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## The Principle of the Primacy of EU Law in Light of the Case Law of the Constitutional Courts of Italy, Germany, France, and Austria

- **ABSTRACT:** *This article examines the relationship among national constitutions, constitutional courts, and the primacy of Community Law in connection with four Member States (Germany, France, Italy, and Austria). It starts with the question of whether national constitutions contain a European Union (EU) clause and explicitly provide for the primacy of Community Law. It examines whether any constitutional restriction or reservation has been elaborated in the case law of constitutional courts, and the extent to which the constitutional courts examined can exercise control indirectly over cases of conformity of EU legislative acts with constitutions or cases of misuse of powers (ultra vires acts). The constitutions examined can be considered uniform in that they contain references to the individual Member States' relationships with the EU and create the possibility of restricting their competence or sovereignty. However, they do not declare the principle of the primacy of Community Law. As a consequence, the constitutional courts of Member States play a key role in the interpretation of the principle of the primacy of Community Law, including the formulation of constitutional requirements and counterbalances in connection with the enforcement of the principle. A reference to constitutional identity appears in the case law of recent decades, the elements of which are elaborated on and filled with more or less specific content by the constitutional courts on a case-by-case basis. In the event of a possible violation of constitutional identity or principles with unconditional effectiveness, some constitutional courts exclude the possibility of Community Law being invoked against the constitution of a Member State, but at least on a case-by-case basis, they maintain the possibility of inapplicability or of creating compatibility. In the latter respect, the article also addresses the limited nature of the powers of constitutional courts to examine the compatibility of EU Treaties and their amendments with the*

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*constitution of a Member State (see ex-ante or ex-post review, procedural or substantive examination).*

- **KEYWORDS:** primacy of EU Law, Constitutional Court interpretation of the primacy of EU Law, restraints of constitutionality, *ultra vires* Community acts, constitutional identity, EU clause.

## 1. Introduction

The European Court of Justice (in current terminology, the Court of Justice of the European Union, hereinafter referred to as CJEU) declared the primacy of Community Law as early as in 1964 in *Costa v ENEL*.<sup>5</sup> In 1970, in *Internationale Handelsgesellschaft*,<sup>6</sup> it stated that Member States may not invoke their constitutional arrangements for the sake of selective or discriminatory interpretation of Community Law. Despite this, the question of the primacy of EU Law is raised repeatedly by bodies that are responsible for interpreting national constitutions, that is, in the cases before the constitutional courts of Member States. An excellent example of this is the decision dated 5 May 2020<sup>7</sup> of the German Federal Constitutional Court (Bundesverfassungsgericht or BVerfG) in connection with the European Central Bank's (ECB) bond purchase programme, in which BVerfG banned the implementation of European Union (EU) law again, causing serious debates around its supremacy. Although 50 years have passed since the principle was first enshrined, the primacy of EU Law is still a problem before Member States' constitutional protection mechanisms. Thus, in our opinion, the actuality of this complex topic, which is so rightly popular among practitioners of Constitutional and EU Law, remains unquestionable.

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5 Judgment of the Court of 15 July 1964. *Flaminio Costa v ENEL* (Case 6/64).

6 Judgment of the Court of 17 December 1970. *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 11/70).

7 BVerfG, 05.05.2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15. The proceedings before the German Constitutional Court sought to examine the ECB's misuse of powers, in which the BVerfG initiated a preliminary ruling procedure before the CJEU based on its previous practice. Article 127 of the Treaty on the Functioning of the European Union defines the powers of the European Central Bank (ECB) with regard to monetary policy (ensuring price stability, supporting the general economic policy objectives of the Union). Whereas Member States are responsible for economic policy measures, the ECB is responsible for the monetary policy. In the preliminary ruling procedure, the CJEU limited its examination to the assessment of the ECB's manifest misuse of powers, whereas the German Federal Constitutional Court ruled that the ECB should have also demonstrated the proportionality of the measure adopted in the context of the bond purchase program, which, in the interpretation of BVerfG, has not happened despite the ECB's wide discretion. Based on its previous case law, BVerfG confirmed the obligation to oppose EU acts implementing a constitutional identity or exceeding powers, and thus affirmed the inapplicability of the CJEU's decision.

This study aims to examine the application of the primacy of EU Law in the Member States, within the framework of which we undertake a comparative analysis of Italy, Germany, France, and Austria<sup>8</sup> regarding jurisdictional issues, the primacy of EU Law, and relevant case laws before their constitutional courts. First, we turn to the relationship between domestic and international law, specifically, the constitutions of the four identified Member States and international and EU Treaties. We also refer to the options available to the constitutional courts in case of a conflict of norms. Next, as the primacy of EU Law is not expressed explicitly by any of the constitutions of the Member States we examine, we present the constitutional interpretation of supremacy, in light of which we deal with constitutional limits influencing the absolute effectiveness of EU Law (with the protection of fundamental rights, the *ultra vires* Community acts and constitutional identity<sup>9</sup>). We also examine the scope of those legislative acts that can be subject to constitutional review and the issue of exceeding powers.

## **2. Relationship between the constitutions of Member States and international and EU Treaties, and the practice to be followed in the event of a conflict of norms**

According to the CJEU, the Law of the EU is an autonomous and separate legal order that is different from classical international law, which must be applied within the law of the Member States without becoming a part of it.<sup>10</sup> However, in analysing the primacy of EU Law in Member States, we cannot go without referring to the relationship between domestic and international law. There are two reasons for this. One is that the relationship between domestic and international law has had an impact on the conceptualisation of Community Law as a *sui generis* legal order: as the Netherlands views the relationship between domestic and international law through the lens of monism, and the direct effect of the treaties was based on the Dutch Van Gend & Loos case<sup>11</sup>, which provided a favourable basis for the European Court of Justice to establish the efficient enforcement of a relatively new legal order.<sup>12</sup> The second reason is that the founding treaties establishing the EU are international treaties within the meaning of

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8 Throughout the study, the four Member States are examined in this order. Settlement criteria were chosen in light of the case law of the national constitutional courts, bearing in mind how easily the Member State's constitutional protection mechanism recognised the principle of primacy of EU law, that is, whether the Member State opposed the position of the EuB, and if yes, how pioneering the constitutional court judgments were when compared to the viewpoint of the CJEU. The latter is most characteristic of the Italian Constitutional Court, whereas it is least true of the Austrian Constitutional Court.

9 For a more detailed summary of the case law of the Member States' constitutional courts on the latter, see: Sulyok, 2014.

10 Jakab, 2007, p. 249.

11 Judgment of the Court of 5 February 1963. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (Case 26/62).

12 Chronowski, 2019, p. 10.

international law, in particular Article 2 (1)(a)<sup>13</sup> of the 1969 Vienna Convention<sup>14</sup>, and it is therefore necessary to clarify in advance how they can be applied in the domestic law of the state and where they are, in principle, located in the hierarchy of norms.<sup>15</sup>

Under Article 10(1) of the Italian Constitution, adopted on 27 December 1947 and entered into force on 1 January 1948<sup>16</sup>, the Italian legal system adapts to the generally recognised rules of international law. The Italian legislature incorporates international treaties containing international obligations into domestic law through a separate act, in which contracts take precedence over domestic law. However, neither the Italian Constitution nor the Act on the Constitutional Court<sup>17</sup> contains provisions addressing a conflict between the Constitution and the provisions of an international treaty. The Act on the Constitutional Court only allows it to examine the conflict between the Constitution and international treaties exclusively in the context of an ex-post review of the promulgating statute.

Article 25 of the Basic Law of the Federal Republic of Germany (Grundgesetz, GG)<sup>18</sup> lays down the principles of general adoption and primacy in relation to customary law and general principles of law,<sup>19</sup> whereas Article 59(2) provides that international treaties on issues regulated by federal legislation may be concluded with the express approval or assistance of the competent body of the federal legislature in the form of a federal law. The BVerfG's approach to international law is generally influenced by the perspective of '*Völkerrechtsfreundlichkeit*', that is, the BVerfG sees the relationship between domestic and public international law in a 'friendly' manner.<sup>20</sup> The GG, particularly under Paragraph 93, which regulates the powers of BVerfG, does not allow international treaties to be revised before they have been signed or ratified. The BVerfG stated in an early judgement that it does not have the power to carry out ex-ante control of international agreements.<sup>21</sup> Thus, constitutional concerns can only be addressed during the discussion of bills transposing international treaties before ratification, and

13 Article 2, 1. For the purposes of the present Convention: (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

14 Legislative Decree No. 12 of 1987 on promulgating the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

15 In Hungarian Law, international treaties promulgated by statute come under the Fundamental Law of Hungary, but rank above statutes. International treaties promulgated by government decree fall under statutes, but rank above government decrees. Trócsányi and Schanda, 2014, p. 111.

16 Costituzione della Repubblica Italiana (Gazzetta Ufficiale n. 298 del 27-12-1947), <https://tinyurl.com/ya8w2mf7> (2020. 01. 06.).

17 Elenco delle leggi di revisione della Costituzione e di altre leggi costituzionali (1948–2003), <https://tinyurl.com/yajdfj3h> (2020. 01. 06.).

18 Grundgesetz für die Bundesrepublik Deutschland, <https://tinyurl.com/hp9unzd> (2020. 01. 29.).

19 Kovács, 2016, pp. 84–90.; Molnár, 2018, pp. 16–17.

20 Wolfrum, Hestermeyer and Vöneky, 2015, p. 4–5. in: <https://tinyurl.com/vjoea75> (2020. 01. 28.).

21 BVerfG, 30.07.1952 – BvF 1/52.

the BVerfG can only examine international treaties that have already been ratified in the context of ex-post normative control from a procedural perspective.

In France, international treaties become a part of domestic law only after transposition. Therefore, the treaties establishing the European Economic Community (EEC) and the EU, as well as their amendments, can only be incorporated into French law after transposition. The relationship between domestic law and international treaties is governed by Articles 54 and 55 of the French Constitution<sup>22</sup>. It provides that treaties or agreements ratified in accordance with constitutional requirements take precedence over the statutes, but not the Constitution, after their promulgation under domestic law, if the treaty or agreement is also applied by the other party. However, the *Conseil Constitutionnel*, acting as the French Constitutional Court, has waived the condition of reciprocity in the case of EU Treaties.<sup>23</sup> Under Article 55 of the French Constitution, international treaties and agreements may be examined by the *Conseil Constitutionnel* only before they are concluded or promulgated on the initiative of the actors entitled to do so by the Constitution,<sup>24</sup> that is, on a non-binding basis. If the *Conseil Constitutionnel* finds a conflict between the Constitution and the obligation arising out of an international treaty, the ratification of the international treaty can only take place by amending the Constitution. Before ratifying the Maastricht Treaty, the Amsterdam and Lisbon Treaties and the European Constitutional Treaty, which were ultimately rejected in a referendum, the *Conseil Constitutionnel* declared their partial incompatibility with the Constitution in a constitutional review and thus deemed it necessary to amend the French Constitution in all four cases. Although in light of the *Conseil Constitutionnel*'s examination, the French Constitution is at the top of the hierarchy of norms, according to some assessments, by amending the Constitution and not the international treaty in the event of a conflict between an international treaty and the Constitution, we cannot speak of the primacy of the French Constitution over international treaties.<sup>25</sup>

The reception of the generally recognised rules of international law is provided for under Article 9 (1) of the Austrian Constitution (Bundes-Verfassungsgesetz, B-VG).<sup>26</sup> Austria's constitutional system is monistic, that is, the B-VG recognises the primacy of international law. According to the Austrian Constitution, no preliminary norm control can be initiated before concluding an international treaty. The constitutionality of international treaties shall be ensured by the legislature, if necessary, with a possible constitutional amendment before ratification. Under Paragraph 140/A (1) of the B-VG, the Austrian Constitutional Court may, in the context of an ex-post facto review, examine the conformity of an international treaty that has already been ratified in accordance with the Constitution. If an international treaty is declared unconstitutional

22 Constitution du 4 octobre 1958., <https://tinyurl.hu/q6pw/> (2020. 01. 09.).

23 Cons. const. décision n° 98-400 DC du 20 mai 1998, in: Rideau, 2015, <https://tinyurl.com/y7apsask> (2020. 01. 09.).

24 At the initiative of the President of the Republic, the Prime Minister, the Speaker of the House of Representatives or the Senate, or 60 representatives or senators.

25 Bonnet, 2019.

26 Bundes-Verfassungsgesetz, BGBl. Nr. 1/1930, <https://tinyurl.com/9oetsbk> (2020. 07. 10.).

by the Constitutional Court, neither the treaty nor the legislation implementing it shall apply, unless the Constitutional Court provides for an appropriate transitional period in its judgement in order to ensure consistency.<sup>27</sup>

### 3. The lack of constitutional provisions regarding the primacy of EU Law

Before discussing the results of our study, we draw the readers' attention to the peculiarity of the relationship between EU Law and the constitutions of the selected Member States, which *Nóra Chronowski* described as a 'constitutional law paradox'. The constitutions of the Member States analysed – and, in the case of Austria, the Federal Constitutional Act of 1994 on Accession to the EU<sup>28</sup> – authorise them to enter an international organisation whose sui generis legal order requires unconditional effectiveness over their domestic laws and constitutions.<sup>29</sup> This creates considerable tension in the interpretation of the constitutions of Member States. László Blutman pointed out that although the case law of the CJEU has remained unbroken since 1970 in terms of the principle of supremacy, the so-called 'priority dilemma' is insoluble as Member States' constitutional protection mechanisms have begun to seek soft solutions to offset the unconditional enforcement of EU Law.<sup>30</sup>

The constitutions of the countries we examined all contain some kind of integration clause, although the content and scope of each are quite different. Italy's accession to the EEC was based on Article 11 of its Constitution,<sup>31</sup> which originally functioned to allow the State to accede to the United Nations. The reference to Community Law and the different nature of Community Law from international agreements did not appear in the Italian Constitution until 2001, when Chapter V underwent a comprehensive amendment.<sup>32</sup> However, the provision does not contain an explicit EU clause and does not enshrine the primacy of Community Law over national law. Under Article 117 (1) of the Italian Constitution, law-making is exercised by the State and the regions in accordance with the Constitution and the restrictions imposed by the EU and other international obligations. Article 11 specifies that Italy participates in European integration by restricting its sovereignty. The Constitutional Court examines cases involving the conflict of competence between Member States and the EU, in the absence of express

27 This is a maximum of one year for international treaties and two years for treaties amending the EU founding treaties.

28 Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union, BGBl. Nr. 744/1994, <https://tinyurl.com/y7grrzp8> (2020. 07. 10.).

29 Chronowski, 2019, p. 2.

30 Blutman, 2017, p. 1.

31 Article 11 of the Italian Constitution: '[I]taly agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends'.

32 Legge costituzionale 18 ottobre 2001, n. 3, Modifiche al titolo V della parte seconda della Costituzione, <https://tinyurl.com/y7fhls53> (2020. 01. 06.).

provisions of the Constitution based on Article 11 even after the 2001 constitutional amendment, and interprets the restriction of sovereignty referred to therein as a transfer of powers. As indicated above, Italy promulgates Community Law into its domestic law, so that the Constitutional Court can only examine the constitutionality of domestic laws transposing EU Law in indirect proceedings (*sindacato in via incidentale*).<sup>33</sup>

Unlike the Italian Constitution, the German GG has had an EU clause since 1993, the year when the Maastricht Treaty (Article 23) entered into force. However, the German legislature does not provide for the primacy of EU Law. Article 23 (1) of the GG clarifies that in order to achieve a united Europe, the Federation may transfer sovereignty to the EU by a law approved by the Federal Council (*Bundesrat*). The German Basic Law derives primacy of EU Law not from the *sui generis* nature of EU Law itself, but from the provisions of the law authorising the German State to delegate powers to a supranational body. The primacy of EU Law in Germany is bound by the German Constitution. Although the GG does not set limits on the delegation of powers, the text mentions democratic, rule of law, social, and federal principles, as well as the principle of subsidiarity and the level of legal protection provided as core values. The latter two requirements are highly emphasised in the case law of BVerfG.

Before 1992, the French Constitution did not contain any specific provision on the country's participation in European integration. After the decision<sup>34</sup> of the *Conseil Constitutionnel*, which only accepted the ratification of the Maastricht Treaty upon an amendment to the Constitution, the new Title XV was incorporated into the French Constitution,<sup>35</sup> which has since been amended several times. However, like the Italian and German constitutions, it does not provide for the primacy of EU Law. Nevertheless, as a consequence of France's participation in European integration, the Constitution clarifies that Member States exercise certain powers jointly.<sup>36</sup> In the absence of a clear provision on the primacy of EU Law, it has been a longstanding challenge for the French legislature to elaborate the primacy of EU Law in practice that is compatible with the French hierarchy of norms.

The primacy and direct effect of EU Law are not expressly provided for in the B-VG. Both these principles were adopted by the 1994 Act of Accession to the European Union and by the case law of the Constitutional Court following the country's accession

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33 The essence of indirect proceedings is that in an ongoing proceeding, either party or the trial judge may initiate an *ex-post* review of constitutionality *ex officio*, if he or she has doubts about the constitutionality of applicable law. However, before referring the matter to the Constitutional Court, it should be declared that the question referred is relevant to the main proceedings and that the doubts are well founded.

34 Cons. const. décision n° 92-308 DC du 9 avril 1992, Maastricht I.

35 Loi constitutionnelle n° 92-554 du 25 juin 1992.

36 The link between the ratification of the Maastricht Treaty and the constitutional amendment emerged partly from the fact that the *Conseil Constitutionnel* described the EU as an international organisation endowed with legal personality and decision-making powers by delegation, and considered that Article 88 (1) of the Constitution allows this delegation of powers. Cons. const. décision n° 92-308 DC du 9 avril 1992, Maastricht I, cons. 13., as well as Cons. const. décision n° 2007-560 DC.

in 1995. Pursuant to Paragraph 9 (2) of B-VG, certain elements of state sovereignty may be transferred to another state or international organisation, but the case law of the Constitutional Court (*Verfassungsgerichtshof*) has not clarified what the phrase ‘certain elements of sovereignty’ means.<sup>37</sup> In any case, it is clear from the case law of the Constitutional Court<sup>38</sup> that Paragraph 9 (2) of the B-VG is not relevant to its relationship with the EU, given that the delegation of powers to the EU is provided for in the Act of Accession. The B-VG pays particular attention to maintaining the status quo in the federal system and in the division of competence between the Federation and the federal states (*Bundesländer*). The powers of federal states enjoy special protection against possible attempts to revoke them, either by the federal government or the EU, or as a result of an international treaty. Whereas the Federal Council (*Bundesrat*) can veto the deprivation of powers, the National Council (*Nationalrat*) may exercise a right of veto in the interest of the democratic rule of law as a particular value that needs to be protected. Articles 23/A–23/K of the Austrian Constitution also provide for the possibility of the national parliament having a say in EU decision-making.

#### **4. The constitutional courts’ interpretation of the primacy of EU Law in the absence of explicit constitutional provisions**

Though the integration clauses in the constitutions of the Member States we examined allowed for the transfer or restriction of powers, it does not mean that these states have relinquished their national sovereignty. The echoes of national constitutional protection fora of Member States, and the case law of the Constitutional Courts have expressed concerns over the EU’s attempts to assert its powers in more and more areas, sometimes under questionable powers. László Trócsányi emphasised that as no confrontation with the EU is in the interest of any Member State, it has been necessary to use a *modus vivendi* that is a gentle and simultaneously effective weapon against the EU.<sup>39</sup> Although Trócsányi used the latter metaphor in connection with constitutional identity, it was not the first *modus vivendi* in the arsenal of constitutional protection mechanisms in the Member States: the protection of fundamental rights and the issue of *ultra vires* Community acts are also popular benchmarks for counteracting EU Law.

The jurisprudence of the Italian Constitutional Court has come a long and controversial way in recognising the primacy of Community Law. In the context of the Member States examined, it is no exaggeration to say that this was the longest and most controversial one. Decisions of the Italian Constitutional Court rejecting the primacy of Community Law were a precedent for the CJEU, as the interpretation of these Italian

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37 Although it would have had the opportunity to do so in many cases, the last was in connection with the ESM Treaty. Mayer, 2013, p. 394.

38 The judgments of the Austrian Constitutional Court: SV 2/12-18 of 16 March 2013 and SV1/2013-15 of 3 October 2013 on the review of constitutionality of the ESM Treaty and the fiscal compact.

39 Trócsányi, 2014, p. 72.



judgements provided a basis for elaborating the principle of the primacy of Community Law in *Costa v ENEL*. Despite the judgement of the CJEU declaring the primacy of Community Law in 1964, the Italian Constitutional Court did not acknowledge the principle of supremacy until the *Frontini* case in 1973,<sup>40</sup> which has not been questioned since then and has been placed under constitutional limits. The Italian Constitutional Court has also come a long way in ruling on the inapplicability of internal rules contrary to Community Law. In its initial case law, it was ruled that the Constitutional Court had the power to declare the unconstitutionality and inapplicability of internal rules that were contrary to Community Law; the court in the case in question could not decide on it. Following the 1976 ruling in the *Simmenthal* case<sup>41</sup> which declared the inapplicability of national laws contrary to Community Law, the Italian Constitutional Court ruled in the *Granital* case<sup>42</sup> only in 1984, which declared that courts shall disregard (*disapplicare*) an internal rule that is contrary to Community Law without initiating a constitutional review.

BVerfG is Europe's Constitutional Court with the most extensive powers, whose case law has played a major role in shaping Community Law and has had a significant impact<sup>43</sup> on both the CJEU and constitutional courts of other Member States. The BVerfG declared the primacy of Community Law in its 1971 *Lütticke* judgement,<sup>44</sup> in a pioneering way as the first one among the European constitutional courts, but it later withdrew from this dynamism to protect its constitution (see below).<sup>45</sup> The BVerfG may formulate its position on Community Law following a constitutional complaint and a judicial inquiry (ex-post constitutional review in a particular case).

In France, the recognition of the primacy of EU Law has taken place in a broader context, within the framework of the case law on the Member States' compliance with international obligations. Here, the ex-post control of compliance with international obligations is not carried out by the *Conseil Constitutionnel* (as under Article 54 of the Constitution, it only has the power to carry out ex-ante control), but by the ordinary courts (*juridictions judiciaires*)<sup>46</sup> and by their Supreme Court (*Cour de Cassation*), as well as in the case of administrative court proceedings by the Council of State (*Conseil d'État*). The *Conseil Constitutionnel* had the opportunity to clarify its position on the primacy of EU Law during the ex-ante control of implementing norms serving the

40 Sentenza 183/1973.

41 Judgment of the Court of 9 March 1978. *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77).

42 Sentenza 170/1984.

43 Fazekas, 2009, p. 61.

44 BVerfG, 09.06.1971 – 2 BvR 225/69.

45 The BVerfG stated that, in accordance with Article 24 of the GG, through the German statute ratifying the EEC Treaty, the rules of the EEC's autonomous legal order in the domestic legal system acquire effectiveness and have to be applied by the German courts. This way, the directly applicable provisions of Community Law take precedence over conflicting national laws, as only in this case can individual rights based on Community Law be guaranteed. Stipta, 2011, p. 300.

46 . Cons. const. décision n° 86-216 DC du 3 septembre 1986.

compliance with EU Law. The process of recognising the primacy of EU Law can be considered relatively slow and cumbersome because of the complexity of the French judicial system and rules of jurisdiction.<sup>47</sup> The recognition of the principle that an earlier international commitment takes precedence over later national legislation occurred relatively late in 1975 (*Conseil Constitutionnel*<sup>48</sup> and *Cour de Cassation*<sup>49</sup>) and in 1989<sup>50</sup> (*Conseil d'État*). The *Conseil Constitutionnel* interprets EU Law as a legal system that is integrated into domestic law but is distinct from the international legal order,<sup>51</sup> and the *Cour de Cassation* has also highlighted the special nature of the Community legal order. Owing to the primacy of EU Law, administrative and ordinary courts have accepted the obligation to interpret national laws in a manner that conforms to the EU, and if this is not possible, to disregard the conflicting norm and to replace it with the EU directive, if necessary.

The issue of a preliminary ruling procedure that may be initiated by the Austrian Constitutional Court on the interpretation or validity of EU Law is 'under-regulated' in Austrian Constitutional Law. The text of the Constitution does not mention it, and the Act on the Constitutional Court<sup>52</sup> provides for the rules of procedure only rather succinctly. Based on the case law of the Austrian Constitutional Court, it is not sufficiently clear when the Constitutional Court is obliged to refer a case to the CJEU.<sup>53</sup> However, a search of the website of the Constitutional Court<sup>54</sup> showed that the Austrian Constitutional Court has initiated preliminary ruling proceedings on four occasions<sup>55</sup> since its accession to the EU.

#### ■ 4.1. Constitutional limits influencing the unconditional effectiveness of the primacy of EU Law

##### 4.1.1. Italy

The Italian Constitutional Court recognised the primacy of Community Law in the 1973 *Frontini* case, and pointed out that the restriction of sovereignty declared under Article 11 of the Constitution in order to accede to the EEC did not empower the EEC institutions with such unacceptable (*inammissibile*) power that would allow the fundamental

47 According to a speech by Jean-Marc Sauvé, Vice-President of *Conseil d'État* on 26 October 2016, France was the last EU Member State to commit to the primacy of EU law. See: <https://tinyurl.com/hu/gTN3/> (2020. 01. 13.).

48 Cons. const. décision n° 75-54 DC du 15 janvier 1975, IVG.

49 C. Cass. Ch. mixte, 24 mai 1975, Direction générale des douanes et droits indirects/S.A.R.L. Weigel et Société des cafés Jacques Vabre, D. 1975.

50 C. E., Ass., 20 octobre 1989, Nicolo.

51 Cons. const. décision n° 2004-505 DC du 19 novembre 2004.

52 Verfassungsgesetz, BGBl Nr. 85/1953, <https://tinyurl.com/ybqfvgn6> (2020. 07. 10.).

53 Ulrich Jedliczka: The Austrian Constitutional Court and the European Court of Justice, <https://tinyurl.com/y8u3xu7z> (2020. 07. 10.), 301. o.

54 See: <https://tinyurl.com/t32e3z9> (2020. 02. 01.).

55 Cases: B 2251/97 and B 2594/97 (10.03.1999); KR 1-6/00 and KR 8/00 (12.12.2000); W I-14/99 (W I-14/99); G 47/12 (28.11.2012).

principles of Italian constitutional order and inalienable human rights to be violated. In its decisions following the *Frontini* judgement, in *Industrie Chimiche Italia Centrale*<sup>56</sup> in 1975, in *Granital* in 1984, and in *Fagd*<sup>57</sup> in 1989, the Constitutional Court gradually developed a system of counterweights (*controlimiti*) to maintain that Community norms shall not violate the foundations of Italian constitutional order and fundamental human rights. The latest decision in *Taricco*<sup>58</sup> (24/2017<sup>59</sup>, 269/2017<sup>60</sup>, 115/2018<sup>61</sup>, 117/2019<sup>62</sup>) has brought several improvements, and introduced – inter alia – viewpoints concerning

56 Sentenza 232/1975.

57 Sentenza 232/1989.

58 Judgment of the Court (Grand Chamber) of 8 September 2015. Criminal proceedings against Ivo Taricco and Others (Case C-105/14). The case was preceded by criminal proceedings before the Italian *Tribunale di Cuneo* against VAT fraud and related offenses committed by Ivo Taricco and others in a criminal organisation. The court brought a preliminary ruling procedure before the CJEU on whether the Italian limitation rules infringe, inter alia, EU rules on the protection of competition and whether EU law requires the courts of Member States to waive certain national laws laying down limitation periods for criminal offenses in order to ensure the effective sanctioning of tax offenses. In a judgment dated 8 September 2015, the CJEU ruled that because of the limitation periods laid down in the Italian Penal Code, proceedings against serious VAT frauds can end with impunity because of the complex criminal proceedings, as these offenses usually lapse before the criminal sanction provided for by law can be imposed by a final court decision. The CJEU considered that such a situation can infringe the obligations imposed on Member States by Article 325 (1) and (2) TFEU and ruled that Italian courts should refrain from applying provisions of national law, if such national law prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union (the so-called ‘Taricco’ rule). At the request of the Court of Cassation and the Milan Court of Appeal, the Italian Constitutional Court made a reference to the CJEU for a preliminary ruling. According to the interpretation of the Constitutional Court, the non-application of national provisions laying down limitation periods for the sake of the application of EU law, as stated by the CJEU in *Taricco I*, violates a fundamental principle of the Italian Constitution, namely the legality of criminal law and thus the constitutional identity of the Italian Republic. According to the Constitutional Court, EU law is applicable only if it is compatible with the constitutional identity of a Member State. The Constitutional Court explained that the EU is a legal system based on pluralism, the unity of which lies in the inclusion of diversity, but that Member States do not have to give up their core values. The constitutional traditions of Member States have been incorporated into EU law, and EU law and CJEU judgments cannot be interpreted to mean that Member States have renounced their constitutional traditions. The Constitutional Court has not clarified the concept of fundamental values in previous judgments, but since this judgment, it has interpreted constitutional identity as a reserved area, as a kind of restriction (*controlimiti*) against primary and secondary Community norms. Later, the CJEU declared in *Taricco II* (C-42/17) that the ‘Taricco’ rule shall not apply in cases when that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision in the applicable law or because of the retroactive application of law imposing conditions of criminal liability stricter than those in force at the time of infringement. The Italian Constitutional Court in its two judgments after *Taricco II* (269/2017, 115/2018) maintained its position that the ‘Taricco’ rule is not applicable because it violates the constitutional principle of legal certainty. See the latter: Judgment of the Court of 5 December 2017. Criminal proceedings against MAS and MB (Case C-42/17).

59 Ordinanza 24/2017.

60 Sentenza 269/2017.

61 Sentenza 115/2018.

62 Ordinanza 117/2019.

the examination of constitutional identity. Although the CJEU ruled in *Taricco I* that national legislation laying down limitation periods shall be ignored for in order to give effect to EU Law, the Italian Constitutional Court held that the application of that principle would violate the legality of criminal legislation, a principle of the Italian Constitution and thus the constitutional identity of the Italian Republic.<sup>63</sup> According to the Constitutional Court, EU Law can only be applied if it is compatible with the constitutional identity of a Member State, and the Law of the EU and the judgements of the CJEU cannot be interpreted to make Member States give up their constitutional traditions. However, the Constitutional Court has not clarified thus far what may be considered the basic values of a Member State. It has developed the doctrine of ‘*controllimiti*’ in its *Taricco* judgements: not only the fundamental order of the Constitution and protection of human rights, but also the constitutional identity that appears as such a consequence that may counterbalance the application of Community Law. Another innovation in *Taricco* was the introduction of the concept of the double preliminary ruling (*doppia pregiudizialità*). In this case, if an internal law violates both the Italian Constitution and EU standards, including the Charter of Fundamental Rights of the European Union, the constitutional review shall be carried out with the examination of directly applicable EU and national laws in parallel. This is necessary because of the interpretation of both national law and the rights enshrined in the Charter of Fundamental Rights in accordance with constitutional traditions. Thus, the Constitutional Court maintained the protection of fundamental rights even in the event of a violation of the rights guaranteed by the Charter of Fundamental Rights, without ruling out the possibility of initiating a preliminary ruling.

#### 4.1.2. Germany

The BVerfG’s initial approach, which harmonised with the case law of the CJEU, has been somewhat overshadowed by the question of the primacy of Community Law over the German Constitution: the BVerfG openly turned against the CJEU in 1974 with its famous *Solange I* judgement,<sup>64</sup> in which it ruled that Germany’s procedural Community regulations are considered statutes and can therefore lawfully be subject to direct constitutional review, and consequently, the BVerfG may examine the compatibility of Community regulations with German GG from the perspective of fundamental rights. The BVerfG also stated that the fundamental rights provisions of GG have a special, inalienable (*unaufgebbar*) constitutional status, and stated, as a consequence of the ‘*solange*’ formula, that in the event of a conflict between Community Law and a constitutional provision guaranteeing fundamental rights, the German constitutional

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63 The concept of constitutional identity first appeared in order no. 24/2017 of the Italian Constitutional Court, in which it projected its attitude towards Community law and the CJEU. The Constitutional Court stated that the principle of legality in criminal law is one of the fundamental principles of Italian constitutionality, which guarantees the inviolable rights of individuals by providing for the clear definition of criminal laws and the prohibition of retroactive effects. Horváth, Pék, Szegedi and Szóke, i.p.

64 BVerfGE 37, 271 2 BvL 52/71 (1971).

provision shall remain in force until (*solange*) the Community institutions have eliminated the conflict in due process. As long as this legal certainty<sup>65</sup> does not arise in the future integration of the Community, the reservation under Article 24 of the GG shall apply. However, the BVerfG stated that it did not have the power to declare a Community regulation contrary to German Law invalid. Therefore, German courts would first have to refer the question to the CJEU for a preliminary ruling and then to the BVerfG. The BVerfG maintained that position for over a decade, but neither in *Solange I* nor in any other subsequent case did it declare a provision of Community Law inapplicable on account of a breach of a fundamental right.<sup>66</sup> In 1986, the BVerfG fine-tuned its previous position and, by limiting its power to directly examine the applicability of EU Law, it took a more lenient position on the protection of fundamental rights. In *Solange II*,<sup>67</sup> the BVerfG acknowledged that the Communities had committed themselves to a stronger legal protection mechanism. In light of these developments, as long as (*Solange*) the European Communities, in particular the CJEU grants a generally efficient fundamental rights protection mechanism that is essentially equal to the protection granted by GG against the powers of Communities, the BVerfG may not exercise the power to decide on the applicability of secondary Community legislation, and may not review that legislation in accordance with the fundamental rights standard laid down in the GG. Although the BVerfG did not cease its constitutional reservation on the primacy of Community Law, it left the review of secondary Community Law to the CJEU for the protection of fundamental rights. In 1992, in *Maastricht*,<sup>68</sup> the BVerfG reaffirmed the reservation made in *Solange II* from the perspective of European judicial cooperation, and pointed out that all acts of the EU institutions could imply constitutional interference in German Law. In the judgement, the BVerfG reaffirmed its competence to guarantee fundamental rights, even in contrast to the relevant competences of the EU, within the framework of cooperation between courts in which this task of protecting fundamental rights is, in principle, performed by the CJEU. However, it stated that, insofar as the CJEU would not be able to ensure an adequate level of protection of fundamental rights, the BVerfG could have the final say on the applicability of Community Law, because EU Law shall not apply against the fundamental principles of unconditional effectiveness laid down by the GG. Two years later, in 1994, the BVerfG maintained its power to review Community Law in *Banana market*,<sup>69</sup> but, in accordance with *Solange II*, it can only be applied under strict conditions, when the level of protection of fundamental rights in the EU decreases generally. As it is almost impossible to prove a reduction in the level of protection, it can be concluded that the reservation of the Constitutional Court against the primacy of Community Law exists in theory, but has no practical significance.

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65 That is, fundamental rights protection of the Community level that is coherent with the fundamental rights guaranteed under GG.

66 Fazekas, 2009, p. 72.

67 BVerfGE 73, 339, 2 BvR 197/83 (1983).

68 BVerfGE 89, 155, 2 BvR 2134, 2159/92 (1992).

69 Judgment of the Court of 5 October 1994. – Federal Republic of Germany v Council of the European Union (Case C-280/93).

The BVerfG also paid particular attention to the inapplicability of *ultra vires* Community acts as a constitutional reservation. In *Maastricht*, the German Constitutional Court *expressis verbis* ruled that the EU does not have the right to ‘*Kompetenz-Kompetenz*’ (competence to define competence), so it is still up to the Member States to decide the extent to which competence is transferred to the EU. If the EU wants to acquire new powers or the integration process deviates from the one determined by the Maastricht Treaty, these cases will no longer be covered by the power to ratify that treaty. The BVerfG sees the EU as a confederation of states (*Staatenverbund*) but not as a federal state, in which the EU institutions should place more emphasis on avoiding an overly broad interpretation of shared competence. In 2000, in *Alcan*<sup>70</sup> the BVerfG rejected a constitutional complaint alleging that a judgement of the CJEU had created such a new Community procedural rule regarding which it had no power, and therefore it constituted an *ultra vires* act, so it should not apply in the court proceedings against the complainant. Reflecting the statement of facts,<sup>71</sup> the BVerfG took the view that the CJEU had only contributed to the exercise of the Commission’s powers and did not constitute a general rule of Community procedural law, it had only acted in a specific case. Owing to the European Commission’s decision ordering repayment (and the principle of the primacy of Community Law), the German procedural provision excluding repayment because of time limits was therefore set aside. In its judgement on the constitutional review of the Lisbon Treaty (2009),<sup>72</sup> the BVerfG had to examine whether that treaty required a transfer of powers from Germany, the implementation of which would *de facto* transfer all German legislative powers to the EU, thus eliminating German sovereignty. Although the BVerfG did not consider the Lisbon Treaty contrary to the GG, it declared, in line with its resolution on the Maastricht Treaty, the lack of competence of the EU to define competence (*Kompetenz-Kompetenz*) in relation to the Lisbon Treaty. Referring to the confederal nature of the EU, the BVerfG also stated that the German Constitution did not authorise Germany to join a European federal state, and that EU Law was applicable in the country insofar as the EU made those rules within the limits of the powers conferred to it by Germany. The BVerfG thus supplemented the constitutional review of *ultra vires* acts with a review aspect, which refers to the unchangeable essence of German state sovereignty.<sup>73</sup> Contrary to the *Maastricht* and *Lisbon* judgements, in its 2019 judgement on the banking union<sup>74</sup> the

70 BVerfGE 2 BvR 1210/98 (1998).

71 In the present case, the Commission classified the financial aid granted by *Bundesland* to Alcan as prohibited state aid and ordered its repayment. The *Bundesland* government’s decision ordering repayment was challenged by Alcan before court, because, under German procedural law, the time limit for ordering a possible repayment had expired, and thus, Alcan’s legitimate expectation of keeping the aid was violated. The Federal Administrative Court requested a preliminary ruling from the CJEU. Following the ruling on the repayment of aid, the Federal Administrative Court dismissed the action. The complainant then turned to the BVerfG. See: Fazekas, 2009, p. 87.

72 BVerfGE 2 BvE 2/08 (2009).

73 Fazekas, 2010, pp. 13–21.

74 2 BvR 1685/14, 2 BvR 2631/14 (2019).

BVerfG found that, following a kind of ‘*Europarechtsfreundlichkeit*’ (pro-European Law) approach, neither the limits on the delegation of powers, nor the constitutional identity had been violated. Although in its case law the BVerfG set limits on the transferability of powers, it did not take into account, as *László Szegedi* pointed out, that in many respects, the rules and practices have already transcended this or are likely to have to do so.<sup>75</sup> The test of misuse of powers is examined by the judgement of BVerfG in May 2020. According to the German Constitutional Court, the CJEU interpreted the principle of proportionality as meaning that the ECB can extend its powers beyond the areas necessary for the achievement of monetary objectives, in connection with which the BVerfG stated that the budgetary law governing substantial revenue and expenditure embodied a transfer limit.<sup>76</sup>

The role of the third *modus vivendi* of BVerfG in counterbalancing the primacy of EU Law is fulfilled by constitutional identity. Under the German Constitution, the inalienable elements of constitutional identity are democracy, rule of law, human dignity, and fundamental human rights, based on which the constitutional control of EU legislative instruments can be scrutinised. As *Endre Orbán* stated, the roots of constitutional identity had essentially begun to sprout in the jurisdiction of the German Constitutional Court in *Solange I*, when the BVerfG made a fundamental rights reservation in the case of the possible inadequacy of the EU fundamental rights system, emphasising the protection of GG’s identity.<sup>77</sup> Later, the issue of constitutional identity resurfaced in its judgement on the constitutional review of the Treaty of Lisbon and in the judgement on the European arrest warrant.<sup>78</sup> In the former, the BVerfG defined constitutional identity as a barrier to further integration and drew up a means of reviewing secondary EU Law, and categorically distinguished between GG’s and Germany’s constitutional identities. In the latter, the German Constitutional Court refused to apply the European arrest warrant because doing so would infringe the right of human dignity of the person concerned, and the constitutional identity embodied under Article 79 (3) of the GG.<sup>79</sup> Although the German Constitutional Court did not substantiate the basic powers with a constitutional provision, it defined them (criminal substantive and procedural law, use of state power, fiscal decisions on revenue and expenditure, elements of the welfare state, cultural issues such as family law, and religious minority rights), regarding which a delegation of powers to the supranational level is not excluded, but it is not fortunate.

#### 4.1.3. France

As neither the primacy of EU Law, nor the conditions and limits for its application are included in the French Constitution, the *Conseil Constitutionnel* has dealt with these

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75 Szegedi, 2020, pp. 96–100.

76 Horváth, Pék, Szegedi and Szóke, i.p.

77 Orbán, 2018, p. 1.

78 2 BvR 2735/14 (2015).

79 Drinóczi, 2020, p. 6.

issues in recent decades. The *Conseil Constitutionnel* first referred to the Constitution's directly contrary provision in 2004 in its judgement on the compatibility of the European Constitutional Treaty with the French Constitution. This general reference was clarified later in 2007 in connection with the constitutional review of the Lisbon Treaty and was determined as the rules or principles that organically linked to France's constitutional identity.<sup>80</sup> This approach is based on Article 4 (2) of the Treaty of the European Union (TEU), which declares that the EU shall respect the Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government; thus, this obligation may also be invoked by the French legislature against the EU.<sup>81</sup> The principles and rules of the constitutional core have been hardly elaborated upon by the *Conseil Constitutionnel* so far (in connection with the draft of the European Constitutional Treaty, where it referred to secularism),<sup>82</sup> but before ratifying international treaties, the *Conseil Constitutionnel* examines whether the international obligation would violate the basic conditions required for exercising national sovereignty, or would question the rights and obligations guaranteed by the Constitution. If this is so, ratification can only take place after the Constitution has been amended.<sup>83</sup> The practical application of this constitutional test in relation to primary sources of law has recently taken place in the context of the EU fiscal compact,<sup>84</sup> when the *Conseil Constitutionnel* had to decide whether the compact entailed a further delegation of powers in favour of the EU over economic and budgetary policy. Finally, it noted that as this new treaty did not violate the basic conditions required for exercising national sovereignty, compliance could be ensured by organic statutes without a constitutional amendment.

Compared to the examination of the constitutionality of international agreements, the constitutional examination carried out following the statutes implementing EU directives into French law may be considered more interesting from the perspective of the primacy of EU Law. Within the framework of ex-ante reviews, the *Conseil Constitutionnel* has, in several cases, taken over the reference to rules or principles inherent in constitutional identity used in connection with the examination of international treaties, and has stated that the implementation of directives cannot infringe these principles unless it has been accepted.<sup>85</sup> The constitutional hardcore can therefore also be invoked as a barrier while implementing a directive.

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80 Cons. const. décision n° 2007-560 DC.

81 However, we can see that, in practice, the French Constitution has so far complied with the EU treaties.

82 Cons. const. décision n° 2004-505 DC, cons. 18. Lásd: Anne Levađe: Le Conseil constitutionnel et l'Union européenne. Cahiers du Conseil Constitutionnel, Hors série – Colloque du Cinquantenaire, 3 novembre 2009, <https://tinyurl.hu/6BVT/> (2020. 03. 01.).

83 Cons. const. décision n° 2004-505 DC, décision n° 2007-560 DC, see: <https://tinyurl.com/y8k2bvpv> (2020. 03. 13.).

84 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

85 Cons. const. décision n° 2006-540 DC.



#### 4.1.4. Austria

The Austrian Constitutional Court recognised the primacy of EU Law immediately after Austria's accession: the national constitutional protection mechanism already paved the way for its case law in 1995,<sup>86</sup> based on the recognition of the primacy of EU Law and, where appropriate, of its direct applicability. The Austrian Constitutional Court has consistently persisted with its direction, has not deviated from it, and has not changed its aspects in the decisions in the following years.<sup>87</sup>

The Austrian Constitutional Court has not invoked national identity<sup>88</sup> under Article 4 (2) TEU thus far, unlike the Italian, German, and French constitutional protection mechanisms. Nevertheless, in matters relating to the European Stability Mechanism (ESM) and fiscal sovereignty, where the ESM itself and the decision-making rules of ESM<sup>89</sup> have been incorporated into the Austrian Constitution, the federal system and the powers of *Bundesländer* have been defined as a value to be protected.

In its examination of the constitutional situation of the ESM Treaty and fiscal compact, the Austrian Constitutional Court had to find an answer to whether these two treaties are international or those amending EU founding treaties. This distinction was significant for the Constitutional Court because if it considers them domestic law as part of EU Law, it can examine their constitutionality together with domestic law. If they are classified as international treaties, it may even find them inapplicable under Article 140 of B-VG in case of unconstitutionality within the procedure of ex-post review. The Constitutional Court eventually classified both the ESM Treaty and its Interpretative Declaration,<sup>90</sup> and the fiscal compact as international treaties,<sup>91</sup> but did not require a constitutional amendment, as it also found that the delegation of powers required by the treaties did not undermine the state's fiscal sovereignty and is not contrary to the provisions of the B-VG.

#### ■ 4.2. The laws that can be subject to constitutional review and the question of misuse of power

The Italian Constitutional Court may review the constitutionality of national legislation transposing EU Law in the context of an ex-post review. In connection with the interpretation of the scope of the restriction of sovereignty contained in Article 11 of the Constitution, the Constitutional Court developed the abovementioned principle of '*controlimiti*', but in its practice so far (besides maintaining the areas of constitutional

86 The judgment of Austrian Constitutional Court: VfSlg.14.391 sz. (12 December 1995).

87 See the judgments of the Austrian Constitutional Court: VfSlg. 15.427 (24 February 1999), VfSlg. 15.450 (13 December 2001), VfSlg. 17.075 (3 December 2003) and VfSlg. 17.065 (28 November 2003).

88 Although constitutional and national identity are often used as synonyms, reality is very different: neither the grammatical interpretation of the wording of Article 4 (2) TEU, nor the case law of the CJEU supports such an interpretation. See Konstadinides, 2015, pp. 127–169.

89 Article 50/A of the Austrian Constitution.

90 Az ESM Szerződéshez fűzött nyilatkozat (Brüsszel, 2012. szeptember 27.).

91 See judgments of 3 October 2013 of SV2/2012-18 and SV1/2013-15.

identity, substantial core of the Italian Constitution, and basic principles of the constitutional order, etc.) it has not concluded the misuse of power by the EU, but by Italy. In *Granital* in 1984, the constitutional protection mechanism held that it was also entitled to review provisions of Italian law on whether they infringed compliance with the EEC Treaty, either with respect to the scheme of that treaty or its principles (*legge di rottura*), and if the legislature unduly exceeded state sovereignty in the legislation ensuring the enforcement of the EEC Treaty. The Italian Constitutional Court ruled that it can declare the unconstitutionality of unlawful statutes in such cases.<sup>92</sup>

Before the ratification of the fiscal compact in June 2012, by amending Article 81 of the Italian Constitution,<sup>93</sup> the Constitution – in line with the fiscal compact – enshrined the balance of budgetary revenue and expenditure (*pareggio di bilancio*), which linked the sustainability of general government deficits to compliance with the economic and financial rules of the EU. Thus, the budgetary balance required by an external (EU) obligation has been given a constitutional rank. However, the amendment raised significant constitutional issues as the ‘constitutionalisation’ of budgetary balance has become an element of the balance among constitutional rights. The amendment thus affected the principles of the constitutional order as well as Chapter I of the Constitution, which contains civil rights, and also raised the issue of the violation of the principle of social and democratic rule of law. Thus, ensuring the obligation of a budgetary balance may even change the basic principles of the Constitution, such as the right to social benefits or work.

In connection with the EU fiscal compact, the Italian Constitutional Court has dealt with Article 81 of the Constitution in several judgements.<sup>94</sup> Although the Constitutional Court did not provide clear guidelines on the concentration between social rights and economic and financial requirements, it developed the concept of constitutionally-oriented budgetary planning, according to which unavoidable constitutional rights shall also be guaranteed while establishing a budgetary balance. It also established the principle of a minimum level of social rights and the graduation of financial resources, which can guarantee fundamental rights even in the event of a lack of resources. In its subsequent judgements, the Constitutional Court, apart from the budgetary balance requirement under Article 81, first ruled that it may examine the legislature’s discretionary right between the exercise of social rights and their financing, and second, declared the priority of social services regardless of their budgetary implications. The Constitutional Court maintained that the Constitution is a set of intertwined principles that prioritise the right of persons to work, health, and education while allocating budgetary resources. The Italian Constitutional Court ruled that constitutional rights take precedence over the budgetary balance required by an

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92 Following the 2001 constitutional amendment, the adoption of such violating laws could, in theory, be ruled out under Article 117 [within the limits set by the European Union].

93 Legge Costituzionale 20 aprile 2012, n. 1.

94 Sentenza 88/2014, Sentenza 70/2015, Sentenza 275/2016.

external obligation, and further (other) budgetary expenditure can only be considered once the needs related to fundamental rights have been met.

Theoretically, the only situation in which the German Constitutional Court does not examine the constitutionality of an implementing internal act is if the Community Act (directive) in question leaves no room for manoeuvre by the legislature. In parallel, a constitutional review is allowed if the Member States have discretion in connection with the implementation. In practice, on the other hand, the BVerfG has examined, for example, the German legislation implementing the Tobacco Labelling Directive in light of the GG. It annulled the German statute implementing the Framework Decision on the European arrest warrant, as it found that the statute violated the GG's provision prohibiting the extradition of its own national. There is no such trust in the BVerfG in connection with Community Law vis-à-vis the former Pillar III.<sup>95</sup>

In France, as the *Conseil Constitutionnel* can only carry out a constitutional review, and cannot examine the compatibility of French laws with international treaties, the ordinary and administrative courts are entitled to handle the latter, and may refer a question concerning the interpretation and validity of EU Law in a specific dispute to the CJEU. The *Conseil Constitutionnel* ruled out the possibility of indirect control of primary EU legal sources in relation to French legislation adopted in order to comply with EU regulations, but also embarked on a dual examination of the implementation of directives. The *Conseil Constitutionnel* considers the implementation of EU directives a constitutional requirement under Article 88-1 of the French Constitution, so that if a directive is not implemented within the time limit or the implementing provisions ignore the aim of the directive, the reason for lawlessness can be declared vis-à-vis the French law in question. In a dispute, the unsuccessful implementation period may be referred to as a subsequent change in circumstances, based on which the annulment of the unlawful French law may be sought.<sup>96</sup> The *Conseil Constitutionnel* shall therefore examine, by teleological interpretation, whether the implementing legislation is manifestly contrary to the provisions or general objectives of the directive.<sup>97</sup> In the absence of such an obvious contradiction, the constitutionality of the implementing legislation shall not be examined.<sup>98</sup> However, if a contradiction is found, the *Conseil Constitutionnel* may not, even in this case, extend its examination of the compatibility of the Directive with the division of competences or the protection of fundamental rights, as this is the task of the CJEU. It shall not examine those articles of the implementing legislation that enable direct compatibility with the directive, either. However, in one example, the *Conseil Constitutionnel* found an implementing legislation contrary to an express provision of the French Constitution, although the

95 Fazekas, 2009, pp. 80–81.

96 Rideau: i.m.

97 Cons. Const. décision n° 2006-543 du 30 novembre 2006, lásd: Allocution de Hubert Haenel lors d'une Journée de travail à la Cour de justice de l'Union européenne, 7 février 2011, <https://tinyurl.hu/DaSp/> (2020. 01. 13.).

98 See: <https://tinyurl.com/y8k2bvpv> (2020. 03. 13.).

measure contained therein was a necessary consequence of an unconditional and precise provision of a directive.<sup>99</sup>

Owing to the time limit under Article 66-1 of the Constitution, the *Conseil Constitutionnel* is practically unable to refer a question to the CJEU for a preliminary ruling in the contexts of an ex-ante review of a draft of an implementing law and the ex-post constitutional review introduced in 2008;<sup>100</sup> however, this was exemplified for the first time in 2013 under the urgency procedure.<sup>101</sup> Initiating a preliminary ruling procedure on the interpretation or validity of EU Law (thus, on the misuse of power) is, in practice, open to ordinary and administrative courts.

The Austrian Constitutional Court has the power to carry out an ex-post normative review procedure in the case of both international treaties and treaties amending the EU founding treaties, as a result of which it can declare these treaties unconstitutional and inapplicable.<sup>102</sup> However, in its practice so far, the Constitutional Court has interpreted the B-VG as creatively as possible to establish the constitutional conformity of both international treaties and treaties amending the EU founding treaties, which has led to criticism. The Austrian Constitutional Court also follows a permissible practice while examining the constitutionality of secondary sources of EU Law.

## 5. Summary

Our research shows that the Italian, German, and French legislatures transform international treaties into domestic law through separate legal acts. For the latter – as *Gábor Sulyok* pointed out – there is a practical argument: domestic law would not normally be able to handle the contractual norms with many peculiarities that are addressed to the states, whose source is international law, and whose regulatory style is coordinative. In contrast, the addressees of transformed norms are subjects of domestic law, whose source is domestic law, and whose regulatory style is subordinate in nature.<sup>103</sup> With the exception of France, the states in question only offer the possibility of a constitutional review in the framework of ex-post norm control following the ratification of international treaties and founding or amending treaties of the EU. Whereas the BVerfG can only examine procedural aspects in such cases, the Austrian Constitutional Court may, in principle, even declare international treaties inapplicable (although it has never done so in its previous case laws, as either a constitutional amendment or permissive interpretation has taken place). In contrast to Italian, German, and Austrian laws,

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99 This case law has been developed further by the *Conseil Constitutionnel* in the direction of referring to rules or principles inherent in constitutional identity.

100 ‘Question prioritaire de constitutionnalité’, that is, preliminary question of constitutionality.

101 In connection with the European arrest warrant see: Cons. Const. décision n° 2013-314 QPC du 4 avril 2013, as well as Judgment of the Court (Second Chamber), 30 May 2013, *Jeremy F. v Premier ministre* (Case C-168/13 PPU).

102 B-VG, Chapter VII, Articles 137–148.

103 Sulyok, 2012, p. 26.

French law only allows a constitutional review before ratification, which has resulted in four constitutional amendments so far, from the Maastricht Treaty to the Lisbon Treaty, because of the partial incompatibility of EU Treaties with the Constitution.

The next question we examined was whether the Italian, German, French, and Austrian constitutions include provisions in connection with the EU, and if they do so, whether the primacy of EU Law is declared. Our research showed that the first question can be answered with a definite ‘yes’, whereas the transposition of EU-related provisions in the case of the three old Member States took place only in the context of the ratification of the Maastricht Treaty (in France in 1992, in Germany in 1993) and thereafter (in Italy in 2001), whereas Austria regulated its relations with the EU at the constitutional level before its accession in 1994. As mentioned in the introduction to Chapter 3, the structure and level of detail in the integration clauses are very different: in the case of Italy, for example, there is a precise list of exclusive and shared competences, the Austrian and French constitutions emphasise the involvement of national parliaments in EU decision-making, whereas GG lists the basic values that are to be protected item by item.

We also found that the Italian, German, French, and Austrian constitutions create the possibility of restricting national competence or sovereignty in order to participate in EU integration. Although the French Constitution uses the wording ‘the joint exercise of powers with other Member States’, on the lines of the wording in Article E (2)<sup>104</sup> of the Hungarian Fundamental Law,<sup>105</sup> the *Conseil Constitutionnel* interpreted the relevant provision of the Constitution as a delegation of powers. Restrictions on sovereignty are also permitted by the Italian Constitution; this has been interpreted by the Constitutional Court as a delegation of powers, and the GG and B-VG also enshrine the principle and possibility of delegation. Although each of the constitutions examined, like Article Q (3) of the Hungarian Fundamental Law,<sup>106</sup> provides for the recognition of the primacy of general principles and recognised rules of international law (although

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104 Article E (2) of the Fundamental Law of Hungary states that: ‘With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure’.

105 State power cannot renounce the constitutional identity that is only confirmed by the Basic Law but has not been established by it. In the case of Hungary, the basis of constitutional identity representing the fundamental value is the historical constitution, and among its elements, we can find fundamental human rights and the inalienable rights of the territorial unity, population, and state form and system of Hungary. The Hungarian Constitutional Court may, based on this, examine the misuse of power by the EU legislature or a possible violation of Hungary’s sovereignty or statehood, as a result of which the EU legislative act would become inapplicable to Hungary.

106 Article Q (3) of the Fundamental Law of Hungary: ‘Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in laws’.

France only recognises the primacy of appropriately ratified international treaties over the statutes, only in the case of application by the other party as well), the principle of the primacy of EU Law has not been declared by any of the constitutions we analysed. The primacy of EU Law is enshrined only in Austria in the Act of Accession to the EU. Thus, in the absence of a constitutional guarantee of the primacy of EU Law, the principle elaborated in 1964 in *Costa v ENEL* was adapted through the case law of constitutional courts of the Member States concerned and of the *Conseil Constitutionnel*, *Conseil d'État*, and *Cour de Cassation* in France.

In the absence of constitutional provisions on the supremacy of EU Law, it was up to the constitutional protection fora in the Member States to recognise the principle of primacy or to define the relationship with it. With the exception of Austria, which immediately incorporated the legal principle into its laws at the time of its accession in 1995, the other three states walked the long road towards recognising the primacy and specific nature of Community Law as distinct from international law. First, in 1971, the BVerfG, then in 1973 the Italian Constitutional Court, in 1975 the French *Conseil Constitutionnel*, and in 1989 the *Conseil d'État* recognised the primacy of earlier international treaties over later national legislation. In the case of Italy, the principle of disregarding national legislation contrary to EU Law was adopted by the legislature only in 1984.

However, in parallel with the acceptance of the primacy of EU Law, on the lines of the practice of the Hungarian Constitutional Court,<sup>107</sup> in all four countries, we found constraints and counterbalances that, in some cases, appear unequivocally in the constitutions, or, in other cases, can be deduced indirectly from the case law of constitutional courts, and to which the states can refer against the unconditional effectiveness of EU Law. According to our study, these restrictions appear either as a principle, a value to be protected, or in the context of the interpretation of constitutional identity. In the case of Germany, the GG lays down the core values (principles that require unconditional effectiveness by the Constitution), whose enforcement the BVerfG expressly observes, such as democracy, rule of law, social and federal principles, the principle of subsidiarity, and a high level of legal protection. Basic values have also been referred to in the judgements of the Italian Constitutional Court, but these have not been explained in detail thus far. In Austria, the protection of the constitutionally enshrined federal system and powers of *Bundesländer* are linked to constitutional identity. The French *Conseil d'État* specifically mentioned secularism and the mandate to exercise the basic requirements of national sovereignty among the rules inherent in constitutional identity. The practice of the Italian Constitutional

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107 The primacy of Community law is not *expressis verbis* contained in the Hungarian Fundamental Law. The Hungarian Constitutional Court did not question the principle of the primacy of Community Law, but similar to the states examined, it formulated requirements that can also be interpreted as constitutional constraints, referring to the protection of fundamental rights, the possibility of the control of *ultra vires* acts, and constitutional identity (see footnote 101), and it stated that the joint exercise of competences by the Member States shall not violate Hungary's constitutional identity. The Constitutional Court may also examine the constitutionality of national legislation transposing an EU legislative act.

Court refers to the foundations of the Italian constitutional order and fundamental human rights. Since 2017, new concepts have been introduced in the interpretation of constitutional identity, such as the legality of criminal legislation, constitutionally-oriented budget planning, and the basic minimum of social rights.

In the context of the examination of legislation transposing secondary EU acts by the constitutional courts of the Member States, we find a dual approach based on whether the given source of law may be subject to a jurisdictional or constitutional review. Perhaps because the constitutions examined provide for the delegation of competences in favour of the EU, thus giving national sovereignty an interpretation that is partly subordinate to EU integration, the French, Italian, and Austrian constitutional courts cannot, in principle, examine the possible conflict of competence between national laws transposing secondary EU Law and national constitutions. Initiating a preliminary ruling procedure, which is an appropriate means of clarifying this, is either practically ruled out or rarely used by the constitutional courts. Only the BVerfG took a firm position in this regard, when it declared the lack of competence on part of the EU to determine competence (*Kompetenz-Kompetenz*). The German Constitutional Court maintains the possibility of a conditional examination of *ultra vires* Community acts, albeit only in the context of ensuring a high level of protection of fundamental rights enshrined in the GG. Thus, the BVerfG did not reserve the right to declare the EU regulations affected by the misuse of powers invalid, but in theory, reserved the right to declare them inapplicable in the event of an infringement of fundamental rights.

The fundamental question with regard to the constitutional examination of national legislation transposing secondary EU legal sources is whether the constitutional courts may indirectly extend the examination to the constitutionality of the secondary EU legal sources to be transposed. In the case law of the German Constitutional Court, it has already carried out a constitutional review disregarding the Community nature of a particular law, and has annulled the German statute implementing the Framework Decision on the European arrest warrant. In the case of Italy and France, in contrast, the case law of constitutional courts is less ambitious, as they shall not examine the ‘full-compliance’ provisions of national legislation implementing directives, but may examine the provisions that give legislators room for manoeuvre.

Despite the CJEU’s strong and homogeneous approach to the primacy of EU Law, this is a highly divisive issue among Member States. It can be assumed that the German Constitutional Court’s decision in May 2020 was not the last time that a Member State’s constitutional protection mechanism will openly (or less openly) oppose the half-century old unbroken position of the CJEU.

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