EU law has produced constitutional principles and institutional structures that affect the decision-making in the Member States and commit them to the enforcement of EU law. Under EU administrative law, supranational phenomena of administrative governance are justified in the light of the Treaties as interpreted by the Court of Justice. In the silence of the Treaties about the possibility to delegate powers to EU agencies, the Court of Justice has set the constitutional constraints that kept these bodies within the EU legal framework. These constraints represent the legal justification of EU agencies' powers and make delegation a phenomenon of pluralisation and specialisation of EU powers. If supranational delegation may be considered a preliminary condition for the delegation of powers to EU agencies, it cannot explain neither whether nor to what extent delegation to EU agencies may be legally possible and necessary. *A contrario*,



this means that the legal substance of supranational delegation is shaped by the autonomous evolution of the EU legal framework. Because of this autonomous dimension of EU public law, the content of the principle of conferral has changed and new regulatory instruments have been developed under EU law.

The growth of EU agencies' powers in the internal market is the consequence of the need for specialisation and technical expertise in some domains where EU law should be developed and implemented (Hofmann and Morini 2012: 421-423; Groenleer 2009: 100-108; Magnette 2005: 7-10). However, this functional development of EU law has been legally constrained by the principle of conferral as set in the Treaties and interpreted by the Court of Justice. The principle of conferral shaping the (political) delegation of competences to EU institutions has the supranational effect of designing a system of division of powers at the EU level which cannot be arbitrarily changed by EU institutions.

The non-delegation doctrine that generally goes under the label of the Meroni doctrine has defined the legal limits to the growth of EU agencies' powers.<sup>IV</sup> The concern of this doctrine is the protection of the balance of powers as set in the Treaties: conferred responsibilities cannot shift from the EU institutions that legitimately retain competences to other bodies outside the relation of supranational delegation from the Member States. If this is the substantive issue, however, the evolution of EU case law on EU agencies' powers demonstrates that the balance of EU powers depends on the autonomous legal developments of the EU legal order. The connection with the Member States through the principle of conferral does not prevent EU law from implementing autonomous instruments of governance in the internal market. The real issue of delegation at the EU level concerns the constitutional status of EU agencies, on the one hand, and the nature and the guarantees about how these agencies exercise powers, on the other hand. As soon as some changes had intervened in these regards, the limits to the conferral of tasks on EU agencies also changed in the interpretation of the Court of Justice.

By analysing the evolution of the Meroni doctrine, I will demonstrate that legally speaking, the EU presents original characteristics as an autonomous legal order. The legal constraints to EU agencies' powers are not at the disposal of the Member States and it rests upon the judicial review of the constitutional framework of the EU. Inasmuch as the legitimacy of EU agencies' powers is located in the autonomy of the EU legal framework, only legal procedures and remedies can legally reconnect the exercise of EU agencies' powers



to the supranational delegation theory. The following sections will show how the judicial interpretation of the Meroni doctrine evolved in almost sixty years of integration according to the Treaties and their interpretation.

### 3.1. Addressing EU agencies' powers through the lens of the Meroni doctrine

The allocation of powers to EU agencies is a clear example of the legal autonomy of the EU from its Member States. Unlike the case of EU institutions, only recently have EU agencies been recognised as institutional actors under the Treaties. Before the Lisbon Treaty, agencies were not included in the Treaties, falling outside the principle of conferral (Lenaerts 1993). Legally speaking, the evolution of their powers is connected to the exclusive development of the EU legal order.

To preserve the allocation of competences as set in the Treaties and not to alter such legal framework, the CJEU developed in the Meroni doctrine the rules for reconciling the need to keep the structure of the supranational legal order unchanged, with the need to delegate technical tasks to expert supranational bodies. This case law is based on the principle of the balance of powers as the other-face of the principle of conferral. The competences of EU institutions cannot be altered by further delegation of tasks implying the exercise of political discretion to bodies not included in the Treaties. By making the institutions able to act only in accordance with the powers they have been conferred by the Treaties, this principle further specifies the more general principle of division of powers within the framework of the European legal order (Jacqué 2004: 383-384). Under the ECSC Treaty, *Meroni* questioned the delegation of power from the High Authority to two bodies under the Belgian private law – the so-called Brussels agencies – for dealing with financial arrangements of the ferrous scrap regime. In doing this, the *Meroni* case set the necessary principles and conditions under which any delegation of powers from institutions may be feasible (see Tridimas 2010: 241-243; Tridimas 2012:60-62).

The case held that delegation should find its structural limit in the impossibility of delegating those powers whose exercise requires a discretionary evaluation, since this involves a shift of responsibility not expected by the Treaty. In the *Meroni* case, the concept of wide discretion referred to a quasi-legislative power 'which may, according to the use which is made of it, make possible the execution of actual economic policy'.<sup>v</sup> In addition, the delegation of powers should be explicit and in line with the principle of conferred



competences: if necessary for the accomplishment of its tasks,<sup>VI</sup> the delegating authority can only provide an agency with powers explicitly<sup>VII</sup> and within the limits of the powers it retains. Tridimas (2012: 60-62) has identified in the necessity requirement the further condition of proportionality for lawful delegation. These tasks should then be performed by the agencies under the same conditions as the delegating authority would have performed them. This means that the execution of the delegated tasks should be subject to the same procedural guarantees to be applied by the delegating authority as a necessary condition for its legitimacy.

Subsequently, the non-delegation doctrine has been further developed in the *Romano* case. Under the EEC Treaty, *Romano* questioned the delegation of regulatory powers from the Council to a body established under EC secondary law, the Administrative Commission on Social security of Migrant Workers. In a preliminary ruling, the CJEU held that agencies cannot impose methods, interpretative rules or obligations to national administrations, but they can only help such national administrations by providing non-binding decisions,<sup>VIII</sup> so as to specify that agencies cannot exercise any rule-making power, but they can only have recommendatory powers.

Only executive powers could thus be delegated from Treaty-based institutions to agencies and their use must be entirely subject to the supervision of the delegating institution. This has been interpreted as holding that no regulatory power can be delegated to agencies without prejudicing the design of powers as set in the Treaties. Administrative rule-making has therefore been frozen with the aim of keeping the institutional structure unchanged and compliant with the principle of conferral. In this line, the non-delegation doctrine has become a constitutional principle of the EU legal order concerning the possible allocation of public powers.

Nonetheless, insofar as internal market development and its proper functioning require those administrative functions to be performed by supranational administrations, an increasing number of agencies have been performing functions that substantially touch upon a regulatory content. Even if formally these agencies have limited powers and issue opinions or draft technical standards to EU institutions or recommendations to Member States, they often retain powers that stretch the Meroni doctrine. The European Aviation Safety Agency (EASA), for instance, issues standards which effectively commit Member States to the implementation of EU regulation in the aviation sector (Simoncini 2015a). More recently,



the European Supervisory Authorities in the financial markets (ESAs) have been bestowed with more intense powers of supervision and regulation which were reviewed by the Court of Justice according to the *Meroni* doctrine (Simoncini 2015b).

The recent *ESMA - short selling* case has somehow opened the door to further EU administrative integration through the development of EU agencies' regulatory powers.<sup>IX</sup> The case concerned the ESMA's power to prohibit or impose conditions on the entry by natural or legal persons into transactions in the short selling market or require such persons to notify or publicise their positions, if and when there is a threat to the orderly functioning and the stability of financial markets with cross-border implications; and no competent authority has already taken measures to address such threat.<sup>X</sup>

When reviewing the compatibility of European Securities and Markets Agency (ESMA)'s powers with the *Meroni* doctrine, the CJEU updated the *Meroni* doctrine to the changed constitutional framework which emerged in the Lisbon Treaty. Firstly, the Treaty on the Functioning of the European Union (TFEU) has recognised agencies as legal actors within the EU legal order.<sup>XI</sup> Italian administrative law scholarship has assessed this as the end of the precondition on which the *Meroni* doctrine was based; that is, the absence of any constitutional foundation for agencies' powers (Sorace 2012: 53). Furthermore, the TFEU holds that legal remedies apply also to EU agencies' acts when 'intended to produce' legal effects on third parties and this makes explicit the principle of judicial review already present to the EU judiciary.<sup>XII</sup> Against this changed constitutional backdrop, the CJEU confirmed the validity of the logic of non-delegation of discretionary powers, but it 'mellowed' *Meroni* (Pelkmans and Simoncini 2014), whereas it probably set aside *Romano*.

The CJEU recognised that the EU legislative power may legitimately confer administrative powers to EU agencies under defined conditions. The CJEU upheld the rules about delegation of powers defined in the *Meroni* case, but noticed that the allocation of direct supervision powers potentially involving a regulatory impact was grounded on well-restricted conditions which make the discretionary power of intervention subject to strict exercise and effective judicial review. Against the changed backdrop of the Treaties, the Court delineates a form of administrative discretion which is situated between the mere executive powers (exercised in completely bound administrative activities) and the 'wide margin of discretion', political in nature, at stake in the *Meroni* case.<sup>XIII</sup>



The CJEU held that it is in the full power of the EU legislature -as composed of the EU Parliament and the Council through the ordinary legislative procedure ex art. 289 TFEU- to confer implementing powers on EU agencies. This demonstrates the autonomy of the EU legal order, as the EU legislature may confer powers of administrative nature not specifically allocated to EU institutions by the Treaties, on third bodies legally included in the Treaties. Even if the Council is composed of its Member States, nonetheless this is a different framework from the one of supranational delegation. Both the nature of the EU legislature and the nature of the powers in question are different. The EU legislature is a different institutional actor, whose acts are the result of a deliberative procedure of two EU institutions, the European Parliament and the Council. Moreover, the powers conferred on EU agencies express administrative competences that are directly exercised at the supranational level and aimed at the internal market integration. However, to keep the conferral of these powers in line with the principle of institutional balance, guarantees about their nature and their exercise shall apply. Only because of these guarantees could the *Meroni* case law be mellowed.

Administrative discretion shall be subject to a series of criteria and conditions set in legislative acts which limit and guide the exercise of administrative powers. This is clear from the *ESMA - short selling* case: the powers conferred on ESMA are not autonomous, but should be exercised according to the relevant regulations conferring the direct supervision powers and more specifically 1) only if a concrete risk to the financial stability is at stake and no competent national authority has intervened; 2) by taking into account a number of factors delineated in the short-selling regulation so that ESMA's intervention does not create further risks in the financial markets (e.g., the risk of regulatory arbitrage, or the risk of reduction of liquidity or the creation of further uncertainty on the market); 3) by limiting the power of intervention to temporary and precise measures as outlined in the founding regulation; and 4) by notifying the competent national authorities.

As long as the Court recognises that the TFEU 'expressly permits Union bodies, offices and agencies to adopt acts of general application', the generally valid *Romano* principle cannot apply anymore to the specific case of EU agencies.<sup>XIV</sup> When setting the guarantees of judicial review, the TFEU only indirectly recognises the capability of EU agencies to adopt acts of general application. Firstly, when addressing the plea of illegality by guaranteeing the inapplicability of acts of general application to specific proceedings, article 277 TFEU



implicitly recognises that agencies can issue acts of general applications. Article 267 *b*) TFEU on the preliminary ruling addresses the interpretation of the acts of agencies and bodies as well as those of the institutions; furthermore, according to article 265 TFEU, the failure to act can be contested to agencies as well, under the same conditions that apply to EU institutions. Nonetheless, these provisions admit that acts of general application are now in the domain of EU agencies.

What the *ESMA - short selling* case did was to recognise the new constitutional status that EU agencies achieved in the Treaties: to the extent that they laid down guarantees about the exercise of their powers, the CJEU could mellow the former severity of the Meroni doctrine without dismissing its general structure.

This judicial development shows that the evolution of the constitutional framework of the EU Treaties can give rise to administrative organisations of powers which are supranational in character and cannot be reconnected to the will of the Member States to delegate competences to the EU. It is the EU legislature in its functional autonomy which may create administrative competences at the EU level (within the scope of the Treaties). Such a judicial development of EU administrative law shows the autopoiesis of the EU legal order as an autonomous constitutional subject. However, the theory of the original delegation of powers from the Member States to the EU shall assist in structuring the accountability and strengthening the legitimacy of EU agencies' powers.

#### 4. Reconnecting EU agencies to the democratic principle

The judicial evolution of the Meroni doctrine shows that from a supranational perspective, the EU is a legal order autonomous from its constituent Member States. The tasks of EU agencies evolved because of legitimate delegation by the EU legislature on the grounds of political choices made at the EU level.

Under the rule of law, the way the integration works is somehow different from pure delegation of administrative functions from the Member States. This is a means to integration, but the EU legal order has been constructed so that it can autonomously develop its own functions within the limits of the Treaties. The oversight of the Member States, therefore, is subject to the autonomous functioning of the EU.



When looking at the growing powers and legitimacy of EU agencies, such autonomous developments of EU administrative law may have great potential for supranational integration in the internal market as well as side effects on the democratic accountability of the EU. The EU administrative framework can have a strong impact on effective harmonisation in the internal market, but it is also clearly disconnected from the national democracies adhering to the EU. As political science scholarship has underlined, this mismatch may raise significant trade-off issues between efficiency and legitimacy in the implementation of EU agencies' tasks (Egan 1998: 499-501).

Administrative law can help to fill the accountability gap and put in place effective mechanisms of control over EU agencies' powers. The implementation of administrative law guarantees beyond the state can help to circumscribe the growth of powers at the EU level and contain the distance of these bodies from national democracies. However, EU administrative law has not provided effective answers yet. It has not yet recognised the relevance and the role of administrative discretion and, consequently, has not developed a coherent accountability system that consistently frames supranational administrative action. As Chiti observed (2016: 587-591), when dealing with administrative power, EU administrative law has focused on how to functionalise it to the implementation of EU law, but it has not been concerned with the establishment of a conceptual framework aimed at understanding the exercise of administrative powers in conformity with the rule of law and democracy. The reason for this failure lies in the disconnection of the development of EU administrative law from its political roots and in its reduction to a functional means of integration.

## 5. The commitment to accountability

When looking at EU agencies' powers from the EU level, the existence of legal remedies to their action and of a framework of political accountability to the EU legislature shall shape the exercise of their powers. When looking at the same issue from the perspective of the Member States, procedural rules can limit and guide the exercise of agencies' powers<sup>xv</sup> as well as the existence of organisational arrangements which allow a representation of Member States' interests in the agency's boards. In the current framework of EU agencies, these variables are articulated in different ways and not all are fully developed and in place. I will



point out the criticalities of these legal arrangements with the aim of showing the difficulties when reconciling the political and legal dimensions.

When discussing the political accountability framework, the delegation of regulatory tasks to EU agencies shall be supervised by the EU legislature through the enforcement of accountability mechanisms which allow the legislature to check that the exercise of the conferred administrative powers is in line with the mandate. Both *ex ante* and *ex post* mechanisms shall operate and ensure that EU agencies exercise only administrative powers within the scope of their remit. According to the (even revised) Meroni doctrine, any *in blank* delegation of powers that implies a full shift of responsibilities cannot be legitimate, as far as delegation shall not involve a loss of responsibility for EU institutions, but only a further refinement of their tasks. Besides the definition of clear conditions for the exercise of powers, however, the *ex ante* control of the EU legislature is not remarkable in the current framework of EU agencies' powers. On the contrary, agencies intervene autonomously and the counterparts of their action are directly the Member States' agencies and private parties operating in the sector of reference.

In this regard, the presence of representatives of the Member States on the management boards of EU agencies might help to find more sustainable regulatory solutions which take into account the diversification of national contexts. Empirical research has not provided conclusive findings on the effects of *de jure* or *de facto* vertical accountability mechanisms connecting members of the management boards and the correspondent national institutions. Findings express some variance; but today these mechanisms are not able to effectively reconnect EU agencies to the national political legitimacy (Buess 2015: 101-107).<sup>xvi</sup>

The presence of national representatives on the management boards may also hamper EU agencies' autonomy and delay the exercise of agencies' powers in favour of more concerted measures which may not have the same effectiveness. In the case of the ESAs, for instance, adjudication powers aimed at requiring the competent national authorities to take the necessary action in accordance with EU law and if necessary, at substituting the competent national authorities' decisions and making decisions directly applicable to financial institutions,<sup>xvii</sup> have never been exercised in the five years since their foundation. One reason for the failure to fully use supervisory powers shall be found in the structure of the governance of the ESAs. As their board of supervisors is composed of representatives of the national competent authorities, before the adoption of restrictive measures addressed



to the same national authorities, they preferred to pursue the supervisory convergence goal by using non-binding mediation, persuasion and reputational instruments which are less burdensome on the addressed national competent authorities.<sup>xviii</sup>

Ex post accountability mechanisms operate with the EU legislature and mainly consist in the submission of an annual report to the European Parliament and the Council which shall give account of the activities carried out.<sup>xix</sup> If the annual report is the traditional method used to ensure the accountability of independent agencies in the Member States, the highly technical nature of reports does not allow a substantive control of the EU legislature on the performance. For instance, a concise version of the report in layman terms could be usefully submitted, so as to enhance the understanding of EU agencies' activities and allow politicians to effectively know the methods and to see the results of EU agencies' performances.

This accountability framework shows that the EU legislature substantially confers powers on EU agencies, but it is not equipped with effective control powers. In this light, it is not by chance that the 2012 Common Approach has introduced an 'alert/warning system' to be activated by the Commission if it has 'serious reasons for concern' that an EU agency may act beyond its mandate, may violate EU law or may be 'in manifest contradiction with EU policy objectives'.<sup>xx</sup> If the EU agency does not accommodate the Commission's request, the latter informs the European Parliament and the Council with the aim of settling the institutional conflict. Vos (2014: 32-33) has suggested that this provision might be susceptible to introducing a form of 'ministerial responsibility for agencies' acts' in relation to EU commissioners. The search for complementary accountability instruments that beyond their specific goals can set up a wider political accountability framework is key to reconnecting EU agencies to the composite nature of the EU and to consolidate their legitimacy.

Alongside the political accountability framework, legal accountability can also play a significant role and limit possible illegitimate use of administrative powers. As seen, the existence of effective judicial protection is a necessary pre-condition for the allocation of powers to EU agencies. The nature of the judicial scrutiny on administrative acts is key (Türk 2013). The question is what level of deference the judiciary takes towards EU agencies' acts when complex technical assessments are submitted to the judicial review.<sup>xxi</sup> Clearly, the scrutiny on facts, the compliance with the criteria of delegation and the enforcement of procedural rights when taking administrative measures and acts are essential elements for making the judicial review effective. In the EU courts' case law, when complex technical



assessments are at stake, courts cannot substitute their appraisal of the case with the one of the competent institution and judicial review shall focus on how the discretionary powers have been applied.

Since the leading case *Technische Universität München*, the criteria for such a control have been consolidated and judicial review has consisted of how the competent authorities have performed ‘the duty (...) to examine carefully and impartially all the relevant aspects of the individual case’.<sup>xxii</sup> Judicial review therefore consists of scrutiny of the law and the facts which grounded the decision in question, as well as of procedural review. When applying this standard to EU institutions, the EU courts applied the manifest error standard: as long as EU institutions have not exceeded the bounds of their discretion, only manifest distortions in the exercise of the conferred powers are illegitimate (Craig 2012:408-409 and 441-445; A.H. Türk 2013: 141).<sup>xxiii</sup> Even if EU agencies have different status from EU institutions, it is reasonable that EU courts apply the same standard of review, but within the different boundaries of (technical) discretion. This means also checking the delegation criteria.

According to *Technische Universität München*, if the fundamental guarantees of fairness – particularly the careful and impartial examination which is closely linked to the right to be heard and the duty to give reasons –<sup>xxiv</sup> are not correctly enforced, the legitimacy of the administrative measures shall be successfully challenged. In this regard, if EU agencies were called to follow a common EU administrative procedure, judicial review could be favoured and the exercise of (technical) discretion could be more controlled.

Even if EU agencies adopt their own rules of procedure based on the general principles set in the founding regulations and in the case law, this cannot have the same legal value of a general law about the EU administrative procedure in terms of protection of procedural rights and controls over the exercise of administrative powers. In fact, the choice of procedural rules is not neutral to the final decision. The way the procedure is articulated allows some interests rather than others to be taken into account and this affects both fact-finders and decision-making (della Cananea 2004: 207). When leaving the definition of the procedure to EU agencies, the prioritisation of interests itself is left to agencies.

The autonomy with which EU agencies can organise their own administrative procedure seems to be at odds with the allocation of administrative powers of supervision and regulation to actors who are not legitimated through the democratic circuit and are also far from the national *demoi*. The implementation of procedural guarantees through primary law



would positively affect the compliance with the constraints of the (even mellowed) Meroni doctrine. The democratic principles embedded in the Meroni doctrine would benefit from the existence of an administrative procedure law which ensures procedural legitimacy in the exercise of EU agencies' powers. The introduction of an EU administrative procedure law would make the exercise of (regulatory) powers more visible to the Member States as well as to European citizens and sector-operators.

## 6. Final remarks. In need for a public law paradigm for EU law

By analysing the evolution of EU agencies' powers, this article aimed to point out the complexity of the EU identity and the insufficiency of single paradigms to explain the hybrid nature of the EU legal order. The autonomy of the EU legal order and its derived legitimacy from the constituent Member States emerged as faces of the same legal reality. From a legal point of view, the powers and the limits of the EU legal order exceed the classification as an experiment of administrative governance, but at the same time the legal autonomy of the EU cannot disregard the national dimensions when developing its own dimension.

The complex foundations of their powers rests upon the evolution of the Meroni doctrine in the EU case law. When setting the constitutional principle of the limits to delegation of EU institutions' powers to other entities, the CJEU has demonstrated it is sensitive (only) to the mutation of the constitutional framework of the Treaties. Only when EU agencies acquired a constitutional status and their powers have been subject to defined conditions and explicitly recognised as amenable to judicial review, have they become legitimate actors able to exercise implementation powers with a regulatory impact.

When considering the 'mediated legitimacy' of the EU as envisaged by the administrative paradigm of EU integration, EU agencies' powers cannot be explained as a supranational delegation experience. They can be interpreted as further fragmentation of national normative powers which involves a relaxation of Member States' oversight aimed at the development of the (supranational) internal market. However, this development is legally justified only according to the autonomous framework of EU law. The legal inconsistency of supranational delegation to explain such a specific development of EU law demonstrates that the administrative paradigm, based on supranational delegation from the Member States,



may not be sufficient to encompass this institutional aspect of EU law. A wider paradigm is therefore needed; a paradigm that can also cover the autonomous developments of EU law.

The instruments of public law may provide the useful approach, giving a good measure of the different aspects of EU law. Under a public law paradigm, the compatibility of EU agencies' powers may be assessed within the framework of EU law as an autonomous legal system composed of the Member States. The legitimate powers of EU agencies shall be compatible with the principle of conferral as set in the Treaties and thus with the balance of powers within the EU. Benchmarks of the compatibility of EU agencies' powers can be identified through administrative law instruments which can re-connect the supranational administration to EU institutions, as well as to the Member States.

The balance of EU powers can be implemented by strengthening the political accountability framework and by settling possible illegitimate alterations through judicial review. From the perspective of the Member States, organisational arrangements and procedural restrictions to the exercise of EU agencies' powers can help to administratively protect against any unwanted extension of EU regulatory tasks. Procedural arrangements also protect individual citizens against arbitrary decisions of EU administrative bodies. Administrative law can thus provide the instruments for containing an unnecessary proliferation of administrative agencies.

As seen, not all these arrangements are in place and their effectiveness may be strengthened, so as to implement new benchmarks for the Meroni doctrine. If more regulatory powers are conferred upon EU agencies, the implementation of these arrangements would become a preliminary condition that allows to maintain in equilibrium the different elements that compose the EU legal order.

EU law as a specific experience of public law presents an original character where the administrative dimension is embedded in the constitutional structure of the Treaties and both these aspects contribute to explaining and nourishing the EU integration process. The constitutional status of the EU is not structured as in the Member States through the traditional state doctrine, but nonetheless it is legally enforceable and it also frames supranational administrative governance.

The administrative approach to EU integration points out the gap between the legal dimension of the EU and its political nature and it recalls the need to safeguard democratic instance in the expansion of EU powers. For this reason, from a pure legal perspective, a



public law paradigm for EU integration would contain and respect these different components in a broader framework. A paradigm that is not open to unify these administrative and constitutional aspects is not able to explain the complexity of the EU legal order. As long as administrative law cannot explain the whole reality of the EU legal order, methodologically this means accepting that a single legal discipline cannot explain the EU legal order. Different legal disciplines shall engage in an interdisciplinary dialogue aimed at understanding the nature of the EU in the polymorphous domain of public law. This dialogue would help to approach the EU as a specific public law experience, which can be analysed but not captured through the categories of the single legal disciplines.

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<sup>I</sup> This is particularly evident in the German Constitutional Court's case law about the existence of equivalent levels of protection of fundamental rights in the so-called Solange saga (Solange I-Beschluß, 29 May 1974, BVerfGE 37, 271 2 BvL 52/71; Solange II-decision, 22 October 1986, BVerfGE 73, 339 2 BvR 197/83) and about the ratification of Treaties (Brunner v European Union Treaty, 12 October 1993, BVerfGE 89, 155; Lisbon Urteil, 30 June 2009, 2 BvE 2/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09). More recently, this is clear also from the preliminary references to the Court of Justice (CGEU) on the legitimacy of financial instruments adopted after the crisis (OMT case, 14 January 2014, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, on which the CJEU ruled in the case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag* ECLI:EU:C:2015:400).

<sup>II</sup> Pollack particularly points out that the functionalist approach of Principal-Agent theory cannot predict either the functions delegated to specific institutions, such as the European Parliament which is not the agent of the Member States, or the developments in the exercise of institutions' functions, which may express the preferences of supranational institutions rather than the ones of the Member States.

<sup>III</sup> See particularly CJEU, Case 294/83, *Les Verts v Parliament*, 1986 ECR 1339, para 23; CJEU, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union*, 2008 ECR I-06351, paras 281-285.

<sup>IV</sup> CJEU, Case 9/56 and 10/56, *Meroni & Co., Industrie Metallurgiche s.p.a. v High Authority*, 1957-1958 ECR 133. <sup>V</sup> 9/56 and 10/56, *Meroni v High Authority*, 173.

<sup>VI</sup> 9/56, *Meroni v High Authority*, 151; 10/56, *Meroni v High Authority*, 172.

<sup>VII</sup> In this regard see also CJEU, Case C-154-155/04, *Alliance for Natural Health*, 2005 ECR I-6541, para 90; CJEU, Case C-301/02 P, *Tralli v ECB*, 2005 ECR I-4071, paras 42-52; GC, Case T-311/06, *FMC Chemical SPRL v European Food Safety Agency (EFSA)*, 2008 ECR II-88, para 66, where the General Court rejected the argument that the Commission had delegated to EFSA its powers to adopt decisions having binding effects on third parties on the grounds that 'powers cannot be presumed to have been delegated and that, even when empowered to delegate its powers, the delegating authority must take an express decision to that effect'. It is interesting that in this latter case the Court does not deal with the legal feasibility of such delegation of powers, so that it does not get to question the validity of the Meroni doctrine.

<sup>VIII</sup> CJEU, Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, 1981 ECR 1259, para 20.

<sup>IX</sup> CJEU, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v Council of European Union and European Parliament*, ECLI:EU:C:2014:18.

<sup>X</sup> Art. 28 of Regulation 236/2012/EU of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.

<sup>XI</sup> Art. 298 TFEU.

<sup>XII</sup> Art. 263 TFEU. See GC, Case T-411/06, *Solgema*, 2008 ECR II-2771, paras 36-37. This represents a further development in the sector of EU agencies and bodies of the principle of judicial review as a key aspect of the rule of law as held *Les Verts* case (94/83 *Les Verts v European Parliament*, 1986 ECR 1339, para 23).



<sup>xiii</sup> C-270/12, *UK v Council and European Parliament*, paras 41-42. See also M Scholten and M van Rijsbergen (2014: 394-395).

<sup>xiv</sup> C-270/12, *UK v Council and European Parliament*, para 65.

<sup>xv</sup> On the role of administrative procedure as a means available to the Principal to ensure the accountability of the Agent see Pollack 1997: 108.

<sup>xvi</sup> As the *de jure* accountability is concerned, Buess notes that the more independent and powerful EU agencies are (like the EMA, EASA, and the OHIM), the less accountable to national institutions they are.

<sup>xvii</sup> Artt. 17, 18, 19 of the Regulation 1093/2010/EU of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; Regulation 1094/2010/EU of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC; regulation 1095/2010/EU of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (hereafter: the ESAs' Founding regulations).

<sup>xviii</sup> See Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), COM (2014) 509 fin., 7.

<sup>xix</sup> See art. 57, of Regulation 216/2008 of the European Parliament and of the Council of 20 February 2008, on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC; see also art 50, art. 16 (4) and 17 (8), of the ESAs' Founding Regulations, which also require the ESAs to clarify plans and include any information requested by the European Parliament on an ad hoc basis.

<sup>xx</sup> Common Approach Annex to the Joint Statement of the European Parliament, the Council of the EU and the European Commission of 19 July 2012 on decentralised agencies, para 59.

<sup>xxi</sup> From this point of view, the American experience is paradigmatic, since in a few years the Supreme Court passed from the deep review of administrative decisions – the so-called hard look doctrine developed in the '70s (see *Citizen to Preserve Overton Park v Volpe* (1971) 401 US 402; *Vermont Yankee Nuclear Power Corp. v National Resources Defense Council* (1978) 435 US 519; *Motor Vehicle MFRS. ASSN v State Farm* (1983) 463 US 29) - to a much more deferential approach in the case *Chevron Usa v Council* (1984) 467 US 837.

<sup>xxii</sup> See CJEU, Case C-269/90, *Technische Universität München*, 1991 ECR I-05469, para 14; see also GC, Case T-13/99, *Pfizer Animal Health SA v Council of the European Union*, 2002 ECR II-03305, para 171.

<sup>xxiii</sup> Türk particularly considers the introduction of general provisions concerning the public participation in EU administrative rule-making as a means 'to enhance the legitimacy of the process' and as a method 'to ensure that the Union courts have an adequate administrative record for substantive review'. See CJEU, Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*, 1990 ECR I-04023, para 9; T-13/99, *Pfizer Animal Health SA*, para 166.

<sup>xxiv</sup> C-269/90, *Technische Universität München*, paras 25-26.

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**The Functions of Constitutional Identity  
Performed in the Context of Constitutionalization of  
the EU Order and Europeanization of the Legal Orders  
of EU Member States**

by

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## Abstract

This article provides an analysis of the functions performed by constitutional identity in constitutional discourses of both the EU and its Member States, in the context of emerging post-Westphalian and supranational constitutionalism. The analysis tries to demonstrate that constitutional identity may serve as one of the key normative ideologies, legitimization strategies and ordering schemes of EU constitutionalism. It reasserts through functional analysis the suitability of constitutional identity for organizing and explaining multiple constitutional orders in a non-hierarchical and inclusive way.

The article is based on a socio-legal approach, deliberately avoiding the predominant legal realist and legal positivist discourses. This is due to the fact that a functional analysis presupposes admitting the existence of ideal, legal and socio-legal dimensions of constitutional concepts and institutions and the taking into account of social implications produced by their functioning. The article deliberately takes a constitutionalist stance on the EU and the EU integration. It is focused on the contribution of constitutional identity for the further constitutionalization of the EU from a socio-political and constitutionalist perspective.

## Key-words

constitutional identity, judicial dialogue, constitutional ideology, sovereignty, supranational constitutionalism, legitimacy



## 1. Taking Constitutional Identity's Functions in the Establishment of Constitutional Dimension of the EU Seriously<sup>I</sup>

Every constitutional concept has its typical functionality. It is constructed in order to perform specific functions in theoretical, positive legal and empirical discourses. This paper is grounded on the idea that constitutional identity<sup>II</sup> as a constitutional concept has a tri-dimensional functionality – theoretical, legal and social, which is a result of the tri-dimensionality of the constitution, perceived as ideal, legal and factual (Tanchev 2003: 112).

Constitutional identity is not only a legal concept. It is also an element of the development of European constitutionalism when tackled as a civilization and a cultural phenomenon.<sup>III</sup> That is why constitutional identity can also be perceived as part of the development of the European constitutional civilization in the post-Westphalian age. Post-Westphalian constitutionalism is the product of multiple factors, three of which have special importance. These are: the emergence of supranational constitutionalism and global governance; the information and mobility revolution; and the opening up of national constitutional orders during the second half of the XX and the first decades of the XXI century to international and supranational legal orders (Carozza 2008).

In this respect constitutional identity has the task of strengthening the constitutional dimension of European integration, and the transformation of the EU into a constitutional, rather than an only international or administrative union. Moreover, it must legitimize the linkage of national constitutional systems, which are based on sovereignty and hierarchy, with a supranational pluralistic constitutional order. Thus, constitutional identity is both a conceptual challenge to Westphalian constitutional theory and constitutional law, and an incentive for a novel constitutionalization of the EU using post-Westphalian constitutional paradigms, concepts and normative ideologies. Constitutional identity is one of the first elements of a new conceptual reality which must address the challenges to the classical principles and concepts of Westphalian constitutionalism emerging from globalization, the constitutionalization of international law and the opening of national constitutional orders to supranational constitutional standards.

The mission of constitutional identity is to provide an alternative to holistic sovereignty as a key principle of Westphalian constitutional law and hierarchy as predominant element



of Westphalian constitutional geometry. This is necessary because both sovereignty and hierarchy have conceptual, as well as pragmatic, problems when applied in the context of global, supranational and post-national constitutionalism, the crisis of territoriality, and constitutional pluralism. Moreover, normative entrenchment (e.g. in article 4, paragraph 2 of the Treaty of the European Union), theoretical debate and judicial dialogue on constitutional identity enhances not only the administrative and regulatory dimension of the relationship between the supranational legal order of the EU and the legal orders of EU Member States (MS), but also the constitutional dimension.

Constitutional identity is among the new normative ideologies of post-Westphalian supranational constitutionalism. Constitutional conceptualization of the new socio-legal reality of a proliferation of constitutional regimes and pluralization of constitutional levels can be achieved by the proper construction of the concept of constitutional identity and its typical functionality.<sup>IV</sup>

Hence it is necessary to delimit the functional catalogue of constitutional identity. This will enable the clarification of the typical goals which can be achieved by putting into practice of this relatively new concept.

Constitutional identity accomplishes several main functions which are partially interrelated. These are the legitimation function, the safeguarding function, the linking function, the differentiating function, the ideological function and the function of constitutional and political self-understanding. All these functions contribute towards the development of a constitutional dimension of the EU and for its transformation into a post-national constitutional polity of states and people (van Gerven 2005: 34 - 52). Their task is to substantiate the emergence of a composite constitutional order in which a structuring of some of the main organizing principles of the Westphalian constitutionalism – sovereignty, hierarchy and a vertical separation of powers - are complemented by constitutional identity as a more flexible concept, more adequate to the dynamics of relations between the post-national constitutional system of the EU and the national constitutional systems of its MS.



## 2. Constitutional Identity as a Legitimation Strategy for the Supranational Constitutionalism of the EU

The provision of constitutional identity in EU law and its conceptual development in judicial dialogue between the Court of Justice of the EU (CJEU), and constitutional courts of EU MS, are part of efforts for the establishment of a democratically legitimated supranational constitutionalism, institutionalized as the EU. Every constitutional project needs legitimation. This is especially true when it is grounded on novel, or reformulated, supportive ideologies and concepts such as constitutional pluralism and multilevel constitutionalism.

Constitutional identity is a point of intersection between post-Westphalian constitutional ideology, post-national legitimacy and the constitutionalization of international law which led to the emergence of supranational EU constitutionalism. This is because it is at the same time an element of post-Westphalian constitutional theory, a central argumentative and legitimation strategy of the theoretical, normative and jurisprudential discourses in European constitutionalism at the beginning of the XXI century, and a key principle of constitutional law of the EU.

The legitimation of the constitutionalization of the EU legal order can be grounded predominantly on rational legitimacy;<sup>v</sup> since the EU is a relatively new system it does not enjoy sufficient traditional legitimacy. It is a depersonalized system of rules and institutions which is deliberately constructed as a non-leadership institutional scheme based on power sharing and dispersion of political authority. Thus, the EU cannot also be legitimated through charismatic legitimacy.

Consequently, the concept of constitutional identity must produce a rational legitimacy for the transfer of constitutional competences from the MS to the EU, for the limitation of MS' sovereignty, and for the primacy of supranational legal standards adopted by the institutions of the quasi-autopoietic<sup>vi</sup> EU constitutional system over the national constitutions of MS. Some theorists even believe that constitutional identity may start to function not only as a legitimation for the limitation of constitutional supremacy and the state's sovereignty regarding constitutional provisions and sovereignty aspects which are not covered by its protective scope, but also transform into a post-Westphalian alternative to sovereignty (von Bogdandy and Schill, 2011: 9). Thus, constitutional identity claims to



become one of the key supportive normative ideologies of post-Westphalian constitutional law.

Constitutional identity performs a legitimation function in respect of several phenomena, which develop on the border between the supranational constitutionalism of the EU, and the national constitutional systems of EU MS. It aims to legitimate the process of transfer of constitutional competences and elements of state sovereignty from MS to the EU. In this context, legitimacy may stem from the role of constitutional identity as a safeguard for the inviolability and non-transferability of the core constitutional values, principles and elements of the institutional design of MS.

The legitimation of the transfer of sovereignty may be grounded on different reasons. It may stem from the substantive prosperity which EU citizens get from the EU, the efficiency and problem solving capacity of the EU institutional system, and its capacity to give adequate responses to challenges of globalization and the world risk society (Beck 1992) etc.

However, these are substantive criteria for the legitimation of a transfer of sovereignty. Taken in isolation they are not safeguards for the preservation of fundamental values, principles and institutions which have developed for centuries in national constitutional systems, and have been enshrined in the civilization code of each of the national communities participating in the EU. Hence, constitutional identity must serve as a safeguard for the fundamental constitutional codes of national communities. It has to legitimize the transfer of constitutional competences to the EU which are located outside the value and institutional core of domestic constitutions and consequently also outside of constitutional identity's protective realm.

At the same time, constitutional identity legitimates the establishment of limitations to the primacy of EU law. It creates historically, anthropologically or socio-politically grounded legitimate exceptions, defined in legal terms by legislators, or much more frequently by courts, which must selectively prevent the encroachment of the supranational order of the EU into the domestic legal order of EU MS.

Consequently, constitutional identity is supposed to simultaneously legitimate the linking and the separation of supranational and domestic legal orders, and outline the limits to the mutual cross-fertilization of the constitutional orders of EU MS, resulting in horizontal judicial dialogue, reception and transplantation (Watson 1993) of institutions, and in the



migration of normative ideologies and ideas. It must more clearly define commonalities and differences between EU constitutionalism and the constitutional traditions of EU MS.

EU constitutionalism is itself a result of the creative mixture of constitutional solutions and constitutional design borrowed from national constitutional models of EU MS, as well as from third countries such as the USA. This makes the EU constitutional order somewhat eclectic. The degree of heterogeneity increases if one considers the divergence of national constitutional traditions, historical experiences and socio-legal contexts which have shaped the constitutional design and constitutional ideology of EU MS.

An example is the mismatch between the republican traditions of France, Italy, Germany, Austria and Central and Eastern European states, and the monarchical traditions of Great Britain, Belgium, Netherlands, Luxemburg and most of the Scandinavian states. Other important instances of incongruence concern the role of religion in society, and the principle of secularism. Thus, the Polish, Romanian and Greek Constitutions put an emphasis on the traditional role of religion as a national identity building factor. In that context, the concept of constitutional identity may serve as a device for the adjustment of the diversity and plurality of constitutional orders in the composite constitutional structure of the EU, allowing for the primacy of EU law while considering important and legitimate national sensitivities.

It should be noted that there is a fracture and internal schism in the function of constitutional identity in generating a rational legitimacy for the linking of European and domestic constitutional orders, and in shaping the demarcation line between constitutional supremacy and EU law primacy. Identity, the result of a self-identification of citizens with the basic outlook and the core parameters of constitutional design, is largely emotional, and thus not a purely rational phenomenon. It rests upon beliefs which often produce imagined reality. Thus, the shaping of collective identity is frequently an emotional process of moulding the “collective Self” of a political community and not necessarily a rational process of the negotiation of values, principles and institutions which should serve as elements of constitutional identity.

Consequently, constitutional identity, which is supposed to rationally legitimize the linking of national constitutional orders with the supranational constitutional order of the EU, is based not only on rationality but also on emotional perceptions, affiliations and motives. That is why constitutional identity is an element of both “emotional” and “rational”



constitutionalism. It is part of the normative ideology of post-Westphalian European constitutionalism, and can eventually become part of the collective beliefs of EU citizens regarding the constitutional pillars of their constitutional and political coexistence. Thus, constitutional identity is also a component of the psychological dimension of law and of the emotional discourse of constitutionalism.

Constitutional identity has a legal shape defined through its institutional components. They can be explicitly proclaimed by the constitutional legislator or - much more frequently - defined by constitutional and supreme courts based on rational judicial argumentation. Hence constitutional identity is a phenomenon which is not speculative. This is because constitutional identity has concrete legal components;<sup>VII</sup> it is part of the normative legal discourse and of the rational constitutionalism. However, constitutional identity cannot be exhaustively rationally proven through legal arguments.<sup>VIII</sup>

Consequently, it seems that the idea for rationalizing the linking of national and EU constitutional orders, based on the legitimation of the transfer of sovereignty through the establishment of safeguards for national constitutional identity, may be grounded on a “constructive mistake”. For it consists of an attempt at generating rational legitimacy via a concept which is preconditioned upon emotions, beliefs and convictions.

This is why the legitimation function of constitutional identity may sometimes produce negligible results in political practice; the generation of legitimacy is an affective process which can hardly be accomplished through direct constitutional engineering (Sartori 1994) and theoretical or jurisprudential construction of complex and even vague concepts such as constitutional identity.

Constitutional identity is also a presumptive bearer of traditional legitimacy. It might be perceived of as a product of socio-legal practices and processes, which shape with time the value and institutional consensus of a political community, and produce its constitutional identity. Time is an important factor in forming constitutional identity. The time dependency of constitutional identity is exactly the reason why it can be suggested that constitutional identity might produce traditional legitimacy. In other words, an assumption of the evolutionary character of constitutional identity, and its gradual construction in the course of national constitutional history, led to an expectation that it contains at least some of the key elements of constitutional tradition and constitutional culture of a political community.



Constitutional identity, as a bearer of traditional legitimacy, should contain the transgenerational consensus of a political community. Thus, its entrenchment through explicit institutionalization in national constitutions or in EU constitutional law, its definition via judicial dialogue, and its preservation by virtue of limitation of the primacy of the EU law, produces legitimacy for parallel processes of the constitutionalization of EU law, the Europeanization of national constitutional law and the safeguarding of the domestic constitutional core.

It must be re-emphasized that the legitimation of the establishment of supranational constitutionalism of the EU, and of the emergence of global constitutionalism by virtue of preservation of the fundamental values, principles and institution for each of the participating states, is not a purely rational process. Thus, the legitimation function of constitutional identity, in its rational as well as traditional dimensions, may prove to be, to some extent, an artificial construction due to its great dependence on rational constitutionalism and the neglect of its emotional aspect. This is an important issue, since the concept of constitutional identity was launched in constitutional discourse with the precise idea of justifying its potential as a novel way of combining principles and concepts which otherwise are nearly irreconcilable. These are the primacy of EU law and the transfer of sovereignty, on the one hand, and the supremacy of national constitutions and holistic and indivisible sovereignty, on the other.

As a matter of fact, the stagnation of the process of constitutionalization of the EU is, to a great extent, the result of an inability to adopt clearer decision regarding the distribution of sovereignty shaped in the context of classic theoretical and legal solutions of the Westphalian constitutionalism. Compromise theories such as “pooling of sovereignties” (MacCormick 1999) have provided satisfactory explanations for a while, until the political and constitutional dimension of the EU rose to unprecedented levels. The holistic version of Westphalian sovereignty has become fragmented into sector-based humanitarian, financial and other sovereignties (Kalmo and Skinner 2010). Last but not least, the EU MS’ control over ultimate decision making in important spheres of transferred sovereignty became increasingly limited, although the EU did not become sovereign in their place. This problem is a consequence of the broader, and principle, issue of the impossibility to grasp and master the new reality of supranational constitutionalism with the conceptual schemes of Westphalian constitutional law developed during the “long XIX century” (Hobsbawm 1996).



In that sense constitutional identity will continue to have an importance in EU constitutionalism to compensate for the lack of clearer solution regarding political sovereignty and legal hierarchy. Constitutional identity is also useful in the context of global constitutionalism based on constitutional pluralism, as they are both non-hierarchical phenomena. In other words, constitutional identity is a concept which has the potential to legitimate the linking and differentiation of networked, polycentric or semi-hierarchical constitutional orders. Constitutional identity diminishes in importance as a legitimization concept and strategy in the case of an existence of a clear hierarchy, e.g. in the form of a Kelsenian normative pyramid, and in the context of straightforward hierarchical solutions regarding the structure of power, authority and sovereignty.

Another important problem forming a partial impediment to the legitimization function of constitutional identity involves the fragmentation of legitimization. The overall legitimization of the relative primacy of EU law over domestic constitutions, produced by constitutional identity, is accomplished not only at the EU level but (until Brexit) in 28 different, and even to some extent divergent, constitutional contexts. In other words, the establishment of the relative primacy of EU law, or the countervailing preservation of the relative supremacy of domestic constitutions, does not draw its legitimization from European citizens as holistic political community, but from domestic political communities – the MS' nations. Moreover, this legitimization is not only jurisdictionally fragmented, but also asymmetric with regard to the argumentative strategies used by national constitutional courts in judicial dialogue with the CJEU, as well as by national politicians.

This is another manifestation of the “no demos” problem,<sup>IX</sup> this time targeting the capability of constitutional identity to serve a pan-European legitimization function. Such a function is possible, but only through an understanding of a composite European public which is fragmented into a plurality of national constitutional communities.<sup>X</sup>

### **3. The Safeguarding Function of Constitutional Identity. Constitutional Identity as Safeguard, Complement or Alternative to State Sovereignty?**

The safeguarding function of constitutional identity consists of several interrelated processes: the protection of the inviolable core of national constitutionalism through its definition, the delimitation of lines which must not be crossed in the course of the



encroachment of supranational constitutionalism into the national constitutional order, and the provision of substantial limitations for the transfer of constitutional competences and sovereignty to supranational regimes.<sup>XI</sup>

Constitutional identity is a safeguard for the preservation of the core of state sovereignty, or of those aspects of sovereignty which are defined as essential and inviolable by the constitutional legislator or by constitutional courts. This is due to the inclusion of some of sovereignty's key aspects in the scope of constitutional identity.

Sovereignty is traditionally understood as an existential category which is closely related to state authority and public power. It is principally provided by constitutions with regard to its essential features, and in respect of its fundamental role as the cornerstone of Westphalian statehood. Sovereignty is proclaimed as a holistic and indivisible phenomenon, which assigns supreme power and defines the supreme power center. Thus constitutions neither explicitly acknowledge its main aspects nor delimit its components.

In contrast, constitutional identity, developed via judicial dialogue, is composed of concrete principles, values and institutions which are defined as non-transferrable elements of the state's sovereignty. Thus, constitutional identity is a naturally composite concept, which permits the construction, deconstruction and reconstruction of its structure and content; whereas sovereignty in its classical Westphalian outlook applied during the age of Modernity is a holistic concept which cannot be disaggregated into particles if it is to preserve its role as the supreme source and depository of public power.

However, since the last decades of the XX century state sovereignty underwent a process of fragmentation, produced by the proliferation of the public power functions and public power centers and levels, and the pluralization and diversification of sovereignty holders. The fragmentation and deconstruction of sovereignty is paralleled by two processes. The first is the asymmetric transfer of state sovereignty to supranational and, implicitly, to subnational holders, in the course of EU integration, constitutional globalization and subnational constitutionalization. The second is the sharing of state sovereignty with new power centers that have emerged in the course of the development of constitutional pluralism and global governance.

Consequently, new post-Westphalian theories of sovereignty, in itself the predominant Westphalian constitutional concept, have developed in order to explain the structural changes of sovereignty in the context of global constitutionalism, supranational



constitutionalism and global governance. They proclaim the possibility of fragmentation of sovereignty, for sovereignty pooling (Keohane 2002: 746 – 749) and for the understanding of sovereignty as no longer existential and normative, but as a limited and attributive paradigm (Grimm 2015: 71-75, 120-121).

Hence constitutional identity as a post-Westphalian concept does not safeguard sovereignty in its traditional version as holistic category, but in its current version as a composite phenomenon; it puts the emphasis on separate aspects of sovereignty, constructing them as sectoral sovereignties. Thus, constitutional identity accomplishes its safeguarding function regarding sovereignty by protecting its specific manifestations in the constitutional axiology (constitutional principles and values) and in institutional design.

Consequently, constitutional identity indirectly serves as a safeguard of sovereignty in the process of providing direct safeguards for specific elements of value and institutional design, against the primacy of supranational legal standards. This mediated and indirect protection of state sovereignty by constitutional identity is a result of differences in their nature.

Constitutional identity is a category which is related to a self-identification by the political community with the fundamental aspects and cornerstones of national constitutionalism. It is focused on giving answers to the questions: “who we are as a constitutionally organized political community”; “what is our collective constitutional Self”; “what are the durable characteristics of our constitutional tradition”; “what differentiates us from other constitutionally organized political communities”; and “what is the core of our value and institutional constitutional consensus”.

At the same time sovereignty is a category which determines the ultimate source, subject and beneficiary of power<sup>XII</sup> and delimits the legitimate confines of state authority. Sovereignty is a concept which should give an answer to the questions: “where is the power center of the constitutionally organized political community”; “who possesses supreme power and the legitimate monopoly over public coercion” (Weber 1922); and “what are the parameters of the accomplishment of power and authority perceived as legitimate by the political community”. Hence constitutional identity demonstrates the value and institutional core consensus of the political community encoded in the constitution, ultimately derived from tradition, whereas sovereignty defines the power center, the source of constitutional ontology, the scheme of power lines, and the basic structure of authority enshrined in the constitutional model of society.



That is why constitutional identity cannot serve as an all-encompassing justification for limiting the primacy of EU law in all spheres of domestic constitutionalism. Constitutional identity may protect only those aspects of sovereignty which are directly related (or in fact proclaimed by constitutional courts or constitutional legislators to be related) to hard-core elements of constitutional consensus produced by the constitutional self-identification of a community.

Moreover, constitutional identity should not serve as a broad instrument for the limitation of the primacy of EU law used by the domestic political elites for tactical reasons. It is a selective limitation to the primacy of EU, and other, supranational constitutional and legal standards because it protects only some of the core elements of constitutional design. If constitutional identity is also interpreted as being an instrument for limiting of the primacy of EU law, with regard to non-essential but otherwise important elements of the constitutional design<sup>xiii</sup>, then it will turn itself into something like an unamendable or entrenched clause. However, constitutional identity and unamendable and entrenched clauses are concepts with a different teleology and frequently with different content.<sup>xiv</sup>

Another aspect of the safeguarding function of constitutional identity concerns its role as a guarantor of the supremacy of the constitution and thus for constitutionally enshrined values, principles and institutions.<sup>xv</sup> The role of constitutional identity as a safeguard for constitutional supremacy is the formal expression of its safeguarding function over state sovereignty. This follows the fact that the supremacy of the constitution, in the domestic legal hierarchy of sources of law, is both a result of, and a safeguard for, the supremacy of the sovereign will in the national public order.

In the context of the judicial dialogue between the CJEU and national constitutional courts constitutional identity functions as a limitation to the primacy of EU law and as a safeguard for the supremacy of some of the elements of the constitutional design of EU MS. However, constitutional identity establishes “counter limits” (Martinico 2007: 205-230 and Faraguna 2015: 27) to the primacy of EU law, not by applying hierarchical argumentation, but through ascription of value preference and via the insulation of key elements of constitutional design from the derogative effect of EU legal standards. This is due to the dynamic and asymmetric character of constitutional identity. In contrast to the formal and rigid principles of the primacy of EU law, and the supremacy of domestic constitutions of EU MS, constitutional identity does not allow for the application of universally applicable



hierarchical schemes for conferring precedence of legal standards or for normative conflict resolution.

In that sense constitutional identity is a more appropriate concept for the linking and delimiting of constitutional orders in a non-hierarchical, polycentric and networked way. Thus, it seems that sovereignty can be used in the multilevel constitutionalist model,<sup>xvi</sup> whereas constitutional identity is also suitable in the context of the constitutional pluralism paradigm.<sup>xvii</sup>

So far, constitutional identity has been presented as a safeguard for state sovereignty and the supremacy of the national constitution. Both political sovereignty and constitutional supremacy are key elements and safeguards for the state as an autonomous, and self-contained, political and legal order. Thus, constitutional identity is a safeguard for the statehood of EU MS.

At the same time constitutional identity is a safeguard for the primacy of EU law and legal order over the constitutions and the constitutional orders of EU MS. This draws from the fact that constitutional provisions, which are not part of constitutional identity, are subjected to the primacy of EU law. Thus, paradoxically, to an extent constitutional identity creates preconditions for the transfer of state sovereignty to the supranational constitutional regime of the EU and for the primacy of EU law.<sup>xviii</sup>

Naturally, a clarification must be made, that the transfer of sovereignty and the primacy of the EU law are not unconditional. That is why they are safeguarded by constitutional identity only insofar as the conditions provided in advance by the domestic constitutional legislator or constitutional court are fulfilled.<sup>xix</sup> They are usually defined as substantial limitations to the transfer of constitutional competences, or directly as elements of constitutional identity.

In fact, it seems impossible to radically redefine the limit of permissible primacy of EU law in favour of the absolute supremacy of domestic constitutions, and thus to deny the relative primacy of EU law over the constitutional order of EU MS, without dismissing the constitutional nature of the EU. Hence the unlimited expansion of the scope of constitutional identity can consequently lead to the destruction of the EU constitutional system, and to its transformation into a supranational administrative regime.

Such a de-constitutionalization of EU law, and its restructuring into a purely administrative system for the coordinated and collective management of certain tasks



established as a response to globalization, may additionally enhance the democratic deficit of the EU. This is due to the fact that the transfer of wide ranging competences from the MS to the EU must be paralleled by the construction of systems of checks and balances, of power polycentrism, for democratic control and accountability and for the protection of human rights. These are all attributes of a constitutional, and not just of an administrative order and regime.

Another problem is that the transfer of sovereignty, and the permitting of a relative primacy of EU law over the constitutions of EU MS, by virtue of judicial dialogue based on national constitutional identity, are not unambiguous phenomena. The adjustment of EU and domestic legal orders on the basis of constitutional identity, shaped through judicial dialogue, is an asymmetric, evolutionary and reflexive process. It produces a partial deconstruction of sovereignty and hierarchy. Frequently it does not lead to the establishment of new hierarchies, new Grundnorm<sup>xx</sup> (Pernice 2006: 22-29) or rules of recognition,<sup>xxi</sup> but to a toleration of legal provisions and legal orders and to polycentric dependencies. That is why it is difficult to say when the demarcation line between the legitimate and illegitimate primacy of EU law over domestic constitutional order has been definitely crossed.

Moreover, the loss of sovereignty of EU MS does not automatically produce a symmetrical acquisition of sovereignty by the EU. Thus, EU integration seems to be a “zero sum game” for both the EU and its member states in respect of sovereignty.

However, the problem might be much more complex; for it not only concerns the redistribution of sovereignty in pluralist or multilevel constitutional settings, but moreover demonstrates the structural change of the very concept of sovereignty, and its increasing incapacity to explain emerging supranational constitutionalism and global governance. In the context of mixed power schemes combining hierarchy with network, as ordering and explanatory paradigms, constitutional identity may prove to be a much more adequate concept for the preservation of the hard core of the constitutional foundations of national communities, than the rigid and holistic concept of sovereignty which necessarily presupposes hierarchical perspectives and solutions.



#### 4. Constitutional Identity as a Bond in a Composite Constitutional Setting Serving Linking and Differentiating Functions between Legal Orders

The linking, and differentiating, functions of constitutional identity are to some extent paradoxically interrelated. Constitutional identity is divisive in two aspects. Firstly, it exposes differences between the national constitutional systems of EU MS, and secondly, it draws a demarcation line between domestic constitutional systems and supranational constitutional regimes, especially between the EU's constitutional system and the constitutional systems of its MS. The differentiation is usually accomplished with a view to both the fundamental constitutional axiology, and the key features of institutional design.

At the same time constitutional identity performs a linking function in two main aspects. Firstly, constitutional identity can serve as a fundament for the development of a common constitutional tradition of countries which have similar constitutional identities. Such attempts for the establishment of common constitutional traditions can be made at a regional level (Scandinavian, Central European, South European etc.) or at the European level, depending on the political purpose, the degree of proximity of the constitutional identities and constitutional traditions and the density of the required constitutional and political integration. Thus, the objective coincidence of constitutional identities or the deliberate development of common or similar constitutional identities are preconditions of, and may serve as tools for, the establishment of supranational constitutional identity at a regional or European level, and eventually for the development of a novel constitutional civilization at the supranational level.<sup>xxii</sup> Hence, such a supranational constitutional civilizational model could be the product of either a common historic and socio-political experience, or of constitutional engineering.<sup>xxiii</sup>

Secondly, constitutional identity indirectly performs a linking function for constitutional systems through the delimitation of fundamental differences between them which must be preserved. In other words, by defining the sphere of inviolable and irrevocable national constitutional values, principles and institutions constitutional identity reciprocally, indirectly and tacitly leaves aside from its protective scope those value and institutional aspects of national constitutional design which can be submitted to the primacy of supranational legal standards, can be subject to transfer of sovereignty and can be sacrificed in the course of



linking with other national and supranational legal orders. Outside the scope of constitutional identity one can find these institutions, values and principles which can be amended through implementation, reception and transplantation of foreign normative examples and can be modified in the light of ideas which have migrated from other supranational or national legal orders.

Limits to the transfer of sovereignty and, vice versa, to the primacy of supranational law can be formal, procedural or substantial. Formal and procedural limits however are usually not directly related to self-identification as a process of value self-definition of the members of the political community. They typically concern the formal framework and basis of the process of linking different constitutional orders. Formal and procedural limits may provide for important strategic or tactical impediments of the intersystem integration, which however are not related to identity – be it national, political, or constitutional.

The specifics of the linking and differentiating functions of constitutional identity result in the fact that it is limitation to the transfer of sovereignty and to the primacy of EU law, and eventually of other supranational standards, which possesses a substantive character, with value and anthropological dimensions. Constitutional identity is both a limitation, and a linkage, between value and institutional normative orders based on durable self-identification of the political community with core issues and fundamental parameters of the constitutional order. That is why constitutional identity is closely related to, and based on, substantial counter-limits for the transfer of sovereignty and for the penetration of supranational constitutional standards into the domestic legal order.

## **5. Constitutional Identity as a Core Concept of the Post-Westphalian Constitutional Ideology<sup>XXIV</sup> of Supranational Constitutionalism in the EU**

Constitutional identity is a stimulus for the development of supportive normative ideologies at the European and national levels, by constitutional theory and even by constitutional courts during judicial dialogue with the CJEU. Constitutional identity is part of the new narrative for mutual recognition of value and institutional orders and for the establishment of a polycentric and pluralist supranational constitutional order.



The ideological function of constitutional identity contributes to the development of the political dimension of the EU and for its establishment as a constitutional union and not just as an international organization or supranational technocratic administration. Constitutional identity is an important part of post-Westphalian ideologies. It serves as an element in the process of the development of matrixes and paradigms for the “ordering of constitutional orders” (Tanchev 2014: 171) constructed in the form of multilevel constitutionalism, or constitutional pluralism, and going beyond traditional schemes for linking domestic and international legal systems via monist or dualist systems.

Constitutional identity has the potential to become part of post-Westphalian constitutional ideology. Constitutional identity is a principle of both national and post-national constitutionalism. On the one hand, it is a safeguard for the sovereignty of the nation state, and is supposed to be the zenith of national political choice in constitutional design. On the other hand, the new constitutional discourse on constitutional identity, which is predominantly led in the framework of EU constitutionalism, is an attempt at putting constitutional identity into practice, as one of the new principles of supranational constitutionalism with its universalist and post-nationalistic aspirations.

Hence constitutional identity simultaneously defines nation-specific and universally valid elements of constitutional design. Constitutional identity reflexively, and indirectly, determines the scope of universally valid elements of constitutional design by delimiting the inviolable constitutional core of national constitutional order. In the latter case, it actually paves the way for the establishment of post-national and supranational constitutionalism in general, and thus for the constitutionalization of the EU’s legal order in particular.

It is possible that constitutional identity could be recognized as a constitutional principle of the national constitutional systems of EU MS. It could be proclaimed as a safeguard, a supplement or even an alternative to the constitutional principle of sovereignty, depending on its outlook, design and the constitutional teleology which is going to be developed on its basis. Constitutional identity may also serve as a contextual and substantial concretization of sovereignty perceived as a non-holistic concept, composed of sector sovereignties. Thus, constitutional identity may function as a precursor to the change of sovereignty, from a holistic and indivisible Westphalian concept, into a fragmented, composite and relativized post-Westphalian paradigm. This is another manifestation of the ideological function performed by constitutional identity.



Respect for national constitutional identity is already a principle of EU constitutional law. It has been enshrined in article 4, paragraph 2 of the Treaty on the European Union and has become an underlying concept in important case law of the CJEU (e.g. the cases C-62/02 “Omega”, C-208/09 Sayn-Wittgenstein etc.). This principle is systemically intertwined with the principles of conferral, relative primacy of EU law, and the respect for the national sovereignty of MS. Thus, constitutional identity gradually became part of the constitutional axiology of European constitutionalism. It must be stressed that it is an element of constitutional axiology and of constitutional ideology, not only at the supranational EU level, but also at the level of EU MS.

Globalization and European integration enhance the constitutional dimension of subnational constitutional orders (Sassen 2007) in federations and unitary states with functional federalism such as Spain, Italy and UK. In that context, the respect of national constitutional identity by both the supranational constitutional regimes such as the EU, and subnational units, increases in importance. The opposite is also true – the emergence and development of constitutional identities in subnational political communities, e.g. the Basques and Catalans in Spain, or the Scottish in the UK, imposes the need for their due respect.

In that vertical dialogue between multiple constitutional identities which proliferate at subnational, national and supranational levels, the concept of constitutional identity acquires not only an ordering, but also an ideological importance. Constitutional identity is an attempt at providing a partial remedy to the rigidity of sovereignty as a traditional ordering; it is also an analytical paradigm, used for the explanation of multilevel power relations, applied in the simpler hierarchical world of Modernity, thus being part of the constitutional ideology of the nation state.

Constitutional identity gradually becomes part of post-Westphalian constitutional ideology due to its flexibility, and capability at giving relatively adequate answers to the power reality of supranational and global constitutionalism. Constitutional identity functions in the context of, and in conjunction with, classical normative ideologies such as the legitimate monopoly of the state over power, authority and coercion (Weber 1972: 821 ff.) and the state and law as ordering instruments in polycentric and pluralistic societies. However, constitutional ideology is also part of a realm of post-Westphalian normative ideologies such as open statehood (Hobe 1996: 127–154) and constitutional pluralism.



Hence, constitutional identity is a central and important component of the constitutional ideology of emerging global and post-Westphalian constitutionalism. It has the capacity to serve as a normative ideology because it is a combination of rational and emotional aspects of constitutionalism.<sup>xxv</sup> Constitutional identity possesses the characteristics of rational constitutionalism, with its role as a safeguard of constitutional values, principles and institutions. Moreover, it serves as a legally determinable borderline between national and supranational (and eventually also subnational) constitutionalism and as a tool for linking and differentiating as well as for assigning primacy of multiple constitutional orders which cannot be ordered only on a hierarchical basis.

The belief in the existence of a collective constitutional Self of national political communities, de-personalized values, aims and will and of transgenerational consensus on the basic elements of constitutional design is an example of the mixed nature of constitutional identity, which is at the same time rational and emotional. The belief that members of a constitutionally organized political community are capable of negotiating and agreeing on value and institutional constitutional consensus, whose core is shaped as constitutional identity, is also based on a mixture of rational and emotional constitutionalism. The same is true for the belief in the capacity of constitutional identity to become a functioning and effective instrument, for the linking and dividing of constitutional and not just of international or administrative orders, and to serve as a safeguard for the constitutional, and not just the political consensus of communities. It underlines the emotional and ideological importance of the concepts under analysis; for the concepts of the constitutionalization of the bond between national and supranational legal orders, and the conception of the EU as a constitutional and not as just an administrative or international system, are daring ones. They are preconditioned on the existence of constitutional ideologies and constitutional paradigms which have both rational and emotional aspects.

Thus, constitutional identity is a rationally constructed concept which also possesses an emotional intensity. It is predetermined by beliefs, yet itself produces beliefs which are not always the immediate result of its rational nature. That is why constitutional identity has the characteristics of a constitutional ideology. It possesses a logical background, rational core and structure, and at the same time presupposes the axiomatic acceptance of some of its constructive premises which should secure a sufficient level of confidence in its capability to give adequate responses to constitutional issues.



Constitutional identity is an attempt at remedying the dysfunctionality of some classical normative ideologies, and especially the difficulties of using sovereignty as a universal analytical and ordering paradigm in the context of supranational and global constitutionalism. Moreover, constitutional identity itself has the features of a normative ideology. That is why it must not only be rationally proven and practically effective, but also has to be emotionally persuasive, in order to become a durable element of the post-Westphalian constitutional ideology of supranational constitutionalism in general, and EU constitutional law in particular. Hence the ideological function of constitutional identity is based on its persuasive and convincing force.

Last, but not least, it has to be mentioned that constitutional identity offers the opportunity of self-reflection to a political community, on the parameters of its constitutional tradition, constitutional culture and the core of its transgenerational constitutional project. In that regard constitutional identity also accomplishes a function of constitutional self-understanding.

The process of determining the collective constitutional Self is usually organized along formalized and judicial lines. It is based on the case law of constitutional and supreme courts as authoritative speakers of a political community. However, such an approach lacks sufficient democratic legitimacy, misses important socio-legal and anthropological arguments, and produces elitist results which might not have sufficient persuasive force for the people. The definition of constitutional identity by the courts, and not by the people themselves, or by their elected representatives, collides with key normative ideologies deeply enshrined in the mainstream constitutional theory of the XIX and XX centuries. These relate to constituent power, democratic representation and parliamentarism which underlies modern representative democracies. The judicial shaping of constitutional identity casts the shadow of “gouvernement des juges” (a peril which was classically defined by Charles De Montesquieu and Edouard Lambert). It questions both the legitimacy and the capability of judges to define, on a case-by-case basis, the constitutional consensus of a political community predetermined by the socio-legal context in which it exists.

In contrast, the establishment of constitutional identity via wide public deliberation seems rather utopian and is exposed to populist biases. The determination of constitutional identity as a form of collective self-reflection, through parliamentary debate, is also not



convincing in the context of the current crisis of representative party democracy experienced by some European societies as well as by the EU itself.

This dilemma is a specific manifestation of the difficulties faced by the classic theory of democracy in explaining emerging post-Westphalian constitutionalism. It is an example of the increasing role of the courts in the context of supranational and post-Westphalian constitutionalism.

## **6. Instead of a Conclusion: the Role of Constitutional Identity for Preserving the Constitutional Character of the EU**

Constitutional identity is one of the relatively new doctrines which conceptualizes, and tries to influence, the development of the EU not only as an internal market, free trade and free movement zone, or supranational regulatory regime, but also as the most developed supranational constitutional order. The functionalist analysis of constitutional identity contributes to the development of the constitutional ideology of supranational constitutionalism in general and of EU constitutionalism in particular.

Constitutional identity serves as a bridge between domestic constitutionalism, formed during Westphalian modernity, and post-Westphalian EU constitutionalism. It is an attempt at a reconciliation of multiple constitutional orders, which cannot be adjusted in the traditional ordering paradigms of Westphalian constitutional geometry – hierarchy and the pyramid. This is due not only to the lack of a clear solution to the distribution of sovereignty in the EU, but also to the structural changes of sovereignty concepts themselves in supranational, post-national and global settings.

Constitutional identity has emerged as an EU legal concept during the phase of European integration which followed the transformation of the European Communities into the European Union, and has been devoted to its constitutionalization. It set down its firm roots in article 4, paragraph 2 of the Lisbon Treaty, and has been further developed by the judicial dialogue of the CJEU and some of the most active constitutional courts of EU MS. It is a well-known fact, widely discussed in the theory, that provisions for the protection of national identity have had to be paralleled by the proclamation of the primacy of EU law in the Treaty on the European Union. However, the Lisbon Treaty did not dare reproduce this “two-pillar model”, composed of primacy of EU law tempered and counterbalanced in respect of



national identity which was provided by the misfortunate Treaty on the Constitution of Europe. Despite this, the provision for the protection of national identity from derogation or infringement by primary EU law establishes a reason for jurisprudential definition of the borderline between domestic and supranational constitutional orders. This is due to the fact that the “judicialisation” of national identity, and its gradual transformation into constitutional identity in the course of judicial dialogue between the CJEU and national constitutional courts, clearly highlights the constitutional dimension of this relatively novel fundamental concept of the European composite and pluralistic legal order. The intensive theoretical debate, and extensive case law on constitutional identity over the last years,<sup>xxvi</sup> demonstrate the potential of constitutional identity to serve not only as a central paradigm in post-Westphalian constitutionalism but also to enhance the constitutional dimension of the EU.

Most of the literature on constitutional identity in recent years has been focused on the case law of the CJEU and MS’ constitutional courts, and on the definition of constitutional identity on the basis of criteria enshrined in positive constitutional law. Hence a legal realist analysis championed the debate, followed by a legal positivist discourse on constitutional identity. In contrast, the interest regarding the functions which constitutional identity performs in the context of a supranational and pluralist constitutional setting has been rather pale.

This article is an attempt to prove that a functional analysis of constitutional identity is an important part of the efforts for shaping a post-Westphalian theory of supranational constitutionalism, part of which is also the concept of constitutional identity. Thus, a functionalist approach to constitutional identity also contributes to a further constitutional conceptualization of the EU.

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<sup>1</sup> Here I make use of some parts of the wording of the title of Ronald Dworkin’s book “Taking Rights Seriously”. Cambridge, Massachusetts: Harvard University Press, 2001.

<sup>11</sup> In this article I am following the approach according to which the concept of national identity provided in article 4, paragraph 2 of the Treaty on European Union should be read as “national constitutional identity”. For the relevant discussion see e.g. Millet, F.-X. *L’Union Européenne et l’identité constitutionnelle des états membres*. Paris, L.G.D.J., 2013, Guastaferrò, B. *Beyond the Exceptionalism of Constitutional Conflicts: the Ordinary Functions of the Identity Clause*. Jean Monnet Working Paper № 1, 2012, Konstadinidies, T. *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*. – In: *Cambridge Yearbook of European Legal Studies*, Vol. 13, Marti, J. L. *Two different ideas of constitutional identity: identity of the constitution v. identity of the people*. – In: Saiz Arnaiz, A., C. Alcobero Llivina (eds.). *National Constitutional Identity and European Integration*. Mortselt:



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<sup>III</sup> The idea that the modern constitutions codify historical, socio-legal and civilization patterns and experience and are producing common constitutional language enshrined in key normative concepts has been recently proposed by Andras Jakab in his book “European Constitutional Language”. Cambridge: Cambridge University Press, 2016.

<sup>IV</sup> According to M. Rosenfeld Europe has to establish its own constitutional identity which has to be based on the existing aspects of collective identity but must also be oriented towards the future and must adapt and transform its own components (Rosenfeld 2005:317).

<sup>V</sup> Regarding the rational, traditional and charismatic legitimacy see Weber (1968:151).

<sup>VI</sup> For the concept of autopoiesis see Teubner (1993).

<sup>VII</sup> For example some authors suggest that the German constitutional identity coincides with the “eternity clause” of the German Constitution. See von Bogdandy and Schill (2011: 15-17). The French and the Italian constitutional identities are also frequently related to the unamendable “republican clause” provided by the 1958 French and the 1946 Italian Constitutions. However both the constitutional jurisdictions of these countries and the French and the Italian doctrine believe that the French and the Italian constitutional identities are not limited to the “republican clause” and that this clause should be interpreted extensively so as to include elements upgrading the mere republican form of government.

<sup>VIII</sup> M. Rosenfeld stipulates that the constitutional identity is in part conscious, in part unconscious. Thus he also points at the double nature of the constitutional identity as both rational and emotional phenomenon (Rosenfeld 2005:318)

<sup>IX</sup> The “no demos” problem has been central part of the discussions on the establishment and development of EU constitutionalism. See Innerarity (2014: 1-36).

<sup>X</sup> For the fragmented European public sphere see Pernice (2006: 16-18).

<sup>XI</sup> B. Guastafarro believes that the constitutional identity is safeguard for the cultural diversity of the EU member states, for their regulatory autonomy and for their discretion for allowing the primacy of the EU law (Guastafarro 2012:1).

<sup>XII</sup> This is formula elaborated by Abraham Lincoln in his Gettysburg Address.

<sup>XIII</sup> In that case constitutional identity will be serving the function of prevention of negative historical cycles and remedying problems inherited by previous constitutional regimes, which however are not a product of fundamental constitutional self-identification of the community.

<sup>XIV</sup> For the opposite opinion equalizing the entrenched clauses with the constitutional identity see von Bogdandy and Schill (2011: 15-16).

<sup>XV</sup> Barbara Guastafarro questions the wide spread opinion that the constitutional identity serves for conflict resolution between the EU law and the national constitutional law only in exceptional hypotheses. According to her the constitutional identity matters not only in exceptional cases but also in all cases of application of the EU law which invoke its adjustment to the national constitutional law. See Guastafarro (2012:1). For the contrary opinion see von Bogdandy and Schill (2011: 16-17).

<sup>XVI</sup> More about the multilevel constitutionalism see Walker 2009.

<sup>XVII</sup> More about the constitutional pluralism see Krisch 2011.

<sup>XVIII</sup> According to J.-D. Mouton ‘the protection of the national identity has double protective function: against the EU when it can infringe this identity with its activity and with the accomplishment of its competences but also when the EU controls the member states regarding the way they respect the democratic values’. See Mouton (2013: 227).

<sup>XIX</sup> Typical examples are the case law of the German Federal constitutional Court and the Italian “counter limits” doctrine.

<sup>XX</sup> Regarding the concept of Grundnorm see Kelsen, 2009.

<sup>XXI</sup> Regarding the rule of recognition see Hart (1997: 100).

<sup>XXII</sup> According to A. von Bogdandy and St. Schill the national identity of the EU member states must be deliberately constructed as identity of states which are members of the EU (Bogdandy, A., St. Schill 2011: 10).

<sup>XXIII</sup> C. Closa is skeptical regarding the possibility for establishment of common European identity due to the impossibility of the EU to achieve the empirical criteria for commonality and specificity (Closa 2005: 416).

<sup>XXIV</sup> Under “constitutional ideology” I understand the system of beliefs that shape and underline the durable perceptions of the socio-legal community regarding important aspects of the value and institutional constitutional design. In that sense the constitutional ideology is composed of different key normative ideas and is part of the “ideal constitution”. For the concept of “ideal constitution see Blondel (1995: 217-218) and Tanchev (2003: 112)



xxv See note №. 5.

xxvi Examples of such extensive case law on national constitutional identity are both the jurisprudence of CJEU on the relative primacy of the EU law over the domestic constitutions (e.g. cases C-62/02 “Omega”, C-208/09 Sayn-Wittgenstein etc.) and the case law of the German, French, Italian, Spanish and Polish constitutional courts.

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## Can the EU's constitutional framework accommodate democratic politics?

by

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## Abstract

The robustness of the EU's constitutional framework – and its ability to accommodate democratic politics – is challenged as never before. The growing disconnect between formally democratic procedures and substantive choice is well illustrated by the Greek crisis. Since its first bailout in May 2010, Greece has held four general elections and a referendum. Yet, the anti-austerity preferences of the Greek electorate have not been effectively translated into policy.

This article uses the Greek crisis to analyse the EU's democratic deficit, and the related issue of the locus of legal and political sovereignty in the EU. It argues that the EU's constitutional framework is not sufficiently responsive to changing material conditions or to the changing preferences of Europeans. Thus, EU constitutionalism needs to be refashioned in order to strike a better balance between democratic and technocratic governance, as well as between the needs of individual citizens, national citizenries, and states.

## Key-words

constitutionalism, democracy, democratic deficit, euro crisis, Greece



## 1. Introduction

The European integration project has been beset by a series of economic and political crises for the past several years. Crisis, in and of itself, need not be cause for existential alarm. After all, on many occasions in the past, crises have provided the European Community/European Union (EC/EU) with opportunities to achieve integration in new areas (Jones 2012). The robustness of the EC/EU's judicially-constructed constitutional framework was often a major factor in enabling it to overcome hurdles. This was the valuable insight provided by integration through law (ITL) scholarship (Scicluna 2015: 1-8). For decades, law functioned as one of the most effective agents of integration, able to drive the process forward (particularly by removing barriers to the effective operation of the single market, i.e. negative integration) even when political support lagged behind.

Today's crises are different. Unsustainable public debts in Greece, the near collapse of the euro, an unprecedented influx of migrants and refugees from the Middle East and North Africa, the rise of euroscepticism across the bloc, and impending Brexit have all challenged the EU's institutional capacity to respond to changing material facts, as well as to the changing needs and preferences of European citizens. To be sure, these are not solely legal problems. Every one of these crises reflects, above all, a failure of political will. In each case, the two-level games played by member state governments inhibit cooperation at the European level, since solutions that are potentially both just and effective are rejected as politically unacceptable to one or more domestic constituency (Bellamy and Weale 2015).

Nevertheless, the EU's constitutional framework – that is, the scaffolding constructed by the treaties and by the Court of Justice of the European Union's (CJEU) treaty interpretations – is also implicated. The limitations of the legal-constitutional paradigm when it comes to capturing the nature of European integration have become apparent in the post-Maastricht period. The Maastricht Treaty inaugurated a bold new era of European unity, facilitating both a deepening and widening of the integration project. It built on the identity-building initiatives of the mid-1980s, including the official adoption of an EC flag, anthem, and the establishment of 9 May as 'Europe Day', thereby aiming to render the integration project visible to European citizens. EU integration, indeed, has been progressively politicised over the past twenty-five years – both because more policy areas are legislated at



the supranational level, and because people are more aware of the Brussels institutions and their activities. However, democratisation (i.e. the ability of citizens to meaningfully influence EU-level policies) has not kept pace with the increased salience of such policies among voters (Sciocluna 2014). Moreover, Economic and Monetary Union (EMU), which was one of the bold new projects introduced by Maastricht, was framed in such a way that law had little agency, and so little capacity, to overcome political intransigence. Thus, the integration-through-law paradigm that explained so well the judicially-led integration of the 1960s-1980s (Stein 1981, Weiler 1994), is not as useful when it comes to defining post-Maastricht integration and, particularly, integration in the present era of crises.

This article focuses on the weaknesses of the EU's constitutional paradigm when it comes to accommodating democratic politics, as expressed by the Greek debt crisis. I start in section 2 by framing the recent crises of European integration in relation to the EU's constitutional paradigm. Section 3 recapitulates the key facts of the Greek crisis, while section 4 uses the crisis to illustrate the EU's democratic deficit across three dimensions – within member states, between member states, and at the European level. Section 5 turns to the 'sovereignty paradox' that the euro crisis has brought into sharp relief. That is, European integration has reached a point where individual national governments cannot effectively formulate policy alone, and yet are reluctant to cede further competences to the supranational level. Finally, I will conclude with a sketch of future scenarios: what is desirable, but unlikely and what might be more likely, if less desirable.

## 2. The political-legal framework of Economic and Monetary Union

Like the EU as a whole, EMU is constituted by treaties, its parameters circumscribed by law. But the law that governs EMU is itself circumscribed – this is law as *object*, rather than law as *agent*. The kind of neofunctionalist momentum that law was able to generate in the single market; that is, CJEU-driven functional spillover; was not possible within the euro area. Instead, the split between supranational monetary policy and national fiscal policy meant that economic convergence among euro states could only occur via concerted political action. Indeed, the decision to allow Greece to join the euro area on 1 January 2001, despite not meeting the entry criteria, illustrates the role played by political discretion in the operation of EMU's regulatory framework (Gibson et al. 2012: 499-502).<sup>1</sup>



Thus, the operation and enforcement of EMU's fiscal policies, though they were set out in legal documents including the Maastricht Treaty and the Stability and Growth Pact (SGP), was heavily reliant on the political will of the member governments. Key requirements, including that euro area states keep their budget deficit below 3% of GDP, and debt to GDP ratio below 60%, proved insufficiently enforceable well before the crisis hit. Although the SGP was originally proposed by German Finance Minister Theo Waigel in the mid-1990s; a decade later, large member states such as Germany and France were able to violate the Pact, 'seemingly with impunity' (Chang 2006: 107). The politicisation of SGP enforcement – with Ecofin often resisting Commission attempts to implement the excessive deficit procedure – and differential treatment of large and small states led to a loss of credibility for the Pact in the lead up to its reform in 2005. That reform, in turn, increased the 'flexibility' with which the SGP's rules were interpreted, further weakening its stringent fiscal requirements (Chang 2006).

Monetary policy, on the other hand, was supranationalised, with responsibility for its administration given to the newly created European Central Bank (ECB). This, of course, affected the ability of national governments to effectively react to adverse economic conditions, despite their retaining control over fiscal policy settings. In particular, since euro area states did not have recourse to currency devaluation in order to improve their economic competitiveness, this had to be done by means of an 'internal devaluation'. During periods of recession, then, a national policy toolkit already limited by membership of the common currency was further emptied by poor economic conditions. National authorities were driven, almost inexorably, towards public spending cuts, tax hikes, and other forms of austerity, giving citizens the impression that political choice – and, thus, democracy – has been 'pre-empted' (Armingeon et al. 2015: 2) by technocratic facts.

We may take two lessons from EMU's hybrid design. Firstly, as is now uncontroversial from the point of view of many scholars and policy makers, monetary union without fiscal union cannot work. Secondly, that in inter-state relations, even within a highly integrated body such as the EU, politics trumps law – even if the democratic quality of the former is degraded by the excessive formalism of the latter. Thus, the Eurozone's 'half-finished' status produced a number of anomalies that contributed to the sovereign debt crisis. For example, even though the ECB was originally conceived as an independent, apolitical and technocratic institution, it has transformed over the past several years into one of the Eurozone's most





powerful political actors. Perhaps the best evidence of this transformation is the fact that it was Draghi's famous promise, made in July 2012, to do 'whatever it takes' to save the Eurozone (later backed up by the announcement of the Outright Monetary Transactions (OMT) programme in September 2012), which calmed markets right at the moment when it seemed the currency union might collapse.

Many scholars have argued that Draghi was right to take the initiative when the euro's continued existence was in the balance and the Council appeared too divided to act decisively (see, e.g., Borger 2013, Petch 2013, Wilsher 2013). Arguing against those who claim that the crucial ECB policies were illegally adopted outside of the Bank's mandate, De Witte (2015) suggests that they are merely indicative of a growing variation of institutional practice within a flexible but stable constitutional framework. Indeed, the constitutional validity of the OMT programme has subsequently been upheld by both the CJEU<sup>ii</sup> and the German Federal Constitutional Court.<sup>iii</sup> Nevertheless, the empowerment of the ECB is problematic from a democratic perspective. The discomfit arises from the Bank's unusual lack of accountability to any government. It has, of course, been common practice for decades for national governments to delegate monetary policy to independent, non-majoritarian central banks, in line with the neoliberal consensus that monetary policy making ought to be treated as a technical, rather than a political, matter. Even so, the ECB is particularly 'politically and socially "disembedded"' (Majone 2012: 14), given the absence of a corresponding fiscal governance apparatus at the European level.

Thus, inconsistencies in the constitutional framing of the single currency are at the heart of the Eurozone's current problems. The elaboration of fiscal rules relating to debt and deficit limits in the Maastricht Treaty and the Stability and Growth Pact gave the impression that the economic dimension of EMU was effectively legally constrained. Yet, the discretionary enforcement of those fiscal rules meant that, in reality, EMU departed significantly from the constitutional model of the single market, where direct effect and supremacy combine to ensure court-driven, depoliticised enforcement of EU law. Moreover, the ultimately political approach to the economic dimension of EMU was also at odds with the administrative approach taken in relation to the monetary dimension, where policymaking was delegated from member states to the ECB.

These inconsistencies have inhibited effective resolution of the euro crisis. As David Marsh (2013) argued, solutions that may make good economic sense – such as creating a





fiscal union with budget, taxation and redistribution competences that are under the jurisdiction of the CJEU – are politically unfeasible. Even debt relief for Greece, which has been increasingly vocally advocated by the International Monetary Fund (IMF), continues to be strongly resisted by creditor states such as Germany, where the government has one eye on federal elections in 2017 (Wallace et al. 2017). Citizens in creditor states do not want to see their taxes endlessly transferred to debtor states, and debtor states are reluctant to give up further control of their economic policies to outside forces. This is the dilemma that now traps Greece and other euro states, and to which I will return in section five of this article.

### **3. The evolution of the sovereign debt crisis in Greece up to the 2015 referendum**

The poor economic situation in Greece came to a head in early 2010 when the new government revealed that the country's budget deficit was far worse than had been previously reported. Once financial markets began to doubt the government's capacity to service its debt, Greece's access to capital markets dried up (Louis 2010: 971–72). A Greek default would have had dire consequences, not only for Greece, but also for the European banking system, market confidence in other heavily indebted Eurozone economies, and the strength of the currency more generally. Thus, EU leaders began to discuss the possibility of putting together a Greek 'rescue package', though in a way that would avoid the potential legal roadblock of the TFEU's 'no-bailout clause' (Article 125). After much hesitation and uncertainty, euro area heads of state and government agreed the details of a financial assistance package in May 2010. Notably, this bailout took the form of a series of bilateral loans between Greece and its Eurozone partners, meaning that it formally bypassed the framework of EU law, though supranational institutions such as the Commission were also involved (de Witte 2011: 5).

Therefore, from the very start, the Greek crisis exposed serious flaws in the Eurozone's legal framework. As with circumvention of the 'no bailout clause', EU leaders had to bend, if not break, the rules in order to keep Greece from crashing out of the euro. This seeming disregard for legality explains a lot of the popular anger and bewilderment towards bailout policies, particularly in Germany, but also other so-called 'Northern' euro states, where the



political culture tends to emphasise strict adherence to formal rules (Auer 2014: 326-328), and where the rule of law was an important source of the EU's legitimacy.

A full explication of the details of the Greek rescue packages, and the conditions attached to them, is beyond the scope of this article. Suffice to note that the first bailout of May 2010 was only ever envisaged as a temporary fix, and certainly not as a sustainable solution to either Greece's or the Eurozone's structural problems. Thus, already by late 2011, Greece required much more financial assistance, leading to the negotiation of a second bailout package of approximately 164.5 billion euros (including undisbursed amounts from the first bailout).<sup>IV</sup> The second bailout was signed in March 2012. It was only secured at the price of the resignation of the then-Greek prime minister, the centre-left George Papandreou, and his replacement by the former ECB official Lucas Papademos, at the head of a technocratic administration (Feldstein 2011: 4). Greeks were also required to accept a series of harsh cost-cutting and tax-raising measures, which have fueled unrest and discontent ever since, especially as the economy has not significantly improved.

In sum, the underlying problems plaguing both Greece and the Eurozone, as a supranational economic and political construct, were never solved. Seven years after the first Greek bailout, the Eurozone is still a monetary union without a fiscal union; Greece's creditors are still reluctant to grant debt relief; and Greece is still unwilling to accept major economic reforms. After a lull, Greece's debt crisis returned to centre stage at the start of 2015, following the election of the far-left Syriza government in January of that year. Given that Syriza had campaigned heavily on an anti-austerity platform, the new government, led by Prime Minister Alexis Tsipras, was keen to be seen to be extracting a better deal from the country's creditors than his predecessors had managed. There followed several months of intense and often acrimonious negotiations between Greek officials and representatives of the IMF, EU and member state governments, during which both sides were reluctant to compromise.

The most dramatic moment came at the end of June 2015, when Tsipras announced that he would hold a referendum on the terms of the next Greek bailout, apparently in an attempt to break the negotiating stalemate. In response to that news, the ECB – which had been supplying Greek banks with the Emergency Liquidity Assistance (ELA) needed to counter the large-scale capital flight engendered by the crisis – announced that it would not increase the amount of that assistance. Once again, it is worth noting that it is deeply troubling from



a democratic perspective that such an important *political* decision was left to the technocratic and notionally apolitical ECB. The ECB's decision had swift consequences, forcing the Greek government to introduce capital controls, including limits on cash withdrawals and on the amount of money permitted to be transferred abroad. Greek banks were also closed for three weeks.

This is the context in which the referendum took place. Not only was the range of choices available to Greek voters constrained from the outset, but the ECB's actions illustrate the extent of the pressure which supranational institutions are able to bring to bear on national democratic processes. Thus, the next section analyses the Greek crisis in relation to the question of how democracy is practiced in the EU and how it relates to the discourse on the EU's constitutional paradigm.

#### 4. Democracy and choice

*'Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number.'*

The above quote is taken from Thucydides' account of Pericles' funeral oration. It was chosen by the European Convention, headed by former French President Valéry Giscard d'Estaing, to open the 2003 Draft Constitutional Treaty. The words were meant to invoke the ancient (Greek) roots of Europe's commitment to democracy, their symbolic quality amplified by their presentation in ancient Greek, a language that very few Europeans read. In fact, the quote, as presented in the draft constitution, was a mistranslation of the original, which does not use the word 'constitution' and in which Thucydides has Pericles 'presenting "democracy" and "liberty" as antithetical' (Canfora 2004: 7-8). As Armin von Bogdandy (2005: 300–301) astutely observed, the quotation used by the Convention may be better described as a 'picture', rather than words; that is, as an image evoking ancient Greek culture and democracy as Europe's founding myth.

The commitment to democracy, the rule of law, fundamental human rights, and peaceful cooperation is very much at the heart of modern European values and the EU's efforts to create its own identity and its own story. European integration was born out of the horrors of fascism and the utter destruction of the Second World War, and the European project is





a deliberate repudiation of that brutal history. While nation-building projects typically rely on processes of geographical ‘othering’, the EC/EU was deliberately constructed in opposition to a temporal other – Europe’s other is Europe’s past (Diez 2004: 325-326). In this regard, the integration process mirrors constitution-building in post-war Western Europe. Particularly in countries such as West Germany and Italy, where fascists came to power in the 1920s and 1930s through manipulating the existing political system, the (re)construction of robust post-1945 democracies drew explicitly on lessons of the past, including the need to mediate and moderate majoritarianism through the creation of non-majoritarian checks and balances, such as a strong constitutional court (Müller 2011). To some extent, the national and European-level processes were linked – the creation of the ECSC and EEC, with their supranational institutions, was yet another check against the re-emergence of domestic demagogues. It was also the beginning of a decades-long attempt by EC/EU leaders to supplement national identities with a shared European identity.

The ill-fated attempt, in the mid-2000s, to adopt a constitution for the European Union revived the identity debate, explicitly seeking to base EU identity on normative values such as democracy. Metaphorically, therefore, the draft constitutional treaty reached back beyond Europe’s bloody recent past, to the continent’s ancient history in order to reclaim democracy as a founding value of the postwar project of peaceful supranational integration. Indeed, the commitment to democracy-promotion was central to the admission of post-authoritarian Greece, Spain and Portugal to the then-European Community in the 1980s. Safeguarding the democratic transitions of the post-communist states of Central and Eastern Europe was also a major impetus behind the enlargements of 2004, 2007 and 2013.

Without diminishing these positive contributions to the consolidation of democracy in Europe since the end of WWII, we may ask to what extent the commitment to democracy is reflected in either the administrative or constitutional paradigm of EU law today. We may also question how successfully the EU lives out its democratic values, and whence it derives democratic legitimacy. Democracy implies choice, but the euro crisis continues to illustrate just how lacking real, substantive choice often is in Eurozone governance. The crisis-driven turn to technocracy is an extension of the administrative logic that partly frames EMU. In other words, it is for experts (in the Commission, in the ECB, etc), rather than politicians to prescribe solutions to the debt and deficit problems of certain governments. Thus, in the Eurozone’s periphery, national governments of both left- and right-wing persuasions have



been forced to accept harsh austerity in exchange for EU and IMF support. As a result, ‘voters experienced that it did not matter who was in government and that the preferences of a majority of the citizens would not be translated into policies’ (Armingeon et al. 2015: 2). This has led to a large number of citizens in these peripheral states losing faith in both national-level and European democracy, and consequently disengaging from mainstream politics (Armingeon et al. 2015: 2).

The referendum that was held in Greece on July 5, 2015 illustrates these troubling developments well. Like Pericles’ quote introducing the draft constitutional treaty, the Greek referendum could also be conceptualised as an *image*, or symbol of democracy. However, I would argue that this image – while formally potent – was substantively hollow; a kind of democratic performance in which the scope for real choice was severely limited. Indeed, rather than symbolising the vitality of democracy in the EU, the Greek referendum symbolised its deficit across three dimensions. Firstly, the democratic deficit within Greece, secondly the democratic deficit between euro area states, and thirdly the EU-level democratic deficit. I will briefly consider each of these in turn.

#### 4.1. The democratic deficit within Greece

The question posed on the referendum ballot paper was ‘whether to accept the outline of the agreement submitted by the European Union, the European Central Bank and the International Monetary Fund at the Eurogroup of 25/06/15’. In other words, Greeks were asked whether or not they accepted the proposals of the country’s creditors, which the Syriza government itself had rejected. The creditors’ proposals, in turn, were connected to a progress review under the second bailout. The EU and IMF were concerned about Athens’ lack of progress in implementing fiscal reforms since Syriza took office in January 2015. The Greek government had to accept the proposals in order to get the next instalment from the second bailout. Since it did not, the second bailout expired at the end of June 2015.

From the point of view of organisation and procedural legitimacy, several aspects of the referendum were problematic. The second Greek bailout actually expired at the end of June, five days before the referendum. This meant that, technically, there were no proposals for Greek voters to accept or reject, as that deal was no longer on the table. Moreover, the vote was called with barely one week’s notice. This was hardly enough time to allow voters to





assess the situation and make a considered and informed choice, again indicating that the vote was more performative gesture than genuine opportunity for democratic engagement.

Indeed, there are broader questions to consider about the role of referendums in modern democracies. An in-depth discussion of this topic is beyond the scope of this article; nevertheless, some comparisons with the Brexit referendum of June 2016 are warranted. Referendums – in which major policy decisions are turned over directly to citizens – do not always sit comfortably with contemporary forms of representative democracy. This incongruity is well illustrated in relation to the UK, where a major rationale for leaving the EU was that Union membership is incompatible with the British constitutional doctrine of ‘parliamentary sovereignty’ (Wellings 2010). It is ironic, then, that politically, at least, the decision to leave the EU was made not by the sovereign parliament, but by the British people.<sup>v</sup>

Both the Greek and British referendums may be regarded as somewhat drastic reactions to the perception that it is not possible to influence EU policymaking through more regular means. In the Greek case, Tsipras was seeking a mandate to strengthen his hand in negotiations with Greece’s creditors – a ploy that, by and large, did not work. In the British case, internal party politics played a large role in David Cameron’s decision to put the UK’s EU membership to a vote, as he sought to stave off a rebellion by Eurosceptics in his own Conservative party. Nevertheless, the fact that 52% of voters opted to leave, indicates Britons’ disillusionment with EU governance and lack of faith in the Union’s ability to respond to citizens’ concerns with meaningful reform. While it is easy to point to the role of misinformation from both political figures and the tabloid press, the Brexit referendum ought to prompt serious debate on the strengths and weaknesses of the EU’s constitutional paradigm. The extent to which Britons can ‘take back control’ by extricating themselves from the EU is yet to be seen. Nevertheless, with Brexit negotiations formally initiated, the British attempt to reassert national sovereignty is certainly less chimeric than the Greek attempt to end austerity via popular vote.

Indeed, the futility of the Greek referendum may be judged by the result. A majority of 61% of voters responded ‘no’, as against 39% who voted ‘yes’. This was not only a resounding rejection of the specific proposals of the progress review but, more significantly, a rejection of austerity politics more broadly. Nevertheless, we may ask what impact the ‘no’ actually had on either Greek policy making or on the creditors’ attitudes towards Greece.





Despite seemingly gaining a mandate for continued defiance of EU and IMF demands, Tsipras very soon compromised, conceding nearly all of the creditors' demands on further spending cuts and tax increases in exchange for an emergency bridging loan, agreed on 20 July, and, later, a third bailout.

This appeared to confirm the pattern of the previous five years of Greece-EU negotiations. As noted previously, the second bailout was only secured at the expense of the replacement of a democratically-elected prime minister with a technocratic one, as well as the acceptance of a series of hugely unpopular austerity policies. What, then, does democracy mean in Greece today? All of the appropriate procedures are in place – Greeks are able regularly to express their opinions via electoral processes. On paper they have choices; they can choose 'yes' or 'no' in referendums, and they can choose between parties and candidates in general elections. Nevertheless, these choices are illusory. As long as they are dependent on external financial assistance, the room to manoeuvre of Greek governments will remain highly constrained, and many of the choices that Greek citizens may wish to make will remain unavailable.

To be sure, this problem is not unique to Greece, or to the Eurozone. State-based democracy is everywhere challenged by processes of globalisation that rob governments of initiative by forcing them to respond to market driven phenomena that operate beyond the state (Rodrik 2011). Nor do I deny that successive Greek governments must take a large share of the blame for the situation in which Greece finds itself. As noted above, the crisis was sparked by the revelation that the country's debt levels had been significantly understated. The democratic deficit in Greece is, thus, also a product of the dishonest behaviour of the country's political class and its tendency to make promises to the electorate that are economically unrealistic and unsustainable. However, this paper's focus is not on the pathologies of Greek political culture, but on EMU's shortcomings insofar as it relies on a combination of administrative and political control to facilitate currency union between a large and diverse group of economies. Indeed, the fact that Greeks are able to attribute their problems to EU figureheads and institutions – German Chancellor Angela Merkel, the European Commission, the ECB – rather than their own government, only compounds the perception of loss of sovereign democratic control.



#### 4.2. The democratic deficit between euro states

Moving beyond Greece, we must also consider the perspectives of other euro area states when evaluating the efficacy of democratic procedures within the Eurozone. One of the most troubling aspects of the Eurozone crisis is the way it has pushed Europe's democracies into competition with each other. Even if Greeks have the democratic right to reject austerity for themselves, do they have the concomitant right to compel other citizens in other Eurozone countries to contribute their taxes towards a bailout?

The situation is further complicated, from the point of view of redistributive justice, by the fact that some of the Eurozone states contributing to bailouts, such as Slovakia and the Baltic states, are poorer than Greece in terms of per capita GDP and per capita income, and that they also have much less generous welfare states. For example, Greek GDP/capita in 2013 was USD21,903 compared to Slovak GDP/capita of USD18,064.<sup>VI</sup> The Greek average monthly net wage in 2014 was 1262 euro compared to 665 euro/month in Slovakia.<sup>VII</sup> Thus, the euro crisis has also highlighted how difficult it is to manage multiple national democracies within the political and legal framework of EMU, and to design democratic procedures that will balance the needs and desires of different electorates, in a way that is just and equitable. In essence, the legal and administrative paradigm that frames EMU (with its focus on public debt and deficit levels as the markers of fiscal health) is ill-equipped to address equity issues that are fundamentally political.

Recall Thucydides' quotation: 'Our Constitution is called a democracy because power is in the hands not of a minority but of the greatest number.' The quote encapsulates the gap between the EU's self-image, as projected by its leaders, and the image that animates a considerable proportion of popular opinion. A series of setbacks for the integration project, from the failure of the constitutional treaty in 2005 to the Brexit vote in 2016, illustrate the difficulty of applying this conception of democratic constitutionalism to the European polity. Part of the democratic failure uncovered by the euro crisis was that 'no effective mechanisms were available to ensure that the fiscal policies of a Euro-Member State would take into account the interests of the other Member States' (Maduro 2012: 3). It is pertinent, then, to ask what is the 'greatest number' when it comes to the EU polity, or its many constituent parts (Bellamy and Weale 2015). Can a majority of Greeks overrule a majority of Slovaks? Can Germans overrule Greeks? How to constitute a democratic majority remains one of the great unsolved challenges of EU governance. Addressing this challenge will likely involve



increasing the role of national parliaments in the supranational lawmaking process, as well as increasing the horizontal accountability of member states to one another, thus better harnessing the EU's 'demoicratic' potential (Nicolaidis 2012).

#### 4.3. The European-level democratic deficit

Finally, there is the European-level democratic deficit. This concept far predates the euro crisis and incorporates debates over the 'no *demos*' thesis, i.e. the question of whether there is a 'European people' to whom democratic mechanisms can meaningfully be addressed (Grimm 1995, Habermas 1998), as well as debates over the extent to which the political contestation that takes place at the national level may serve as a useful model for EU reform (Hix 2008). Key features of the European-level democratic deficit include the fact that the EU's institutional structure privileges the executive branch of government at the expense of the legislative branch, that national parliaments' loss of policymaking and oversight power is not compensated by the European Parliament (EP), and that EP elections remain 'second-order' contests, which are marked by low turnout rates and in which voters are often motivated more by national than EU-level concerns (Follesdal and Hix 2006).

Though these deficiencies are longstanding, they are exacerbated by the euro crisis. For example, the crisis has magnified the EU's tendency to privilege national executives, with the European Council becoming the Union's preeminent decision making body (Dawson and de Witte 2013: 818), while the directly elected European Parliament is sidelined (Fasone 2014). There is some irony in this development, since, on paper, the EP is more powerful and more involved in policy making than it has ever been in its history. Nevertheless, in practice the key decisions regarding crisis management have been made by a small number of elite figures – the heads of the IMF, ECB and Commission, and the leaders of the most powerful member states, above all Germany.

Therefore, the crisis is exposing the relative paucity and weakness of supranational democratic mechanisms in the EU. In many member states, populist parties are seizing on anti-EU sentiment to fuel their political campaigns. The Brexit referendum was a particularly potent example of the traction that can be gained by linking EU membership to a loss of control over national destinies. Similar rhetoric has been espoused by populist leaders such as Marine Le Pen in France and Geert Wilders in the Netherlands, and forms part of an increasingly strident critique of the EU from governing parties in Poland and Hungary. The





populist depiction of the EU as remote, elitist and an external ‘other’ leads me to another concept that may help us to understand the shortcomings of EU constitutionalism – that of a ‘sovereignty paradox’.

## 5. The sovereignty paradox

It is a conventional wisdom of EU scholarship that the European Union is a unique construct; neither an ordinary international organisation nor a federal state. Arguably, this indeterminate status – entrenched in the EU’s constitution of ‘bits and pieces’ (Curtin 1993) – is the cause of many of the EU’s current problems.

This point may be explicated specifically in relation to the Eurozone. Although many aspects of EMU governance are dealt with at the supranational level (most notably, monetary policy, which is subject to the administrative paradigm of EU law), EMU does not have a true government. This results in a sovereignty paradox – states have already shared and/or delegated many of their lawmaking competences. They have already pooled so much of their sovereignty that they can no longer achieve their policy objectives, particularly macroeconomic objectives, alone. And yet, euro area states continue to resist compromise (e.g. on the question of the mutualisation of euro area debt) and to jealously guard their remaining competences. The result is often paralysis: national governments cannot succeed alone, yet they struggle to effectively cooperate. They cannot re-nationalise the powers they have already given up, but they are unwilling to give up further powers (e.g. over taxation), as would be needed to find EU-level solutions (Marsh 2013).

As a result, the EU’s unique status – as a kind of confederation of sovereign but interdependent states – becomes a burden. To understand why this is so, we may turn to the insights of the 18th century American scholar and statesman, Alexander Hamilton, who argued forcefully in favour of the creation of a strong American federal state in *The Federalist Papers*. Hamilton’s (1787) critique of ‘government over governments’ was informed by the economic, political and security weaknesses of the American confederation, which he blamed on the coercive incapacity of the national government and its resultant dependence on the states; each with its own level of ability and willingness to enforce national law. Hamilton analysed the consequences thus:



‘The measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme, which has, at length, arrested all the wheels of the national government, and brought them to an awful stand ... The greater deficiencies of some States furnished the pretext of example and the temptation of interest to the complying, or to the least delinquent States. Why should we do more in proportion than those who are embarked with us in the same political voyage? Why should we consent to bear more than our proper share of the common burden? ... Each State, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support, till the frail and tottering edifice seems ready to fall upon our heads, and to crush us beneath its ruins.’

Much of this analysis can be applied to the legal design of EMU. The experience of the single currency illustrates the pitfalls of pushing for high levels of integration in one area without an overarching federal structure in place. The creation of a currency union without the centralised oversight and administration of a finance minister and without effective enforcement mechanisms meant that individual national governments were able to pursue very different fiscal policies for too long without sanction (Louis 2010: 978–80). Thus, the failure to bring EMU fully within the constitutional paradigm in which laws are made following the community method, and enforced by the CJEU in accordance with direct effect, undermined the ECB’s single monetary policy over a number of years, leading to the crisis. The crisis, in turn, has undermined the EU’s constitutional balance, insofar as solutions have been sought outside of the framework of EU treaty law (e.g. the Fiscal Compact which was adopted as an international treaty, and the European Stability Mechanism (ESM), which was established as an intergovernmental institution under public international law.)

## 6. Concluding remarks

Where does all of this leave the European Union and its project of a single currency? Now, more than ever, European integration is a project in search of an identity. Could a revived constitutionalism furnish the EU with such an identity? On one view, the current conflagration of crises could well be the catalyst for a ‘constitutional moment’ – that is, general recognition of the need for transformative legal and political change (Scicluna 2015: 128-129). But seizing such an opportunity would require inspiration and charismatic leadership at the EU-level, and/or the strong support of national governments. Both elements seem to be lacking in the EU today.



The Greek crisis has taken up enormous amounts of the time and resources of EU institutions and national leaders. But it is a distraction from greater problems that confront the European project. Even resolving Greece's debt situation (which is proving so difficult in itself) would not solve the underlying constitutional crisis. Doing that will take major reform – including either creating a true economic union (in which law enjoys agency comparable to what it has in the single market) to match the monetary union, or repatriating powers to the individual member states, perhaps via legalisation of the political principle of subsidiarity.

The chances for such massive reform are slim. The EU's inability to deal coherently and decisively with other pressing concerns, such as the migrant crisis, the conflict in Ukraine, the security threat posed by terrorism, and Brexit, all militate against a broad-ranging and open discussion of the Union's future, which would include potentially large-scale treaty change. Instead, the most likely scenario is that the EU (and the euro area) will continue to 'muddle through', by delaying much-needed major reform and only dealing with individual problems as they arise. It is possible that the EU could maintain this course of action, which may also be described as 'permanent crisis management', for many years. However, it is not a solution to either the democracy deficit or the sovereignty paradox.

'Muddling through' is not a solution to the democracy deficit because it concentrates power in the hands of a small number of decision makers that are not accountable to the vast majority of EU citizens (*contra* the optimistic quote that opened the draft constitutional treaty). And it is not a solution to the sovereignty paradox because such a piecemeal approach encourages retreat into narrow national self-interest and discourages deeper cooperation. Instead, as it passes the sixtieth anniversary of the Treaty of Rome, the European Union ought to refocus on big questions, prime among them the role that law has to play in framing a union in which further integration and stronger democratic accountability go hand in hand.

This process of reflection and reform should involve constitutional consolidation. In other words, crisis management initiatives that were adopted outside of the auspices of the EU treaties – including the Fiscal Compact and ESM – should be brought fully within them. Brexit may even make this process easier, given that British opposition was largely responsible for the Fiscal Compact's adoption as an international treaty in 2013. Such a consolidation would increase the congruence between the constitutional paradigm – rule-of-law bound, judicially driven – that frames the single market, and the administrative paradigm



– expressed through the delegation of authority from member states to technical bodies such as the ECB and ESM - that frames monetary union. It may even be a first step towards a fully fledged fiscal union, incorporating both greater financial integration between member states, and the judicial (rather than political) enforcement of fiscal rules. In relation to the former, Miguel Poiaras Maduro's (2012: 1, 12-16) suggestion that financial solidarity ought to come not from transfers between member states, but from new EU own resources, offers a way forward that will not exacerbate the democratic deficit by 'putting national democracies on a collision course'. Unless this kind of broader constitutional consolidation takes place, 'muddling through' may amount to the slow decay of the integration project.

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<sup>I</sup> Greece's debt-GDP ratio was close to 100% at the time of its acceptance into the euro area, but was allowed to join on the basis that the ratio was on a declining path (Gibson et al. 2012: 501).

<sup>II</sup> Case C-62/14, Peter Gauweiler et al. v Deutscher Bundestag (OMT case).

<sup>III</sup> BVerfG, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 decision from 21.06.2016.

<sup>IV</sup> The EU contribution of 144.7 billion euros came from the EFSF, while the IMF contributed 19.8 billion euros. 153.88 billion euros had been disbursed when the bailout expired in June 2015.

<sup>V</sup> Legally, the referendum was non-binding, since British constitutionalism does not make provision for binding referendums. After some contestation on the question of whether the government could trigger Article 50 of the Lisbon Treaty without parliament's authorisation, the decision to leave the EU was indeed ratified by parliament's passage of the government's Brexit Bill in March 2017 (Asthana, Mason, and O'Carroll 2017).

<sup>VI</sup> IMF World Economic Outlook Database, available at <https://www.imf.org/external/pubs/ft/weo/2015/01/weodata/weoselgr.aspx>.

<sup>VII</sup> Eurostat figures.

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# The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?

by

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## Abstract

The paper deals with the validity of constitutional pluralism as a constitutional theory for the European Union and a paradigm for the understanding of EU law in the current times of crisis. It reconstructs the way in which constitutional pluralism came to the fore, the different ways in which the theory was presented, and considers historical criticism it has faced. It then looks at the anomalies that, allegedly, cannot be explained today by constitutional pluralism as a paradigm, linked to the current economic and political crises in the Union. The reconstruction of the debate is complemented with reflections on both the descriptive and normative validity of EU constitutional pluralism's claims.

## Key-words

European integration, European constitutionalism, constitutional pluralism, economic crisis, political crisis



## 1. Introduction

This special issue deals with competing paradigms for EU law in times of crisis. The basic idea is to question paradigms of EU integration in the context of current multifaceted critical situations, contribute to a better understanding of their impact on the nature and identity of the Union, and reflect on their applications and implications.

The theory of EU constitutional pluralism is surely one of the most successful paradigms for the explanation of EU law development in the last decades: it was termed by a leading scholar in the field, himself considered a pluralist (Jaklic 2014; Weiler 2012: 13), as a new ‘orthodoxy’, as ‘the only party membership card’ capable today to ‘guarantee a seat at the high tables of the public law professoriate’ (Weiler 2012: 8). Thus, it is obvious to question its soundness, especially because the crisis added to its classic discontents new critical voices pleading for its ‘unsustainability’ (Kelemen 2016).

The connection of the terms *paradigm* and *crisis* cannot but lead to the adoption of certain specific epistemological coordinates in such an endeavour. Thomas Kuhn famously suggested designating as a *paradigm* what the members of a certain scientific community have in common, namely the whole of ideas, techniques and values shared by the members of an epistemic community; and to consider that a scientific revolution occurs when members of an epistemic community encounter *anomalies* that cannot be explained by the accepted paradigm, so to put such a paradigm in *crisis* (Kuhn 1962).

If, as suggested by Weiler, constitutional pluralism has been an orthodoxy for EU legal scholars, at least for a while, and for many such a theory is now put in crisis by the crisis, we will adopt Kuhnian coordinates to shape this essay as follows.

In the first chapter, we will briefly reconstruct the way in which constitutional pluralism came to the fore, the different ways in which the theory was presented, how it became a *paradigm*. We will also consider historical criticism it has faced since the beginning of its journey in the world of ideas. In what follows, we will look at the *anomalies* that, allegedly, cannot be explained today by constitutional pluralism as a widely-accepted paradigm. In the second chapter, in particular, we will look at the debate which arose around recent measures to resolve the Eurozone crisis and some famous judicial cases which are related: this is the first area of law in which doubts about the possible ‘demise of the pluralist



movement' (Sarmiento 2015) organically emerged. In the third chapter, we will examine another sensitive anomaly: the recent instrumental use by certain Central and Eastern European constitutional tribunals of a supposedly pluralistic jargon, for political reasons. The fourth chapter will wrap up the arguments and conclude by discussing the enduring validity of constitutional pluralism as a paradigm for the explanation of EU law and its development.

## 2. A brief reconstruction of the debate: forms of constitutional pluralism and its discontents

Constitutional pluralism emerged as an organic theory in the early 1990s.

As well known, its basic tenets were formulated in Neil MacCormick's 1993 seminal work "Beyond the Sovereign State", in which this leading scholar aimed at prompting a renewed debate on the problem of how to 'locate sovereignty and the theory of sovereign statehood in the setting of legal theory, showing how developments in European Community law raise difficulties for some standard positions in legal theory', in the immediate aftermath of the Maastricht Treaty (MacCormick 1993: 1).

As also well known, the debate was invigorated by the historical *Maastricht-Urteil* case of the German Constitutional Tribunal some months later (Poiars Maduro 2012: 69-70). The judgment gave a new prominence to the risk of constitutional conflicts between EU law and national constitutions, stemming from the specular claims of ultimate authority inherent in the caselaw of the European Court of Justice on the supremacy of EU law, and in national constitutional courts on the limits to such a principle of supremacy. As noted by scholars, 'constitutional pluralism is often presented as a reaction to this judgment' (Poiars Maduro 2012: 69). In fact, MacCormick himself reacted to the judgment with another important article, 'The Maastricht-Urteil: Sovereignty Now' (MacCormick 2015), merging the doctrinal and the judicial 'formants' of the theory together (I am of course paraphrasing the words of Sacco 1991).

Nevertheless, both the judgment and the theory did not come out of the blue.

The *Maastricht-Urteil* was the last episode of a series of well-known cases of the *Bundesverfassungsgericht*, starting the *Solange* cases of 1974<sup>I</sup> and 1986,<sup>II</sup> in which the potential conflict between German constitutional law's and supranational law's possession of



supremacy was accommodated in a significant process of mutual influence.<sup>III</sup> Such a judicial process, concerning the primacy of EU law and competing constitutional claims of ultimate authority, was not only fed by German cases: to name a few examples, important judgments of the Italian Constitutional Court such as *Frontini*,<sup>IV</sup> *Industrie chimiche*,<sup>V</sup> *Granital*,<sup>VI</sup> and *FRAGD*<sup>VII</sup> played an analogous role between the 1970s and the 1980s (Barile 1973; Gaja 1990; Cartabia 1990); controversies such as *Macarthy v Smith*<sup>VIII</sup> and *Factortame*<sup>IX</sup> prompted similar debates in the United Kingdom (Best 1994); the year before, in 1992, the French *Conseil Constitutionnel*,<sup>X</sup> and the Spanish *Tribunal Constitucional*,<sup>XI</sup> issued negative decisions on the compatibility of the Maastricht Treaty with their respective constitutions, requiring constitutional amendments before ratification could proceed (Oppenheimer 1994: 385, 399, 712; Baquero Cruz 2007: 1); the Danish Supreme Court soon followed the German initiative by issuing a judgment on the unconstitutionality of the implementation of the Maastricht Treaty<sup>XII</sup> reminiscent in both ‘conceptual matrix and normative solutions’ (Baquero Cruz 2007: 13).

The theory of pluralism itself was a development, or better a refinement, of the doctrinal works on the constitutional nature of the European Communities (themselves a major *paradigm* for the study of supranationalism competing with others) (Weiler, Haltern 1998; De Witte 2012). In different ways, authors like Stein (Stein 1981), Mancini (Mancini 1989) and Weiler (Weiler 1999) posed fundamental questions, such as if Europe implied a supranational construction of constitutional nature, and if it indeed needed a formal constitution. The answers to these ‘old questions’ (Poiáres Maduro 2012: 67-68) created a narrative, that of European constitutionalism, with profound implication in terms of what conception of, say, fundamental rights protection, separation of powers and judicial review ought to shape EU law.

The same proponents of constitutional pluralism presented it as a refinement of a constitutionalist narrative that ‘developed without a constitutional theory’, as an attempt at theorizing the nature of European constitutionalism (Poiáres Maduro 2012: 67-68). The *Maastricht-Urteil*, with its normative thickness and theoretical robustness,<sup>XIII</sup> was a development and refinement of all the judgments of previous decades on the relationship between national and supranational norms, and the competing of constitutional claims of ultimate authority, involving plain arguments of a political nature, in the sense of a basis in theoretical conceptions of the state. Moreover, with its normative thickness and theoretical



robustness, *Maastricht-Urteil* shaped a new doctrinal agenda, which was equally a development and refinement of the lines of cases cited above. Thus, constitutional pluralism was forged as a development and refinement of constitutionalist readings of the European Communities, then probably a stronger paradigm than now (Chiti, Teixeira 2013; De Witte 2015).

Such a theoretical development was based predominantly on *political* (again, in the sense of based on theoretical conceptions of the state) observations on the nature of judicial competition for ultimate authority, with clear *legal* implications. The caselaw of national courts, based on a fruitful *Solange* narrative<sup>XIV</sup> or in any case developing through the years towards an always more integrated approach with that of the European Court of Justice,<sup>XV</sup> was considered to be part of a general process of development of the law of integration (in the sense defined by Pescatore 1974), ‘in motion and open’ but also ‘running smoothly’ towards the classic aim of an ‘ever closer union’, also in legal terms (Baquero Cruz 2007: 1).

The *Maastricht-Urteil* was probably the first judgment in which, instead, ‘the superiority of the national constitutional model on the integrative process’<sup>XVI</sup> was plainly predicated, in a way in which, in comparison with the classic tenets of the European Court of Justice jurisprudence,<sup>XVII</sup> the idea of a hierarchy between (certain) national constitutions and EU law appeared inherently unstable, or unresolved, and destined to remain so. The idea of a potential *stability in instability* was conceived. According to Wittgenstein’s seventh proposition, ‘whereof one cannot speak, thereof one must be silent’ (Wittgenstein 1922); and for comparative constitutional scholars like Foley, the lesson to be learned from constitutional history is precisely that it is best not to comment on the ultimate questions concerning sovereignty (Foley 1989; Bin 2012: 54 et seq.; Bin 2014: 11). In the wake of what appeared to be a stable coexistence of competing narratives on how to conceptualize the plurality of constitutional sources in Europe and their relationship, constitutional pluralists came to the fore and argued that no one should pretend to be able to give the definitive word on the point of prevalence of one order over another (Bin 2014: 11). After all, ‘the habitual willingness to defer indefinitely consideration of deep constitutional anomalies, for the sake of preserving the constitution from the severe conflict that would arise from attempts to remove them, represents the core of a constitutional culture’ (Foley 1989: 10): and the constitutional culture of Europe could precisely rest, for pluralists, on such an apparently unstable, or unresolved, solution, as a decision not to decide.



In legal terms, the theory was appropriate, since it was able to capture the plurality of constitutional norms at stake after the enactment of the Maastricht Treaty, and the magnitude of the potential constitutional conflicts threatened at the time by judgments such as *Maastricht-Urteil* and the French and Spanish cases of 1992. The latter ultimately proved to be unproblematic: their respective constitutions were easily amended, and the Treaty was soon ratified; when conflicts did come, it was in the form of ‘soft’ constitutional conflicts (Baquero Cruz 2007: 1). The German case was different: it came in the form of a potentially ‘hard’ conflict, threatening disobedience, evoking the possibility of unilateral withdraw (Baquero Cruz 2007: 1), but eventually led to ratification and adherence, even though by placing strong conditionality on the table (never overruled). It left the idea of a potential stability in instability.

In political terms the theory was captivating, since it captured the political zeitgeist of the time, with the first signs of popular disaffection in the French and Danish referenda. This was again the case years later, after the constitutional failure of 2004 (Martinico 2009). Constitutional pluralism helped to reinvigorate the idea that both the European Union and national legal orders could be conceived of as constitutional systems, and could coexist even though it was impossible, in political terms, to answer that ‘old question’ on whether Europe needed a formal constitution, and how to reconcile competing claims of authority in a stable way (Poiars Maduro 2003; Poiars Maduro 2012: 67-68).

The same concrete utility of the theory emerged in other subsequent phases of the European legal system development: to name a few, in recent periods in which it was otherwise difficult to reconcile that way in which the European Court of Justice, in the *Kadi* case of 2008,<sup>xviii</sup> expanded the promise of constitutional autonomy already inherent in *Van Gend en Loos* to reassert that, with a supreme and directly effective EU law, individuals are subjects of the Treaties to be protected, while, in the same years, the *Bundesverfassungsgericht*, with the *Honeywell*<sup>xix</sup> and the Lisbon Treaty cases,<sup>xx</sup> reasserted the national pluralist narrative and therefore the retained power to comply *ultra vires* and identity reviews; to conceptualize the ongoing and unsettled controversy over the scope of protection of EU fundamental rights, with competing interpretation over Art. 51 of the EU Charter of fundamental rights by the Court of Justice<sup>xxi</sup> and, again, national constitutional courts such as the German one,<sup>xxii</sup> to make sense of the continued conflict surrounding



the European Arrest Warrant in the last decades, based on national constitutional limits.<sup>xxiii</sup>

In this way, over the years, constitutional pluralism became a paradigm. According to a recent study, which attempted a taxonomy, several variants were suggested by its proponents (Jaklic 2014). In addition to MacCormick's foundational theorization, there would be a strand of Walker's *epistemic* pluralism, focused on the limitations of classic national constitutionalism in explaining today's social transformation and political challenges, and the incommensurability of authority claims by supranational and national constitutionalism (Walker 2002); a strand of Weiler's *substantive* pluralism, more interested in defining a balance between the two confronting constitutional identities, the nation-state and the European one, and the substantive content of it (Weiler 2003: 10);<sup>xxiv</sup> and *institutional* and *interpretative/participative* strands of pluralism, of Kumm (Kumm 1999; Kumm 2005) and Poiares Maduro (Poiares Maduro 2003; Poiares Maduro 2007; Poiares Maduro 2012), focusing in particular on how the theory, through its contestation of finality and conclusiveness, highlights the role of particular institutions which take decisions of constitutional significance, and on the ways in which those institutions should act and interact.

In sum, Poiares Maduro recently identified three major claims of constitutional pluralism as a constitutional theory of EU: the empirical, the normative and the thickly normative (Poiares Maduro 2012). The analysis of these is vital in understanding how the theory proved decisive, for many, in conceptualizing European legal and political challenges of the last decades as discussed above, and useful to reflect, later, on current suspected anomalies.

The empirical claim is the 'starting point' of the theory. It develops from a consensus over the fact that the EU is governed by a form of constitutional law,<sup>xxv</sup> and identifies the phenomenon of a plurality of constitutional sources and claims of ultimate authority which create a context for potential constitutional conflicts that are not hierarchically regulated. This is particularly obvious in the case of EU law, where the multiplication of competing legal sites and jurisdictional orders is evident, and a discursive practice between the European Court of Justice and national constitutional courts, aimed at reducing the risks of constitutional conflicts and accommodating their respective claims of final authority, is in place in the form of a 'dialogue' (Claes 2006; Poiares Maduro 2007). The first claim is



therefore descriptive in nature: its basic tenet is that ‘constitutional pluralism is what best describes the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them’; it is a claim where EU and national legal orders can be construed as normatively autonomous but also institutionally bound by the adherence of their respective actors to both legal orders (Poiares Maduro 2012: 69-74).

The normative claim of the theory is complementary, and it is the following (Poiares Maduro 2012: 75 et seq.): not only does the question of final constitutional authority remain open in the EU, but it ought to be left open, since *heterarchy* (in the sense widely exposed, in comparative terms, by Halberstam 2009) is superior to hierarchy as a normative ideal in circumstances of competing constitutional claims of ultimate authority. This is a different level of discussion, reminiscent of what we referred to before as the lesson to be learned from constitutional history according to comparative constitutional scholars such as Foley (Foley 1989). This claim would fit, here again, particularly for the EU case: for here the fact is that the recognition of the legitimacy of the EU constitutional claim, and the idea that competing constitutional claims such as the supranational and the national ones are of equal legitimacy or, at least, cannot be balanced against each other once and for all. As MacCormick put it, in a system of constitutional pluralism ‘it is possible that each [constitutional order] acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges the constitutional superiority over another’ (MacCormick 1999: 102 et seq.). In this sense, it would be desirable to embed – explicitly or not – pluralist thinking within EU law: and the best way to do it could actually vary, ranging from the idea that national courts should explicitly take account of EU interests in interpreting national law (Poiares Maduro 2007) to the idea that ‘EU law should be self-policing’ (Davies 2012: 269), and it should adopt a more pluralist approach and prevent EU law becoming a threat to national constitutions (Kumm 2005).

The thickly normative claim of the theory is the following: in the current state of affairs, pluralism provides a closer approximation to historical ideals of constitutionalism than either national constitutionalism or a form of EU constitutionalism modeled after national constitutionalism. It would be, in general, the best representation of the ideals of constitutionalism. This broad claim is based on the idea that pluralism is an inherent ingredient of constitutionalism, and that it can be decisive, facing today’s ‘changing nature



of the political authority and the political space', and therefore in the current context of increased pluralism and deterritorialisation of power, to leave open and to periodically reassess questions of inclusion faced by national polities, of democratic exercise of power vis-à-vis limitations of power for the protection of minorities, and of institutional solutions in the organisation of power' (Poiares Maduro 2012: 77 et seq.).

For our purposes, it is important to note that these views were endorsed by many in the context of EU studies,<sup>xxvi</sup> although of course not necessarily in a complete way and therefore wholly supporting the three claims suggested by Poiares Maduro. Theoretically, it is possible to differentiate and divide them, and endorse a descriptive/empirical version of EU constitutional pluralism without backing, on the normative plan, the other arguments on its appropriate nature.

The same can be said for the critical arguments faced by constitutional pluralism.

In the last two decades, constitutional pluralism became a paradigm, an orthodoxy in the study of EU law: still, it attracted, from the beginning, critical remarks by renowned authors.

To name a few, Loughlin termed constitutional pluralism an oxymoron, 'used to make a full-fronted assault on the conceptual edifice of public law' and its basic tenets, including sovereignty intended as ultimate political authority, and as an indivisible concept (Loughlin 2014: 24). He rejected MacCormick's idea of competing constitutional claims of equal value determined by judicial claims, as flawed by 'the fallacy of equivalence in which all species of law (all normative orders) are assumed to possess a similar status and authority' (Loughlin 2014: 17). He basically rejected the idea itself that 'EU is governed by 'a form of constitutional law'' (Loughlin 2014: 24), therefore simply not accepting the constitutional narrative of the EU which is the basis of EU constitutional pluralism, as discussed.

Similarly, Somek contested the novelty of the theory by reducing constitutional pluralism to a form of monism under national law. According to him, constitutional pluralists give up precisely where an answer is most needed: what happens when constitutional conflict cannot be prevented or solved? In this respect, in his view, the normative claim that the answer ought to be left open is flawed: in fact, the question of final authority is never left open, and there must always be a legal answer, at worst in terms of 'legally irrelevant statements'.<sup>xxvii</sup>



Davies contested the idea of constitutional pluralism as a description of an only apparently unstable, or unresolved, balance between competing national and supranational claims. He acknowledged the ‘initial attractiveness’ of the theory, which can seem ‘more convincing than one which concedes to the claims of one side or the other’; yet he deemed the symmetry of the situation ‘illusory’ (Davies 2012: 270). He argued that national courts control the outcome of actual cases, and in most cases still consider that their ultimate allegiance, in the event of conflict, is to national constitutions and national supreme courts; conversely, EU law may assert in principle, but it lacks the means to enforce its assertions. In this sense, practically, national constitutions are the superior authority, on the operational level.

Baquero Cruz, on his side, ironically cherished the ‘noble, consensual and politically correct’ nature of constitutional pluralism (Baquero Cruz 2016: 365) - with a view to protecting the authority of Union law as being ‘more fragile than one might think when reading a handbook on Union law’ (Baquero Cruz 2016: 356). He has consistently argued that the approach of Union law to its relationship with national law is ‘more productive and more ordered’ than national constitutional approaches, which contest the autonomy and primacy of Union law (Baquero Cruz 2016: 357), and which potentially damage the integrity of Union law (Baquero Cruz 2007: 18). He recently openly contended that ‘constitutional pluralism has serious problems both as a description (for things are not always as it claims they are) and as a prescription (because it does not offer an attractive and sustainable model for the relationship between the legal systems involved)’ (Baquero Cruz 2016: 369).

This last is in fact the point to be emphasized and unpacked here. All the classic discontents of constitutional pluralism were radically critical on all its claims, within their respective logics and in their logical order. Authors like Loughlin, Somek, Davies, Baquero Cruz, have always contested the basic tenets of the theory, and therefore the adequacy of the descriptive/empirical claims on pluralism on the nature of the competing claims for final constitutional authority in Europe. As we saw, they either contested the idea of a constitutional narrative for European integration itself, or in any case contested the openness of the debate on the *Kompetenz-Kompetenz*, and the possibility itself of heterarchy as a veritable constitutional principle replacing hierarchy.



This is perfectly legitimate, of course, precisely because we are talking of different paradigms for the understanding of the same phenomena.

But the nature of such critical views must be separated from other more recent critical remarks presented as new anomalies which the paradigm of constitutional pluralism would not be able to explain.

### 3. The first alleged anomaly: the unsustainability of constitutional pluralism in times of crisis

Today constitutional pluralism is facing different kinds of criticism. In paradigmatic terms, these new critical remarks are presented not as radical objections to the adequacy of the theory for the understanding of the relationship between EU law and national constitutional law. On the contrary, they are presented as a discussion on the ‘unsustainability’ of the theory in present times (Kelemen 2016), for we would face anomalies that could not be explained by the accepted paradigm, anomalies that are capable of pushing the paradigm into crisis.

The first source of such a criticism was the observation of the new legal dynamics prompted by the Euro-crisis of the last years.

The argument came in two different but interrelated fashions.

Authors like Kelemen argued that the *Gauweiler* case of 2015, issued by the European Court of Justice,<sup>xxviii</sup> definitely defied any possible constitutional pluralist stance. The case is one of the best known in recent times: the question was whether the European Central Bank had exceeded its mandate in previous years by announcing the Outright Monetary Transactions (OMT) bond-buying program in an effort to resolve the Eurozone crisis.<sup>xxix</sup> The reference for the preliminary ruling - the first ever - came once again from the *Bundesverfassungsgericht*, in early 2014;<sup>xxx</sup> but in Kelemen’s view, more than as a dialogical act of judicial deference between apical courts, it should be read as a ‘poisoned chalice’, a ‘vitriolic’ order where both ultra vires review, and identity review, were explicitly threatened, and a clear set of limitations to the acceptability of the OMT program according to German constitutional law was propounded (Kelemen 2016: 137). The threat was clear enough in the explicit statement that, should the Court of Justice not adhere to the restrictive interpretation suggested in the reference, an identity review assessed



‘exclusively according to German constitutional law’, and not ‘according to EU law’, could be performed, leading to disobedience towards the supranational judicial dicta and a declaration of inapplicability of the OMT program in Germany.<sup>xxxI</sup> As we know, the European Court of Justice did not acquiesce, and sent back a preliminary ruling explaining how the OMT program was sufficiently connected to the ECB’s monetary policy mandate as to fall within its proper competences, and, in general terms, reasserted its own claim of constitutional rule, its *Kompetenz-Kompetenz*.<sup>xxxII</sup> As a result, in June 2016 the *Bundesverfassungsgericht* finally held that if the conditions formulated by the Court of Justice of the European Union, in its judgment intended to limit the scope of the OMT program, were met, neither the complainants’ rights under German Basic Law nor the *Bundestag*’s overall budgetary responsibility were violated by the launch of the OMT program.<sup>xxxIII</sup> This holding was complemented, nonetheless, with deep concerns on both the theoretical arguments put forward by the Court of Justice and the factual assumption thereby implied.<sup>xxxIV</sup>

According to Kelemen, the OMT judicial saga is an example of how ‘the Court of Justice’s approach to the question of supremacy is straightforward and compelling’ (Kelemen 2016: 141), while the German approach is ‘fundamentally unsound’, based on casuistry, and ultimately unsustainable, since it could lead to ‘no uniform application of EU law and no coherent EU legal order’ (Kelemen 2016: 143). This criticism was also formulated by Fabbrini in terms of a necessary guarantee of the equality of Member States vis-à-vis EU law: ‘[i]n the end, in the compound order of the EU, the supremacy of EU law is the only guarantee that states will abide by the same rules, mutually depriving themselves of the power to discretionally pick and choose the rules of EU law they like or not’ (Fabbrini 2015: 1016). From these premises, Kelemen continued by saying that the ‘unsettled state of affairs’ left open by constitutional pluralism was fundamentally ‘unsustainable’. He acknowledged that Constitutional pluralists have embraced this unsettled state of affairs as the product of the prudent exercise of ‘constitutional tolerance’ by both levels of courts (the concept is obviously borrowed from Weiler 2003), since promoting judicial dialogue between the high courts of Europe is surely a good thing, as is avoiding destructive judicial conflicts where possible through tolerance and accommodation. He also acknowledged that, in fact, in the EU legal space apical courts have avoided conflicts, if not through mutual accommodation and fertilization (in the sense



predicated by Poiares Maduro 2007), at least by talking past one another and ignoring the points on which their jurisprudence actually conflicted (Kelemen 2016: 146; Sarmiento 2012). But in his opinion such stability of instability could not be a proper solution: ‘while direct conflict between EU and national constitutional orders has been avoided for a long time indeed, it was inevitable that such conflict would emerge eventually’ (Kelemen 2016: 146). With *Gauweiler*, the psychological ‘parallel play’ inherent in constitutional pluralism came to a close, especially given the magnitude of the interests at stake: the continued existence of the whole architecture built for the ‘survival of the Eurozone’ was at risk ((Kelemen 2016: 146, 147).

This last point links Kelemen’s arguments with the general remarks of another leading scholar, Daniel Sarmiento. In a recent essay - framed in the conversational style of a blog post but with his usual brilliance - he suggested that ‘academics that seemed quite comfortable with the pluralist narrative now seem quite uncomfortable with it’, including himself: the ‘pluralist movement’, in his view, might be ‘in retreat’, since it ‘dramatically crashed against the wall of reality’ (Sarmiento 2015).

What was the anomaly found by Sarmiento to challenge, in such a harsh way, the validity of the paradigm to which he himself adhered? In his view, pluralism provided ‘a nice theoretical backdrop’ to developments taking place, for example, during the EAW saga, when, as said, a large number of constitutional and supreme courts engaged in a lively debate about the constitutional limits of EU Law (Pollicino 2008): but the niceness of the theory was in its ‘harmless’ nature, since, ‘in the nineties and 2000’s’, when ‘pluralism was nice’, the questions at stake were of no existential importance. After all, questioning the European arrest warrant could neither destroy the EU, nor would it undermine the authority of the Court of Justice; the same could be said, in his view, to those very principled decisions from constitutional courts deciding on the constitutionality of reform Treaties, imposing strict conditions but, ultimately, green-lighting their ratification by Parliaments, as in cases such as *Maastrich-Urteil* and *Lissabon-Urteil* discussed above (Sarmiento 2015). Today, the situation would be different: supranational agreements ‘entered by Member States in the European Council, in the Eurogroup, the actions of the troika, etc., seemed untouchable for national courts that had been much more concerned in the past about much more irrelevant EU acts’, so that pluralism could no longer explain the way in which constitutional and supreme courts actually deal, in today’s context of fear,



with the authority of EU Law (Sarmiento 2015). Moreover, when pluralism came back to the game, in cases such as the challenge of the *Bundesverfassungsgericht* to the OMT program, it did so ‘with a force and consequences much more destructive than ever seen in the past’, and therefore in a tremendously dangerous way that makes it undesirable: ‘in the midst of the worse economic and political crisis the EU has gone through, it might seem too dangerous to play’ with pluralist stances, and therefore wise to go back to an unconditional version of supremacy (Sarmiento 2015).

All in all, considering both Kelemen’s and Sarmiento’s points, it seems to me that these new arguments against constitutional pluralism are flawed, but interesting and worthy of consideration. They embody the current zeitgeist in which constitutional pluralism as a paradigm is surely under scrutiny. They must be scrupulously analyzed to understand their differences compared to the classic criticism faced by constitutional pluralism that we already summarized.

In this sense, one can start by highlighting that Kelemen’s argument is strictly normative. In his manifesto, he actually acknowledges the descriptive validity of pluralism, or, in Poiares Maduro’s words, the validity of its empirical claim. In his words, ‘(c)onstitutional pluralism may describe the situation in the EU at least since the FCC’s *Maastricht* judgment’ (Kelemen 2016: 146), and ‘constitutional pluralists like Miguel Poiares Maduro are surely right in their empirical claim that today, given the unresolved impasse between the Court of Justice and national constitutional courts, constitutional pluralism ‘best describes the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them’ (Kelemen 2016: 145). He also acknowledges that mutual accommodation is sometimes reached openly, by judicial cross-fertilization, and sometimes merely through selective silences (Kelemen 2016: 146): and this is, again, part of classic teachings from comparative constitutional history on how ‘latest questions concerning sovereignty’ are treated (Foley 1989; Bin 2012; Bin 2014), and therefore the basis of constitutional pluralist thinking. Kelemen’s preoccupation is on another plane, and its criticism is therefore very different from Loughlin’s, Somek’s or Baquero Cruz’s: his idea is that pluralism is today, with cases such as *Gauweiler*, an unsustainable position, dangerous for the correct unfolding of European integration.



Having clarified his points in this way, it seems less odd that another author published, on the same issue as Kelemen, an article in which he reads the *Gauweiler* saga precisely in constitutional pluralist terms (Goldmann 2016). Matthias Goldmann convincingly argued that the OMT controversy is in fact constitutional pluralism in action: it allowed two repeat-players, such as the *Bundesverfassungsgericht* and the European Court of Justice, to unfold their traditional ultimate claims of authority; it allowed them, at the same time, to interact, through the first preliminary ruling ever issued by the German tribunal to the court, which is a detail not to be underestimated; it allowed - albeit in harsh terms - the dialogic research of a solution through the typical pluralist approach of ‘mutually assured discretion’ between institutions (Goldmann 2016: 128). In Goldmann’s view, this is desirable on the normative plane, but first of all it is true from a descriptive point of view, confirmed by a collective reading of the preliminary reference from Karlsruhe, the preliminary ruling from Luxembourg, and the final German decision. Without doubt, the style of the reference was questionable, and some grievances which were left untouched in the final decision are relevant: but the question was substantially positively solved at the time, and one must remember that mutual accommodation through judicial dialogue is a diachronic exercise, in which judgments talk for both present and future purposes (Faraguna 2016a). Now we know that, as of the summer of 2017, a new preliminary reference by the *Bundesverfassungsgericht* concerning the quantitative easing program has reached Luxembourg,<sup>xxxv</sup> it is easy to predict that those grievances left in *Gauweiler* will be part of a new judicial conversation and duly taken into account by the European Court of Justice.

In sum, the whole saga was constructed, or at least can be read, through the lexis of constitutional pluralism: a theory that predicts, after all, mutual institutional accommodation and the switch to the idea of pure legality to the basic principle of legitimacy (Halberstam 2010), which is visible in the case in the ‘mutually assured discretion’ between courts described by Goldmann and also in the Court of Justice’s deference to the expertise of the European Central Bank.<sup>xxxvi</sup>

Coming to Sarmiento’s thesis, it can be split in two parts. In his view, the new supranational legal construction addressing the Euro-crisis, of hybrid European and international nature (De Witte 2013; Kilpatrick 2014), stiffened the dynamics of the European constitutional legal space. ‘Agreements entered by Member States in the



European Council, in the Eurogroup, the actions of the troika, etc., seemed untouchable for national courts that had been much more concerned in the past about much more irrelevant EU acts' (Sarmiento 2015): in the era of the European Financial Stability Facility, the European Financial Stability Mechanism, the European Stability Mechanism, the Fiscal Compact, the various Memoranda of Understanding signed by Member States with the *Troika*, there would be no more room for pluralistic instances. National apical courts are worried by the potential economic consequences of their decisions – a classic problem in the theory of adjudication (Posner 1996; Dyevre 2008; Alviar García, Klare, Williams 2014) - and this would inhibit them from claims of constitutional authority. There would simply be no more pluralism: a descriptive claim. Moreover, when back in action, in cases such as *Gauweiler*, pluralism proved indeed dangerous and undesirable, with its ability to lead to 'consequences much more destructive than ever seen in the past' (Sarmiento 2015). Pluralism, according to Sarmiento as well, could be dangerous: in this sense, he adds a classic normative claim, similar to Kelemen's.

I have my own objections to the first descriptive claim made by Sarmiento. I do not think that the European constitutional space is today less pluralistic than before. Recent comparative research on the impact of Euro-crisis legal measures on national legal orders, as discussed above, has shown that, on the contrary, several national constitutional or supreme courts indeed exercised strong judicial review on austerity measures prompted by Euro-crisis law. Sarmiento claims that 'playing pluralism suddenly became a high-risk game and many national jurisdictions decided that it was time for obedience', and in particular this was the case of debtor countries involved in financial assistance programs. Sarmiento wrote that '(W)ith the exception of a few decisions of the Portuguese Constitutional Court, the other courts decided to put pluralism to rest' (Sarmiento 2015): the Portuguese case was surely the most remarkable in terms of the quantity of judicial decisions, and was the most debated,<sup>xxxvii</sup> but, as I have also argued elsewhere (Pierdominici 2016; Poiares Maduro, Frada, Pierdominici 2017), it is possible to detect similar exercises of constitutional claims of authority against austerity measures and their supranational sources in Greece,<sup>xxxviii</sup> Latvia,<sup>xxxix</sup> Romania,<sup>xl</sup> and Cyprus.<sup>xli</sup> In each of these countries, we have had in recent years one or more examples of judicial adjudication on austerity measure involving a review based on national constitutional principles of objectives set by supranational Euro-crisis law. The Portuguese example is well known, and quoted by



Sarmiento himself, as the *Tribunal Constitucional*, at least in some cases,<sup>XLII</sup> was explicit in elaborating such an interpretative move: in its view, supranational obligations set by Euro-crisis law are purely obligations of result, therefore leaving the State free to determine how that result is achieved, and in this sense the Tribunal is therefore free to conduct its review based only on national constitutional provisions, with neither tentative harmonization with EU law and its principles, nor the perceived need to raise a preliminary reference procedure (Poiares Maduro, Frada, Pierdominici 2017: 8 et seq.). This was a highly contestable interpretative move, already criticized by scholars (Kilpatrick 2014; Poiares Maduro, Frada, Pierdominici 2017); but is indeed a claim of ultimate constitutional authority vis-à-vis supranational norms, even of a radical nature. The aforementioned cases of other debtor countries such as Greece, Latvia, Romania, Cyprus replicated, albeit in a more implicit fashion, the same dynamics: national courts performed judicial reviews on austerity measures involving an interpretation of supranational norms according to national principles, and a ‘removal’ of those based on national constitutional arguments (Pierdominici 2016: 366 et seq.; Poiares Maduro, Frada, Pierdominici 2017: 29 et seq.). In this sense, pluralism is still alive and kicking, although in a new – maybe subtle – form, and in areas of law in which EU law is complemented by international law measures of a hybrid nature, and where the application of basic canons such as primacy is debatable.

The same can be said for the case of creditor countries, ‘on the other side of the economic spectrum’ as Sarmiento put it: he wrote that in those countries we had ‘hardly any major challenging rulings coming from the courts’ (Sarmiento 2015), but we all know of the important German cases on the constitutionality of the participation in Euro-crisis assistance programmes, much discussed in recent times,<sup>XLIII</sup> and we also recently learned of a new preliminary reference issued by the *Bundesverfassungsgericht* to Luxembourg, concerning the constitutionality of the participation in the quantitative easing programme.<sup>XLIV</sup> The German Tribunal, in this respect, has always been a repeat-player in the game of pluralism, and confirmed its role in this respect. But this was not an isolated example: the Estonian Supreme Court was also asked in 2012 to rule on the constitutionality of the European Stability Mechanism ratification by the country, given various concerns on the possible violation of principles of parliamentary democracy, and the budgetary powers of the *Riigikogu*.<sup>XLV</sup> It actually gave the green light to the programme, but did so only by posing conditions on the subscription of capital stock of anti-crisis stability mechanisms: in this



sense, in its exercise of the application of ‘proportionality to sovereignty’, the decision proposed a solution which was potentially transient in nature (Ginter 2013). Here doubts might be raised on the compatibility of logic; where debtor countries case law established on a case-by-case conditionality the constitutionality of austerity measures, and creditor countries caselaw established on a case-by-case conditionality finding participation to financial assistance constitutionally feasible (Poiaras Maduro, Frada, Pierdominici 2017: 29 et seq.). Therefore, I also continue to see from this side of the economic spectrum constitutional pluralist instances in action.

After all, it would be difficult to argue today that constitutional pluralist instances are disappearing, when, in the last twelve months or so, we had cases such as *Gauweiler*,<sup>XLVI</sup> the new German reference raised on the quantitative easing procedure,<sup>XLVII</sup> the new Danish Supreme Court’s decision of December 2016 rejecting the horizontal direct effect of EU law general principles by interpreting strictly the Danish Accession Act<sup>XLVIII</sup> (and running contrary to the Court of Justice preliminary ruling in the case and to its established caselaw ranging from *Mangold*<sup>XLIX</sup> to *Kücükdeveci*),<sup>L</sup> and the preliminary reference of the Italian Corte costituzionale in the Taricco saga, where the application of the counterlimits doctrine is suggested.<sup>L1</sup>

Given this factual background, I think that the core of Sarmiento’s general claim is therefore more normative than descriptive in nature; although in this sense, it is a perfectly legitimate claim, and well argued. Like Kelemen, he is now ultimately afraid of the inherent risks of constitutional pluralism, the magnitude of the questions that can be at stake in such cases where there is a judicialization of mega-politics (Hirschl 2008), such as in constitutional complaints over Euro-crisis measures (and many other areas which intersect EU nowadays’ expanded competences), and ultimately the possibility of an explosion of antagonistic constitutional claims.

In my view, this again leaves untouched the validity of the empirical claim of constitutional pluralism as a paradigm that can explain the coexistence of competing constitutional claims of authority in the Union, which are not fading at all. Sarmiento himself, in another more recent essay, suggested a more dialogical approach to mutual judicial accommodation in the European space in his comments on *Dansk Industri* and *Taricco*, by reutilizing jargon reminiscent of pluralism (Sarmiento 2017).



This makes me think that his major concern is with a specific normative aspect of constitutional pluralism, of a particular typology: is constitutional pluralism desirable, in the sense that it can really lead to a fruitful mutual accommodation of competing constitutional claims through a genuine inter-institutional dialogue? In the past, this probably happened. But today: are there any limits to it? Should we define exceptions vis-à-vis the potential danger inherent in the theory?

To reflect on these points, we firstly analyze the second current anomaly of the constitutional pluralist paradigm, in the next chapter.

#### **4. The second alleged anomaly: on the uses and abuses of constitutional pluralism**

Constitutional pluralism was successful and attractive - some critics say - as for a long time it put a measure of theoretical indirect pressure on the European Court of Justice and on other European institutions, but remained without direct practical consequences (Davies 2012: 270 et seq; Baquero Cruz 2016: 367). As said, some recent critics now propose a rethinking of the paradigm, for the potential dangerousness that it has increasingly acquired in times of judicialization of mega-politics such as the Euro-crisis treatment. We discussed the traits and the pitfalls of these new critical remarks. As also said, arguments like Kelemen's and Sarmiento's boil down to a question of a strongly normative nature: is constitutional pluralism desirable? Does it really promote mutual accommodation between competing constitutional claims, in one way or another, or does it conceal existential risks for the fruitful development of the law of integration? I tried to discuss the examples, put forward by the new critics, drawn from Euro-crisis law.

Nonetheless, I do not undervalue their normative question. I consider it profound, especially if we now turn our attention to another phenomenon recently suggested as a second anomaly for the pluralist paradigm: one is tempted to label it as a sort of Eastern abuse of constitutional pluralist jargon.

A brief contextualization is in order. Some constitutional pluralists, Walker in particular, focused their reflections on how the notions of constitutionality and constitutionalism are in transition vis-à-vis new social and political challenges of post-modernity, but, at the same time, in today's *Weltstunde des Verfassungsstaates*, in the global



hour of the constitutional state (Walker 2002: 1; Häberle 1992). Such a special political *zeitgeist* was explicitly exemplified by Walker, in 2002, with the example of Eastern and Central Europe countries, where ‘the post-Communist establishment of liberal democratic regimes has been accompanied by the gradual emergence of new constitutional settlements, and by vigorous debate over the precise model of constitutionalism the final form of these settlements should represent’ (Walker 2002: 1; Howard 1993; Elster 1993).

Fifteen years later, we have probably left *der Weltstunde des Verfassungsstaates* behind. We live in a period of crisis: as it has been argued, a multifaceted crisis, which is capable of highlighting our ‘economic, financial, fiscal, macroeconomic, and political structure weaknesses’ (Menendez 2013: 454). Eastern and Central Europe countries are today, in many instances, not examples of the unfolding of the global hour of constitutionalism, but major examples of the political crisis which is gripping Europe.<sup>LI</sup>

This is not the place in which to go in depth into these topics. Nonetheless, it is relevant to emphasize that some recriminations of Eastern and Central Europe Member States have been recently framed, in judicial controversies, in a jargon reminiscent of constitutional pluralism. We will discuss in here a couple of momentous episodes.

The first can be traced back to 2012, when the Czech Constitutional Court declared an EU act, namely a ruling of the Court of Justice, as *ultra vires*.<sup>LI</sup> In the *Landtová* case concerning an alleged discriminatory pension scheme in the Czech republic, that resulted from the dissolution of Czechoslovakia, the Czech Court wrongly argued that a European regulation, which governs co-ordination of pension systems among the Member States, may not be applied to an entirely specific situation of a dissolution of the Czechoslovak federation, and to consequences stemming thereof (Komárek 2012; Bobek 2013: 226). The consequence was the performance of an *ultra vires* review of the Court of Justice preliminary ruling issued in the same case<sup>LIV</sup> on the basis of national constitutional norms, and its disapplication. The saga started a veritable exercise of mutual inter-institutional accommodation: a preliminary reference was sent to Luxembourg by the Czech Supreme Administrative Court, in light of a previous judgment of the local constitutional court issued without having asked preliminary reference to the Court of Justice, although its ruling necessarily involved the interpretation of the relevant Regulation no. 1408/71; the Czech Government submitted observations which openly admitted that the CCC’s case law was contrary to EU law; the CJEU even tried to ‘soften’ the consequences of its ruling by



stating that the special increment which was deemed discriminatory could be maintained, but should be paid to Slovak nationals as well as Czech, and to all EU citizens in general.<sup>LV</sup>

Against this mundane backdrop, the situation inconceivably deteriorated. The Czech Constitutional Court - whose previous interpretation was marred by Czech Government observations – and the Court of Justice, ultimately the Supreme Administrative Court in a final judgment, tried to have a final say on the topic. Having not submitted a preliminary reference when this was possible, the Czech Constitutional Court then asked to submit a letter to the European Court of Justice, in which they provided an explanation of their caselaw, as it had not been properly defended by its Government before the Court. The Luxembourg Registry, however, sent the letter back, stating that ‘according to what is established practice, the members of the CJEU do not exchange correspondence with third parties concerning the cases submitted to the CJEU’ (Komárek 2012). This somewhat predictable response led the Czech Court, incredibly, to lament the breach of its own guarantees of a fair trial (!); and, on the substance, to consider the Court of Justice’s initiative to apply free movement rules to legal arrangements following from the dissolution of Czechoslovakia as unconstitutional, and therefore to consider the *Landtová* preliminary ruling as an act exceeding the competences transferred to the EU by virtue of Article 10a of the Czech Constitution, and thus an ultra vires act.

All in all, the Czech Constitutional Court was an exercise of ‘national pride and prejudice’ (Baquero Cruz 2016: 367), fed by the national sensitivity of the case at hand concerning the post Czechoslovak dissolution agreements, and plain ignorance of EU law, at least in procedural terms on how preliminary references work before the Court of Justice. It is important to note that such an exercise was undertaken by ‘closely following the steps and terminology’ of the German *Bundesverfassungsgericht* (Baquero Cruz 2016: 367), in deeming an act of the Union ultra vires as allegedly exceeding the scope of transferred powers as per the original paradigm, even elaborately referring to its rulings such as *Solange* and *Maastricht-Urteil*. It did so, in any case, by selectively overlooking the *Bundesverfassungsgericht* when more relevant for the case at hand, for instance, by forgetting that its much discussed *Honeywell* jurisprudence<sup>LVI</sup> not only preached *Europafreundlichkeit*, but limited the proclamation of ultra vires act to ‘drastic’, ‘manifest, consistent and grievous’ cases, with a ‘right to a tolerance of error’ by the Court of Justice and the condition of a previous opportunity for Luxembourg to interpret the issue in question



(Zbiřal 2012: 12 et seq.). This was not the case in *Landtová*, where the German jargon was merely instrumentally employed. The Czech Court, therefore, instrumentally used the German pluralist approach in a case in which its own interpretation of EU law was plainly wrong, and by wrongly translating the German insights in its jurisprudence.

The second relevant episode is more recent. It concerns an even more problematic case, that of contemporary Hungary. It is the last step of the building up of the country to the infringement of values enshrined in Art. 2 TEU. After the anti-migrant referendum of October 2016, and the failed attempt to reform the Constitution of November 2016, last December Decision no. 22/2016 of the Hungarian Constitutional Court was published.<sup>LVII</sup> The case concerned European Council Decision 2015/1601, of 22 September 2015, which established provisional measures in the area of international protection for the benefit of Italy and Greece. As well known, the Council decision introduced a quota system for the relocation of migrants: the supranational order was for the transfer of 1294 asylum seekers to Hungary. This was contested by the national government, which has a political platform of strong opposition to migration, very much focused on national sovereignty. The case was initiated by the Hungarian Commissioner for Fundamental Rights (a sort of ombudsman), sympathetic with the government, and brought before the Constitutional Court: the court itself, as known, is composed of members all appointed by the same parliamentary majority, supportive of the government, as made possible by the recent reform of the appointment procedure in 2011 (Kelemen 2017).

The questions brought to the Court asked whether the collective transfer of migrants implied in Council decision 2015/1601 would violate the prohibition on the collective expulsion of foreigners provided by the new Hungarian Constitution of 2011; whether state bodies and institutions are entitled or obliged to implement EU measures which can be in conflict with fundamental rights protected by the constitution; whether there are constitutional limitations, based on the kind of act, to the duty to fulfill the obligations stemming from the European Treaties through the 'joint exercise of competences' with other EU member states and EU institutions; whether there are constitutional limitations under new local constitutional law for national bodies, agencies, and institutions, within the legal framework of the EU, to facilitate the relocation of a large group of foreigners legally staying in one of the Members States without their expressed or implied consent and without personalized and objective criteria applied during their selection.



The case was therefore framed in the double form of a test of the respect of fundamental rights of relocated migrants and asylum seekers, and a fine tuning of the relationship between EU law obligations on national bodies, agencies, and institutions and alleged national constitutional limits. The concrete questions linked to the rights of the migrants (on the interpretation of Article XIV of the Fundamental Law) were separated from the others (on the interpretation of its Article E), and the Court decided not to examine them:<sup>LVIII</sup> after all, as emphasized by Halmai, the only rights which needed defense in the case were ‘those of the migrants and refugees, but their rights will be ignored if Hungary exempts from the quota decision, and any other solution of the refugee and migrant crisis’ (Halmai 2017a; his arguments were then developed in Halmai 2017b).

Thus, unsurprisingly, the substance of the case was reduced to an abstract review of the unwelcome ‘joint exercise of competences’ of Hungary with EU. And in light of the provisions of the new Fundamental Law of 2011, the Court developed a whole theory of limits to such a joint exercise, and to the primacy of EU law and obligations stemming thereof in the Hungarian legal order. Compared to the Czech *Landtová* case, the attempt here was similar, but even more refined. The Court made, in Decision n. 22/2016, substantial reference to comparative constitutional law<sup>LIX</sup> and even to the European Court of Human Rights’ jurisprudence;<sup>LX</sup> here again, it focused in particular on the German teachings coming from the *Bundesverfassungsgericht* caselaw, widely quoted in specific details (a dissenting opinion even criticises the Court for the rubber-stamp copy of a sentence from a German judgment!).<sup>LXI</sup>

Therefore, in this way, and by ‘relying on the German Federal Constitutional Court’s methods of constitutional review of EU law’ (Halmai 2017a), a whole theory of limitations to the primacy of EU law once again developed, ranging from the possibility of a fundamental rights review to an ultra vires review, composed in turn of a sovereignty review and an identity review, based on a unilateral appropriation of Art. 4(2) TEU interpretation. Each of the components of such a theoretical construction had been criticized by the original commentators: as said, the idea of an ‘ultima ratio defense’ of fundamental rights review was in the case at hand completely absurd, and in fact, contrary to the German original model, for the reference was meant ‘to lower the standards of fundamental rights protection’ and not to promote higher standards (Halmai 2017a). The idea of a veritable identity review was no less detached from reality, because although what



should belong to such a concept is debated by scholars (Besselink 2010; von Bogdandy, Schill 2011; Guastafarro 2012; Saiz Arnaiz, Alcobarro Llivina 2013; Faraguna 2016b) it was difficult to see what core interests (e.g. the form of the state,<sup>LXII</sup> its secular nature,<sup>LXIII</sup> the protection of national language,<sup>LXIV</sup> or fundamental budgetary decisions)<sup>LXV</sup> would be at stake in the case of a few hundred migrants relocated for their own interest. Finally, the idea of a sovereignty review, although in line with other constitutional courts' jurisprudence, is perilously similar to the Hungarian Government's political portfolio.

And in fact, Decision no. 22/2016 of the Hungarian Constitutional Court has been denounced as a plain political decision (Halmai 2017a; Halmai 2017b), in which a petition reduced to abstract questions was answered in an abstract way<sup>LXVI</sup> with the essential aim of putting in place the possibility of a future *ultra vires* review of EU law. Claiming that transposing the quota system into national law conflicted with legitimate interests and principles, entrenched in the Hungarian national constitutional identity, was a very different way of framing a constitutional claim of authority from that of the past, that of the fruitful mutual accommodation of the 1970s and 1980s. It was phrased by using, in a refined way, constitutional pluralist jargon specially adapted from the German example. But it did so to promote a purely political constitutional claim of authority, not linked to the theory of the state vis-à-vis supranational organization, but simply to the *form* of the state, given the terrible transformation Hungary is undertaking. Ultimately, the practical aim was simply to derogate to Hungary's obligation under EU law. It was, in this sense, a plain 'abuse of constitutional pluralism' (Halmai 2017b).

It is here that we see the real danger of constitutional pluralism from a normative point of view. As with many other 'constitutional ideas', it can circulate, 'migrate' (Choudhry 2006), and be transplanted (Watson 1974; Tushnet 1999; Graziadei 2009; Shaffer 2012), especially today in an era of globalization of law. But any migration of constitutional ideas can be genuine and fruitful, or rather forced and instrumental in nature; and comparative transplants, as well known, can be successful or not depending on the recipient environment. When the first organic discussions on the theory started, critics suggested that constitutional pluralism could become, and remain, one of those nice theories confined to certain academic communities, often in Anglophone circles.<sup>LXVII</sup> Our analysis proves that this was not the case: and that in the current globalized legal space, and given



the influence of German public law in continental Europe, constitutional pluralist concepts percolated.

As already noted (Baquero Cruz 2016: 366), in its recent order in the *Gauweiler* saga, the *Bundesverfassungsgericht* referred to the judgments of at least ten constitutional courts of European Member States which have in the last years followed, with some variations, its pluralist approach to the relationship between Union law and State constitutional law.<sup>LXVIII</sup> From our analysis, one can notice that today's abusive uses of the pluralist jargon, such as in the Czech Republic in *Landtová*, or in Hungary with Decision no. 22/2016, can be nicely (and always better) packaged in the form of civilized judgments, for the accommodation of mutual claims, with the use or misuse of extra-systemic hermeneutic parameters and lip service to comparative judicial precedents. But from our analysis it is also clear that, notwithstanding, the Czech and Hungarian cases analyzed are cases of abuse of constitutional pluralism and its jargon for pure and immediate political purposes: as said, *Landtová* was rejected by commentators as an exercise of 'national pride and prejudice' (Baquero Cruz 2016: 367), and the Constitutional Court's judges taunted as if 'giving *Solange* into their hands' was like letting 'children play with matches' (Komárek 2012); Decision no. 22/2016 in this respect was even more worrying because it was an episode of voluntary abuse (Halmai 2017b), and even better crafted in formal and theoretical terms.

There was no dialogue there, not even a *hidden* dialogue, in search of some consistency (Martinico, Fontanelli 2008; Fontanelli, Martinico 2010), but a plain and abusive disobedience to the canons of EU law, for purely instrumental purposes. This shows that the problem for the paradigmatic value of constitutional pluralism today is not therefore the more or less muscular use of genuine pluralistic instances, which, as exemplified by *Gauweiler*, can eventually find accommodation,<sup>LXIX</sup> but a fully distorted use of constitutional pluralism and its jargon, the heterogenesis of its intents, and the unintended distorted consequences that such an abuse can create.

Albeit paradoxically, this still reinforces the descriptive/empirical claim of constitutional pluralism; however, this poses a renewed challenge for constitutional pluralism theorists, to define the proper rules of this game of mutual accommodation, in *interpretative/participative* terms, so that uses and abuses of constitutional pluralism can be detected, diversified, and differentially and properly treated.



## 5. Some concluding remarks

In the paper, we have tried to discuss the current value of EU constitutional pluralism as a paradigm, in times of crisis. We briefly sketched the origins of the theory and its development, its basic tenets, and also historical criticism it has met. We then passed to examine the current criticism constitutional pluralism is facing, precisely in these times of crisis: and we discussed the essentially different strands of such criticism which are indeed linked to the Euro-crisis and to Central and Eastern Europe political scenarios.

All in all, the argument proposed is that, fortunately or unfortunately, constitutional pluralism is the theory that is best able to describe the current state of affairs of EU constitutionalism. It retains, therefore, its strong empirical claim. It depicts the European phenomenon of a plurality of constitutional sources and claims of ultimate authority, and the inherent potential constitutional conflicts that are not hierarchically regulated; it also represents the discursive practice between supranational and national judicial authorities, aimed, when pluralism is properly used, at reducing the risks of constitutional conflicts, and accommodating their respective claims.

In this sense, constitutional pluralism can be considered as a paradigm because it is a valid *theory*: it is the formulation and definition of the general traits and principles of a certain area of practice, as well as all the activities logically deduced from those traits and principles. It is therefore a valid set of cognitive statements aimed at information and knowledge on what it is; and useful for predictions - in hypothetical terms - on what can be in the future.

The current debate that I tried to trace is instead on the normative plane, which is different. Is constitutional pluralism desirable in the EU? Is it useful? Is it dangerous? Should the question of ultimate authority really be left open in the EU constitutional space? The normative claim of pluralism has been strongly questioned in the recent times of crisis.

In this sense, it is indeed questionable if constitutional pluralism is a *doctrine* - in a different sense compared to the concept of *theory* (Modugno 2014: 2; Posner 1997). Is pluralism articulated enough to be prescriptive, and not merely descriptive? Does it clearly prescribe, to operate or interpret in a certain way rather than another? Does it really



encapsulate a *sollen*, and not merely a *sein*? Does it do it in practical terms for the legal operators of the EU constitutional space?

One is tempted to answer, drawing from the wise words of Weiler,<sup>LXX</sup> that constitutional pluralism can be considered to do so provided that it shapes a reality in which there is a commonality of shared values in place, ordered in a hierarchical sense, and where the fruitful heterarchy is in the institutions and the voices which are called to interpret those values.<sup>LXXI</sup> Hierarchy of shared values, heterarchy of voices and institutions: these were the rules of the game when constitutional pluralism was proved to work, this is the way to distinguish uses and abuses of constitutional pluralism.

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<sup>I</sup> BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß.

<sup>II</sup> BVerfGE 73, 339 2 BvR 197/83 Solange II- Beschluß.

<sup>III</sup> In the words of the German scholar Georg Ress '(Q)uesta giurisprudenza ha contribuito in maniera essenziale alla formazione degli standards democratici e dello Stato di diritto della potestà normativa della UE ed è un esempio di come i singoli Stati membri possono prendere parte all'interpretazione del diritto comunitario in un processo significativo di reciproca influenza': see Ress 1999: 146.

<sup>IV</sup> Corte costituzionale no. 183/1973.

<sup>V</sup> Corte costituzionale no. 232/1975.

<sup>VI</sup> Corte costituzionale no. 170/1984.

<sup>VII</sup> Corte costituzionale no. 232/1989.

<sup>VIII</sup> England and Wales Court of Appeal (Civil Division) Decision *Macarthy's Ltd v Smith (No.2)* [1980] EWCA Civ 7 (17 April 1980).

<sup>IX</sup> United Kingdom House of Lords Decision *R v Secretary of State for Transport ex p Factortame Ltd (Interim Relief Order)* [1990] UKHL 7 (26 July 1990).

<sup>X</sup> Conseil constitutionnel Décision 92-308 DC, 9 April 1992 (I), *Traité sur l'Union européenne (I)*, JORF, 11 April 1992, 5354.

<sup>XI</sup> Spanish Tribunal Constitucional, *Declaración 1/1992*, 1 July 1992 (Treaty of Maastricht).

<sup>XII</sup> Danish Supreme Court (Højesteret), judgment of 6 April 1998, *Carlsen v. Rasmussen*.

<sup>XIII</sup> See the words of J. Baquero Cruz in *Avbelj and Komárek* 2008, 9: '(I)t was paradigmatic, it was a piece of dogmatics with a well developed reasoning linked to a theory of the state'.

<sup>XIV</sup> In the specific German case: BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß, BVerfGE 73, 339 2 BvR 197/83 Solange II- Beschluß.

<sup>XV</sup> In the specific Italian case: Corte costituzionale no. 183/1973, 170/1984, 232/1989, 509/1995.

<sup>XVI</sup> 'La superiorità del modello costituzionale statale sul processo integrativo', in the words of Martinico 2012: 41.

<sup>XVII</sup> Arrêt du 5 février 1963, *Van Gend en Loos / Administratie der Belastingen* (26/62, Rec. 1963 p. 3); Arrêt du 15 juillet 1964, *Costa / E.N.E.L.* (6-64, Rec. 1964 p. 1141); Arrêt du 9 mars 1978, *Amministrazione delle finanze dello Stato / Simmenthal* (106/77, Rec. 1978 p. 629).

<sup>XVIII</sup> Arrêt du 3 septembre 2008, *Kadi et Al Barakaat International Foundation / Conseil et Commission* (C-402/05 P et C-415/05 P, Rec. 2008 p. I-6351) ECLI:EU:C:2008:461.

<sup>XIX</sup> BVerfG, Order of the Second Senate of 06 July 2010 - 2 BvR 2661/06.

<sup>XX</sup> BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08.

<sup>XXI</sup> Arrêt du 26 février 2013, *Åkerberg Fransson* (C-617/10) ECLI:EU:C:2013:105; Arrêt du 6 mars 2014, *Siragusa* (C-206/13) ECLI:EU:C:2014:126.

<sup>XXII</sup> BVerfG, Urt. 24.4.2013 – 1 BvR 1215/07: see in particular paragraphs 90-91, which read 'It follows



directly from the wording of Art. 51 sec. 2 EUCFR and from Art. 6 sec. 1 of the Treaty on European Union that the Charter does not extend the field of application of Union law beyond the competences of the Union, and that it neither establishes new powers or tasks for the Union, nor modifies the powers and tasks defined in the Treaties (cf. also ECJ, judgment of 15 November 2011, C-256/11, Dereci et al., para. 71; ECJ, judgment of 8 November 2012, C-40/11, Iida, para. 78; ECJ, judgment of 27 November 2012, C-370/12, Pringle, paras. 179 and 180). Accordingly, for the questions that were raised, and which only concern German fundamental rights, the European Court of Justice is not the lawful judge according to Art. 101 sec. 1 GG. The ECJ's decision in the case Åkerberg Fransson (ECJ, judgment of 26 February 2013, C-617/10) does not change this conclusion. As part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice (cf. BVerfGE 126, 286 <307>), this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the Member States (Art. 23 sec. 1 sentence 1 GG) in a way that questioned the identity of the Basic Law's constitutional order (cf. BVerfGE 89, 155 <188>; 123, 267 <353 and 354>; 125, 260 <324>; 126, 286 <302 et seq.>; 129, 78 <100>). The decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR. Rather, the European Court of Justice itself expressly states in this decision that the European fundamental rights under the Charter are "applicable in all situations governed by European Union law, but not outside such situations" (ECJ, judgment of 26 February 2013, C-617/10, para. 19).

<sup>xxiii</sup> See for instance the Polish case Trybunał Konstytucyjny (Polish Constitutional Court), ruling 27 April 2005 (P 1/05), the German case BVerfG 2 BvR 2236/04 (Zweiter Senat) - Beschluss vom 24. November 2004, the Cypriot case Cyprus Supreme Court, ruling 7 November 2005 (294/2005), all discussed by Pollicino 2008.

<sup>xxiv</sup> And see Weiler 2012: 13, where he admits that his theories 'can easily fit with the vernacular of constitutional pluralism'.

<sup>xxv</sup> And, in paradigmatic terms, this is contested by those who do not agree on such a theoretical premise: see Loughlin 2014: 24-25.

<sup>xxvi</sup> Recently even by the President of the Court of Justice of the European Union: see Lenaerts 2015.

<sup>xxvii</sup> Somek 2012: 346 et seq.: 'If national courts were to let Union law trump constitutional law, they would clearly act as agents of the supranational system and thereby sever their ties with the national system. Viewed from the national perspective, again, they would not act as courts and produce legally irrelevant statements'; these remarks are coupled with strong critical arguments against the normative claims of constitutional pluralism in subsequent Somek 2014.

<sup>xxviii</sup> Arrêt du 16 juin 2015, Gauweiler e.a. (C-62/14) ECLI:EU:C:2015:400.

<sup>xxix</sup> European Central Bank Press Release, Technical Features of Outright Monetary Transaction, 6 September 2012.

<sup>xxx</sup> BVerfG, Case No. 2 BvR 2728/13, section B.II.4, on the 'Possibility of an Interpretation in Conformity With Union Law': see on this Schneider 2014.

<sup>xxxi</sup> BVerfG, Case No. 2 BvR 2728/13, section D, paragraphs 102-103.

<sup>xxxii</sup> Arrêt du 16 juin 2015, Gauweiler e.a. (C-62/14) ECLI:EU:C:2015:400.

<sup>xxxiii</sup> BVerfG, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13.

<sup>xxxiv</sup> Ivi, para. 181 et seq.: 'Nevertheless, the manner in which the law was interpreted and applied in the Judgment of 16 June 2015 meets with serious objections on the part of the Senate in respect of the establishment of the facts of the case (aa), the principle of conferral (bb), and the judicial review of acts of the European Central Bank that relate to the definition of its mandate (cc)'.

<sup>xxxv</sup> C-493/17 en cours, Weiss e.a. (C-493/17).

<sup>xxxvi</sup> Arrêt du 16 juin 2015, Gauweiler e.a. (C-62/14) ECLI:EU:C:2015:400, especially at para. 55 et seq. and 79 et seq.

<sup>xxxvii</sup> See, in English, the recent special issue published by *E-pública Revista Eletrônica de Direito Público*, vol. 4 no. 1 Maio 2017, devoted to 'A jurisprudência da crise do Tribunal Constitucional Português'; and in Portuguese Almeida Ribeiro and Pereira Coutinho 2014.

<sup>xxxviii</sup> Decision no. 668/2012 of the Plenum of the Council of State, 20 February 2012, available at the website <http://www.dsnet.gr/Epikairothta/Nomologia/668.htm>. See the report by Marketou Afroditi I., Dekastros Michail, 2014, *Greece*, available at the website <http://eurocrisislaw.eu.eu/greece>, especially sub V.4.



XXXIX Judgment of the Constitutional Court of Latvia in the case no. 2009-43-01, 21 December 2009, available at the website <http://socialprotection-humanrights.org/wp-content/uploads/2015/06/Latvia-2009-Constitutional-Court-Elders-Rights-Judgment.pdf>.

XI. See the report by Vita Viorica, 2014, *Romania*, available at the website <http://eurocrisisaw.eu/romania/>, and the list of the Romanian Constitutional Court thereby provided, including cases no. 1414/2009, 1415/2009, 872/2010 e 873/2010 e 874/2010, 1655/2010, 1658/2010, 383/2011, 574/2011, 575/2011, 765/2011, 1533/2011; see also Zegrean and Toader 2013.

XLI Maria Koutselini-Ioannidou et al. v. the Republic, 7 October 2014, available at the website <http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/mero>; Law on pensions of state officials (General Principles) of 2011, N. 88(I)/2011, available at the website [http://www.cylaw.org/nomoi/arith/2011\\_1\\_88.pdf](http://www.cylaw.org/nomoi/arith/2011_1_88.pdf).

XLII For instance in the well known *Acoș rda* o no 574/2014, 14 August 2014, available at the website <http://www.tribunalconstitucional.pt/tc/acordaos/20140574.html>.

XLIII BVerfG, Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13 on the ratification of the European Stability Mechanism; BVerfG, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13 on the OMT program.

XLIV C-493/17 en cours, Weiss e.a. (C-493/17).

XLV Case 3-4-1-6-12 of 12 July 2012, on which see Ginter 2013, and Evas 2016, chapter eight.

XLVI BVerfG, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13.

XLVII C-493/17 en cours, Weiss e.a. (C-493/17).

XLVIII Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v The estate left by A.

XLIX Arrêt du 22 novembre 2005, Mangold (C-144/04, Rec. 2005 p. I-9981) ECLI:EU:C:2005:709.

L Arrêt du 19 janvier 2010, Küçükdeveci (C-555/07, Rec. 2010 p. I-365) ECLI:EU:C:2010:21.

LI Corte costituzionale, ordinanza no. 24/2017; C-42/17 en cours, M.A.S. et M.B. (C-42/17).

LII See the systemic threats to the rule of law detected by EU institutions in the scope of the so called new EU Framework to strengthen the Rule of Law: [http://ec.europa.eu/justice/effective-justice/rule-of-law/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm), and Pech and Scheppele 2017.

LIII Czech Constitutional Court, judgment of 31 January 2012, Pl. U S 5/12: see on this Zbiřal 2012.

LIV Arrêt du 22 juin 2011, Landtová (C-399/09, Rec. 2011 p. I-5573) ECLI:EU:C:2011:415.

LV Ivi, para. 43 and 47: 'the documents before the Court show[ed] incontrovertibly that the judgment discriminate[d], on the ground of nationality, between Czech nationals and the nationals of other Member States'; 'no evidence capable of justifying such discrimination has been adduced before the Court'.

LVI BVerfG, Order of the Second Senate of 06 July 2010 - 2 BvR 2661/06.

LVII Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law of 30 November 2016, available in the official English translation at the website [http://hunconcourt.hu/letoltesek/en\\_22\\_2016.pdf](http://hunconcourt.hu/letoltesek/en_22_2016.pdf) (last access 29th August 2017).

LVIII Decision 22/2016. (XII. 5.) AB, para. 27-29.

LIX Decision 22/2016. (XII. 5.) AB, para. 34-46.

LX Ibidem, par 47: 'The Constitutional Court underlines that according to Article I (1) of the Fundamental Law, it is the primary obligation of the State to protect the inviolable and inalienable fundamental rights of MAN. As the protection of fundamental rights is a primary obligation of the State, it shall precede the enforcement of everything else. Accordingly, the Member State's liability cannot be exempted at the European Court of Human Rights either, by making a reference to implementing the law of the EU (Cp. *Matthews v. United Kingdom*, 18 February 1999)'.

LXI Ibidem, par. 106: 'This is why I consider the following statement made in the second next paragraph of the majority decision to be unacceptable: "The protection of constitutional selfidentity may be raised in the cases having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility". This statement has been taken without examination from the decision of the German Federal Constitutional Court quoted earlier in the reasoning (BverfG, 2 BvE 2/08, 30 June 2009), in the absence of any argument based on the Fundamental Law of Hungary'.

LXII Arrêt du 22 décembre 2010, Sayn-Wittgenstein (C-208/09, Rec. 2010 p. I-13693) ECLI:EU:C:2010:806.

LXIII Conseil Constitutionnel, décision n° 2008-564 DC -19 juin 2008.

LXIV Arrêt du 24 mai 2011, Commission / Luxembourg (C-51/08, Rec. 2011 p. I-4231) ECLI:EU:C:2011:336; Arrêt du 16 avril 2013, Las (C-202/11) ECLI:EU:C:2013:239.



LXV BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08: see in particular its para. 252-260, where a list is elaborated: 'decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)'.

LXVI Decision 22/2016. (XII. 5.) AB, para. 68-69: 'The petitioner's question related to the transferring of third country nationals in the context of the European Union can be answered by the Constitutional Court in the framework of this procedure aimed at the interpretation of the Fundamental Law as follows. If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercising of competences based on Article E) (2) of the Fundamental Law, the Constitutional Court may examine, on the basis of a relevant petition, in the course of exercising its competences, the existence of the alleged violation'.

LXVII See J. Baquero Cruz in Avbelj and Komárek 2008: 13-14: 'I wonder whether constitutional pluralism is really dominant in the academia. Maybe not. Many Community lawyers do not even know that these issues are being discussed. They do not care. And others do not dare to criticise them. There are two discourses talking past each other. In French journals, for example, you never see articles about this. In German journals, *Europarecht*, sometimes, but it is not mainstream. In the College of Europe in Bruges, I do not think students are taught about these things. There is a disconnection'.

LXVIII BVerfG, Case No. 2 BvR 2728/13, par. 30.

LXIX This was also the idea propounded by M. Cartabia in her lecture *Europe Today: Bridges and Walls* at the European Law Institute - 2016 Annual Conference and General Assembly in Ferrara, 7th September 2016, available at the website [https://boa.unimib.it/retrieve/handle/10281/145747/207020/Cartabia%20ELI%20Lecture%20v.1.0\\_final.pdf](https://boa.unimib.it/retrieve/handle/10281/145747/207020/Cartabia%20ELI%20Lecture%20v.1.0_final.pdf), 10: 'everything considered, Gauweiler was a remarkable and constructive example of judicial cooperation, concerning a very sensitive and crucial issue which is at the core of the present European agenda. It was the practical implementation of the idea of *Verfassungsgerichtsverbund*, elaborated years ago by Andreas Vosskuhle, the current chief justice of the BVerfG. Indeed, it was an example of successful judicial dialogue; although – as it has been noticed - surely not a gentlemen's conversation'.

LXX Weiler 2012, 17: 'I think words simply lose their meaning if one tries to describe a legal political order as constitutional when it does not have both the pluralist and hierarchical combined- though one can have endless debates on the appropriate dosages of each'.

LXXI In the various ways, in constant definition, sketched by Poireres Maduro 2007; Kumm 2005; Halberstam 2010.

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**The Single Market and Synchronized Mechanisms for  
the Exercise of Administrative Functions: Converging  
Pathways or New Pathways for Integration? The Case  
of the European Banking Union**

by

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## Abstract

The EBU represents a clear investment in administrative integration with clear implications for the constitutional features of the EU. This paper aims to give an analysis of the administrative arrangements, through which the functions of supervision and resolution are affecting the single financial market. This case study is very interesting because these functions represent a genuine novelty in the history of financial integration since they are pre-ordained to a specific public interest: financial stability. Particularly, they cause a shift in the decision gradient from the technical to the political, as market integrity is less and less the key interest compared to financial stability. However, this wider discretionary power is not adequately counteracted by checks and balances in favour of accountability. As a result, the EBU makes a new contribution to the well-known ‘fragmentation of the executive power’ of the EU by introducing a new governance tool positioned between the Communitarian and Intergovernmental Method, but its development is still full of uncertainties given that constitutional equilibrium is far from being definitively reached.

## Key-words

European Banking Union, financial market, financial stability, EU integration



## 1. Introduction

In this particularly delicate stage of EU history there are increasing initiatives that attempt to establish new governance mechanisms with the purpose of strengthening the effective functioning of European institutions and policies. Primarily political difficulties contend with organizational engineering solutions that appear to be trying out new ways to strengthen reasons for unity. The European Banking Union (EBU) is a paradigmatic example that lends itself to analyzing such choices.

Many early comments dedicated to the EBU stressed the originality of this solution, opining that it represented a new stage of administrative European integration (Clarich 2013; Laguna de Paz 2014; Kern 2015). The EBU is a powerful investment in administrative integration (E. Chiti 2013), whose principal innovation is to create complex operating mechanisms based on a combination of different techniques (Ibrido 2017, 205-216). For instance, exclusivity, direction, coordination and cooperation together define lines of transmission in the exercise of administrative functions for supervising and resolving credit institutions, which allow national and European administrative structures to act in a synchronized manner.<sup>1</sup> Not surprisingly, when we speak of the EBU, reference is made to system contexts and to operations portrayed as operating mechanisms, where ordinary operating techniques of administration are not distinct but assembled to yield a single definition of administrative issues. There is no simplistic European-type predominance of national administrations, nor is there any direct reliance on national authorities to apply the rules, decisions and measures agreed on at the European level. The boundaries between the two classic models of administration, a centralized one and a decentralized, indirect one – more or less hardened, have become decidedly fuzzier (Avbelj 2015, 792-795).

This work focuses on verifying which elements this solution adds to the already varied and imaginative outcomes to which the EU has accustomed us. Is the EBU the new tribute paid to the EU's fervent engineering innovation? Are we in the presence of a new kind of public power? What is added by this new stage of development in organizational models? What constitutional implications are involved? And, most importantly, what is the relationship with the internal market, and especially the credit market?



Answering these questions means checking if the new solution simply establishes a line of continuity with more traditional solutions, or if it marks, if not a discontinuity, a change. In order for this work to be at all useful, Section 2 will deal with the causes that led to the establishment of the EBU; Section 3 the links between the EBU and the internal market, especially (in Section 4) the regulation of State aid in troubleshooting procedures; Section 5, the extent to which financial stability in the single market involves the public interest; Section 6, issues concerning accountability; and Section 7, concluding remarks.

## 2. Origin of the EBU

When in 2012 the EBU project was launched with a communication from the European Commission,<sup>11</sup> the EU had already been hit by the financial crisis, and had already taken steps to define its new supervisory financial system (ESFS), based on the De Larosière report. What followed was that the EBU embodied a reaction that, on the one hand, signalled the inadequacy of the tools designed until then, and, on the other, grappled with more specific problems, especially regarding Eurozone stability, greatly threatened by the precarious control of national budgets.

Starting with the first point, namely the inadequacy of the tools designed up to 2012, this means emphasizing that the EBU intended to interrupt the hitherto firm principle of home country control, which established rule sharing at the European level, leaving the Member States with the task of ensuring the supervision of financial institutions (Schoenmaker 2012). Of course, the *pre*-EBU scenario was not the result of an unchanged status of decades, but was in turn the result of several phases, all centred on bringing about a single internal market (Lamandini 2003). The first phase was characterized by the jumble of classic tools through which the EU reinforced its integration through law over the years, namely the case law of the Court of Justice of the European Union (CJEU) and the legislative technique of harmonisation (Bartl 2015). With these tools the EU simply removed the legal and administrative obstacles that prevented the completion of the single internal market in the financial sector. It defined an operating system whose administrative machinery of government remained largely national, albeit increasingly conditioned by European rules.



The establishment of European administrative machinery with a supportive, coordinating function was unsuccessfully attempted in 1999 on the basis of the Financial Services Action Plan, but just ten years later, when the financial crisis erupted, it came into being thanks to the establishment of three agencies and of the European Systemic Risk Board (ESRB).<sup>III</sup> The construction of a new administrative apparatus alongside the European Commission aimed to create a more careful and precise system of unitary regulation that was not limited to general aspects, but that could draw up more focused rules, reference standards and guarantees of shared information, more timely interventions in times of crisis, as well as rules for resolving conflicts between national authorities in the various financial market segments. In other words, the ESFS reinforced the European dimension of financial market governance by acting mainly on technical and administrative control, but with the intent to totally restrict itself to improving the internal market (Simoncini 2015b). The agencies did not strip administrative functions from the national to the European level, but had a purely technical, supportive role toward the European Commission, being connected directly to the Member States and their technical representative authorities. The traditional model of building the single market remained substantially respected through certain constants: a) action was primarily focused on regulation; b) the purpose was to level the playing field of market participants mainly in order to achieve freedom of movement of capital; c) the technical function of European regulators remained unchanged, both those of an institutional nature, such as the Commission, and new ones, represented by agencies that guaranteed a balanced regulatory framework.

In this context the substantial cohesiveness of European interventions, albeit marked by distinct phases, is useful in order to further emphasize that recourse to the system of agencies in the financial field was not – in turn – without innovative elements. The financial agencies were also granted direct decision-making powers that seemed to clearly exceed the historic, consolidated system of the “Meroni doctrine”, in keeping with a recently emerged revision of European law. Proof of this were the powers granted to the European Banking Authority (EBA) in cases of emergency, and those in which it resolves conflicts with national authorities. This statement is confirmed by the ESMA case,<sup>IV</sup> where the CJEU ruled that the granting of discretionary powers to the European Securities and Markets Authority (ESMA) did not of itself constitute a violation of the “Meroni doctrine”



if power granted was exercised within the context of well-defined principles that, however, made it possible to circumscribe its exercise in such a way as to not give the agency a power free from any predetermined limit. Although the judge strove to contain the decision within a framework of consolidated compatibility of jurisprudence in respect of delegated powers, commentators have correctly pointed out that the decision confirmed the revised formulation that was handed down.<sup>V</sup>

Therefore, the aim of finalizing a single market suffused successive interventions in the financial sector up to the EBU, though not without the transposition of some important developments concerning the attribution of greater regulatory powers at the European level. Consequently, the need to construct the EBU a few years after the establishment of the ESFS highlighted the inadequacy of these solutions. So our investigation will now indicate the extent to which the EBU represented an element of discontinuity and what elements it was able to change.

Before plunging into this field of investigation it is important to emphasize that the EBU also responded to diverse needs and, in particular, the need to interrupt the perverse link between the crisis of the private financial system, especially banks, and sovereign government debt. In this perspective, some substantial differences clearly emerged with the establishment of the ESFS, first among them being the limited scope of the EBU, which is focused only on countries with the euro as its official currency. This limited scope is in itself a clear reference to the support of another specific European policy, monetary union, that has a range of powers different from those of the single market, being centred primarily on the European Central Bank (ECB). Although the EBU is ring-fenced by guarantees that ensure its separation from the direct governance of the single currency, it is clear that its task also exceeds the mere assurance of the single financial market. The uncertainties and fibrillations of the credit market are indeed capable of causing serious indirect interference in the stability of the single currency and, therefore, ensuring direct intervention to prevent and resolve banking crises has become a task entrusted to the EU through the controversial use of Article 127.6 TFEU, within mechanisms that affect the monetary union. Thus, inevitably, new purposes were added to the task of managing European financial entities, even if limited to those having jurisdiction in countries that have adopted the single currency. Proof of this is also the fact that the EBU provides a coherent response within the Euro-unitary framework of the founding treaty, first, of the



European Financial Stability Facility (EFSF), and, second, of the European Stability Mechanism (ESM), which offered an immediate, temporary response outside the treaties that founded the EU. Somehow the EBU is inscribed in the more general new European governance mechanisms which the EU started after the Eurozone crisis erupted (Kjaer 2010, 25-30).

However, in the case of the EBU, since its purpose was to create mechanisms ensuring the effective transmission of administrative decisions between the European and national levels, there was (i) the establishment of new entities, such as the Single Resolution Board (SRB) or the Supervisory Board (SB) with effective powers, (ii) complex and multiple organizational relations with other European and national authorities, including the ESFS, where there are mixed decision-making and coordination needs of very diversified interests, (iii) complex procedures with guarantees of participation by interested parties, aimed at diversified macro- and micro-prudential decisions, supervision and control, and propositions of possible measures of resolution. In this light it is interesting to explore how this division of structures and decisions, and complexity of purposes, also includes that of ensuring the single market, since reconciliation with the rules that support the single market is not called into question (Camilli 2015, 51-52). There are, for example, many links that oblige the EBU to operate consistently with the EBA. Indeed, the EBA has the task of defining the technical rules of the financial markets through the *Single Rulebook* which the ECB, in its supervisory role, must implement; it likewise establishes a reciprocal conditioning link between the EBA and the SRB, since a representative of the latter may be appointed to the EBA's decision-making committee and – in turn – the EBA, whenever issues within their jurisdiction are at stake, can delegate a representative to participate in the partial or plenary sessions of the SRB's governing bodies (Cappiello 2015, 434-437). In short, the connections with the guarantors of the single market are established precisely to ensure the orderly coexistence between the single market and the supervision/resolution functions regarding it (Lastra 2013).

It is important to understand whether this further stage of evolution of European organizational models is pursuing this objective as it always has, or whether it is introducing innovative elements, and – if so – what results it is producing for bringing about the single market. What we need to understand is if another route to the single market has been taken.



### 3. The single market in the EBU framework

In the rationales which accompany the founding acts of the EBU there are recurrent references to the internal market, for which supervisory and resolution functions are important conditions to help build a framework of uniform rules within which credit sector operators can work (Magliari 2015). However, besides these basic connections of a general nature, there are far more obvious influences that have a significant impact on the single market.

First, we must distinguish between the EBU's supervisory and resolution functions. The first operates, except for some limited power of macro-prudential policy, toward ensuring a preventive control of the soundness of credit companies where the single market is taken only as a benchmark to be observed without exercising any direct powers, as specified in Article 1.1, Reg. EU 1024/2013 (Reg. SSM). However, the second function has a direct impact on the functioning of credit companies, determining the conditions for continuing or discontinuing its action, with all the implications that this produces. So, although EU Reg. 806/2014 (Reg. SRM) also identifies, in the integrity and unity of the market, the criteria of action that should inspire the resolution authorities (Article 6.2), the constraint of the single market is a much more important condition when making decisions on the resolution of credit institutions. References to the internal market and to safeguarding its integrity recur far more often with regard to exercising the resolution function (Lastra 2013, 1220-1223).

In particular, this is clear from the objectives listed in Article 14 Reg. SRM, which includes, of course, three aims intended to protect the market and two aimed at protecting specific subjects for which European legislation provides safeguards. The first three aims encompass the guarantees that ensure the continuity of operators in order to alter the market as little as possible, to avoid adverse effects on financial stability that could jeopardize market order, in particular by preventing contagion, and to minimize public financial support, which could alter market conditions. Conversely, among the objectives for establishing guarantees for certain categories of subjects, are those aimed at depositors of under one hundred thousand euros, investors, as covered by Directive 97/9/EC, funds and customers. It would seem, then, that the role of the single market has a specific



importance in the exercising of resolution functions, to the extent that it still appears to be a central purpose.

In a similar way, the assessment that the SRB has to make, in developing plans for a resolution, is aimed at safeguarding market rules as much as possible. The primary objective of the SRB is to decide whether a particular entity can either be subjected to ordinary insolvency rules, in the case that financial instability is not at stake, the latter meaning that neither the proper functioning, efficiency and integrity of the internal market, nor the financial system of one or more Member states are compromised (Art. 10.5). In this case the resolution power is that of ordinary provision. Significantly, it is recommended that this SRB assessment should take into account the warnings and recommendations of the ESRB and the criteria formulated by the EBA.

What we derive from this is that for the EBU the single market and its smooth functioning continues to be a benchmark for measuring the actual achievement of financial stability, but the following paragraphs can lead to a different interpretation of these conclusions.

#### **4. The concurrence of the State aid framework**

The principal test of the relationship between the EBU and the internal market, in the component that is most exposed to this relationship – i.e., the resolution function – is the assumption that resolution programs allow for recourse to State aid, when this assumption, though discouraged by the SRM, becomes viable (Lastra 2013, 1215). In such circumstances, Article 19, Reg. SRM provides that the implementation of the resolution program is subject to the favourable, or conditioned, decision expressed by the European Commission on compatibility with the internal market, even when recourse to the single resolution fund is permitted. The European Commission exercises control on the basis of standard procedural, interpretative and regulatory tools, that also utilize procedures for State aid unrelated to those for banking resolution. This is very interesting to note because, by deferring to normal procedures, it obliges a scrutiny of the kind of assessment that in such circumstances the Commission conducts as an independent body that participates in the responsibilities of resolution.



In such cases, the Commission applies the acts of communication approved since 2008. Faced with the threat of massive national bailouts of firms immediately after the start of the financial crisis, which would have seriously undermined the single market,<sup>VI</sup> the European Commission, prompted in particular by the European Council, issued a ‘package’ of special measures between 2008 and 2011, with which it gave the Member States a wide range of tools of public support to financial institutions, especially banks and businesses.<sup>VII</sup> The tools available to the States ranged from public guarantees on liabilities and on interbank lending, to the recapitalization of banks and firms; from the supervised and controlled liquidations of businesses and banks in serious trouble to measures intended to free banks of devalued and “toxic” financial assets, to facilitating access to credit for nationalization in extreme cases. These were all measures that the Commission deemed legitimate under Article 107.3.b., TFEU, with regard to the serious disturbance of national economies that the crisis brought about.

Specifically, the permitted measures were nothing new in themselves, since a large part of them were already planned and governed by previous communications issued by the Commission under Article. 107.3.c. TFEU (Liberati 2014), particularly in the field of bailouts and restructuring of firms in trouble.<sup>VIII</sup> Despite this, and despite the fact that the Commission refers precisely to this discipline to reaffirm their validity, even in the presence of the new ‘package’ of measures, the Commission considered it equally urgent to provide further guidance for facing the extraordinary situation that had arisen as a result of the international financial crisis (Tonetti 2009). The EU’s approach was therefore incremental: it did not so much intend to extend the tools that the States already had available, even though in truth this occurred in some cases,<sup>IX</sup> as much as to make them more effective, in view of the extraordinary situation that had arisen.

In fact these rules reaffirm certain principles established at the European level, now summarized in the *Banking Communication*.<sup>X</sup> The permissible aid must be capable of producing minimal distorting effects, and subsequently: the beneficiary enterprises and market sectors must be identified in a clear and non-discriminatory way; the beneficiaries are also called on to share part of the burden in order not to gain advantages over their competitors; the aid must be indispensable,<sup>XI</sup> namely the aid must be well targeted, proportionate and necessary; there is a set of safeguards for minimizing competitive risks;



the duration of the aid must be temporary; the rules for selecting beneficiaries are very strict and binding (Tridimas 2010).

This makes it possible to highlight some interesting aspects. The Commission, despite an emergency situation, did not abandon the general principles that guide it in the field of State aid.<sup>xii</sup> The consequence is that the communications adopted are reminders that the ordinary way to restore an orderly condition of the progress of economic relations remains that of the competitive market, limitable only in the cases already anticipated under previous guidelines and notices adopted by the Commission. The actual interpretation of serious disturbance of national economies to justify the extra aid should be made in accordance with the strict criteria established by judicial reviews.<sup>xiii</sup> Competition and free trade among the Member Countries are therefore still the first objectives to be protected. Nevertheless, given the situation, the Commission considered it necessary to adopt a new aid discipline to prevent and correct grave consequences due to the destabilization of the private financial system and systems of production. Their aim therefore was not to rewrite the rules of economic relations (Napolitano 2008), but to direct national public initiatives within a framework of common European principles.

It thus seems clear that Article 107.3.b. TFEU was used by the Commission to actively coordinate public intervention in the economy of Member States; the norm is not an excuse for a general prohibition, but, as has been said,<sup>xiv</sup> a regulatory clause for the coordination of national economic policies. Many of the communications adopted by the Commission to tackle the financial crisis explained that the procedure adopted was intended to prevent a 'rush to subsidies' which would be created among Member States if the Commission should fail to take measures of active support (Schwarze 2010). In essence, the EU, in facing the onslaught of the crisis, found itself faced with two extreme positions: to forbid any state aid that exceeded the limits already defined in other communications, a move that would have been totally ineffective during the crisis, or to allow Member States to act freely, given that they considered the measures hitherto permitted by the EU to be inadequate.

In other words, the Commission, called upon to choose on whether to adopt a policy that privileged a consistency of regulations, trusting in market rules, or to adopt a policy that enhanced extreme differentiation but with the risk of compromising the unitary principles of European law, chose a middle ground, namely regulating the aid policy of the



Member States. In this role, the discretion exercised by the European Commission was necessarily significant, because, as was also reaffirmed recently in the *Kotnik* case,<sup>xv</sup> the communications issued by the European Commission, while determining a self-limitation of the power of restraining aids granted by Member States, also did not oblige them to accord to them, from which it follows that the Member States were still free to notify aid granted under conditions other than those set out by the communications, and to submit themselves to the Commission's discretionary evaluation.

In the case of resolution procedures operated by the SRB that provided for the use of a single fund, its discretionary power was further accentuated. Article 19 Reg. SRM provided for the possibility of the Commission to review its decision at any time, based on a recommendation submitted by the SRB or on its own initiative, so that, in essence, the Commission was endowed with a sort of *jus poenitendi* that was subject to a very limited judicial review. Such broad discretionary features were further confirmed by Article 20 Reg. SRM, which provided that, if the revision of an earlier decision on State aid is requested by a Member State, the Council, acting unanimously, must decide on derogation within seven days, or, in the event of inaction, the Commission itself may do so again. Note that the Commission in this latter circumstance exercises power that the Council failed to use, which characterizes it as a true outcome of a highly discretionary decision.

What has been observed up to now highlights the fact that the application of guidelines on State aid, theoretically aimed at protecting the internal market, is a source of more complex indications than appears at first sight. In part this is due to the very nature of the guidelines on State aid that grant the European Commission a true active coordinating power over State policies and, if it is the SRB that acts, also over European subjects; but, in the case of resolution procedures which result in the use of the single fund, the Commission's power is characterized in actual political terms, meaning by this expression of a power more of pure discretion than a technical power (M. P. Chiti 2014). In other words, the market-based paradigm is not the only yardstick of the resolution procedure (Ioannidis 2016): even if State aids are a measure of last resort, they are a possible tool in the event of the use of the single fund meaning that internal market protection can be subordinated to other interests of financial stability.

Moreover, the Commission's discretion, which occurs within the framework of the SRM, or when the assessments regarding only the countries which have adopted the euro,



is wider when compared to when the Commission, but also the Council, applies the guidelines on State aid outside EBU borders, thus marking a difference, albeit contained. As we have seen, the Commission is not only authorized to intervene with another EU body (i.e. SRB) but can review its position even at very short notice.

## 5. The protection of the public interest: financial stability

Recourse to State aid is, as mentioned in resolution procedures, an extreme solution, since it is conditioned by a prior appeal to shareholders, bondholders and creditors for burden-sharing. This is the so-called bail-in system, which derives from concerns on the limiting of the use of tools that alter competitive market conditions (Wojcik 2016). Nevertheless, even from this perspective one can see how administrative procedures at the European level subsequent to the SRM produced effects of innovation in safeguarding the internal market.

Indeed, Article 18.1 established that among the conditions that make the resolution program applicable, with its typified contents, there is a recognition of the public interest in such measures (Sciascia 2015a, 111-115). Public interest acts, therefore, as a legitimizing factor of the resolution power, which gives the responsible parties – the European bodies, as will be seen shortly – the authority to restrict the liberty of financial operators (Wojcik 2016, 116-126). Citing the public interest as a legitimizing factor highlights the fact that the legislative provision for resolution power is, by itself, not considered a sufficient condition to thus qualify the intervention of subjects entrusted with this task, almost as if one wished to attribute to this express qualification an additional decisional capacity (De Vauplane 2012, 274).

It is actually a rather unusual condition in the panorama of EU law, which rarely explicitly assigns the task of protecting public interests to bodies of the European Union. Actually, as demonstrated by abundant case law,<sup>xvi</sup> the European legal system is usually willing to accommodate reasons of public interest, claimed by Member States, as a suitable motivation to allow for exemptions to prohibitions or obligations originating from the EU.

The confirmation of this additional meaning, which the explicit mention of public interest grants, emerges in paragraph 5 (Article 18), where it is clarified that the public interest includes the resolution measures that proportionately pursue the aims defined in



Article 14 Reg. SRM, cited above, and on the proviso that there is evidence of impairment of the ordinary provisions for managing the conditions of insolvency. In other words, the qualification of public interest serves to legitimize the power of imposing resolution measures to compel subjects, that legitimately boast claims against the credit institution subject to resolution, to fulfil their duties.

Article 18 Reg. SRM actually explains that qualifying certain measures as being of public interest authorized the imposition of restrictions on the freedoms of individuals and, in this case, the right of ownership of securities and their values. The imposition of bail-in measures can end up obliging private investors to suffer the hardships of the credit institution's losses, the conversion of venture capital, the devaluation of values, and much more. It was therefore a classic dynamic of conflict between authority and freedom, where the freedoms curtailed by European authorities would in this case be precisely that of the investors.

This prediction received notable confirmation by the CJEU in the course of 2016 about resolution cases activated by the Member States on the basis of legal premises, in which the EU acted in a conditioning capacity. In the *Kotnik* case, for example, the CJEU described the guarantee of the stability of the financial system as a public interest, and this reduced the ability of the principle of legitimate expectation to protect the subjective condition on some investors, who complained about the alleged (and illegitimate) modification of the Commission's conduct in relation to state aid to banking credit (Raganelli 2016). In its judgment the Euro-unitary judge made it clear that even if the European Commission had actually adopted different decisions from past ones to protect the stability of the financial system, the decision can be intended to protect a *superior public interest*, to which other prominent *public interests would be subordinated*, such as legitimate expectations. However, in the *Kotnik* case the possibility of compressing the full right to property consisting of credit loans, as well as the limitation of subordinated rights, was justified by the fact that, according to the CJEU, the banking communication limited itself to setting a condition for State aid to be granted. But it was clearly a logical artifice, since that condition led in any case to utilizing restrictive instruments of credit when – as in the *Kotnik* case – the banks had capital shortfalls that could not be dealt with by using ordinary tools. In other words, *Kotnik* confirmed the full application of Article 18 Reg. SRM, where the binding effects of the resolution are clearly spelled out.



In the *Ledra* case,<sup>xvii</sup> the issue was the legitimacy of restrictive provisions put in place by Cypriot authorities of some Cypriot banks' creditors' rights, based on a conditioning agreement in accordance with the ESM Treaty. Here, the CJEU assigned to financial stability the qualification of general interest, on the basis of which Article 52 of the Charter of Fundamental Rights justified limitations on the right of ownership, thus equating it with what Article 18 SRM qualifies as public interest.

Lastly, in the *Dowling* case,<sup>xviii</sup> which also emerged from a recapitalization program undertaken on the basis of conditions set out for financing within the ESM framework, the CJEU countered the arguments of the shareholders, obliged to participate in a recapitalization program with a consequent devaluation of their securities, with the higher public interest of financial stability. Interestingly, the CJEU stressed that, although there is in the EU a public interest for safeguarding shareholders and creditors, "this interest cannot be considered dominant in all circumstances with respect to the public interest in ensuring the stability of the financial system". Thus, here again the idea emerges of a superior interest in financial stability which is also able to prevail over the interests of creditors, even though these too are classified as public.

Therefore, from the perspective of case-law, the public interest in Article 18 Reg. SRM is revealed as a *higher* interest, a *general interest* legitimized directly by the Charter of Fundamental Rights, and even a public interest hierarchically superior to those of other public interests (Raganelli 2016). As just noted, it marries significantly with the provisions of Article 18.7 Reg. SRM, which establishes that the resolution program is subject to the Commission, which can suggest that the Council deny its adoption in the absence of the public interest. It follows, in accordance with the findings in the previous section on State aid, that the assessment of public interest is subject to a highly discretionary prerogative by the Commission and Council. Thus it is evident that the power of resolution presents itself as a broad discretionary power, which is exercised through the consideration of other interests, some of which are also public, and able to restrict basic rights that are traditionally protected by the EU (Macchia 2016).

There is a significant coincidence with the opinions of some authors drawing the same conclusions about the predominance of financial stability when they commented on the OMT case:<sup>xix</sup> market integrity is less and less a key interest compared to financial stability (Beukers 2014; Ioannidis 2016; Pennesi 2016).



## 6. Accountability and legitimacy

The EBU presents itself as a composite structure, whose responsibilities are shared among various authorities, partly national and partly European, where among the latter some are newly created as a result of secondary legislation, while others were already in force. This complex of authorities and relationships between authorities, combined with the growth of discretionary powers highlighted above, raises important questions for the responsibility which must be exercised and the forms of guarantee of the stakeholders (Lenaerts 2014, 767-769). In this sense both the SSM and the SRM devote specific provisions to the issue by adopting a variety of solutions that can be divided into three categories: i) responsibility for activities carried out in general; ii) responsibilities for individual measures; iii) transparency.

With regard to the first category, firstly the authorities appointed at the top of the two mechanisms, i.e., the SB of the ECB with regard to the SSM and the SRB with regard to the SRM, are required to link up with the European Parliament and, as appropriate, also with the Council, the Commission, the Eurogroup and the Court of Auditors. The presidents of the SB and the SRB transmit to all these subjects the Annual Activity Report (Article 20 Reg. SSM; Article 45 Reg. SRM), which the relative presidents must submit to the European Parliament at a public hearing, as well as to the Eurogroup in the case of the SB, and to the Council in the case of the SRB. Public hearings before the authorized bodies of the Parliament, the Eurogroup and the Council can be arranged at the request of the latter in relation to the performance of the duties assigned by the regulations to the SB and the SRB, in the same way that a duly motivated written response has made them compulsory to queries or issues raised by the Parliament or the Council and the Eurogroup. Of interest in this respect are also inter-institutional agreements, that the two EBU authorities have signed with the European Parliament, that regulate in minute detail ways of reinforcing the relationship between these institutions, and the possibility of calling restricted meetings between representatives of the SB and the SRB and presidents of Parliament and/or presidents of the relevant parliamentary committees for specific in-depth examinations. However, relations with the European Parliament do not stop at the activity carried out in verifying formally assigned tasks, but also develop around other



information, since the SB and the SRB are also required to take into account the use of allocated resources, organization and personnel with regard to selection procedures, informal communications given to operators and subjects who the SB and the SRB address, informal consultations, and yet more. In other words, all the activity undertaken by the top authorities of the EBU is connected with the European Parliament in the form of sharing a massive quantity of information (De Bellis 2015, 87; Ibrido 2017, 238-244).

To this must also be added a specific connecting procedure with national parliaments, to which the presidents of the SB and the SRB must also transmit their annual report, with the possibility of critical feedback (Ibrido 2017, 248-252). The involvement of national parliaments makes a less invasive check than in the European Parliament possible, because the powers of the SB and the SRB involve no legal obligations, yet there can be forms of connection that resound more forcefully on public opinion than are available to the European Parliament. Indeed, national parliaments can ask to express their explicit remarks in writing, and may even invite the presidents or other members of the authorities for an exchange of opinions about the interventions regarding specific Member States.

Overall the top-level structures of the EBU are required to give an account of their activities and to answer the observations made by various relevant authorities, and especially to parliamentary authorities in a circuit of democratic accountability that seems resilient. However, a point to be stressed in this context is that no specific form of connection has been developed for the Commission and the Council, though they too are resolution authorities with broad powers. This can of course be explained by the fact that these authorities already receive specific linkage attention with the European Parliament, directly governed by the founding treaties, but we stress the fact to indicate the special condition of the Council, which is both a resolution organ, hence theoretically subject to supervision, and an organ of assessment of the SRB's resolution activities, thus forming a kind of self-controlling authority. In this sense, therefore, the circuit of democratic accountability does not appear even well defined, not least in view of the fact that the Council, though made up of national government representatives, is still a distinct, autonomous body.

As to the responsibility for singular acts by the authorities of supervision and resolution functions, general provisions hold, and Article 263 TFEU is applied in the judicial review of actions taken by the Commission, the Council and the ECB. An indirect confirmation



comes from Article 86 Reg. SRM, which recalls Article 263 TFEU regarding provisions made by the SRB, which are therefore covered by general conditions required for the other authorities. This means that at the level of judicial review the expansion of discretionary powers established in the above-mentioned cases has no specific balancing of the judges' powers. This can also be argued in the light of Article 13 Reg. SSM and 37 Reg. SRM, which, with reference to another very effective power attributed to the SB and the SRB, namely the inspection of market players, state that, even where it is necessary to obtain the prior written consent of national judicial authorities, this is limited to checking that the reasons for the inspection are not arbitrary and disproportionate, without actually reviewing the merits, or having the right to get additional information about the request. This is a clear limitation of national judicial power, even if at the same time the cited provisions establish the jurisdiction of the CJEU on the matter, though it has no preventive power of authorization.

The administrative bodies designed for the review, respectively the Administrative Board of Review (Directive 24 Reg. SSM) and the Appeal Panel (Directive 85 Reg. SRM) at least partially compensate for these deficits of pinpointed control of jurisdiction (Sciascia 2015b, 383-387). However, while Article 24 Reg. SSM gives a generalized competence of control over supervisory acts regarding both procedural and substantive matters, Article 85 Reg. SRM is not as broad and, above all, only limits powers of control to certain provisions that the SRB can take, which do not include those established in Article 18 and 19, to which special attention has been given in this paper. Therefore, even with reference to a review of an administrative nature, the broad discretionary powers exercised, especially in relation to the resolution, do not find adequate counter-measures in terms of controls.

Lastly, still in regard to the individual measures, the regulations establishing the SSM and the SRM regulate procedural right in a variety of ways. In particular, the hearing of a contradictory opinion and an ample right of access in the proceedings relating to supervision by the persons directly affected by the final acts are recognized, in accordance with Article 22 Reg. SSM, while this extension of rights is limited only to penalty proceedings in the case of a resolution function, as per Article 40 Reg. SRM. In general terms the SRM simply foresees applying the general rules of access to documents established in Reg. EC 1049/2001, which is thus also extended to the SRB. It follows that from the perspective of procedural and participatory rights, the reinforcement of



protection is partial and, in any case, absent in the presence of the very incisive powers over internal markets that governance over the resolution function provides.

The last parameter by which to measure accountability in exercising the functions included in the EBU is transparency (Alemanno 2014). In spite of a general reference to the right to access and some specific disclosure requirements regarding penalizations, according to Article 41 Reg. SRM, there are a lot of references in which the regulations concerning supervision and resolution ensure the secrecy or confidentiality of information. Starting with the relationships that the SB and the SRB develop with the European Parliament, where specific procedures are provided, private meetings can be held with no obligation to keep records or give news through press conferences. The protocol on the resolution function also expressly refers to the general protection protocol regarding personal data but, unlike its function in regulating access, it extends the relative obligations to the Commission and the Council as well, in their exercise of resolution powers and not only, therefore to the SRB (Article 89 Reg. SRM).

This tendency to enhance the confidentiality of information is even clearer in the regulation on resolution, which refers to Article 88 Reg. SRM's scrupulous safeguard of professional secrecy. The activity carried out by SRB officials and other authorities involved is definitely based on the principle of official secrecy. The same Article 88.5 Reg. SRM establishes a relationship between the presupposition of confidentiality of information and public interest, in the sense that disclosure of information must be conditioned by assessing the impact this can have on the public interest concerning financial, monetary or economic policies, commercial interests on operators and inspections, and investigations and audits. Confidentiality is therefore considered a value for protecting the public interest.

Conclusively, the value of transparency of the acts and activities included in the supervisory and resolution procedures is impaired in favour of confidentiality, so as to become an essentially useless tool in enforcing the accountability of authorities who perform administrative functions in the credit sector. This is due to the assumption that performance of supervision and resolution in financial policies hinges on the ability to keep restricted data and information, but transparency seems destined to get a broad scope of derogation, even beyond what is appropriate. It is worthwhile noting that transparency is never associated with public interest, as opposed to confidentiality.



## 7. Concluding remarks

The EBU represents a case in which the EU is experimenting with original forms of administrative integration, in respect of functions that have an impact on the single market. Unlike the architectures of authority employed so far by the EU to safeguard the internal market, the EBU introduces significant innovations that can be summarized thus: decisions relating to the internal market tend to take on a connotation of increasing political discretion at the expense of technical judgment. Until now the growth of the administrative apparatus at the supranational level has functioned to neutralize the political conditioning that especially characterizes national governments, which is usually considered as an obstacle to completing the internal market. However, it now seems that the proliferation of authorities, and the complexity of the mechanisms that govern coexistence, find in discretionary political judgment its extreme synthesis for leading everything back to unity. In this sense the EBU strengthens the well-known phenomenon of ‘fragmentation of the executive powers’ (Ibrido 2017, 278-286) in the EU legal system with the introduction, though, of an acknowledged discretionary power, particularly in the monetary and financial policy. Overall the EBU seems likely to be able reproduce two types of trends: an administrative integration that actually contains a problematic coexistence of conflicting interests, or an administrative integration that develops a unified process based on several gradated layers (Magliari 2015, 207-210).

This is not at odds with the internal market, but establishes renewed equilibriums. It distinguishes and identifies the public interest, that of financial stability (Tuori-Tuori 2014), which becomes the ranking point to which all other interests, including public ones, are subordinated. The technical assessment of the conditions that sustain the market turns out to be an essential element of knowledge, which, however, is not automatically a rule, an act or a decision. The decisive moment is distinct and separate. Somehow a dynamic between the time for evaluation and the time for decision, which until a few years ago was the exclusive purview of nation states, has been reconstituted on a larger scale, but in the meantime the answerable subjects have changed and only partly coincide with national ones.



If the understanding of the internal market, measured till now on a kind of gradient of technical/political rapport, established a clear predominance of the former element, the EBU manifests a shift of this balance towards the political nature of decisions, whose main attribution is given to supranational bodies (Veitch 2012). This is evident when the Council comes into play, but is not that different from the hypothesis in which the Commission and even the new supranational authorities of the EBU intervene. Tipping the balance towards the side of political terms means taking on the dialectic of interests with greater care, recognizing a number of rationales and attempting to adopt solutions that establish a dynamic and non-automatic equilibrium (Macchia 2015, 1617-1618; Ibrido 2017, 194). Something new, probably in the middle of a Communitarian Method and an Intergovernmental Method, is coming into view.

Is this step accompanied by adequate safeguards for democratic control (Curtin-Mendes 2011, 116-121)? The answers the EBU case offers tell us that this only partially occurs. We are definitely witnessing a trend toward strengthened connections with parliamentary institutions, primarily the European parliament, and then national parliaments, which gain some freedom for direct contacts with the European authorities, though this does not take place without the presence of important limitations and some exceptions. On other fronts, however, the truth is even less reassuring. Judicial review is very limited and in some cases even virtually absent (De Vauplane 2012, 574); administrative safeguards, which must still be concretely tried, appear only partially capable of filling the gaps of jurisdictional protection. Even the limited recognitions of procedural rights are scarcely encouraging, since at best they are reaffirmed in their general terms in the face of new powers that appear much more incisive. Publicity and transparency seem recessive values in contrast to confidentiality and secrecy, indicating a deep link of the latter with public interests. Basically the gradient shift does not seem to find a strong balance in terms of accountability, formerly sacrificed exclusively in favour of organized interests when the technical component prevailed.

In a complex system, like the European, the transfer of decision quota from the technical to the political level certainly involves a shift in the balance of power, which apparently sees that of the economic operators as recessive, as compared with that of the governing authorities. However, the still insufficient balance of control tools for democratic governance conceals the emergence of power relationships that seem to



coalesce according to the prevalent interests of certain Member States. It is worth recalling the role of the Intergovernmental Agreement of 2014 in heavily affecting the use of the Single Resolution Fund in order to prevent the real mutualisation of losses. Restoring the political gradient of decisions does not favour solidarity issues, but new public interests (Baroncelli 2016) behind which other partial pre-existing interests are hidden. A new financial constitution is emerging (Mostacci 2013), without reliable linkages capable of challenging what Lindseth called the ‘democratic disconnect’ (Lindseth 2010, 234).

Time, and the consolidation of such solutions, will tell us which direction will prevail; in the meantime, guarantees for the internal market are bound to change shape and equilibriums.

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<sup>I</sup> I skip any comment on this feature to my previous writing (Gigliioni 2015).

<sup>II</sup> See the Commission communication *A roadmap towards a Banking Union*, COM/2012/510 final.

<sup>III</sup> The ESAs were established by the EU Regulations 1093/2010 (EBA), 1094/2010 (EIOPA), 1095 (ESMA) and 1092/2010 (ERSB).

<sup>IV</sup> CJEU, Case C-270/12, *United Kingdom v. European Parliament and Council*.

<sup>V</sup> See Adamski (2014), Chamon (2014) and Simoncini (2015a).

<sup>VI</sup> The crisis was triggered in 2007 in the USA because of sub-prime mortgages and it spread rapidly to Europe because of the high exposure of banks and European financial institutions with regard to these tools. Initially Europe reacted with some rescue measures that were already governed appropriately by some of the Commission’s communications on state aid in the rescue and restructuring of enterprises (see the decisions: June 4, 2008, 2009/341/EC, *Sachsen LB*, in Guce, 2009, L 104, October 21, 2008, 2009/775/CE, *IKB*, in Guce, 2009, L 278, October 28, 2009, 2010/262 / EC, *Northern Rock*, in Guce, 2010, L 112). But after the failure of *Lehman Brothers* the crisis worsened significantly and the ordinary tools adopted until then no longer seemed adequate, given the fact that the Commission normally takes at least a year to decide on the aid notifications for which it considers it necessary to initiate a conformity evaluation procedure. Given the gravity of the situation, in two cases at least, by the Commission’s own admission (see the report on state aid updated to spring 2009 COM (2009) 164 final), aid was granted to the limits of legitimacy in the absence of restructuring plans by the recipient firm, which led the Community authorities to adopt new, more effective and timely tools; see decisions October 1, 2008, C(2008)5673 final, *Bradford & Bingley* and October 2, 2008 C(2008)5735, *Hypo Real Estate*.

<sup>VII</sup> The tools permitted were those included in the following Commission communications: one on the banking sector, *The application of the rules on State aid adopted for financial institutions in the context of the current global financial crisis* 2008/C 270/02 and subsequent amendments; the one on recapitalization, *The recapitalization of financial institutions in the current financial crisis: limitation of aid to a necessary minimum and safeguards against undue distortions of competition*, 2009/C 10/03; the one on impaired assets, *treatment of activities that have suffered an impairment loss in the Community banking sector*, 2009/C 72/01; *Temporary Community framework for measures to support access to finance the current situation of financial and economic crisis*, 2009/C 83/01; the one on restructuring, *the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the rules on State aid*, 2009/C 195/04; the one on exiting from the crisis, *relative to the application, from January 1, 2011, of the rules on state aid to support measures for banks during the financial crisis*. Another is in the works and is founded on the basis of the *DG Staff Working Document*, with the title *The application of state aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2011*, which marks a further step for exiting the system of exceptional aid under Directive 107, p. 3, letter b) TFEU.

<sup>VIII</sup> The reference is to the Communication from the Commission, *Community guidelines on State aid for rescuing and restructuring firms in difficulty*, 2004/C 244/02, enacted on the basis of Directive 107, p. 3, letter c) TFEU.



The communication is also taken into account with a view to phasing out the emergency aid package that the European Commission has followed so far as ordinary future reference discipline.

<sup>IX</sup> The aid measures of the Impaired Assets Communication appear to innovate the range of tools made available by the communication on rescue and restructuring of firms in difficulty. An example is the opportunity that is given to the beneficiaries not to include in the budget heavily devalued securities or to allocate public resources to equalize the losses due to the devaluation of the securities; see communication 2009/C 72/01, p. 15. See also Liberati (2014).

<sup>X</sup> The new communication in force since August 2013 is exactly that of the Commission, *The application of rules on State aid to support measures for banks during the financial crisis* in 2013/C 216/01.

<sup>XI</sup> In the case of Austria, the Commission noted for instance that no private investor would have offered a series of bank guarantees that for intensity and breadth covered practically the full Austrian banking system under great stress, and this is considered as an essential element for judging the help granted as being indispensable; see Decision, December 9, 2008, C(2008) 8408 final.

<sup>XII</sup> Explicit in this regard is the Banking Communication: see 2008/C 270/02, p. 3.

<sup>XIII</sup> See Court of First Instance, December 15, 1999, T-132/96 and T-143/96, *Freistaat Sachsen and Volkswagen Sachsen GmbH v. Commission*, Rec. 1999, II-3663, p. 167, where it is clear that the serious disturbance in the national economy should be understood as concerning the economy of the entire country and not just certain territorial areas. That approach was also followed by the European Commission: see the decisions of the Committee, May 20, 1998, 98/490/EC, *Crédit Lyonnais*, in Guce, 1998 L 221; June 27, 2007 2008/263 / EC, *BAWAG-PSK*, in Guce, 2008, L 83.

<sup>XIV</sup> See Battini (1994), who has stressed the primarily function of coordination of State aids rather than the function of safeguarding competition.

<sup>XV</sup> CJEU, Case C-526/14, *Kotnik et al. v. Državni zbor Republike Slovenije*.

<sup>XVI</sup> See, for instance, CJEU, Case C-399/14, *Grüne Liga Sachsen eV et al. v. Freistaat Sachsen*, related to the use of public interest for the inclusion of the sites of Community importance; CJEU, Case C-346/14, *European Commission v. Austria*, related to the sustainable development principle; CJEU, Case C-15/13, *Technische Universität Hamburg-Harburg et al. v. Datenlotsen Informationssysteme GmbH*, related to the use of public interest for in-house providing; CJEU, Case C-351/12, *OSA v. Léčebné lázně Mariánské Lázně a.s.*, related to the limits for the freedom to provide services.

<sup>XVII</sup> CJEU, Case from C-8/15-P to C-10/15-P, *Ledra Advertising Ltd. et al. v. European Commission and European Central Bank*.

<sup>XVIII</sup> CJEU, Case C-41/15, *Gerard Dowling et al. v. Minister for Finance*.

<sup>XIX</sup> CJEU, Case C-62/14, *Gauweiler v. European Central Bank*.

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# The Interpretive Function of the CJEU and the Interrelationship of EU and National Levels of Consumer Protection

by

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## Abstract

This paper analyses the ways in which the Unfair Contract Terms and Unfair Commercial Practices Directives try to steer a path between imposing a common European standard and allowing national variation. The open wording of the norms and safeguard clauses in both directives allows room for their flexible application. The differentiated role between the Court of Justice, as the interpreter of European law, and the national courts, as the party that applies it, provides a release valve to prevent any direct clashes and allows a subtle way for national perspectives to be reflected.

The analysis finds that, irrespective of the underlying level of harmonisation, and with the backing of the European legislator's intention of ensuring a high level of consumer protection, the CJEU is gradually painting the average European consumer with more realistic features. Here, the case law of the CJEU fulfils a bridging function between the labelling requirements in the Foodstuff Regulation, the transparency requirements in the Unfair Contract Terms Directive and the informed decision requirements in the Unfair Commercial Practices Directive. In these three domains the CJEU recognises that the level of customer attention may be suboptimal, even in the presence of comprehensive and correct information.

The CJEU's approach contributes to more convergence in consumer protection throughout the EU. Yet, in terms of legitimacy, it must be noted that in all cases the CJEU has maintained a clear distinction between interpretation and application. The particular constitutional legal order in which the CJEU operates only allows for a process whereby the contours of a more coherent European consumer protection policy are gradually revealed. In the absence of sufficient legislative guidance at the European and national levels, national courts may be increasingly informed by the case law of the CJEU in an effort to establish clearly desirable common expectations. Those who believe that, in practice, uniformity can be achieved overnight by simply adopting a common maximum norm appear over-optimistic.



## Key-words

Unfair Contract Terms Directive, Unfair Commercial Practices Directive, interpretive function of the CJEU, levels of consumer protection, average consumer



## 1. Introduction

The EU's extensive engagement with consumer protection law is well documented (Howells 2017). It sees a European approach to these issues as a means of removing barriers to trade, and to the creation of a common competitive environment. However, the extent to which full harmonisation is possible or desirable is debated. We take two directives – one in which a minimum harmonization approach has been adopted (Directive 93/13/EEC on Unfair Contract Terms) and the other in which a maximum harmonization approach has been adopted (Directive 2005/29/EC on Unfair Commercial Practices). We first note the ways in which this legislation tries to steer a path between imposing a common European standard and allowing national variation. The Unfair Contract Terms Directive (UCTD) seeks to limit national discretion by structuring the standard, and use of, an indicative list, whereas, despite adopting a maximum harmonisation approach, the Unfair Commercial Practices Directive (UCPD) has limits to its scope, and exceptions allowing for some national traditions. Moreover, the open textured nature of the norms allows room for flexible application.

This leads on to our second point of discussion relating to the role of the courts in developing common norms. Central to this discussion is the differentiated role between the Court of Justice of the European Union (CJEU) as the interpreter of European law and the national courts as the party that applies it. This relationship provides a release valve to prevent any direct clashes, and allows a subtle way for national perspectives to be reflected.

According to Article 4(2) a TFEU the establishment of the internal market is built on a competence which is shared between the Union and the Member States. According to Lenaerts the CJEU has continually been called upon to uphold the 'rule of law' as provided for by Article 19 TEU (Lenaerts 2015, 14-15). In his view, the Court at first exercised a gap-filling function<sup>1</sup> and later aimed to safeguard the core of the European integration set out in the Treaty. Once the constitutional foundations of the EU legal order were put in place and the establishment and functioning of the internal market secured, the CJEU moved into a new paradigm. As the constitutional court of a more mature legal order, it now sees its role primarily as one of upholding the 'checks and balances' built into the EU's constitutional legal order of states and peoples, including the protection of human



rights, displaying greater deference to the preferences of the EU legislator or to those of the Member States (Lenaerts 2015, 16).

In contrast with other subdomains of EU law, internal market policy has not recently been the subject of (identity) crises. The establishment of the internal market as such is not put into question in consumer law literature either, rather at some occasions the manner in which it has been given concrete shape has been queried. Hence, the constitutional/administrative paradigm debate does not play a predominant role in the domain of consumer protection policy. Viewed from a consumer protection angle, the EU legal order presents itself as a genuine construct that can objectively be reduced to one or other traditionally defined paradigm. As a result, it may be submitted, alongside Lenaerts, that the CJEU is a constitutional court of a more mature legal order that upholds checks and balances, and which, depending on circumstances, displays greater deference to preferences of the EU legislator or to those of the Member States.

That being said, the Court of Justice case law relating to consumer protection can leave more or less discretion to national courts, and in respect of unfair commercial practices the Court has fiercely cracked down on national laws that seem to infringe the scope of the Directive. However, we see this as a dialogue that allows for gradual convergence, and use national case law to see how effective this is. An exhaustive account of the cases related to the UCTD and UCPD goes far beyond the purpose of this paper. Instead of reporting an extensive number of cases, we selected cases that are most illustrative of the research question of this contribution, and of the directives under investigation.

An important insight from our research is that the concept of the average consumer that has been so heavily criticized by consumer movements for having unrealistic expectations of actual consumer behaviour, is in the practice of the CJEU actually more realistic, and even protective of consumers.

We firstly analyse the UCTD (Section 2) and subsequently the UCPD (Section 3). To enhance the reader friendliness of the paper the same format is applied. Firstly, we clarify the general scheme of the directives (subsections A), followed by an overview of relevant case law of the CJEU (subsections B). These analyses are complemented with an actual and illustrative account of relevant national cases (subsections C). Finally, a conclusion is drawn in Section 4.



## 2. Unfair Contract Terms Directive

### 2.1. The Directive's unfairness standard

Art. 3(1) provides: 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.

Art. 4(2) provides: 'Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language'.

There is an annex of indicatively unfair terms. Inclusion in the annex does not create any formal presumption of unfairness, though in practice courts do take notice of whether challenged terms are similar to those found in the Annex. The Annex includes exclusion and limitation clauses and also penalty clauses. The other terms in the Annex deal more with ensuring there is a balance between the two parties – this fits in with the core requirement that there be a significant imbalance. These have been classified as terms that (i) give one party control over the contract terms or the performance of the contract, (ii) control the duration of the contract and (iii) which prevent the parties having equal rights (Howells 1997, 106-107).

#### 2.1.1. *Good faith and significant imbalance*

Good faith is not an independent test of unfairness, but rather is linked to the establishment of a significant imbalance. Recital 15 provides that

'Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the



requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account’.

Does this standard only require a clear conscience and use of transparent procedures, or as the recital suggests is a contractor required to take some account of the legitimate interests of the other party? (Farnsworth 1962, 666; Brownsword 1994, 197)

The CJEU has interpreted this as requiring an assessment of ‘whether the seller or supplier could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations’.<sup>II</sup> Moreover, does good faith go beyond mere procedural controls, and require that some terms be always considered unfair as they are so seriously imbalanced? As Hugh Beale comments

I suspect that good faith has a double operation. First, it has a procedural aspect. It will require the supplier to consider the consumer's interests. However, a clause which might be unfair if it came as a surprise may be upheld if the business took steps to bring it to the consumer's attention and to explain it. Secondly, it has a substantive content: some clauses may cause such an imbalance that they should always be treated as [...] unfair (Beale 1995, 245).

Whatever, the meaning of good faith, the requirement of significant imbalance indicates that there must be some substantive unfairness. There are judicial statements in which assessment of imbalance should involve a comparison with the legal position without the term.<sup>III</sup> Exclusion and limitation clauses are therefore obvious such targets of this regulation. One approach to evaluating imbalance is to ask whether the consumer would reasonably accept the term if it was drawn to their attention.<sup>IV</sup> The CJEU sees this as part of the good faith test,<sup>V</sup> whereas it might be better to ask that question to establish whether there is a substantive imbalance. If an imbalance were found then there might be a consideration of whether it was contrary to good faith, and factors such as transparency and any justifications for using the term could be taken into account. The possible agreement test looks at fairness from the consumer's perspective, but the good faith standard also raises the distinct question of the extent to which the supplier has to take consumer's interests into account.

The ambiguous nature of the good faith test is perplexing when trying to distil the ultimate rationale for the regulation of unfair terms. However, it can be very useful as a



cloak for the differential application of the norms between legal systems. In this respect, it can be recalled that the minimum harmonisation level of the UCTD allows Member States to adopt a stricter unfairness test; for instance, Belgian legislation, in transposition of the directive, does not refer to good faith as part of the unfairness test.

### *2.1.2. Core terms*

The exclusion in art. 4(2) of what might loosely be called core terms underlines that the Directive is not concerned with the fairness of the core bargain. Recital 19 explains: 'assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied'. Market forces should discipline such terms: allowing their challenge would interfere with freedom of contract (Brandner 1991, 647). Consumers can be expected to look after these matters for themselves. Regulation is needed of those more technical terms that consumers will not think to consider, or even be able to evaluate, and yet can cause them unfair surprises. The ability to have a broad or narrow interpretation of art. 4(2) is another lever to have a more or less uniform approach.

### *2.1.3. Plain and intelligible language*

Terms must be drafted in plain and intelligible language.<sup>VI</sup> The sanction is to interpret the term in the manner most favorable to the consumer.<sup>VII</sup> If core terms are not drafted accordingly, they will be subject to assessment for fairness. The average consumer was invoked to ensure that legal and technical jargon should be eschewed (Willett 2007, 328-332). Terms must not only be formally understood, but their consequences should also be understandable by the average consumer. This is part of a broader transparency requirement. The extent to which this is embraced can again affect the level of uniformity.

## **2.2. CJEU case law**

### *2.2.1. Procedural effectiveness*

The case law of the CJEU has been far richer and more expansive than might have been anticipated (Wilhemsson 2017; Micklitz 2014, 771). Much of this has been of a procedural nature, controlling the use of arbitration clauses,<sup>VIII</sup> ensuring procedural time limits do not prevent redress,<sup>IX</sup> requiring interlocutory remedies be available<sup>X</sup> and requiring



that courts adopt an *ex officio* doctrine to consider unfair terms of their own motion.<sup>XI</sup> This jurisprudence will not be dealt with here.

### 2.2.2. *General approach*

The preliminary reference is a co-operative procedure between the CJEU and national courts (art. 267 TFEU). The CJEU's role is to interpret EU law, but it is for national courts to apply it. The CJEU has described the unfairness test as vague,<sup>XII</sup> and has wanted to give guidance on the test and the annex. Yet, it has appreciated that it would be overburdened given the potentially large number of unfair terms that might be referred. Although in *Océano Grupo Editorial SA v Murciano Quintero*,<sup>XIII</sup> the CJEU was willing to hold that a jurisdiction clause in a contract for the sale of encyclopaedias must be unfair, the Court backtracked in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter*<sup>XIV</sup> and even accepted that the fairness assessment needed to take account of national law and the factual matrix.<sup>XV</sup>

### 2.2.3. *Significant imbalance and good faith*

The CJEU has only recently started to give guidance on the core elements of the fairness test. In *Aziz*, it noted that ‘in referring to concepts of good faith and significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, Article 3(1) of the directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated’.<sup>XVI</sup>

This seems to support the view that the fairness test is an amalgam of procedural and substantive justice.

The CJEU has said that ‘to ascertain whether a term causes a “significant imbalance” in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms’.<sup>XVII</sup>



In *Aziz*, the CJEU stated that ‘in order to assess whether the imbalance arises “contrary to the requirement of good faith”, it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations’.<sup>xviii</sup>

As suggested above, this may be a better test of whether there is significant imbalance rather than a lack of good faith. The fact that the Court uses this test in the context of good faith indicates that use of a substantively unfair term can in itself be contrary to good faith.

#### 2.2.4. Core terms

In *Kásler v OTP Jelzáogbank*<sup>xix</sup> the CJEU noted that under Art. 4(2) the exclusion from assessment of terms relating to the main subject matter of the contract, or the price or remuneration, was an exception that had to be construed strictly. It accepted the core/ancillary term distinction. Terms falling within the ‘main subject matter of the contract’ are ‘those that lay down the essential obligations of the contract and, as such, characterize it’. Ancillary terms are therefore those that do not decide the essence of the contract. Whether the exchange rate for monthly repayments fell within the main subject matter was left to the national courts.<sup>xx</sup> The Court held that the exclusion for price or remuneration could not apply to a term that simply fixed exchange rates, as that could not be considered remuneration. Previously the exemption had not been applied to a mechanism for amending prices of services in *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési ZRT*.<sup>xxi</sup> The CJEU seems to have sent a clear signal that this exemption should be narrowly construed, but its application is again a matter for national law.

#### 2.2.5. Transparency

The CJEU has given some very strong guidance on what is required for terms to be plain and intelligible. This is crucial, for even core terms can be reviewed if they fail to meet this standard. In *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési ZRT*<sup>xxii</sup> it was held that the power to vary the contract had to provide the method for fixing fees and the reasons for amendment.<sup>xxiii</sup> These had to be set out in plain and intelligible language so consumers could foresee, on the basis of clear intelligible criteria, the amendments that the supplier could make.<sup>xxiv</sup> Equally, the importance of consumers knowing how a power to amend



prices could be exercised was underlined in *RWE Vertrieb v Verbraucherzentrale Nordrhein-Westfalen EV*.<sup>xxv</sup> *Kásler v OTP Jelzálogbank ZRT*<sup>xxvi</sup> concerned a complex pricing mechanism for pricing and repayment of a foreign currency loan. The Court made explicit the requirement that intelligibility should not be restricted to mere formal or grammatical intelligibility. The standard to be used is that of the average consumer. The Court used the traditional formula, that such an average consumer should be reasonably well informed, and reasonably observant and circumspect. However, in practice it applied this test in a way which promoted consumer protection. It was not concerned with a mere formal ability to understand. The average consumer should not only be able to understand the difference between buying and selling rates. She must also be able to comprehend the significant economic consequences that may result from the application of the selling rate to the calculation of repayments, and the total sum repaid.<sup>xxvii</sup>

The standard to be used is that of the average consumer, but the contractual framework may also have an impact on the consumer's level of attention. *Van Hove v CNP Assurances SA*<sup>xxviii</sup> concerned a loan contract combined with an insurance contract, intended to ensure that mortgage loan repayments were covered. The CJEU emphasized the relevance of the fact that the contract at issue forms part of a broader contractual framework. The Court said that 'the consumer cannot be required, when concluding related contracts, to have the same vigilance regarding the extent of the risks covered by that insurance contract as he would if he had concluded that contract and the loan contracts separately'.<sup>xxix</sup>

In the same vein, the CJEU stressed the importance of the APR in consumer credit contracts in *Pobotovost*,<sup>xxx</sup> and *Maria Bucura*.<sup>xxxi</sup> Informing the consumer of the total cost of credit, in the form of an interest rate calculated according to a single mathematical formula, is of critical importance as it contributes to the transparency of the market, enables the consumer to compare offers of credit and enables him to assess the extent of his liability. Hence, 'the failure to mention the APR in the credit agreement at issue, the mention of the APR being essential information in the context of Directive 87/102 (consumer credit), may be a decisive factor in the assessment by a national court of whether a term of a credit agreement concerning the cost of that credit in which no such mention is made is written in plain, intelligible language within the meaning of Article 4 of Directive 93/13'.<sup>xxxii</sup>



### 2.3. National case law

There are now many lower court decisions in the UK applying the Directive, sometimes in a manner that is very faithful to European law. However, attention has now focussed on Supreme Court decisions that appear to be less consumer friendly. In fact, the Supreme Court has in fact recently considered the transparency test to be opaque,<sup>xxxiii</sup> but this approach, when combined with the discretion accorded to national courts in applying the EU law as interpreted by the CJEU, makes it hard to say whether the Supreme Court has wrongly applied the law. Though as a final court it can be criticized for failing to make a preliminary reference where the law seems unclear.

In *Director General of Fair Trading v First National Bank plc*,<sup>xxxiv</sup> a term requiring interest to be paid on delayed payments when rescheduling debts was considered fair as it was necessary if interest was to be recoverable. Many of the judgements have demonstrated an appreciation of the European origin of fairness, and an understanding that it is an amalgam of procedural and substantive fairness. Core terms were also distinguished from ancillary or subsidiary terms. It was emphasised that the exemption for core terms should be applied restrictively. The result in this case was seen as disappointing by many consumer activists, but that may be an unfair critique, as there is nothing inherently unfair in reserving the right to default interest under the main contract. This decision can in fact be seen as adopting a European approach to interpretation. However, it can perhaps be criticised for the judges' readiness to accept that the understanding of good faith was settled, and therefore did not merit a reference to the European Court.

The reluctance to refer was also present in *Office of Fair Trading v Abbey National plc and Others*,<sup>xxxv</sup> which involved a challenge by the Office of Fair Trading to excessive bank charges incurred through a range of irregular activity by customers. Such charges were central to the financing of the "free-if-in-credit" model that most British current accounts operated under. The question was whether they were subject to review under the Regulations. The Supreme Court viewed the charges as part of the overall package involved for 'free-if-in-credit' accounts and excluded them from review. The deal was free banking in return for banking charges if the account was used unwisely. The charges were an important part of the bank's revenue. The decision not to refer seems difficult to justify. The matter was considered *acte clair* despite the Court of Appeal and High Court having reached a different conclusion. This runs counter to the House of Lords' decision in *First*



*National Bank v Office of Fair Trading*, where the core terms concept was invoked, and default charges were seen as one, but not the only, term relating to price that remained subject to review. The German Supreme Court has in fact subjected such charges to review.<sup>xxxvi</sup> The Supreme Court decision looks even more insecure when assessed against the later CJEU's decision in *Árpád Káster, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*,<sup>xxxvii</sup> in which the Court accepted the core/ancillary term distinction. The explanation, but not justification, for failing to make a reference was perhaps the desire to give the banks some respite and security after their many setbacks in recent years. A reference to Europe would have left them uncertain of their liabilities for a significant period of time (Morgan 2010, 208-214).

*Parking Eye v Beavis*<sup>xxxviii</sup> shows a recent example of the room for legitimate disagreement on how the test should be applied. It concerned the fairness of a £85 charge for overstaying a two-hour free parking offer. Lord Toulson found that this created a significant imbalance, as it was a greater imposition than the damages normally recovered.<sup>xxxix</sup> He argued that it had not been proven that a consumer would accept the term, and noted that for some consumers this was a hefty sum, that applied even if the overstay was short. In his view, Lords Neuberger and Sumption had erred in holding a term was reasonable, because it was reasonable for the supplier to include the term. They had also been persuaded by the prominence of the term, and the fact that the car park had good reasons to impose the charge to ensure compliance. They also agreed with Lord Mance that it was a fair trade-off for two hours free parking. This case illustrates that the test leaves a lot of discretion, and that even senior judges can come to different conclusions when applying it. These differences seem to be more due to the attitude of the judge to social protection of consumers, than any factor unique to the common law, given the differences between common law judges (Howells, forthcoming).

We mentioned above that there is no or very little legislative guidance on how the transparency requirement must be applied. Consequently, when assessing the transparency of contract terms, national courts enjoy a broad discretion.

Focussing on core terms, the UK Consumer Rights Act 2015 provides that the exemption of Article 4 (2) UCTD applies only if the core term is also prominent. A term is prominent if it is brought to the consumer's attention in such a way that an average consumer would be aware of it (S. 64(4)). In most of the other Member States of the EU



there is no equivalent requirement to bring core contract terms to the consumer's attention.

The absence of sufficient legislative guidance has led to divergent interpretations of the transparency requirement, despite the gap filling case law of the CJEU referred to above. In Poland for instance, core terms are in conformity with the rule in the directive excluding them from the unfairness test, if they are worded clearly.<sup>XI</sup> Yet, the clarity requirement refers to the substance of the standard term concerned, and is satisfied if the term allows for only one possible meaning viewed from the perspective of the average consumer.

French case law remains quite hesitant to apply the transparency principle on core terms (Rochfeld 2004, 981). French courts have historically been quite reluctant to declare a core term null only because of the lack of clarity of that term. Czech case law also shows that the exclusion from the unfairness test of core contract terms is not subject to an elaborate transparency requirement (Ildiko Sik-Simon, 2017).

The most protective approach is to be found in Finland, where core contract terms are not excluded from the unfairness test. A similar protection seems available in Greece, although this does not appear to have been a deliberate legislative choice. Greek legislation omitted an exclusion for core contract terms, so that the protection against unfair terms in consumer contracts extends to cover these. However, influenced by the case law of the CJEU, Greek courts have increasingly interpreted national legislation in conformity with the Directive and the CJEU's case law. In the absence of any legislative guidance on how the transparency principle must be applied, Greek case law developed three principles for the assessment of the transparency of any contract term. First, the principle that contract terms must be clear (grammatically correct and succinct, no obscure terms) and comprehensible (subjective ability of the consumer to realize the term's true meaning); second, the principle of the determinable content of terms (no vague terms); and third, the principle of foreseeability of terms (prohibiting unexpected, unusual, surprising or misleading terms). Businesses must ensure that contract terms correspond to those three principles, assessed from the point of view of an average consumer, who is assumed to be a self-aware and responsible person (Dellios 2015, 118-119).

A broader approach is to be found in Italy, where despite the fact that the Italian legislator also attaches great importance to the transparency of consumer contract terms, and favours the broad reading of transparency provided by the CJEU in *Arpad Kasler*,<sup>XII</sup>



Italian courts seem to apply an *ex post* case-by-case approach by exclusion. Clauses that obviously do not correspond to the transparency requirement are excluded, such as contradictory terms in the consumer contract, as are terms that are drafted in highly technical (financial) language and terms written in an ambiguous, vague language (Giorgianni 2009, 209).

Belgian case law also offers examples of incoherent, and thus non-transparent, terms in consumer contracts.<sup>XLII</sup> On one occasion the Liège Court of Appeal was more willing to accept the transparent character of a term in an insurance contract.<sup>XLIII</sup> Prior to *RWE Vertrieb*, cited above, the Brussels Court of Appeal held that the general information duty imposed on businesses does not require the seller to inform the consumer of the consequences of legal requirements, even though these requirements could have had an impact on the fairness of some of the contract terms.<sup>XLIV</sup>

Thus, one can see that case law creates a dialogue between the CJEU and national courts; there is convergence, but also room for national discretion. However, we see in the transparency requirement, and the characterisation of the ‘average consumer’, that the CJEU has placed the spotlight on the need to ensure consumer protection has practical value for consumers.

### 3. Unfair Commercial Practices Directive (UCPD)

#### 3.1. Directive’s scheme and harmonisation method

##### 3.1.1. Broad scope

The UCPD has a very broad scope. It applies to unfair business-to-consumer (B2C) commercial practices before, during and after a commercial transaction in relation to a product. Furthermore, Article 2(d) of Directive 2005/29 gives a particularly wide definition to the concept of commercial practices: ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers’. It follows that all types of promotional campaigns, that clearly form part of an operator’s commercial strategy and relate directly to the promotion thereof and its sales development, constitute commercial practices.<sup>XLV</sup>



The particularly wide scope of the directive extends to any commercial practice directly connected with the promotion, sale or supply of a product to consumers. Also mixed commercial practices (with B2C and B2B aspects) fall within its scope. According to recital 6 in the preamble to Directive 2005/29/EC, only national legislation relating to unfair commercial practices 'which harm "only" competitors' economic interests or which relate to a transaction between traders is thus excluded from that scope'.<sup>XLVI</sup>

The general scheme of the directive is characterised by three types of prohibition. First, the general norm of Article 5 functions as a catch all clause, and prohibits unfair commercial practices in general. It provides that a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts, or is likely materially to distort, the economic behaviour of the average consumer with regard to the product.

Second, the directive defines two precise categories of unfair commercial practices, namely misleading practices and aggressive practices. These so-called smaller general norms prohibit misleading and aggressive practices, that having regard to their nature and the factual context cause, or are likely to cause, the average consumer to take a transactional decision which he would not otherwise have taken.

Lastly, Annex I to Directive 2005/29/EC establishes an exhaustive list of 31 (misleading and aggressive) commercial practices which are regarded as unfair in all circumstances. Consequently, these commercial practices alone can be deemed to be unfair without a case-by- case assessment against the provisions of the directive, and in the light of the average consumer.

To apply the UCPD in practice, first it must be verified if the alleged unfair practice is listed in the Annex I black list of the directive. Only if that is not the case can recourse be made to the smaller general prohibitions of misleading and aggressive practices corresponding to the criteria set out in Articles 6 and 7 and in Articles 8 and 9 of Directive 2005/29/EC respectively. If no misleading or aggressive practice can be proven the general norm of Article 5 eventually comes into play.

Directive 2005/29/EC fully harmonises, at the Community level, the rules relating to unfair business-to-consumer commercial practices. Accordingly, Article 4 thereof expressly provides that Member States may not adopt stricter rules than those provided for in the directive, even in order to achieve a higher level of consumer protection.<sup>XLVII</sup> Hence,



Member States no longer enjoy broad discretion to regulate unfair commercial practices. However, the UCPD excludes some practices of its scope and also contains a number of safeguard clauses which allow Member States to further regulate the field.<sup>XLVIII</sup>

### *3.1.2. Excluded practice, safeguard clauses and open norms*

The UCPD does not regulate health and safety rules, rules on taste and decency, contract law, authorisation regimes and deontological rules for liberal professions that are in conformity with EU-law. Member States remain fully competent in those fields subject to other limits imposed by EU-law. The UCPD also contains a number of safeguard clauses. The most important is Article 3(9) on national rules concerning financial services and immovable property. This provision allows Member States to impose requirements which are more restrictive or prescriptive than the Directive.

In *Citroën Belux*,<sup>XLIX</sup> the CJEU interpreted this safeguard clause in favour of the Member States, thereby applying a literal interpretation of the provision. It ruled in line with the European legislator's preferences<sup>L</sup> that 'the wording of Article 3(9) of Directive 2005/29 merely allows Member States to adopt more stringent national rules in relation to financial services and does not enter into further detail. Accordingly, it does not impose any limit as regards how stringent national rules may be in that regard or lay down any criteria regarding the degree of complexity or risk which those services must involve in order to be covered by more stringent rules. Nor does it follow from the wording of that provision that the more restrictive national rules can cover only combined offers composed of a number of financial services or only combined offers of which the main component is the financial service'.<sup>LI</sup>

The Court's analysis of the free movement provisions in the TFEU also produced the same result: since financial services are, by nature, complex and entail specific risks with regard to which the consumer is not always sufficiently well informed, a combined offer of which one component is a financial service may well mislead consumers as to the true content and actual characteristics of the combination offered and, at the same time, deprive them of the opportunity of comparing the price and quality of that offer with other corresponding services from other economic operators.<sup>LII</sup> Furthermore, and despite total harmonisation, the use of open norms in the prohibitions laid down in the UCPD allows room for nationally inspired applications. Take for instance the prohibition of misleading



actions as an example: it prohibits commercial practices that contain false, or even factually correct information that, including the overall presentation, deceives or is likely to deceive the average consumer in relation to one or more of the elements specified in the provision, and causes or is likely to cause him to take a transactional decision that he would not have taken otherwise (see art. 6 (1) UCPD). References to the overall presentation of commercial practice and its impact on the purchase decision of a consumer entail a certain discretion for national courts; the exhaustive list of elements about which deception can take place allows for a certain discretion. The list for instance refers to deception about the ‘main characteristics of the products’ but proceeds with the wording ‘such as’, thus allowing national courts to expand the list of main characteristics.

The general scheme of the UCPD also allows some leeway for the national courts. Interpreting the unfair commercial practices of the black list annexed to the UCPD, the CJEU held in *4Finance*<sup>LIII</sup> that ‘a practice not covered by Annex I to Directive 2005/29 may nevertheless be prohibited where a specific and concrete assessment leads to the conclusion that it is unfair within the meaning of Articles 5 to 9 of that directive’.<sup>LIV</sup> In contrast, where a practice comes within the scope of the blacklisted provisions, the prohibition is absolute. In the case law of the CJEU a literal interpretation of the blacklisted unfair practices prevails.

For instance, in *Purely Creative*<sup>LV</sup> the Court held that the commercial practice of informing a consumer that he has won a prize and obliging him, in order to receive that prize, to incur a cost of whatever kind, is in all circumstances prohibited. Moreover, it is not permissible to allow traders to make use of a multi-option scheme, unless at least one of the methods did not involve any payment by the consumer.

Such restrictive interpretation is legitimized by the CJEU on the basis of the high level of consumer protection pursued by the UCPD, and the precise function of the black list within the internal market. As to the first, the CJEU points out that unfair practice exploits the psychological effect caused by the announcement of the winning of a prize, in order to induce the consumer to make a choice which is not always rational, such as calling a premium rate telephone number to ask for information about the nature of the prize, travelling at great expense to collect an item of low-value crockery or paying the delivery costs of a book which he already has. Even when one of the methods would not involve any cost, the psychological exploitation of the consumer would remain the same. As



concerns the internal market, the objective of legal certainty would not be achieved if traders were allowed to impose on the consumer costs which are ‘*de minimis*’ compared with the value of the prize. That would make it necessary to determine evaluation methods both for the costs and the prizes, and would also require such difficult evaluations to be carried out by national courts on a case-by-case basis, in order to prove that ‘*de minimis*’ element, which is precisely what Annex I to the directive sought to avoid by including that practice.<sup>LVI</sup>

Moreover, the benchmark of the ‘average consumer’ referred to in the UCPD creates a certain flexibility, albeit that the CJEU has to a considerable extent handcuffed national judges, by stating that, in the case that the consumer was able to make informed choices, market deregulation prevailed over national regulatory protection (see more extensively: Straetmans 2016, 199-210). This case law concerning misleading practices will be briefly highlighted in subsection B.

### 3.2. Case law of the CJEU concerning misleading practices

The CJEU has consistently held that the assessment of whether an appellation, brand name or advertising statement may be misleading must take into account the presumed expectations of an *average consumer who is reasonably well informed and reasonably observant and circumspect*.<sup>LVII</sup> This benchmark of the European average consumer has its origin in the prime consideration, taken from non-binding preliminary programmes for a consumer protection and information policy, that consumers should be enabled to make a choice in the market in full knowledge of the facts.<sup>LVIII</sup> The emergence of this European consumer image was implicitly present in misleading practices cases like *GB-Inno-BM*,<sup>LIX</sup> *Yves Rocher*<sup>LX</sup> and *Mars*,<sup>LXI</sup> and was subsequently consolidated in the *Gut Springenbeide* and *Tusky* case.<sup>LXII</sup> It has since been confirmed in case law, and also more recently in legislation.<sup>LXIII</sup>

With regard to labelling requirements, the CJEU emphasized that the rational consumer, whose purchasing decisions also depend on the composition of the products, will first read the list of ingredients. As a result the average consumer who is ‘reasonably well informed and reasonably observant and circumspect’ is not misled by the use of a term on the label if the seemingly misleading impression the term entails is contradicted by the list of ingredients that duly indicates the presence of all the ingredients in the product.<sup>LXIV</sup> Hence, a comprehensive and correct list of ingredients on the packaging of a product may



prevent a consumer's misleading impression derived from a term or depiction used on the packaging of the product.<sup>LXV</sup>

Although the CJEU recognises that cases may exist where the requirement of an additional statement to the trade description is necessary in order to avoid any confusion on the part of consumers, it has consistently struck down additional national labelling requirements to that end. In *Commission vs. Italy*,<sup>LXVI</sup> for instance, the CJEU opposed Germany's prohibition of the marketing of hollandaise sauce or béarnaise sauce prepared from vegetable fats instead of butter and eggs in accordance with the recipe traditionally followed in Germany. The CJEU stated that 'for consumers who are heedful of the composition of a product, sufficient information is available by way of the list of ingredients which (...) must appear on the labelling'.<sup>LXVII</sup> In the same vein, the CJEU held in *Darbo*<sup>LXVIII</sup> that mentioning 'naturrein' on the packaging of strawberry jam gave consumers no misleading impressions. It pointed out that 'an average consumer who is reasonably well informed and reasonably observant and circumspect could not be misled by the term 'naturally pure' used on the label simply because the jam contains pectin gelling agent whose presence is duly indicated on the list of its ingredients'.<sup>LXIX</sup>

In misleading advertising cases the CJEU also emphasized that the European average consumer has a duty to internalize the information which is disclosed to him in the market (for a more elaborated account of the developments in case law of the CJEU: Straetmans 1998, 355-408; Straetmans 2013, nrs. 100-101, 108-122, Weatherill 2013, 5-20). The *Clinique*<sup>LXX</sup> case is illustrative of this point; the German Government sought to stop the use of the name 'Clinique' for cosmetic products, on the grounds that that name could mislead consumers into believing that the products in question had medicinal properties. The CJEU adequately countered the German objections. It stated 'that the range of cosmetic products manufactured by the Estée Lauder Company is sold in the Federal Republic of Germany exclusively in perfumeries and cosmetic departments of large stores, and therefore none of those products is available in pharmacies. It is not disputed that those products are presented as cosmetic products and not as medicinal products. It is not suggested that, apart from the name of the products, this presentation does not comply with the rules applicable to cosmetic products. Finally, according to the very wording of the question referred, those products are ordinarily marketed in other countries under the name 'Clinique' and the use of that name apparently does not mislead consumers'.<sup>LXXI</sup>



Hence the German prohibition did not appear to be necessary to satisfy the requirement of consumer protection and human health. The Court therefore added ‘the clinical or medical connotations of the word ‘Clinique’ are *not sufficient to make that word so misleading as to justify the prohibition* of its use on products marketed in the aforesaid circumstances’ (own emphasis).<sup>LXXII</sup>

The importance of this last sentence cannot be overlooked. Even though the CJEU recognised that the possibility should not be excluded that German consumers may wrongfully infer from the product name that it has medicinal qualities, this is not sufficient to prohibit the use of that name as deceptive. The product is presented as a cosmetic product, its presentation complies with the specific labelling requirements laid down in European directives, and the product can only be bought outside pharmacies. This information should suffice to alert the European consumer and allows him to correct his initial wrongful inferences from the product name.

The bluntness of the CJEU in *Clinique*, and the CJEU’s preference for the European average consumer as a standard for the assessment of misleading practices, has been criticised in consumer literature as *majoritarianism* (Weatherill 1999, 51-85). Some have argued that the concept of the average, confident consumer has a very weak and unreliable basis in Community law (Roth 2003, 944; Wilhemsson 2007, 243-268; Unberath 2007, 1251-1252). In the same vein, a common objection is that although information disclosure can contribute to the empowerment of consumers, it is often of very little help to vulnerable consumers when it comes to leading a self-determined life (Howells 2005, 360-372). This has even prompted some scholars to conclude that European consumer information policy leaves out the protection of the really weak, illiterate or poor consumer (Hondius 2006, 93; Heiderhoff 2000-7, 743).

In consequence, the CJEU somewhat mitigated the effect of its rulings in subsequent judgments. Thus, in *Estée Lauder*,<sup>LXXIII</sup> whilst confirming the standard of the average consumer, the CJEU also held that ‘in particular, it must be determined whether *social, cultural or linguistic factors* may justify the term “lifting”, used in connection with a firming cream, as meaning something different to the German consumer as opposed to consumers in other Member States, or whether the instructions for the use of the product are in themselves sufficient to make it quite clear that its effects are short-lived, thus neutralising any conclusion to the contrary that might be derived from the word “lifting”’.<sup>LXXIV</sup>



However, the mitigating effect of the reference to particular social, cultural or linguistic factors was put immediately into perspective by the Court's consideration that 'at first sight, the average consumer - reasonably well informed and reasonably observant and circumspect - ought not to expect a cream whose name incorporates the term 'lifting' to produce enduring effects'.<sup>LXXV</sup> The CJEU acted similarly in the *Linhart and Biff*<sup>LXXVI</sup> case, where it held that the mere statement 'dermatologically tested' or 'clinically tested' appearing on the packaging of soaps and hair products meant that the product was 'well tolerated or at least harmless when applied to the skin'.<sup>LXXVII</sup>

It follows from the foregoing that the European average consumer is depicted as someone who is well capable of processing information which is disclosed in the market. Moreover, the European average consumer has a duty to take advantage of this information, the release of which is not non-committal, especially when that information empowers him to correct his misleading impressions based on the product name, or other particulars of the product, or in advertising.

And yet, despite the preference for an average consumer tailored to the objectives of the internal market, recent developments in the CJEU's case law may reveal a changing approach towards the consumer's duty to internalize disclosed information, and perhaps also towards national courts' leeway to include national preferences in the assessment.

In the recent *Teekanne* case,<sup>LXXVIII</sup> the Court had to interpret the alleged misleading character of the mentions on the packaging of a fruit tea. That packaging comprised a number of elements of various sizes, colour and font, in particular (i) depictions of raspberries and vanilla flowers, (ii) the indications 'fruit tea with natural flavourings' and 'fruit tea with natural flavourings – raspberry-vanilla taste' and (iii) a seal with the indication 'only natural ingredients' inside a golden circle. The questions referred to the Court were not so much about whether information requirements stemming from the foodstuff labelling directive (Directive 2000/13/EC repealed by Regulation 1169/2011/EU) were complied with - the list of ingredients on the packaging correctly referred to 'natural flavourings with a taste of vanilla' and 'natural flavourings with a taste of raspberry, blackberries, strawberry, blueberry, elderberry' - but whether the depictions on the packaging of the fruit tea were of such a nature that they could mislead consumers with regard to the tea's content. In other words, does the labelling of a foodstuff and methods used for the labelling give the consumer the impression, by means of the appearance,



description or pictorial representation of a particular ingredient, that that ingredient is present, even though it is not in fact present and this is apparent solely from the list of ingredients on the foodstuff's packaging?

Having regard to the settled case-law set out above, one would have expected the CJEU to rule that the list of ingredients expresses, in a manner free from doubt, the fact that the flavourings used are not obtained from vanilla and raspberries but only taste like them, and that correct and complete information provided by the list of ingredients on packaging constitutes sufficient grounds on which to rule out the existence of any misleading of consumers. As indicated above, consumers have a duty to internalize information which is disclosed to them in the market and on the products.

At first, the Court in *Teekanne* confirmed that 'it is apparent from the case-law that the Court has acknowledged that consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients, the display of which is required'.<sup>LXXXIX</sup> But then the CJEU surprisingly continued that 'the list of ingredients, *even though correct and comprehensive*, may in some situations not be capable of correcting sufficiently the (average reasonably well informed, and reasonably observant and circumspect) consumer's erroneous or misleading impression concerning the characteristics of a foodstuff that stems from the other items comprising its labelling' (own emphasis).<sup>LXXX</sup>

In doing so, in the *Teekanne* case the CJEU *recognised for the first time* that correct and complete information provided by the list of ingredients on packaging, in accordance with the labelling of foodstuffs directive, may constitute misleading advertising. It follows that the display of the correct and comprehensive list of ingredients no longer rules out the possibility that the labelling has the capacity to mislead consumers. That would be the case for instance if some of the elements of which the labelling is composed are in practice misleading, erroneous, ambiguous, contradictory or incomprehensible.<sup>LXXXI</sup> Indeed, the prime consideration of European labelling laws is that the consumer has correct, neutral and objective information that does not mislead him.<sup>LXXXII</sup> The CJEU added that 'where the labelling of a foodstuff and methods used for the labelling, *taken as a whole*, give the impression that a particular ingredient is present in that foodstuff, even though that ingredient is not in fact present, such labelling is such as could mislead the purchaser as to the characteristics of the foodstuff' (own emphasis).<sup>LXXXIII</sup>



Whether the consumer is actually being misled is for the referring court to examine. It must carry out an overall examination of the various items comprising the fruit tea's labelling in order to determine whether an average consumer may be misled as to the presence of raspberry and vanilla flower, or flavourings obtained from those ingredients. To further guide national judges, the CJEU in *Teekanne* pointed out that 'in order to assess the capacity of labelling to mislead, the national court must in essence take account of the presumed expectations, in light of that labelling, which an average consumer who is reasonably well informed, and reasonably observant and circumspect has, as to the origin, provenance, and quality associated with the foodstuff, the critical point being that the consumer must not be misled and must not be induced to believe, incorrectly, that the product has an origin, provenance or quality which are other than genuine'.<sup>LXXXIV</sup> Furthermore, the national court must in particular take into account 'the words and depictions used as well as the location, size, colour, font, language, syntax and punctuation of the various elements on the fruit tea's packaging'.<sup>LXXXV</sup>

These developments in respect of labelling requirements demonstrate that the CJEU is increasingly aware of national critiques on how the benchmark of the average consumer is applied in cases of deception. It reduces the consumer's responsibility to process information, as well as his duty to internalize mandated or voluntary disclosures when taking purchase decisions.<sup>LXXXVI</sup>

This case law exerts an influence on how the prohibition of misleading commercial practices under the UCPD is to be applied, and allows national judges to mitigate, to a certain extent, the outcomes of the assessment in the light of the European average consumer benchmark. The guidelines for the assessment of the misleading character proposed by the CJEU already coincide with the assessment criteria of misleading commercial practices provided for by the UCPD. There too, the national court is required to carry out a global, synthetic assessment of commercial practice taking into account all relevant circumstances of the case in view of assessing the capacity of a commercial practice to mislead consumers. The wording of the prohibition to mislead consumers in the UCPD, highlighted above, is also flexible enough to allow national judges to make an assessment, provided that the (correct or wrong) information negatively affects the purchase decision of the consumer. This has been confirmed recently in the *Team4Travel* case<sup>LXXXVII</sup> where the CJEU held that 'the misleading nature of a commercial practice



derives solely from the fact that it is untruthful in as much as it contains false information or that, generally, it is likely to deceive the average consumer in relation to, inter alia, the nature or main characteristics of a product or a service and that, therefore, it is likely to cause that consumer to take a ‘transactional’ decision that he would not have taken if there had been no such practice’.

Also, the recent *Canal Digital Danmark*<sup>LXXXVIII</sup> case seems to confirm the approach taken in *Teekanne*. The case concerned Canal Digital’s price advertising campaign for TV subscriptions on television and on the internet. The CJEU held that when the price of a product is divided into several components, one of which is particularly emphasised in the marketing, while the other is completely omitted or is presented less conspicuously, ‘an assessment should be made, in particular, whether that presentation is likely to lead to a mistaken perception of the overall offer’.<sup>LXXXIX</sup> This will be the case ‘if the average consumer is likely to have the mistaken impression that he is offered a particularly advantageous price, due to the fact that he could believe, wrongly, that he only had to pay the emphasised component of the price’.<sup>XC</sup> An advertisement will be all the more misleading if the omitted, or less visible, component of the price represents a significant part of the total price that the consumer is required to pay. The fact that the total price was mentioned in the initial advertising or could be retrieved on the website of the advertiser does not shield the trader from the application of the prohibition of misleading actions. The objective of a high level of consumer protection set forth in the UCPD serves as a correcting factor for literal interpretations of the Directive’s provisions with adverse effects on consumer protection.

Thus, in a striking parallel with *Teekanne*, the CJEU emphasised in *Canal Digital Danmark* that an average consumer who is provided with correct and comprehensive information in advertisements, nevertheless may have a mistaken perception of the offer due to the presentation of that information taken as a whole. The Court does so without renouncing that the average consumer must serve as a benchmark for the assessment of misleading practices (in labelling, in advertising, etc.). That way, the Court seems to confirm the stance it has developed with regard to misleading packaging of products. Despite the absence of any reference to *Teekanne*, it may in our view be deduced from the approach taken in *Canal Digital Danmark* that a similar correction<sup>XCI</sup> to the general rule



applies in both subdomains of misleading practices. The CJEU has managed to bridge the case law in both domains of unfair marketing law.

It follows that even in the case where a trader satisfies the information requirements imposed by the law, this does not rule out that the information may be presented in such a manner that the average consumer remains misled, notwithstanding the correct and comprehensive information he received. This characterization, by the national judge, must be based on an overall assessment of the case. As the CJEU pointed out in *Teekanne*, in some circumstances correct and comprehensive information may no longer be capable of correcting the consumer's erroneous or misleading impressions based on other informational elements.

### 3.3. National case law

Notwithstanding the strong adherence to the European standard of an average consumer of national courts, national traditional standards continue to play an important role in the assessment of law provisions.

Within Europe, the UK takes, for instance, a particular place. The average consumer has become the benchmark for the law of unfair commercial practices, but even before the UCPD was adopted the UK traditionally adopted a robust approach; demanding that consumers make a realistic interpretation of advertising. We have also seen that the UK is comfortable with the average consumer context, and in the UK Consumer Rights Act 2015 uses the average consumer for one additional particular point concerning unfair terms control: to determine whether a term specifying the main subject matter of the contract, or assessment of the price (see also *supra*), is sufficiently prominent to be excluded from the Act's assessment of fairness.<sup>XCII</sup>

The most prominent example of the leeway granted to the Member States is Finland where psychologically inspired assessments by the Market Court remodel the average consumer, stating for instance that the value of the giveaway should not be used to distract a consumer from the price of the main product, and that reporting prices to consumers in an inconsistent way may be considered to be inappropriate, or otherwise unfair conduct, in marketing consumer goods.<sup>XCIII</sup> It follows that the general benchmark for the Finnish national consumer legislation remains a weaker, less rational consumer. In the same vein, Greek courts rely on a relatively well informed but inexperienced consumer, halfway



between a careful, suspicious or observant person and a gullible, completely indifferent or careless person.<sup>XCIV</sup>

Irish courts also struggle with the application of the average consumer, especially in advertising cases. In the *Aldi* decision, the Court of Appeal avoided an overly paternalistic approach to the average consumer, stating that '[t]he notional consumer has common sense' and that 'shoppers have to be given some credit for intelligence and appreciation of common marketing practice'.<sup>XCv</sup> In this case Aldi objected to a comparative advertising campaign by the Dunnes chain of supermarkets, in which shelf-edge labels compared Dunnes's and Aldi's prices for 262 separate products. Aldi claimed this was misleading, particularly in relation to certain products, since Dunnes compared the price of their own brand tomato ketchup with Aldi's even though Aldi's ketchup has more tomato content, and compared its own-brand products when the Aldi products carried quality assurance marks (Kelly 2018). The High Court stated that comparisons are misleading if not all material and relevant features of the products are set out in the comparative advertising. However, the Court of Appeal rejected the assumption that it would inevitably be misleading not to provide full details of the compared products: 'a comparison of products meeting the same needs or intended for the same purpose may be compared by reference only to price, always assuming that the comparison is not outlawed as being misleading'.<sup>XCvI</sup> The misleading character of the advert had to be based on an independent finding of a misleading practice, and not merely based on the fact that the advertisement had failed to set out *all* the features of the products. The Court of Appeal continued that a decision such as misleading practice should not be lightly found. In this case the intention was comparison, not deceit and neither was there a case of deliberately seeking to mislead consumers.<sup>XCvII</sup> The Court of Appeal thus concluded that the average consumer was well capable of understanding price comparisons of that type and would not be misled either by general slogans such as 'lower price guarantee' and 'always better value'.<sup>XCvIII</sup>

However, in the *McC Cambridge* case<sup>XCIX</sup> the Supreme Court seem to depart from the stricter European standard in favour of, according to Kelly, a perhaps more realistic view of a consumer, stating that 'even ordinary reasonable prudent consumers do not, in fact, frequently carry out a detailed examination of the product [bread] at the time when they take the bread from the supermarket shelf and place it in the supermarket trolley' (Kelly 2018). This case concerned a common law action for passing off 'which requires that the



plaintiff has a “goodwill” or reputation in his business, that consumers are likely to be misled into buying the goods / services of the defendant, and that the plaintiff is therefore likely to suffer damage’ (Kelly, 2018). Although there was some evidence that if the consumer actually looked at the packaging and ‘get up’ of the defendant’s soda bread they would not confuse it with that of the plaintiff, the Court held that one bakery had passed off its soda bread as that of the rival bakery, as there was the potential for confusion if consumers put in into their shopping trolley without properly looking at it. The Court emphasised ‘the phenomenon of fast moving consumer goods displayed on the supermarket shelf’,<sup>C</sup> and stated that ‘even ordinary reasonable prudent consumers do not, in fact, frequently carry out a detailed examination of the product at the time when they take the bread from the supermarket shelf and place it in the supermarket trolley’ (Kelly 2018).

Polish courts experienced similar difficulties in advertising cases for which courts developed a formalized, two-step test. First, the targeted audience was determined on the basis of the type of the advertised product or service and, second, the medium used for the advertisement is taken into account.<sup>CI</sup> Assessments by courts were made in that particular order and may sometimes, in contrast with the Irish evolution, lead to weaker protection. In a 2014 judgment concerning the sales of tickets to UEFA EURO 2012 football games, the Polish Supreme Court held that a term included in the standard conditions of business, according to which, in case of a discrepancy between English and Polish language versions of the conditions, the English version should prevail, was not unlawful within the meaning of Article 385<sup>1</sup> of the Civil Code. This was due to the fact that contested standard terms only applied to the online sales channel and therefore were addressed at a group of consumers who were more technology-savvy, active, well-informed, cautious, attentive and used to standard terms being drafted in English”.<sup>CI1</sup>

#### 4. Conclusion

We have pointed out above that legal scholars have criticised the CJEU’s inclination to favour the internal market approach, to the detriment of national regulatory autonomy. It was felt that, especially in the eighties and nineties, CJEU case law disregarded national



preferences, and endowed average consumers with characteristics that were far from realistic.

However, it must be noted that the CJEU should not be criticised for straining the limits of judicial interpretation, as it has often the difficult task to draw lines on the basis of legal rules that leave open a number of crucial questions. The abovementioned analysis of the Court's interpretation of provisions of the UCTD and UCPD further underscores this.

It follows that the Court's case law is legitimate, exercising its role within the EU's constitutional legal order of states and peoples. Even strong opponents, in terms of the CJEU's 'legitimacy' of rulings, recognise that the role the CJEU has played in the process of Union building and European integration has been second to none (Weiler 2015, 253).<sup>CIII</sup> In the same vein Weatherill points out that most of 'the Court's embrace of a *circumloquacious statement of the result rather than a reasoning for arriving at it* is the result of the calculatedly imprecise concept of the internal market loaded into the Treaty' (Weatherill 2015, 108). Snell, in his examination of the legitimacy of free movement case law, also concludes that despite the legitimacy of the case law of the CJEU having been weakened by insufficiently reasoned judgments, it may be the least bad option (Snell 2015, 124-126).<sup>CIIV</sup>

This analysis demonstrates that with regard to both the UCTD and the UCPD the CJEU took on a gap-filling role. In particular, in its case law relating to the transparency requirement in the UCTD, the CJEU gradually laid out the understandings of extensiveness in the requirement of intelligibility. This involved developing a more sophisticated model of the average consumer. Under pressure of national and behavioural economists' critiques on how the benchmark of the average consumer is applied in cases of deception, the CJEU showed itself prepared to reduce the consumer's responsibility to process information and to mitigate the consumer's duty to internalize mandated or voluntary disclosures when taking purchase decisions.

Within the paradigms debate, it comes as no surprise that now that the internal market has come of age, attention has shifted to the complementary paradigm of consumer protection. When the internal market economy is thriving, adjustments can be made to bring the internal market paradigm more in line with the high level of consumer protection that both the UCTD and UCPD intend to ensure. In this context of a more mature legal order, the CJEU is enabled, depending on the circumstances, in its display of greater deference to the preferences of the EU legislator, or to those of the Member States. It



nudges Member States towards a more convergent interpretation, whilst allowing room for national variations in application.

The analysis of national case law relating to unfair contract terms and unfair commercial practices illustrates that national traditional standards continue to play an important role in the assessment of law provisions. This may be seen as self-evident in the presence of a minimum harmonisation directive like the UCTD, which automatically implies a broad discretion for the Member States. But with regard to the maximum harmonisation brought about by the UCPD, the use of general concepts like the average consumer, as interpreted by the CJEU, also allows room for national divergent applications.

It is, however, interesting to see that irrespective of the underlying level of harmonisation the CJEU, backed by the European legislator's intention to ensure a high level of consumer protection, is gradually depicting the European average consumer with more realistic features. Here, the case law of the CJEU fulfils a bridging function between the labelling requirements in the Foodstuff Regulation, the transparency requirements in the UCTD, and the informed decision requirements in the UCPD. In these three domains the CJEU recognises that the level of attention of the consumer may be suboptimal, even in the presence of comprehensive and correct information.<sup>CV</sup> Yet, the impact of the Court's case law in these domains is quite different. In the context of unfair terms control the CJEU imposes a stricter standard on businesses, to take account of the limited abilities of the average consumer. A similar approach with regard to unfair commercial practices mitigates the existing standard as understood from free movement case law. In the domain of foodstuff labelling the Court's approach is in line with the very detailed rules laid down by the European Legislator. In all three cases, the CJEU's interpretation contributes to the high level of consumer protection set forth by the European legislator.

The CJEU's approach contributes to more convergence in consumer protection throughout the EU. Yet, in terms of legitimacy, it must be noted that the CJEU in all cases has maintained a clear line between interpretation and application. This is best illustrated with *RWE Vertrieb v Verbraucherzentrale Nordrhein-Westfalen EV*<sup>CVI</sup> in which case the Court 'recalled that ultimately it is not for the Court but for the national court to determine in each particular case whether that is so. The jurisdiction of the Court extends to the interpretation of the provisions of those directives and to the criteria which the national



court may or must apply when examining a contractual term in the light of those provisions, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case'.<sup>CVII</sup>

The particular constitutional legal order in which the CJEU operates only allows for a process whereby the contours of a more coherent European consumer protection policy are gradually revealed. In the absence of sufficient legislative guidance at the European and national level, national courts may be increasingly inspired by the case law of the CJEU in an effort to establish the clearly desirable common expectations. Those who believe that uniformity can be achieved in practice overnight by simply adopting a common maximum norm appear over-optimistic.

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<sup>I</sup> In its original version, the EC Treaty commanded the Court of Justice to ensure that in the interpretation and application of the Treaties the law is observed, but did not define 'the law'. 'In order to honour that constitutional mandate in a self-referential and, in that sense, autonomous legal order, the ECJ could not limit itself to a formalistic understanding of the rule of law. Accordingly, it had no choice but to complete the constitutional lacunae left by the authors of the Treaties. In so doing, (...) EU law could not break away from the constitutional traditions of the Member States'.

<sup>II</sup> CJEU 14 March 2013, Case C-415/11, *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164, para 69.

<sup>III</sup> See Aziz, op cit.

<sup>IV</sup> Wilhelmsson has labelled this the "possible agreement test" (Howells forthcoming [2018]) at 148

v Aziz.

<sup>VI</sup> This is backed up by a rule of interpretation which states the meaning most favourable to the consumer should prevail (although this does not apply in collective actions as it might save terms that were harmful to the consumer): art. 5.

<sup>VII</sup> Art. 5. Injunction actions are also possible, in which case this interpretative rule does not apply: art 5 in fine and art. 7 (2). This is so as not to protect terms that are potentially unfair to consumers.

<sup>VIII</sup> CJEU 3 April 2014, Case C-342/13, *Katalin Sebestyén v Zsolt Csaba Kóvári, OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt*, ECLI:EU:C:2014:1857.

<sup>IX</sup> CJEU 21 November 2002, Case C-473/00, *Cofidis SA v Jean-Louis Fredout*, ECLI:EU:C:2002:705.

<sup>X</sup> CJEU 14 March 2013, Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164, para 76.

<sup>XI</sup> CJEU 27 June 2000, Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v Roció Murciano Quintero and Salvat Editores SA v José M. Sánchez Alcón Prades, José Luis Copano Badillo, Mohammed Berroane and Emilio Viñas Feliú*, ECLI:EU:C:2000:346 ; CJEU 6 October 2009, Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, ECLI:EU:C:2009:615 and CJEU 26 October 2006, Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, ECLI:EU:C:2006:675.

<sup>XII</sup> CJEU 9 November 2010, Case C-137/08, *VB Penzügyi Lízing ZRT v Ferenc Schneider*, ECLI:EU:C:2010:659.

<sup>XIII</sup> CJEU 27 June 2000, Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v Roció Murciano Quintero and Salvat Editores SA v José M. Sánchez Alcón Prades, José Luis Copano Badillo, Mohammed Berroane and Emilio Viñas Feliú*, ECLI:EU:C:2000:346.

<sup>XIV</sup> CJEU 1 April 2004, Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Hofstetter*, ECLI:EU:C:2004:209.

<sup>XV</sup> CJEU 1 April 2004, Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger*



*Hofstetter and Ulrike Hofstetter*, ECLI:EU:C:2004:209.

<sup>xvi</sup> *Aziz*, para 67.

<sup>xvii</sup> *Ibid.*, para 68.

<sup>xviii</sup> *Ibid.*, para 69.

<sup>xix</sup> CJEU 30 April 2014, Case-26/13, *Árpád Kásler and Hajnalika Káslerné Rábai v OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282.

<sup>xx</sup> *Ibid.*, para 49-50.

<sup>xxi</sup> *Ibid.*, para 23.

<sup>xxii</sup> CJEU 26 April 2012, Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, ECLI:EU:C:2012:242.

<sup>xxiii</sup> It is unclear whether the case was about the power to vary the contract by including these expenses or the fact the new term failed to specify the method of calculating expenses.

<sup>xxiv</sup> CJEU 26 April 2012, Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, ECLI:EU:C:2012:242, para 28.

<sup>xxv</sup> CJEU 21 March 2013, Case C-92/11, *RWE Vertrieb AG tegen Verbraucherzentrale Nordrhein-Westfalen eV*, ECLI:EU:C:2013:180.

<sup>xxvi</sup> CJEU 30 April 2014, Case-26/13, *Árpád Kásler and Hajnalika Káslerné Rábai v OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282.

<sup>xxvii</sup> Compare CJEU 26 February 2015, Case C-143/13, *Matei*, ECLI:EU:C:2015:127, paras 73-77.

<sup>xxviii</sup> CJEU 23 April 2015, Case C-96/14, *Jean-Claude Van Hove v. CNP Assurances SA*, ECLI:EU:C:2015:262

<sup>xxix</sup> See para 48 A similar mitigating approach can be seen in CJEU 3 April 2014, Case C-342/13, *Katalin Sebestyén*, ECLI:EU:C:2014:1857, para 34, where the Court held: “even assuming that the general information the consumer receives before concluding a contract satisfies the requirement under Article 5 that it be plain and intelligible, that fact alone cannot rule out the unfairness of a clause providing for the exclusive competence of a single arbitration tribunal”.

<sup>xxx</sup> CJEU 16 November 2010, Case C-76/10, *Pobotovost*, ECLI:EU:C:2010:685.

<sup>xxxi</sup> CJEU 9 July 2015, Case C-348/14, *Maria Bucura*, ECLI:EU:C:2015:447.

<sup>xxxii</sup> CJEU 16 November 2010, Case C-76/10, *Pobotovost*, ECLI:EU:C:2010:685, para 71.

<sup>xxxiii</sup> See Lords Neuberger and Sumption in *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 WLR 1373, at para 105. Lord Carnwath agreed.

<sup>xxxiv</sup> [2001] UKHL 52, [2002] 1 A.C. 481.

<sup>xxxv</sup> [2009] All ER (D) 271 (Nov).

<sup>xxxvi</sup> The German Supreme Court assessed whether an overdraft was fair without even considering whether it was subject to assessment: BGH 21 October 1997, BGHZ 137, 43, NJW 1998, 309. See discussion in Law Commission, *Unfair Terms in Consumer Contracts: A New Approach?* (2012) para 7.56-61 and Annex A.

<sup>xxxvii</sup> CJEU 30 April 2014, Case-26/13, *Árpád Kásler and Hajnalika Káslerné Rábai v OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282.

<sup>xxxviii</sup> *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 WLR 1373.

<sup>xxxix</sup> *Ibid.*, para 309.

<sup>xl</sup> According to the Polish Supreme Court the lack of transparency of a standard term can in itself constitute an unfair term, irrespective of whether it contributes to a significant imbalance of the parties' rights and obligations to the detriment of the consumer. See Judgment of the Supreme Court in case I CSK 72/15 (n 27).

<sup>xli</sup> CJEU 30 April 2014, Case-26/13, *Árpád Kásler and Hajnalika Káslerné Rábai v OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282. In line with the Arpad Kasler-case of the ECJ, the consumer must be in a position to understand all the advantages and drawbacks of the contract terms used so that he is fully aware of the exact legal and economic reach of the terms and can make an informed choice.

<sup>xlii</sup> See e.g. Vred. Grâce-Hollogne 25 May 2012, *JLMB* 2012, 438.

<sup>xliiii</sup> See Luik 27 March 2012, *For. Ass.* 2013, 137, annotation A. Cruquenaire. The term was worded as follows : “La présente assurance a pour objet de garantir l'assuré contre le risque de décès par accident, sauf celui expressément exclu par article III. La couverture vaut dans le monde entier. Par accident, on entend tout événement provenant de l'action soudaine et fortuite d'une cause extérieure étrangère à la volonté de l'assuré”.

<sup>xliiv</sup> See Brussels 3 May 2002, *DCCR* 2003, 53, annotation E. Terryn.

<sup>xlv</sup> See e.g. CJEU 23 April 2009, Joined cases C-261/07 and C-299/07, *VTB-VAB and Galatea*,



ECLI:EU:C:2009:244.

<sup>XLVI</sup> See CJEU 14 January 2010, Case C-304/08, *Plus Warenhandelsgesellschaft*, ECLI:EU:C:2010:12.

<sup>XLVII</sup> See CJEU 23 April 2009, Joined cases C-261/07 and C-299/07, *VTB-VAB and Galatea*, ECLI:EU:C:2009:244, para 52.

<sup>XLVIII</sup> Note that the CJEU is very strict in not allowing national laws to be justified on consumer protection grounds if they are advanced to conceal purely economic reasons. See e.g. CJEU 13 January 2000, C-254/98, *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH.*, ECLI:EU:C:2000:12, para 33 and CJEU 18 September 2003, Case C-416/00, *Tommaso Morellato v. Comune di Padova*, ECLI:EU:C:2003:475, para 40.

<sup>XLIX</sup> CJEU 18 July 2013, Case C-265/12, *Citroën Belux*, ECLI:EU:C:2013:498.

<sup>L</sup> One of the objectives of the UCPD is to ensure a high level of consumer protection.

<sup>LI</sup> CJEU 18 July 2013, Case C-265/12, *Citroën Belux*, ECLI:EU:C:2013:498, para 25. The intention of the EU legislature is to leave it to the Member States themselves to assess how restrictive they wish to make those measures and to allow them freedom of action in that connection, enabling them to go so far as to prohibit certain arrangements.

<sup>LII</sup> See more in detail, CJEU 18 July 2013, Case C-265/12, *Citroën Belux*, ECLI:EU:C:2013:498, para 39.

<sup>LIII</sup> CJEU 3 April 2014, Case C-515/12, *4Finance*, ECLI:EU:C:2014:211.

<sup>LIV</sup> CJEU 3 April 2014, Case C-515/12, *4Finance*, ECLI:EU:C:2014:211, para 32. In the present case, the practice fell foul of the prohibition of pyramid promotional schemes, but could be combined with a misleading practice severable from the pyramid promotional scheme.

<sup>LV</sup> CJEU 18 October 2012, Case C-428/11, *Purely Creative*, ECLI:EU:C:2012:651.

<sup>LVI</sup> *Ibid.*, paras 46-47.

<sup>LVII</sup> See in particular, CJEU 28 January 1999, Case C-303/97, *Sektellerei Kessler*, ECLI:EU:C:1999:35, para. 36. Thereby, the CJEU was not particularly inspired by human information processing models taken from other disciplines. See for example the Limited Capacity Model of Mediated Message Processing and the LC4MP developed by Lang and find more about this model in the contribution of Mangold to this book.

<sup>LVIII</sup> CJEU 7 March 1990, Case C-362/88, *GB-Inno-BM*, ECLI:EU:C:1990:102, para. 17: ‘a prohibition against importing certain products into a Member State is contrary to (the provisions relating to free movement of goods) where the aim of such a prohibition may be attained by appropriate labelling of the products concerned which would provide the consumer with the information he needs and enable him to make his choice in full knowledge of the facts’ (*own emphasis*).

<sup>LIX</sup> See CJEU 7 March 1990, Case C-362/88, *GB-Inno-BM*, ECLI:EU:C:1990:102. The ECJ agreed with the European Commission that any normally aware consumer knows that annual sales take place only twice a year so that the ‘European’ consumers would not be misled by information on temporary price reductions.

<sup>LX</sup> CJEU 18 May 1993, Case C-126/91, *Yves Rocher*, ECLI:EU:C:1993:191. The Court held that the prohibition on ‘eye-catching’ advertising was disproportionate: it also prohibits correct advertising that is eye catching.

<sup>LXI</sup> CJEU 6 July 1995, Case C-470/93, *Mars*, ECLI:EU:C:1995:224, para 24. The CJEU held that ‘reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase’.

<sup>LXII</sup> CJEU 16 July 1998, Case C-210/96, *Gut Springenbeide and Tusky*, ECLI:EU:C:1998:369, para. 31.

<sup>LXIII</sup> See Directive 2005/29/EC on unfair commercial practices (UCPD) and Directive 2011/83/EU on consumer rights (CRD).

<sup>LXIV</sup> See to that effect, e.g. CJEU 9 February 1999, Case C-383/97, *Van der Laan*, ECLI:EU:C:1999:64, para 37.

<sup>LXV</sup> See e.g. CJEU 10 September 2009, Case C-446/07, *Severi*, ECLI:EU:C:2009:530, para 61 on the question whether the designation of a foodstuff, ‘Salame tipo Felino’, which is evocative of a place and which is not registered as a PDO or PGI may be legitimately used by producers who use it uninterruptedly for a considerable period and in good faith, is misleading. “It is clear from the Court’s case law that, in order to assess the capacity to mislead of a description to be found on a label, the national court must in essence take account of the presumed expectations, in light of that description, of an average consumer who is reasonably well informed, and reasonably observant and circumspect, as to the origin, provenance, and quality associated with the foodstuff, the critical point being that the consumer must not be misled and must not be induced to believe, incorrectly, that the product has an origin, provenance or quality which are other than genuine.”

<sup>LXVI</sup> CJEU 25 November 2010, Case C-47/09, *Commission vs. Italy*, ECLI:EU:C:2010:714.

<sup>LXVII</sup> *Ibid.*, para 36.

<sup>LXVIII</sup> CJEU 4 April 2000, Case C-465/98, *Darbo*, ECLI:EU:C:2000:184.



LXIX *Ibid.*, para 22.

LXX CJEU 2 February 1994, Case C-315/92, *Clinique*, ECLI:EU:C:1994:34.

LXXI *Ibid.*, para 21.

LXXII *Ibid.*, para 23.

LXXIII CJEU 13 January 2000, Case C-220/98, *Estée Lauder Cosmetics vs. Lancaster Group*, ECLI:EU:C:2000:8.

LXXIV *Ibid.*, para 29. According to the German Government the use of the term ‘lifting’ for a firming cream may mislead consumers as to the duration of the product’s effects, because it gives purchasers the impression that use of the product will obtain results which, above all in terms of their lasting effects, are identical or comparable to surgical lifting.

LXXV CJEU 13 January 2000, Case C-220/98, *Estée Lauder Cosmetics vs. Lancaster Group*, ECLI:EU:C:2000:8, para 30.

LXXVI CJEU 24 October 2002, Case C-99/01, *Linhart and Biffj*, ECLI:EU:C:2002:618.

LXXVII *Ibid.*, para 32.

LXXVIII CJEU 4 June 2015, Case C-195/14, *Bundesverband der Verbraucherzentralen e. a. vs. Teekanne GmbH*, ECLI:EU:C:2015:361.

LXXIX *Ibid.*, para 37.

LXXX *Ibid.*, para 40.

LXXXI *Ibid.*, para 41.

LXXXII See more in particular paragraphs 30-34 of the case.

LXXXIII *Ibid.*, para 41.

LXXXIV *Ibid.*, para 36.

LXXXV *Ibid.*, para 43.

LXXXVI Also in the domain of unfair contract terms the CJEU showed itself prepared to reduce the impact on the (un)fair character of contract clauses of even extensive pre-contractual information, see CJEU 3 April 2014, Case C-342/13, *Katalin Sebestyén v Zsolt Csaba Kóvári, OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt*, ECLI:EU:C:2014:1857. The CJEU first confirmed the fundamental importance of pre-contractual information for the consumer’s decision to be bound by the conditions drafted in advance by the seller or supplier. But instead of connecting immediate consequences for consumers to this voluntary disclosure by the trader, the ECJ was prepared to mitigate its impact on consumers, pointing out that “even assuming that the general information the consumer receives before concluding a contract satisfies the requirement under Article 5 that it be *plain and intelligible*, that fact alone cannot rule out the unfairness of a clause such as that at issue (red.: arbitration clause) in the main proceedings”(own emphasis). The high level of consumer protection set forth by the Unfair Contract Terms Directive must also have played a role in the ECJ’s decision.

LXXXVII CJEU 19 September 2013, Case C-435/11, *CHS Tour Services vs. Team4-Travel*, ECLI:EU:C:2013:574.

LXXXVIII CJEU 26 October 2016, Case C-611/14, *Canal Digital Danmark*, ECLI:EU:C:2016:800.

LXXXIX *Ibid.*, para 43.

XC *Ibid.*; para 44.

XCI Namely that even in the presence of complete and correct information deception of an average consumer can take place. (See already on this point prior to the Canal Digital Danmark case, (Straetmans, 2017, 102-103).

XCII See UK Consumer Rights Act 2015: ‘A term is prominent if it is brought to the consumer’s attention in such a way that an average consumer would be aware of it’.

XCIII See Peltonen – Määttä, 2015, 88 and Market Court decision MAO 445/09.

XCIV See Athens Multi-Member Court of First Instance decisions, Armenopoulos 2004, 562 and further on this subject Delouka-Inglesi 2015, 41-87.

XCv *Aldi Stores (Ireland) Limited and Aldi GMBH & Co KG v Dunnes Stores*, [2017] IECA 116, at paras 104 and 105.

XCvi [2017] IECA 116, para 30.

XCvii At this point Kelly in her contribution rightly points out that the UCPD prohibits misleading commercial practices irrespective of the trader’s intentions to or not to mislead. Misleading practices is a strict liability offence.

XCviii ‘It seems to me that no sensible person could be misled by the use of general slogans that are the commonplace stuff of most advertising. [...] I think that shoppers have to be given some credit for intelligence and appreciation of common marketing practices. A lawyer’s exegesis of the words used is wholly



inappropriate and it would correctly be brushed aside as unworldly and unrealistic by any average shopper. In my view, the proposition accepted and adopted by the trial judge in this regard is, with respect, unrealistic and inconsistent with the attitude to be ascribed to a reasonably well-informed and circumspect shopper’.

<sup>XCIX</sup> *McCambridge Ltd v Joseph Brennan Bakeries* [2013] 1 ILRM 369

<sup>C</sup> [2013] 1 ILRM 369, para 43.

<sup>CI</sup> See judgment of the Polish Supreme Court of 2 October 2007 in case II CSK 289/07.

<sup>CI</sup> Judgment of the Polish Supreme Court in case I CSK 555/13 (n 27). See also European Commission, ‘Fitness Check of EU Consumer Law’, Brussels, 2017, 888.

<sup>CI</sup> But he also warns: ‘It is not simply that it has no major legitimacy problems in the big sense I have discarded at the outset’ (238) that you cannot find ‘structural issues which potentially compromise the institutional authority of the Court and the authoritativeness of its jurisprudence’ (251).

<sup>CI</sup> Yet, Snell emphasizes that the Court needs to ensure that it does not interfere excessively with national economic models.

<sup>CI</sup> See Teekanne, cited above, with regard to labelling of foodstuffs, Canal Digital, also cited above, concerning misleading practices and Katalin Sebestyén and Van Hove, both also cited above, with respect to the intelligibility of contract terms.

<sup>CI</sup> CJEU 21 March 2013, Case C-92/11, *RWE Vertrieb AG tegen Verbraucherzentrale Nordrhein-Westfalen eV*, ECLI:EU:C:2013:180.

<sup>CI</sup> *Ibid.*, para 48. Within the framework of the prejudicial procedure the power of the CJEU is limited to giving preliminary rulings concerning the validity and interpretation of acts of the institutions of the Community, including directives (see Art. 267 TFEU).

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**Administration or Federation?  
Constitutional Self-Image and the World Political Order  
in Which the EU Finds Itself**

by

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## Abstract

In this article, I compare constitutional and administrative models in terms of their implications for the EU legal order's interaction with other legal regimes. I aim to make a twofold argument on the implications of the EU's constitutional self-image to the world political order. First, as the CJEU adopts an identity-centred strong constitutionalist position on the Union's external relations, it implicitly frames the EU legal order's interaction with other legal regimes as in a federated order. Yet the strong political implications of federation are likely to bring about more inter-regime conflicts and provoke reactions from Member States. Second, I provide a critique of the administrative model in the light of GAL's intervention in inter-regime relations, suggesting a post-identity constitutional alternative in times of crisis. Freed from the value-laden concept of constitutional identity, but without de-constitutionalizing itself, the EU can have the benefits of both the constitutional and administrative models by moving towards a weak-form constitutional order. In the event, the debate, as to whether to conduct the EU's external relations according to the constitutional or the administrative model, is misconceived.

## Key-words

EU external relations, constitutional self-image, weak-form constitutional order, GAL approach, post-identity constitutional vision



## 1. Introduction: Two Visions of Political Ordering

Not long ago, the European Union (EU or Union) was a source of political inspiration. Students of law, international politics, and other disciplines keenly studied the European project, which was seen as the prototype of new politics: post-statist, post-national, or even post-political (Brunkhorst 2004: 103; Haltern 2003). Despite the defeat of the “Treaty establishing a Constitution for Europe” in 2005, the Lisbon Treaty of 2009 carried the constitutional flame. The EU continued to stand as the object of constitutional admiration for its transformation, from a regional body focused on the administration of coal and steel, into a constitutional polity without arousing the emotions surrounding the idea of constituent power (Kuo 2012a). Seen in this light, the EU appeared to be a constitutional compound of multilevel governance, suggesting a nascent European federation without a European federal state (Weiler 2001; Pernice 1999; Pernice 2009; Delledonne and Martinico 2016; Fossum and Jachtenfuchs 2017; Keating 2017). As the exemplar of this new federalism, the EU model seemed to stand ready to be deployed on a global scale (Cohen 2012: 48-49).

Yet the European project appears to have soured following a series of crises after the Lisbon Treaty (Sciicluna 2014). The Greek debt crisis has called the euro, the symbol of the European integration, into question since 2009. The continuous flow of refugees driven by the ongoing Syrian Civil War has crushed the semblance of solidarity among Member States. The result of the British referendum on 23 June 2016 has suddenly made the unthinkable very real, as the forthcoming Brexit belies the EU’s self-identification as “an ever closer union.” Beneath these ground-shaking events lurks the potential for a nationalist turn in Member States. In this view, the EU is no longer the solution to, but the source of, problems. Instead of being an object of admiration, the EU is blamed for economic stagnation, for lower living standards, for chronic unemployment, for strained social security networks, for higher criminality, and for government deficits. The EU is held responsible for all the woes facing its Member States. Alongside, and drawing from, popular antipathy towards the EU, populist movements continue to gain ground, threatening to bring down the European constitutional compound.<sup>1</sup> Confronted with the nationalist turn in politics, the nation-state is once again turned to as the ultimate fountain of the political (re)legitimation of the EU



(Weiler 2012). The EU appears to be regressing to its early stage of development as a transnational administrative body, entering its post-constitutional era.

The narrative above traces the trajectory of the EU, moving from a transnational administration to a constitutionalized federation and back to a transnational administration again. Seen in this light, the constitutional and administrative characterization of the EU has much to do with the identity of the EU but little to say about the world beyond. Yet administration and federation are not just the two tales of the Union. Instead, as I shall argue, the EU's seeming oscillation in its political form, between administration and federation, reveals something of the relationship that it envisages between the world and itself. My argument is that in choosing between administration and federation, the EU not only positions itself in the world but may also inadvertently define the political form of the world. Specifically, when the pendulum swings to the extreme of constitutionalized federation, the world political order conceived by the EU emerges as a federated one, that would operate based more on principles and norms, than on bargains and diplomacy. Yet the relationship between the constitutional polity of the EU, and the outside world in a federated global order, may turn out to be one of friction, even confrontation, instead of harmony, while such a constitutional self-image of the EU also sows the seeds of strife between the EU and its Member States. This does not suggest that swinging back to the extreme of administration is the way out of friction. Rather, as I shall contend, a better approach would be to recast the European project in new constitutional terms, situating the EU and its relationship with the world between administration and federation.

My argument is structured as follows. To show why the constitutional self-image of the EU is not only a matter of interpreting the EU legal order, but also bears on the envisaging of the political form of the world order, I first revisit the *Kadi* case in Section 2. Although the Court of Justice of the EU (CJEU) has been praised for its adherence to constitutionalism by upholding fundamental rights, its decision was not just about the EU's constitutional image. Yet, that it explicitly tied the stringent requirement of effective judicial remedy to the constitutional principles of the EU legal order, suggests the underlying role of constitutional identity in the rulings.<sup>11</sup> This identity-underpinned position implicitly situated the constitutionalized EU in a particular world political order: a global constitutional compound. The United Nations (UN) was treated as an incomplete constitutional order that is still in its early stage of constitutionalization. Both the EU and the UN became part of the global



constitutional compound, suggesting a federated world order. Yet, in the federated world order, not only did legal friction occur between the EU and the outside world, but the Member States also reacted against the European project. In Section 3, I take up the question of whether the EU is entering its post-constitutional era in view of proposals to revert to the administrative model as the antidote needed to the current nationalist turn. Considering the current constitutional condition of the EU, I cast critical light on the administrative turn and suggest that the EU be reconceived as what I call a weak-form constitutional order, unencumbered by the value-laden concept of constitutional identity. Although the constitutional principles underpinning the European project must guide the EU's external relations, they need not be hardened into the equivalent of identity that stands as unnegotiable terms of reference. Rather, they should be read through the lens of a revised, broader *ordre public*, which would focus on the world order in general, in administering the legal relationship between the Union and the world. Constitutional principles do not command the EU's external relations but rather take shape in the course of its interaction with the world. In this way, the future relationship between the Union and the world will be less confrontational.

## 2. Not Just About the Union: The EU's Constitutional Self-Image and the Federated World Order

With the CJEU's *Kadi II* judgment of 18 July 2013, the much-discussed legal saga, that began with the flight ban on Yassin Abdullah Kadi and the freezing of his financial resources imposed by the European Commission (Commission) in 2001, finally came to an end.<sup>III</sup> Holding that the Commission regulation implementing the UN Security Council (UNSC)-mandated sanctions regime, in response to its *Kadi I* judgment of 2008, still fell short of the standard of the fundamental rights stipulated in EU law, the CJEU affirmed the ruling of the General Court that annulled the impugned Commission regulation.<sup>IV</sup> This result shows the CJEU's adherence to the fundamental principles of the EU and the rule of law prevails over other concerns.

Seen through this European legal lens, the harm inflicted on Mr Kadi seemed to end with the closing of the protracted saga. Yet the fact of the matter is that he had already been removed from the UN sanctions list before *Kadi II*, but only thanks to the Office of the



Ombudsperson and other mechanisms created by the UNSC in response to *Kadi I* (Hovell 2016: 20). This discrepancy suggests that the protection of fundamental rights was not the CJEU's only concern in its *Kadi* rulings. Essentially, alongside its praised stance on the normative values underpinning the Union, the CJEU had placed the autonomy of the EU legal order in the limelight in the rulings, suggesting something else other than the protection of fundamental rights.<sup>V</sup> Then, what lies at the heart of the CJEU's *Kadi* decisions? What does it tell us about the relationship between the Union and the world? Do the CJEU's *Kadi* rulings suggest a more complex relationship between the EU and the international legal order than the traditional international vs. municipal divide suggests? To find out, let us rewind the saga for a moment.<sup>VI</sup>

In *Kadi I*, the CJEU struck down Council Regulation 881/2002, which was adopted to implement the UNSC resolutions regarding counterterrorism sanctions under Chapter VII of the UN Charter, on the grounds that the regulation constituted an unjustified restriction of Mr Kadi's, and other targeted persons', right to be heard, right to an effective legal remedy, and right to property.<sup>VII</sup> Notably, the CJEU considered the fundamental rights established in its jurisprudence, including the abovementioned “an *integral* part of the general principles of law.”<sup>VIII</sup> In the face of the obligations imposed by an international agreement, the CJEU considered its role to be to ensure that the constitutional principles of the EU legal order are not prejudiced. In other words, when the implementation of international obligations is in conflict with the protection of fundamental rights, the CJEU must uphold the latter against the former as fundamental rights constitute the fundamental principles of the EU constitutionalized legal order. In failing this obligation, the CJEU would undercut an integral part of the general principles of law of the EU legal order in the EU's implementation of international agreements (Kuo 2015: 170). Seen in this light, “constitutional integrity” lies at the heart of the CJEU's approach to the conflict between the UNSC resolutions and EU law (Halberstam and Stein 2009: 62; see also Kuo 2015: 170-171).

To understand the full meaning of constitutional integrity and see the implications of the CJEU's insistence on the fundamental principles of the EU legal order to the relationship between the Union and the world, a closer look at the possible options before the CJEU in situations like *Kadi* will help. Cass Sunstein (1999) suggested that judges have four options in terms of scope of decision and depth of reasoning when facing controversies concerning fundamental rights. Specifically, to resolve a case, judges can control the “meaning” of their



rulings by formulating the decision narrowly as the judgment on a concrete individual dispute or widely as the settlement of a fundamental constitutional issue. Apart from appealing to the narrowness vs. width distinction in the scope of decision, judges can manage the implications of their rulings through their style of reasoning: a ruling can be accompanied either by a shallow argument or by a deep reasoning about basic principles. Taken together, judicial rulings on issues concerning fundamental rights fall in one of four categories: narrow-shallow, narrow-deep, wide-shallow, and wide-deep (Sunstein 1999: 10-19). In this light, the CJEU could uphold Mr Kadi's rights without bringing up fundamental principles. Instead of adopting "judicial minimalism," which Sunstein advocated on the grounds of democratic deliberation (1999: 4-6), the CJEU rested its ruling in *Kadi I* on its "deep" reasoning, conceptualizing the protection of fundamental rights as the constitutional principles of EU law. Moreover, though the CJEU noted that not all the provisions of the EU treaties are non-derogable, it made it clear that no derogation was permissible on "the principles of liberty, democracy and respect for human rights and fundamental freedom" of EU law as they had been enshrined "as [the] foundation of the Union."<sup>IX</sup> In this view, fundamental rights occupy a higher echelon than other derogable principles in the EU legal order. Fundamental rights are foundational to the EU legal order, constituting the Union's "constitutional identity" (Śledzińska-Simon 2015: 126; Reestman 2009: 382-384; Polzin 2016).<sup>X</sup> In sum, the CJEU went deep in its reasoning in *Kadi I* as it not only concerned the protection of fundamental rights, but also aimed to build up a constitutional identity for the EU legal order (Besselink 2010: 41; Tuori 2015: 339; see also Ziegler 2009; Martinico 2014; Martinico 2016). What grounded the CJEU's insistence on fundamental principles and constitutional integrity in the *Kadi* rulings was the idea of constitutional identity.

Moreover, the way that the CJEU thought about the Union's constitutional identity suggests far-reaching implications, from the CJEU's identity-based defence of fundamental rights, to the relationship between the Union and the world. To attribute an "identity" to the EU legal order, the CJEU does not look into whether the Union and its law have evolved into something with which EU citizens can identify themselves.<sup>XI</sup> Instead, it looks to its own case law.<sup>XII</sup> In this way, the CJEU demonstrates that the constitutionalization process it has helped to set off gives birth to the Union's constitutional identity. Read together with Miguel Maduro's Opinion of the Advocate General (AG), the importance of ascribing constitutional identity to the CJEU-driven constitutionalization process becomes clearer (Kuo 2015: 171-



174). As far as the relationship between the Union and the international legal system is concerned, AG Maduro goes all the way back to the *Van Gend en Loos* moment. Postulating *Van Gend en Loos* as “[t]he logical starting point of ... discussion,” he further infers “the autonomy of the Community legal order” from that landmark ruling.<sup>xiii</sup> In other words, constitutional identity pivots on the autonomy of the EU legal system, which governs the relationship between EU law and the international legal order (ibid: 171). Alluding to the internal/external distinction at the core of the traditional relationship between national legal orders and international law (Grimm 2005: 453; Kuo 2010b: 345-351), the CJEU regards the autonomy of the EU legal system vis-à-vis the international legal order as integral to the protection of the Union’s constitutional identity.<sup>xiv</sup> As Daniel Halberstam and Eric Stein observed, the CJEU’s allusion to the internal/external distinction reveals its intent to “complete the original promise of the Court to define the [Union] as an ‘autonomous legal order’” (Halberstam and Stein 2009: 46-47; Krisch 2010b: 169-170; but cf Isiksel 2010, 567-568). Viewed thus, the CJEU’s stance towards the Union’s international obligations mandated by the UNSC resolutions was simply the logical conclusion of *Van Gend en Loos*, by virtue of which the EU legal order began to take on the autonomous and constitutional character (Kuo 2015: 172). As part of this ongoing constitutionalization process, *Kadi I* fulfilled the “promise first delivered in . . . *Van Gend en Loos* . . . in 1964” by substantiating the Union’s constitutional identity (cf. de Búrca 2010: 44).

Notably, the CJEU’s pivoting of the idea of constitutional identity on the autonomy of EU law conforms with its continuing efforts to establish the autonomous and constitutional character of the EU legal order, vis-à-vis national legal orders of Member States, in its case law (Kuo 2015: 172). Since its inception in *Van Gend en Loos*, the main goal of the constitutionalization process has been to establish the autonomy of the EU legal system vis-à-vis Member States (Halberstam and Stein 2009: 62; Mayer 2010: 20-21). To that end, the CJEU has endeavoured to build the EU legal order into a fully-fledged constitutional value system. More important, it is on the condition of the EU legal order providing a fully-fledged system of fundamental rights that national courts have suspended their constitutional jurisdiction concerning the compatibility of EU law with the fundamental rights of the constitutions of Member States (Claes 2006: 417-423). Failure to defend fundamental rights would open the hard-won CJEU jurisdiction to potential interventions from national courts, calling the autonomy of the EU legal order into question. Thus, mindful of its role in



guarding the autonomy of the EU legal order, the CJEU holds that “an international agreement cannot affect the allocation of powers fixed by the [EU law]” and considers this principle to be the core of “the autonomy of the [Union] legal system.”<sup>xv</sup> Moreover, underlying this allocation of powers is the CJEU’s role in ensuring that “the obligations imposed by an international agreement cannot have the effect of prejudicing the [non-derogable] constitutional principles” of the EU legal order, namely, the Union’s constitutional identity.<sup>xvi</sup> Seen in this light, the ultimate goal of the CJEU-initiated process of constitutionalization cannot be fully achieved without extending further to the external dimension of the EU legal order vis-à-vis the international legal system (Besson 2009: 255; Eckes 2012).<sup>xvii</sup> This line of reasoning shows that there was much more at stake in *Kadi I* than the protection of fundamental rights. With the protection of fundamental rights understood within the framework of constitutional identity, the CJEU has defended fundamental rights to preserve the autonomy of the EU legal order and its own jurisdiction.

The more recent *Kadi II* of 2013 further illuminated the CJEU’s identity-based approach to the legal issues resulting from the EU’s implementation of the UNSC resolutions. Though the CJEU focused its attention on the procedures stipulated in the impugned regulation, which were aimed at accommodating both *Kadi I* and the corresponding procedural reforms at the UN level, it reiterated the identity-centred gist of *Kadi I*, that “the fundamental rights...are an integral part of the general principles of European Union law.”<sup>xviii</sup> Proceeding from constitutional identity, the CJEU further indirectly disputed the Ombudsperson mechanism, part of the UNSC-instituted procedural reforms in response to the requirement of effective legal remedy set out in *Kadi I*, in its discussion about the substance of rights concerned.<sup>xix</sup> In contrast to its attitude in *Kadi I* that essentially subscribed to AG Maduro’s proposal, the CJEU rejected AG Yves Bot’s recommendation for limited judicial review, which was proposed in the light of the procedural reforms concerning the UN targeted sanctions regime.<sup>xx</sup> As the Sanction Committee’s sanctions list, which was transposed to the impugned regulation, was not subject to the “judgment” of “a court” at the UN level, the CJEU decided that there were insufficient guarantees for EU institutions to presume that decisions on the content of the sanctions list were justified. Thus, the CJEU insisted that the requirement of effective legal remedy in EU law could not be satisfied if the impugned regulation did not include a full judicial review of the factual and evidentiary grounds of the sanctions list it was meant to adopt and implement. On this view, despite providing for



limited judicial review, the impugned regulation, which aimed to strike a balance between fundamental rights and international security in the light of the procedural reforms at the UN level (including the establishment of the non-judicial but independent Office of the Ombudsperson), was judged to be failing on “the guarantee of effective judicial protection” at the EU level.<sup>xxi</sup> To put it bluntly, given that effective legal remedy is understood as effective judicial protection in EU law, limiting the scope of judicial review in the Union on the grounds that non-judicial procedural safeguards have been instituted at the UN level would be tantamount to undercutting the Union’s constitutional identity and undermining the autonomy of the EU legal order.

As has been substantially discussed in the literature, the CJEU essentially subjected the UNSC resolutions to its own second-guessing in *Kadi I* when they were implemented at the EU level, suggesting a strong constitutionalist approach to the Union’s external relations.<sup>xxii</sup> Notably, some scholars saw it as the CJEU’s “act of civil disobedience” to protest the total lack of due process with the UN-backed sanctions regime at that time (Isiksel 2010: 563). Yet the insistence of *Kadi II* on judicial remedy revealed the CJEU’s assertion of autonomy and attachment to constitutional identity with little regard for the UN’s unique decision-making procedures (Hovell 2016: 27-29). This strong constitutionalist approach to the Union’s external relations has raised doubts as to whether a chauvinistic “European exceptionalism” is on the rise.<sup>xxiii</sup> In other words, a constitutionalist EU is ostensibly no less sinful than an exceptionalist America when its own status vis-à-vis the rest of the world is at stake (Goldsmith and Posner 2008). Paralleling American exceptionalism (Spiro 2000), the CJEU’s strong constitutionalist approach as suggested in its *Kadi* rulings appears to pose another threat to the international legal order in the name of sovereignty (Kuo 2015: 169-170).

As a corollary to my earlier characterization, the classical model of international relations appears to have been transposed to the relationship between the Union and the world. From this perspective, the internal/ external distinction the CJEU alluded to is redolent of the dualist international vs. municipal divide in the international legal order (Kokott and Sobotta 2012). Yet the CJEU’s emphatic distinction between EU legal instruments implementing the UNSC resolutions and the UN sanctions regime itself explains why the CJEU’s approach was constitutionalist rather than nationalist or sovereigntist despite its allusion to the internal/external distinction. Though the *Kadi* rulings inevitably undercut the UN sanctions



regime, the CJEU had emphatically confined its scrutiny to EU legal instruments without encroaching on the legality of the UNSC sanctions.<sup>xxiv</sup> Cynical commentators may view the CJEU's "narrow" decision as nothing but a disingenuous gesture; others may argue that the CJEU had no alternative as it simply lacked jurisdiction beyond EU law. Nevertheless, a close read of the CJEU's rulings in the light of the two AG Opinions will point us in another direction. AG Maduro's Opinion in particular has been praised for its *Solange*-styled dialogic approach, as it invited the UN to address the concerns about due process raised with respect to its targeted sanctions regime.<sup>xxv</sup> Seen in this light, the external UN was not so much considered to be an alien other, in the classical mode of international relations, as treaded like another unit in a pluralistic constitutional landscape, which included the UN and the EU (cf. Maduro 2009: 372-379).

It is true that the evocation of the *Solange*-styled dialogue was missing in *Kadi I*. Nevertheless, the CJEU's substitution of "internal" for AG Maduro's value-laden choice "municipal" with respect to the EU legal order<sup>xxvi</sup> suggests that the CJEU envisaged the relationship between the Union and the world as something other than the international vs. municipal divide proposed in the traditional mode of international relations (Krisch 2010b: 170-171). For this reason, the strong constitutionalist stance in *Kadi I* was not nationalist defiance against the international legal order, but rather figured as an exceptional act of civil disobedience in the quest of rule of law at the international level (Isiksel 2010: 563-569; see also Hovell 2016: 18). The political world in which the relationship between the Union and the world was conceived according to the principles of constitutional pluralism emerged as a federated order, or rather, a federation as Jean Cohen (2012) suggests (76-78).

Framed as a federation, the world of constitutional pluralism is distinct from the Westphalian order (ibid: 80-158). Institutional or jurisdictional dialogue is expected to play the principal role in steering relations between distinct constitutional units of the federation (ibid: 151-152). Yet it does not mean that relations between distinct constitutional units of the federation are always smooth. As *Kadi II* illustrated, constitutional conflicts between federal units may end up being irreconcilable. Whether this suggests that constitutional pluralism or jurisdictional dialogue is simply rhetoric is not my present concern.<sup>xxvii</sup> Yet *Kadi II* does indicate that the constitutional self-image of the Union foreshadowed the Union's external relations: the more a federal unit emphasizes its own constitutional identity, the more intense the conflict with other units becomes. The CJEU's attribution of constitutional



identity to the Union made the UN sanctions regime virtually incompatible with the provisions of fundamental rights in EU law. Clinging to the idea of constitutional identity, the CJEU took the provision of effective judicial protection at its face value, instead of adjusting the content of fundamental rights to the uniqueness of the UN regime.<sup>xxviii</sup>

More important, reference to constitutional identity in the federated political order not only intensifies the Union's external relations, but also threatens to unsettle its internal arrangement. Whether federation is a type of political order on its own terms or merely a transitional arrangement in preparation for a fully-fledged sovereign federal state is unclear (Compare Beaud 2017 with Schmitt 2008: 381-395). Yet historical examples of federations seem to point in the direction of a federal *state* (Schmitt 2008: 388-395). Continuing to build up the Union's constitutional identity and formulating the Union's interactions with the world accordingly may well have a boomerang effect. The (in)famous Opinion 2/13 on the EU's accession to the European Convention on Human Rights (ECHR) seems to confirm suspicions about the future of the Union. Despite the ECHR having been recognized as one of the sources of inspiration for EU constitutional principles, the CJEU's insistence on its privileged status as the designated institutional guarantor and interpreter of the EU legal order reveals the centrality of the legal independence of the EU from other jurisdictions in its constitutional self-image (Eeckhout 2015; cf. Halberstam 2015). In sum, the CJEU's identity-centred constitutionalist approach to the Union's external relations threatens to deepen Member States' suspicions about whether the Union is on a path towards a federal state, intensifying constitutional conflicts with other constituents of the federated world order.

### 3. Between Federation and Administration: The Future of the EU and the World Beyond

Concerns over the destination of federalist development and identity implications of the constitutionalist approach, as discussed above, have invigorated interest in contemplating non-constitutional alternatives to the conceptualization of the EU and its external relations. Notably, calls for framing the EU in non-constitutional terms had been made before the current crises. In this view, the EU is not a polity-building project, regardless of whether it is dubbed a federation or a federal state. The legitimacy of the Union lies in its administrative



character (e.g., Majone 1996; Lindseth 2010). And, the EU still remains what it was meant to be at its origin: a transnational administration that acts as the agent of the principal, namely, the Member States (Lindseth 2010). To answer the question of legitimacy about the Union's internal affairs, reverting to the administration understanding thus emerges as the advisable way forward (cf. Weiler 2012: 268). I hasten to add that the administrative alternative must be differentiated from recent nationalist talk when it comes to the Union's external relations. As the issue here concerns the relationship between the EU legal order and the outside world instead of high international politics, the administrative alternative does not mean that the resulting issues should simply be left to Member States, or to their judicial arms for that matter. As things stand, that option is simply inconceivable. To go down that, nationalist, path not only denies the fact of the EU being a recognized entity in international law but will also lead to the dismantling of the Union. How, then, can the Union's external relations be conceived of under the paradigm of administration? The Global Administrative Law (GAL) approach<sup>xxix</sup> may cast some light on the relationship between the EU legal order and the world in the administrative turn.

GAL is an avowedly non-constitutional normative response to issues resulting from more and more regulatory competences and decision-making powers being delegated to or shared by regional or international bodies (Krisch 2010a). Given that this move towards global or transnational governance reflects the practical needs of administrative regulation, GAL maintains that its approach is pragmatic. Inspired by the development of the modern administrative state, GAL focuses attention on how to utilize traditional administrative law tools to address the legitimacy challenge facing global governance by holding transnational regulators to account (Kingsbury et al. 2005b). GAL contends that, guided by the idea of "publicness" (Kingsbury 2009: 31-33; see also Kingsbury 2008), administrative law tools (those clustered under the rubric of due process in particular) have enhanced the transparency and accountability of administration when the administrative state arose at the expense of the national legislature in the second-half of the nineteenth century. Drawing on the success story of the national administrative state, GAL argues that the legitimacy question haunting global governance can also be answered with the help of administrative law (Kuo forthcoming). Yet this is only one dimension of GAL's intervention (Kuo 2012b: 1062-1064; Kuo 2013: 444-445). GAL's take on the fragmentation of global governance bears on the relationship between the EU legal order and the world under the administrative model.



Notably, GAL's response to the legitimacy challenge facing global governance is situated in the reconfigured law-space nexus in the post-national world order (Kingsbury et al. 2005b: 18-27; see also Kuo forthcoming). A juxtaposition of GAL and its source of inspiration, national administrative law, will help us to understand the importance of the post-national law-space nexus in GAL. In essence, national administrative space (in the form of the nation-state) is to national administrative law as global administrative space is to global administrative law. Specifically, GAL conceives the post-national world as a "global administrative space" transcending the boundaries of nation-states (Kingsbury et al. 2005b: 18-20). Seen in this light, what emerges from the global administrative space is a variegated "global administration" that subsumes international organizations, national administrations, private or hybrid bodies, and other informal arrangements such as various committees or networks contributing to global governance (ibid: 20-23). The objective of the GAL approach is to rein in global administration by means of global administrative law. Notably, a characteristic of global administration is a "de-territorializ[ation]" of public authorities (Cassese 2015: 466; cf. Ruggie 1993: 171-174), levelling domestic administrators and other regulatory players in global governance.<sup>xxx</sup> Such an understanding of global governance intimates a landscape of legal pluralism (Krisch 2006).

Against the backdrop of legal pluralism, the steering of relationships between regulatory regimes in the variegated global administrative space is central to the functioning of global governance. With governance issues becoming more and more complex and diverse, and given the multiplicity of networks of sectoral governance regimes, it is not always clear which regulatory body constitutive of global administration should have jurisdiction in an individual case. More often than not, an individual case is subject to multiple jurisdictions (Kuo 2013: 444). Failure to address the issues surrounding inter-regime legal relations would plunge global governance into regime collisions or inter-jurisdictional conflicts, as the literature on the fragmentation of the international legal order suggests (Koskenniemi 2007: 4-9; Fisher-Lescano and Teubner 2004: see also Teubner 2012). Thus arises the "conflict of laws" question in global administrative law (Kuo 2013: 444). Facing the threat of inter-jurisdictional conflicts amidst the fragmentation of global governance, GAL once again appeals to the idea of publicness in conceiving "conflicts of laws arrangements" (Kingsbury 2009: 56).

At the core of GAL's approach to resolve inter-jurisdictional conflicts is the balance in inter-regime relations that is to be struck in the light of the idea of publicness and its



associated principles. To resolve inter-jurisdictional conflicts, the intricate interrelationships between regulatory regimes are steered with due consideration of the underlying principles of the idea of publicness, including principles such as the limitation of power, the requirement of justification and proportionality, procedural mechanisms for deliberative decision-making, and the protection of human rights in each governance sector (ibid; Kingsbury 2008: 197). Notably, the steering of inter-regime relations is carried out on a case-by-case basis. In each instance of conflict of law arrangements, the laws of two regulatory regimes in conflict are balanced against each other to decide which one to apply in each case (Krisch 2010b: 277-278). In sum, “balancing” underpins GAL’s approach to inter-regime relations (Krisch 2006: 269-274; cf. Cassese 2005: 680).

Through GAL’s lens, the relationship between the EU legal order and the world under the administrative model figures differently from that envisaged in constitutional terms. Several points merit special mention. In contrast to the normatively progressive constitutional pluralist approach to inter-jurisdictional conflicts under the constitutional paradigm, balancing is the underlying principle that governs the Union’s external relations under the administrative model. This does not mean that balancing is reduced to a strategic practical exercise of discretion. Instead, as noted above, it only materializes in the light of the normative idea of publicness (Kuo 2012b: 1064-1067). Yet, in contrast to constitutional pluralism, which includes an implicit normative comparison of jurisdictions in terms of the degree of their constitutionalization (Cohen 2012: 69), balancing does not make, say, the EU legal order the model to which the competing UN regime is expected to progress, when the former prevails over the other in a situation like *Kadi*. Furthermore, the heterarchical relationship among jurisdictions that the administrative approach entertains suggests a different political world than the federated world order as implied in the constitutional paradigm. Global administrative space is a construct built to characterize and conceptualize the current state of affairs in the global landscape of legal pluralism. It is descriptive, if you will. In contrast, the federated world order is political in nature, having significant normative implications for how its constituents should interact with each other (ibid: 80-102; see also Kuo 2014: 287-288). The world order emerging from the intricacies of distinct legal systems is not federation but rather some semblance of administration (Somek 2010). Viewed thus, neither autonomy nor identity plays a role in the administrative approach to the Union’s external relations.



External relations, under the administrative model as discussed above, would be organized around an exercise of balancing in the light of the normative idea of publicness unencumbered by constitutional dictates. One clear positive of this non-constitutional alternative is that the EU legal order could be rendered more accommodating of other regimes; there would be less friction in the Union's external relations. Yet the administrative model also raises some important issues. First, the idea of publicness is vague, despite the support of the associated principles as noted above. It is unclear to what extent it can provide clear guidance on which regime should have jurisdiction, or whose law should apply in each instance of conflict (Kuo 2012b: 1067-1072). Second, the administrative model seems to suggest that the relationship between the EU legal order and the outside world it envisages would be framed in non-constitutional terms, corresponding to its approach to the Union's internal legitimacy. This is a misconception. And so is GAL's disavowal of constitutional ambition (Kuo 2013: 453-458). Considering the reality of irresolvable value pluralism, GAL has warned against responding to global governance from constitutional perspectives. As constitutional decisions, more likely than not, concern incompatible fundamental values, constitutionalizing the post-national world order would simply antagonize its constituents, making the issues resulting from fragmented global governance more complicated (Krisch 2006). Yet GAL is not impervious to constitutional choice. The values and principles clustered around due process are constitutional in nature. They may be only constitutional in the small-c sense, but are as contested as other fundamental decisions made in the adoption of a Big-C Constitution (Kuo 2011: 71-80). Moreover, by disavowing constitutional ambition, GAL has made its value choice as to what a constitution should look like and what deserves the noble designation of "constitution" (Kuo 2013: 453-458). GAL distances itself from the constitutional approach, in the hope that appealing to administrative law would free itself from contentious value choices confronting the post-national world and provide pragmatic answers to global governance. Yet this ostensibly apolitical position prevents GAL's underlying values from critical scrutiny, holding off genuine debate about the future of the world political order (ibid: 464-466; cf. Chimni 2005; Marks 2005). It is a misconception to make a dichotomy of the distinction between the constitutional and administrative approach.

As some GAL scholars begin to consider the constitutional question,<sup>xxxii</sup> the debate about whether to conduct the relationship between the EU legal order and the outside world



according to the constitutional or the administrative model should be reformulated, too. As the Union has taken on a constitutional character in various aspects, it will be a significant challenge to revert to the early days when the Union was merely the prototype of transnational administration. Thus, the foregoing debate should not be about a choice between constitutional and administrative models. Rather, it should be about in what kind of constitutional terms the relationship between the EU legal order and the outside world should be conceived. As discussed in Section 2, the CJEU has conceived the interaction between the EU legal order and other regimes in constitutional terms centring on the idea of constitutional identity and legal autonomy. It is the insistence on constitutional identity and legal autonomy that has pitted the EU legal order against the UN regime. Yet constitutional principles do not necessarily lead to hardened constitutional identity, not to mention a dogma of legal autonomy (cf. Cohen 2012: 75). An accommodating and balanced rendering of a fundamental right such as the right to effective judicial protection, with the variances between the EU and other regimes factored in, does not mean abandoning constitutional principles. Rather, it suggests that what matters is the integrity of the core of the rights concerned, not the autonomy of the legal order itself. To put it differently, when it comes to the relationship between the EU legal order and the outside world, we need to rethink rather than waive constitutional terms.

Moving away from the strong constitutional terms of identity (cf. Haltern 2003: 39-44), the Union's external relations can be recast in what I call the weak-form constitutional model, drawing lessons from GAL's proposal for a "conflicts of laws arrangement." On the one hand, in contrast to GAL's avowedly non-constitutional stance, the constitutional significance of the relationship between the EU legal order and the outside world should be brought to the fore under the weak-form constitutional model (cf. Kuo 2013: 464-468). Balancing, the process through which inter-jurisdictional conflicts are to be resolved, needs to be reconceived accordingly. On the other hand, the "conflicts of laws arrangement" that GAL alludes to can be further developed, and transposed to the weak-form constitutional model. In the situation where an exception needs to be made to a rule, one of the conflict of laws solutions is the '*ordre public*' doctrine, which allows the court to reject the application of foreign law for considerations of domestic public policy. This classical doctrine in conflict of laws suggests that rules need to be applied and adjusted in the broader context of public policy (see generally Mills 2008).<sup>xxxii</sup> Despite its vagueness, this principle is informative in



the steering of the relationship between the EU legal order and other regimes. As far as the Union's external relations is concerned, the rule that awaits application in the broader context of public policy is the fundamental rights provision of EU law. To apply the fundamental rights provision without adjustment would mean disregarding the broader context of public policy. This is just what the *Kadi* rulings had alluded to. In the light of how legal conflicts have been addressed in conflict of laws, the fundamental rights provision needs to be understood in a revised, broader *ordre public* in steering the relationship between the EU legal order and other regimes. Under the revised version, the calculation of *ordre public* would not be fixated on domestic policy concerns, but rather have to take the general world order into consideration (Cançado Trindade 2011: 205). Taken together, balancing provides the constitutional passage through which fundamental rights take shape in the course of EU law interacting with other legal orders. Through this lens, the legal relationship between the EU and other regimes is neither a fully-fledged federation nor simply an administration. Rather, it is in-between.

#### 4. Conclusion

In this article, I have compared constitutional and administrative models in terms of their implications for the EU legal order's interaction with other legal regimes. I have argued that choosing between administration and federation, the EU not only positions itself in the world, but may also inadvertently define the political form of the world. To show why the constitutional self-image of the EU is not only a matter of interpreting the EU legal order but also bears on the envisaging of the world order, I first revisited the *Kadi* case. My analysis has shown that the CJEU's constitutional approach to the relationship between the EU legal order and the outside world pivoted on constitutional identity and legal autonomy. Proceeding from this identity-underpinned strong constitutionalist position, the CJEU implicitly treated the UN as an incomplete constitutional order while both the EU and the UN became part of a federated world order. Yet a federated world order does not lead to a frictionless relationship between the EU legal order and other regimes. Rather, the politically charged implications of a federated world order have not only brought about more legal conflicts between the Union and the outside world, but also provoked more reactions from the Member States against the European project. Following the analysis of the constitutional



approach to the Union's external relations, I then shifted attention to how the relationship between the EU legal order and the outside world is conceived under the administrative model in the light of GAL's intervention in inter-regime relations. Considering the current constitutional condition of the EU, I cast critical light on the administrative turn, suggesting a post-identity constitutional alternative. Freed from the value-laden concept of constitutional identity but without de-constitutionalizing itself, the EU can have the benefits of both the constitutional and administrative models by moving towards a weak-form constitutional order. Situated between federation and administration, the legal relationship between the EU and other regimes should be resolved through constitutionalized balancing, unencumbered by the concepts of constitutional identity and legal autonomy. Instead of hardening into constitutional identity, the constitutional principles underpinning the European project would be read through the lens of a revised, broader *ordre public* focused on the world order in general. To conclude, constitutional principles do not dictate the Union's external relations but rather take shape in the course of its interaction with the world. In the event, the debate about whether to conduct the Union's external relations according to a constitutional or administrative model is beside the point. The new focus of attention, in times of crisis, should be in what kind of constitutional terms the relationship between the EU legal order and the outside world is to be conceived.

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<sup>I</sup> Despite a series of pushbacks against populism as evidenced by the defeat of the Freedom Party candidate Norbert Hofer in the recent Austrian presidential election and the Dutch electorate's denying Geert Wilders' PVV (Party for Freedom) the status of the largest parliamentary party with the culmination of Emmanuel Macron's election to the French presidency, the structural conditions for the thriving of populism in European politics remain unchanged (Brubaker 2017).

<sup>II</sup> **CJEU**, Joined Cases C-402/05 P & C-415/05 P, *Kadi v Council*, 2008 ECR I-6351 (Grand Chamber) (hereinafter *Kadi I*); **CJEU**, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission v Kadi*, 2013 ECR I-0000 (Grand Chamber) (hereinafter *Kadi II*).

<sup>III</sup> Mr Kadi was placed under the targeted sanctions regime established by a series of United Nations (UN) Security Council (UNSC) Resolutions when he was listed on the Sanctions Committee Consolidated List on 17 October, 2001. In terms of EU law, the restrictive measures (including the flight ban and the freezing of funds and other financial resources) did not apply to him until the adoption of the Commission Regulation (EC) No 2062/2001 of 19 October, 2001. *Kadi II*: paragraphs 16-17.

<sup>IV</sup> **CFI**, Case T-85/09, *Kadi v Commission*, 2010 ECR II-5177.

<sup>V</sup> Though the CJEU does not mention the autonomy of the EU legal order in *Kadi II*, it continues with the line of reasoning about 'constitutional integrity' that is at the centre of *Kadi I*. *Kadi II*: paragraph 67. I shall further elaborate the concepts of autonomy, constitutional integrity, and constitutional identity and their roles in both judgments later.

<sup>VI</sup> The following discussion on *Kadi I* draws on part of Kuo 2015: 169-174.

<sup>VII</sup> *Kadi I*: paragraphs 334 and 370.

<sup>VIII</sup> *Ibid*: paragraph 283 (emphasis added).

<sup>IX</sup> *Ibid*: paragraph 303.



<sup>x</sup> At the core of the concept of constitutional identity is the question of whether a changing constitutional order should be regarded as the continuation of the original one or as the replacement that is new and distinct from it. Notably, a recent wave of literature alludes to an alternative understanding of constitutional identity, suggesting that the constitution is constitutive or reflective of the political or national identity of its citizens through its provisions or interpretations (Jacobsohn 2010; Rosenfeld 2010; cf. von Arnould 2017: 312). In contrast to the former strain of scholarship on constitutional identity, the latter is more or less sociologically oriented and centres on the question of ‘identification’ (Reestman 2009: 378; Polzin 2016: 412). Specifically, to determine whether a particular constitution is constitutive of the political identity of citizens requires empirical investigations into the ‘common mental predispositions’ of citizens and sociological studies of whether and, if so, how that constitution becomes that which citizens identify themselves with (Reestman 2009: 377-379).

<sup>xi</sup> See note ix.

<sup>xii</sup> *Kadi I*: paragraphs 283, 335, and 355. See also Kuo 2015: 171.

<sup>xiii</sup> Opinion of Advocate General Poiares Maduro, Case C-402/05 P, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, delivered on 16 January 2008 (hereinafter Opinion of AG Maduro), paragraph 21.

<sup>xiv</sup> *Kadi I*: paragraphs 317 and 321.

<sup>xv</sup> *Ibid*: paragraph 282.

<sup>xvi</sup> *Ibid*: paragraph 285.

<sup>xvii</sup> Concerns over the autonomy of the EU constitutional order vis-à-vis other international legal orders have become more evident as EU law becomes the subject before the tribunals outside the EU legal order (Parish 2012: 142-143).

<sup>xviii</sup> *Kadi II*: paragraph 67.

<sup>xix</sup> *Ibid*: paragraphs 133-134.

<sup>xx</sup> Opinion of Advocate General Yves Bot, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission v Kadi*, delivered on 19 March 2013, paragraphs 81-87, 113-114.

<sup>xxi</sup> *Kadi II*: paragraphs 133-134. See also Hovell 2016: 9.

<sup>xxii</sup> “Constitutionalist” here refers to the strong constitutional claims made in the *Kadi* rulings without regard to the constitutionalist versus pluralist debate concerning the legal configuration of the world order (cf de Búrca 2010: 31; Krisch 2010b: 167-168).

<sup>xxiii</sup> For variations on the meaning of European exceptionalism, see Nolte and Aust 2013.

<sup>xxiv</sup> *Kadi I*, paragraphs 293-294, 299; *Kadi II*, paragraph 67.

<sup>xxv</sup> Opinion of AG Maduro, paragraphs 21-22, 38-39.

<sup>xxvi</sup> *Ibid*: paragraphs 21-23, 37, and 39.

<sup>xxvii</sup> For my further reflections on constitutional pluralism and jurisdictional dialogue, see Kuo 2015: 174-188; Kuo 2010a: 871-882.

<sup>xxviii</sup> *Kadi II*, paragraphs. 100-101, 133-134.

<sup>xxix</sup> Global Administrative Law (GAL) as a normative response to global governance in theory originates in a project of the same name at NYU, which has brought together scholars from both sides of the North Atlantic and beyond (Kingsbury et al. 2005a). To avoid terminological confusion, I use “GAL” to refer to the aforementioned theoretical stance towards global governance unless otherwise specified. As regards the actual regulations concerning global governance that inspire GAL, I call them “global regulatory norms” in the present article. In contrast, “global administrative law” (in small letters) refers to the legal rules and principles that GAL identifies as normatively governing global administration. Notably, not all global regulatory norms can be classed as global administrative law. For further discussion on GAL and other approaches to global governance, see Kuo forthcoming.

<sup>xxx</sup> The following discussion of GAL’s position on the conflict of law issues arising from global administration draws on part of Kuo 2013: 444-445.

<sup>xxxi</sup> Notably, in a 2015 symposium published in *International Journal of Constitutional Law* in celebration of the then ten-year-old GAL, the constitutional question was not dodged anymore. In contrast to the avowedly non-constitutional stance in the earlier development of GAL, most of the contributors to that celebratory symposium have embraced the constitutional question of global governance. Apart from the editor Joseph Weiler, there are eight contributors to this symposium, including GAL’s founding scholars Sabino Cassese, Benedict Kingsbury, and Richard Stewart among others. Only Benedict Kingsbury stops short of touching upon the relationship between GAL and Global Constitutionalism. For the differing stances towards the constitutional question among GAL scholars, see Symposium 2015.

<sup>xxxii</sup> Notably, Christian Joerges is the trailblazer of the Bremen School of Conflicts-Law Constitutionalism, which aims to respond to inter-jurisdictional conflicts in the postnational world order by aligning conflicts of



law with constitutionalism (e.g., Joerges 2011; see also Kuo 2013: 445-451).C-269/90, *Technische Universität München*, paras 25-26.

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## Constitutional and administrative paradigms in judicial control over EU high and low politics

by

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## Abstract

This article explores the particular tensions surrounding judicial review in EU external relations. The tensions are classified using a two-dimensional framework. Firstly, a distinction based on policy domains of high and low politics, which is derived from constitutional theory, and external to the CJEU; and secondly a distinction based on legitimizing paradigms of administrative (EU as effective global actor) or constitutional (judicial review as guarantee of fundamental rights) in character and determined by the Court itself. Even though one would expect a dominance of the administrative paradigm in the domain of high politics, the Court uses both the administrative and the constitutional paradigm in its external relations case-law. The decision on which of these becomes the guiding frame seems to depend more on the policy domain, and be made case by case, which suggests politically sensitive adjudication, rather than a coherent approach to legitimizing the nascent judicial review in EU external relations.

## Key-words

EU external relations, judicial review, Court of Justice of the EU, EU constitutional law



*“When no wind blows, even the weathervane has character”*

Stanisław Jerzy Lec, Unkempt Thoughts, 1962

## 1. Introduction

The tension between the “administrative” and the “constitutional” paradigms is expressed in a particular way in the domain European Union (EU) foreign policy. In the EU context, the policy domain of EU external relations encompasses not only traditional domains of foreign policy, such as trade or development cooperation, but also the external dimension of internal EU policies (Eeckhout 2011: 5). The particularity of this domain is that it necessitates taking into account two dimensions of analysis – both internal and external to the EU. In order to paint an analytical picture of these interactions, this article adopts the perspective of one particular institutional actor – the Court of Justice of the European Union (CJEU).

The CJEU faces particular systemic challenges when adjudicating in the domain of EU external relations. On the one hand, the scholarship has explored the causal links between EU internal cohesiveness and the efficiency of its external representation (da Conceição-Heldt & Meunier 2014, Thomas 2012). This cohesiveness could then be promoted by an increased role of the European Commission in EU external relations. On the other hand, there have been recurring calls for rethinking and improving the democratic legitimacy of the EU (Müller 2016, Patberg 2017). These calls would also translate into more checks and balances in the EU’s external relations domain. In a longer-term perspective of its EU external relations case-law, the CJEU is balancing calls for more efficiency with those for more checks and balances.

In its adjudication, the CJEU can choose between different justificatory arguments derived from the EU’s constitutional structure. This article categorizes these arguments into two broad alternative paradigms of legitimizing the Court’s decisions. They can be legitimized either because they improve the efficiency of the EU’s external representation or because they contributed to the consolidation of the EU’s constitutional legal order. While the administrative paradigm prioritizes concerns of efficiency, the constitutional one shifts the emphasis to democratic legitimacy guaranteed by a system of checks and balances. The administrative paradigm sets up expectations of transparency, expertise and accountability



(Shapiro 2005). The constitutional paradigm bases the legitimacy of the CJEU on its unifying role guarding the respect of the deliberative democratic process across the whole domain of EU law as a “constitutional umpire” (Lenaerts 2013: 1302).

While efficiency concerns would push the Court to align with the policy goals pursued by the EU in a particular project in the global arena, the constitutionalist paradigm would rather channel considerations catering for its internal political project of the democratization of supranational institutions. The particularity here is that consistency and efficiency of the EU as a global actor appears to be diminished by a broad institutional involvement, which creates a tension between the two paradigms in EU external relations.

A further particularity of the EU external relations domain is the traditional limitation of judicial review in foreign policy. Traditionally, executive actors in foreign policy were given more leeway in a constitutional structure. The courts would apply a lower scrutiny of judicial review or even refrain from exercising it, such as in the case of the “political question doctrine” of the Supreme Court of the United States (Seidman 2004). The approach of the CJEU in EU external relations has, from the beginning, departed from traditional ideas of foreign policy as “high politics” and as a prerogative of the executive power. However, while the Court has taken up an active role in reviewing the actions of the EU and its Member States (MSs) in foreign policy, this article submits that it has done so with a varied degree of scrutiny.

I explore the hypothesis that, in its case-law, the CJEU defies the traditional constitutional law distinction between high and low politics, and the scrutiny of its judicial review seems to rather depend on the issue area. According to the theorization of the legitimacy of judicial review and the traditional understanding of the separation of power doctrine, we should expect the administrative paradigm to be dominant in the domain of foreign policy. The administrative paradigm emphasizes efficiency and submits foreign policy instruments to an administrative rather than a constitutional standard of review. This tends to result in more deference being shown by the judiciary towards the executive in that context. The executive branch is responsible before parliament and hence, indirectly, before the voters. However, the CJEU seems to be paying little attention to inter-institutional balance when deciding on the scrutiny of its review and on the deployment of competing legitimizing paradigms. As a result, the Court uses both administrative and constitutional approaches in its external relations case-law. The decision on which of these becomes the



guiding frame seems to depend rather on the policy domain of individual cases, which suggests a lack of coherent approaches to legitimizing the nascent judicial review in EU external relations. Instead, the CJEU acts rather like a weather vane, adjudicating in a policy sensitive manner.

This article analyzes examples of the CJEU's post-Lisbon judgments in the domain of external relations from the perspective of establishing the relative relevance of two distinctions – first, whether the Court frames the question raised before the bench in the administrative or constitutional paradigm and, second, whether the questions raised before the Court stem from the domain of high or low politics. The article proceeds in three parts. First, I “translate” the tensions between the administrative and constitutional paradigms from general EU law to the domain of external relations. Thereafter, I proceed to the analysis of the CJEU's case-law to explore whether the administrative paradigm is deployed in its reasoning in judgments concerning low politics, while the constitutional paradigm is preferred in high politics. In the second part, I analyze selected judgments where the Court relies on the administrative paradigm, both in the domain of high and low politics. Third, I repeat this exercise for the constitutional paradigm. In order to increase the explanatory value of the case studies analyzed, they are framed not as individual judgments, but as series of decisions on a particular subject matter. This analysis of specific jurisprudential lines of cases allows for the presentation of the broader context in the particular policy domain.

## 2. Constitutional and administrative paradigms in EU external relations

In order to guide the analysis of the case-law, it is necessary to first explore the distinction between the alternative legitimizing paradigms in the adjudication of the CJEU. These paradigms operate in the background of the legal argumentation deployed by the Court and they can be categorized in two broad alternative categories for the purposes of highlighting the differences (rather than similarities) in their deployment in EU external relations. The article introduces a twofold differentiation – on the one hand, between the deployment of administrative or constitutional paradigm and on the other hand, between the policy domains belonging to low or high politics.

Based on the structural choice in the Treaties to separate the domains of Common Foreign (CFSP) from other policy domains, as well as the stronger constitutionalization of



low politics, one would expect a higher scrutiny of judicial review in the domain of low politics. However, the construction of implicit external competences as mirror images of internal policies of the EU can be construed as a move away from the special nature of foreign policy in the EU context.

The first distinction made for the purposes of this analysis is between constitutional and administrative paradigms as ways of framing the legitimacy of the EU in general, and the CJEU more specifically. The administrative paradigm, as a legitimation pattern, builds on arguments of efficiency and output legitimacy, whereas the constitutional paradigm links to democratic legitimation and input legitimacy (Schmidt 2012). The administrative and constitutional paradigms deployed here, to categorize the legitimization strategies of the Court in its external relations adjudication, resonate with approaches theorizing global governance in general, namely global administrative law and global constitutionalism respectively. Sometimes these theoretical approaches are referred to as paradigms of European or international law; however, for the purposes of this analysis, I distinguish between the theories that have a normative component and the paradigms that perform the role of an analytical framework. Paradigms “function as mediators between scientific theories and the world” (Avbelj 2016: 406). They have also a normative dimension as they serve as a prescription to “coherently organize” reality (Fabbrini 2014: 2).

The administrative and constitutional paradigms need to be understood in a particular manner when framing the legitimacy of the EU in external relations specifically. Whilst internal policies strengthening the supranational features of the EU may generally be classified as one of the factors defining the constitutional paradigm, this view needs to be adjusted in the context of EU external relations. Here, the perspective of the constitutionalization of the EU’s foreign policy usually implies submitting it to more control of supranational institutions - the European Parliament and the CJEU. This in turn, is perceived as diminishing the effectiveness of the EU as an actor on the global scene. Hence, the argument of strengthening the EU as a unified actor in the particular context of external relations is the corner stone of the logic of the administrative paradigm. The pragmatic logic of the administrative paradigm focused on effectiveness is not limited to expanding the scope of prerogatives of the Commission. Especially, in the context of the Eurozone crisis, the intergovernmental path has appeared as an efficient decision-making mode and has resulted in the “straight-jacketing” of the Commission (Schmidt 2015). Hence, for the purposes of



this article, the administrative paradigm will be understood as the CJEU furthering the goal of the EU as an efficient actor on the international scene, whereas the constitutional paradigm will be identified in judgments based on individual rights. Whilst the exercise of judicial review in EU external relations can be justified in terms of the constitutional paradigm, the administrative paradigm rather suggests a systemic deference of the Court to political decision-makers in this domain.

A second crucial distinction is the one between judicial review in the domain of high and low politics. In the specific context of external relations, the jurisprudential approach of the CJEU seems to defy the classic distinction between high and low politics. Traditionally, foreign policy would be the domain of high politics - subject to diplomatic negotiations and immune to judicial review. Low politics would concern the external dimension of predominantly internal and presumably more technical policy domains. This traditional understanding seems to be reflected in the exclusion of the CJEU's jurisdiction over Common Foreign and Security Policy (CFSP) in the Treaties. Hence, one could imagine a formal distinction between high and low politics, which, in the case of the EU, would go along the lines of the former pillars, or now along the policy domains covered by ordinary legislative procedure. According to this formal definition of low politics, the Common Commercial Policy (CCP) would also be part of low politics as it is subject to the ordinary legislative procedure and judicial scrutiny. However, this purely formal distinction between low and high politics based on the type of legislative procedure prescribed in the Treaties seems to miss the constitutional and political concerns lying at the root of the distinction.

The CCP has been an exclusive external competence from the beginning, and has been the crucial domain for the global presence of the EU in international relations. Hence, a more substantial definition of the distinction between low and high politics appears appropriate to capture the political sensitivity of particular policy domains in the EU. High politics can be understood as “the promotion of larger political principles and ideological goals” (Balkin and Levinson 2001: 1062). The EU has been promoting particular political goals in its CCP, distinct from internal policies. Therefore, for the purposes of this article I define high politics as “inherently external” areas of foreign policy, such as the CFSP and CCP, whereas low politics will encompass the external dimensions of EU internal policies, in particular the Area of Freedom Security and Justice (AFSJ). Even though such an understanding does not necessarily correspond to the structure of the Treaties, it appears



justified in view of the normative underpinnings of the special status of high politics as a domain of diplomatic negotiations, where the hands of the executive should not be bound by internal politics and institutional approval process. With that reason in mind, it seems more coherent to analyse the CCP together with the high politics.

### 3. Administrative paradigm

In its ambition to become a global actor, the EU has developed a “governance mode of foreign policy” (De Burca 2013). The Court’s role in the development of EU external relations as an effective and coherent domain of EU policy “simply cannot be overstated” (Van Vooren et al. 2014: 28). The EU Treaties provide a general framework for EU external action, which has been subject to extensive revision and centralization with the Lisbon Treaty (Eeckhout 2012: 265). However, in view of the inherent vagueness of constitutional provisions, there is a need for more operationalizable principles, which the Court has developed.

#### 3.1. Low politics

Through a gradual process of jurisprudential development, the Court has built up a range of EU competences in external action in a parallel construction to EU internal competences (3.1.1.). Without this jurisprudential construction, the EU might not have emerged as an important international actor at all. A more recent example of the CJEU prioritizing an efficient mode of decision-making over the possibility of constitutionalizing a particular domain is the external dimension in the Eurozone crisis (3.1.2.).

##### 3.1.1. *Implied external powers*

One of the main lines of case-law, where the Court has adopted the functional justifications in EU external relations, relates to the implied competences of the EU in concluding international agreements. Apart from such express external powers as the area of CCP, the EU can also dispose of an implied competence. The Court was the main actor in the process of establishing and developing the doctrine of such implied external powers of the EU. It responded to the expectations of international partners to align EU competence with developments in the multilateral trading system (Ankersmit 2014: 196). The doctrine of



implied competence concerns, however, only the existence of an external competence of the EU, and not its nature that is decided separately (Koutrakos 2006: 80).

The doctrine of implied competences was first established in the CJEU's *ERTA* judgment. In a nutshell, the conferment of internal competence in a specific area of activities on the EU (then the EC), by the Treaty, implies the conferment of external competence in that area (Koutrakos 2006: 78). This can be the case *inter alia* when “internal power has already been used in order to adopt measures which come within the attainment of common policies” (para.4).

In its *Opinion 1/76* the Court went as far as to acknowledge the existence of a supranational competence, even if the internal measures in the domain in question were to be taken only after the conclusion of an international agreement: “in so far as the participation in the international agreement (...) is, as here, necessary for the attainment of one of the objectives of the Community”. However, this far-reaching jurisprudence is mostly justified by the particular character of the case before the Court, that concerned the inland waterway in the Rhine, which can in fact only be regulated effectively by an international agreement including Switzerland (Koutrakos 2006: 95).

In subsequent judgments, such as *Opinion 2/92*, the Court upheld such broad understandings of the existence of a European external competence. It has merely raised the bar higher with regard to conditions under which such a competence may become exclusive (Koutrakos 2006: 103). The next controversial decision concerning the implied external competences was *Opinion 1/94* that dealt with the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Court rejected submissions by the Commission that the content of those agreements fell within the scope of the CCP, as well as all three arguments construing an implied external competence: an application of the *ERTA* principle, of the “necessity principle” pursuant to *Opinion 1/76* or of the general clauses of art.95 and 308 EC. The focus of this opinion was not on the international dimension but rather on internal unity.

### 3.1.2. European Stability Mechanism

In the *Pringle* (2012) case, the argument was raised that art. 3(2) TFEU prohibits Member States from concluding an agreement between themselves which might affect common rules, or alter their scope. In her Conclusions for *Opinion 2/13*, Advocate General (AG) Kokott



suggested that this rule could also apply to the case of EU's accession to the ECHR, but solely in those parts not superseded by art.6(2) TEU as *lex specialis*. Indeed, an international agreement about a European Stability mechanism (ESM) established in Luxembourg by all the Member States of the Eurozone could be susceptible of interfering with the EU policies on the single currency. But instead of entering into comparable detail as in its *Opinion 2/13* about the human rights protection in the EU, in *Pringle* (2012) the Court in five short paragraphs dismissed the application of art.3(2) TFEU. The reasoning appears slightly confusing as the Court, on the one hand, underlined the institutional continuity from the European Financial Stability Mechanism (EFSF) based on art.122(2) TFEU to the ESM but, on the other hand, highlighted the fact that establishment of an institution such as the ESM is not covered by the Treaties (para.101-105).

The administrative paradigm limiting constitutionalization can be understood within the context of the particular policy domain of economic and fiscal policy. The setting-up of the ESM was followed by numerous judicial challenges, mostly in its ratification before national constitutional courts. In terms of academic coverage, while some authors have talked about “high degree of judicial intervention” (Fabbrini 2014) in the domain, others have claimed that “courts possibly offered a unique forum for participation and contestation (...), which was largely not availed of” (Fahey and Bardutzky 2013). These contrasting accounts can be explained by differentiating the quantity of judicial challenges from the level of scrutiny applied by the courts. The highest courts in Estonia, France, Ireland, Austria, Poland and Germany have all taken up the task of adjudicating on the compatibility of the ESM Treaty with their national constitutions. As the ESM was not an EU law, they were not bound by their deferential case-law such as the *Solange* judgments. However, none of the courts have seriously engaged with the possible fundamental rights challenges arising from the implementation of the ESM mechanism. In the context of national post-crisis measures, the Portuguese *Tribunal Constitucional* stands out as an exceptional example, with its scrutinizing of the budget law passed under the Memorandum of Understanding (MoU) with the Troika, in the light of social rights (Nogueira de Brito, 2014, p.71). The national courts did not engage in substantive constitutional review. In the context of other post-crisis measures, the CJEU too, in its *Gauweiler* (2015) judgment, “effectively relinquished judicial review as a mechanism to hold the ECB accountable for potential ultra vires acts” (Transparency International



Report 2017: 46). From that perspective, it might seem less surprising that the CJEU also adopted a rather “administrativist” perspective in the *Pringle* (2012) judgment.

### 3.2. High politics

The administrative paradigm can also be observed in the CJEU’s adjudication in the domain of high politics. In order to observe the similarities and differences to the approach adopted in low politics domains, I analyse three lines of case-law. The first line relates to the expansion of the scope of CCP, and the second revolves around the doctrine of loyal cooperation, which the Court has made a powerful tool; it has identified art. 4(3) TEU as an efficient mechanism of ensuring the effectiveness of EU external action. In the third, I discuss cases concerning the delimitation of the scope of CFSP and AFSJ. The institutional stakes in this delimitation are the necessity or complementarity of the European Parliament’s consent, which impacts on the perceived efficiency of the conclusion of international agreements.

#### 3.2.1. Scope of the CCP

In order to illustrate the question of the delimitation of the CCP in view of guaranteeing an effective external representation of the EU in all trade related issues, I analyse the question of the inclusion of intellectual property in the CCP. The Court has walked a thin line of not including intellectual property as an exclusive competence, but allowing international rules to indirectly bind national judges. Even though the CJEU has not been as expansionist on the scope of exclusive competence as it was on the existence of an EU external competence, it has not adopted constitutional justifications for those outcomes, but has rather prioritized the administrative perspective in its reasoning.

The Court issued a series of judgments interpreting art.50 (6) of TRIPS. In spite of the fact that in *Opinion 1/94* the Court concluded that the TRIPS Agreement belongs for the most part to the competence of Member States, in subsequent judgments it went on to interpret its legal provisions (Lavranos 2005: 15). The Court was thus pushing the boundaries of its jurisdiction. It did so in order to avoid divergences in interpretations of TRIPS articles by national courts of the MS (para.32-35). In *Dior* (2000) the Court clearly stated the circumstances under which the provisions of TRIPS can lead to this indirect effect. The issue has to concern a “field to which TRIPs applies and in respect of which the Community [EU]



has already legislated” (para.49). In that case, the national courts are obliged to apply and interpret the national provisions “as far as possible in the light of the wording and purpose (...) of TRIPS” (para.49).

In spite of the gradual permeating of TRIPS content into enforcement by national courts, the Court did not overrule its *Opinion 1/94*. The approach of denying the EU the possibility of being unequivocally in charge of negotiations in that domain, at the international level, has been criticised as a failure of the Court to align the scope of the EU’s CCP with the dynamic of developments within the WTO (Ankersmit 2014: 196). The Court’s tergiversation has even been described as taking three steps forward and two steps backward as in the *Echternach Procession* (Bourgeois 1995). However, the Court’s concern has been to a large extent internally motivated. The doctrine of implied competence is based on the parallelism of internal and external competences; this also means that, as AG Cruz Villalón pointed out in his Opinion in *Daiichi Sankyo* (2013), the competences shared in the internal context cannot be *de facto* turned into exclusive competences via external relations (para.57-59).

The Court had been loyal to its *Opinion 1/94* logic until *Merck Genéricos* (2007). However, the Treaty of Lisbon brought about changes in legislation, notably as art. 207 TFEU now included “commercial aspects of intellectual property” as an EU exclusive competence. The first decision interpreting this provision was *Daiichi Sankyo* (2013); basically, the Court could have adopted two possible solutions, which Laurens Ankersmit describes as “inwardly oriented option” and “outwardly oriented option” (Ankersmit 2014: 197). The former was proposed by AG Cruz Villalón who emphasised the risks of encroachment upon the shared nature of the competence to regulate intellectual property rights (para.57-59). He adopted an internal perspective, submitting that the notion of “commercial aspects of intellectual property” in art.207 TFEU should be interpreted as an “autonomous concept of European Union law” and not in parallel to the scope of TRIPS (para.58). Moreover, the approach proposed by the AG would represent a continuation of the Court’s approach to TRIPS since *Opinion 1/94*. The inward-looking option would have emphasized the complexity of the internal distribution of competences rather than the efficiency of the EU’s external representation, so it would have better fitted the constitutional paradigm.

In its *Daiichi Sankyo* (2013) judgment the Court took a different approach; it admitted that the Treaty amendments provide sufficient grounds for discontinuing its jurisprudential



line. It ruled that *Opinion 1/94* and *Merck Genéricos* (2007) were not “material for determining to what extent the TRIPS Agreement, as from the entry into force of the TFEU, falls within the exclusive competence of the European Union in matters of the common commercial policy” (para.48). The Court’s new conclusion was that the TRIPS now falls “in its entirety” within the scope of the EU’s competence in CCP (para.43). The CJEU relied on historical interpretation, emphasising the intention of the authors of the amendment (para.55). This shift appeared more justified now, as the MS as “masters of the Treaties” included the amendments changing the distribution of the competences within the EU (para.48).

The interaction between the amendment of art. 207 TFEU and the Court’s interpretation of EU competences with regard to the TRIPS provides a good illustration of the Court’s tendency to internalize the administrative paradigm. It can be considered a “considerable victory for the Commission” (Ankersmit 2014: 200), for in *Daiichi Sankyo* (2013) the Court almost fully aligned with the Commission’s submissions. All the intervening MS presented a different approach, so that the AG even referred to these submissions as “the single dissenting voice” (para.43). Since the judgment, the Commission has become not only *de facto*, but also *de jure*, the sole negotiator in the WTO meetings in the domain of intellectual property (Ankersmit 2014: 200).

Laurens Ankersmit interprets the *Daiichi Sankyo* (2013) judgement as a *revirement jurisprudentiel* (Ankersmit 2014: 198). I believe that the Court’s approach on “indirect effect” of TRIPS in case-law, developed between *Opinion 1/94* and *Daiichi Sankyo* (2013), had already revealed the Court’s readiness to encroach upon the distribution of competences within the domain of intellectual property rights. Hence, the *Daiichi Sankyo* (2013) judgment did not come as a surprise, but it provided the Court with a possibility of profiting from a change in written law to justify a new, more general, approach. Conversely, we can see that in other domains, such as the access of non-privileged applicants to the CJEU, the Court was not ready to change its case-law in spite of an amendment of the text of the Treaties. Therefore, the Court’s tendency to prioritize an administrative solution to the question of competences in CCP cannot be solely attributed to legislative change.

A similarly dynamic interpretation is proposed by AG Sharpston for *Opinion 2/15*, who advanced an interpretation of the scope of the CCP as a “living instrument”, to the extent that it can “neither be determined in the abstract nor identified in a static and rigid manner” (para.100). She clearly stated that it followed from *Daiichi Sankyo* (2013) that the whole



TRIPS, and not only the articles relevant for deciding the case, fell within the scope of CCP (para.430). Nonetheless, the AG concluded that the draft EU-Singapore Free Trade Agreement (EUSFTA) also included non-commercial aspects of intellectual property, which were not covered by art. 207 TFEU (*i.a.* through incorporation of the Berne Convention, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (apar.451-456).

The inclusion of TRIPS within the CCP means that the Court had integrated these provisions into its scope of jurisdiction. The risks of divergences across MS that it was trying to mitigate in cases such as *Dior* (2000) disappear. Hence, the Court clearly came to the fore as a gatekeeper for the effect and application of TRIPS within the EU legal order. The justifications of the Court's case-law on implied competence in external relations were parallel to those applicable to the establishment of doctrine of supremacy of EU law (Van Vooren and Wessels 2014: 130). They were based on the efficient and uniform application of EU law across the MS.

### 3.2.2. *Duty of loyal cooperation limiting MS actions*

Another illustration of the Court adopting the administrative paradigm is its case-law on the duty of loyal cooperation enshrined in art. 4(3) TEU. The CJEU has put flesh on the bones of this constitutional principle in the EU legal order (Hillion 2009: 34).

The *portée* of the duty of loyal cooperation is easier to justify in the domains of exclusive competence of the EU, where MSs should not act on their own. For instance, in the case *Commission v Greece* (2009) the Court concluded that Greece had violated its obligations under art.4 (3) TEU by submitting to the International Maritime Organisation (IMO) a proposal for monitoring the compliance of ships and port facilities with the requirements of the International Convention for the Safety of Life at Sea, concluded in London on 1<sup>st</sup> November 1974, and the International Ship and Port Facility Security Code (para.38). The question of the reach of art. 4(3) TEU gets a good deal more controversial in the area of shared competences, where a broad interpretation might encroach upon the distribution of competences between the EU and the MSs. If any individual action by a MS were to violate the duty of loyal cooperation, a shared competence would be *de facto* transformed into an exclusive one. Still, the Court in Luxembourg did not shy away from a far-reaching understanding of the significance of art. 4(3) TEU in the domain of external relations.



The central message of *Opinion 1/94* can be identified by emphasising the essential role of duty of cooperation for bringing mixed competences (shared by the EU institutions and MSs) within the EU legal framework (Koutrakos 2006: 117). The Court, by its *Opinion 1/94*, took up an active role in shaping the practical exercise of shared competences within the domain of WTO law (Persin 2013: 76).

The same EU-internal perspective was adopted by the Court in the series of judgments concerning Open Skies Agreements. In practice, its decision that the ownership and control clause of those agreements was contrary to the principle of free movement of services put an obligation upon the MS to denounce Open Skies Agreements. Similar to the case-law on the scope of the CCP, when establishing the principle of parallelism of internal and external competences, the Court based its jurisprudence on the same effectiveness concern that it had invoked for the establishment of the principle of supremacy of EU law (Baquero Cruz 2006: 231).

In its judgement *Commission v Sweden* (2010) the CJEU did not make a clear-cut differentiation between the fact of exercising a competence and the manner in which it is done, as suggested by the AG. However, it insisted on distinguishing the current proceedings from *Commission v Greece* (2009) on the basis that the latter concerned EU exclusive competences (para.72). It might suggest that the Court was not ready to take a sweeping position as to the effects of the duty of loyal cooperation in the area of shared competences. Nonetheless, the Court did follow the AG as to the results, and it condemned Sweden for its failure to fulfil its obligations under art. 4(3) TEU. It emphasised the underlying policy considerations of the duty of loyal cooperation, in a similar formulation to Christophe Hillion's, by stating that Sweden's actions risked compromising "the principle of unity in the international representation of the Union and the Member States", as well as undermining their negotiating position on the international scene (para.104).

The duty of loyal cooperation represents another illustration of the Court's tremendous contribution to the operationalisation of principles governing EU external relations, and simultaneously, it provides an illustration of the inherent tensions in that domain. When the CJEU opts for a solution providing great flexibility in the delimitation of EU and MS powers, it might often come at a risk of undermining the common position in the international arena. Hence, the Court has a tendency to adopt an administrative paradigm by aligning with the European Commission and contributing to the construction of coherent EU external policy.



### 3.2.3. *Delimitation of Common Foreign and Security Policy*

A certain decline of the administrative paradigm can be identified in the case-law of the CJEU in respect of the delimitation of CFSP and the external dimension of AFSJ. These are all cases challenging the applicability of certain legislative procedures. In principle, the CFSP is a domain where the Council is the sole legislator. Hence, it has been the Commission or, recently, the European Parliament that have demanded a different procedure that anticipates their involvement.

In the *ECOWAS* (2008) case the Court struck down a Decision of the Council regarding the contribution of the EU to the Economic Community of West African States (ECOWAS) in the framework of the Moratorium on Small Arms and Light Weapons. The Court ruled that as this decision not only fell within the scope of CFSP, but also within development cooperation policy, the proper legal basis was to be found in the EC Treaty at the time (now TFEU). Thus, the Commission should have been involved.

In the same vein, the European Parliament made an unsuccessful challenge against the Regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban. The EP claimed that this measure was covered by the external dimension of the AFSJ and hence the appropriate legislative procedure should be the ordinary procedure requiring a positive vote by the Parliament. The Court concluded that the Regulation was rightly based on art.215 (2) TFEU and not on art.75 TFEU.

The European Parliament also brought a challenge concerning the Council Decision on the signing and conclusion of the Agreement between the EU and the Republic of Mauritius. This concerned the conditions of transfer of suspected pirates and associated seized property from the EU-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer (EU-Mauritius Agreement). The Council had concluded that the EU-Mauritius Agreement was a matter solely of CFSP and the Parliament was only informed *post factum*. In line with the other instances of the Parliament actively invoking its rights within the EU decision-making procedure, it introduced an annulment procedure before the Court in Luxembourg.

The main challenge raised by the Parliament was based on a violation of art.218(6) TFEU by the Council. This subparagraph introduces a list of instances when consent or



consultation of the European Parliament is necessary in the procedure of concluding an international agreement. It can be considered that the sole exception is an agreement relating exclusively to CFSP. In the case *Parliament v Council* (2014) the Parliament submitted that the EU-Mauritius Agreement concerned not only CFSP, but also “judicial cooperation in criminal matters, police cooperation and development cooperation” (para.25). It admitted that the centre of gravity lay with the CFSP and that other domains were concerned “only incidentally” (para.46).

AG Bot suggested that the Court should depart from the literal interpretation of art. 218(6) TFEU and instead focus on the parallels between institutional competences in the internal and external domains (para.30). He put forward the *telos* of “symmetry between the procedure for adopting measures internally and externally”, as well as the “parallelism between the Parliament’s powers internally and its powers externally”.

The Court followed AG Bot on that point. It concluded that the Council can complete an international agreement without involving the Parliament when “the decision concluding the agreement in question is legitimately founded exclusively on a substantive legal basis falling within the CFSP” (para.59). Furthermore, it considered this distinction among different procedures foreseen for conclusion of international agreement by art. 218(6) TFEU as “objective criteria that are amenable to judicial review” (para.60).

Nonetheless, the Court still annulled the Council Decision on the conclusion of the EU-Mauritius Agreement due to the infringement of art.218(10) TFEU (para.78). This provision guarantees the European Parliament the right to be “immediately and fully informed”. Hence, the CJEU did guarantee the formal right of the Parliament to be informed, but refused to extend the Parliament’s substantial powers to its participation in the making of international agreements by the EU.

Were it to have adopted a literal interpretation of the agreement relating “exclusively” to CFSP, the Court would have in fact enlarged the competences of European Parliament in external relations. It can be argued that this would then diminish the capacity of the EU to efficiently negotiate and conclude such international agreements. These negotiations are usually entrusted to the European Commission, which puts the Court’s judgment *Parliament v Council* (2014) in line with the pro-integrationist tendency of strengthening the EU as a global actor and aligning with the Commission.



This entanglement of the internal and external dimensions can be compared to the question of the delimitation between art.114 TFEU and art.207 TFEU addressed *i.a.* in *Daiichi Sankyo* (2013) case. The Court had to decide whether agreements such as TRIPS should be concluded on the basis of the competence of the EU to introduce the necessary harmonisation for the functioning of the internal market, or whether the EU should rather rely on its competences in the domain of external action (para.56). The Court could also have relied on the gravity test to determine the adequate legal basis. It did not do so expressly, but it did consider the “primary objective” of TRIPS as a decisive argument, which seems to be a similar approach (para.58).

The CJEU’s expansive approach to the affirmation of the existence of an EU external competence has been moderated by the Court’s prudence in delimiting the domains of shared and exclusive EU competences. The tendency has been to guarantee that both the EU and its Member States find themselves at the table.

## 4. Constitutional paradigm

In a piece summing up an annual conference of the European Constitutional Law Network, Wendel et. al. singled out primacy and fundamental rights as basic fundaments of the EU legal order under a constitutional paradigm (Wendel, Angelov, Belov 2009: 231). Following this logic, and the introductory discussion of the constitutional paradigm, I analyse cases where the Court has adopted the primacy of EU law and fundamental rights as the overarching framework legitimizing the exercise of counter-majoritarian judicial review.

### 4.1. Low politics

Following the logic of low politics covering mainly internal policy domains, which have an external dimension, two policy issues that represented serious human rights challenges are presented in the following subchapters. When adjudicating on the issue of blacklisting potential terrorists and data protection, the CJEU has adopted a markedly constitutional legitimizing paradigm.



#### 4.1.1. *The Kadi saga*

The *Kadi* cases, widely discussed in the literature (for an overview of the debate see De Burca 2010; Avbelj et al., 2014), became a flagship example of the exercise of judicial review based on fundamental rights by the CJEU. In the *Kadi* cases, the Court gave priority to the consideration of fundamental rights and the autonomy of the EU legal order. At the same time, it put EU institutions in a very uncomfortable position in the international scene. It imposed two obligations on EU institutions that can prove problematic in the context of EU-UN relations. The first is to provide reasons for the listing of an individual. The practice of the UN Sanctions Committee has not been to demand detailed reasons for listing proposals, but rather the process was based on mutual trust and classified information. Hence, it is difficult for the Council to demand information that even the UNSC does not possess. The second problematic issue is the obligation to guarantee access to justice. If the EU were to allow an internal “in principle full review” of the listing by European courts, it might lead to incompatibilities with the UN system. Consequently, the Member States might face the dilemma of whether to follow their obligations within the EU or the UN framework.

One of the arguments used to justify the extensive scope of judicial review is its effectiveness - a well-known argument in EU law (*Kadi* (2008) para.119). In its position, the Court is defending the integrity of the EU legal order and human rights as the “very foundations of the Community” (*Kadi* (2008) para.5), thus in fact performing fact a similar role to a constitutional court (Lavranos 2010: 273). When reviewing the implementation of a UN blacklisting into EU law, the CJEU adopts a constitutional paradigm and *de facto* performs a constitutional review of the EU measures adopted to implement the UN sanctions.

#### 4.1.2. *Data protection*

Certain elements of judgements relating to data protection fall within the scope of EU external relations, as they concern the interactions with non-European partners, in particular the US, with regard to dealing with personal data. However, the general context of the policy domain should not be forgotten. The CJEU has become a forerunner in the protection of the fundamental right to data privacy – it provided the first instance for exercise of its judicial review on the basis of the Charter of fundamental Rights of the EU (CFREU) and as the first international court to develop “the right to be forgotten” (*Google Spain* (2014): right to

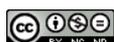


be forgotten, and *Digital Rights Ireland* (2014): data retention directive). This particularly high importance attached by the Court to data protection provides the necessary context for explaining its tendency to adopt the constitutional paradigm in that domain.

In the *PNR* (2006) cases, responding to an inter-institutional challenge introduced by the European Parliament, the CJEU annulled the arrangements on the transfer of name records of air passengers from the EU to the US Bureau of Customs and Border Protection, because the Council and Commission relied on the wrong legal bases (Fahey 2012). In order to limit the negative effects of its “constitutionalist” decision, the court awarded the EU institutions a “grace period” to remedy the situation internally, without having to re-engage the international partner. A similar solution was also adopted in the *Kadi* (2008) case, even though the awarded time period was specifically meant in this case for further negotiations (to obtain more evidence) with the international partner (the UN). In the pending request for *Opinion 1/15*, once again submitted by the European Parliament, AG Mengozzi has already argued that the PNR agreement envisaged between the EU and Canada appears incompatible with human rights guaranteed in the CFREU.

In the *Schrems* (2015) case, the Irish High Court asked whether the relevant EU Directive had to be interpreted, in light of CFREU, as prohibiting national control of “Safe Harbour decisions” pursuant to individual human rights claims. The CJEU held that classifying the US as a “safe harbour” at the EU level, does not preclude national authorities from examining individual claims about human rights violations. The Court read the relevant Directive in light of art.47 CFREU (para.64) when it prescribes control by national supervisory authorities (para.43). It cited *Kadi* (2008), underlining that the EU is a “union based on the Rule of Law” (para.60). The Court applied strict scrutiny, justifying it by the “important role” of data protection, the large scale of the interference, as well as the automatic processing of the data in the case (para.78,91). It stated that the level of data protection in the US would not need to be absolutely identical to that in the EU for an opposite result (para.73). However, the lack of possibilities for redress for individual claimants invoking breaches of fundamental rights led it to conclude that the protection level was not “adequate” (para.70, 95).

## 4.2. High politics





In the high politics domain, focusing mainly on the EU's competence to enter into international agreements, the CJEU also sometimes adopts a constitutional paradigm and emphasizes the autonomy of a consolidated European legal order and the protection of fundamental rights. In terms of inter-institutional balance, the judgments discussed in this section provide important illustrations for the claim that a limited role for the Commission fits into the particular expression of the constitutionalist paradigm in EU external relations.

#### 4.2.1. *Opinion 1/09*

*Opinion 1/09* can serve as an illustration of a CJEU decision that curtails the leading role of the Commission in shaping the EU's foreign policy on broader issues of economic policy. Several private stakeholders had been unhappy with the decentralised system of patent protection in Europe (Lock 2011: 576). The EU institutions, in particular the European Commission, had been steering a legislative process for the introduction of a unified patent regime for at least a decade before the judgment in March 2011 (Adam 2011: 280). It was supposed to promote innovation and investment in the single market, as well as the competitiveness of the European economy, as the existing patent enforcement system was costly and cumbersome. Moreover, the unified patent project formed part of a bigger initiative of the European Commission for a new integrated industrial policy that would include intellectual property rights (Wealde et al 2010: 385). In the interest of the single market, the Commission had, since 2000, been considering possibilities of EU accession to the European Patent Convention (*Opinion 1/09* para.4); a binding jurisdiction had always been a crucial element for such a regime to work (Adam 2011: 281).

The Court's opinion forced the EU institutions to change strategy. Due to the technical nature of patent litigation, the options of entrusting either EU or national judges with this task were off the table (Lock 2011: 586). The MS had to reach the desired result in the framework of enhance cooperation (art.326 *et seqq.* TFEU).

In *Opinion 1/09*, the Court rejected the possibility of setting up a unified patent regime as an international agreement parallel to the EU Treaties. The crucial aspect was the inclusion of a Unified Patent Court in this regime; the crucial problem was that this agreement foresaw a judicial body, a Unified Patent Court (UPC) (para.8).

The challenges relevant for the purposes of this analysis arose from the risk to the principle of primacy of EU law (para.20, 22). There would have been no control over the



application and interpretation of EU legislation falling under the jurisdiction of the UPC. The recurring argument was also the preservation of the autonomy of the EU legal order. Further, the new agreement would have undermined the exclusive nature of the CJEU's jurisdiction. Some MS doubted the competence of the EU to conclude such agreement as there has not been a complete harmonisation in the patent domain (para.23). If there were no current existence of either a unique patent covering the EU territory or a unified jurisdiction, then the EU would have had nothing to transfer by virtue of an international agreement. Moreover, *Opinion 2/94* had previously confirmed that the EU did not possess a competence allowing it to transfer the patent competence to an international organisation (para.26).

Most MSs defended the compatibility of the envisaged agreement with European law (para.33). They pointed out that a mechanism allowing the UPC to ask the CJEU preliminary ruling questions already existed in the draft agreement (para.34). The UPC already had an obligation to respect EU law and follow the answers given by the Court in Luxembourg to preliminary ruling questions (para.41). As legal basis for EU competence, the parties had submitted either art.81 TFEU in combination with art.114 TFEU, or the “catch-all” art.352 TFEU (para.35, 37). A possible way of understanding the exclusive jurisdiction of the CJEU would have been to limit it to the domains of exclusive competences of the EU, which was not the case for the domain of patent regulation (para.39).

The Court admitted that the envisaged agreement did not represent a violation of articles 262 and 344 TFEU as these did not establish a monopoly for the CJEU in the domain of intellectual property rights (para.62). A crucial point weighing in favour of a judgment on incompatibility was the exclusiveness of the CJEU's jurisdiction intertwined with the consideration of the autonomy of EU legal order. The Court went as far back as *Van Gend en Loos* (1963) to affirm the different nature of EU Treaties, which created a new legal order, from “ordinary international treaties” (para.65). This represented another broad reference to the principles of EU law that reflects the wish to emphasise the continuity in the Court's approach. The Court in Luxembourg considered itself vested with the task to “ensure respect for the autonomy of the European Union legal order thus created by the Treaties” (para.67). The appearance of the UPC in the European judicial landscape would have constituted a risk for the effective and uniform application of EU law. The UPC would not have been an EU court nor a national court of a MS; it would, however, have enjoyed exclusive jurisdiction



over patent issues and in part applied EU law, which is usually a task of national and EU judges (para.71-73).

Another major problem that the CJEU identified was the absence of a mechanism to effectively enforce the obligation of the UPC to make a preliminary reference under art.48 of the envisaged agreement. The Court referred to the *telos* of art.267 TFEU, namely to the guarantee of the uniform and effective application of EU law across the EU territory (para.83). The “correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order” executed by a tandem of EU and national judges were the *raison d’être* of the preliminary ruling procedure (para.84). This joint application system involves safety mechanisms, such as state responsibility for breaches of EU law by judicial bodies established in *Köbler* (2003). The UPC, however, would not have been subject to such safety mechanisms.

In conclusion, the Court considered that it would be too much of a threat for the “powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law” (para.89). It was a different approach than the one adopted by the Court in the *Pringle* (2012) judgment discussed above. In the *Pringle* (2012) case, the Court accepted the involvement of EU institutions in the ESM created outside of the EU framework and it set very few limitations to the discretion of the institutions with regard to this involvement (Craig 2013).

The logical consequence of the autonomy logic has been the co-opting of the project into the EU legal order. Accordingly, the Member States switched tactics, to implementing a common patent agreement as a measure of enhanced cooperation. The UPC was finally established by an Agreement on the Unified Patent Court in February 2013. Spain and Italy contested the decision authorising enhanced cooperation under art.329 (1) TFEU. This time the Court upheld the decision as the UPC no longer posed a threat to its exclusive and ultimate jurisdiction.

#### 4.2.2. *Opinion 2/13*

In *Opinion 2/13* the Court ruled that the Draft Accession Agreement of the EU to the European Convention on Human Rights (ECHR) was incompatible with the EU Treaties. This judgment can be classified as constitutionalist both because of the legitimizing paradigm



adopted by the Court, and in view of its consequences in terms of judicial politics. The Court listed several reasons to justify the incompatibility of the negotiated accession deal with the EU Treaties. According to the ECHR's approach, the international level of human rights protection represents the "floor" and the member states are free to go beyond it and introduce higher levels of protection. This might be in conflict with the approach adopted by the CJEU in the *Melloni* (2013) judgment, where national rules guaranteeing higher levels of human rights protection had to give way to the interest of a uniform and efficient application of EU law across all MS (para.188). Moreover, the EU principle of mutual trust that might allow MS to "skip" human rights controls through cooperation agreements (e.g. European Arrest Warrant, distribution of asylum seekers) might be endangered by a conventionality control exercised by the European Court of Human Rights (ECtHR) (para.191). The new Protocol no.16 of the ECHR might lead to the circumvention of the EU preliminary ruling procedure as the ECtHR might theoretically, in some cases, be the first and only supranational instance deciding on cases concerning EU law (para.196). The prior involvement mechanism would guarantee a participation of the CJEU only in cases concerning validity (and not necessarily interpretation) of EU law. The rarely used possibility of inter-state disputes under ECHR might be in tension with the principle of autonomy, loyal cooperation and art.344 TFEU. The Court was not convinced by the envisaged co-respondent mechanism's guarantees in view of the inter-institutional balance among the EU institutions (para.231).

*Opinion 2/13* has delayed the EU's accession to the ECHR indefinitely and hence created a chance for the CJEU to develop its own jurisprudence in the domain of human rights on the basis of the CFREU (Halberstam 2015). Therefore, the judgment can also be interpreted as constitutionalist with this broader political and institutional context in mind, as it might allow the Court to develop its constitutional role with an autonomous practice of judicial review.

## 5. Conclusions

The continuing litigation shows that the format and intensity of judicial review in various domains of EU external relations are not yet settled. The CJEU's active role in establishing the *modus operandi* of EU external relations is not always voluntary. Sometimes, just as a



weather vane without wind still needs to point in some direction, the Courts need to render a decision even if the legislative framework has been intentionally drafted in a vague manner. Hence, the Court is channeled by its external environment to delimit between the competences of the EU and its MS as well as among the institutions.

Questions concerning the correct legal basis, as well as the procedural rights of particular institutions, reflect the more general tensions explored in this article. The CJEU can legitimize its decisions by deploying the administrative or constitutional paradigm, and respond to different concerns raised about the position of EU external relations in the constitutional structure of the EU. On the one hand, the Court can orient itself rather internally and incorporate external relations in the increasingly constitutionalized EU legal order. On the other hand, it can further cohesiveness of EU's external representation by leaving more leeway to the European Commission. Classifying these various legitimizing arguments as two broad alternative paradigms reflects the tensions between Court's role of overseeing the exercise of governance in the EU and its innate role as part of the dynamic project of European integration.

Traditionally, this balance is struck by limiting judicial review in the domain of high politics. When trying to test how the CJEU strikes the balance between its judicial oversight, and leaving the leeway to the MS in foreign policy, the first difficulty is that the EU legal framework does not reflect the distinction between high and low politics. This can, however, be overcome by looking at the rationale of the distinction and classification of the issue area in various policy domains of the EU that have an external dimension. The analysis of the Court's adjudication in high and low politics does not show a particular pattern of deployment of administrative vs. constitutional paradigm to legitimize the scrutiny of its judicial oversight. Instead, it seems that particular issue areas relating to human rights and the autonomy of the EU's legal order are more prone to be adjudicated within the constitutional paradigm, while issues such as trade policy or economic and fiscal policy tend to fall within the administrative legitimizing paradigm.

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