TURUN YLIOPISTO
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The Evolving Doctrine of Primacy

Faculty of Law: Re-Examining the Foundations of EU Law

LL. M. Thesis

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Primacy of EU law is the fundamental principle of law on which full and uniform application of EU law, the rule of law among it, is based on. Primacy has no explicit statutory basis but is founded on the case law of the Court of Justice of the European Union. The principle states that in case Union law and national law are in an irresolvable conflict so that the two norms cannot be brought to conformity by interpretation, the national law, irrespective of its domestic hierarchical status, is to be disapplied in the particular case.

In the last few years rule of law backsliding has taken place in several of the Member States and the constitutional bodies in those and some of the other Member States have declared statements that openly challenge primacy. Meanwhile the Court has given two judgments that appear to deviate from the established doctrine of primacy in that the national measure was to be annulled instead of merely disapplied due to primacy. Inspired by these developments, I study in the thesis what is the content of primacy on the basis of case law and legal literature and examine whether the recent rulings of the Court reflect a true change in primacy, and if so, why would that be the case. My research methods consist of legal dogmatics supplemented with legal, especially constitutional theory.

I conclude that primacy has two aspects: It manifests itself as an absolute rule that demands application of EU law and as a much more relative principle defining the consequences of application of EU law. These consequences can vary from disapplication to annulment of the national measure depending on the situation and are guided by the requirements of fulfilling other general principles of EU law. Based on research findings, I propose that very little, if at all, room is left for determining the effects of primacy on the basis of national constitutional identity. Thus, primacy is closely related to the constitutional nature of the EU and the Court appears to have harnessed the principle as its arm in its defense against breaches of the rule of law in Member States.

Avainsanat: primacy, direct effect, rule of law, national constitutional identity

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Euroopan unionin oikeuden ensisijaisuus on perustavanlaatuinen oikeudellinen periaate, johon EU-oikeuden, oikeusvaltioperiaate mukaan luettuna, täysi ja yhdenmukainen soveltaminen perustuu. Etusijaperiaate ei ole lakiin kirjoitettu vaan se on muodostunut Euroopan unionin tuomioistuimen oikeuskäytännön pohjalta. Periaatteen mukaan, jos unionin oikeus on jossakin tapauksessa kansallisen oikeuden kanssa sellaisessa ratkaisemattomassa ristiriidassa, ettei näitä normeja voida tulkinnallisesti sovittaa yhteen, on kansallinen normi jätettävä soveltamatta riippumatta sen valtionsisäisestä oikeuslähdeasemasta.

Viimeisten vuosien aikana oikeusvaltioperiaatteen toteutuminen on vaarantunut useissa jäsenvaltioissa ja näiden sekä joidenkin muidenkin jäsenvaltioiden perustuslailliset elimet ovat antaneet lausuntoja, jotka avoimesti kyseenalaistavat etusijaperiaatteen. Sillä välin EU-tuomioistuin on antanut kaksi tuomiota, jotka poikkeavat vakiintuneesta etusijaperiaatteen soveltamistavasta siinä, että kansallinen toimi oli periaatteen nojalla kumottava pelkän soveltamatta jättämisen sijaan. Näiden kehityskulkujen innoittamana selvitän tutkielmassa oikeuskäytäntöön ja oikeuskirjallisuuteen nojautuen mikä on EU-oikeuden etusijaperiaatteen sisältö ja tutkin, heijastavatko EU-tuomioistuimen viimeaikaiset tuomiot etusijaperiaatteen todellista muutosta ja miksi näin olisi. Tutkimusmenetelminäni hyödynnän lainoppia oikeusteorialla, ja erityisesti valtiosääntöteorialla, täydennettynä.

Johtopäätöksenäni esitän etusijaperiaatteella olevan kaksi puolta: Se ilmenee yhtäältä ehdottomana sääntönä, joka edellyttää EU-oikeuden soveltamista, ja toisaalta paljon suhteellisempana periaatteena, joka määrittää EU-oikeuden soveltamisen seurauksia. Nuo seuraukset voivat tapauksesta riippuen olla kansallisen toimen soveltamatta jättäminen tai kumoaminen ja niiden valintaa ohjaa muiden EU-oikeuden yleisten periaatteiden toteutumisen edellytykset. Tutkimustulosteni perusteella esitän, että etusijaperiaatteen vaikutusten määräytymisessä kansalliselle valtiosääntöidentiteetille annetaan vain vähän, jos lainkaan, merkitystä. Siten etusijaperiaate liittyy läheisesti Euroopan unionin valtiosääntöiseen luonteeseen ja EU-tuomioistuin vaikuttaa valjastaneen periaatteen aseekseen sen puolustautuessa jäsenvaltioissa tapahtuvia oikeusvaltioperiaatteen rikkomuksia vastaan.

Avainsanat: etusijaperiaate, välitön oikeusvaikutus, oikeusvaltioperiaate, kansallinen valtiosääntöidentiteetti

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Opinions of Advocate Generals

European Court of Human Rights

National courts

Abbreviations

AG	Advocate General of the Court of Justice of the European Union (Advocate General)
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union (the Court)
CT	Constitutional Tribunal of Poland
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESCB	European System of Central Banks
EU	European Union (the Union)
FCC	Federal Constitutional Court of Germany
ICC	Italian Constitutional Court
KNAB	Corruption Prevention and Combating Bureau of Latvia
MEP	Member of the European Parliament
NCJ	National Council of the Judiciary of Poland
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Context and structure of the thesis

The European Union (EU) provides a complementary and an overlapping legal system to those of its Member States. The EU legal order consists of primary law composing of the founding Treaties and the general principles of law and of the secondary law derived from the legal basis set in primary law. As in any system of multilevel and overlapping jurisprudences, a method to resolve situations of conflict of laws is needed. In the EU, that method is the primacy of EU law, the doctrine of EU law always taking precedence over the law of the Member States.

Primacy has been a contentious issue from the outset with which the legal authorities have nevertheless managed to live with. Within the last decade or so, it appears to a casual observer that the conflict between primacy of the Union law and the national sovereignty of the Member States has somewhat escalated. The reasons may be many and varied, but likely include the continuous emergence of EU level crises, be that the financial crisis or the rule of law crisis, among many, followed by changes in political powers in the Member States and further in the Union bodies.

Though issues of primacy are typically discussed with a degree of discretion, recent events have urged the EU to proclaim primacy very explicitly through the voices of for example its executive body, the Commission (concerning Poland[1]) and by its judicial body, the Court of Justice of the European Union (concerning Germany[2]). Lately, the Court has taken a step further. On two occasions, the Court has extended the traditional doctrine of EU law primacy, namely that the effect of primacy on national measures is only that the national court must not apply the measure in question,[3] to the point where the national measure has been declared null and void. The latter means that the national measure has been annulled. Though the facts of the cases were somewhat out of ordinary, the rulings might indeed hint to the gradual transformation of the Court's adjudication to take the direction of ruling on the validity of national acts. This would represent a major development of constitutional dimensions but also

[1] European Commission, 'European Commission reaffirms the primacy of EU law' published 7 October 2021, https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5142.
[2] Court of Justice of the European Union, 'Press release following the judgment of the German Constitutional Court of 5 May 2020' published 8 May 2020, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf.
[3] In the language of the Court, the referring court must disapply the measure.

invoke significant consequences on procedural law followed in national proceedings. These issues will be the main themes of the thesis.

Like all general principles of law, primacy is not frozen in its contents but evolves through the mosaic of case law of the Court. Being reactionary to the cases brought before it, the Court cannot proactively provide all the qualifications and legal effects of primacy at once, but these are revealed as the circumstances in the individual cases give reason to. These are also, while keeping the general principle in force, subject to change along the legal and institutional developments over time. Prior immersing in the most recent case law on primacy, I intend to introduce the reader to the historical formation of the doctrine that will, hopefully, help her to understand why the current affairs may be of importance to future developments and can these cases be accommodated to the established concept of primacy.

EU law is deeply intertwined with the law of the Member States, this perhaps being the most notable and characteristic feature of the Union, and it would be absurd to discuss the two EU law cases as wholly isolated legal events. Therefore, I intend, in the final chapter before concluding, to position the discussed two cases from the viewpoint of primacy to the constitutional framework of the EU and therefore as a principle of national constitutions as well. This requires a somewhat delicate discussion on the constitutional nature of the Union and also on the interplay between the substantive law of the Union and how it is made a reality through the procedural rules within the Member States.

Though my sincere intention is to remain within an internal view of law and thus strictly concentrate on legal analysis of the cases, an adequate societal and political context should be provided. In the first case studied in detail, the then governor of the Central Bank of Latvia, Mr Ilmārs Rimšēvičs, was under criminal proceedings for corruption. The case has connections to the Latvian money laundering scandals starting to be revealed from mid-2010s onwards in which several Latvian banks have been charged of helping to evade UN imposed sanctions on Russian and even North Korean funds.[4] Mr Rimšēvičs himself has been accused of accepting bribery, and the criminal proceedings, begun in early 2018 and having taken a variety of turns ever since, are still on-going as the respondent is as of this writing in summer 2022 still being investigated.

[4] I have used various news sites on internet to collect information on the scandals and the role of Mr Rimšēvičs.

Despite the importance of the case for the European System of Central Banks, the case of Mr Rimšēvičs is relatively clear for the purposes of this research, the doctrine of primacy. This is because the facts were not part of any systemic ambiguity on rule of law or other foundational values of the Union but concerned a singular event of Latvian criminal proceedings and a possible breach of the right to a fair trial for the accused. Also, the applicable piece of EU law, as explained later, was reasonably clear. Most importantly, there was no true opposition from the Latvian authorities on EU law primacy: the government did argue that the Court had no jurisdiction but once the claim was rejected, the government did not deny the primacy of EU law. Due to these reasons, the case is rather straightforward to analyze in purely legal terms.

Such are not the circumstances in the second case to be detailed. This is the case of a Polish judge, Mr Waldemar Żurek. The case is part of a grander scheme of developments on the rule of law backsliding in various Member States that has taken many forms in different countries. In Hungary, the negative development has appeared mainly in the form of restricting the freedom of the press and of certain academic institutions; in Romania, as insufficient measures to or even legalizing corruption; and in Poland most prominently, as loss of independence of the judiciary, though this has also taken place in Hungary and Romania together with limiting the rights of minorities and women.

In Poland, a number of legal changes have been implemented since the coming into power of the ruling party PiS in 2015.[5] These include the reformation of the National Council of the Judiciary (NCJ), a body which appoints judges to the Polish courts. The reformation in essence turned the body into a political organ in that appointment of judges became controlled by the executive and the legislative branches of government. In addition, two chambers, the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber, were set up in the Polish Supreme Court, which imposed disciplinary actions on judges and are empowered by the so-called muzzle law. The law criminalizes judges for giving critical statements on the judicial organization in Poland and also gave other tools to authorities to silence judges. All these were certainly still not the only events that impaired the rule of law in Poland; other measures included for example the mass transfer of judges and prosecutors to other courts and

[5] Amnesty International, 'Poland: Briefing on the rule of law and independence of the judiciary in Poland in 2020–2021' published 17 June 2021, https://www.amnesty.org/en/documents/eur37/4304/2021/en/.

localities as well as other punitive actions on judges intended to produce a chilling effect on the faculty.

As a response, the European Commission initiated in 2017 the Art 7 TEU procedure against Poland for "a clear risk of a serious breach by a Member State of the values referred to in Article 2". This "nuclear option" that would enable the suspension of certain rights of the Member State including financial benefits is still in progress. In March 2018 the Court found the Constitutional Tribunal of Poland (CT) not to be a court at all due to the process of appointing its judges.[6] It is against this background that the prime minister of Poland decided to ask the Constitutional Tribunal whether EU law enjoys primacy in Poland.[7]

The Constitutional Tribunal, having been pronounced not to be a true tribunal by the Court, took its revenge and ruled that several of the articles of the Treaty on European Union were inconsistent with the Polish constitution and that it is the constitution that is to have primacy.[8] This was a drastic but an unsurprising ruling since the CT faced a choice between denying primacy of EU law and denying its own capacity as a court. Among the many articles to be ruled as inconsistent with the Polish constitution were the second subparagraph of Art 19(1) TEU in conjunction with Art 2 TEU and Art 4(3) TEU. Indeed, not only was the primacy of EU law rejected, several of the central Treaty provisions were outright dismissed to have legal force when interpreted the way the Court has done. What is striking in the judgment is its blank brevity: the grounds were hardly argued and the dismissal of the Treaty articles were not particularly delicately qualified. Thus, the ruling does not provide ample material for a legal analysis but can only be understood in its political context.

Meanwhile, many of the judges and other individual actors have taken their cases to the Court and to the European Court of Human Rights (ECtHR). These cases provide much more to ponder upon. I have chosen the EU case of judge Żurek as it is the most relevant from the primacy point of view for the reasons I explain in more detail in section 3.2.2. For the moment, suffice it to say that in the case the Court ruled that a national measure must be declared null

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[6] Judgment in case C-824/18 *A. B. and others (Nomination des juges à la Cour suprême - Recours)* ECLI:EU:C:2021:153.
[7] International Bar Association, 'Rule of Law: Poland's highest court challenges primacy of EU law' published 11 November 2021, https://www.ibanet.org/Rule-of-law-Polands-highest-court-challenges-primacy-of-EU-law.
[8] K 3/21 *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, judgment of the Constitutional Tribunal of 7 October 2021, Poland.

and void instead of merely disapplied. A somewhat similar case in facts of another Polish judge has since been ruled on.[9] Here, the Court found the case inadmissible for the reasons related to the procedural requirements under Art 267 TFEU under which the case was raised but nevertheless reminded the referring court of the duty to disapply national measures inconsistent with EU law.[10] Due to the inadmissibility, the grounds given by the Court to the main proceedings were insufficient for further analysis here.

In general, the Court has largely ruled the Polish measures to be inconsistent with EU law. Likewise, ECtHR has also given several rulings against Poland for violating the European Convention on Human Rights (ECHR). The Constitutional Tribunal[11] and several of the chambers of the supreme court[12] were found not to be courts or tribunals established by law. Mr Żurek himself has received a judgment in his favor.[13] In July 2022, there are 37 cases pending at the ECtHR concerning judicial independence in Poland.[14]

As of this writing, the most recent developments indicate that the Commission of the EU may be finding a path forward with regards improving the rule of law in Poland[15] whereas the situation in Hungary and in Romania is continuing to degrade. The Commission has advanced infringement proceedings against Hungary to the Court on matters related to the freedom of media[16] and on violating minority rights.[17] Further, The Venice Commission of the Council of Europe has notified the organization of the judiciary in Hungary taking steps to worrying directions, although perhaps in a more discrete way than in the case of Poland, for instance

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[9] Judgment in case C-508/19 *M. F. v J. M.* ECLI:EU:C:2022:201.
[10] *Ibid.*, para. 79.
[11] Judgment in *Xero Flow w Polsce sp. z o.o. v Poland* (Application no. 4907/18) on 7 May 2021 and the associated press release ECHR 138 (2021).
[12] a) Judgment in *Reczkowicz v Poland* (Application no. 43447/19) on 22 July 2021 and the associated press release ECHR 236 (2021) and the cited case law therein; b) Judgment in *Advance Pharma sp. z o. o v Poland* (Application no. 1469/20) on 3 February 2022 and the associated press release ECHR 039 (2021).
[13] Judgment in *Żurek v Poland* (Application no. 39650/18) on 16 June 2022 and the associated press release ECHR 202 (2022).
[14] European Court of Human Rights, Notification of 37 applications concerning judicial independence in Poland, Press release ECHR 248 (2022) of 25 July 2022, https://hudoc.echr.coe.int/eng-press?i=003-7392626-10111158.
[15] European Commission, 'NextGenerationEU: European Commission endorses Poland's €35.4 billion recovery and resilience plan' published 1 June 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3375.
[16] European Commission, 'Media freedom: the Commission refers HUNGARY to the Court of Justice of the European Union for failure to comply with EU electronic communications rules' published 15 July 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2688.
[17] European Commission, 'Commission refers HUNGARY to the Court of Justice of the EU over violation of LGBTIQ rights' published 15 July 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2689.

through the process of allocation of cases to judges.[18] In Romania, the constitutional court has declared EU law primacy to be conditional on amending Romanian constitution[19] as a response to the finding of the Court of recent judicial reforms in that state violating EU law primacy and the conditions set for Romania upon its accession to the Union.[20]

Primacy has been a fundamental principle of EU law from the early days of the 1960s onwards and continues to take new shape and influence the relations of the Union, its Member States and the individuals within. Let us elaborate.

1.2 Study goal and research questions

The goal of the study is to clarify the meaning of the doctrine of primacy as it stands today. I will examine what has been the contents of primacy in the case law of the Court and how and why it has evolved the way the way it has (research question 1 studied in chapter 2). As part of answering this, I will need to study what is the legal authority and the function of primacy (subquestions 1.1 and 1.2). I will then move on to study whether the recent case law represents a paradigmatic change in the doctrine (research question 2 studied in chapter 3) and if so, what is the exact change and what are the reasons behind it (subquestions 2.1 and 2.2). Finally, I will study what is the role of primacy in the constitutional nature of the EU law and how that is reflected in its relation to the law of the Member States (research question 3 studied in chapter 4) and how the possible recent changes in the doctrine affect EU constitutionalism, notably by transforming the role of the Court (subquestion 3.1). Answering these research questions by building up from the individual cases to the constitutional architecture of the EU and its composite Member States will, I hope, result in a coherent picture on the doctrine of primacy.

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[18] European Commission for Democracy through Law (Venice Commission) of the Council of Europe, 'Hungary – Opinion on the amendments to the Act on the organisation and administration of the Courts and the Act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020' published 16 October 2021, https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)036-e.

[19] Constitutional Court of Romania, Press release of 23 December 2021, https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/.

[20] Court of Justice of the European Union, The Court of Justice rules on a series of Romanian reforms in the areas of judicial organisation, the disciplinary regime applicable to judges, and the financial liability of the State and the personal liability of judges as a result of judicial error, Press release No. 82/21 of 18 May 2021, https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210082en.pdf.

1.3 Methods and sources

I will follow legal dogmatics in the framework of legal theories from the internal viewpoint of law. The internal viewpoint means that I will deliberately avoid considering, apart the context provided in the Introduction, any possible political or societal motivations of the rulings referred. I justify this doctrinal approach by premising that although it cannot be precluded that understanding the political realities in many of the cited cases could provide relevant context, the Court bases its reasoning strictly on legal grounds and juridical arguments. Therefore, the societal contexts do not serve to fulfil the research interests of the thesis but are left for other studies.

My main sources will be the case law of the Court and critical, mostly peer-reviewed, literature by legal scholars, supplemented by statutes and other official sources as well as national and other judgments where relevant. A limited number of trustworthy online sources will also be utilized.

1.4 Scope and restrictions

The scope of the thesis is the doctrine of primacy. In early case law, the doctrine became apparent in the fields of the internal freedoms and market integration of the Union. Later cases have increasingly brought other fields within those covered by the case law, such as protection of fundamental rights and, very latest, securing the rule of law and the independence of the judiciary and other EU agents. However, although I will frequently refer to these fields, they are not the topic of the thesis and I will not study the contents of those fields of application of primacy in detail. For instance, I will not study what is the meaning of the rule of law in the EU or what actions the Commission has taken to address the rule of law backsliding in Member States nor do I study the scope and contents of EU fundamental rights per se.

2 Primacy of EU law

2.1 Legal basis and the functions of primacy

EU law primacy, together with closely associated direct effect, are considered as the defining characteristics of EU law.[21] In Court's practice, primacy is derived from the constitutional nature of the EU and the independence of its legal sources, the Treaties. Primacy thus has its legal authority in the Court's case law though it can be read as implicitly written into the Treaties too. In early case law, the binding and directly applicable nature of EU law[22] was taken as a justification for primacy[23] in order to ensure full, complete and uniform application of EU law.[24] The objective, in other words, the autonomy of EU law, sets the basis for the function of primacy: while uniformity is enforced most importantly by the preliminary ruling procedure, full and complete application is enforced by direct effect and primacy.

Primacy lacks an explicit statutory authority in the primary law of the EU. Statutory basis was attempted in the Constitutional Treaty that was never ratified, whose Art I-6 expressly stated Union law primacy.[25] The principle of primacy was subsequently incorporated in Declaration 17 attached to the Lisbon Treaty, along with a similar Opinion of the Council Legal Service, both of which referred to the case law of the Court as a source of primacy.[26] Although these are sometimes considered as mere political statements, the Court has very recently began to use them as legal sources.[27] Additionally, primacy is recognized in some of the international agreements Member States have engaged in. This is so at least in the Agreement on a Unified Patent Court, an international treaty between many of the EU Member States under the auspices of the EU, the contracting parties of which subject themselves according to Art 20 of the Agreement to EU law in its entirety and to respect its primacy.[28]

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[21] B de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in P Craig and G de Búrca (eds.) *The Evolution of EU Law* (3rd edn., Oxford: Oxford University Press, 2021) 187–227.
[22] Judgment in case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1, 12.
[23] Judgment in case C-6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66, 594.
[24] Judgment in case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49, 632.
[25] Treaty Establishing a Constitution for Europe [2004] OJ C 310, Art I-6.
[26] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Declaration 17 annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon [2008] OJ C 115.
[27] Judgment in case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)* ECLI:EU:C:2022:99, para. 49.
[28] Agreement on a Unified Patent Court [2013] OJ C 175/1.

Since EU Treaties are agreements between sovereign states, EU law and its primacy need to be adjusted to the framework of international law. The Court, having the ultimate power to interpret the Treaties, has made it very clear that EU law has precedence not only over the law of the Member States but also over any international law the Member States or the Union itself has committed to.[29] This means that not even a body of international law that binds a signatory state or the EU should it have signed the international treaty can overrule and put EU law autonomy in jeopardy.[30] The interpretation extends, for reasons of preserving the autonomy of EU law, beyond traditional public international law since Member States cannot engage in intra-EU bilateral investment treaties[31] either nor conclude an ad hoc arbitration agreement between a Member State and an individual[32] if EU law could be applied in those proceedings.

Within the legal systems of the Member States, the acceptance of EU law primacy largely depends on whether the country leans towards a monist or a dualist approach to international law. Whereas in monist countries EU law primacy has been relatively painlessly accepted, the same cannot be said of countries with a dualist tradition. There, an international treaty needs to be transposed to domestic legislation with a national measure before achieving direct applicability, notwithstanding the duty for a harmonious interpretation even in the absence of such implementing measures.[33] This results to a situation where the provisions of an international treaty have the force of a national law and in conflict of laws situations the usual resolution methods, such as *lex posterior derogat legi priori*, apply. This is so even when the national law contradicts the international law, in which case the national provision retains its force and the breach of international law becomes essentially a contractual dispute between the state and the treaty partners according to the principle of *pacta sunt servanda*. The great difference of EU law to other international treaties that the doctrines of direct effect and primacy revealed was that what was standard practice to give precedence to international treaties over national provisions only when it came to the legal relations between the parties of the treaty, namely the states involved, became upon the adoption of *Van Gend en Loos* and *Costa v ENEL*

[29] Judgment in Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999, para. 45.
[30] Opinion 2/13 of the Court (Full Court) - Adhésion de l'Union à la CEDH of 18 December 2014 ECLI:EU:C:2014:2454, para. 183.
[31] Judgment in case C-284/16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158.
[32] Judgment in case C-109/20 *Poland v PL Holdings Sàrl* ECLI:EU:C:2021:875.
[33] B de Witte (2021) 187, 201.

a rule to give an international treaty internal effect, so that the provisions of the treaty will have precedence over national law even in domestic proceedings between individual parties.[34]

2.2 Direct applicability and direct effect as conditions for primacy

A distinction must be made between direct applicability and direct effect of EU law. Should a provision of EU law be directly applicable, the provision becomes part of the Member State law without any national implementing measures, whereas if a provision of EU law has direct effect, an individual can base her claims directly on the provision against a Member State in national court proceedings.[35] In theory then, direct effect provides rights for individuals and is by definition directly applicable; yet, not all directly applicable measures necessarily provide individual rights. In practice, the use of the two concepts in the language of the Court has varied over time.[36] A proposal for clarification is to limit direct applicability only to be used *stricto sensu* in the context of regulations that are directly applicable in national law without any implementing measures; direct effect instead would refer to the capacity of the Union law to create individual rights that national courts must protect.[37] Yet, the understanding of direct applicability most often takes the broad sense to mean that an EU law provision is in force and must be applied in Member States' legal orders (thus as understood in the monistic doctrine of international law) but whether the provision can be invoked by an individual as a source of rights, that is, whether the provision has direct effect, is a separate question ultimately to be determined by the Court in its case law.[38]

Direct effect of EU law was first established in the seminal judgment of *Van Gend en Loos*. In the judgment, conditions were set for a provision of EU law to have direct effect. These were that the provision was clear and unconditional, provided a negative obligation, and was not qualified by any need for implementing measures in Member States.[39] The conditions have since been loosened so that national discretion or the need for national or Union implementing

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[34] B de Witte (2021) 187, 188–189.
[35] J A Winter, 'Direct Applicability and Direct Effect Two Distinct and Different Concepts in Community Law' (1972) 9(4) CMLRev 425–438.
[36] A Pohjalainen, 'Eurooppaoikeuden etusijaperiaate – matka 1960-luvulta 2010-luvulle' Edilex Lakikirjasto, version 1.0, published 4 January 2012.
[37] *Ibid.* and ref. 19 therein.
[38] A Rosas and L Armati, *EU Constitutional Law: An Introduction* (3rd edn., Oxford: Hart, 2018) 72–73.
[39] Judgment in case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1, first and second paragraphs of page 13.

measures do not preclude direct effect.[40] What is more, the reach of direct effect has expanded to cover both, often without clear distinction, offensive use as a source of new rights and defensive use as a protection against a conflicting national provision. Currently, direct effect appears to demand nothing more than that the provision should be "sufficiently operational" so that in can be applied in national courts.[41]

Whether a provision of EU law has direct effect depends on the type of the provision in question which can have different conditions for applicability and on the nature of the legal relations of the parties concerned.[42] Primary law, including Treaty articles and general principles that are the relevant types of law for this thesis, does in general have the capacity for direct effect. Although it is said to be possible to categorize those Treaty provisions that have direct effect and those that do not, the classification is apt for new interpretations of the Court.[43] For example, the direct effect of the second subparagraph of Art 19(1) TEU was only established[44] and confirmed[45] in 2021, given that the provision is now deemed to provide a clear, precise, and an unconditional obligation as to the result to be achieved.[46] This is exemplified in the Opinion of the Advocate General (AG) in one of the cases to be discussed later (to which the Court concurred), where the AG concludes that "[h]ence, the second subparagraph of Article 19(1) TEU may be invoked by an individual or by a national judge in order to verify whether a judicial decision was handed down by a court or a tribunal, which fulfils the requirements of an independent and impartial court or tribunal previously established by law".[47] The message is that the provision was interpreted to provide rights to individuals, here, the right to have verified whether a judicial decision was given by an independent and an impartial court.

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[40] W Phelan, '*Van Gend en Loos*, 1963 – Direct Effect' in *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge: Cambridge University Press, 2019) 31, 37–39.
[41] B de Witte (2021) 187, 192–194.
[42] By nature of the legal relations I refer to vertical direct effect (where state has obligations towards individuals) and horizontal direct effect (where individuals are obliged towards other individuals).
[43] B de Witte (2021) 187, 196.
[44] a) Judgment in case C-824/18 *A. B. and others (Nomination des juges à la Cour suprême - Recours)* ECLI:EU:C:2021:153, para. 146; b) Judgment in case C-83/19 *Asociaţia "Forumul Judecătorilor din România"* ECLI:EU:C:2021:393, para. 250.
[45] Judgment in case C-357/19 *Euro Box Promotion and Others* ECLI:EU:C:2021:1034, para. 253.
[46] The second subparagraph of Art 19(1) TEU was referred already in the judgment of the *Portuguese judges* case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117. However, it could be argued that the judgment did not yet afford direct effect to the provision but only direct applicability, cf. discussion in section 3.3.
[47] Opinion of Advocate General Tanchev in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:289, para. 94.

It is also to be noted that the roles of primacy and direct effect cannot be reversed: The need to ensure primacy cannot be used as grounds for giving an EU law provision direct effect.[48] Direct effect must stem from the provision itself. Thus, direct effect of an EU law provision is a condition precedent for its primacy over national law.[49] If the provision does not have direct effect, it cannot be invoked as a source of rights for an individual in national court proceedings even in case national law contradicts that provision.

When looking at case law, we can observe the relationship of primacy to direct applicability and direct effect to have developed over time. In *Internationale Handelsgesellschaft* (1970) nor in prior case law any qualifications for primacy had yet been formulated.[50] In *Simmenthal* (1978), the Court stated that "directly applicable Community provisions produce direct effect".[51] Thus, direct effect was something that automatically followed direct applicability. The Court has since adopted a so-called Nimz formula into frequent use, which is a hybrid of *Costa v ENEL* and *Simmenthal* and reads "[a] national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary by refusing of its own motion to apply any conflicting provision of national legislation, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means".[52]

As of today, there now seems to be very little difference whether the term direct applicability or direct effect is used as a condition for primacy, despite the theoretical divergence of the two concepts. The tide appears to have turned to favor direct effect in the language of the Court in case law. In *Filipiak* (2009), the condition for EU law primacy was clearly stated to be direct applicability.[53] In *Winner Wetten* (2010) the Court made seven references to direct applicability and one for direct effect.[54] In the very latest cases over the past few years the Court appears to exclusively refer to direct effect as a precondition for primacy of Union law. This was so at

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[48] Judgment in Case C-573/17 *Criminal proceedings against Daniel Adam Poplawski* ECLI:EU:C:2019:530, para. 60.
[49] *Ibid.*, para 68.
[50] Judgment in case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114.
[51] Judgment in case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49, 632.
[52] B de Witte (2021) 187, 205 and reference 85 therein.
[53] Judgment in case C-314/08 *Krzysztof Filipiak* ECLI:EU:C:2009:719, para. 82.
[54] Judgment in case C-409/06 *Winner Wetten* ECLI:EU:C:2010:503.

least in cases *RS*,[55] *Forumul*,[56] *Euro Box Promotion*,[57] *Poplawski*[58] and *W. Ż.*[59] I shall therefore assume, if the particular wording or circumstances do not suggest otherwise, that EU law has primacy when the provision at stake has direct effect.

2.3 Effect of primacy

2.3.1 Conformity by interpretation

EU law precedence manifests itself not only through primacy but even primarily through the obligation for consistent interpretation, also known as conforming interpretation. This means that national legislation, in all cases and even when prima facie in conflict with EU law, must be interpreted so as to conform to EU law. Conformity by interpretation follows directly from the Member States' duty to sincere cooperation expressed in Art 4(3) TEU. Of course, the said provision can be interpreted to also result in the doctrine of primacy. Nevertheless, case law as well as scholarly commentary has a clear consensus that the primary means for giving EU law precedence is by consistent interpretation and only if that is genuinely not possible, must EU law be given primacy in the below, disregarding sense.[60]

Duty to consistent interpretation extends further than primacy in that the former exists even for the provisions of EU law that do not have direct effect. Most importantly, unimplemented directives[61] and framework decisions do not possess direct effect but must still be taken into account when interpreting national law to achieve conformity to EU law.[62] Here, as understood with the preliminary ruling procedure under Art 267 TFEU, the rule is that the Court cannot interpret national law and neither can it adjudicate on its application, but instead the Court can

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[55] Judgment in case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)* ECLI:EU:C:2022:99.
[56] Judgment in case C-83/19 *Asociația "Forumul Judecătorilor din România"* ECLI:EU:C:2021:393.
[57] Judgment in case C-357/19 *Euro Box Promotion and Others* ECLI:EU:C:2021:1034.
[58] Judgment in case C-573/17 *Criminal proceedings against Daniel Adam Poplawski* ECLI:EU:C:2019:530.
[59] Judgment in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:798.
[60] B de Witte (2021) 187, 207 (reference 92 and the cited case law therein).
[61] Judgment in case C-106/89 *Marleasing v Comercial Internacional de Alimentación* ECLI:EU:C:1990:395, para. 8 of Grounds.
[62] a) Judgment in Case C-573/17 *Criminal proceedings against Daniel Adam Poplawski* ECLI:EU:C:2019:530, para. 109; b) Judgment in case C-105/03 *Maria Pupino* ECLI:EU:C:2005:386, para. 43.

and must provide all necessary guidance for the national court to do that interpretation and application.[63]

Conformity through interpretation is limited by the requirements of general principles of law such as legal certainty and non-retroactivity[64] and reaches its ultimate boundary at the point when achieving conformity would require *contra legem* reading of the national law.[65] This is the moment when national authorities must switch to primacy, provided that the relevant provision of EU law has direct effect.[66]

2.3.2 Genuine primacy

When conformity through interpretation cannot be reached, national authorities must give precedence to EU law through primacy. There are four characteristic features of primacy that are relevant when evaluating the effect of the doctrine: i) EU law has primacy irrespective of the hierarchical status of the contradicting national provision; ii) primacy applies in all national authorities, not only in courts; iii) the time independence of primacy in the sense that primacy does not depend on whether the conflicting national law was created prior or after the EU law in question and also in the sense of its urgency, meaning that primacy must take place at once and in general cannot wait for the national legislator to take corrective actions; and iv) primacy to EU law is given in the form of the duty of the national authority to ignore or "disapply" the contradicting national rule. Below I shall have a closer inspection on each of these characteristics.

The most contested feature of primacy is that the doctrine requires any piece of EU law, as long as it has direct effect, to be given priority over any, even constitutional, piece of national law. There is then a potential for a mismatch in the hierarchical status between the two complementary legislations, namely that of the Union and that of the Member State, with the consequence that even a provision of secondary EU law has precedence over national constitutional norms. Some qualifications for primacy still remain.

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[63] a) Judgment in joined cases C-95/79 and C-96/79 *Procureur du Roi v Charles Kefer and Louis Delmelle* ECLI:EU:C:1980:17, para. 5 of Decision; b) Judgment in case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* ECLI:EU:C:2008:54, para. 38.
[64] Judgment in case C-105/03 *Maria Pupino* ECLI:EU:C:2005:386, para. 44.
[65] *Ibid.*, para. 47.
[66] A Klip, 'Contra Legem' (2014) 22 EurJ Crime, Criminal Law and Criminal Justice 105, 112.

For one, although EU law has primacy over national constitution and fundamental rights provided therein,[67] this requires that the Union law and the Court itself respect and protect fundamental rights as they derive from the constitutional traditions common to the Member States.[68] This general principle of EU law has since been codified in Art 6(3) TEU. Yet, provided that EU law does guarantee sufficient protection of fundamental rights, its provisions take precedence over national law also when that national law provides protection of fundamental rights beyond that protected by the EU law.[69]

Other qualifications for primacy is that in order to claim primacy, the provision of EU law must lie within the scope of powers conferred to the Union and respect national constitutional identities. These are the issues of ultra vires and identity reviews to be discussed in section 2.5 and essentially imply that when EU law does not satisfy these tests, that law does not possess primacy, or any legal effects to that matter. For the Member States who have taken the stance of retaining Kompetenz–Kompetenz, the power to adjudicate on whether a Court's judgment lies ultra vires or respects national identity provides a final limit to EU law primacy.

That primacy binds all authorities of Member States is a well-established acquis in case law and does not give reason for more detailed analysis for the purposes of the thesis.[70]

Already stated in *Simmenthal*, national law that conflicts with EU law is rendered automatically inapplicable.[71] What does automatically mean? I can see two, not necessarily mutually exclusive, ways to understand this. The first, procedural way to understand the statement is that "automatically" simply means that the inapplicability must be taken into account by national authorities even if the issue is not explicitly raised by a party to the judicial or administrative proceedings. The other, substantive way would be to understand the expression to mean that the conflicting national provision is void *ex tunc*, that is, it has never been valid even when its invalidity was not recognized. This interpretation can be supported on an *a contrario* basis due to the facts of the case: the referring Italian lower court was waiting for a validity review of the

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[67] Judgment in case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114, para. 3 of Grounds.
[68] *Ibid.*, para. 4 of Grounds.
[69] Judgment in case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107, paras. 58–59.
[70] For example, cf. judgment in case C-824/18 *A. B. and others (Nomination des juges à la Cour suprême - Recours)* ECLI:EU:C:2021:153, para. 148.
[71] Judgment in case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49, 643.

national law from the constitutional court. Had the constitutional court found the law invalid, the effect of the finding would have taken effect only *ex nunc*.[72] It is therefore possible the Court was referring to the retroactive effect of the decision when it stated that the effect would be automatic. However, considering that the judgment also holds that "the national authorities are automatically forbidden to apply a national provision found to be incompatible with the Treaty",[73] as well as later developments in the case law as summarized below, systematic interpretation would suggest the former to be the established understanding. Automatic inapplicability is hence to be read in its procedural sense in that the conflicting national provision must be disregarded *ex officio*.

That the Court cannot annul national laws or administrative measures of Member States itself but can only give declaratory judgments was established very early on under the auspices of the European Coal and Steel Community.[74] The nature of disregarding national provisions of law when in conflict with EU law was specifically addressed in *IN.CO.GE*.[75] The facts of the case related to Italian tax law that was deemed to be against the Union law and consequently a question arose whether the tax was to be refunded to the persons of whom the tax had already been levied.

In the specific circumstances, the duty to disapply national tax law was clear. However, the Advocate General was very careful to respect the procedural autonomy of the Member States and instructed the Court to leave the effectuation of disapplication for the various legal systems of the Member States, where concepts such as annulment or invalidity might have different meaning.[76] Indeed, he pointed out that already in *Lück*,[77] a judgment from 1968, the issue of whether disapplication is enough or declaration of void *erga omnes* is required in case of conflict between national and Union law, the Court replied that it was for the referring court to choose the appropriate means from those offered by domestic procedural law to ensure the

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[72] W Phelan, '*Simmenthal*, 1978 – Obligations of "Lower" National Courts' in *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge: Cambridge University Press, 2019) 171, 172.
[73] Judgment in case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49, 633–634.
[74] Judgment in case C-6/60-IMM *Jean Humblet v Kingdom of Belgium* ECLI:EU:C:1960:48, 568.
[75] Judgment in joined cases C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl and others* ECLI:EU:C:1998:498.
[76] Opinion of Advocate General Ruiz-Jarabo Colomer in joined cases C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl and others* ECLI:EU:C:1998:228, paras. 17–19.
[77] Judgment in case C-34/67 *Firma Gebrüder Lück v Hauptzollamt Köln-Rheinau* ECLI:EU:C:1968:24.

individual rights provided by Union law.[78] Nevertheless, the AG engages in discussion on the possible effects of disapplication and strongly resists the Commission's proposal to have the national law declared non-existent; only administrative measures can become non-existent (*ex tunc*) whereas adopted law can only be invalidated or found illegal but not in the sense of non-existence.[79] This would be especially so in for example tax law, where the law, despite being in conflict with Union law, has existed and certainly produced legal effects, and claiming such laws to be non-existent would be utter legal fiction.[80] The AG notes that the Court can and should limit the temporal effect of its rulings in the interest of legal certainty, which would become an inconceivable practice should the Court declare a law non-existent.[81] Therefore, nothing in EU law prevents reclassification of the previous legal relations of subjects on the basis of the Court's findings but the matter remains for the domestic court or legislature to resolve.[82]

The Court likewise dismissed the Commission's proposal and concurred with its AG in that *Simmenthal* is not be read so that disapplication would mean annulment of national law.[83] Accordingly, the Court deemed the consequences of disapplication to be left to the national court under conditions of conforming to the principles of equivalence and effectiveness, namely that the national provisions that determine repayment of the levied tax must not be less favorable than those governing similar domestic acts and that the national provisions do not render virtually impossible or excessively difficult to exercise the rights derived from Union law.[84] Unlike the AG, The Court did not discuss the theoretical effects of declaring a national law non-existent or other such categories of "sanctioning" domestic law but left it all together for national authorities. The case indicates the Court's willingness to respect national procedural autonomy, which, though not absolute, can limit the retroactive effect of the finding a national measure to conflict with Union law.[85] Overall, the Court settled for taking a very practical approach, focusing more on substantial issues and not touching too heavily on

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[78] Opinion of Advocate General Ruiz-Jarabo Colomer in joined cases C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl and others* ECLI:EU:C:1998:228, para. 21.
[79] *Ibid.*, paras. 29–40.
[80] *Ibid.*, paras. 41–42.
[81] *Ibid.*, paras. 43–44.
[82] *Ibid.*, paras. 53–54.
[83] Judgment in joined cases C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl and others* ECLI:EU:C:1998:498, para. 21.
[84] *Ibid.*, para. 25.
[85] *Ibid.*, para. 29.

procedural ones as long as those do not discriminate against EU law, by for example setting tighter limitation periods for EU rights than for similar rights of domestic law origin.[86]

The principle of procedural autonomy in the context of disapplication of a national measure has since been confirmed on many occasions. In *Filipiak* the Court stated that the national court, in case of a conflict between a provision of national law and a directly applicable provision of Union law, has to resolve the conflict by refusing to apply the conflicting national provision and not by declaring the national provision invalid.[87] This is so even if the national court would have the competence to proclaim such a judgment. The Court then specified the acquis in that incompatibility of national law with EU law does not render that piece of national law non-existent, but that the national court has a duty to disapply the conflicting national provision, subject to the condition that the disapplication does not weaken the court's capacity to protect individual rights provided by EU law.[88]

The teachings of *Simmenthal*, *IN.CO.GE.* and *Filipiak* are thus that the effect of primacy is to render the conflicting national law automatically non-applicable but not invalid nor non-existent. Also, the Court cannot oblige national courts to invalidate the domestic provision, even if the referring court was entitled to do so by national law. This indicates that the Court has an interest to ensure the efficacy of EU law, and not mind if there is a conflicting act in Member States as long as it is not applied. By this paradigm, namely by not declaring or demanding the referring court to declare the national law null and void, the Court avoids direct conflict with national constitutional or superior courts who typically retain the exclusive competence to invalidate domestic laws.[89]

In many cases, the practical difference between disapplication and annulment are few and far between. Some exceptions do occur. When EU law aims to fully harmonize national legislations, the conflicting domestic law must be modified or repealed and mere disapplication is not enough.[90] What is more, disapplication in other cases is just a minimum requirement set

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[86] A Biondi, 'The European Court of Justice and certain national procedural limitations: Not such a tough relationship' (1999) 36 CMLRev 1271, 1282–1283.
[87] Judgment in case C-314/08 *Krzysztof Filipiak* ECLI:EU:C:2009:719, para. 82.
[88] *Ibid.*, para. 83.
[89] T Beukers, 'Case Law. A. Court of Justice. Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, Judgment of the Court (Grand Chamber) of 8 September 2010, not yet reported' (2011) 48 CMLRev 1985, 1994.
[90] B de Witte (2021) 187, 206 and reference 89 therein.

by the Court; the national legislator can annul the law on voluntary basis although what appears to be more typical, is that courts annul administrative measures based on national law that is inconsistent with EU law while the legislator and /or the constitutional court retains the law valid. Should the provision of EU law that precludes the application of the national law cease to exist by expiry or by acts of the EU legislator, the domestic law is still in existence and ready to be applied again.[91]

Apart from requiring direct effect, primacy as formulated in *Simmenthal* is unconditional and absolute as it requires a lower national court to disapply a conflicting national provision irrespective of the opinion of superior or constitutional court. Already prior to *Simmenthal* the Court had confirmed that a national court has a duty to disapply a conflicting national law without waiting for any corrective measures of constitutional basis[92] and subsequently to *Simmenthal* that national courts may not allow any domestic law to prevent granting interim relief on grounds of EU law.[93] In *Winner Wetten*, the conflict between the Court and a national constitutional court were taken to the extreme. In the case, a provision of German ordinary law was found to be inconsistent with the German Basic Law, the constitution of Germany, as well as conflicting with EU law.[94] Although the Federal Constitutional Court, and a lower ordinary court which set aside primacy in favor of the order of the constitutional court and made this decision without referring the case to the Court, would have liked to temporarily withhold the unconstitutional law valid in order to prevent a state of *non liquet* until corrective measures were taken by the legislator, the Court did not accept that.[95] What sets *Winner Wetten* apart from the referenced cases above is that the problem was not that the constitutional court did not invalidate the conflicting provision (as it never is since the problem can be resolved by disapplying the provision) but that the constitutional court specifically ordered the referring court to apply the provision, despite it being incompatible with the constitution; the clash between EU law demanding disapplication and national constitutional court, ordering the application, could not be more direct.[96] Yet, EU law primacy prevailed. Accordingly, primacy is very unforgiving as it may not be derogated from even temporarily and requires that the

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[91] B de Witte (2021) 187, 206.
[92] Judgment in case C-48/71 *Commission v Italy* ECLI:EU:C:1972:65, para. 6 of grounds.
[93] Judgment in case C-213/89 *The Queen v Secretary of State of Transport, ex parte Factortame* ECLI:EU:C:1990:257, para. 21.
[94] Judgment in case C-409/06 *Winner Wetten* ECLI:EU:C:2010:503.
[95] T Beukers (2011) 1985, 1986–1987.
[96] *Ibid.*, 1995.

referring court sets aside those national provisions that are in conflict with EU law immediately when that conflict is revealed irrespective of considerations of legal gaps and irrespective of the rulings by the national constitutional court on the matter.[97]

One more terminological consideration between disapplication and annulling national measures must be made and that relates to how the Court occasionally expresses primacy by stating that EU law precludes a national measure. Though primacy is independent of whether the conflicting national law was adopted prior or subsequent to the Union law, primacy, when interpreted by the wording in *Simmenthal* could be taken to be even stricter *ex ante* than *ex post*: the judgment held that "[EU law] preclude[s] the valid adoption of new national legislative measures to the extent to which they would be incompatible with [EU law]".[98] The word "preclude", the dictionary definition of which is to prevent something from happening, thus has in ordinary use a time-dimension. Also, preclusion is a concept of procedural law and means that the preclusion denies a party from doing something (prior to the actual event), for example presenting a piece of evidence or invoking a certain ground for her case. One could argue then, that when a national measure is precluded by Union law, that would mean invalidation of the measure *ex ante*, prior to its adoption. However, I have found no support for this interpretation in case law but rather would suggest that when EU law precludes a national measure, it is to be understood that the Court has found an inconsistency in the national measure with EU law but says nothing about the consequences of the finding. Preclusion thus has a reduced meaning in EU law and a finding of such leaves the inconsistency a matter for the national authorities to remedy. In principle then, it could be possible to allow adoption of legislation conflicting with EU law provided it is only applied in cases that lie outside the scope of EU law (disapplication *ex ante*). This could be even codified in the law itself.

As a recent example, in *Tele2 Sverige* the Court found EU law to preclude Swedish and British national legislations, which were implementing a prior EU directive and that in substance were close to identical with the corresponding, later invalidated Data Retention Directive.[99] The grounds for the annulment in the latter and preclusion for the former were that the measures

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[97] Similarly to *Winner Wetten*, a lower court was not bound in *Elchinov* to a decision of the supreme court on the grounds of EU law primacy, cf. judgment in case C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa* ECLI:EU:C:2010:581.
[98] Judgment in case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49, 632.
[99] Judgment in joined cases C-203/15 *Tele2 Sverige AB v Post- och telestyrelsen* and C-698/15 *Secretary of State for the Home Department v Tom Watson and others* ECLI:EU:C:2016:970.

provided by the acts were disproportionate when balanced against the restrictions on fundamental rights provided by the Charter of Fundamental Rights of the EU (CFR, later Charter) the measures would have resulted in. For the sake of the argument here, the important part is what was not said in the judgment: The possibility for allowing the national law to come into force in such a limited way that it would be only applied in cases outside the field of application of the Charter, that is, when the Member States were not applying or implementing EU law, such as in wholly internal matters or matters between a Member State and a third country, was not considered at all. Contrary to this scenario, the case could represent an example of a harmonizing legislation that would indeed require complete annulment, even if this was not explicitly expressed in the judgment. Nevertheless, the Court did not use the term primacy once in the judgment, but satisfied to hold that the Union law precluded the said legislation.

Very recently, the Court has given a similar judgment, where a national law was precluded on the grounds that the law would have breached the second subparagraph of Art 19(1) TEU.[100] The case however provides little support for the argument above in that all possible applications of the national law would be related to EU law since the precluded law would have denounced courts in Romania to examine the conformity of legislation to EU law if that legislation was declared constitutional by the domestic constitutional court, so that there simply was no room for applying the law outside of the scope of EU law. Still, the Court reminds the effect of primacy to be the duty to disapply any national, unilateral measure that is inconsistent with EU law.[101]

To conclude, the effect of primacy, according to the firmly established view, is that the conflicting national law must be disapplied with the meaning that the national court may not apply the law to the extent that it in any way prevents, diminishes or delays the full effect of EU law but does not annul the national law. This means, in general, that if the national law is to be applied in a field that is not subject to EU law, the national law retains its full legal force. Should two conditions be fulfilled, namely that the inconsistency cannot be remedied by interpretation of national law and that the EU law provision has direct effect, primacy is absolute and cannot be diminished by any act of the Member States. Instead, the effect of primacy is much less absolute and may be left open for national authorities to react upon.

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[100] Judgment in case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)* ECLI:EU:C:2022:99.
[101] *Ibid.*, para. 55.

2.4 Primacy and supremacy

A long-standing issue in EU law scholarship has been the doctrinal debate whether EU law possesses supremacy or primacy, the latter term being far preferred by the Court. Supremacy, in its hierarchical model entails EU law to be all-encompassing, absolute, unconditional and a necessity for an ever-deepening integration and federal unity.[102] The concept has features to which the Court seems to adhere to, like that the notion that each and every EU law provision has precedence over any national provision, the ultimate adjudicator of the Union competence is the Court itself, and the duty for consistent interpretation. Where there is a deviation is that the model would give only transitory significance to direct effect since all EU law is valid law of the land in any case, whereas the Court in practice has retained direct effect an alive and dynamic doctrine. Also, the Court has not interpreted the relationship of EU law and national law as tightly unidirectional but is more open to dialogue than proclaimed by hierarchical supremacy as such.

A somewhat modified model is the conditional supremacy, that, though a little fuzzy and ambiguous, holds much the same paradigms but only under the conditions that the EU acts within the competences conferred on it and along the principles of EU law, such as subsidiarity and proportionality while respecting national constitutional identities.[103] The model contains primacy to result from supremacy (the source of which is the national constitutional recognition) and assigns direct effect to only have its narrow meaning, that of creating rights to individuals. The model holds the precedence of all EU law, though not deriving from direct effect but from supremacy itself. A distinct feature between the two idealized models is that whereas unconditional supremacy requires complete invalidation of a conflicting national law, its disapplication is sufficient under the conditional hierarchical model.

The heterarchical model on the relationship of EU law to national law is clearly different. In the model, the two systems of law are considered horizontal, not vertical and giving EU law precedence is always called primacy. Supremacy as a term is reserved to the internal use of the corresponding, autonomous legal systems: a constitutional norm is superior to an ordinary piece

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[102] M Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter' (2011) 17 ELJ 744, 746–747.
[103] *Ibid.*, 747–750.

of law within the legal system of a Member State and a Treaty article is superior to an article in secondary law within the system of EU law. Still, neither of the latter is superior to national legislation but must be given primacy in what can be called a trans-systemic doctrine. The consequences of primacy are left to the national authorities to take care of, and thus, whether the domestic measure is to only be disapplied or invalidated is a question for the national procedural autonomy to resolve. The two legal systems, that of Member States and that of EU, can never invalidate the laws of the other.[104]

The function of primacy in heterarchical model is reduced to be only a tool for conflict resolution; this is to say, EU law is only applied, but must be applied, if there is a conflict between national and EU law, and only under conditions of direct effect and conferred competence. While direct effect has a role of a trigger to primacy, the competence review is resolved by a supranational organ of the Union, the Court and the constitutional body of the Member State, each within its own autonomous sphere of jurisdiction under the assumption of respect of constitutional pluralism and dialogue of the courts due to the voluntary adjoining to the Union and the principle of sincere cooperation. The heterarchical model thus leaves the issue of Kompetenz–Kompetenz without a razor-sharp solution; the Court has the adjudicative capacity to resolve the issues of competence, subsidiarity and proportionality and this must be respected by national courts as long as their "irreducible epistemic cores" are not infringed. The right of constitutional courts to guard the boundaries of a state's legal order is thus recognized as well as a state's right to withdraw from the Union under its own constitutional principles as are the corresponding rights of the Union's Court and its right to restrict Member State rights in case of serious breaches of Union values.[105]

Unlike in hierarchical models that result in rivalry and distrust,[106] voluntarism is of critical importance for the heterarchical model, the existence of which depends on mutual amicable openness of the constitutional organs of each party. Direct effect in the heterarchical model manifests in a clear distinction between Union acts in that regulations function as tools for unifying Member State legislation whereas directives are instruments not only for management of diversity but for its preservation.[107] To understand the heterarchical model of EU law, the

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[104] *Ibid.*, 750–751.
[105] *Ibid.*, 752–753.
[106] *Ibid.*, 762.
[107] *Ibid.*, 754.

preferred one by the Court[108] and the basis for constitutional pluralism, one must release of the territorial doctrine of international law, namely the presumption that there is just one law in force in any one state with international law operating between states, and accept that there are two, the national and the EU law, coexisting in any one Member State operating simultaneously and view primacy as a necessary doctrine to coordinate the application of the two jurisdictions.

A yet different paradigm of the two concepts is that primacy is purely a conflict-resolving method related to individual rights whereas supremacy is a constitutional concept relating to the relations of institutions.[109] When viewed from this angle, the Court has interpretive, judicial Kompetenz–Kompetenz as conferred by Arts 263 and 267 TFEU and apply primacy when exercising that competence, while Member States retain legislative competence through the political, legislative process of the EU (with the possibility to amend the Treaties) and exercise national and democratic sovereignty.[110] Supremacy then relates to a court's competence to perform an ultra vires review, that is, whether it is the Court of the European Union or a national constitutional court that has the ultimate competence for performing such a review.[111] Accepting this paradigm , neither *Landtová*,[112] *Gauweiler*,[113] *Ajos*,[114] *Taricco*[115] (later, *Taricco I*) and its follow-up case *M.A.S. and M.B.*[116] (later, *Taricco II*) nor *Weiss*[117] and the respective responses by national courts, all EU law cases where primacy was challenged by national courts that considered national constitutions as Kelsenian *Grundnorm* to which base their analysis, were about primacy but supremacy.[118] The primacy-supremacy dichotomy, as argued by Tuominen, indicates the Court to favor hierarchical models of interaction where Member States, through their constitutional courts, accept EU law primacy but only insofar and as so long as their political legislator, who remain supreme "Masters of the Treaties", so will.[119]

Whereas Avbelj presents primacy and supremacy as alternative ways of understanding the

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[108] *Ibid.*, 760.
[109] T Tuominen, 'Reconceptualizing the Primacy–Supremacy Debate in EU Law' (2020) 47 Legal Issues of Economic Integration 245–266.
[110] *Ibid.*, 248.
[111] *Ibid.*, 254.
[112] Judgment in case C-399/09 *Marie Landtová v Česká správa socialního zabezpečení* ECLI:EU:C:2011:415.
[113] Judgment in case C-62/14 *Peter Gauweiler and others v Deutscher Bundestag* ECLI:EU:C:2015:400.
[114] Judgment in case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* ECLI:EU:C:2016:278.
[115] Judgment in case C-105/14 *Criminal proceedings against Ivo Taricco and Others* ECLI:EU:C:2015:555.
[116] Judgment in case C-42/17 *Criminal proceedings against M.A.S. and M.B.* ECLI:EU:C:2017:936.
[117] Judgment in case C-493/17 *Proceedings brought by Heinrich Weiss and Others* ECLI:EU:C:2018:1000.
[118] T Tuominen (2020) 245, 254–256.
[119] *Ibid.*, 263.

relationship of EU law and national constitutions, Tuominen proposes them to cover altogether different domains of law and the question whether EU law has primacy or supremacy becomes akin comparing apples to pears. This is an alluring approach for a legal scholar at least, as it allows him to study primacy as a concept of procedural law and leave aside the politico-legal conceptualisations of supremacy and state sovereignty within the EU. Yet, it is also a risky analysis, if adopted by courts. To demonstrate, in *Ajos*, the Danish Supreme Court concluded a conforming interpretation to be impossible without *contra legem*, but instead of turning to primacy, it resorted to supremacy of Danish constitution, despite clear guidance offered by the Court.[120] By not acknowledging heterarchy and constitutional self-restraint, the Danish court took on a "neo-sovereignist agenda" and in the process risked turning EU law from an autonomous legal order to a residual one.[121]

To conclude and simplify, if EU law is to be considered to have primacy, the Court has a heterarchical (horizontal) relationship to national courts and can only demand disapplication of national norms in case of irresolvable conflict with EU law. If instead EU law is considered superior, the Court has a higher status in hierarchy and can demand the invalidation or annulment of national provisions. In the latter case, the national court can only invoke grounds of ultra vires or similar review if it wants to adhere to withholding the national provision. Thus, such reviews have had a significant input in questioning the fundamental basis of primacy.

2.5 National identity and common constitutional tradition

As illustrated above by the Danish response to *Ajos* and the judgment of the Polish Constitutional Tribunal referred to in section 1.1, primacy of EU law can only have binding effect provided the national authorities de facto accept primacy and implement and enforce the judgments they get from the Court. Even if they do, it is in the nature of the constitutional pluralism that not all Member States apply primacy in an identical manner and the constitutional nature of the particular legal system has yielded various issues in its adoption. These are grounded on two principles of the Union law. First, Art 4(2) TEU obliges the Union to respect the equality of Member States and their national constitutional identities. This duty derives its

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[120] M R Madsen, H P Olsen and U Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation' (2017) 23 ELJ 140–150.
[121] *Ibid.*, 150.

contents from domestic constitutions and not for example from cultural values.[122] Further, not any particular feature is protected, rather the article qualifies the protected area to fundamental structures and essential state functions. The article is therefore not to be considered a general exemption clause for derogating from Treaty obligations but can, according to authors' reading of case law, relativize primacy through proportionality analysis.[123] Second, Art 6(3) TEU codifies fundamental rights as they result from constitutional traditions common to the Member States as a general principle of law. These doctrines have formed a basis for an interplay between the constitutions of the Member States and that of the Union that affects how primacy is conceived.

Two broad categories can be devised: Those Member States that accept primacy as an integral and defining consequence of their EU membership and those that do recognize primacy but only within the limits set by their own constitutions. Whereas primacy has historically not been a fundamentally questioned doctrine in the former states, especially for states that joined after the doctrine was already part of acquis and who had the opportunity to prepare themselves, such as Finland,[124] states such as Germany and Italy have had a more complicated relationship to primacy. The latter of course do recognize their duty to satisfy the international obligations they have freely committed to, but contend the status of EU law, including primacy, to be a matter of their domestic legal order.[125] Though these states tend to accept primacy over ordinary national laws, they struggle to accept primacy over constitutional norms.[126] In particular, the Federal Constitutional Court of Germany (FCC) has retained itself the capacity to conduct a validity review on EU law on fundamental rights basis, based on ultra vires evaluation and on national identity basis.[127] Accordingly, the FCC has ever since from its *Solange I*[128] and *Solange II*[129] judgments (of 1974 and 1986, respectively) via the *Lisbon Decision*[130] (2009) all the way to the *PSPP judgment*[131] (2020) withheld itself the power for an ultra vires review of the competence of the Court and reserved the competence to review that EU acts respect the

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[122] A von Bogdandy and S Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' (2011) 48(5) CMLRev 1417–1454.
[123] *Ibid.*, 1445.
[124] J Salminen, 'Euroopan integraatiooon sitoutuminen osana valtiosääntöidentiteettiä' in *Suomen valtiosääntö ja Euroopan unioni* (Helsinki: Unigrafia Oy, 2019) 86–92.
[125] de Witte (2021) 187, 188.
[126] *Ibid.*, 215.
[127] K Tuori, *European Constitutionalism* (Cambridge: Cambridge University Press, 2015) 90.
[128] BVerfGE 37, 271 2 BvL 52/71 Federal Constitutional Court judgment of 29 May 1974.
[129] BVerfGE 73, 339 2 BvR 197/83 Federal Constitutional Court judgment of 22 October 1986.
[130] 2 BvE 2/08 Federal Constitutional Court judgment of 30 June 2009.
[131] 2 BvR 859/15 Federal Constitutional Court judgment of 5 May 2020.

German constitutional identity. Hence, constitutional courts consider constitutional identity and the core values therein to lay the limits to EU law primacy but avoid direct collision by exposing to judicial dialogue with the Court, in particular through Art 267 TFEU. Art 267 TFEU is therefore not only a pragmatic tool for the referring courts to help resolve cases, but an instrument for effecting constitutional pluralism.

Constitutional pluralism was put to test in *Taricco I*. In the case, an Italian criminal law provision on limitation periods on certain tax frauds, classified as substantive criminal law provisions under the Italian legal order, was in conflict with an EU law provision (Art 325 TFEU) and primacy would have required the referring court to disapply the domestic law resulting in retroactive criminal law proceedings.[132] Thus the Court was focused on protecting the financial interests of the Union and the "*Taricco* rule" crafted in its judgment would have produced an *in peius* effect, harming the defendant against the principle of legality in criminal proceedings.[133] This was unacceptable for the Italian Constitutional Court (ICC). The ICC then referred similar cases to the Court in *Taricco II* with an implicit ultimatum that it would apply the doctrine of *contralimiti* ("counterlimits"), effectively an Italian version of constitutionality review, should the Court retain its holding and not respect Italian constitutional identity.[134] The Court amicuously replied that the disapplication of conflicting Italian criminal law provisions was not needed should it result in infringing the principle of legality.[135]

The "*Taricco* saga" is seen by many as, first of all, a landmark case where both a national constitutional court and the Court subjected themselves to dialogue and secondly, an opening of the Court to loosen its requirement of absolute primacy of EU law. True as the former might be, the latter hypothesis is more questionable. The judgment in *Taricco II* can be read that it was not due to the Italian constitutional identity that made the Court to withdraw from its requirement of disapplication as presented in *Taricco I*, but instead, after hearing the circumstances in more detail in the referral of the Italian Constitutional Court leading to *Taricco II*, protection of the common constitutional principle of legality.[136] The Court then set the duty

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[132] M Bonelli, 'The *Taricco* saga and the consolidation of judicial dialogue in the European Union' (2018) 25(3) Maastrich Journal of European and Comparative Law 357–373, 359–365.
[133] G Piccirelli, 'The '*Taricco* Saga': the Italian Constitutional Court continues its European journey' (2018) 14 EurCLR 814, 818.
[134] *Ibid.*, 816–817.
[135] Judgment in case C-42/17 *Criminal proceedings against M.A.S. and M.B.* ECLI:EU:C:2017:936, para. 62.
[136] M Bonelli (2018) 357, 365–368.

to correct the situation to Italian lawmakers. In other words, the Court did not worry about the consequences disapplication would have rendered to the national legal system nor did it care had specifically Italian constitutional identity been disregarded, but did care that disapplication of national criminal law would have infringed an EU principle of law deriving from the common constitutional tradition. I would argue that it was therefore not a case that the Court would have reacted to the threats of the ICC of using the counterlimits doctrine that made the Court to "give up" on primacy. Rather, the usual consequence of primacy, disapplication, would have resulted in breach of another source of EU law of equal or even higher hierarchy than Art 325 TFEU, the general principle of legality. That principle would not have had full *effet utile* had the national law been set aside. Nevertheless, the Court was open to consider the arguments of the Italian Constitutional Court and, by reformulating its preliminary referral questions, transposed the worries on Italian identity to worries on common principle of law.

As exemplified by the *Taricco* cases, the preliminary reference system allows constitutional courts to engage in dialogue with the Court and express their concerns on national identity issues. Conversely, since no national court, constitutional or otherwise, has the right to prevent, delay or intervene a preliminary ruling request by a referring court, the mechanism provides a route for lower courts to by-pass national constitutional courts, often perhaps inadvertently.[137] Consequently, the national constitutional court will only get the opportunity to react, if at all, after the Court has given its judgment, when it may have to resort to accepting the judgment, perform an ultra vires type of a review, that was the action of the FCC to *Gauweiler*[138] and *Weiss* judgments[139] or propose the Court to modify its position with a new preliminary ruling request, the reaction of the Italian Constitutional Court to *Taricco I*. The latter option was perhaps a lesson learned from the Court's treatment of the Czech Constitutional Court in *Landtová*.[140] Still, presenting such a new preliminary referral might not be a general and practical solution for the dialogue since the constitutional court must bring in novel, convincing arguments or facts of the case or of national law that makes the ruling request to have a truly

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[137] *Ibid.*, 368.
[138] A Pliakos – G Anagnostaras, 'Saving Face? The German Federal Constitutional Court Decides *Gauweiler*' (2017) 18(1) German Law Journal 213–232.
[139] Press release of the Federal Constitutional Court No. 32/2020 of 5 May 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html.
[140] M Bobek, '*Landtová*, *Holubec*, and the Problem of an Uncooperative Court: Implications for the Preliminary Ruling Procedure' (2014) 10 EurCLR 54–89.

new question of interpretation of EU law since the Court is unwilling to act as a court of appeal for its own previous judgments.[141]

The *Gauweiler* and *Taricco II* show how constitutional courts can propose if not even guide the Court to find a mutually acceptable solution so that national identities in the form of common constitutional tradition and EU law primacy can be respected simultaneously. But this is only possible if there is such a constitutional court. In Finland there is not. Constitutionality of legislation is controlled at an abstract level by a parliamentary committee (that cannot refer to the Court under Art 267 TFEU) prior the enactment of the legislation and ordinary courts *in concreto* in their day-to-day proceedings, where, should the national law be imminently against the constitution, the courts have a duty to disapply the ordinary law. The courts in Finland are therefore in principle accustomed to the terminology of disapplying and could exercise the doctrine also in respect of EU law. Yet, the situation is so rare in practice, and disencouraged by the legislator, that the courts rarely do that and lack the capability not only to protect the constitutional identity of Finland but also to contribute to the development of the common constitutional tradition to such a degree that the relationship of EU law to Finnish law approaches that of hierarchical supremacy rather than heterarchical primacy.[142]

Counter to the thesis, an argument can be made that the Finnish system performs constitutional review of EU law in a more discrete manner than preliminary ruling referrals by Art 267 TFEU and at an earlier phase of legislation so that there is the said contribution but only its perception is more difficult.[143] For example, on government's proposal for the implementation of General Data Protection Regulation[144] the Constitutional Committee of the Parliament cited constitutional identity as a contributing, though a narrowly applicable, factor on the resolution of a conflict between EU law and institutional solutions in a Member State.[145] The Committee then resolved the issue by requiring changes to the legislative proposal based on conclusions it drew from existing case law instead of referring the question to the Court, which it could not

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[141] M Bonelli (2018) 357, 369.
[142] M Puumalainen, 'EU:n etusijaperiaatteesta Suomen valtiosäännössä' (2019) Lakimies 234, 237–238.
[143] T Ojanen, 'Vastaväittäjän lausunto Mikko Puumalaisen väitöskirjasta "EU:n etusijaperiaatteesta Suomen valtiosäännössä"' (2019) Lakimies 240, 245–246.
[144] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.
[145] PeVL 14/2018 vp. Perustuslakivaliokunnan lausunto hallituksen esityksestä eduskunnalle EU:n yleistä tietosuoja-asetusta täydentäväksi lainsäädännöksi, 14.

do.[146] In another example, in its statement on pandemic recovery plan[147] the divided Constitutional Committee concluded, rather aggressively as it did not set any conditions such as a dialogue with the Court or the EU act lying manifestly ultra vires, that the plan represented such a major derogation from the Treaties that it could only be approved under special national legislative procedure requiring a qualified majority support from the Parliament.[148] This was opposed by the overwhelming majority of the opinions of legal experts who, alongside with the dissenting minority of the Committee members, were in support of an ordinary procedure requiring only a simple parliamentary majority.[149]

The Finnish examples show, in my opinion and in accordance to the argument of Puumalainen, that when the referral system of Art 267 TFEU is not in use, the national legislator may have more degrees of freedom to take constitutional identity into account when balancing that to the requirements of EU law but the outcomes achieved are in constant risk of being in conflict with EU law. What is more, though such arguments on constitutional identity may retain occasional significance in internal affairs of a Member State, they hardly form a part of the common constitutional tradition, a lot stronger ground of justification in cases a national measure appears to be in conflict with EU law. To reformulate, there is, as demonstrated by the *Taricco* cases, a difference between constitutional identity and common constitutional tradition. The former is a limitation to the competences of the Court from the perspective of Member States whereas the latter is a source of law, something that can be used as grounds when adjudicating on hard cases. A domestic system that does not refer to the Court on possible conflicts of EU law with its constitutional law never feeds in to the common constitutional tradition and the conflicts are doomed to remain as national curiosities. The issues do not contribute to the acquis of the Union in the form of case law and the precedent value of such conflicts remain negligent. Thus, having a constitutional body that is unable to refer cases to the Court may provide a false sense of

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[146] *Ibid.*, 15.
[147] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L 424/1.
[148] PeVL 14/2021 vp. Perustuslakivaliokunnan lausunto hallituksen esityksestä eduskunnalle Euroopan unionin omien varojen järjestelmästä annetun neuvoston päätöksen (EU, Euratom) 2020/2053 hyväksymisestä, 12–13.
[149] In the Finnish system of *ex ante* constitutional review, when the Constitutional Committee finds a legislative proposal to require a simple majority, it means the Committee considers the proposal to be consistent with the Constitution or that the transfer of competence to an international organization is less than significant. Conversely, should the Committee find that the proposal requires a qualified majority of the Parliament, it considers the proposal to derogate from the Constitution or transfer a significant amount of competence to an international organization.

"quasisovereignty" for the national legislator, but it could be claimed that the arrangement does not conform to the duty of sincere cooperation as it precludes the adjudication of the Court.

This argument is somewhat moderated by Lenaerts who suggests that the judges of the Court from different Member States, despite not representing their country of origin, contribute to the understanding of national identities in the Court.[150] Even if so, such contribution would be weak and sporadic. A stronger argument, also expressed by Lenaerts, is the habit of the Court to engage in comparative legal research that intends to identify national identities and recognize any common constitutional tradition that may exist.[151] This comparative interpretation may even be considered a fifth method of interpretation alongside the textual, historical, systematic and teleological ones. Through the comparative method, even a non-referred conflict of national and EU law may be brought to the sphere of common constitutional tradition.

To conclude, there prevails a need for a heterarchical dialogue between the constitutional courts (or any court that interprets constitution) of the Member States and the Court to find a mutually acceptable solution for the interest of the Court to secure EU law effectiveness through primacy and for the national court to ensure protection of constitutional identity preferably in the spirit of comity. The Court is nevertheless strict in its demands for primacy and the Member States are required to give full effect to EU law by whatever means it takes.

2.6 A synthesis on primacy

Having discussed the perceived but not necessarily real moderating effect of national constitutional identity to primacy, a revisit to the primacy – supremacy distinction is necessary to clarify the argument. Dougan, in his seminal paper, provided a synthesis on the relationship of supremacy, primacy and direct effect by proposing EU law supremacy to be understood through two alternative models: either as primacy or through the trigger model.[152] In the former, primacy and supremacy are synonymous and represent a constitutional fundamental of the EU

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[150] K Lenaerts, 'Concluding remarks by Mr Koen Lenaerts, President of the Court of Justice of the European Union' (2021) in *EUnited in diversity: between common constitutional traditions and national identities* (Conference proceedings, Riga, Latvia, 2–3 September 2021) 231, 232–233.
[151] K Lenaerts, 'The constitutional traditions common to the Member States: the comparative law method' in *EUnited in diversity: between common constitutional traditions and national identities* (Conference proceedings, Riga, Latvia, 2–3 September 2021) 35–43.
[152] M Dougan, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy' (2007) 44(4) CMLRev 931–963.

that penetrates all legal relations between the Union and its Member States. Primacy exists and takes precedence of its own force producing exclusionary effects. These effects result from EU provisions setting aside incompatible national provisions irrespective of what are the consequences for the national legal system, possibly leaving a legal vacuum that the legislator then needs to fill in case that gap cannot be closed by existing national law that is compatible with EU law. The legal orders of the EU and of the Member States are viewed as a unitary system where each and every piece of EU law has full effect replacing the national provision wherever consistency by interpretation is not reached. The direct effect is irrelevant in the model and therefore not a precondition for primacy.

The trigger model instead produces substitutionary effects that depend on direct effect. Should the threshold criteria for direct effect, that is, sufficient clarity, preciseness and unconditionality be satisfied, direct effect is triggered and new rights or obligations are created by the EU law provision. Here, direct effect of the EU provision ensures that when it sets aside a national provision, no legal vacuum is left but filled with the EU provision. The two legal systems, that of the EU and that of a Member State, are viewed separate with various linkage points: direct effect that provides rights to individuals, state liability in case of eg. unimplemented directives, and infringement actions in case of a Member State breaching EU law. Supremacy still exists as a concept but is reserved to the judicial review of the validity of national law what the Court can do under Art 258 TFEU infringement procedure.[153]

One should note that the trigger model is able to create rights even if a provision of EU law by its wording does not use any phrase that would indicate creation of rights. Indeed, this happens whenever an EU provision sets an obligation to a national judge since that obligation inversely becomes a right to an individual. Although the case law provides support for both models in various contexts, it appears it is the trigger model that is favored by the Court.[154] The two models may often produce identical legal consequences but occasionally possess better or worse explanatory power. As a prominent example, consider the duty of consistent interpretation.[155] The primacy model views this duty as the same as supremacy and due to the exclusionary effect that simply sets aside national law irrespective of legal certainty, there should not be a limitation

[153] *Ibid.*, 933–934.
[154] That the Court nearly exclusively uses the word primacy in its judgments should not as such be interpreted as meaning that the Court would exclusively apply Dougan's primacy model in its adjudication.
[155] M Dougan (2007) 931, 945–947.

of *contra legem* referred above. But in the trigger model, the duty for consistent interpretation is a Treaty-derived obligation with direct effect for a national authority (and thus a right for an individual to have his case adjudicated by consistent interpretation) that can be limited by the general principle of legal certainty, thus justifying *contra legem* limitation.

The two models presented by Dougan may explain why there seems to exist a fundamental conflict between the Member States and the Union when it comes to accepting primacy. When Member States withhold the capacity to perform constitutionality reviews on EU legislation, they have a view of primacy very akin to Dougan's primacy model: The constitutional courts appear to feel their national law is inferior to that of the superior EU law under which the national law should subject itself. As a defense, the constitutional courts set conditions for conforming to subjugation. The Court instead, upon viewing primacy from the perspective of the trigger model, considers EU law to provide rights to individuals and its role to protect those rights against the "abuses", inadvertent or not, of national legislature. The constitutional courts may have the final say on national legislation but those provisions must be substituted by Union law whenever not in conformity with Union law.

The tendency of EU norms to take the shape of rights as envisioned by the trigger model is, according to some observers, creating a legal culture of adversarial litigation.[156] This eurolegalism, together with increasing constitutionality reviews of parliamentary actions, is a contributing factor to the trend of judicialization of politics. In what parallels with the situation in the USA, adversarial litigation is emerging as a tool for regulating highly liberalized market with weak administrative capacity in that private litigants take the role of enforcing EU law in national courts. Yet, this is not to be seen as a negative development, at least not solely. The central characteristics of eurolegalistic regulation are detailed legal rights-providing norms with transparency requirements and the empowerment of private actors to assert their legal rights. Ideally, the system would promote legal certainty and access to justice. Regulation by litigation surely has its downsides but the above characteristics fare much better in terms of democracy and rule of law compared to the alternative that existed, and still exists, namely closed policymaking by elite technocrats for corporatist interests through the revolving door.[157] Should the view be accepted, the propensity of the Court to lean towards the trigger model of primacy,

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[156] R D Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge, Massachusetts: Harvard University Press, 2011) 8.
[157] *Ibid.*, 15.

that emphasizes the rights EU law provides, becomes understandable as a form of regulation through litigating individuals as agents of enforcement. I will re-examine this idea from a constitutional perspective in section 4.3.2.

In summary of the chapter, primacy in its established form is a multifaceted doctrine with various dimensions of abstract and concrete nature. Indeed, it could be argued that primacy is a heuristic concept rather than a falsifiable theory of scientific accuracy and predictive power. What primacy does is that it transforms legal relations into rights but says very little about how those rights are to be enforced, leaving the issue to national jurisdictions, who may occasionally struggle to find a satisfactory solution that would enable them to protect the rights without subordinating national sovereignty to an unacceptable level.

3 Primacy in change

3.1 General remarks

The Court has recently released two judgments where primacy was applied in a non-conventional manner in that the national measures being challenged at the Court were not ordered to be disapplied but annulled or declared invalid. In this chapter, I will study the cases in detail and analyze whether the cases give reason to believe the doctrine of primacy is in change with respect to prior case law.

3.2 A tale of two cases

3.2.1 Rimšēvičs

In *Rimšēvičs* the Court found a national administrative measure given in the context of criminal proceedings to be invalid.[158] The facts of the case were somewhat exceptional since the proceedings at the Court did not result from an action for annulment under Art 263 TFEU nor as a preliminary ruling request under Art 267 TFEU and not even as an infringement procedure under Art 258 TFEU but rather as a matter of direct litigation under provisions concerning the European System of Central Banks, namely Art 14.2 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (later, Art 14.2 of the Statute of the ESCB and of the ECB). Despite this, the judgment can be seen as a significant development since the Court expressly annulled a national measure and not only required it to be disapplied due to being in conflict with EU law.

The litigated facts include the actions of the Latvian anti-corruption office KNAB, which had imposed several restrictive measures on the Governor of the Latvian Central Bank, Mr Rimšēvičs, who acts as a plaintiff. Mr Rimšēvičs, whose term at office in the Central Bank of Latvia was set to end in 2019, was suspected of crimes related to bribery and he was relieved from the decision making, control and monitoring duties of the Central Bank. The relief was set as a temporary measure that did not include any predetermined end date and was subject to being revoked at any time. Thus there was a real chance that the measure removed Mr

[158] Judgment in the joined cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia* ECLI:EU:C:2019:139.

Rimšēvičs from the office for the remainder of his definite term. Other coercive means set to him by the KNAB consisted of paying a surety, prohibition of approaching certain persons and a prohibition of leaving the country without authorization. The latter was a particularly forceful measure as an essential part of the duties of the Governor of a national central bank is to attend the meetings of the European Central Bank held in Frankfurt, Germany. In essence, the measures removed Mr Rimšēvičs from his office as the Governor of the Latvian Central Bank.

In his claims, Mr Rimšēvičs called for the Court to declare his relief from office unlawful. In its own litigation, joined in the Court's proceeding, the ECB required the Latvian government to present the information concerning the criminal investigation and the Court to declare that the decision of Mr Rimsevics's relief from office should have been made by an independent court or tribunal and, should the evidence so confirm, that the removal was unjustified.

In its judgment, the court found that the Government of Latvia had not shown that the conditions for relieving the governor of the Central Bank as stated in Art 14.2 of the Statute of the ESCB and of the ECB were satisfied.[159] The Court did not review the legality of the other measures that were imposed on the claimant.

In her opinion, AG Kokott notes the function of the provision to be "to protect the institutional and personal independence of the governors of the national central banks and of the office which they occupy within the ESCB and the ECB" from the influence of Member States rather than only to ensure the smooth routine operation of the institutions.[160] As regards the nature of the proceedings, she notes that the action by Art 14.2 of the Statute of the ESCB and of the ECB is a *sui generis* remedy within the system of legal protections afforded by the Court.[161] The consequences of the classification of the act are marked since the annulment of the contested measure would lead to the plaintiff to immediately resume his office whereas merely

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[159] Article 14.2 of the Statute of the ESCB and of the ECB reads: A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. [2016] OJ C 202/230.

[160] Opinion of Advocate General Kokott on the joined cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia* ECLI:EU:C:2018:1030, para. 80.

[161] *Ibid.*, para. 36.

finding the measure illegal would require national authorities to take corrective measures.[162] As this represents the first case where Art 14.2 of the Statute of the ESCB and of the ECB was interpreted by the Court, it was unclear whether the judgment, in case the measure was found to be in conflict with EU law, would have the former, cassatory effect or whether the latter, declaratory effect.[163] AG Kokott is in favor of the declaratory effect,[164] further noticing that the relieving of a governor of a central bank is an autonomous concept of EU law irrespective of the national classification of the actions leading to that effect.[165]

In the judgment, the Court first stated the obvious: In the interpretation of EU law, the context and purpose of the provisions must also be taken into account, not only the wording.[166] Further, even temporary measures, in particular as they do not contain any specific end date, might put serious pressure on the governor of a Central Bank,[167] and there therefore must be a route for a legality review of such temporary measures, otherwise the provision aiming to shield the governor from such pressure would in fact lose its effect.[168]

The Court then moves on to argue on its jurisdiction in the matter denied in the claims by the Latvian government. The Court found that despite Art 276 TFEU excluding the competence of the Court to review the validity and proportionality of national measures within certain actions in the area of freedom, security and justice, the powers of Member States in criminal matters must be "in line with the fundamental freedoms guaranteed by EU law" and also with the whole of EU law. This can be reviewed by the Court even if the EU only has limited powers conferred in criminal matters.[169]

Coming back to the key issue of the nature of the proceedings, the Court did not fully agree with its Advocate General. The Court held that systematic and teleological interpretations support the view that the action by Art 14.2 of the Statute of the ESCB and of the ECB was not

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[162] *Ibid.*, para. 39.
[163] J Bast, 'Autonomy in Decline? A Commentary on Rimšēvičs and ECB v Latvia' Verfassungsblog, 13 May 2019, https://verfassungsblog.de/autonomy-in-decline-a-commentary-on-rimsevics-and-ecb-v-latvia/.
[164] Opinion of Advocate General Kokott on the joined cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia* ECLI:EU:C:2018:1030, para. 68.
[165] *Ibid.*,para. 77.
[166] Judgment in the joined cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia* ECLI:EU:C:2018:1030, para. 45.
[167] *Ibid.*, para. 52.
[168] *Ibid.*, para. 53.
[169] *Ibid.*, para. 57.

an infringement proceeding similar to Art 258 TFEU but an action for annulment as there are analogies to Art 263 TFEU that concerns actions for annulment of an EU measure.[170] Although the Court acknowledges that Art 14.2 of the Statute of the ESCB and of the ECB derogates from the usual distribution of powers between the EU and the Member States, which entails that the Court may only review EU acts under the powers of Art 263 TFEU, the annulling effect of the judgment is justified by the special status of the ESCB and the ECB where "[t]he ESCB represents a novel legal construct in EU law…within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails."[171] In spite of the clear parallels with the "new legal order" statement in *Van Gend en Loos*, which formed the basis for general direct effect of EU law and ultimately, to the notion of primacy, the Court in *Rimšēvičs* emphasized the extraordinary nature of the facts of the case by noticing that the provision in question "adds a legal remedy" that is "very specific", concerns "unique subject matter" and can only be exercised in "exceptional circumstances".[172] The contrasting interpretation therefore suggests the Court does not intend to create new doctrines but rather retain its holdings in a very limited range.

In its conclusions, the decision of the Court was based on the fact that despite providing a multitude of documents, the government of Latvia did not produce any evidence in support for the criminal proceedings [173] and that "the decision at issue [of the KNAB] must be annulled", but only in so far as it prevents the plaintiff executing his tasks as Governor of the Latvian Central Bank, the Court not adjudicating on other interlocutory measures.[174]

Two aspects seem to be of particular importance in the argumentation of the Court. First, the Court made it very clear that the European System of Central Banks is a very special legal entity where the national and EU jurisdiction integrate and the powers of national courts and the Court intertwine. One reading of this is that the Court is eager to proclaim autonomy in that whenever the Court has even some say in the matter, its word must be given absolute primacy; even a narrow slice of competence gives the Court all it needs for its judgments to have precedence. The judgment highlights the interest the Court has in protecting the independence of the European central bankers from national politics, codified in Art 7 of the Statute, perhaps due to

[170] *Ibid.*, paras. 64–68.
[171] *Ibid.*, para. 69.
[172] *Ibid.*, para. 71.
[173] *Ibid.*, para. 94.
[174] *Ibid.*, para. 97.

the Euro crisis and its aftermath in fresh memory and the fact that the case was the first where the legal force of Art 14.2 of the Statute of the ESCB and of the ECB was put to test.

The second aspect of particular notice is less explicitly expressed in the judgment but can be understood by the criticism the Court imposed on the Latvian Government for not providing documents for the Court to support the factual grounds on the criminal proceedings against Mr Rimšēvičs. The documents the government disclosed during the proceedings were deemed irrelevant by the Court and only at the very end of the process did the government offer to provide further material, though not specifying the nature of that, which offer was dismissed by the Court. This rather suspicious behavior of the national authorities, justified by the government's need to protect the criminal investigation, and the Court's unapproving response could be interpreted as the desire of the Court to guard and promote the right of the plaintiff to a fair trial and presumption of innocence. Since this was sufficient to deem the national decision where a governor of a central bank is dismissed under Art 14.2 of the Statute of the ESCB and of the ECB unjustified, the issue whether such a decision should have been made by an independent court or tribunal rather than a government agency was not ruled on.[175]

3.2.2 W. Ż.

The second case concerned a Polish judge with the titular initials. The case can be seen as one of the many in a series of cases adjudicated in the Grand Chamber of the Court on the state of the rule of law in Poland.[176] As explained in more detail in section 1.1, these largely concern the organization and administration of courts, or bodies masquerading as such, in Poland including such issues as appointment of judges to[177] and removal of judges from their post[178] and the overall legality of courts under Polish legal order in respect to the independence, impartiality and the requirement of a court to be previously established by law.[179] The conflict has culminated in the finding of Poland to have failed its obligations as a member of the Union

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[175] *Ibid.*, para. 96.
[176] a) L Pech, 'Protecting Polish judges from Poland's disciplinary "Star Chamber": *Commission* v. *Poland (Interim proceedings)*' (2021) 58 CMLRev 137–162; b) K Ruutu, 'Oikeusvaltioperiaate ja kansallinen identiteetti Euroopan unionin oikeudessa Puolan oikeuslaitosta koskevien uudistusten valossa' (2021) Defensor Legis 473–492.
[177] Judgment in case C-824/18 *A. B. and others (Nomination des juges à la Cour suprême - Recours)* ECLI:EU:C:2021:153.
[178] Judgment in joined cases C-585/18, C-624/18 and C-625/18 *A. K. (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982.
[179] Cf. the discussion on the judgments of the European Court of Human Rights in section 1.1.

and,[180] together with Hungary,[181] becoming subject to conditionality of financial benefits the states receive from the Union to the development of rule-of-law as provided by Art 7 TEU.[182]

In the particular case of *W. Ż.* the facts are rather complex but essentially boil down to what are the legal effects of a decision of a court that is not to be regarded as independent, impartial and previously established by law. The beginnings of the case were laid when judge W. Ż. was transferred from one division to another in the court he was serving. He appealed to the Polish National Council of the Judiciary (NCJ), which decided not to adjudicate on the matter. W. Ż. not only challenged the decision before the Supreme Court of Poland but also demanded the recusal of the judges of the chamber that was to hear his appeal, the Chamber of Extraordinary Control and Public Affairs of Poland due to the manner the judges of the chamber were appointed. The referring court, the Civil Division of the Supreme Court of Poland, states that appeals were brought before the Polish Supreme Administrative Court against a resolution of the NCJ that proposes new judges to be appointed to the Chamber of Extraordinary Control by the President of the State who, despite the resolution being suspended by the latter court, appointed some of those candidates.

Despite the proceedings being pending in the Supreme Administrative Court and the court having made a preliminary reference request concerning another resolution of the NCJ on a list of candidate judges to the Supreme Court, a single judge was nominated to the office of the Chamber of Extraordinary Control. That judge (later, the single judge) dismissed the action of W. Ż. as inadmissible without having access to the case file and without hearing W. Ż.. The referring court now asks the Court whether a court, namely the single judge appointed in such circumstances, constitutes an independent and impartial court established by law especially in the light of the second subparagraph of Art 19(1) TEU and what the implications should be in case the answer is negative.[183]

In its ruling the Court considers the circumstances which have to be taken into account to consider a court or a tribunal to be independent and impartial and previously established by law within the meaning of the second subparagraph of Art 19(1) TEU. The Court held that in case

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[180] Judgment in case C-791/19 *Commission v Poland* ECLI:EU:C:2021:596.
[181] Judgment in case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97.
[182] Judgment in case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.
[183] Art 19(1)(2) TEU reads: Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. [2008] OJ C 115.

the circumstances are such that a national court or tribunal cannot be considered the above, the second subparagraph of Art 19(1) TEU and the principle of the primacy of EU law require that a national court declares an order made by the said body null and void.

In his proposal, the Advocate General in the case, in addition to arguing on the basis of the necessity to ensure the independence, impartiality and prior establishment of the court, did seem to give weight to the grave breaches on the right to fair trial and also to breaches in the national law on the nomination of judges.[184] The Advocate General then summarizes the criteria for a three-step test set by the European Court of Human Rights in *Ástráðsson*[185] for identifying whether a court or tribunal is to be regarded as established by law in relation to the appointment procedure of its judges.[186] However, the Advocate General then extends the principles of the test so that "they must also apply in the case of disregard of judicial control introduced in relation to previous acts of appointment having a constitutive character vis-à-vis that appointment", thus laying the foundations for the annulling effect of the judgment to come.[187] He then moves on, having first recognized with references to the case law of the Court, to observe that access to an independent and impartial tribunal previously established by law is an essential component of the right to a fair trial and that "[i]f those requirements [to check that the tribunal is such] are not fulfilled, such an incompatibility may in principle be raised as a ground of annulment of the judicial decision on the basis that the formation of the court or tribunal in question was irregular".[188] Further, the Advocate General recognizes Art 19(1)(2) TEU together with Art 47 CFR to constitute the fundamental right of effective judicial protection in the application of EU law in an individual case.[189] Finally, the Advocate General concludes, somewhat indecisively, by stating "that as long as protection by way of such setting aside (or ignoring) of the contested order, resulting from the primacy of EU law, is ensured, it is not necessary for EU law to intervene in the sphere of judicial appointment" [190] and that "a potential infringement… does not imply that the [national] act… is invalid per se".[191] Overall,

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[184] Opinion of Advocate General Tanchev in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:289, paras. 11–12.
[185] Judgment of the European Court of Human Rights in *Guðmundur Andri Ástráðsson v Iceland* (Application no. 26374/18) on 1 December 2020.
[186] Opinion of Advocate General Tanchev in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:289, para. 77.
[187] *Ibid.*, para. 78.
[188] *Ibid.*, para. 96.
[189] *Ibid.*, paras. 101–102.
[190] *Ibid.*, para. 104.
[191] *Ibid.*, para. 105.

the Advocate General appears to consider both annulment and disapplying as possible outcomes without much, if any, difference in the legal consequences of the two in the particular case.

In its reasoning, the Court followed a path of advancing from the examination of jurisdiction and admissibility, denied in the claims of the defendant government, to the actual substance matter. The Court took a clearer approach to that of its Advocate General at the outset by reformulating the original question so that "the referring court asks, in essence, whether [Art 19(1)(2) TEU] and the principle of the primacy of EU law must be interpreted as meaning that a national court…must declare null and void [the order made by the single judge]".[192] Thus, the Court takes as its task to examine whether a consequence of EU law primacy is to annul the national measure.[193]

As it comes to the jurisdiction of the Court, the Court states, very similarly *mutatis mutandis* to what it did in *Rimšēvičs* concerning its competence to rule in criminal matters, that although the organization of justice in Member States falls within the national competence, the Member States are nevertheless obliged to comply with EU law when exercising that competence.[194] The Court is careful not to step out of its competence when it reminds that the Court does not in itself rule on the compatibility of national law with EU law but only provides "full guidance on the interpretation of EU law" for the national court to rule on the said compatibility, strictly following the procedural rules set in Art 267 TFEU.[195]

As to the substance matter, the Court gives much importance to the necessities of protecting the independence of the national courts and the fundamental rights, the right to a fair trial in the national proceedings included.[196] The Court argues on the procedural aspects related to the case, including the fact that the national measure at issue was done while a related preliminary ruling was pending at the Court (that of legality of the law on NCJ resolved in case *A. B. and others*).[197] The Court concludes the legal facts by stating the fundamental procedural rules for appointment

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[192] Judgment in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:798, para. 71, see also para. 121.
[193] Since this is not a direct action but a preliminary reference request, the eventual annulment takes place by the action of the national court and not by the judgment of the Court as such.
[194] Judgment in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:798, para. 75.
[195] *Ibid.*, para 79.
[196] *Ibid.*, paras. 108, 122.
[197] *Ibid.*, para. 140.

of judges to have been breached[198] to such a degree that trust necessary in a democratic society governed by rule of law for the independence and impartiality of courts was endangered in the eyes of individuals.[199]

Finally, the Court comes to the issue of the effect of EU law primacy. The Court guides the national court on the basis of EU law primacy to declare the national measure null and void without any provision of national law to be able to prevent this and that the principle entails the Member State bodies an obligation to give full effect to EU law provisions and that national law, even constitutional, must not undermine that effect.[200] Curiously, the Court then reminds the national court of the duty to disapply national provisions that are contrary to EU law with a direct effect[201] before making the determinative statement that in the present case, EU law primacy requires Member States to give full effect to the second subparagraph of Art 19(1) TEU by, subject to assessments to be made by the referring court, declaring the order null and void[202] without any consideration of legal certainty or finality of decisions to prevent that conclusion.[203]

3.3 A coincidence or a new paradigm on primacy?

The particular facts of the above two cases give a certain flavor of uniqueness as to the findings of the Court. Mr Rimšēvičs, the plaintiff and a high ranking official of the European System of Central Banks, was under criminal investigation for bribery related to the money laundering type of activities of some suspicious funds. While the national criminal proceedings seem to be still ongoing as of this writing, there exists the possibility that the Court had a particular impetus to give heightened protection for the integrity of the ESCB as reflected in the importance the court gave for the unwillingness of the Latvian government to provide documented evidence against the governor.

In *W. Ż.*, the Court appears to take a step further towards the general applicability of its ruling. The individual concerned, a Polish judge, was essentially demoted after publicly criticizing

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[198] *Ibid.*, para. 152.
[199] *Ibid.*, para. 153.
[200] *Ibid.*, paras. 155–157.
[201] *Ibid.*, para. 158.
[202] *Ibid.*, para. 159.
[203] *Ibid.*, para. 160.

rearrangements in the Polish judicial system.[204] Whereas in *Rimšēvičs* the annulled national measure was such that it would not be, despite the opinion of the AG, completely clear to envision the difference between not applying the measure in the particular case and invalidity of the measure with the consequence of the measure being null and void, the ruling in *W. Ż.* expressly states the effect of primacy, when achieving full efficacy of EU law so demands, to be the national measure to be null and void, irrespective of the considerations of legal certainty or finality of the decision in the national legal order.[205] Further, since the ruling in *Rimšēvičs* was based on direct action where the Court applied EU law to the facts of the case and directed its decision to the individual parties in the proceeding, the ruling in *W. Ż.* is given under the auspices of Art 267 TFEU, with the consequence that the Court only interprets EU law in the light of the factual and legal situation described by the referring court, gives its guidance in a general form and directs the interpretation not to the parties in the proceedings but to the referring court and also to all the other courts within the Union applying EU law.

To be on the safe side, one must reconsider the possibility of a terminological misreading. This is made possible by the fact that in *W. Ż.* the Court refers to the duty of national courts to disapply a national measure[206] and to declare it null and void[207] as corollary terms. It is thus possible that the Court considers, in the particular case and against the settled terminology, that the duty to disapply is to have the meaning of declaring the measure null and void when it relates to the obligation of a national court to act on the national measure at issue guided by the preliminary ruling. Yet, this consideration is not supported by the fact that the Court also refers to the duty to annul "in its entirety" as a possible outcome of the case.[208] Accordingly, in the judgment the Court seems to use the term "set aside" synonymously to "disapply" and considers that and annulment as alternative effects of EU law primacy.[209]

In analyzing Court's judgments, care must be taken not to make excessive conclusions on the wording since "judgments… tread a fine line in expressing neither too much nor too little".[210]

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[204] Opinion of Advocate General Tanchev in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:289, para. 2.
[205] Judgment in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:798, para. 160.
[206] *Ibid.*, para. 158.
[207] *Ibid.*, para. 159.
[208] *Ibid.*, para. 141.
[209] *Ibid.*, last sentence.
[210] A Rosas and L Armati (2018) 275.

Still, whereas the annulment of a national measure in *Rimšēvičs* could be interpreted to be the result of the special character of the provision the ruling was based on, nothing in the textual analysis of the judgment in *W. Ż.* gives reason to consider the *ratio decidendi* to be somehow limited in applicability. This of course is to be expected as the legal authority of the ruling was EU primary law with a very wide scope of applicability, namely the Treaty Article 19(1)(2) TEU and the general principle of primacy. Taking into account all the above considerations, there is, in my opinion, sufficient reason to believe the Court to have had the intention to adjudicate a national act to be fully annulled. This is a particularly striking result since not long before the judgment in *W. Ż.* and concerning substantially similar issues in the Polish system of appointing in and removing judges from their posts, the Court explicitly, in both cases *A. K.*[211] and *A. B.*[212], concluded that the principle of primacy of EU law must be interpreted in such a way that the referring court must disapply the national provision at stake.

As stated, the distinction between deeming a national measure not applicable in the case (due to it being incompatible with EU law) on the one hand and not to be in existence (due to it being null and void) can have potentially important consequences for the individual. A declaratory finding of illegality leaves the remedy to the mercy of national authorities. Thus the individual, if national authorities remain passive despite the judgment, would have to start a new proceeding to enforce her rights. Further, other individuals in similar circumstances cannot fully rely on the ruling but are still bound to the national measure and risk being sanctioned if they do not conform to it. A finding of nullity, instead, not only has a self-enforcing effect in that the individual in question is relieved from the effects of the measure at once and also provides legal certainty for other individuals in similar circumstances.

An annulment would thus have a wider and a deeper effect with which the Court appears to give increased protection to the concerned individuals and to the institutions they represent but also to the fundamental rights and to the founding values of the Union to which Member States have committed themselves upon accession to the Union. Indeed, judge Rosas, a former member of the Court, questions whether the Treaties alone provide sufficient mechanisms to protect fundamental rights and rule of law in case of a serious breach of them in Member

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[211] Judgment in joined cases C-585/18, C-624/18 and C-625/18 *A. K. (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982, paras. 166, 171.
[212] Judgment in case C-824/18 *A. B. and others (Nomination des juges à la Cour suprême - Recours)* ECLI:EU:C:2021:153, paras. 153, 166, 167.

States.[213] He identifies the inadequacy of the infringement procedure of Art 258 TFEU in the face of systematic problems in protecting these core values and the difficulties of engaging Art 7 TEU that are the legal mechanisms by which the Union can enforce EU law compliance in Member States. With this background, the decisions in *Rimšēvičs* and *W. Ż.* may be interpreted as a form of "judicial activism" in strengthening fundamental rights protection and rule of law by giving enhanced weight to EU law primacy.

Rimšēvičs and *W. Ż.* would not be the first cases of modern era where the Court has proactively reacted to secure the rule of law. In *Portuguese judges* the opportunity was grasped in the form of giving direct applicability to the second subparagraph of Art 19(1) TEU when the Court stated the safeguarding the judicial independence of any national court that may apply EU law to be an obligation of Member States deriving from primary EU law.[214] Further, the Court has recognized in *Land Hessen* that "the independence of the judges of the Member States is of fundamental importance for the EU legal order" and a prerequisite for guaranteeing individuals' rights derived from EU law.[215] In *Repubblica*, a similar issue as to that in the *W. Ż.* was at stake in the sense that the ruling concerned the conformity of national judicial appointment procedure with EU law since in the Maltese system of judicial organization, the prime minister had a formal, but a necessary role in the appointment process.[216] There, the Court concluded the Maltese system to be in conformity with EU law as the participation of a political figure in the appointment does not in itself create a violation of Art 19(1)(2) TEU. Curiously, the Maltese court had also asked in its preliminary reference request whether a finding of such a violation would have a retroactive effect, that is, whether the decision would be that of disapplying national law or of annulment; however, subsequent to the finding of conformity, the Court did not address this question.

Notably, the Court reminds in *W. Ż.* that Art 47 CFR only applies when Member States implement EU law, as authored by Art 51(1) CFR, but instead Art 19(1)(2) TEU refers to fields covered by EU law and therefore applies whenever it affects bodies that do or potentially will

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[213] A Rosas and L Armati (2018) 160–161.
[214] Judgment in the case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117, paras. 34, 37.
[215] Judgment in the case C-272/19 *Land Hessen* ECLI:EU:C:2020:535, para. 45.
[216] Judgment in the case C-896/19 *Repubblica* v *Il-Prim Ministru* ECLI:EU:C:2021:311.

adjudicate in EU law matters.[217] The latter provision thus has a very wide scope and is to be applied in the totality of the actions of the bodies of Member States when the body in question has a status derived from EU law, even if the material issue the body is acting on lies outside the scope of EU law.[218] In essence, the provision affects every court of the Member States and the whole of the national legal order, constitutional or otherwise. The Court has thus given judicial independence a position of a constitutional value that manifests itself in several Union law provisions.[219]

The particular circumstances in both *Rimšēvičs* and *W. Ż.* appear to support the view that the reason the Court gave EU law primacy the stronger effect of null and void instead of just disapplying the national measures might be related to the sensitivities of the positions of the concerned individuals. Both governors of central banks and judges of national courts have an emphasized need for the protection of their independence. Both posts are in great danger of political influence and both institutions that the posts represent, namely the central banks based monetary system and a judicial system based on independent and impartial courts established by law, are founded and depend on freedom of such influence. This is reflected in the status of that protection in the sense that both, the Statute of the ESCB and the ECB being annexed to the Lisbon Treaty and Art 19 TEU together with Art 47 CFR constitute primary EU law. The Court therefore has a high alertness to guard the independence of the post holders, especially within the contexts of the aftermath of the financial crisis and the on-going rule of law backsliding. Such sensitivity is reflected in the grounds of the judgments[220] and also suggested before when the Court used Art 19(1)(2) TEU, with its very wide scope of application covering in practice the whole of Member States' judicial organization, as a tool to transform itself from a marginalized player to a central actor in responding to Union's crises.[221] This is a history-tested method of the Court to strengthen the supranational response of the Union to various challenges in integration.[222]

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[217] Judgment in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:798, paras. 102–104.
[218] M Bonelli and M Claes, 'Judicial serendipity: how the Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 EurCLR 622, 631.
[219] *Ibid.*, 634–635.
[220] a) R Smits, 'A National Measure Annulled by the European Court of Justice, or: High-level Judicial Protection for Independent Central Bankers' (2020) 16 EurCLR 120, 136–139. b) Judgment in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:798, paras. 107–108, 110.
[221] M Bonelli and M Claes (2018) 622, 623.
[222] P Craig, 'Institutions, Power, and Institutional Balance' in P Craig and G de Búrca (eds.) *The Evolution of EU Law* (3rd edn., Oxford: Oxford University Press, 2021) 46, 54–57.

By proclaiming direct applicability to Art 19(1)(2) TEU the Court has extended its reach to be an overarching guardian of the European judiciary.[223] To balance the direct applicability given to the provision, as argued by Rizcallah and Davio, the provision must be interpreted to be limited to protect the essence of judicial independence by providing a shield to the integrity of the institution of the national court system in general.[224] The function of the provision according to this institutional reading is not to give subjective rights to individuals in their singular case but to secure the institutional essence of the judicial system. The authors derive institutional support for their case from some of the arguments made by an Advocate General in other cases[225] but the argument can be criticized in that the Court specifically reminded that in order for primacy to take effect, the provision of EU law in question must have direct effect, thus explicitly highlighting the function of primacy to protect rights to individuals, with the implicit meaning that Art 19(1)(2) TEU indeed does so.

Accepting Art 19(1)(2) TEU to have direct effect, the reason for the annulment of the national measure in *W. Ż.* becomes understandable. The logic of the Court's argumentation follows the path of examining whether the national measure was made by an independent, impartial and previously legally established court and if not, any decision made by such a body is not compatible with Union law because that body was not a court in the first place. The procedure by which the national decision was made contrasted Art 19(1)(2) TEU and must be annulled on the basis of primacy of Union law even if the decision was made according to the national law. Disapplying the decision is not sufficient, because the decision would remain in force, even if not applied in the particular case. Rather, to achieve effect *erga omnes* the decision must be annulled completely.

Given that the facts of the two cases were very different, it should come as no surprise that the Court did not refer to *Rimšēvičs* in its *W. Ż.* judgment, suggesting the Court did not see any relevant connections between the two cases. This is noteworthy considering the Court's propensity in cases of developing a new legal principle first to set up a new principle in one

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[223] The roots of the concept of the European judiciary can be traced to Robert Lecourt's 1976 book "L'Europe des juges". I have, however, been unable to access the original publication.
[224] C Rizcallah and V Davio, 'The Requirement that Tribunals be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust' (2021) 17 EurCLR 581, 594–595.
[225] *Ibid.*, 595.

case and then further develop the conditions for its applications in subsequent cases.[226] Is there anything in *Rimšēvičs* that would tie the Court's argumentation together with that in *W. Ż.*? As stated above, the concerned individuals suffered in both cases severe infringements in their fundamental right to a fair trial and needed a remedy. In *Rimšēvičs*, as far as the legal nature of the remedy, the plaintiff sought for annulment and his supporter, the ECB, sought for a declaratory judgment. Whereas the Advocate General retained legal orthodoxy by viewing the matter in terms of a binary understanding between action of annulment of EU acts and declaration of incompatibility with EU law of national measures as mutually exclusive alternatives, the Court took a more hybrid approach and interpreted the effect of the action provided by Art 14.2 of the Statute of the ESCB and the ECB to be that of annulment for the implicit reason of ensuring EU law effectiveness.[227] In the case, the effectiveness of EU law demanded the interpretation that, although the Court cannot annul national measures that deprive individuals their rights derived from EU law, it can annul a national measure that remove them an EU status, which is what the measure of KNAB did to Mr Rimšēvičs.[228]

Securing efficacy of EU law by protecting the status of the concerned individuals under Union law from illegal national measures thus justified the annulling decisions of the Court in both cases. Whereas the Court highlights in *Rimšēvičs* that it can only annul a national measure in highly exceptional circumstances, *W. Ż.*, somewhat contrastingly, suggests that the Court, as demonstrated by its eagerness to protect the independence of the "European judiciary", is ready to invalidate national measures if necessary to ensure full *effet utile* of individuals' EU-status. In parallel, the Court has afforded a similar, at face value expansive, interpretation of other primary law provisions for them to have primacy over national measures in order to protect the status of members of other Union institutions, although that does not necessarily result in annulment of domestic measures. This was the case in *Junqueras Vies*.[229] In the case, a Member-elect of the European Parliament was detained, which prevented him to execute a national requirement that would have required travelling and that was necessary by domestic law for the person to accept the mandate of MEP. The Court found that such a requirement

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[226] M Broberg and N Fenger, 'The Preliminary Ruling' in *Broberg and Fenger on Preliminary References to the European Court of Justice* (3rd edn., Oxford: Oxford University Press, 2021) 371, 396.
[227] T Tridimas and L Lonardo, 'When can a national measure be annulled by the ECJ? Case C-202/18 Ilmārs Rimšēvičs v Republic of Latvia and case C-238/18 European Central Bank v Republic of Latvia' (2020) 45 ELRev 732, 733–735.
[228] *Ibid.*, 736.
[229] Judgment in case C-502/19 *Oriol Junqueras Vies* ECLI:EU:C:2019:1115.

prevented the person from enjoying parliamentary immunity as provided by EU law, but nevertheless left the effects of the finding for the referring court to assess in light of the duty for sincere cooperation.[230] Meanwhile, Mr Junqueras Vies had been convicted in a final instance and the Spanish supreme court did not revoke the sentence nor offered any other remedy for him so that, although the Court clearly stated Mr Junqueras Vies to have received the status of an MEP from the moment the election was concluded, he was left without the immunity afforded by the status derived from EU law.[231]

The lack of retroactive effect in *Junqueras Vies* contrasts gravely in particular with *Rimšēvičs*.[232] What could be the motivations for the Court to settle for setting the referring court the rather abstract obligation to sincere cooperation as provided in Art 4(3) TEU instead of that to disapply or even declare null and void the national measure (of requiring the MEP-elect to travel to obtain his mandate)? I can find two possible explanations. Either the Court considered the referring court in Spain, a long-since Member State with well-established legal organization, to be so trustworthy that further guidance on corrective measures were deemed unnecessary for the referring court to draw appropriate conclusions (which trust the Spanish legal system then failed). Alternatively, the politically highly sensitive circumstances lying at the core of national sovereignty, Mr Junqueras Vies being a prominent figure in the Catalan independence movement, made the Court excessively careful not to step in the sphere of national competence and disrespect national constitutional identity.

Considering all the above, the jury is still out whether *Rimšēvičs* and *W. Ż.* represent the beginnings of a paradigm change in primacy. What is clear already, is that the Court is flexible in defining the degree of measures necessary to effect primacy. Sometimes disapplication is sufficient, but occasionally, when the full *effet utile* of EU law so demands and in particular when the effect of a body of primary law such as a Treaty article or a general principle of Union law like respect of fundamental rights provided by Union law, is at risk, mere disapplication may not be adequate.

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[230] *Ibid.*, paras. 85–93.
[231] S Hardt, 'Fault Lines of the European Parliamentary Mandate: The Immunity of Oriol Junqueras Vies' (2020) 16 EurCLR 170–185.
[232] The Court has since waivered the immunity of Mr Rimšēvičs in its judgment in case C-3/20 *Criminal proceedings against AB and Others* ECLI:EU:C:2021:969. Here, the Court qualified the immunity against criminal proceedings enjoyed by a European central banker and, though such immunity exists when the person operates in the capacity of the governor of a central bank of a Member State, it does not preclude criminal proceedings in entirety, for example investigative measures and gathering of evidence is still possible.

4 Primacy in EU constitutionalism

4.1 General remarks

In the previous chapter, I presented my interpretation on why the Court adjudicated the way it did in *Rimšēvičs* and *W. Ż.*. I concluded by stating that the primary reason for the doctrine of EU law primacy to have an effect of annulment of a national measure in the cases was that the Court considered such an effect to be necessary to secure the effectiveness of EU law. More specifically, it appears the desire to protect the fundamental rights and the foundational values of the EU together with distrust to national authorities contributed to the Court's decision to annul and declare national measures null and void, respectively, instead of leaving such remedial decisions to the discretion of national authorities.

These decisions, both having a factual connection to the principle of the rule of law on the one hand and to the protection of the independence of a status of an individual derived from EU law on the other, represent prima facie a deviation from the established case law. Below, I attempt to examine what this apparent deviation could signify for the role of primacy in the constitutionalism of EU law with respect to those of its Member States. I approach the issue from three perspectives that I have examined in the thesis. First, I will study the claim of many constitutional bodies that primacy is subject to the respect of national constitutional identity. Whereas section 2.5 focused on Member State point of view on national identity claims, here in section 4.2, I examine the issue with the help of recent case law from the Court's viewpoint. Second, I will investigate to what extent primacy can be understood as a constitution forming principle of the Union itself and compare that view to its instrumental understanding as a procedural tool to resolve disputes between Member States and the supranational Union. Thus, section 4.3.1 examines constitutional pluralism as an explanation for the evolving character of primacy in contrast to section 4.3.2, where I discard constitutional theories and experiment with the idea that primacy is nothing more than a dispute resolution method. That dualism of primacy will lead me to the third perspective, balancing primacy with the principle of national procedural autonomy, an issue I will study in section 4.4.

4.2 Balancing primacy and national constitutional identity

Having discussed the significance of national constitutional identity in section 2.5, I will study how the Court has balanced between the respect for constitutional identity and the founding values of the Union. Art 2 TEU defines human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including those of minorities, as the founding values of the Union. Of these, the content of the rule of law has been among the most contested ones. The Court has harnessed Art 19(1)(1) TEU to guard the rule of law as it provides that "[t]he Court of Justice of the European Union… shall ensure that in the interpretation and application of the Treaties the law is observed". As stated above, the Court has enforced the capacities provided by the provision by declaring a national measure to be incompatible with EU law and the national court thus to have a duty to disapply the measure. But nothing in the Treaties limits the power of the Court to such declaratory judgments; instead the Court can, and it has, taken steps further and ruled the national measures invalid as far as to be null and void.

Of course, neither *Rimšēvičs* nor *W. Ż.* represent any tectonic change in the relations of the Court vis-à-vis Member States as regards competence to annul national legislation. The cases only concerned individual administrative and adjudicative decisions in the Member States and not national legislation, let alone constitutional provisions. Primacy of EU law over the latter has through the history of the EU been the true trial by fire as regards the acceptance of primacy and nothing in *Rimšēvičs* or *W. Ż.* contribute to that.[233] Yet, even a capacity to annul decisions of national authorities implies a delicate yes to the federal question as regards the constitutional nature of the Court. The significance of the change in the legal content of primacy should not be underestimated. Also, in the specific case of *W. Ż.*, by giving direct applicability to the second subparagraph of Art 19(1) and therefore not basing its decision on Art 47 CFR, the Court was able to circumvent the limitations in its competence regarding Poland as imposed by Protocol No 30 attached to TFEU.[234]

As evidently clear in the cited cases, the primacy of EU law, when coupled with direct applicability of Art 19(1)(2) TEU, gives the Court the competence to rule on the judicial organization in the Member States as part of securing the rule of law. Rule of law can have two

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[233] M Kumm and V Ferreres Comella, 'The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union' (2005) 3(2–3) Int. J. Const. Law 473–492.
[234] Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, [2008] OJ C 115.

conceptual meanings: a formal one, where the principle is satisfied by complying with defined procedures and rules; and a substantive one, where the principle imposes material requirements to legislation such as respect for fundamental rights.[235] Further, rule of law also has a constitutional dimension and encompasses the separation of powers and as a component of that, prohibits "government by judges".[236] The development where the Court adjudicates on the organization of the courts within the Member States does provoke the upstream question whether the Court can adjudicate on the national manner of separation of powers. Arguments expressed in case law of the Court seem to reinforce such a hypothesis.[237] Such an evolution would surely shift the Union further beyond mere cooperation of Member States toward a federative construction[238] since Member State constitutional composition would be subject to review by the Court. A federative cooperation akin to a hybrid model, instead of EU – Member State dichotomy, of jurisdiction has already been suggested with the corollary conclusion that the principle of primacy will leave the final resolving power to the Court.[239]

To support the said argument, and similarly to the *Portuguese judges*, the case of *W. Ż.* originated from the details of the national administration of a judicial body. The referring court turned to the Court which was eager to argue on the basis of Art 19(1)(2) TEU that in essence captures the Union founding value for the respect for the rule of law.[240] The event can be seen in the wider context of the Court giving more direct applicability to the values expressed in Art 2 TEU and as indicated in *Repubblica*, where the Court reminded of the *pacta sunt servanda* principle in international law in that Member States have voluntarily committed to those values compliance of which is a condition precedent for the enjoyment of the rights derived from the Treaties.[241] Provided the values expressed in Art 2 TEU indeed possess direct applicability, this would, on the grounds of the very wide scope of application of them, turn the Court further into a constitutional court having the capacity to adjudicate on the legality of virtually any national measure.

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[235] P Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) Public Law 467–487.
[236] C Rizcallah and V Davio (2021) 581, 604.
[237] a) Judgment in case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:798, paras. 127, 129; b) Judgment in case C-896/19 *Repubblica* v *Il-Prim Ministru* ECLI:EU:C:2021:311, para. 54 and the case law cited therein.
[238] A Rosas and L Armati (2018) 190.
[239] T Tridimas and L Lonardo (2020) 732, 737–739.
[240] M Bonelli and M Claes (2018) 622, 632.
[241] Judgment in case C-896/19 *Repubblica* v *Il-Prim Ministru* ECLI:EU:C:2021:311, paras. 61–63.

The body of case law on Polish rule of law issues appears to suggest that the realization of the principle of the rule of law forms the ultimate boundary beyond which respect for constitutional identity as included in Art 4(2) TEU cannot extend. Although the Court cannot determine the contents of such national identity, it still has the power and the duty to ensure its conformity with EU law.[242] The national measures in many of the Polish cases take sovereignty too far to be acknowledged to lie within the limits of national discretion, unlike in *Omega Spielhallen*[243] and *Sayn-Wittgenstein*[244], where national discretion allowed restrictions of EU derived rights in order to protect the values of Art 2 TEU. Accordingly, the competence of national constitutional bodies to determine national identity, including such judicial reforms that took place in Poland, must be applied in conformity with EU law and in the specific case of the principle of the rule of law, the contents of the principle derive from common constitutional values shared by the Member States.[245]

As noted on several occasions already, even the classical interpretation of primacy extends beyond the constitutional law of Member States. This issue has recently resurfaced in two Romanian cases concerning again the effect of Art 19(1)(2) TEU and confirming the conclusion above based on Polish cases. In *Euro Box Promotion*, primacy of EU law was in conflict with an order of the national constitutional court.[246] The Romanian constitutional court denied the referring court to advance in criminal proceedings against a number of individuals charged inter alia of tax fraud and corruption. To do so would have breached Art 325 TFEU, yet not obeying the orders of the constitutional court would have imposed a risk of disciplinary sanctions on the members of the referring court. The case has many connotations to the issues examined so far, such as the national guarantees of fundamental rights not being able to justify an infringement of EU law as concluded in *Melloni* and the definition of a court in the EU sense discussed in *Portuguese judges* and other case law. What is of particular relevance in *Euro Box Promotion*, besides the fact that the Court ruled EU law primacy to have precedence over national constitution, is that the Court introduced a new dimension of primacy: the Court stated that the Union can only respect the equality of Member States before the Treaties as required by Art 4(2) TEU if the Member States, due to primacy of EU law, cannot rely on any unilateral measure

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[242] K Ruutu (2021) 473, 489–490.
[243] Judgment in case C-36/02 *Omega Spielhallen* ECLI:EU:C:2004:614.
[244] Judgment in case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806.
[245] P Aalto and N Jääskinen, ’Euroopan unionin tuomioistuin vuonna 2022’ (2022) Defensor Legis 546, 554–558.
[246] Judgment in case C-357/19 *Euro Box Promotion and Others* ECLI:EU:C:2021:1034.

against the EU legal order.[247] The Court then moved on in its discussion on primacy without elaborating further the implications of such potential disrespect on Member State equality. The significance of the holding thus remains to be seen but could imply that the Court will approve the viewpoints of the Member States as regards their national constitutional identity differentially depending on their acceptance of Union law primacy. Though an early conclusion, the consequences could be drastic should the Court deem national identities of some Member States as valid legal arguments subjecting itself to an interactive dialogue with the constitutional bodies of those states whereas render some national identities irrelevant and treat constitutional bodies of those Member States as subordinates of which the Court would command in a hierarchical setting.

In *RS*, concerning the same national law that was to be disapplied in *Euro Box Promotion*, the Court held, unsurprisingly, that primacy "must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law".[248] This is essentially a restatement of the exclusive competence of the Court to interpret EU law and thus make the final evaluation of the compatibility of a national law to that of the EU law; Member States cannot retain such competence to their constitutional courts. The Romanian law is another case of rule of law backsliding as the Court further needed to adjudicate (to the negative) on the national provision which incurred disciplinary liability to a judge who applied EU law despite the contradicting case law of a constitutional court that was incompatible with EU law.[249] Importantly for this chapter, the Court also states that although EU law must not undermine national constitutional identity under Art 4(2) TEU, that provision does not have "neither the object nor the effect [to authorize a national constitutional court to disapply EU law]".[250] In essence, the Court expressly rejected the idea that national identity could be invoked as grounds for limiting the scope or effects of primacy. As the outcome of the judgment, the Court required the national court to disapply on its own motion the national law that it considers incompatible with EU law even if no reference is made to the need to annul the law.[251]

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[247] *Ibid.*, para. 249.
[248] Judgment in case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)* ECLI:EU:C:2022:99, para. 78.
[249] *Ibid.*, para. 93.
[250] *Ibid.*, para 70.
[251] *Ibid.*, para. 59.

In summary, recent case law appears to support the argument I proposed in the context of the "*Taricco* saga" in section 2.5 in that denouncing primacy on the basis that a piece of EU law would disrespect national identity is a weak argument and likely to be, if not completely dismissed, subjected to severe qualifications, particularly in cases of very general applicability such as the organization of national judicial orders under Art 19(1)(2) TEU. The conclusion is to be contrasted with that of von Bogdandy and Schill, who strongly argue national identity to be able to moderate absolute primacy, and may suggest that the doctrine is in the process of transforming towards having a more supreme, hierarchical character.[252]

4.3 Primacy as a constitutional principle in the EU

4.3.1 Primacy as a constitution forming principle

In truly federal states, precedence of federal law can only be challenged on grounds of ultra vires, the review of which is performed by a federal constitutional court. Analogously in the EU, the capacity of judicial review belongs to the Court on grounds of Art 263 TFEU.[253] Once the constitutionality of a federal law is confirmed, the precedence of it is undisputed. Yet, in the EU, primacy can only take effect if accepted by national courts and other domestic authorities. As stated in sections 2.4 and 2.5, many Member States have some reservations and withhold the power to exercise judicial review. It is therefore safe to say that as long as the source of primacy is considered to be the national constitution rather than the Treaties, EU law will be recognized as a piece of public law with federative dimensions rather than, lacking express federal clause, a truly federal legal order.[254] This conclusion does not of course negate the influence of the EU law on national constitutions, and therefore the influence of the Court on national legal principles and practice, but sets the framework for the discourse by acknowledging the Union not to be a federal state.

In the greater scheme of things the EU has always, or at the very least beginning from *Van Gend en Loos*, had a constitutional nature, which was only underlined in the Treaty of Lisbon.[255] The

[252] A von Bogdandy and S Schill (2011) 1417, 1419.
[253] One could argue that Art 267 TFEU provides the ultimate capacity to rule on the validity of EU acts to national courts; yet, this would require national courts to directly oppose the guidance given by the Court in its preliminary ruling.
[254] B de Witte (2021) 187, 227.
[255] A Rosas and L Armati (2018) 275.

doctrine of "a complete system of legal remedies" offered by Art 263 TFEU to review the legality of Union acts joined by the exclusive competence of the Court to execute such a review and Art 267 TFEU to review the compatibility of acts of the Member States in individual cases coupled with the enforcement mechanisms such as the infringement procedure provided by Art 258 TFEU and the doctrine of State liability form the current backbone of the constitutional attributes of the Court.[256] The judgments in *Rimšēvičs* and *W. Ż.*, the former through a direct action and the latter through Art 267 TFEU, have expanded the Court's capacity to review national acts from declaration of illegality (and thus requiring separate enforcement) to that of annulment that does not in principle require separate enforcement procedure and that, according to the paradigm of *ex tunc*, renders a retroactive effect.

Case law, most recently *Euro Box Promotion* and *RS* cited above, indicate that there is still a long way for the Court to expressly annul or require the referring court to annul legislative acts of the Member States. The Court rather leaves the matter for the national authorities to remedy. The fact that the Court interprets EU law leaving its application to national courts highlights the constitutional nature of the Court as a supreme court would have to apply the law to each case at hand. Should the Court drift towards application rather than interpretation would risk there to be a very large number of cases to be resolved by it.[257] The distinction is of course not clear-cut: the influence of preliminary rulings beyond the case at hand[258] and the wide variety of substance matter that the Court needs to rule on give it a flavor of a supreme court despite it restraining to interpretation.[259]

Legal theorists have acknowledged that simply because a norm is valid does not in itself guarantee justice taking place. Habermas ponders on the issue of choosing between valid norms the appropriate one which is to be applied in the concrete legal situation in a functioning democracy.[260] He notes that there can co-exist equally valid norms that are constitutionally justified, of which just one can be chosen for application in the individual case. When viewed from the Habermasian justification – application dualism, the function of the Court is to resolve

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[256] *Ibid.*, 278.
[257] M Broberg and N Fenger, 'The Preliminary Ruling' in *Broberg and Fenger on Preliminary References to the European Court of Justice* (3rd edn., Oxford: Oxford University Press, 2021) 371, 393.
[258] M Broberg and N Fenger, 'The Effects of the Preliminary Ruling' in *Broberg and Fenger on Preliminary References to the European Court of Justice* (3rd edn., Oxford: Oxford University Press, 2021) 399, 407.
[259] J Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter' (2015) 21(2) European Public Law 285, 301.
[260] J Habermas, 'Dworkin's Theory of Law'in *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy* (trans. William Rehg, Cambridge, Massachusetts: The MIT Press, 1996) 211, 217–218.

norm collisions (between EU and national provisions) and choose the norm to be applied. The interpretation of EU law becomes choosing the applicable law between several valid alternatives; this still is not applying the law *in concreto* but instrumentalization of primacy to become a procedural rule.

Whereas the (national or EU) constitution has the function of justifying legal norms, the theoretical framework of a European constitutional democracy sets the issue of constitutional identity aside and shifts the focus of constitutional discourse to the compatibility of national sovereignty to the European legislation, each with a democratic justification.[261] In this setting, the role of the constitutional courts is to mediate the interests of the Europeanized individual who has attained rights from EU law and who has the Court to back her up and those of the national public autonomy. The idealized model is in effect a form of constitutional pluralism, where each institution is taken into account with its fair share of competence and mutual respect and where the Court is acknowledged to have the ultimate competence to rule on the validity of EU law and the role of national courts is to fit domestic details into the framework.[262] This does require acceptance by Member States that they have indeed committed to release some of their sovereignty to the Union, as noted already by the Court in *Costa v ENEL*, in exchange for which the individuals of the Member States acquire the status of subjects to EU law and the fundamental rights protection that it entails in the global surroundings.

Habermas appears to agree, calling the EU to develop into a transnational democracy with two-dimensional sovereignty, that of European citizens and that of its peoples, the Member States.[263] He concludes increasing the legitimization of the supranational organs of the EU, most prominently, the European Parliament, to be of utmost importance by improving the democratic status of the institutions while retaining the heterarchical relationship of EU institutions with Member States. This would require the self-empowerment of the European citizen and a national citizen, both in the same natural person, who is willing to divide sovereignty between the supranational Union and the nation state. Primacy, in this Habermasian federative model, would derive its justification from functional arguments and not from any general principle of

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[261] J Komárek, 'National constitutional courts in the European constitutional democracy' (2014) 12(3) Int. J. Const. Law 525–544.
[262] As discussed in section 2.5, in reality not all national constitutional courts or bodies willingly approve the Court's ultimate jurisdiction.
[263] J Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How It Is Possible' (2015) 21(4) ELJ 546–557.

federal law standing above domestic law. In that regard, the model is consistent with the current formulation of primacy as depicted in this thesis.

A further variety of pluralistic, heterarchical constructions is that of demoicracy. Understood as "governing by peoples but not as one", the model represents yet another alternative to federal and intergovernmental structures.[264] The detailed analysis might be ambiguous but the overall idea is the avoidance of the concept of a single European people. In the demoicratic ideology, it is accepted that European peoples are and remain distinct but can still govern jointly. The EU is seen as a genuine Union; it will never be a federal state but at most, a federal union, and the school of thought takes very literally the objective of an " ever closer union among the peoples of Europe" as stated in Art 1 TEU.

Demoicracy thus lays on the foundation of "no demos", Europe not constituting of a single people and certainly rejects any conceptions of a single European identity. The individuals, as also proposed by Habermas, represent simultaneously the Union and the State, the constitutions of which are open to influence of those of others but never merging. The EU as a demoicracy is at a state of constant flux and evades precise definitions on classical terms such as federation but is more akin a unique *sui generis* entity, whose governance is a constant managerial struggle to find sufficiently acceptable, pragmatic solutions.

It is clearly true that there are characteristics in the current EU that fit into the demoicratic idea. But the concept is also so abstract and transmutable that it is unclear whether its conceptualisations bring anything new for the understanding of the Union and primacy as its constitutional principle. It does not appear a too distant suspicion that demoicracy is whatever best fits current state of affairs rather than providing any institutional support for acknowledging the nature of the EU.[265]

Yet another constitutional model of the Union is provided by Tuori. His theoretical framework somewhat resembles demoicracy, at least as far as the federal status of the Union's constitution must be rejected since the EU lacks a "Kelsenian characteristic of superiority" in the sense of

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[264] K Nikolaïdis, 'The Idea of European Demoicracy' in J Dickson and P Eleftheriadis (eds.) *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012) 247–274.
[265] M Ronzoni, 'The European Union as a demoicracy: Really a third way?' (2017) 16(2) European Journal of Political Theory 210–234.

missing competence to invalidate a national law.[266] In other words, the state law does not derive its validity from the federal constitution.[267] He also emphasizes the dynamic nature of the Union as he understands the EU multidimensional constitutionality as a temporally varying interplay between the framing political and juridical constitutions followed by sectoral constitutions, of which he identifies (micro- and macro)economic, social and security constitutions,[268] and others even more, such as EU digital constitution,[269] that follow a historical path of development through different phases like focusing on common market and integration, judicial activism and fundamental rights protection. Declaring EU law autonomous, even from the premise of international law in that the internal effects of a treaty are determined by national constitutions, was necessary to achieve uniformity and effectiveness of EU law during the development of the Union.[270] Since the relationship of EU law to Member State law has been and is bound to have the dual nature of both an integrated and independent legal system lacking pure Kelsenian hierarchy, there is always room for teleological interpretations on primacy and its effects; the speech act of the Court exceeds that of the constitutional courts in domestic constitutional discourse.[271] Though acknowledging perspectivism in the understanding of EU legal system, it is indeed the judicial system(s) of the Union, in particular the internal primacy of EU law within Member States, by which Tuori outright rejects the view that the EU is just another international treaty system with some distinctive features but instead a transnational polity.[272] This was already reflected in part by the language of the court in early judgments: whilst in *Van Gend en Loos*, Union law was "a new legal order of international law",[273] already *Costa v ENEL* gave more emphasis on the exceptionalism and integrativeness of the Union as the Treaty has "[b]y contrast with ordinary international treaties…created its own legal system…[that] became an integral part of the legal systems of the Member States".[274]

Of very opposite opinion is Jääskinen, current judge of the Court, who recognized the inconsistency of the fundamental principles of the proposed Union constitution, direct effect

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[266] K Tuori (2015) 12.
[267] *Ibid.*, 345.
[268] *Ibid.*, 319.
[269] G De Gregorio, 'The Rise of Digital Constitutionalism in the European Union' (2020) 19(1) Int. J. Const. Law 41–70.
[270] K Tuori (2015) 322–323.
[271] *Ibid.*, 325–327.
[272] *Ibid.*, 340–344.
[273] Judgment in case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1, 12.
[274] Judgment in case C-6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66, 593.

and primacy at the frontline, to the national sovereignty of Member States.[275] In his opinion, the "metaconstitutional paradox" as he calls it is insolvable as long as the Union remains a *sui generis* legal construct of which a Member State can revoke itself, as indeed has since happened. There is ultimately no room for interplay or dialogue between the laws of the Member States and the Union, but a direct conflict ensues, that can only be resolved by clear rules. Still, one should consider that these views were expressed in his pre-Lisbon thesis and it is unclear whether they remain valid considering the developments since. Nevertheless, Kelemen and Pech similarly argue for the traditional, strict view of primacy in a more modern context of rule of law backsliding in that primacy should not be moderated by national identity and is to be held as an absolute rule if it is to effect its function as ensuring uniform application of EU law.[276] The authors go as far as completely rejecting the idea of constitutional pluralism since the doctrine is susceptible to autocratic abuses for the tendency of such governments to define national constitutional identity as whatever serves their interests. Rather, all Member States face a choice: either submit to primacy or leave the Union.

4.3.2 Primacy as a tool for dispute resolution

Perhaps then, rather than a constitutional court, the acceptance of which would require the adoption of complex, scholastic or even perhaps detrimental concepts such as constitutional plurality, heterarchical legal relations and demoicracy, the Court can be understood essentially as a dispute settlement body or a court of arbitration with direct effect and primacy as its instruments of enforcement. When viewed from this angle, the Treaties are agreements between Member States to which they have volunteered and the members of the arbitration tribunal are chosen among the initiative of the parties to the agreement. The Court applies Treaties as law of the arbitration, though the mandate derives from case law and implicit reading of the Treaties and not from explicit choice of law clause in the agreement, and leaves national legislation to the Member States to deal with. This will leave out the problem of accepting the superiority of the Court; no lawyer considers arbitration tribunals to be superior to the courts of the state they are in, but recognize the jurisprudence of the arbitration tribunal to be derived from the contractual obligation the parties have committed to.

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[275] N Jääskinen, 'Euroopan metakontekstuaalinen paradoksi' in *Eurooppalaistuvan oikeuden oikeusteoreettisia ongelmia* (Helsinki: Yliopistopaino, 2008) 203–209.
[276] R D Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies 59–74.

Such understanding can only be accommodated should it be acknowledged that individuals, be that citizens, other natural persons residing within Member States or legal persons, are not only subjects of the law of the Member States but also subjects of the EU law. Since the Treaties provide them rights through direct effect, these individuals truly are subjects with a capacity for agency, and not only objects of juridical control. This has the corollary that these subjects can exercise their rights against Member States themselves. When States relieve some of their sovereignty to the EU, their grip on the individuals loosens. Indeed, this was argued already in *Costa v ENEL* when the Court found that "[b]y…real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves".[277]

One might indeed propose that it is this enhanced independence of individuals from their Member States that is the root cause for the hesitancy to accept EU law primacy in some Member States. The argument follows those of Phelan who makes the case that the fact that individuals can and do enforce the Treaties in the courts of the Member States benefits the other Member States and sets the EU Treaties apart from other international trade agreements, whose enforcement is based on retaliatory measures between states and other unilateral safeguard mechanisms.[278] He takes the argument as far as seeing the Treaty system, enforced by the Court and national courts together as provoked by private litigants as an alternative for inter-state self-help so that the empowerment of individuals acts for the benefit of other individuals and for the Member States since the states do not have to engage in the self-help action, ultimately, war. In this view, it is the direct effect and primacy that transform a theoretical prohibition of retaliation and self-help, enforced with nothing more than *ex post* declaratory judgments of a tribunal, into de facto effective mutual controls while ensuring compliance to the Treaties. Providing rights to their individual subjects, guaranteed by primacy, the Treaties regulate states' behaviour; individuals become proxy agents of states. As a reward, the subject achieves a citizenship that is not limited to its economic dimension but also covers the political one.

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[277] Judgment in case C-6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66, 593.
[278] W Phelan, 'States and Individuals in the Great Judgments of the European Court of Justice, 1961–1979' in *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge: Cambridge University Press, 2019) 221–241.

Should we accept Phelan's arguments, the unique enforcement mechanisms of the trade treaty that required direct effect and primacy also created from the beginning a European citizen in the sense that she has rights and capacity to exercise them outside that provided by national law alone. This is in line with many scholars[279] and supports the functionalist view of primacy by arguing that by requiring primacy, the Court is not promoting the federalist agenda but only acts by necessity and takes care that the Treaties function the way they were intended to.[280]

Phelan strongly argues on behalf of Treaties as exceptional international trade agreements, the exceptionality of which derives from the lack of unilateral safeguards such as derogations and other remedies in times of economic difficulties that are so typical in most, if not all, other trade agreements.[281] In his view, the fact that such safeguards were only available through prior authorization by supranational bodies of the Union, mainly Commission, and enforced by courts in litigations raised by individuals was what made the Union special in being both deep and inflexible (from the point of view of the participating states) and necessitated direct effect and absolute primacy.

Though this might have well been the case in the time Phelan bases his claims on, namely the period of "great judgments" in the 1960s and 1970s, today the Union is about much more than just free trade. The four freedoms are still important but today's EU covers other fields than free trade alone. Sure, the new fields of competencies like regulation of internet services and data transfer, management of immigration and coordination of energy and environmental policy all have trade and economic aspects but are also deeply embedded in the fundamental rights and other foundational values. The threat to peace in the EU does not come from spirals of escalating retaliatory measures between Member States but from beyond the borders of the Union; the most important trade partners are not necessarily fellow Member States but major countries in the rest of the world; and societal turmoil related to migration does not, post-Brexit, derive not so much from movement of people between Member States but more from immigration from outside of the Union. This is why, even if the significance of the

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[279] Cf. discussion on the trigger model of primacy and eurolegalism in section 2.6.
[280] W Phelan, '*Costa v. ENEL*, 1964 – Supremacy' in *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge: Cambridge University Press, 2019) 73–74 and references 25–26 therein.
[281] W Phelan, '*Pork Products*, 1961 – No unilateral safeguards' in *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge: Cambridge University Press, 2019) 13–30.

constitutional dimensions of the Treaties could be downplayed in the past, it certainly cannot be done today. The hypothesis of increasing constitutionality of EU law also explains the heightened importance the Court is giving to the foundational values of the Union and primacy as a tool of their enforcement, yielding primacy not only a constitutional principle of substantive nature but a nature of a procedural rule. This aspect will be examined in greater detail below.

4.4 Balancing primacy and national procedural autonomy

Though I presented some criticism on Phelan's thesis of EU derived rights as substitutes for retaliatory measures in the event of breach of the Treaties, I fully acknowledge the conception of the Treaties having a rights-creating character. The essence of the criticism can instead be reduced to the finding that the increased focus on fundamental rights and on the foundational values of the Union due to the different crises it has gone through, has resulted in the need to protect rights not just in trade-related matters but in a variety of EU competences. For example, though fundamental rights were established as a general principle of law and formed common constitutional tradition already in Phelan's era of "great judgments", it was only later, beginning from the Maastricht Treaty in 1993, that they were given more weight as part of the legitimization of the common market ideology.[282] I will therefore examine how primacy affects the Court's fundamental rights protection and the procedural guarantees to have them together with other EU rights, enforced.

An important principle is proportionality that is to be applied in the application of EU law as it affords flexibility to the interpretation of Union provisions and allows the avoidance of national law challenges to EU law, thus acting as a justificatory counterpart to primacy.[283] This is especially so when balancing restrictions on fundamental rights, in which field the Court may feel particular distrust to Member States.[284] This power to adjudicate would only be limited by the scope of EU law, a matter which to a large degree depends on the Court's own discretion on which Treaty provisions are to be given direct applicability and direct effect.

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[282] T Ojanen, 'Perus- ja ihmisoikeudet – Eurooppalaisen konstitutionalismin Akilleen kantapää?' (2009) Lakimies 1106–1124.
[283] W Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439, 464.
[284] J Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter' (2015) 21(2) European Public Law 285–308.

Rimšēvičs and *W. Ż.*, where the Court changed its requirements for Member States from duty to disapply to that of annulment, would not represent the first cases where the Court would "change its language" when needed to ensure fundamental rights protection; a similar change took place in *ERT*,[285] when EU fundamental rights protection extended from the situations of Member States implementing EU law as expressed in *Wachauf*,[286] to those of acting within the scope of EU law.[287] Yet, jurisdiction to adjudicate on fundamental rights does not come into play in merely hypothetical situations but requires that the actual occurred facts put the situation into the scope of EU law.[288] The national act must also have a sufficiently direct connection to EU law.[289] When that is not the case, for example when the Court does not have jurisdiction due to the national provision not intending to implement EU law[290] and also when EU law has only an indirect, interpretative effect on national provisions in situations that fall outside the scope of Union law even if the national provision refers to EU law,[291] EU provisions do not have primacy and national rules do not need to be disapplied. Considering that Art 14.2 of the Statute of the ESCB and of the ECB and Art 19(1)(2) TEU both contain direct effect, the two cases obviously fall within the scope of EU law. In *Rimšēvičs*, the requirement for a factual event was satisfied by the temporary but indeterminate dismissal of Mr Rimšēvičs and in *W. Ż.*, by the appointment of a single judge under conditions which left the individual concerned without guarantees for a fair trial. The two cases therefore indisputably belong to the jurisdiction of EU law.

The EU judicial organization, the European judiciary, is based on an integrated, decentralized system where each national court functions as an EU court and where applicants can exercise their EU-derived rights. This means that Member States must provide effective judicial protection of those rights. The joint system can thus be summarized by saying that EU law provides the rights and national law provides the remedies, with due regard to the duty on

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[285] Judgment in case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* ECLI:EU:C:1991:254.
[286] Judgment in case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* ECLI:EU:C:1989:321.
[287] J Snell (2015) 285, 289.
[288] *Ibid.*, 290.
[289] *Ibid.*, 296.
[290] Judgment in case C-309/96 *Daniele Annibaldi* ECLI:EU:C:1997:631, paras. 21–25.
[291] Judgment in case C-310/10 *Ministerul Justiţiei şi Libertăţilor Cetăţeneşti v Ştefan Agafiţei and others* ECLI:EU:C:2011:467, para. 47.

sincere cooperation.[292] The procedural autonomy of Member States could however result in negating primacy and direct effect that form the foundation of those rights, should national procedural law make it impossible for an individual to enforce them. Tension therefore exists between primacy and national procedural autonomy. In order to enable balancing between these interests, the Court has in its case law developed the twin principles of equivalence and effectiveness.[293] The principles state that Member States' procedural autonomy is limited so that national rules governing actions to protect rights derived from EU law must not be less favorable than those governing similar actions of national law and those rules must not make it virtually impossible or excessively difficult to exercise rights derived from the Union law.[294] The principles, now included in the reading of the second subparagraph of Art 19(1) TEU,[295] were put in practice for example in *IN.CO.GE.*,[296] when the Court considered how far it should guide the referring court on the consequences of a finding of incompatibility of a national provision with EU law. It is here, on issues of what might be called enforcement of EU rights, that the absoluteness of primacy is finally moderated through the balancing acts of the Court.

In the issue of how far the Court can interfere with national procedural autonomy, the Court is said to have an attitude of "selective deference" or operating on an "objective justification model", leaving more room to operate for domestic courts in some cases and being more intrusive in others.[297] Generally, the Court is careful of intervening with national procedural rules. This is particularly so when such interference would risk legal certainty in a context where individual's EU rights were not in danger.[298] This was evident in *Heemskerk*, where disapplication of a national law due to inconsistency with EU law would have breached the domestic principle of *reformatio in pejus* in that the plaintiff of an appeal process would have

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[292] K Lenaerts, 'National remedies for private parties in the light of the EU law principles of equivalence and effectiveness' (2011) 46 Irish Jurist 13–37.
[293] Important case law for establishing the principle of equivalence are judgments in cases a) C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188; b) C-45/76 *Comet BV v Produktschap voor Siergewassen* ECLI:EU:C:1976:191; and c) C-158/80 *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* ECLI:EU:C:1981:163 whereas the principle of effectiveness is more difficult to locate to any particular set of cases but rather follows from the doctrine of *effet utile*.
[294] B de Witte (2021) 187, 204.
[295] K Lenaerts (2011) 13, 14.
[296] Cf. discussion in section 2.3.2.
[297] K Lenaerts (2011) 13, 16.
[298] K Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2011) 33(5) Fordham International Law Journal 1338, 1382–1383.

been set to a worse position than without the appeal.[299] Viewed from another perspective, the Court relaxed on its requirement of absolute primacy for the interest of protecting fundamental procedural rights of the individual. In this view, the Court was less strict than in the later *Melloni* case, perhaps because at the time of the former, the Charter was not yet in force and there were no such guarantees of fundamental rights on behalf of the EU law that applied in the latter.

Conversely, should the rights derived from EU law be in danger, the interests of securing the effect of EU law might rule over national procedural laws. In these type of situations, the Court has taken steps in the path of immersing its rulings on national procedural law in many cases: *Lucchini* represents a case where the interest of legal certainty, namely *res judicata* of a prior national judgment, was by-passed by the interests of effecting EU law.[300] In *Cartesio*, though the Court formally withheld its earlier case law allowing appeals to be made in higher instances against the decision of a lower court to make a preliminary ruling request, the Court qualified the legal force of such appeals so that the lower referring court is not bound to the court of appeal's decision when deciding on the case based on the answer it gets from the Court.[301]

The above cases indicate that the avoidance of the Court from interfering with national procedural autonomy beyond the minimum requirements of conforming to the principles of equivalence and effectiveness has diminished and the Court appears now to set positive demands for national procedural rules. This is at least the case when the Court requires procedural rules to provide effective judicial protection. This duty was defined in *Unibet*, where a gambling company was prohibited from advertising its lotteries in Sweden.[302] The problem for the company was that it itself was not criminally charged but instead the various media companies that displayed its advertisements were. Now the issue was whether there were adequate means for Unibet to enforce its EU rights. Although the Court concluded in the particular case that there was, it nevertheless complemented its response by stating that should the only way for an individual to dispute on the compatibility of a national provision with EU law be to breach the national provision and subject itself that way to administrative or criminal

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[299] Judgment in case C-455/06 *Heemskerk BV and Firma Schaap v Productschap Vee en Vlees* ECLI:EU:C:2008:650.
[300] Judgment in case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* ECLI:EU:C:2007:434.
[301] Judgment in case C-210/06 *CARTESIO Oktató és Szolgáltató bt* ECLI:EU:C:2008:723, para. 98.
[302] Judgment in case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* ECLI:EU:C:2007:163.

proceedings, that would not qualify for sufficiently effective judicial protection.[303] Yet, there are no requirements as for what type of proceedings should be available or what outcomes should be reachable as long as the individual has a chance to invoke the EU provision. This can be understood to also mean that effective judicial protection is more about ensuring the *effet utile* than about guaranteeing individual rights.[304] *Effet utile* would thus represent the substantive fulfilment of EU law whereas effective judicial protection represents sufficient satisfaction of procedural requirements for enforcing that law.

A concluding hypothesis can now be compiled on *Rimšēvičs* and *W. Ż.* based on the interplay between Union law and national procedural autonomy. First of all, the cases were very different from each other, both on facts and on points of law. The common denominator was that the individuals at issue, who had some EU rights at their enjoyment, were denied of those rights by administrative and extrajudicial measures in a legal order that generated distrust in the eyes of the Court. This distrust was likely further sensitized by the institutional status of the individuals concerned, the other representing a member of the European System of Central Banks and the other the European judiciary. The integrity and the independence of both of these institutions are crucial to the justification of the whole EU as it currently stands.[305] Considering that, while still trying to maintain coherence with its own case law,[306] the Court is not bound to its own rulings with the implication that it can overrule its own decisions on the interpretation of EU law but it cannot rule on the validity of its previous preliminary rulings,[307] the Court has been careful on giving any guidance on how the Member States should remedy situations where setting aside a national provision is unavoidable in order to secure primacy. Notwithstanding, the absence of strict *stare decisis* in EU law provides flexibility for the Court to take the necessary steps to secure efficient judicial protection for the individuals by changing its practice if necessary. No principle of constitutional identity, such as the Polish one for the organization of its judicial bodies or the Latvian claim for the exclusive national jurisdiction on criminal

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[303] *Ibid.*, para. 64.
[304] M Taborowski, 'Case C-432/05 Unibet Some practical remarks on effective judicial protection' (2008) 14(3) Columbia Journal of European Law 621, 647.
[305] Both cases, like many of the Polish rule of law cases and the follow-up case of *Rimšēvičs*, were heard in the Grand Chamber of the Court, an indication of the importance of the cases, cf. Rules of Procedure of the Court of Justice, Title II, Chapter 6, Art 60 (OJ L 265/1, 29 September 2012).
[306] M Broberg and N Fenger (2021) 399, 409.
[307] P Pohjankoski, 'Eurooppalaisen oikeusvaltion etulinjassa: tuomarin rooli EU-oikeudellisen ennakkoratkaisun pyytämisessä' (2021) Lakimies 76, 80.

matters, can preclude the Court from penetrating the remedial systems of Member States when effecting primacy so requires.

In summary of the chapter, recent case law, discussed in section 4.2, suggests that the Court is rather unresponsive towards claims of national identity but does give weight to common constitutional principles. Although the Court has been open for a judicial dialogue, constitutional pluralism is reaching its limits upon challenges to the rule of law and other foundational values of the Union as concluded in section 4.3.1 but reducing the character of primacy from a constitution forming principle to a mere dispute resolution rule appears, as argued in section 4.3.2, inadequate as well. Rather, primacy is taking an even higher priority in the Court's practice and expanding to increasingly interfere with the procedural autonomy of the Member States to the degree discussed in section 4.4. I conclude this emerging expansive teleological interpretation of primacy to be a response of the Court to systematic challenges within Member States against the constitutional values of the Union.

When viewed from a historical perspective, the constitutional evolution of primacy took the doctrine from being a rather simplistic concept of Union law supremacy, in all cases but without too much concern given to the implications of it, to something much more relational and horizontal: Primacy existed as a superiority clause for EU law but only within its sphere of jurisdiction. Careful balancing was required to fit the spheres of EU law to that of national constitutions and vice versa with sometimes severe difficulties at the boundary zone. This constitutional pluralism only worked so far as the national bodies were willing to submit to it by judicial restraint and conforming interpretation. The recent crises period of the Union and the rule of law backsliding in particular appear to have shifted primacy back to its early role as a choice of law rule that has a substantive aspect, namely what is the applicable law, and a procedural aspect, namely how that law must be effectuated in an individual case. In this regard, primacy is (re)approaching superiority.

5 Concluding remarks

The central result of this study is that primacy of Union law exists in two dimensions. The first is the substantive dimension. This means that EU law must prevail and materialize in the Member States so that *effet utile*, the full and uniform effect of EU law is realized. The second is a procedural dimension and relates to how the effect of EU law is put into practice within Member States. Here, the procedural requirements of EU law, the principles of equivalence and effectiveness and the principle of effective judicial protection, may allow national discretion so that often, but not always, mere disapplication of a national act is sufficient to satisfy primacy. *Rimšēvičs* and *W. Ż.* qualified at least some of the conditions for when the Court can take a step further in guiding the procedural realization of EU law to such an extent that full annulment of a national measure is necessary.

Another key result of the study is that what primacy essentially does is to put the individual and her rights to the center of EU law. The function of primacy is simultaneously to ensure the effectiveness and uniform application of EU law in Member States and to secure that an individual can de facto exercise the rights the Union law confers to her. The doctrine has therefore a function at the level of the legal orders, where primacy is related to national identities from the point of view of the Member States and constitutional traditions common to the Member States from the point of view of the Union, and at the level of the legal subjects, where primacy is connected to the concept of direct effect. Whereas the former dimension often remains in the sphere of legal theory, it is the latter where primacy manifests itself *in concreto*, most prominently by empowering the individual against state abuses.

In Dworkinian terms, primacy is more akin a principle with a differing weight and not a strict all-or-nothing rule and therefore not locked in to have a certain content and result. Rather it is a principle that adapts to changing conditions and evolves on passage of time. The Court is likely to always give primacy the content which in any particular case is needed to realize its function. On individual level, the decisions to annul national measures in *Rimšēvičs* and *W. Ż.* may simply be consequences of the specific facts in the cases. Most importantly, the national measures in question were not legislative acts but rather acts of executive nature, namely an administrative measure related to criminal investigation and a judicial decision. Further case law and its systematization is needed to conclude on the matter.

An established tradition of the EU constitutionalism is for the Member States, "Masters of the Treaties", to amend the Treaties as a response to the case law of the Court in the form of qualification, limitation or codification.[308] Whether this occurs in some form with respect to primacy having an annulling effect to a conflicting national measure in what would in effect be a reattempt of a constitutional treaty remains to be seen but for the moment is to be considered extremely unlikely. The development would represent a major step towards a federal nature of the Union as it would further shift the role of the Court from a parallel to that of both a constitutional and a superior court relative to national courts.

Before the decision of the Polish Constitutional Tribunal denying primacy, conflicts of the Court and national courts on the questions of national approval of primacy and competence of the Court have been coped with, though with occasional difficulty,[309] partly since the Court has a mandate to take national constitutional identities into account in its jurisprudence as provided by Art 4(2) TEU.[310] The research here concludes that it is rather the common constitutional tradition, to which national identities may feed in, that may be the more important ground for moderating the effects of primacy. If we now have seen the beginning of the development where the Court rules national measures invalid, and especially if this in future is to concern national legislative acts, such peaceful coexistence and mutual understanding might well be endangered. It is one thing for the Court to say that a particular national provision must not be applied in the case at hand concerning its duty to ensure correct interpretation and application of EU law and another thing to say that the said provision is invalid as such. This would be especially prone to disobedience if such a judgment concerned a piece of national legislation representing constitutional order. Still, on the level of the legal orders, the decisions of the Court do nevertheless raise the possibility of the Court developing towards a constitutional court as a defense of its authority against national rebellions such as what took place in Poland.

The long trend in the case law of primacy suggests the Court to have empowered national courts as part of the European judiciary to enforce EU law even against national superior or constitutional courts. In *Rimšēvičs* and *W. Ż.*, the Court continued its fight for EU law

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[308] A Rosas and L Armati (2018) 46–48.
[309] To remind, the cases of such conflicts such as *Ajos* and *Weiss* concerned some specific aspect of EU law in an individual case whereas the Polish CT denounced primacy in very general and systematic terms, cf. chapters 1 and 2 for discussion.
[310] A Rosas and L Armati (2018) 68.

effectiveness, uniformity and autonomy. The Court did not trust the judicial systems in the respective Member States and took direct command to itself by annulling or guiding the referring court to annul a national measure. This self-empowerment, though within the boundaries of the teleological interpretation of the Treaties, would surely be a contestable action should there not be strict qualifications for such rulings. The research here indicates that only hierarchically lower acts than legislative acts can be subjected to such annulment and there must be some fundamental rights issue, such as derogation from a fair trial, or a lack of trust in the eyes of the Court for national authorities' abilities to secure those rights, to justify the extended jurisdiction of the Court. The fact that the individuals had an EU institutional position was likely a contributing factor in the cited cases and the risk of endangering the rights of such actors may be a condition for the annulling effect of primacy. However, care must be taken to make any definite conclusions. The two cases are very recent and it is quite possible they remain singular outliers in the body of case law to come.

Irrespective, the evolution of primacy, and direct effect alongside it, clearly demonstrates that when it comes to ensuring the efficacy and uniformity of EU law, the Court is ready to go very far. Facing systematic challenges on judicial organization in some Member States, the Court has had to give direct effect to Art 19(1)(2) TEU. To remedy national measures that conflict EU law, it has had to annul the measures. To prevent adoption of a conflicting national law, it has had to preclude the legislation. However, I have argued in the thesis that when the Court precludes a national law through a preliminary reference under Art 267 TFEU, it does not necessarily mean finding the measure invalid. This is in contrast when Union acts are ruled invalid under Art 263 TFEU proceedings. In other words, the Court finding EU law to preclude a national measure under Art 267 TFEU is therefore not a judicial review proper in the constitutional sense of *Marbury v Madison* of a genuinely federal state.[311]

Since reviewing the validity of national laws is not conferred on the powers of the Court in Art 19(3) TEU nor elsewhere in the Treaties and considering that the Union and its institutions can only take action on the basis of the principle of conferral as provided in Art 4(1) TEU and Art 5(1)–(2) TEU, there is no statutory power for the Court to do that. But lack of express statutory power was never an obstacle for primacy in the first place. Member States have tried to limit the powers of the Court by invoking issues of national identity which the Court has been very

[311] 5 U.S. (1 Cranch) 137 (1803) *Marbury v Madison,* judgment of the U.S. Supreme Court of 24 February 1803.

reluctant to acknowledge, particularly when the matter concerns the foundational values of the Union or the fundamental rights guaranteed by the EU.[312]

Indeed, primacy may not in fact be a "super-constitutional" principle of EU law after all, but one among many principles, which are balanced with respect to each other in individual cases.[313] Referring back to Dworkin's definition of a legal principle, it is not the national interest, be that national identity or domestic procedural principles, but Union general principles of law, rule of law among them,[314] that are the balancing weights. Besides national identity – common constitutional tradition dichotomy and the distinction between fundamental rights guaranteed by the EU vis-à-vis those guaranteed by national law, this aspect is apparent in other principles of law. For example, as stated above, proportionality as a principle of EU law and therefore as evaluated by the Court can limit the extent of primacy,[315] whereas proportionality as a national principle of law cannot supersede primacy of EU law provisions.[316] When understood this way, case law on primacy is largely federated: primacy is both a consequence and a cause of EU law autonomy with respect to the laws of its members.

I therefore consider that a further step towards federalization, the annulment of a law in a Member State, to lie within the reach of innovative interpretations of the Court. Of the two decentralized, federative institutions of the Union, that of the European System of Central Banks and that of the European judiciary, the governing body of the former has already shown its readiness to do "whatever it takes" to keep the institution functional in times of crisis.[317] One day, should the rule of law backsliding escalate or other existential crises develop, primacy may demand the same from the latter.

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[312] K Lenaerts (2021) 231, 234.
[313] C Rauchegger, 'Four functions of the principle of primacy in the post-Lisbon case law of the European Court of Justice' in K S Ziegler, P J Neuvonen and V Moreno-Lax (eds.), *Research Handbook on General Principles in EU Law – Constructing Legal Orders in Europe* (Cheltenham: Edward Elgar, 2022) 157, 166.
[314] The "conditionality judgments" of the Court against Hungary and Poland expressly define rule of law as common constitutional tradition among the Member States, cf. judgments in cases a) C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para. 234; and b) C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98, para. 266.
[315] W Sauter (2013) 439–466.
[316] Judgment in case C-273/15 *ZS 'Ezernieki' v Lauku atbalsta dienests* ECLI:EU:C:2016:364, para. 54.
[317] The quote refers to a speech given by then president of the ECB Mario Draghi on 26 July 2012, which is generally considered to have salvaged the Euro monetary system from breaking apart during the Euro crisis.