The disapplication of primacy within the CJEU jurisprudence

A desaplicação do primado na jurisprudência do TJUE

Dimitris Liakopoulos

Abstract

The present work is concentrated on the analysis of jurisprudence of the CJEU in the sector of principle of primacy of EU and especially in the case of disapplications. Non-application is configured as the necessary consequence of the implementation of the principles of direct efficacy and direct applicability, two essential pillars in the construction of the control system on respect for the primacy. But are national courts always required to disapply national rules which conflict with directly effective Union rules? A constant and prolonged refusal by the supreme or constitutional jurisdictions of the Member States to apply EU law if it conflicts with the cardinal principles of the respective legal systems could determine an "external" temperament of the scope of the principle of primacy also from the point of view of the EU legal system? These are some of the issues that we seek to investigate through the latest jurisprudence in the case of the primacy of EU law.

Keywords: principle of primacy, CJEU, disapplication of norms, internal limits, legal certainty, principle of legality.

Resumo

O presente trabalho concentra-se na análise da jurisprudência do TJUE no âmbito do princípio do primado da UE e especialmente no caso de desaplicações. A não aplicação configura-se como consequência necessária da implementação dos princípios da eficácia direta e da aplicabilidade direta, dois pilares essenciais na construção do sistema de controle sobre o respeito ao primado. Mas os tribunais nacionais são sempre obrigados a não aplicar as regras nacionais que entram em conflito com as regras da União diretamente efetivas? Uma recusa constante e prolongada por parte das jurisdições supremas ou constitucionais dos Estados-Membros de aplicar o direito da UE se contrariar os princípios cardeais dos respectivos ordenamentos jurídicos poderia determinar um temperamento "externo" do alcance do princípio do primado também do ponto de vista de vista do sistema jurídico da UE? Estas são algumas das questões que procuramos investigar através da mais recente jurisprudência no caso do primado do direito comunitário.

Palavras-chave: *princípio do primado, TJUE, desaplicação de normas, limites internos, segurança jurídica, princípio da legalidade.*

INTRODUCTION

The Luxemburg judges had taken care to highlight the existence of "internal" limits to the primacy principle (i.e. the "protection of fundamental rights" informed to the "common constitutional traditions of the Member States"), in the continuous jurisprudential debate. The opinion that the Court of Justice of the European Union (CJEU) proclaimed an "absolute supremacy rule"[1] of Community law on national constitutions prevailed in time.

In particular, with Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil des ministres[2] the CJEU has returned to the delicate issue of the temporary suspension of

[1] D. Liakopoulos, European integration through member states' constitutional identity in EU law, ed. Maklu, Antwerp, Portland, 2019.

[2] CJEU, C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil des ministres of 29 July 2019, ECLI:EU:C.2019:622, published in the electronic reports of the cases. See also in argument: C. Eckes, European Union powers under external

the primacy of Union law.

It is known that the famous Simmenthal judgment marked a decisive turning point in the affirmation of the system of adaptation of domestic law to EU law: "(...) The national judge, charged with applying the provisions of Community law, has the obligation to ensure the full effectiveness of these rules, disapplying if necessary, on its own initiative, any conflicting provision of national legislation, even later, without having to request or wait for its prior removal by legislation or by any other constitutional procedure (...)"[3].

The CJEU stated that the effects of Community law in the individual Member States constituted a matter relevant to the interpretation of the founding treaties[4]. On closer inspection, however, this ruling does not represent a break with international law, but its "creative development"[5] in the context of a "new kind of legal order in the field of international law" which binds both Member States and their citizens. In fact, the negotiating autonomy that international law recognizes to the parties to a treaty certainly allows them to agree also on the effects that the rules of that treaty will produce in the respective legal systems[6], providing, for example, the direct effect covenant rules in judgments before national courts[7] or their prevalence over internal rules in case of conflict[8].

The role of the CJEU...

The EU law itself places limits on the obligation of secondary non-application, allowing state bodies to continue to apply, for example, the internal rules relating to the principle of res judicata, even when they preclude the correction of a jurisprudential orientation[9] or an administrative practice[10] contrary to EU law. European judges have observed that, taking into account the importance that the principle of the intangibility of the res judicata assumes to guarantee the stability of legal relations and the

---

pressure: How the EU's external actions alter its internal structures, Oxford University Press, Oxford, 2019, pp. 143ss.

[3]CJEU, C-106/77, Simmenthal of 9 March 1978, ECLI:EU:C:1978:49, I-00629, par. 24. M. Claes, The primacy of EU Law in European and National Law, in D. Chalmers, A. Arnull (eds.), The oxford handbook of European Union law, Oxford University Press, Oxford, 2015, pp. 185ss.

[4]CJEU, 26/62, Van Gend & Loos of 5 February 1963, ECLI:EU:C:1963:1, I-00003. 6/64, Costa v. ENEL of 15 July 1964, ECLI:EU:C:1964:66. I-01195. A. Hartkamp, C. Siburgh, W. Devroe, Cases, materials and text on European Union law and private law, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss. L. Woods, P. Watson, Steiner & Woods European Union law, Oxford University Press, Oxford, 2017, pp. 37ss. J.L. Da Cruz Vilaça, European Union law and integration. Twenty years of judicial application of European Union law, Hart Publishing, Oxford & Oregon, Portland, 2014. R. Schütze,, T. Tridimas, Oxford principles of European Union Law, Oxford University Press, Oxford, 2018. C. Barnard, S. Peers, European Union law, Oxford University Press, Oxford, 2017, pp. 788ss. M.Derlèn, J. Lindholm, The Court of Justice of the European Union. Multidisciplinary perspectives, Hart Publishing, Oxford & Oregon, Portland, 2018.

[5]B. De Witte, EU Law: Is it international law?, in C. Barnard, S. Peers (eds.), European Union law, Oxford University Press, Oxford, 2014, pp. 187ss.

[6]B. De Witte, The European Union as an international legal experiment, in G. De Búrca, J. Weiler (eds.), The worlds of European constitutionalism, Cambridge University Press, Cambridge, 2011, pp. 48-49.

[7]Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration), Advisory Opinion, (1928) PCIJ Series B no 15, ICGJ 282 (PCIJ 1928), 3rd March 1928, pp. 17-18: "the very object of an international agreement, according to the intention of the contracting parties, may be the adoption of some definite rules creating individual rights and obligations and enforceable by the national courts". E. Bjorge, The evolutionary interpretation of treaties, Oxford University Press, Oxford, 2014.

[8]See art. 3, par. 2, of the Treaty on Stability, Coordination, and Governance in Economic and Monetary Union, of 2 March 2012: "The rules set out in paragraph 1 produce effects in the national law of the contracting parties (...) through binding and permanent provisions-preferably constitutional-or whose faithful respect is otherwise strictly guaranteed throughout the national budget process". For further analysis: R. Portmann, Legal personality in international law, Cambridge University Press, Cambridge, 2010, pp. 68ss. E. Bjorge, The evolutionary interpretation of treaties, op. cit.,

[9]CJEU, C-234/04, Kapferer v. Schlank & Schick GmbH. of 16 March 2006, ECLI:EU:C:2006:174, I-02585, par. 21. C-126/97, Eco Swiss of 1st June 1999, ECLI:EU:C:1999:269, I-03055, par. 48. For further details see: S. Andersen, The enforcement of EU law: The role of the European Commission, Oxford University Press, Oxford, 2012, pp. 61ss. T. Corthaut, EU ordre public, Kluwer Law International, New York, 2012. N. Basener, Investment protection in the EU: Considering EU law in investment arbitrations arising from intra-EU and extra-EU bilateral investment agreements, Nomos Verlag, Baden-Baden, 2017. M. Danov, E.Becker, P. Beaumont, Cross-order EU competition law actions, Bloomsbury Publishing, New York, 2013. J. Malenovský, L'agonie sans fin du principe de non-invocabilitè du droit interne, in Revue Gènèrale de Droit International Public, 121, 2017, pp. 27ss.

[10]CJEU, C-453/00, Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren of 13 January 2004, ECLI:EU:C:2004:17, I-00837, par. 24, in which it is stated that "Community law does not require that an administrative body is, in principle, obliged to review an administrative decision that has acquired (...) definitive character" following the "expiry of reasonable terms of appeal" or of the "'Exhaustion of the means of judicial protection". M. Klamert, The principle of loyalty in EU law, Oxford University Press, Oxford, 2014.

good administration of justice in the EU and in the national legal systems[11], the Member States must consider themselves, free to define the methods for implementing the principle of res judicata, in compliance with the principles of effectiveness and equivalence[12].
In the Olimpiclub judgment[13], for example, the EU judge stated that the res judicata authority of a ruling issued against a given taxpayer and relating to a certain year did not extend to decisions addressed to the same taxpayer, but relating to other tax periods. in the Banco Primus judgment, likewise, the same CJEU stated that a definitive sentence relating to the abusive nature of certain clauses of a contract did not preclude the possibility of reviewing, in a subsequent judgment, the possible abusiveness of other clauses of the same contract[14].
It is equally known that the so-called "disapplication" (or "non-application") is configured as the necessary consequence of the implementation of the principles of direct efficacy and applicability[15], two essential pillars in the construction of the control system on respect for primacy. On the other hand, the absence of a mechanism that would entail the automatic ineffectiveness of the internal regulation that is in conflict with Union law would deprive the Community system of any usefulness, denying the same reason for existing[16].
Indeed, except for the shrimp passage of the Melki and Abdeli[17], rulings, the application of the primacy principle has been strenuously guaranteed and consolidated over the years by the CJEU[18]. The CJEU stated that the priority nature of an incidental constitutional legitimacy procedure allows the national judge not to immediately disapply a national rule that it considers contrary to EU law pending this constitutional scrutiny, provided that the judge can "take any measure necessary to ensure the provisional judicial protection of the rights conferred by the Union legal order "and may" disapply, at the end of such an incidental proceeding, the national legislative provision in question if he deems it

---

[11]CJEU, C-224/01, Köbler v. Republic of Austria of 30 September 2003, ECLI:EU:C.2003:513, I-10239, par. 38. For further details see: K. Lenaerts, I. Maselis, K. Gutman, EU procedural law, Oxford University Press, Oxford, 2014, pp. 143ss. C. Van Dam, European tort law, Oxford University Press, Oxford, 2013, pp. 45ss. R. Schütze, European constitutional law, Cambridge University Press, Cambridge, 2012, pp. 404ss.

[12]C-234/04, Kapferer v. Schlank & Schick GmbH. of 16 March 2006, op. cit., par. 22. CJEU, C-2/08, Olimpiclub Srl. of 3 September 2009, ECLI:EU:C:2009:506, I-07501, par. 24. With regard to the application of the principle of equivalence to national rules on res judicata, see, in particular, the judgments of the CJEU: C-40/08, Asturcom Telecomunicaciones SL contro Cristina Rodríguez Nogueira of 6 October 2009, ECLI:EU:C:2009:615, I-09579, parr. 49-59. C-69/14, Târșia v Statul român and Serviciul Public Comunitar of 6 October 2015, ECLI:EU:C.2015:662, published in the electronic reports of the cases, parr. 32-35. For further details see also: T. Lock, The European Court of Justice and international courts, Oxford University Press, Oxford, 2015, pp. 86ss. M. Kellerbauer, M. Klamert, J. Tomkin, The European Union treaties and the charter of fundamental rights. A commentary, Oxford University Press, Oxford, 2019. E. Berry, M.J. Homewood, B. Bogusz, Complete EU law: Text, cases and materials, Oxford University Press, Oxford, 2019. F.S. Benyon, Services and the EU citizen, Bloomsbury publishing, New York, 2013. I. Benöhr, EU consumer law and human rights, Oxford University Press, Oxford, 2013.

[13]CJEU, C-2/08, Olimpiclub Srl. of 3 September 2009, op. cit.,

[14]CJEU, C-421/14, Banco Primus SA contro Jesús Gutiérrez García of 26 January 2017, ECLI:EU:C:2017:60, published in the electronic reports of the cases, par. 54. For further analysis see also: Y.M. Atamer, P. Pichonnaz, Control of price related terms in standard from contracts, ed. Springer, Berlin, 2019, pp. 108ss. N. Jansen, R. Zimmermann, Commentaries on European contract laws, Oxford University Press, Oxford, 2018.

[15]CJEU, C-31/18, „Elektrorazpredelenie Yug“ EAD v. Komisia za energiyno i vodno regulirane (KEVR) of 17 October 2019, ECLI:EU:C:2019:868, not yet published.

[16]It's referred as a primauté existentiel: P. PESCATORE, Le droit de l’intégration, Leiden, 1972, pag. 85.

[17]CJEU, joined cases C-188/10 and C189/10, A. Melki and S. Abdeli of 22 June 2010, ECLI:EU:C.2010:363, I-05667 and C-112/13, A v.B and others of 11 September 2014, ECLI:EU:C:2014:2195, published in the electronic reports of the cases; it seems possible to deduce that, in the absence of the conditions for the adoption of the precautionary measures, the obligation of non-application imposed on the national courts remains temporarily suspended until the conclusion of the incidental constitutional legitimacy procedure. This reading, as underlined in the doctrine, not only appears to be dystonic with respect to the obligation of secondary non-application set out in the Simmenthal judgment, but seems to leave the needs of individual protection in the background compared to those of dialogue between the Courts. For further details see also: D. Paris, Constitutional courts as guardians of EU fundamental rights? Centralised judicial review of legislation and the Charter of Fundamental Rights of the EU: European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, A v B and others, in European Constitutional Law Review, 11 (2), 2015, pp. 392ss. F. Cafaggi, S. Law, Judicial cooperation in European private law, Edward Elgar Publishers, 2017, pp. 230ss. E. Guinchard, M.P. Granger, The new EU judiciary: An analysis of current judicial reforms, Kluwer Law International, New York, 2016. E. Cloots, National identity in EU law, Oxford University Press, Oxford, 2015. K. Bradley, N. Travers, A. Whelan, Of courts and constitutions. Liber amicorum in honour of Niel Fennelly, Bloomsbury Publishing, New York, 2014.

[18]CJEU, C-213/89, Factortame of 19 June 1990, ECLI:EU:C:1990:2433, I-02433. C-312/93, Peterbroeck Van Campenhout & Cie SCS v. Belgian State of 14 December 1995, ECLI:EU:C:1995:437, I-04599. C-5/14, Kernkraftwerke Lippe-Ems GmbH contro Hauptzollamt Osnabrück of 4 June 2015, ECLI:EU:C.2015:354, published in the electronic reports of the cases. D. Patterson, A. Södersten, A companion to EU law and international law, Wiley & Sons, New York, 2016, pp. 159ss. P. Giliker, The Europeanisation of english tort law, Bloomsbury Publishing, New York, 2014, pp. 90ss. L. Clèment-Wilz, Le rôle politique de la Cour de justice de l'Union europèenne, ed. Larcier, Bruxelles, 2019.

contrary to Union law[19].
It was precisely the CJEU that provided for the possibility of temporarily suspending the non-application of the internal rule in contrast with the rule of Union law, upon the occurrence of different conditions which are well-circumscribed by the same. Evidently, this is a very different matter from the activation of counter-limits "threatened" by national laws to protect fundamental principles.
The exception to this principle can be found in some decisions of the CJEU which for the moment are far from numerous. Nonetheless, the character of the absoluteness of the primacy, which for many decades has accompanied its uncontested claim, is at least mitigated.
For the first time, the possibility of "a temporary suspension of the effect of non-application exerted by a rule of Union law directly applicable with respect to national law contrary to that rule"[20], in the presence of imperative requirements of legal certainty, was recognized by the CJEU in Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim[21]. In the present case, it states that "as a result of the primacy of directly applicable Union law, national legislation concerning a public monopoly on betting on sports competitions which, according to what was ascertained by a national court, entails restrictions incompatible with the freedom to establishment and the freedom to provide services, since these restrictions do not contribute to limiting the betting activity in a coherent and systematic way, it cannot continue to apply for a transitional period"[22]. But are national courts always required to disapply national rules which conflict with directly effective Union rules? Once again, the CJEU itself has provided a negative answer, which, starting from the Winner Wetten judgment, contemplated the possibility of a "temporary suspension of the effect of non-application exercised by a provision of EU law directly applicable with respect to national contrary to this rule"[23]. On that occasion, however, the European judges considered that there were no imperative requirements of legal certainty such as to justify the maintenance of a national discipline on sports betting incompatible with the rules on the internal market[24]. Nonetheless, it does not seem possible to exclude that, in different factual circumstances, the Union judges may consent to the temporary suspension of the obligation of non-application on the basis of needs related to the protection of legal certainty.
If in the Winner Wetten ruling the CJEU recognizes the legitimacy of this operation, justified by the need to protect the certainty of legal trafficking, it is only in the subsequent decision Inter Environnement Wallonie ASBL and Terre Wallonne ASBL v. Région Wallonne[25] that it formulates the guiding criteria that must guide the CEO and the temporary suspension of disapplication, this time regarding environmental protection[26].
On this occasion, the CJEU states that the referring court may exceptionally be authorized to apply the national provision that allows it to maintain certain effects of an annulled national act, taking into account the specific circumstances of the main proceedings, provided that four conditions are met[27].

---

[19]CJEU, joined cases C-188/10 and C189/10, A. Melki and S. Abdeli of 22 June 2010, op. cit.

[20]CJEU, C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres of 29 July 2019, op. cit., par. 66.

[21]CJEU, C-409/06, Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim of 8 September 2010, ECLI:EU:C:2010:503, I-08015. R. Schütze, T. Tridimas, Oxford principles of European Union Law, Oxford University Press, Oxford, 2018. S. Planzer, Empirical views on European gambling law and addiction, Springer, Berlin, 2014. P. Koutrakos, N.N. Shuibhne, P. Syrpis, Exceptions from derogation giustification and proportionality, Bloomsbury Publishing, New York, 2016, pp. 315ss. K. Lenaerts, New horizons for the rule of law within the EU, in German Law Journal, 21 (1), 2010, pp. 32ss.

[22]T. Beukers, Case C-409/06, Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim, Judgment of the Court (Grand Chamber) of 8 September 2010, in Common Market Law Review, 48 (6), 2011, pp. 1985ss.

[23]CJEU, joined cases C-188/10 and C189/10, A. Melki and S. Abdeli of 22 June 2010, op. cit.

[24]CJEU, C-409/06, Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim of 8 September 2010, op. cit., par. 67.

[25]CJEU, C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres of 29 July 2019, op. cit.,

[26]T. Lock, Are there exceptions to a Member State's duty to comply with the requirements of a Directive?: Inter-environnement Wallonie, in Common Market Law Review, 50 (1), 2013, pp. 217ss.

[27]See the Opinion of the Advocate General Kokott, presented in case: C-348/15, Stadt Wiener Neustadt v Niederösterreichische Landesregierung of 8 September 2016, ECLI:EU:C:2016:662, published in the electronic reports of the cases, par. 38. R. Van Gestel, J. De Poorter, In the court we trust: Cooperation, coordination and collaboration between the ECJ and supreme administrative courts, Cambridge University Press, Cambridge, 2019, pp. 74ss.

With reference to the first condition, the CJEU reserves the possibility of suspending the non-application of the internal regulation in contrast to only the hypotheses in which the reference directive was in any case, in essence, correctly transposed. That is to say that in accordance with the law it will be able to maintain its effects as long as the conflict with the Union law represents the result of the non-fulfillment, for example, of a formal and/or procedural obligation (in this case, the omission of the assessment of environmental impact).

On the other hand, the same will not happen if the rule in question is the result and/or the consequence of a failure to transpose the directive or its incorrect transposition such as to conflict with the essential objectives of the directive itself. If so, in fact, the Member States would have an incentive to follow this second line of behavior, being able, on occasion, to equally apply the internal rule indifferent to the provisions of the European directive issued "(...) such a possibility of regularization must be subordinated on the condition of not offering interested parties the opportunity to circumvent the rules of Union law or to disapply them and to remain exceptional"[28].

In relation to the second condition, the CJEU specifies that the "in-offender" act can only maintain its effectiveness in the event that a new act cannot promptly remedy the prejudices that would result from the non-application of the conflicting internal rule. That is, the suspension of disapplication must necessarily take the form of an extreme ratio.

The third requirement prefigured by the Union judge is closely connected to the second: Verified that the act of domestic law in contrast with the directive cannot be replaced in the short term, the vacatio legis that would follow its annulment would create a lower standard of protection of the environment than that ensured by the act to be disapplied, which would paradoxically run counter to what was prefigured by the directive itself, the active parameter of the antinomy ("a legal vacuum that would be even more harmful"). Hence the pragmatic need to maintain its effects despite the established illegitimacy "(...) national legal protection in the face of an insufficient transposition of EU law should not further prejudice the transposition. It is therefore conceivable that the repeal of legislation that implements a directive only in part, and therefore insufficiently, would worsen the situation with reference to the objectives of the directive. An insufficient implementation, in fact, allows a greater approach to these objectives than the absence of any implementation")[29].

It should be clarified that no problem arises if the directive is self-executing, that is when the rules within it impose negative obligations on the Member States or when they become clear, precise and unconditional. In this case, the legislative gap created by the non-application of the conflicting rule may be filled by the direct effectiveness of the directive itself, without prejudice to the initiation of a possible infringement procedure by the Commission against the defaulting State. And again, even if the directive is not such as to be directly applicable by the common judge, the latter's action, as is known, is subject to the obligation of conforming interpretation of the internal rules of the directive "regardless of the whether it is a matter of previous or subsequent [internal] rules"[30]. Reason why internal law can be interpreted by the internal judge in line with the principles and objectives underlying the implemented directive[31].

---

[28]CJEU, C-196/16 and C-197/16, Comune di Corridonia and others v. Provincia di Macerata and Provincia di Macerata Settore 10-Ambiente of 26 July 2017, ECLI:EU:C:2017:589, published in the electronic reports of the cases, par. 38.

[29]See the conclusions of the Advocate General Kokott in case: C-561/16, Saras Energía SA and others v. Administración del Estado of 12 April 2018, ECLI:EU:C.2018:236, published in the electronic reports of the cases, par. 21.

[30]CJEU 106/89, Marleasing v. La Comercial Internacional de Alimentación SA of 13 November 1990, ECLI:EU:C.1990:395, I-04135, par. 8. B. Thomson, M. Gordon, Cases and materials on constitutional and administrative law, Oxford University Press, Oxford, 2014, pp. 451ss. T.C. Hartley, The foundations of EU: An introduction to the constitutional and administrative law of the European Union, Oxford University Press, Oxford, 2014, pp. 237ss. P. Giliker, The Europeanization of english tort law, Bloomsbury Publishing, New York, 2014.

[31]CJEU, C-240/98 to C-244/98, Oceano Grupo Editorial SA v. Roció Murciano Quintero (C-240/98) and Salvat Editores SA v. José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98). of 27 June 2000, ECLI:EU:C:2000:346 I-04941. K.Gutman, The constitutional foundations of European contract law: A comparative analysis, Oxford University Press, Oxford, 2014. L. Azoulai, The question of competence in the European Union, Oxford University Press, Oxford, 2014, pp. 140ss. G. Dannemann, S. Vogenauer, The common European sales law in context: Interactions with english and german law, Oxford University Press Oxford, 2013, pp. 690ss. C-129/00, Commission of the European Communities v Italian Republic of 9 December 2003, ECLI:EU:C:2003:656, I-14637. M. Prete, Infringement proceedings in EU law, Kluwer Law International, New York, 2016. A. KACZOROWSKA-IRELAND, European Union Law, ed. Routledge, London & New York, 2016. C-397/01 to C-403/01, Pfeiffer Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v. Deutsches Rotes Kreuz,

Conversely, a different problem arises-and is noted in the present case - when this principle is forced to stop before an interpretation of the national law entirely contra legem[32]. In fact, even if the directive does not have direct effect, upon expiry of the transposition deadline in the laws of the Member States, it has "the effect of bringing the national legislation at issue into the scope of Union law a matter governed by the same directive"[33]. In this case, the suspension of the primacy prevents the national judge, who must in any case contribute to ensuring the realization of the useful effect of EU law, is forced to raise a question of constitutional legitimacy before the Constitutional Court to assert the illegitimacy of the internal regulations due to the contrast, irremediable in interpretation, with the Union law without direct effect[34]. From Frontini[35] to M.A.S. in Italy, from Solange to Gauweiler[36] in

Kreisverband Waldshut and V. of 5 October 2004, ECLI:EU:C.2004:584, I-08835. C-212/04, K. Adeneler and others v. Ellinikos Organismos Galaktos (ELOG). of 4 July 2006, ECLI:EU:C:2004:443, I-06057. D. Chalmers, G. Davies, G. Monti, European Union law, Cambridge University Press, Cambridge, 2019. M. Kellerbauer, M. Klamert, J. Tomkin, Commentary on the European Union treaties and the Charter of fundamental rights, Oxford University Press, Oxford, 2019. A. Rosas, L.Armati, EU constitutional law. An introduction, Bloomsbury Publishing, New York, 2018. C-122/17, Smith v. Patrick Meade and others of 7 August 2018, ECLI:EU:C:2018:631, published in the electronic reports of the cases.

[32]CJEU, C-384/17, Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya of 4 October 2018, ECLI:EU:C:2018:810, par. 59. C-486/18, RE v. Praxair MRC of 8 May 2019, ECLI:EU:C:2019:379, above the cases published in the electronic Reports of the cases, par. 38.

[33]CJEU, C-555/07, Kücükdeveci v. Swedex of 19 January 2010, par. 25.

[34]With the sentence n. 269 of 2017, even the Italian Constitutional Court seems to have adapted to this "temperate" version of the obligation of secondary non-application with reference to the national rules which may, at the same time, conflict with "the guarantees safeguarded by the Italian Constitution" and with the guarantees "codified by the Charter of the Fundamental Rights of the EU "(7 November 2017, n. 269, Ceramica Sant'Agostino). Given that, the Charter of the Fundamental Rights of the European Union (CFREU) would have a "typically constitutional content", it is necessary to subject any violations to a common union of constitutionality entrusted to the Judge of the laws and this "also in order to ensure that the rights guaranteed by the CFREU are interpreted in harmony with the constitutional traditions" and "maximum protection (...) at a systemic level is guaranteed". Where a law or an act endowed with similar force is the subject of doubts of illegality both in reference to the rights protected by the Italian Constitution, and in relation to those guaranteed by the CFREU, the national judge is required, without prejudice to the appeal, even subsequent, to the postponement preliminary ruling to the CJEU, to raise a question of constitutional legitimacy, and this would seem - even when the provisions of the Charter allegedly violated have direct effect. This ruling opens up quite a few questions, as it is based on an "axiological-substantial" criterion that is anything but univocal, that is to say the "constitutional" value of the Charter. How will the common judge have to settle if the doubt of compatibility concerns not directly the CFREU rules, but the general principles underlying them, or fundamental rights not contemplated by it? Quid iuris if the violation of the Charter is inferred together with the conflict with the rules of the TFEU on the internal market or with rules of secondary law, as required by art. 51 Charter for the purpose of the latter's applicability to the conduct of the Member States? Furthermore, how can the expansion of the prerogatives of the Italian Constitutional Court be reconciled with the continuing right of the judge in question to disapply, if necessary with the comfort of the CJEU, (C-322/16, Global Starnet Ltd of 20 December 2017, ECLI:EU:C:2017:985, published in the electronic reports of the cases, par.26) which states that the national court of last instance is required to make a preliminary reference also in the event that, in the context of the same national procedure, the Constitutional Court of the State in question has already assessed the constitutionality of the national rules in the light of constitutional rules having a content similar to that of the rules of EU law which may be relevant in the preliminary ruling. See also ordinance n. 3821/18, with which the Italian Court of Cassation asked the Constitutional Court to provide clarifications about the continuing ability of the common judge to disapply the internal rules that have passed the preventive union of constitutional legitimacy also in terms of compliance with the CFREU), the rulings issued at the outcome of the constitutionality judgment? Whatever the answer to these questions, it seems undeniable that sentence n. 269 of 2017 places itself, albeit not in a completely convincing way, in the furrow traced by the rulings Melki and A v. B, thus reiterating the "non-absolute" nature of the obligation of secondary disapplication.

[35]Italian Constitutional Court, sentence n. 183 of 27 December 1973. For further analysis see also: H.J. Blanke, S. Mangiameli, The EU after Lisbon. Constitutional basis, economic order and external action, ed. Springer, Berlin, 2011, pp. 257ss. G. Martinico, O. Pollicino, The interaction between Europe's legal systems. Judicial dialogue and the creation of supranational laws, Edward Elgar Publishers, Cheltenham, 2012, pp. 88ss. L.I. Gordillo, Intelorcking constitutions. Towards an interordinal theory of national European and UN law, Bloomsbury Publishing, New York, 2012. S. Mangiameli, The European Union and the identity of member states, in L'Europe en Formation, n. 269 (3), 2013, pp. 154ss.

[36]2 BvR 2728/13 of 14 January 2014; 2 BvR 2728/13 of 21 June 2016. For further details see: M. Payandeh, The OMT judgment of the German Federal Constitutional Court. Repositioning the court within the European constitutional architecture, in European Constitutional Law Review, 13 (2), 2017, pp. 402ss. T. Konstadinides, The rule of law in the EU. The internal dimension, Bloomsbury Publishing, New York, 2017. F. Amtenbrink, G. Davies, D. Kochenov, The internal market and the future of European integration,. Essays in honour of Laurence W. Gomley, Cambridge University Press, Cambridge, 2019. S. Grundmann, H.W. Miclitz, The European banking union and constitution. Beacon for advanced integreation or death-knell for democracy?, Bloomsbury Publishing, New York, 2019. F. Wollenschläger, Fundamental rights regimes in the EU: Contouring their spheres, in Y. Nakanishi, Contemporary issues in human rights law, ed. Springer, Berlin, 2017, pp. 26ss. A.S. Barros, Governance as responsibility, Cambridge University Press, Cambridge, 2019, pp. 25ss. M. Poiares Maduro, M. Wind, The transformation in Europe. Twenty five years on, Cambridge University Press, Cambridge, 2017, pp. 285ss. S. Garben, I. Govaere, P. Nemitz, Critical reflections on constitutional democracy in the European Union, Bloomsbury Publishing, New York, 2019, pp. 170ss.

Germany, passing through Holubec[37] in the Czech Republic and Ajos[38] in Denmark, the theoretical basis of these external limits is substantially the same: If the primacy of EU law in national law derives from a transfer of sovereignty implemented by virtue of (constitutional) rules of the Member States, the founding principles of the same system constitute a limit to this transfer of sovereignty and therefore to the application of the primacy internally. Given that these rulings are undoubtedly likely to define the rank of EU rules from the point of view of national laws, it is instead necessary to ask whether they are suitable for tempering the principle of primacy also from the point of view of EU law, thus to exclude the prevalence of the latter in case of conflict with certain key principles of the laws of the Member States.

According to the CJEU, the primacy of EU law is based not only on the transfer of sovereign powers implemented by the Member States, but also on the will of the latter as contracting parties to the founding Treaties[39]. However, the subsequent practice of the parties in the application of a treaty can give rise to an agreement between the parties regarding the interpretation of the pact obligations[40] and, in this way, broaden or reduce its scope[41]. It can therefore be hypothesized that a constant and prolonged refusal, by the supreme or constitutional jurisdictions of the Member States, to apply EU law when the latter conflicts with the cardinal principles of the respective legal systems could determine an "external" temperament of the scope of the primacy principle also from the point of view of the EU legal system?[42] The answer to this question seems negative, given that, as opportunely noted in the doctrine, it is the EU right to regulate the practice of the Member States and not vice

---

[37]Pl.Ús 5/12, Slovak Pensions of 31 January 2012. For further analysis see also: M. Bobek, Central European judges under the European influence. The transformative power of the EU revisited, Bloomsbury Publishing, New York, 2015. S. Douglas-Scott, N. Hatzis, Research handbook on EU law and human rights, Edward Elgar Publishers, Cheltenham, 2017. A. Lazowski, S. Blockmans, Research handbook on EU institutional law, Edward Elgar Publishers, 2016, pp. 359ss. N. Foster, Foster on EU law, Oxford University Press, Oxford, 2019, pp. 161ss. M. Adams, H. De Waele, J. Meeusen, Judging Europe's judges. The legitimacy on the case law of the European Court of Justice, Bloomsbury Publishing, New York, 2013, pp. 225ss. M. Bobek, Selecting Europe's judges: A critical review of the appointment procedures to the European courts, Oxford University Press, Oxford, 2015, pp. 51ss.

[38]CJEU, C-441/14, Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen of 19 April 2016, ECLI:EU:C:2016:278, published in the electronic reports of the cases. U. Šadl, S. Mair, Mutual Disempowerment: Case C-441/14 Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v The estate left by A, in European Constitutional Law Review, 13 (2), 2017, pp. 349ss. M. Strand, V. Bastidas, M.C. Ioacovides, EU competition litigation transportation and first experiences of the new regime, Bloomsbury Publishing, New York, 2019. U. Belanusau, K. Henrard, EU anti-discrimination law beyond gender, Bloomsbury Publishing, New York, 2018. M. Scheinin, H. Krunke, M. Aksenova, Judges as guardians of constitutionalism and human rights, Edward Elgar Publishers, Cheltenham, 2016, pp. 83ss. P.J. Kuijper, F. Amtenbrinnk, D. Curtin, The law of the EU and the European communities, Kluwer Law International, New York, 2018. J. Van Zeben, A. Bobić, Polycentricity in the EU, Cambridge University Press, Cambridge, 2019. J. Baquero Cruz, What's left of the law of integration? Decray and resistance European Union law, Oxford University Press, Oxford, 2018. U. Neergaard, K.E. Sørensen, Activist infighting among courts and breakdown of mutual trust? The Danish Supreme Court, the CJEU and the Ajos case, in Yearbook of European Law, 36, 2017, pp. 45ss. A. Bakardjieva Engelbrekt, X. Groussot, The future of Europe: Political and legal integration beyond Brexit, Bloomsbury Publishing, New York, 2019, pp. 202ss. H. Krunke, B. Thorarensen, The nordic constitutions: A comparative an contextual study, Bloomsbury Publishing, New York, 2018, pp. 199ss. P. Zumbanen, The many lives of transnational law. Critical engagements with Jessup's bold proposal, Cambridge University Press, Cambridge, 2020, pp. 151ss.

[39]CJEU, 6/64, Costa v. ENEL of 15 July 1964

[40]Art. 31, par. 3, lett. b) of the Vienna Convention on the Law of Treaties. The relevance of the judicial practices of the parties for the purpose of forming an agreement between the parties regarding the interpretation of a treaty. M. Fitzmaurice, O. Elias, P. Merkouris, (eds), Treaty interpretation and the Vienna Convention on the Law of Treaties, 30 years on, Martinus Nijhoff, The Hague, 2010, pp. 9ss. O. Dörr, Article 31. General rule of interpretation, in O. Dörr, K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A commentary, Springer, Heidelberg-New York 2012, pp. 536ss. M. Samso, High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties, in Leiden Journal of International Law, 24, 2011, pp. 5ss. J.M. Sorel, V. Borè Eveno, Article 31. General rule of interpretation, in O. Corten, P. Klein, The Vienna Convention on the law of treaties. A commentary, Oxford University Press, Oxford, 2011, pp. 806ss.

[41]The International Court of Justice has taken into account the subsequent practice of WHO States to exclude that the use of nuclear weapons in the context of an armed conflict fell within the competence of this organization. Legality of the threat or use of nuclear weapons, advisory opinion of 8 July 1996, ICJ Reports 1996, p. 239, par. 23. A. Zimmermann, C.J. Tams, K.J. Oellers-Frahm, K., The statute of the International Court of Justice. A commentary, Oxford University Press, Oxford, 2019.

[42]For an example of this "decentralized" modification of international rules other than those falling under EU law, see the Italian Constitutional Court ruling of 22 October 2014, n. 238, S.F., point 3.3 of the part in law, in which it is hoped that this ruling will promote an evolution of the customary principle of immunity from jurisdiction, leading to the exclusion from this benefit of war crimes and against humanity. The ruling of the Constitutional Court of Justice could configure "a possible exception to the irrelevance of domestic law as a cause for excluding the illegality of the violation of an international obligation". See also in argument: M. Breuer, Principled resistance to ECtHR judgments. A new paradigm?, ed. Springer, Berlin, 2019. J. Wouters, C. Ryngaert, T. Ruys, International law: A European perspective, Bloomsbury Publishing, New York, 2018. C. Brölmann, Y. Radi, Research handbook on the theory and practice of international lawmaking, Edward Elgar Publishers, Cheltenham, 2016.

versa[43]. The CJEU has in fact clarified that the content of the founding Treaties cannot be changed "except through a revision to be carried out pursuant to art. (48 TEU)"[44], which" a simple practice cannot prevail over the rules of the Treaty"[45], nor" derogate from (such) rules "or create a" precedent that binds the institutions (of the Union)"[46]. In fact, the Court itself does not use the canon of subsequent practice except for the interpretation of international agreements concluded by the EU with third parties[47].
The fourth and final prerequisite represents the closing clause of the criteria so far provided: An exception to the principle of primacy inherent in the suspension of the non-application of a national rule in contrast with Community law, otherwise capable of jeopardizing the entire system of "communicating vessels" formed by the Union and the Member States, can only be temporary. And it is evident that the possible laziness of the legislator regarding the amnesty of the irregularities found may be the subject of an appeal for non-fulfillment, for violation, first of all, of the principle of loyal cooperation referred to in art. 4, par. 3 TEU[48].

(Follows) The importance of the Winner Wetten and Inter Environnement Wallonie I rulings
In particular, it appears from the words of the CJEU that only the national judge making a referral to the CJEU of justice can be legitimized to apply the national provision which allows him to maintain certain effects of a annulled national act. This means that the judge would be obliged in any case to request the interpretative intervention of the Luxembourg court in advance, whenever he intended to continue to apply the illegitimate national legislation, albeit under the strict conditions indicated above "(...) le juge national, lorsqu'il veut moduler les effets d'une annulation d'un acte contraire au droit de l'Union, doit-il préalablement saisir la Cour de justice afin de recueillir son autorisation préalable? Le pouvoir de modulation des juges nationaux dépend-il d'une obligation de renvoi préjudiciel?"[49].
In addition, in the jurisprudence on this point, the CJEU has always made use of the terms "authorize" and/or "grant"[50]. The terminology used suggests that to obtain the desired result, an action is required following a request that occurred in advance. In other words, that the internal judge must obtain from time to time, upon request, the consent of the Union judge in order to exceptionally be able to derogate from the primacy "(...) Il est vrai que l'arrêt InterEnvironnement Wallonie pouvait se prêter à plusieurs interprétations en ce qu'il disait que la juridiction nationale "pourra exceptionnellement être autorisée à" faire usage de cette faculté: cette autorisation doit-elle être conférée par la Cour au cas par cas? (...)"[51].
In this sense, in fact, the provision of the Inter-Environnement Wallonie I judgment is explicit: "(...) Taking into account the specific circumstances of the main proceedings, the referring court may exceptionally be authorized to apply the national provision that allows it to maintain certain effects of a annulled national act (...)"[52].
Admitting the configurability of a sort of prior authorization by the CJEU would entail the creation and

[43]G. Nolte, Jurisprudence under special regimes relating to subsequent agreements and subsequent practice: Second report for the ILC study group on treaties over time, in G. Nolte (ed.), Treaties and subsequent practice, Oxford University, Oxford, 2013, pp. 302ss.
[44]CJEU, 43/75, Defrenne v. Sabena of 8 April 1976, ECLI:EU:C:1976:56, I-00455, par. 58.
[45]CJEU, C-327/91, France v. Commission of 9 August 1994, ECLI:EU:C:1994:305, I-03641, par. 36. L.I. Gordillo, interlocking constitutions. Towards an interordinal theory of national, Bloomsbury Publishing, New York, 2012. N. Zipperle, EU international agreements. An analysis of direct effect and judicial review pre and post-Lisbon, ed. Springer, Berlin, 2017, pp. 103ss.
[46]CJEU, 68/86, United Kingdom of Great Britain and Northern Ireland v Council of the European Communities of 23 February 1988, ECLI:EU:C:1988:85, I-00855, par. 24.
[47]G. Nolte (ed.), Treaties and subsequent practice, op. cit.
[48]D. Liakopoulos, European integration through member states' constitutional identity in EU law, op. cit.
[49]L. Clèment-Wilz, L'office du juge interne pour moduler les effets de l'annulation d'un acte contraire au droit de l'Union. Reflexions sur l'arret Association France Nature Environnement du Conseil d'Etat français, in European Papers, 2 (1), 2017, pp. 265 and 266.
[50]CJEU, C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres of 29 July 2019, op. cit., par. 58. C-409/06, Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim of 8 September 2010, op. cit.,
[51]H. Cassagnabère, Le juge du droit de l'Union et la modulation dans le temps, in Les Nouveaux Cahiers du Conseil constitutionnel, 54 (1), 2017, pp. 62ss.
[52]CJEU, C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres of 29 July 2019, op. cit., par. 59.

recognition of a new action/power scheme for the judges of the Curia that the Treaties do not attribute to it. In essence, a hybrid species of the preliminary reference for interpretation; a sort of archetype of "constitutive interpretative sentence", in total disharmony with the TFEU rules, which attribute to the preliminary rulings of interpretation merely declarative nature[53].

With the pronunciation Association France Nature Environnement v. Premier Ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie also in terms of environmental protection, the Union judge takes the opportunity to clarify this aspect and to resize the "authorization system"[54], in line with primary legislation and with its own jurisprudence on the faculty and obligation to refer[55]. The CJEU reiterates the four criteria of the InterEnvironnement Wallonie I judgment and confirms the exceptional nature of the suspension: "If the national courts had (always) the power to give primacy, even only provisionally, to national rules, in case of conflict with the Union law would be undermined by the uniform application of the latter"[56].

Following the previous judgments, he further observes that with a view to balancing the principles of legality and primacy, on the one hand, and the imperative of environmental protection deriving from the same EU law, on the other, the internal judge has the power "to exceptionally maintain certain effects of a national act incompatible with Union law"[57].

Subsequently, it further highlights that the exceptional faculty granted to the national judge can be exercised only "on a case-by-case basis and not abstractly or globally"[58]. Indeed, as has already been said, this power must be exercised taking into account the specific circumstances of the dispute on which it is called to rule.

However, these caveats seem absent in Taricco II[59], in which the CJEU, (re) interpreting the previous Taricco I judgment[60], stated that the national courts are exempted from the obligation to disapply the internal provisions on the statute of limitations-which they hold, in violation of art. 325, par. 1 TFEU, to the imposition of effective and dissuasive penal sanctions in a considerable number of cases of serious fraud to the detriment of the financial interests of the Union or which provide, in contrast to art. 325, par. 2, TFEU[61], limitation periods shorter than those foreseen for crimes affecting national financial interests-when this obligation is incompatible with the principles of determinateness and non-retroactivity, corollary of the principle of legality in criminal matters[62]. In particular, according to the CJEU, the obligation of non-application by the national court is lost if it leads to "a situation of uncertainty in the system (...) as regards the determination of the applicable limitation regime", incompatible with the principle of determinacy[63], or if it involves the retroactive application to certain

---

[53]CJEU: joined cases 66, 127 and 128/79, Amministrazione delle Finanze v Srl Meridionale Industria Salumi, Fratelli Vasanelli and Fratelli Ultrocchi of 27 March 1980, ECLI:EU:C:1980:101, I-01237, par. 9. C-61/79, Amministrazione delle finanze dello Stato v. Denkavit italiana Srl of 27 march 1980, ECLI:EU:C:1980:100, I-01205, parr. 15 and 16. C-309/85, Barra v. Belgian State of 2 February 1988, ECLI:EU:C:1988:42, I-00355, par. 11.

[54]CJEU, C-379/15, Association France Nature Environnement v. Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie of 28 July 2016, ECLI:EU:C.2016:603, not yet published.

[55]CJEU, C-283/81, CILFIT of 6 October 1982, ECLI:EU:C:1982:335, I-03415. See: O. Mamoudy, Encadrement de la possibilité pour le juge national de maintenir en vigueur un acte contraire au droit de l'Union, in Actualité Juridique Droit Administratif, 2016, pp. 2226ss. K. Sowery, Reconciling primacy and environmental protection: Association France Nature Environnement, in Common Market Law Review, 54 (1), 2017, pp. 8ss. R. Schütze, T. Tridimas, Oxford principles of European Union Law, op. cit.,

[56]Par. 33, which is referred also to par. 58 of the CJEU, C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres of 29 July 2019, op. cit.,

[57]See the conclusions of the Advocate General Bobek presented in case: C-574/15, Scialdone of 2 May 2018, ECLI:EU:C.2018:295, published in the electronic Reports of the cases, parr. 37 and 180.

[58]CJEU, C-574/15, Scialdone of 2 May 2018, op. cit., par. 40.

[59]CJEU, C-42/17, M.A.S. and M.B. of 5 December 2017, ECLI:EU:C:2017:936, published in the electronic reports of the cases.

[60]CJEU, C-105/14, Taricco and others of 8 September 2015, ECLI:EU:C:2015:555, published in the electronic reports of the cases. M. Bonelli, The Taricco saga and the consolidation of judicial dialogue in the European Union: CJEU, C-105/14 Ivo Taricco and others, ECLI:EU:C:2015:555; and C-42/17 M.A.S., M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017, in Maastricht Journal of European and Comparative Law, 25 (2), 2018, pp. 362ss. M. Timmerman, Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: Taricco, in Common Market Law Review, 53, 2016, pp. 780ss. D. Liakopoulos, European integration through member states' constitutional identity in EU law, op. cit.,

[61]J. Schwarze, V. Becker, A. Hatje, J. Schoo, EU-Kommentar, ed. Nomos, Baden-Baden, 2019.

[62]CJEU, C-42/17, M.A.S. and M.B. of 5 December 2017, op. cit., par. 62

[63]CJEU, C-42/17, M.A.S. and M.B. of 5 December 2017, op. cit., par. 59

defendants of a statute of limitations "more severe than the one in force at the time of the commission of the crime", in defiance of the principle of non-retroactivity[64].
In essence, in Taricco II the CJEU seems to have entrusted the national judge with the balance between the primacy of EU law and the principle of legality in criminal matters, leaving that judge not only the power to define the scope of the latter on the basis of its own law[65] (also more broadly than the declination of this principle accepted, for example, in the context of the ECHR[66]), but also the power to ascertain in full autonomy the recurrence of the conditions of suspension of the obligation of primary disapplication. In other words, it would seem that, albeit limited to a sensitive and not yet fully harmonized sector such as that of the regulation of the prescription of VAT offenses, the CJEU has conferred on the national judge precisely that "power to attribute primacy to national rules "which, just over a year earlier, had considered irreconcilable with the requirements of uniform application of EU law[67]. Ultimately, it seems to be possible to conclude that legal certainty, environmental protection and the principle of legality in criminal matters may constitute, in the circumstances specified by the CJEU, values that can be balanced with the principle of primacy of EU law and, therefore, of the "internal" limits to the obligation of non-application of national rules in contrast to EU rules with direct effect. These exceptions, without a doubt, confirm the rule of primacy: But a rule that admits exceptions cannot, by definition, be considered "absolute".
The CJEU states that the common judge has no obligation to refer to it in a preliminary ruling, but can precede the suspension whenever "it is persuaded that the exercise of this exceptional power does not raise any reasonable doubt"[68]. Absence of doubt that "requires (in any case) detailed proof". With this "corrective" the CJEU re-affirms the validity of the union model spread in relations with the internal judge. On the other hand, it is known to all that the preliminary ruling mechanism provides that the Luxembourg courts are called only to interpret Union law in the context of the cooperation procedure between the national courts and the CJEU established by art. 267 TFEU[69]; and for the sole purpose of providing the referring court with a useful answer that allows him to settle the dispute with which he is invested. The application of the right to the concrete case remains the work of the national judge, albeit within the limits of what is clarified and detailed in the interpretative judgment[70]. It is still up to the latter to make the final decision on the suspension and the modalities of the same. And by "authorization" it must therefore be understood that the CJEU is the only one entitled to establish the criteria upon which the internal judge can maintain the effects of an illegitimate internal act by contrast with Union law. And this by virtue of art. 19 TEU which gives the CJEU the role of sole guarantor of the nomophilactic function[71].
Moreover, even in the France Association[72] ruling and subsequent jurisprudence, the CJEU

[64]CJEU, C-42/17, M.A.S. and M.B. of 5 December 2017, op. cit., par. 60

[65]CJEU, C-42/17, M.A.S. and M.B. of 5 December 2017, op. cit., parr. 45 and 58

[66]CJEU, C-42/17, M.A.S. and M.B. of 5 December 2017, op. cit., par. 57.

[67]CJEU, C-379/15, Association France Nature Environnement v. Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie of 28 July 2016, op. cit., par. 33.

[68]CJEU, C-379/15, Association France Nature Environnement v. Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie of 28 July 2016, op. cit., par. 52.

[69]D. Liakopoulos, European integration through member states' constitutional identity in EU law, op. cit.,

[70]CJEU, C-73/08, Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française of 13 April 2010, ECLI:EU:C:2010:181, I-02735, par. 64. E. Guild, S. Peers, J. Tomkin, The EU citizenship directive: A commentary, Oxford University Press, Oxford, 2019. M. Jacob, Precedents and case-based reasoning in the European Court of Justice: Unfinished business, Cambridge University Press, Cambridge, 2014. A.F. Tatham, Central European constitutional courts in the face of EU membership. The influence of the german model in Hungary and Poland, Martinus Nijhoff Publishers, The Hague, 2013, pp. 311ss. A. Vrdoljak, The cultural dimension of human rights, Oxford University Press, Oxford, 2013, pp. 163ss. C-621/15, N. W and Others v Sanofi Pasteur MSD SNC and Others of 21 June 2017, ECLI:EU:C:2017:484, published in the electronic reports of the cases, par. 49. C. Warin, Individual rights under EU: A study on the relation between rights, obligations and interests in the case law of the Court of Justice, Nomos Verlag, Baden-Baden, 2019, pp. 522ss. C-632/18, Fonds du Logement de la Région de Bruxelles-Capitale SCRL v Institut des Comptes nationaux (ICN) of 3 October 2019, ECLI:EU:C:2019:833, published in the electronic reports of the cases, par. 48.

[71]J. Schwarze, V. Becker, A. Hatje, J. Schoo, EU-Kommentar, op. cit.

[72]CJEU, C-379/15, Association France Nature Environnement v. Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie of 28 July 2016, op. cit., par. 34.

maintained this unhappy lexical choice[73]. It would perhaps have been more appropriate that the CJEU had not made use of these expressions since the beginning in order not to generate any kind of confusion. It could have confined himself to establishing that the national court may maintain-temporarily and exceptionally - the effects of an illegitimate national act in conflict with Union law whenever the conditions laid down in the inter-environnement Wallonie I case law are met.
Incidentally, it is evident that the possible wrong choice of the national judge regarding the (non-suspension) of the lack of application will certainly produce a double order of consequences; or, if the judge - as long as it is, it is good to remember it, of last resort-has manifestly failed to observe the obligation to refer the preliminary ruling to the CJEU pursuant to art. 267, par. 3 TFEU in the presence of obvious doubts on the non-application, this breach, with reference to the Union law, may be the subject of an appeal for an infringement[74], while, in relation to the protection of damaged private individuals, it may establish an action for compensation for damage, thus as expressed in the Köbler case law and following[75].
While confirming the previous logical-argumentative framework, the inter-environnement Wallonie II case grants the opportunity to investigate certain issues. The decision concerns the absence of the environmental impact assessment in the procedure for adopting an internal law. In more detail, the two applicants associations asked for the annulment of the law hereby which extended the operation of two nuclear power plants to the Belgian constitutional CJEU, which in turn referred the matter to the Kirchberg judges.
The CJEU addresses the issue of suspension in the ninth and final question of its pronunciation[76]. It identifies the specific criteria to be met for the suspension, which, mutatis mutandis, take up the inter-environnement Wallonie I paradigm. In this case, "the maintenance of the effects of national measures adopted in violation of the obligations deriving from the directives" is bound to the the existence of a "serious and effective threat of interruption of the electricity supply of the Member State concerned, which could not be addressed by other means and alternatives"[77].
The Luxembourg judge then refers to the arguments now consolidated in the previous jurisprudence and confirms the point of arrival: "(...) Only the CJEU can, exceptionally and for imperative considerations of legal certainty, grant a temporary suspension of the effect of non-application exercised by a rule of EU law with respect to rules of domestic law which conflict with it. In fact, if national courts had the power to give primacy, even if only provisionally, to national rules, in case of conflict with Union law, the uniform application of Union law would be prejudiced"[78].
The inter-environnement Wallonie I ruling therefore adds security of electricity supply to the parameters that legitimize, at least in theory, the suspension of the record. This is certainly a public interest worthy of protection which, at the same time, constitutes, pursuant to art. 194, par. 1, lett. b), TFEU[79], one of the objectives of the Union's energy policy. Nonetheless, it is good to point out the doubts raised by the extension of this jurisprudence also to the sector in question.
Indeed, it cannot be said that this selection should be conducted with due caution. If we consider otherwise, we run the risk that the continuous and significant expansion of the scope could reverse

---

[73]CJEU, C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres of 29 July 2019, op. cit., parr. 177-178.

[74]CJEU, C-416/17, European Commission v French Republic of 4 October 2018, ECLI:EU:C:2018:811, published in the electronic reports of the cases. A. Turmo, A Dialogue of Unequals-The European Court of Justice Reasserts National Courts' Obligations under Article 267(3) TFEU: ECJ 4 October 2018, Case C-416/17, Commission v. France, in European Constitutional Law Review, 15 (2), 2019, pp. 344ss. C. Barnard, the substantive law of the EU, Oxford University Press, Oxford, 2019, pp. 425ss.

[75]CJEU, C-224/01, Köbler v. Republic of Austria of 30 September 2003, op. cit., par. 38. In particular, moreover, on the indemnity denied in the event that the violation is committed by a judge not of last resort, CJEU C-168/15, Milena Tomášová v. Slovenská republika-Ministerstvo spravodlivosti SR and Pohotovosť s.r.o. of 28 July 2016, ECLI:EU:C:2016:602, par. 36. P.J. Kuijper, F. Amtenbrinnk, D. Curtin, The law of the EU and the European communities, op. cit., C-218/11, Hochtief Solutions AG Magyarországi Fióktelepe v. Fővárosi Törvényszék of 28 July 2019, ECLI:EU:C:2019:630, par. 36. C-447/17 P, Guardian Europe Sàrl v. European Union of 5 September 2019, ECLI:EU:C:2019:672, all the above cases published in the electronic reports of the cases, parr. 75 and 76.

[76]CJEU, C-447/17 P, Guardian Europe Sàrl v. European Union of 5 September 2019, op. cit., parr. 167-192.

[77]CJEU, C-447/17 P, Guardian Europe Sàrl v. European Union of 5 September 2019, op. cit., par. 179.

[78]CJEU, C-447/17 P, Guardian Europe Sàrl v. European Union of 5 September 2019, op. cit., par. 197.

[79]J. Schwarze, V. Becker, A. Hatje, J. Schoo, EU-Kommentar, op. cit.,

the rule with the exception, overturning the current system of relations and thus seriously endangering the supremacy of EU over domestic law, which represents one of the fundamental cornerstones of the integration process.
Furthermore, the Advocate General Kokott was of the same opinion, who, in the conclusions to the case presented on 29 November 2018, suggested distinguishing security of minimum supply, essential interest, from general security of supply, which is certainly of less importance, in order to avoid unjustified and disproportionate extensions[80].
In conclusion, from what has been said so far, it is clear that "the disapplication of the primacy", if this can be defined, remains confined for the moment, by the CJEU, to specific areas of law and with reference only to some concrete operations of balancing of principles selected by the CJEU itself, such as the certainty of legal trafficking, the protection of the environment and the security of electricity supply.

And after the sentence of 5 May 2020?
In the same spirit of “limits“ we can see the German Constitutional Court ruled with a sentence on 5 May 202081 at the conclusion of the well-known Weiss case[82] which had given rise to a judgment of the CJEU on a preliminary reference by the Constitutional Court itself, in December 2018. The initiative started, in the four cases brought together, by a surprisingly high number of applicants who agree that the European Central Bank's Public Sector Purchase Program (PSPP) is one of the four programs in which the so called quantitative easing is the one specifically addressed to the purchase of public debt securities. We recall that the ultra vires of the institutions can according to the Bundesverfassungsgericht be legitimized ex post through a revision of the treaties with the procedure provided for by article 48 TEU83.
The German Constitutional Court has sanctioned the possibility of using the principle of democracy set out in article 38 of the Grundgesetz as a structural limit, so to speak, to the prevalence of European Union law over domestic law; reconfirming the possibility of setting limits to the prevalence of European Union law over domestic law when fundamental principles of the State Constitution are at stake is certainly not new.
Consistently, the insistent reference made in par. 158 et seq. by the German Constitutional Court to democratic principles elevates the principle of attribution, the principle of proportionality and the division of powers to the rank of democratic guarantees. The distinction, in the practical case, between economic and monetary policy, however artificial (and also somewhat contradictory in the text of the sentence) becomes paradigmatic of a surreptitious attempt to force the process of European integration beyond what is democratically accepted by the States upon ratification. The European agenda and the Integrationsprogramm tell us the German Constitutional Court that cannot be achieved by judgment or by way of practice (par. 158).
Despite a statement of principle of opposite sign (par. 159), in minutely identifying the economic effects of the monetary policy measures adopted by the Central Bank, and in affirming the legal significance of these effects, for the purpose of assessing the proportionality to which the Bank would be required, the Constitutional Court clearly notes that monetary policy measures are sometimes intended to explain a strong impact on variables of a real nature, in particular on aspects relating to the distribution of resources and opportunities among the various categories of economic actors, if the use of the monetary instrument were likely to produce significant distributional effects, the nature of the decisions in question would acquire intrinsically "political" importance, and the relative powers should therefore be subject to the control of bodies directly or indirectly expression of popular sovereignty.

---

[80]CJEU, C-447/17 P, Guardian Europe Sàrl v. European Union of 5 September 2019, op. cit., parr. 206, 210, 211, 217 and 219.

[81]German Constitutional Court judgment: 2BvR 859/15.

[82]CJEU, C-493/17, Weiss and others of 11 Deccember 2018, ECLI:EU:C:2018:1000, published in the electronic reports of the cases. See also: A.Am Moois, The Weiss judgment: The Court's further clarification of the ECB's legal frame work: Case C-493/17 Weiss and others, in Maastricht Journal of European and Comprative Law, 26 (3), 2019, pp. 452ss.

[83]D. Liakopoulos, European integration through member states' constitutional identity in EU law, op. cit.

The decision of the German Constitutional Court constitutes the final outcome of the twist suffered-as a result of the action carried out in recent years by the ECB-by the theoretical model underlying the Treaty of Maastricht (and subsequent "reforms") and the related regulatory framework. Seen in this light, the setting of this decision, and its results, can then be considered revealing of a twofold, uncomfortable truth due to the neutrality...politics of European monetary policy is essentially a...myth; and that, despite this circumstance, this policy remains, at present, in the hands of a technical body, not subject, as such, to political control.

According to our opinion on the assumption that the current Treaties configure the Union as an organization founded on the cooperation of sovereign States, which remain the masters of the Treaties, and therefore the German voters-through ratification by their representatives in the Bundestag -have accepted the limitations of sovereignty necessary only for the creation of an organization that was unable to autonomously self-determine its conduct. The Court therefore considers any attempt by the Union and its institutions to free themselves from the principle of democracy this model without going through the Treaty revision procedure, and therefore without the consent of the national Parliaments. It is in fact in Maastricht that the Member States, with the decision to create an Economic and Monetary Union founded on a common currency, but on economic and fiscal policies still managed at national and simply coordinated at European level (art. 119 TFEU)[84], they have given rise to a fundamental contradiction which over the years has manifested itself with ever greater force. The transformation of the European Union from an organization with purely economic purposes to an organization endowed, at least for a part of its Member States, with a competence traditionally attributed to monetary sovereignty has in other words led to the inadequacy of rules dictated the single market to apply to sectors where a political decision is required. This contradiction is closely linked to the observations that the German judges make to ECB and CJEU, and therefore to the content of the conflict between the German Court and the Union institutions.

In conclusion, the principle of proportionality, thus configured, not only would not be justified in comparative public law, but would also be unduly applied to a question of delimitation of competences between bodies (in contrast with Union law; in a confused, overall way erroneous and culturally aberrant; while the relative reasoning is incomprehensible).

Is it really possible to continue to think that contradictions of this magnitude can be governed - if not resolved - by technical or judicial bodies, and not by the political and democratic way of the Treaty revision procedure? Is it not in/from a situation of this kind-rather than from a decision of a Constitutional Court - that bodies such as the CJEU or the ECB itself risk, in the long run, to be crushed?

Concluding remarks and outlook

It cannot be ruled out that in the future the CJEU may expand the list of possible derogations. However, it would be appropriate for this operation to be confined in the most absolute exceptionality, given the repercussions that can cause an excessive extension of the application area.

The principle of the primacy of EU law cannot be considered "absolute" for at least four different orders of reasons. First, if the "absolute" character of this principle is identified with the suitability of EU rules to prevail over the constitutional rules of the Member States, this attribute has a reduced definitive value, in that it identifies a characteristic that EU law shares with all international treaties, attributable to the customary principle pacta sunt servanda. Although the CJEU was the first to extend the application of this principle from relations between Member States to those within their respective legal systems. This specificity of EU law has been transposed and emulated by the judges of other regional organizations that pursue, on the model of experience European, forms of integration more intense than the intergovernmental model. Secondly, in spite of the centrality evoked by the "absolute" character of the principle of primacy, the latter plays a completely residual role in the definition of interordinate relationships, finding application as extrema ratio in situations of irremediable antinomy between a national norm and a EU standard that is valid according to the supranational system and that, according to the same system, does not allow derogations, expressed or deducible in

[84] D. Liakopoulos, European integration through member states' constitutional identity in EU law, op. cit.

interpretative way, which allow its coexistence with the aforementioned internal regulation. Although the union of legitimacy on EU acts and the recognition of exceptions to EU law remain the exclusive prerogative of the CJEU, in declining these "application prerequisites" of the principle of primacy in the individual cases submitted to its examination, this CJEU has proved to be overall receptive to legal values protected at national level, sometimes leaving - as in the Omega[85] and Bogendorff[86] judgments - the national courts the last word in balancing the interests at stake. Thirdly, if by "absolute" we mean a principle that does not allow exceptions, the primacy of EU law cannot be considered as such in so far as it does not unconditionally impose the resolution of interordinate antinomies through the non-application of the conflicting national rule (so-called non-application primary). In particular, the EU legal system allows the temporary suspension of the obligation of non-application of the internal regulation in question where the latter is functional to the protection of other legal values deemed worthy of protection, such as legal certainty, environmental protection and the principle of legality in criminal matters. Furthermore, although in principle the national judge is required to disapply, in addition to the conflicting national rule, also any other internal rule or practice that may prevent, even temporarily, from remedying a situation incompatible with EU law (so-called non-application secondary), the latter allows the courts of the Member States to continue to apply the national rules relating to the res judicata authority of judicial decisions and to the prior control of the constitutional legitimacy of laws that appear simultaneously in conflict with internal constitutional rules and with EU law. Therefore, given that the EU system itself includes "internal" limits to the primacy principle, it is not clear how the latter can be considered "absolute". Fourth, although the additional "external" limits that the jurisdictions of some Member States have intended to apply to the application of EU law in their respective systems are not, as such, likely to lead to a temperament of this principle from the perspective of law EU, given that the subsequent practice of the Member States is not relevant for the interpretation of EU rules, the warnings set by national courts can nevertheless influence the CJEU in the interpretation of the "internal" limits to the primacy principle, sometimes leading it to " internalize ”some of the requests coming from the Member States in order to avoid the onset of exhausting inter-legal conflicts. This is because the application of the principle of primacy, in spite of its alleged "absolute" character, belongs to the national courts, on which the CJEU does not have significant means of compulsion. It is also evident that, if the primacy of EU law it is not "absolute", appeals to judicial disobedience aimed at limiting the scope of this principle are deprived of their main justification.

In any event, these appeals seem difficult to reconcile with belonging to a "Community of law" with autonomous jurisdictional bodies[87], as this postulates the renunciation by the Member States of the power to "do justice for themselves"[88], all the more if we consider that said Community, in pursuing unity, contemplates a plurality of mechanisms to welcome diversity[89]. Ultimately, no Member State

---

[85]CJEU, C-36/02, Omega of 14 october 2004, ECLI:EU:C:2004:614, I-09609. T. Corthaut, EU ordre public, op. cit., L. Cruszczynski, W. Werner, W.G. Werner, Deference in international courts and tribunals. Standard of review and margin of appreciation, Oxford University Press, Oxford, 2014, pp. 44ss.

[86]CJEU, C-438/14, Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe e Zentraler Juristischer Dienst der Stadt Karlsruhe of 2 June 2016, ECLI:EU:C:2016:401, published in the electronic reports of the cases. M. Kellerbauer, M. Klamert, J. Tomkin, The European Union treaties and the charter of fundamental rights. A commentary, op. cit., D. Chalmers, G. Davies, G. Monti, European Union law, op. cit.,

[87]CJEU, 294/83, Les Verts v. European Parliament of 23 April 1986, ECLI:EU:C:1986:166, I-01339, par. 23: "(…) The European Economic Community is a community of law in the sense that neither the States that are part of it, nor its institutions are removed from the control of the conformity of their acts to the basic constitutional charter constituted by the Treaty (...)". P. Lynch, N. Neuwahl, G. Wyn Rees, Reforming the EU: From Maastricht to Amsterdam, Routledge, London & New York, 2014. M. Cremona, Market integration and public services in the EU, Oxford University Press, Oxford, 2011, pp. 225, 237. M. De Visser, Constitutional review on Europe: A comparative analysis, Bloomsbury Publishing, New York, 2013.

[88]CJEU, joined cases 90 and 91/63, Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium of 13 November 1964, ECLI:EU:C:1964:80, I-01217. W. Phelan, The revolutionary doctrines of European law and the legal philosophy of Robert Lecourt, in The European Journal of International Law, 28 (3), 2017, pp. 948ss. M. Varju, Member state interests and European Union: Revisiting the foundations of member state obligations, ed. Routledge, London & New York, 2019. C.J. Mann, The function of judicial decision on European economic integration, ed. Springer, Berlin, 2013.

[89]M. Claes, The primacy of EU law in European and national law, in D. Chalmers, A. Arnull (eds.), The oxford handbook of European Union law, op. cit., pp. 190ss.

can claim to apply EU law "only in what is useful" but "not in what may be disturbing"[90], because participation in the European integration process inevitably underlies the principle here habet commoda, ferre debet onera[91].

REFERENCES

Adams, M. De Waele, H., Meeusen, J., *Judging Europe's judges. The legitimacy on the case law of the European Court of Justice,* Bloomsbury Publishing, New York, 2013, pp. 225ss.

Amtenbrink, F., Davies, G., Kochenov, D., *The internal market and the future of European integration. Essays in Honour of Laurence W. Gomley,* Cambridge University Press, Cambridge, 2019.

Andersen, S., *The enforcement of EU law: The role of the European Commission*, Oxford University Press, Oxford, 2012, pp. 61ss.

Atamer, Y.M., Pichonnaz, P., *Control of price related terms in standard from contracts*, ed. Springer, Berlin, 2019, pp. 108ss.

Azoulai, L., *The question of competence in the European Union*, Oxford University Press, Oxford, 2014, pp. 140ss.

Bakardjieva Engelbrekt, A., Groussot, X., *The future of Europe: Political and legal integration beyond Brexit,* Bloomsbury Publishing, New York, 2019, pp. 202ss.

Baquero Cruz, J., *What's left of the law of integration? Decray and resistance European Union law*, Oxford University Press, Oxford, 2018.

Barnard, C., Peers, S., *European Union law,* Oxford University Press, Oxford, 2017, pp. 788ss.

Barnard, C., *The substantive law of the EU*, Oxford University Press, Oxford, 2019, pp. 425ss.

Barros, A.S., *Governance as responsibility,* Cambridge University Press, Cambridge, 2019, pp. 25ss.

Basener, N., *Investment protection in the EU: Considering EU law in investment arbitrations arising from intra-EU and extra-EU bilateral investment agreements,* Nomos Verlag, Baden-Baden, 2017.

Belanusau, U., Henrard, K., *EU anti-discrimination law beyond gender*, Bloomsbury Publishing, New York, 2018.

Benöhr, I., *EU consumer law and human rights,* Oxford University Press, Oxford, 2013.

Benyon, F.S., *Services and the EU citizen,* Bloomsbury publishing, New York, 2013.

Berry, E., Homewood, M.J., Bogusz, B., *Complete EU law: Text, cases and materials*, Oxford University Press, Oxford, 2019.

Beukers, T., “Case C-409/06, Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim, Judgment of the Court (Grand Chamber) of 8 September 2010”, *Common Market Law Review,* 48

[90]CJEU, 6/64, Costa v. ENEL of 15 July 1964, op. cit., C. Virseda Fernàndez, Uniòn europea, Editorial Aranzadi, Pamplona, 2020.

[91]CJEU, C-39/72, Commission of the European Communities v. Italian Republic of 7 February 1973, ECLI:EU:C:1973:13, I-00101, parr. 24-25: "The fact that a state, in consideration of its national interests, unilaterally breaks the balance between the advantages and the burdens deriving from its belonging to the Community (...) shakes the foundations of the Community legal order". M. Decheva, Recht der europäischen Union, ed. Nomos, Baden-Baden, 2018.

(6), 2011, pp. 1985ss.

Bjorge, E., *The evolutionary interpretation of treaties,* Oxford University Press, Oxford, 2014.

Blanke, H.J., Mangiameli, S., *The EU after Lisbon. Constitutional basis, economic order and external action*, ed. Springer, Berlin, 2011, pp. 257ss.

Bobek, M., *Central European judges under the European influence. The transformative power of the EU revisited,* Bloomsbury Publishing, New York, 2015.

Bobek, M., *Selecting Europe's judges: A critical review of the appointment procedures to the European courts*, Oxford University Press, Oxford, 2015, pp. 51ss.

Bradley, K., Travers, N., Whelan, A., *Of courts and constitutions. Liber amicorum in honour of Niel Fennelly,* Bloomsbury Publishing, New York, 2014.

Breuer, M., *Principled resistance to ECtHR judgments. A new paradigm?*, ed. Springer, Berlin, 2019.

Brölmann, C., Radi, Y., *Research handbook on the theory and practice of international lawmaking,* Edward Elgar Publishers, Cheltenham, 2016.

Cafaggi, F., Law, S., *Judicial cooperation in European private law*, Edward Elgar Publishers, 2017, pp. 230ss.

Cassagnabère, H., "Le juge du droit de l'Union et la modulation dans le temps", in *Les Nouveaux Cahiers du Conseil Constitutionnel,* 54 (1), 2017, pp. 62ss.

Chalmers, D., Davies, G., Monti, G., *European Union law,* Cambridge University Press, Cambridge, 2019.

Claes, M., "The primacy of EU Law in European and national law", in D. Chalmers, A. Arnull (eds.), *The oxford handbook of European Union law,* Oxford University Press, Oxford, 2015, pp. 185ss.

Clèment-Wilz, L., "L'office du juge interne pour moduler les effets de l'annulation d'un acte contraire au droit de l'Union. Reflexions sur l'arret Association France Nature Environnement du Conseil d'Etat français", in *European Papers,* 2 (1), 2017, pp. 265 and 266.

Clèment-Wilz, L., *Le rôle politique de la Cour de justice de l'Union europèenne*, ed. Larcier, Bruxelles, 2019.

Cloots, E., *National identity in EU law,* Oxford University Press, Oxford, 2015.

Corthaut, T., *EU ordre public,* Kluwer Law International, New York, 2012.

Cruszczynski, L., Werner, W., Werner, W.G., *Deference in international courts and tribunals. Standard of review and margin of appreciation,* Oxford University Press, Oxford, 2014, pp. 44ss.

Da Cruz Vilaça, J.L., *European Union law and integration. Twenty years of judicial application of European Union law,* Hart Publishing, Oxford & Oregon, Portland, 2014.

Dannemann, G., Vogenauer, S., *The common European sales law in context: Interactions with english and german law,* Oxford University Press Oxford, 2013, pp. 690ss.

Danov, M., Becker, E., Beaumont, P., "Cross-order EU competition law actions, Bloomsbury Publishing, New York, 2013

De Witte, B., EU Law: Is it international law?", in C. Barnard, S. Peers (eds.), *European Union law,* Oxford University Press, Oxford, 2014, pp. 187ss.

De Witte, B., "The European Union as an international legal experiment", in G. De Búrca, J. Weiler (eds.), *The worlds of European constitutionalism,* Cambridge University Press, Cambridge, 2011, pp. 48-49.

Derlèn, M., Lindholm, J., *The Court of Justice of the European Union. Multidisciplinary perspectives*, Hart Publishing, Oxford & Oregon, Portland, 2018.

Dörr, O., "Article 31. General rule of interpretation", in O. Dörr, K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A commentary,* Springer, Heidelberg-New York 2012, pp. 536ss.

Douglas-Scott, S., Hatzis, N., *Research handbook on EU law and human rights*, Edward Elgar Publishers, Cheltenham, 2017.

Eckes, C., *European Union powers under external pressure: How the EU's external actions alter its internal structures,* Oxford University Press, Oxford, 2019, pp. 143ss.

Fitzmaurice, M., Elias, O., Merkouris, P., (eds), *Treaty interpretation and the Vienna Convention on the Law of Treaties, 30 years on*, Martinus Nijhoff, The Hague, 2010, pp. 9ss.

Garben, S., Govaere, I., Nemitz, P., *Critical reflections on constitutional democracy in the European Union*, Bloomsbury Publishing, New York, 2019, pp. 170ss.

Giliker, P., *The europeanisation of english tort law*, Bloomsbury Publishing, New York, 2014, pp. 90ss.

Gordillo, L.I., *Interlocking constitutions. Towards an interordinal theory of national European and UN law*, Bloomsbury Publishing, New York, 2012.

Grundmann, S., Miclitz, H.W., *The European banking union and constitution. Beacon for advanced integreation or death-knell for democracy?*, Bloomsbury Publishing, New York, 2019.

Guild, E., Peers, S., Tomkin, J., *The EU citizenship directive: A commentary*, Oxford University Press, Oxford, 2019.

Guinchard, E., Granger, M.P., *The new EU judiciary: An analysis of current judicial reforms*, Kluwer Law International, New York, 2016.

Gutman, K., *The constitutional foundations of European contract law: A comparative analysis*, Oxford University Press, Oxford, 2014.

Hartkamp, A., Siburgh, C., Devroe, W., *Cases, materials and text on European Union law and private law,* Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss.

Hartley, T.C., *The foundations of EU: An introduction to the constitutional and administrative law of the European Union, Oxford University Press, Oxford, 2014, pp. 237ss.*

Jacob, M., *Precedents and case-based reasoning in the European Court of Justice: Unfinished business,* Cambridge University Press, Cambridge, 2014.

Jansen, N., Zimmermann, R., *Commentaries on European contract laws*, Oxford University Press, Oxford, 2018.

Kaczorowska-Ireland, A., *European Union Law,* ed. Routledge, London & New York, 2016.

Kellerbauer, M., Klamert, M., Tomkin, J., *Commentary on the European Union treaties and the Charter of fundamental rights,* Oxford University Press, Oxford, 2019.

Kellerbauer, M., Klamert, M., Tomkin, J., *The European Union treaties and the charter of fundamental rights. A commentary*, Oxford University Press, Oxford, 2019.

Klamert, M., *The principle of loyalty in EU law*, Oxford University Press, Oxford, 2014.

Konstadinides, T., *The rule of law in the EU. The internal dimension*, Bloomsbury Publishing, New York, 2017.

Koutrakos, P., Shuibhne, N.N., Syrpis, P., *Exceptions from derogation justification and proportionality,* Bloomsbury Publishing, New York, 2016, pp. 315ss.

Krunke, H., Thorarensen, B., *The nordic constitutions: A comparative an contextual study*, Bloomsbury Publishing, New York, 2018, pp. 199ss.

Kuijper, P.J., Amtenbrinnk, F., Curtin, D., *The law of the EU and the European communities,* Kluwer Law International, New York, 2018.

Lazowski, A., Blockmans, S., *Research handbook on EU institutional law,* Edward Elgar Publishers, 2016, pp. 359ss.

Foster, N., *Foster on EU law,* Oxford University Press, Oxford, 2019, pp. 161ss.

Lenaerts, K., Maselis, I., Gutman, K., *EU procedural law*, Oxford University Press, Oxford, 2019, pp. 143ss.

Lenaerts, K., "New horizons for the rule of law within the EU", in *German Law Journal,* 21 (1), 2010, pp. 32ss.

Liakopoulos, D., *European integration through member states' constitutional identity in EU law,* ed. Maklu, Antwerp, Portland, 2019.

Lock, T., "Are there exceptions to a Member State's duty to comply with the requirements of a Directive?: Inter-environnement Wallonie", *Common Market Law Review,* 50 (1), 2013, pp. 217ss..

Lock, T., *The European Court of Justice and international courts,* Oxford University Press, Oxford, 2015, pp. 86ss.

Malenovský, J., "L'agonie sans fin du principe de non-invocabilitè du droit interne", in *Revue Gènèrale de Droit International Public,* 121, 2017, pp. 27ss.

Mamoudy, O., "Encadrement de la possibilité pour le juge national de maintenir en vigueur un acte contraire au droit de l'Union", in *Actualité Juridique Droit Administratif,* 2016, pp. 2226ss.

Mangiameli, S., "The European Union and the identity of member states", in *L'Europe en Formation*, n. 269 (3), 2013, pp. 154ss.

Martinico, G., Pollicino, O., *The interaction between Europe's legal systems. Judicial dialogue and the creation of supranational laws,* Edward Elgar Publishers, Cheltenham, 2012, pp. 88ss.

Am Moois, A., "The Weiss judgment: The Court's further clarification of the ECB's legal frame work: Case C-493/17 Weiss and others", in *Maastricht Journal of European and Comprative Law,* 26 (3), 2019, pp. 452ss.

Neergaard, U., Sørensen, K.E., “Activist infighting among courts and breakdown of mutual trust? The Danish Supreme Court, the CJEU and the Ajos case”, in *Yearbook of European Law,* 36, 2017, pp. 45ss.

Nolte, G., “Jurisprudence under special regimes relating to subsequent agreements and subsequent practice: Second report for the ILC study group on treaties over time”, in G. Nolte (ed.), *Treaties and subsequent practice*, Oxford University, Oxford, 2013, pp. 302ss.

Paris, D., “Constitutional courts as guardians of EU fundamental rights? Centralised judicial review of legislation and the Charter of Fundamental Rights of the EU: European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, A v B and others”, in *European Constitutional Law Review*, 11 (2), 2015, pp. 392ss.

Patterson, D., Södersten, A., *A companion to EU law and international law*, Wiley & Sons, New York, 2016, pp. 159ss.

Payandeh, M., “The OMT judgment of the German Federal Constitutional Court. Repositioning the court within the European constitutional architecture”, in *European Constitutional Law Review*, 13 (2), 2017, pp. 402ss.

Pescatore, P., *Le droit de l’intégration,* Leiden, 1972, pag. 85.

Planzer, S., *Empirical views on European gambling law and addiction*, Springer, Berlin, 2014.

Poiares Maduro, M., Wind, M., *The transformation in Europe. Twenty five years on,* Cambridge University Press, Cambridge, 2017, pp. 285ss.

Portmann, R., *Legal personality in international law,* Cambridge University Press, Cambridge, 2010, pp. 68ss.

Prete, M., *Infringement proceedings in EU law,* Kluwer Law International, New York, 2016.

Rosas, A., Armati, L., *EU constitutional law. An introduction*, Bloomsbury Publishing, New York, 2018.

Šadl, U., Mair, S., “Mutual Disempowerment: Case C-441/14 Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v The estate left by A”, in *European Constitutional Law Review,* 13 (2), 2017, pp. 349ss.

Samso, M., “High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties”, in *Leiden Journal of International Law*, 24, 2011, pp. 5ss.

Scheinin, M., Krunke, H., Aksenova, M., *Judges as guardians of constitutionalism and human rights,* Edward Elgar Publishers, Cheltenham, 2016, pp. 83ss.

Schütze, R., *European constitutional law*, Cambridge University Press, Cambridge, 2012, pp. 404ss.

Schütze, R., Tridimas, T., *Oxford principles of European Union law*, Oxford University Press, Oxford, 2018.

Schwarze, J., Becker, V., Hatje, A., Schoo, J., *EU-Kommentar*, ed. Nomos, Baden-Baden, 2019.

Sorel, J.M., Borè Eveno, V., *Article 31. General rule of interpretation, in O. Corten, P. Klein, The Vienna Convention on the law of treaties. A commentary*, Oxford University Press, Oxford, 2011, pp. 806ss.

Sowery, K., “Reconciling primacy and environmental protection: Association France Nature Environnement”, in *Common Market Law Review,* 54 (1), 2017, pp. 8ss.

Strand, M., Bastidas, V., Ioacovides, M.C., *EU competition litigation transportation and first experiences of the new regime,* Bloomsbury Publishing, New York, 2019.

Tatham, A.F., *Central European constitutional courts in the face of EU membership. The influence of the german model in Hungary and Poland,* Martinus Nijhoff Publishers, The Hague, 2013, pp. 311ss.

Thomson, B., Gordon, M., *Cases and materials on constitutional and administrative law*, Oxford University Press, Oxford, 2014, pp. 451ss.

Timmerman, M., “Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: Taricco”, in *Common Market Law Review*, 53, 2016, pp. 780ss.

Turmo, A., “A Dialogue of Unequals-The European Court of Justice Reasserts National Courts’ Obligations under Article 267(3) TFEU: ECJ 4 October 2018, Case C-416/17, Commission v. France”, in *European Constitutional Law Review,* 15 (2), 2019, pp. 344ss.

Van Dam, C., *European tort law*, Oxford University Press, Oxford, 2013, pp. 45ss.

Van Gestel, R., De Poorter, J., *In the court we trust: Cooperation, coordination and collaboration between the ECJ and supreme administrative courts,* Cambridge University Press, Cambridge, 2019, pp. 74ss.

Van Zeben, J., Bobić, A., *Polycentricity in the EU*, Cambridge University Press, Cambridge, 2019.

Vrdoljak, A., *The cultural dimension of human right*s, Oxford University Press, Oxford, 2013, pp. 163ss.

Warin, C., *Individual rights under EU: A study on the relation between rights, obligations and interests in the case law of the Court of Justice,* Nomos Verlag, Baden-Baden, 2019, pp. 522ss.

Wollenschläger, F., “Fundamental rights regimes in the EU: Contouring their spheres”, in Y. Nakanishi, *Contemporary issues in human rights law,* ed. Springer, Berlin, 2017, pp. 26ss.

Woods, L., Watson, P., *Steiner & Woods European Union law*, Oxford University Press, Oxford, 2017, pp. 37ss.

Wouters, J., Ryngaert, C., Ruys, T., *International law: A European perspective*, Bloomsbury Publishing, New York, 2018.

Zimmermann, A., Tams, C.J., Oellers-Frahm, K., *The statute of the International Court of Justice. A commentary,* Oxford University Press, Oxford, 2019.

Zipperle, N., *EU international agreements. An analysis of direct effect and judicial review pre and post-Lisbon,* ed. Springer, Berlin, 2017, pp. 103ss.

Zumbanen, P., *The many lives of transnational law. Critical engagements with Jessup's bold proposal,* Cambridge University Press, Cambridge, 2020, pp. 151ss.