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The EU integration through the lenses of domestic Constitutional/Supreme Courts: the material scope of constitutional clashes*

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Introduction

Over the past year two judgments involving the relationship among Poland and Hungary and the European Union («EU») grabbed the attention of European legal scholars. Interestingly both proceedings were initiated by a member of the Government seeking to assess the consistency of some pieces of EU law with some national constitutional provisions. Be as it may, in carrying out their judicial scrutiny these courts tapped into some traditional arguments such as the concept of national identity, sovereignty, and the abuse of the Union's competences: in other words, this case law ultimately deals with the fundamental—and yet puzzling—doctrine of the *ultra vires* and identity review first developed by German scholars.

Accordingly, the setting of the scene is clearly occupied by the «constitutional clashes» which evolved alongside the European integration process. More precisely, this expression is meant to identify the cases in which national Constitutional/Supreme courts questioned the operation of EU law. The constitutional nature of these episodes refers to a threefold aspect. First, from an objective point of view, it suggests that national constitutional features (either written or not) were invoked as an obstacle to the operation of EU law. Second, from a subjective point of view, it refers to the fact

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that these judgments were handed down by Constitutional or Supreme domestic courts. Finally, this wording refers also to the idea that all these clashes pertain to the very constitutional substance of the EU integration, as it will be hinted.

The present work aims at exploring the recent judgments going through the «constitutional clashes» already occurred in the past (Section 1 and 2). This investigation will attempt to detect the main elements of these rulings, thus showing that labelling them—based on the arguments proposed by national courts—as purely identity or *ultra vires* reviews is a troubling task as the two pleas often co-exist (Section 3). At a second stage it will be discussed whether a crucial factor might be represented by the material scope in which the cases fall: the typology of the EU measure challenged, the policy area involved and, possibly, its degree of harmonisation (Section 4). It is going to be assessed whether the reflections made for the traditional clashes in terms of material scope allow to observe the Polish K 3/21 and the Hungarian X/477/21 from a different perspective (Sections 5). In the end some concluding remarks will be drawn.

1. *Learning from the precedents. Previous experiences of national courts challenging EU law: a summary*

In the aftermath of the Lisbon Treaty, many scholars started wondering how national Constitutional/Supreme courts would react to the new arrangements of the EU constitutional democracy notwithstanding that some of them had, already from the earliest days of the European Communities, retained the possibility to scrutinise EU law in the light of national constitutional standards[1]. However, the post-Lisbon scenario presented *constitutionally sensitive* novelties thus further underpinning a «constitutional exceptionalism» trend[2]. Accordingly, many courts paid scrupulous attention to the effect of this step of the integration process. The most famous decision was issued by the German Federal Constitutional Court, the Bundesverfassungsgericht[3] (hereinafter also «*BVerfG*» or «GCC»), nonetheless it was envisaged that also other national courts would be keen to thoroughly monitor the Union's activity in this new legal framework.

[1] Bundesverfassungsgericht, 2nd Senate, 29 May 1974, 2 BvL 52/71, s.c. *Solange I* and Bundesverfassungsgericht, 2nd Senate, 22 October 1986, 2 BvR 197/83, s.c. *Solange II* concerning the consistency of EU law with fundamental rights; Corte costituzionale, 27 December 1973, n. 183/73, *Frontini*. For the latter, see Section 3, namely the part referring to the Italian *controlimiti* doctrine.

[2] Expression by M. Kos, *The PSPP Judgment of the Bunderverfassungsgericht and the Slovenian Constitutional System*, in *Central European Journal of comparative Law*, p. 93.

[3] Bundesverfassungsgericht, 2nd Senate, 30 June 2009, 2 BvE 2/08, the s.c. *Lissabon Urteil*.

While the s.c. *ultra vires* (review) doctrine was by then well established—officially initiated by the *BVerfG* in its *Maastricht* decision[4] and also followed by other national courts[5]—the novelty brought by the Lisbon Treaty in this respect especially concerns the introduction of the new-worded identity clause under Article 4(2) of the Treaty on the European Union («TEU») that national courts looked willing to invoke as a potential derogation from EU law[6].

In fact, it was pointed out that national constitutional courts started feeling isolated[7] considering the expansion of the EU competences and the Charter of Fundamental Rights (hereinafter «Charter» or «CFREU») new *status* as a source of primary law. It was maintained that the new asset should encourage a wiser and more frequent use of the judicial dialogue under Article 267 of the Treaty on the Functioning of the European Union[8] («TFEU»). Whether these predictions proved to be true will the tackled in the next sections.

In doing so, the expression «constitutional clashes» is used to identify the cases in which national courts have opposed or hypothesised restraints in respect of the implementation/application of the EU rules at domestic level eventually determined to protect the hard core of their constitutions.

As is very well known, the very first constitutional clash within the previous terms occurred in the s.c. *Czech pension* case. Basically, referring to the peculiar asset of the Czech and Slovak territories after the dissolution of the former federation, the Czech Constitutional Court, Ústavní soud (hereinafter the «CCC») ruled out the consequences of the operation of the EU principle of non-discrimination as defined

[4] Bundesverfassungsgericht, 2nd Senate, 12 October 1993, 2 BvR 2134/92 & 2159/92, the s.c. *Maastricht Urteil*.

[5] As regards Spain, please refer to C. B. Schutte, *Declaration 1/2004 of the Spanish Constitutional Court (European Constitution), Tribunal Constitucional on the European Constitution*, in *European Constitutional Law Review*, 2005, p. 281; as regards Poland, see Judgment K 18/04 of the Polish Constitutional Court annotated, Trybunal Konstytucyjny by K. Kowalik-Banczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, in *German Law Journal*, 2005, p. 1355; as regards Czech Republic, see the decision of the Czech Constitutional Court: Ústavní soud, 26 November 2008, Pl. ÚS 19/08; as regards France, see Conseil Constitutionnel, 20 December 2007, n. 2007-560.

[6] *Ex multis*, see S. Schill, A. Von Bogdandy, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review*, 2011, p. 1417. As for a comprehensive overview of how constitutional courts reacted to the amendments occurred in the Lisbon Treaty and the typology of review they fostered, see M. Galimberti, S. Ninatti, *Constitutional Resistance to EU Law: The Courts and Test of Constitutional Identity Conflicts*, in *PRAVNI ZAPISI*, 2020, p. 413 ss. available at https://aseestant.ceon.rs/index.php/pravzap/article/view/28877

[7] J. Komàrek, *The place of constitutional courts in the EU*, in *European Constitutional Law Review*, 2013, p. 420.

[8] M. Claes, *The Validity and Primacy of EU law and the 'Cooperative Relationship' between National Constitutional Courts and the European Court of Justice*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 151.

in the *Landtová* decision[9] and then refused to adjust its interpretation of the domestic pension regime in force to the Court of Justice of the European Union (hereinafter also «CJEU») caselaw. In so doing the CJEU upheld the referring court's view—the Czech Supreme Administrative Court, Nejvyšší správní soud (hereinafter also «SAC»)—and maintained that the domestic measure implicated a discriminatory pension treatment based on nationality and, thus, could not be applied.

Seven months from the *Landtová* ruling[10] the CCC used another pending case to openly blame the CJEU's position on the national pension schemes for failing to distinguish the legal relationships arising from the dissolution of a state with a uniform social security system from the legal relationships arising from the free movement of persons among the Member States[11].

However, any possible further (judicial) conflict was avoided due to two events. First, the Government compensated all the applicants in the proceedings pending before the SAC, thus preventing the discriminatory effects of the national legislation feared by the CJEU. Secondly, the CCC's composition changed almost completely between 2013 and 2015 and the new justices looked not interested in pursuing the old *Slovak pension saga*. As often happens in this kind of issues, one might wonder whether the case constitutes a real contrast with the (CJ)EU rather than a collision among domestic supreme judges[12].

Shortly after the Czech case, it was the turn of the Danish Supreme Court, Højesteret, (hereinafter also «DSC») to take a critical stance on the relationship with EU law. Interestingly, alike in the Czech case, the Danish court rejected the operation of the EU general principle of non-discrimination on the ground of age. Particularly, it held that the Danish Accession Act to the EU («DAA») in light of the principle of legal certainty[13] did not limit national sovereignty to the extent that an unwritten EU principle could take precedence over (written) national law[14].

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[9] CJEU, 22 June 2011, C-2399/09, *Landtová*, ECLI:EU:C:2011:415 focusing on the compatibility of some aspects of the national social security schemes with Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

[10] *Ibidem*.

[11] Ústavní soud, 31 January 2012, Pl. VS 5/12, *Slovak Pensions* XVIL, particularly para2.

[12] A. Bobic, *Constitutional Pluralism Is Not Deas: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice*, in *German Law Journal*, 2017, p. 1395.

[13] For an overview of the DSC's previous caselaw on the point see H. Krunke, S. Klinge, *The Danish Ajos Case: The Missing Case from Maastricht and Lisbon*, in *European Papers*, 2018, p. 157.

[14] Højesteret, 6 December 2016, n. 15/2014. For an overview of the nature of the (constitutional) limits raised in the judgment cfr. R. Holdgaard, D. Elkan, G. Krohn Schaldemose, *From Cooperation to Collision: the ECJ's Ajos Ruling and the Danish Supreme Court's Refusal to Comply*, in *Common Market Law Review*, 2018, p. 17.

According to the CJEU's famous *Dansk Industri* ruling[15] previously triggered by the same court, this general principle prevented a domestic piece of legislation that, in the event of dismissal, recognised some allowances only to workers of a certain age.

While the above clashes were somehow all settled, most scholars agree that in the *Taricco saga* a «constitutional clash» strictly speaking was nipped in the bud thanks to the judicial dialogue among the Italian *Corte costituzionale* (hereinafter also «ICC») and the CJEU[16]. The issue, as familiar, arose as a consequence of the *Taricco* ruling[17] in which the Italian statute of limitation for VAT-related offences was found in breach of Article 325 TFEU. In fact, in the CJEU's view—due to its length—it prevented «the imposition of effective and dissuasive penalties […] of serious fraud affecting the financial interests of the European Union […]»[18]. The judicial fine-tuning was achieved when the CJEU—albeit ignoring the mention of Article 4(2) TEU made by the referring court[19]—acknowledged that, (solely) due to the lack of harmonisation of the limitation period at the time of the facts, Italy was free to subject the matter to its own rules[20] and, therefore, not to disapply the national legislation. Thus, the ICC, in its judgment n. 115/2018 reiterated that «the referring ordinary courts cannot apply the '*Taricco* rule' to them because it contradicts the principle of legal certainty in criminal matters enshrined in Article 25(2) of the Constitution»[21].

Whether the qualification would somewhat depend on the EU reaction, it is suggested that a clash in the true sense emerged in the German case. In fact, while the *BVerfG* has always endeavoured to ensure that the limits of the EU competences were observed (s.c. *ultra vires* review) and that national identity was respected (s.c. identity

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[15] CJEU, 19 April 2016, C-441/14, *Dansk Industri*, ECLI:EU:C:2016:278.

[16] *Ex plurimis*, D. Sarmiento, *The Consob Way - Or how the Corte Costituzionale Taught Europe (once again) a Masterclass in Constitutional Dispute Settlement*, in *Eu Law Live*, https://eulawlive.com/long-read-the-consob-way-or-how-the-corte-costituzionale-taught-europe-once-again-a-masterclass-in-constitutional-dispute-settlement-by-danielsarmiento/#, 17 April 2021 and M. Bonelli, *The* Taricco Saga *and the Consolidation of Judicial Dialogue in the European Union*, in *Maastricht Journal of European and Comparative Law*, 2018, p. 357.

[17] CJEU, 15 September 2015, C-105/14, *Taricco*, ECLI:EU:C:2015:555.

[18] *Ibidem*, para 58.

[19] Corte costituzionale, 26 January 2017, n. 24/2017. For a deeper analysis of the order for referral, see, *ex plurimis*, G. Rugge, *The Italian Constitutional Court on* Taricco*: Unleashing the normative potential of 'national identity'?*, in *Questions of International Law*, 2017, p. 21.

[20] CJEU, 5 December 2017, C-42/17, *M.A.S. & M.B.*, ECLI:EU:C:2017:936, paras 45-47. Cfr. Section 4.3.

[21] Corte costituzionale, 31 May 2018, n. 15/2018, para 10. For a more detailed understanding of this judicial *saga*, cfr. G. Piccirilli, *The* 'Taricco Saga'*: The Italian Constitutional Court continues its European journey: Italian Constitutional Court, Order of 23 November 2016 no. 24/2017; Judgment of 10 April 2018 no. 115/2018 ECJ 8 September 2015, Case C-105/14,* Ivo Taricco and Others*; 5 December 2017, Case C-42/17,* M.A.S. and M.B., in *European Constitutional Law Review*, 2018, p. 814.

review)[22], the hypothesis of a genuine clash only occurred in the *PSPP/Weiss* case. As it previously happened in *Gauweiler*[23], the attention of the German court was drawn by the extraordinary monetary policies undertaken in 2015 by the European Central Bank («ECB») to face the financial crisis. This time, the GCC, after questioning the validity of the decisions establishing the Public Sector Purchase Programme («PSPP») in light of many Treaty provisions including Article 4(2) TEU, overruled the CJEU's findings in *Weiss*[24]. Accordingly, in its following famous decision of May 5, 2020[25] it declared both the PSPP Decision itself and the CJEU's ruling *ultra vires*, being at one time in breach of the Treaties and of the Basic Law. For the very first time in history, not only a national court refused to implement an EU measure but, instead, it claimed to decide on its validity and effectiveness irrespective of the existence of a problem of inapplicability of national law[26].

Hence, while celebrations began in Poland and Hungary[27], it is no surprise that almost one year later, on June 9, 2021, the Commission initiated an infringement proceeding charging Germany for the violation of the core of EU law such as the principle of autonomy, primacy, effectiveness, and uniform application, as well as the respect of the jurisdiction of the CJEU under Article 267 TFEU. However, the proceedings were closed on December 2, 2021, soon after that the Federal

[22] For a full overview of how the *BVerfG* developed the criteria to scrutiny EU law, refer to S. Simon, *Constitutional Identity and Ultra Vires Review in Germany*, in *Central European Journal of Comparative Law*, 2021, p. 185.

[23] CJEU, 16 June 2015, C-62/14, *Gauweiler*, ECLI:EU:C:2015:400. Subsequently the GCC validated the view taken in Luxembourg that the Outright Monetary Transaction Programme («OMT») was fully compatible with the prohibition of monetary financing under Articles 119 TFEU, 123 TFEU and 127 TFEU, see Bundesverfassungsgericht, 2nd Senate, 21 June 2016, 2 BvR 2728/13.

[24] CJEU, 11 December 2018, C-493/17, *Weiss*, ECLI:EU:C:2018:1000. The order for referral also involved Article 4(2) TEU in conjunction Articles 123 and 125 TFEU. The GCC, among other things, alleged that considering the scale of its effects the Decision may be falling outside the powers of the ECB. The arguments of the *BVerfG* in its request of preliminary reference can be summarised as follows: the ECB disregarded the distribution of competences by acting outside the limits of Article 119 TFEU, exceeding its competences under Article 127 TFEU and Articles 17-24 Protocol n. 4 and infringing the prohibition of monetary financing under Article 123 TFEU, the principle of democracy and the constitutional identity of Germany.

[25] Bundesverfassungsgericht, 2nd Senate, 5 May 2020, 2 BvR 859/15.

[26] H. T. Nguyen, M. Chamon, *The ultra vires decision of the German Constitutional Court: Time to fight fire with fire?,* in *Hertie School Policy Paper 1/2020* available at https://www.hertie-school.org/fileadmin/2_Research/1_About_our_research/2_Research_centres/6_Jacques_Delors_Centre/Publications/20200528_German_Constitutional_Court_Nguyen.pdf, 20 May 2020. See also D. Sarmiento, *An Infringement Action against Germany after its Constitutional Court's ruling in Weiss? The Long Term and the Short Term*, in *EU Law Live*, https://eulawlive.com/op-ed-an-infringement-action-against-germany-after-its-constitutional-courts-ruling-in-weiss-the-long-term-and-the-short-term-by-daniel-sarmiento/, 12 May 2020.

[27] On the reaction of the Polish authorities to the approach undertaken by the German Constitutional Court see, *ex plurimis*, S. Biernat, *How Far Is It from Warsow to Luxembourg and Karlsruhe: The Impact of the PSPP Judgement on Poland*, in *German Law Journal*, 2020, p. 1004.

Government explicitly committed itself to use all the means at its disposal to ensure compliance with Union law and to actively avoid further *ultra vires* findings on the part of the *BVerfG*[28].

2. Reshaping constitutional clashes in light of the Polish and Hungarian judgments

As is well-known, recently both the Hungarian Constitutional Court, Alkotmánybíróság (hereinafter also «HCC») and the Polish Constitutional Tribunal, Trybunał Konstytucyjny (hereinafter also «PCT»)[29] apparently joined the previously mentioned national courts in claiming potential restraints to the operation of EU law. The following investigation aims at contending that these rulings belong to a different typology of constitutional clashes which geneses are rooted in the intricacies of the «rule of law backsliding»[30].

Preliminarily to the current analysis it is necessary to quickly go through the content of these decisions.

2.1. The K 3/21 ruling: the new principle of supremacy of national law over EU law

On the 7th of October 2021 the Polish Constitutional Tribunal reiterated[31] its willingness to discuss the very foundations of the EU project. Namely, while the

[28] S. Poli, R. Cisotta, *The German Federal Constitutional Court's Exercise of* Ultra Vires *Review and the Possibility to Open an Infringement Action for the Commission*, in *German Law Journal*, p. 1078 as comparing this infringement proceeding with those previously initiated in response to the behaviour of national courts.

[29] Trybunał Konstytucyjny, 7 October 2021, K 3/21. While the statement of reasons has not been published at present, the operative part is available at https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej; Alkotmánybíróság, 7 December 2021, n. X 477/2021.

[30] This subject cannot be tackled in the present analysis, for a comprehensive analysis of this phenomenon, see L. Pech, K. L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *19 Cambridge Yearbook of European Legal Studies 3*, 2019, p. 3.

[31] Trybunał Konstytucyjny, 14 July 2021, P 7/20 in which the Tribunal first claimed the supremacy of national law over EU law and ruled out the Articles 4(3) TEU and 279 TFEU as incompatible with the Polish Constitution. This ruling came as a reaction to CJEU, 8 April 2020, C-791/19 R, *Commission v Poland*, ECLI:EU:C:2020:277 where the Court issued *interim* measures aimed at the immediate suspension of the Polish law establishing a new disciplinary regime for the judges. For an insight of the background of the most recent judgments of the PCT, cfr. M. Coli, *On Primacy, the Rule*

statement of reasons is still missing, the operative part of the decision takes a few steps to strike down the most pivotal provisions of the TEU. The message behind this declaration is crystal clear and probably not much will be added when the statement of reasons is published[32].

The action was introduced by the Polish Prime Minister Morawiecki in March 2021 soon after the judgment in *A.B. and others*[33] was handed down in Luxembourg. This latter found that EU law precludes domestic measures such as those impeding preliminary references to the CJEU and those governing the judicial appointment to the Polish Supreme Court. By its application the Prime Minister sought to assess whether Articles 1(1) and 1(2), 19(1) TEU in conjunction with, respectively, Article 4(3) and 2 of the TEU were consistent with the Constitution. Basically, the values and the provisions enabled to enforce them since the CJEU's *ASJP* judgment[34] were challenged.

The PCT's findings argued that the supremacy of the Constitution and of the Polish Republic is endangered by the CJEU's interpretation of Articles 1, 2, 4(3) and 19(1) TEU. This stance is held true insofar as the interpretative approach adopted in Luxembourg affects the EU system of competences defined in the Treaties. Interestingly, none of the CJEU's ruling is expressly mentioned.

Among other things, the Constitutional Tribunal pointed out that, pursuant to Article 87(1) of the Constitution, the Polish system of the sources of law has a hierarchical structure. In that hierarchy, international agreements such as the TEU are placed below the Constitution which is the supreme law in the Polish legal order. Additionally, pursuant to Article 188(1) of the Constitution, the PCT adjudicated that its mandate also includes the task to review the constitutionality of EU primary law.

Albeit other constitutional provisions were involved, there is no need to go into detail to understand that the PCT deliberately asserted the power to assess the consistency of EU primary law with the Polish Constitution. Therefore, in complement to the aforementioned TEU norms, the principle of primacy itself was put under challenge. Primacy is defeated in an all-encompassing manner bearing no link with the operation of specific rules and their eventual inability to take precedence over national law. In other words, while no specific EU rule is targeted by this decision,

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of Law, and Poland: going down the Rabbit Hole?, in *Blog di Diritti Comparati*, https://www.dirittocomparati.it/on-primacy-the-rule-of-law-and-poland-going-down-the-rabbit-hole/, 25 October 2021.

[32] W. Brzowski, *C'è del marcio in Polonia? Il significato autentico della sentenza costituzionale 7 ottobre 2021*, in *Quaderni costituzionali*, 2021, p. 971.

[33] CJEU, 2 March 2021, C-824/18, *A.B. & others*, ECLI:EU:C:2021:153.

[34] CJEU, 27 February 2018, C-64/16, *ASJP*, ECLI:EU:C:2018:117 where the CJEU first held that national organisation of the judiciary falls within the scope of Article 19(1) TEU which, read in conjunction with Article 47 CFREU, demands independence of the judges as a pre-condition to grant effective judicial protection. This device, as pointed out, turned out to be the means through which the CJEU can monitor the state of health of the rule of law within the national systems as regards the corollary of the independence of the judiciary.

the very principle of primacy is questioned at a purely abstract level. This element highlights a remarkable difference with the previous experiences of constitutional clashes where national courts, rather than challenging the basics of the EU membership enshrined in the TEU, looked willing to tap into the Treaties to support their claims[35].

Subsequently, at least four major events followed the K 3/21 judgment. First, on 27 October 2021, the CJEU imposed to Poland a fine of the amount of one million euros per day[36] (an unprecedented magnitude) for its failure to abide by the *interim* measures ordered in July 2021[37] while at the European Council's meeting of 21-22 October this topic was not discussed at all[38]. Second, on 24 November 2021[39] the Polish Constitutional Tribunal ruled that Article 6 of the European Convention on Human Rights («ECHR») is inconsistent with the Polish Constitution. Using a similar formula to that of the K 3/21 judgment, it held that the standards concerning the judiciary do not apply to the Constitutional Court «insofar as» it is not a court within the meaning of Article 6 ECHR. Third, in December 2021 the Commission launched an infringement procedure against Poland expressly due to the PCT's statements[40]. Last, but not less important, on February 16, 2022, the CJEU dismissed the action for annulment brought by Poland and Hungary[41] against Regulation 2092/20 establishing the rule of law-conditionality mechanism[42].

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[35] Cfr. Section 3 analysing the reasons alleged by national courts.

[36] CJEU, 27 October 2021, C-204/21 R, *Commission v Poland*, ECLI:EU:C:2021:878.

[37] CJEU, 14 July 2021, C-204/21 R, *Commission v Poland*, ECLI:EU:C:2021:593, known as 'the order of 14 July 2021' requesting Poland to suspend the domestic norms which, among other things, conferred new powers to the disciplinary chamber. N.B. this order was handed down the very same day of the Trybunał Konstytucyjny, P 7/20, cit.

[38] Editorial, *Sovereign Within the Union? The Polish Constitutional Tribunal and the Struggle for European Values,* in *European Papers*, 2021, p. 1117, available at https://www.europeanpapers.eu/es/e-journal/sovereign-within-union-polish-constitutional-tribunal-and-struggle-for-european-values.

[39] Trybunał Konstytucyjny, 24 November 2021, K 6/21 available at https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny. For a comment see E. Letowska, *The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal*, in *Verfassungsblog*, https://verfassungsblog.de/the-honest-though-embarrassing-coming-out-of-the-polish-constitutional-tribunal, 29 November 2021.

[40] See the press release available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070.

[41] CJEU, 16 February 2022, Joined cases C-156/21 & C-157/21, *Hungary and Poland v European Parliament and Council*, ECLI:EU:C:2022:97. For an overview of the content and the meaning if this ruling, cfr. A. Baraggia, M. Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, in *German Law Journal*, 2022, p. 131.

[42] Regulation n. 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

2.2. The X/477/21 ruling

Alike in the Polish experience, the action was introduced by the Hungarian Minister of Justice who lodged a petition with the Constitutional Court attempting to circumvent the CJEU's judgment in C-808/18[43]. In the latter Hungary was found in breach of several provisions belonging to the EU asylum legal framework essentially due to the indiscriminate pushbacks of asylum seekers and their unlawful detention in the transit zones at the Serbian border. The petitioner, while seeking an abstract interpretation of some constitutional provisions, suggested that implementing the CJEU's ruling would encroach upon the constitutional identity of Hungary.

The Hungarian Court thus found itself faced with two constitutional provisions very different in terms. The first one, Article E(2)—the s.c. «European clause» of the Hungarian Fundamental Law—is devoted to govern the relationship among the national legal order and the EU. In doing so this provision fosters a potential limit to the EU integration process: compliance with the Hungarian Fundamental Law (rights, freedoms and territorial unity etc.) is portrayed as a pre-condition for the lawful exercise of the EU competences. The other constitutional provision called into question, Article XIV(4), specifically addresses the management of asylum applications[44]. In doing so, it prevents the entitlement to asylum in the event the applicants have passed by a country different from that in which they were persecuted.

Albeit considering the applicant's view, the HCC refrained from responding concretely to the question of the enforceability of the CJEU's ruling. Indeed, neither it expressly excluded, nor it endorsed the applicant's view. Rather it left the final decision up to the governmental authorities. Nonetheless, the vague terminology used by the Hungarian court did not rule out the main argument of the petitioner, namely that the ensuing arrival and irregular stay of migrants may harm the identity elements of «the traditional social environment of persons living in Hungary[45]» and, therefore,

[43] CJEU, 17 December 2020, C-808/18, *Commission v Hungary*, ECLI:EU:C:2020:1029 in which the CJEU assessed the violation of several provisions of the EU directives—2013/32, 2013/33 and 2008/115—imposing minimum grants for asylum seekers when applying in the Member States. For an analysis of the background of this case see B. De Witte, E. Tsourdi, *Confrontation on Relocation – The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v Council*, in *Common Market Law Review*, 2018, p. 1457.

[44] Article XIV(4) reads: «Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or in the country of their habitual residence […]. A non-Hungarian national shall not be entitled to asylum if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution».

[45] Reference to this concept and to identity features is made at least nine times is the text of the decision of Alkotmánybíróság, n. X 477/2021, cit. See particularly para 2.

jeopardise the Hungarian national identity itself[46]. Despite the worst Poland-alike scenario was avoided[47], what kind of follow-up this stance will have is yet to be seen. In a nutshell the HCC validated a possible obstacle to the implementation of EU secondary law concerning asylum as interpreted by the CJEU. Expectedly, this standpoint can be understood as the judicial version of the well-established reluctance of the national Government to comply with EU (asylum) law[48].

3. Applying the German doctrine: distinguishing ultra vires and identity reviews. Preliminary remarks

Scholars tried to categorise the caselaw explored in the above based on the reasons attached by national courts when rejecting the operation of Union law. Hence, in light of the well-established identity and *ultra vires* (German) doctrine, these rulings were eventually branded as alternatively belonging to one of the two categories.

Before analysing whether these criteria succeeded in distinguishing these constitutional clashes, it is worth recalling that several arguments have been offered to de-legitimise both types of review.

From this perspective, Craig clearly held that national courts are not suitable to scrutinise the CJEU's (eventually *ultra vires*) interpretation of the Treaties[49]. In the same vein it was reiterated that the *ultra vires* typology of review is precluded in principle by the system established under Articles 19 TEU and 267 TFEU which assigns solely to the CJEU's the task to interpret the Treaties including the system of competences laid down therein[50]. All these views somehow converge in the sense of voiding the use of this instrument by national courts.

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[46] D. Dósza, M. J. Menkes, *Somewhere Between Poland and Germany – The Hungarian Constitutional Court's Ruling in the Refugee Push-Back Case*, in *EU Law Live*, https://eulawlive.com/op-ed-somewhere-between-poland-and-germany-the-hungarian-constitutional-courts-ruling-in-the-refugee-push-back-case-by-daniel-dozsa-and-marcin-j-menkes/, 15 December 2021 in which it is argued that the HCC gave *carte blanche* to the Government to disregard the CJEU's ruling.

[47] N. Chronowski, A. Vincze, *Full Steam Back. The Hungarian Constitutional Court Avoids Further Conflict with the ECJ*, in *Verfassungsblog*, https://verfassungsblog.de/full-steam-back/, 15 December 2021.

[48] On this point, see B. Nagy, *Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation*, in *German Law Journal*, 2016, p. 1033.

[49] P. Craig, *The ECJ and ultra vires action: a conceptual analysis*, in *Common Market Law Review*, 2011, p. 396: «Little thought is given by such national constitutional courts as to whether these charges pressed against the EU are coherent in the light of activist forms of constitutional interpretation engaged in by such national courts themselves».

[50] *Ex plurimis*, L. Pace *La sentenza della Corte costituzionale Polacca del 7 Ottobre 2021: tra natura giuridica dell'Unione, l'illegittimità del sindacato* ultra vires *e l'attesa della soluzione della "crisi" tra Bruxelles e Berlino*', in *BlogDUE*, https://www.aisdue.eu/la-sentenza-della-corte-costituzionale-polacca-del-7-ottobre-2021-

Albeit it is not possible to delve into one of the most debated concepts of European constitutional law in this essay i.e., national identity and its claims, also this topic was thoroughly debated by scholars. Recently, it was noted that this formula has been used to designate most claims regardless of whether they properly fit the concept of national identity under Article 4(2) TEU[51]. In fact, scholars fairly pointed out that its wording cannot back up claims generally based on legal/cultural diversity[52].

The present work will overlook any investigation on the true meaning of Article 4(2) TEU and will rather focus on the distinction among identity and *ultra vires* reviews on general grounds.

To this end, the difference might be summarised as follows: the identity-based review assumes a reasoning in terms of purely domestic law insofar as it entails the scrutiny of the EU measure in light of national standards. On the other hand, the *ultra vires* review is rooted in EU law insofar as this kind of claim is based on the breach of the Union's boundaries stemming from the Treaties.

3.1. Overlapping competence and identity-based arguments

Investigating on whether identity or competence-related arguments prevailed in each of the constitutional clashes analysed in the above turns out to be particularly problematic. Instead, a few elements highlighted in the previous sections disclosed a trend of overlapping identity-based and competence-based claims[53].

This overlap might be read as the logical consequence of the fact that the identity review as initiated by the *BVerfG*'s Lisbon ruling, rather than inventing a self-standing and autonomous standard of review, simply complemented the pre-existing grounds on which EU law could be questioned from a domestic perspective.

The issue is further demonstrated when tapping in the EU domain. For instance, the basic contents of national/constitutional identity laid down in Article 4(2) TEU

tra-natura-giuridica-dellunione-lillegittimita-del-sindacato-ultra-vires-e-lattesa-della-soluzione-della/, 28 October 2021.

[51] F. X. Millet, *Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way*, in *European Public Law*, 2021, p. 571. The author refers to what he calls «national constitutional identity cases» (NCI cases) as the sole hypotheses lawfully pertaining to the scope of Article 4(2) TEU. He also examines other cases which, albeit discussing national identity, are to be recorded as falling outside the very notion of identity under Article 4(2) TEU.

[52] B. De Witte, *Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States*, in *European Public Law*, 2021, p. 559 who emphasises that the sole objective of Article 4(2) TEU is to grant that the Union does not encroach upon the institutional specifics of the Member States structures.

[53] On this point, cfr. D. Paris, *National and Supranational Court as Battleground and Meeting Ground of Constitutional Adjudication. Limiting the 'Counter-limits'. National Constitutional Courts and the Scope of the Primacy of EU Law*, in *Italian Journal of Public Law*, 2018, p. 205, particularly para 2.

also identify fields in which the Union has no competence to intervene[54]. Therefore, it is apparent that identity and competence-based standards are deeply intertwined in the very wording of the Treaty.

This complexity is primarily illustrated by the frequent plea of Article 4(2) TEU supported by (the lack of) competence-related arguments. In fact, unfolding the arguments employed by national courts, one can note a hybrid form of identity and competence pleas.

The *Slovak Pensions* ruling was labelled as the first *ultra vires* review in history[55] and, more precisely, it was maintained that it amounted to «a legally contestable and politically inappropriate application of the *ultra vires* review»[56]. However, a closer inspection reveals that the CCC blamed the CJEU for failing to familiarise with the «constitutional identity of the Czech Republic»[57] characterised by a history that «has no parallel in Europe»[58]. Basically, the identity features mentioned refer to the specifics of the territorial asset of the State.

The same line of reasoning, though differently framed, can be employed for the *PSPP/Weiss* and the *Ajos* cases.

As for the latter, the reasoning mostly relies on the Danish Accession Act to the EU which, in the DSC's view, does not allow a non-written rule to prevail over national law. This argument assumes that Denmark has not conferred competence to the Union to that extent. While the competence-related argument is quite blatant, identity was called into question by the Government when it submitted its observations in the proceedings before the CJEU.

The most patent crossover among identity and competence-related arguments, though, emerges in the *BVerfG*'s ruling. Albeit the questioned piece of EU law was declared *ultra vires*, it does not go unnoticed how the Second Senate drew on arguments concerning the features of the federal system, in other words: identity elements. This is marked in the conclusion which reads that the PSPP cannot be implemented in

[54] E.g., the reference to national security as both an identity element and a matter in which the Member States have exclusive competence. In this regard, cfr. B. De Witte, *Exclusive Member State Competences—Is There Such a Thing?*, in S. Garben – I. Govaere (eds.) *The Division of Competences between the EU and the Member States - Reflections on the Past, the Present and the Future*, 2017, p. 59, particularly the conclusion.

[55] Z. Kühn, *Ultra Vires Review and the Demise of Constitutional Pluralism. The Czecho-Slovak Pension Saga, and the Dangers of the State Courts' Defiance of EU Law*, in *Maastricht Journal of European & Comparative Law*, 2016, p. 185.

[56] G. Anagnostagoras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, in *German Law Journal*, 2019, p. 959.

[57] Ústavní soud, n. Pl. VS 5/12, cit. See particularly para 2.

[58] *Ibidem*.

Germany not only because it overrides the system of competences as laid down in the Treaties[59], but also because it «affects the constitutional identity of the Basic Law»[60].

All the reflections made so far for the present investigation look not fully applicable to the *Taricco saga*. This is maybe because a sharp distinction among a competence-based and an identity-based review was never developed within the Italian doctrine of counter-limits (*controlimiti*)[61]. To this end, it must be recalled that this doctrine was developed to pinpoint some core principles of the Constitution that cannot step back in favour of a rule of international law[62]. Only subsequently, in the famous *Frontini*[63] case, the ICC extended the *controlimiti* doctrine to EU law. However, these supreme principles were never defined, nor listed, so as they were shaped through a case-by-case assessment. The main consequence of these principles falling short of a precise content is that one may wonder whether they can underpin either identity-based or competence-based claims. Still, the fact that it relies on the existence of supreme constitutional norms would suggest that counter-limits are better suitable to support identity-based complaints.

Nonetheless, the question whether the ICC addressed a purely identity-based reference to the CJEU cannot be answered in clear terms. Indeed, while the order for referral by the Corte costituzionale[64] was labelled as a *controlimiti* (rather than identity) threaten[65], and while some authors suggested that a competence-based claim would make sense due to the broad (*ultra vires*) interpretation of Article 325 TFEU[66], it should be ultimately borne in mind that the claims of the referring court primarily relied on

[59] Bundesverfassungsgericht, 2 BvR 859/15, cit., paras 230-234.

[60] *Ibidem*, para 228.

[61] For a deeper insight see F. Fabbrini, O. Pollicino, *Constitutional identity in Italy: European Integration ad the fulfillment of the Constitution*, in *EUI Working paper Law*, 2017/06 available at http://hdl.handle.net/1814/45605.

[62] The ICC, referring to the international agreement (s.c. *Patti del Laterano*) governing the relationship among the Republic of Italy and the Catholic Church, observed that, although the Constitution acknowledges a relationship of mutual sovereignty and independence «it cannot have the force to deny the supreme principles of the constitutional order of the State». See Corte costituzionale, 24 February 1971, n. 30/1970.

[63] Corte costituzionale, n. 183/1973, *Frontini*, cit.

[64] Corte costituzionale, order n. 24/2017, cit.

[65] E.g., see the wording of these titles: R. Mastroianni, *La Corte costituzionale si rivolge alla Corte di giustizia in tema di "controlimiti" costituzionali: è un vero dialogo,* in *federalismi.it*, https://www.federalismi.it/nv14/editoriale.cfm?eid=436, 5 April 2017 and D. Gallo, *Controlimiti, identità nazionale e i rapporti di forza tra primato ed effetto diretto nella sa.ga Taricco*, in *Il Diritto dell'Unione Europea*, 2018, p. 249.

[66] In this respect it was argued that the shortcoming of the *Taricco* ruling would be that the CJEU took for granted the direct effect of Article 325 TFEU while it lacks the pre-conditions (being clear, precise, and unconditional). See C. Amalfitano, *La vicenda* Taricco *e il dialogo (?) tra giudici nazionali e Corte di giustizia*, in *Il Diritto dell'Unione Europea*, 2018, p. 153; D. Gallo, *Controlimiti, identità nazionale e i rapporti di forza tra primato ed effetto diretto nella saga Taricco*, cit.

Article 4(2) TEU and reference to the concept of national/constitutional identity appears at least four times in order n. 24/2017.

3.2. Identity clash, competence clash or neither? How to understand the Hungarian and the Polish judgments

Focusing on the reasons alleged in the Hungarian and Polish recent rulings, these judgments, pretty much as the previous, seem liable to be perceived neither as full-fledged *ultra vires*, nor as identity reviews. Rather, it is maintained that they put forward a hybrid form of claims mostly (but not exclusively) associated to national identity and EU competences pleas.

Especially bearing in mind that they were both triggered by a member of the Government, it will be hinted that this marks a major distinction when it comes to catalogue these rulings.

As for Hungary, it is self-evident that the arguments put forward by the petitioner are mostly related to the national identity which was already invoked to support the derogation from Directive 2008/115 in the proceedings before the CJEU[67]. However, also the exercise of the Union competences is called into question. Actually the overlap between these two concepts is enshrined in the very wording of Article E(2) of the Hungarian constitution itself which, in parasitic terms, requires that the (joint) exercise of competences between the EU and Hungary does not impair the national identity[68]. Therefore, in the Hungarian X/477/21 ruling, the intersection among identity-based and competence-based claims is rooted in the constitutional text itself in which these two elements are entangled to any eventual claim against the operation of Union law. Again, it is worth stressing that, not explicitly excluding the applicability of EU law in the domestic legal order, this ruling may not amount at all to a review of EU law strictly speaking.

As regards Poland, the yet limited part of the ruling available looks rather focused on competence-related arguments. The main fear expressed therein regards the constitutional sovereignty of Poland purportedly endangered by the expansion of the EU competences beyond the Treaties' boundaries, thereby *ultra vires*. Missing the

[67] CJEU, C-808/18, *Commission v Hungary*, cit., particularly para 262.

[68] The Article reads: «With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. *Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure* (emphasis added)».

full text of the decision it would be provisional to assess which argument is truly predominant. Nonetheless it is clear that the PCT's statements foster an unmatched version of the challenges to Union law acknowledged in the past as the very primacy of EU law is in the balance while the latter is declared hierarchically subordinated to national constitutional law.

4. A possible narrative: the material scope of constitutional clashes as an influential factor

One might wonder if the actions of the constitutional courts may offer an interpretative context beyond the usual dichotomy among identity and competence regrets which, as considered in the above, is not always satisfactory. In this view, it will be explored whether, alternatively, the material scope of these clashes may represent not only a paramount criterion to catalogue and distinguish them, but also to understand their outcome. The material scope will be read as possibly stressing some differences among the conflicts occurred in the past from each other and as a key to distinguish them from the clashes arisen in most recent times.

To this end the expression material scope will be used to identify the EU law measure and the EU policy area involved in the case. Accordingly, the investigation will take place as follows: it will be examined which kind EU law measure is disputed (e.g., its degree of harmonisation) and the competence field/policy area in which it was undertaken. The rationale of this approach is based on the idea that, also from the EU viewpoint, substantially different EU measures can assume a different meaning and leave a different margin of appreciation[69] to the Member States and, thus, to national courts as to their implementation (or derogation).

4.1. Exclusive competences, namely monetary policy

The approach undertaken by the Second Senate should be explored first, as the domain in which the *BVerfG* rejected the operation of the ECB measures, the Euro area, belongs to the EU exclusive competences. As a matter of fact, the exclusive nature of a competence entails that «only the Union may legislate and adopt legally

[69] The multiple forms of discretion enjoyed by the Member States benefit when enacting EU law cannot be tackled in the present analysis. Cfr. T. van den Brink, *Refining the Division of Competences in the EU: National Discretion in EU Legislation*, in S. Garben – I. Govaere (eds.), *The Division of Competences between the EU and the Member States - Reflections on the Past, the Present and the Future*, 2017, p. 251.

binding acts»[70] being the Member States able to do it themselves «only if so empowered by the Union or for the implementation of Union acts[71]». Accordingly, referring to the «paradoxes»[72] of this ruling, it was held that such a review of the ECB's measures is in principle prohibited, especially based on proportionality[73].

Thereby it is little surprise that, in terms of Union law, such an approach by a national court was deemed unlawful and that infringement proceedings were started as well. In other words, it is hypothesised that either the exclusive nature of the EU competence at stake, or the fact that the national court expected to scrutiny itself the validity of an EU measure impacted on the outcome of the constitutional clash. Put it simple: the review of the boundaries of the EU competences is narrower than ever in a domain where only the EU is empowered to act[74], all the more where the CJEU itself had already fully scrutinised the measure in *Weiss* and clarified that the PSPP Decision pertained to monetary policy according to the *Pringle* criteria[75].

Indeed, unlike in the previous cases, the Commission charged Germany for the violation of the core of EU law including the respect of the CJEU's jurisdiction under Article 267 TFEU. In light of all the above, it is argued that a subject being exclusively entrusted to the EU and run by an independent body such as the ECB could hardly be double-checked by domestic authorities on most grounds. This clearly influenced the outcome of the clash which indeed culminated in the initiation of the infringement action on the part of the Commission. This point is ultimately made sound since the proceeding was terminated in the pre-litigation phase based on the undertaking of the Federal Government to prevent any *ultra vires* scrutiny by the *BVerfG* in the future.

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[70] Article 2(1) TFEU.

[71] *Ibidem*.

[72] M. Wendel, *Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception*, in *German Law Journal*, 2020, p. 979.

[73] *Ex plurimis*, F. C. Mayer, *To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's ultra vires Decision of May 5, 2020*, in *German Law Journal*, 2020, p. 1116. The author makes this point to emphasise the incoherency of the *BVerfG*'s reasoning. To this end he notes that proportionality is not the appropriate standard to ascertain the boundaries of exclusive competences. Indeed, this principle rather than determining whether the Union is competent *in abstracto*, is aimed at governing the exercise of a given competence assuming that the competence *per se* exists. As further enhancing the idea that national courts have restricted grounds to review the ECB's actions, see the doctrine of mutual horizontal discretion among the EU institutions theorised by M. Goldmann, *Constitutional Pluralism as Mutually Assured Discretion. The Court of Justice, the German Federal Court, and the ECB*, in *Maastricht Journal of European & Comparative* Law, 2016, p. 119.

[74] Cfr. Craig, *The ECJ and ultra vires action: a conceptual analysis*, cit. and M. Wendel, *Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception*, cit. as both delegitimising any form of review of the EU competences carried out by national courts.

[75] CJEU, C-493/17, *Weiss*, cit., particularly para 61 quoting CJEU, 27 November 2012, C-370/12, *Pringle*, ECLI:EU:C:2012:756 where the Court was first called upon to distinguish economic policy measures from monetary policy measures as only the latter belong to the EU exclusive competences.

4.2. General principles of Union law: non-discrimination faced with social security and employment

Considering some obvious analogies among the Danish and Czech cases, they will be discussed together. Indeed, both concerned the (in)consistency of some domestic norms with the EU principle of non-discrimination. The Czech *saga*, regarding the pension regimes, falls within the scope of social security. At first glance, the kind and the extent of the competence entrusted to the Union in this field is blurred. In fact, the Union enjoys a shared competence in social policy where its action is further limited to the aspects defined in the TFEU[76]. On the one hand, the EU action in social security is described under Article 153(1)(c) TFEU as ancillary to achieve the social policy objectives under Article 151 TFEU; on the other hand, the wording of Article 153 TFEU—support and complete—suggests that this policy falls within the scope of the complementary competences as laid down under Articles 2(5) and 6 TFEU where harmonisation of national legislations is expressly precluded. These elements might lead to conclude about the existence of broader margins for constitutional claims at domestic level than those accorded in monetary policy. Put it simple: the less extensive are the Union's powers in a given area, the greater will be the leeway for national courts to object the actions undertaken in that domain. However, this stance is not so plain.

The core of the clash, as already emphasised, regards the compatibility of national law with the mandate not to apply social security schemes deemed discriminatory on the ground of nationality. It should be recalled that Regulation (EEC) n. 1408/71 steering the CJEU's reasoning was adopted for pursuing internal market objectives. Basically, to enhance and protect the free movement of workers it was necessary to combat discrimination on the ground of nationality in many side fields, including social security schemes. As it is very familiar for the internal market logic, the operation of this principle requires the persons entitled to protection to have previously moved across the Member States, being necessary the s.c. cross-border element. Lacking any movement among Member States for the applicants in the main proceedings, the CJEU[77] adopted a far-reaching understanding of the foreign requirement in order to adjudicate the compatibility of the domestic measure with EU law. Considering this relaxed connection among the purely internal situation at stake before the referring court and EU law, it is less surprise that no action was undertaken to sanction the CCC's stance.

Though differently, this reasoning may apply to the Danish case. The field of this constitutional conflict is employment. While the Union is vested with a social policy competence in the terms clarified above, legislative actions in the employment

[76] Social security is mentioned under Article 153(1)(c) as a field in which the Union can «*support and complete* the activities of the Member States (emphasis added)». N.B. Article 4(2)(b) TFEU which specifies that the shared competence in social policy is limited to «the aspects defined in the Treaties».

[77] CJEU, case C-399/09, *Landtová*, cit.

area can be incidentally taken under different legal bases as it happened with the non-discrimination framework established by Directive 2000/78/EC[78] which was first brought to the fore by the referring court. Indeed, albeit adopted under Article 19 TFEU devoted to non-discrimination, this directive governs the employment domain. However, pending the national litigation among private parties, the CJEU recruited its own legal techniques to compensate the lack of horizontal direct effects accorded to directives. As it did in *Mangold*[79], it suggested to the DSC that the general principle of non-discrimination itself implied that the domestic legislation should be set aside[80]. The main consequence, alike in the Czech case, was the refusal to disapply the national legislation allegedly incompatible with this principle rather than with a directly regulatory tool enabled to replace the national provision.

This latter aspect eventually marks a further difference between two typologies of clashes. One typology, *à la PSPP*, can be identified when the debate affects the implementation/enactment of a regulatory piece of legislation which is deemed to be unlawful/invalid according to the domestic judge. The other category, such as in the Danish and the Czech clashes, rather underlies an inconsistency among a national substantive proviso and a principle of EU law. In these latter hypotheses, neither the validity nor the operation of EU law is questioned at general level. It is argued that, from the viewpoint of the Union, it could be one thing to refuse to implement a substantive measure of EU law on the grounds that it is has not been validly adopted and scrutinised (*à la PSPP*), but quite another to refuse to disapply a domestic piece of legislation found in conflict with (a principle of) EU law when its lawfulness is not debated.

Albeit a hierarchy of the possible challenges to EU law as depending on the kind of legal source at stake was never established, the fact that no sanctioning action was undertaken against Czech Republic and Denmark could perhaps be explained in light of the substantive law area involved, i.e. an EU principle rather than a regulatory/substantive norm strictly speaking.

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[78] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[79] CJEU, 22 November 2005, C-144/04, *Mangold*, ECLI:EU:C:2005:709. It was ruled that the operation of the principle of non-discrimination did not depend on the directive as being already enshrined in primary law as a general principle. This case tackles the scope of application of the principle of non-discrimination.

[80] Despite the present investigation cannot go through the countless issues posed by the (yet ambiguous) relationship among non-discrimination directives and the general principle of non-discrimination, one cannot but notice that the Danish case lies on the very same pages of *Mangold*. For a deep analysis of this longstanding question and the updates to *Mangold* in the CJEU caselaw see *ex plurimis*, M. de Mol, *The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?*, in *Maastricht Journal of European and Comparative Law*, 2011, p. 109 and E. Muir, *Of Ages In – and Edges Of – EU Law*, in *Common Market Law Review*, 2011, p. 39.

Further implications of this theoretical distinction will be developed in the following Section.

4.3. Criminal law and the principle of legality, a very sensitive policy area

Someone noted that in the *Taricco saga* a constitutional clash was prevented thanks to the achievement of a judicial fine-tuning[81] and that this episode may epitomise a sample of the incremental function of the judicial dialogue[82]. In this respect, the present analysis tries to highlight that the adjustment among the CJEU and the ICC is (at least partly) due to the circumstances of the dispute. The domain of this constitutional conflict is criminal law which, as is famously known, falls is an area in which the Member States only very recently accepted an EU competence to be carried out pursuant to the Community method with any consequence in terms of enforceability and direct effect[83]. Indeed, after the abolition of the pillar structure, the cooperation in criminal matters was incorporated in the Union *acquis* and the competence to adopt both substantive and procedural measures in this field was conferred in the Treaties[84].

The crucial point is that, at the time of the proceedings, the specific aspects of criminal law involved (the limitation period) were not harmonised at EU level. In fact, the deadline to implement Directive n. 2017/1371 on the fight against fraud to the Union's financial interests[85], had not expired yet. As briefly displayed in the above, this may have impacted on the outcome of the *saga*.

In fact, the directive partially altered the matter of the dispute by providing a common maximum limitation period for the offences affecting the EU finances[86]. This is explained by the CJEU itself when saying that «the limitation rules applicable to criminal proceedings relating to VAT had not been harmonised by the EU legislature […] The Italian Republic was thus, at that time, free to provide that in its legal system

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[81] Cfr. M. Bonelli, *The* Taricco Saga *and the Consolidation of Judicial Dialogue in the European Union*, cit. and D. Sarmiento, *The Consob Way - Or how the Corte Costituzionale Taught Europe (once again) a Masterclass in Constitutional Dispute Settlement*, cit.

[82] A. Bobic, *Constitutional Pluralism Is Not Deas: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice*, cit., particularly p. 30.

[83] For an insight on the evolution of the Union's competence in criminal law matters, A. Klip, *European Criminal Law: an Integrative Approach*, Antwerp, 2016, particularly chapters 1 and 2.

[84] The legal bases are, respectively, Articles 82 and 83. However also other provisions of the TFEU allow to take actions in fields related to criminal law e.g., Article 86 confers the competence to establish the European Public Procurement Office.

[85] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

[86] Article 12(4) Directive 1371/17 which reads: «Member States may establish a limitation period that is shorter than five years, but not shorter than three years».

those rules [….] form part of substantive criminal law»[87]. Clearly the existence of secondary law and its degree of harmonisation turns out to be relevant for the present investigation. Thus, the function of harmonisation with respect to constitutional clashes can be summarised as follows: the more detailed the legislation (in force), the less is the room for national courts to claim derogations/exemptions. This explains also the outcome of the Danish and the Czech cases in which national law was not disapplied by virtue of a principle and not due to an alternative regulatory tool of EU law (e.g. a measure establishing the allowances for dismissed workers or governing in detail the pensions calculation regime).

The relevance of the degree of harmonisation/regulatory capacity of the EU measure is further confirmed *vis à vis* the *Melloni* ruling[88] which, interestingly, falls within the very same field of criminal law (namely, the s.c. European Arrest Warrant or «EAW»)[89]. Given the exhaustiveness of the reasons to refuse the execution of the warrant under the EAW, the CJEU did not afford any national/constitutional derogation to the functioning of the cooperation scheme. This approach, focusing on the goal of the Framework Decision, denied any leeway for the referring court to claim any (fundamental rights-based) exception. The Court's reasoning is based on the idea that full harmonisation of a given domain—such as for that covered by the EU Arrest Warrant—precludes the situations involved from being affected by the national standards. For the present purposes, putting together *Melloni* and *Taricco* highlights a clear nexus among the degree of harmonisation and the tenability of identity-based[90] claims by constitutional courts.

In conclusion, considering all the reflections made about the extent of these conflicts, all the four cases, albeit diverging in subject, present a very demarcated scope insofar as a given measure, or, better still, a determined provision of EU law is debated. Whether this might hold true for the most recent rulings will be analysed in the following.

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[87] CJEU, C-42/17, *M.A.S. & M.B.*, cit., paras 44-45.

[88] CJEU, 26 February 2013, C-399/11, *Melloni*, ECLI:EU:C:2013:107. For the present purpose, this case does not amount to a constitutional clash. A comparison with *Taricco* is made to highlight how the degree of harmonisation of the EU legislation may impact on the discretionary power of the States and national courts to claim restraints.

[89] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial. The amendments occurred in 2009 introduced an exhaustive list of grounds for refusing the execution of the warrant.

[90] Despite this topic cannot be developed here, it is worth specifying that while claiming possible derogations to the execution of the warrant, the Spanish Constitutional Tribunal invoked both Article 4(2) TEU and Article 53 CFREU.

5. The material scope of the crisis of values in the background of the Polish and Hungarian judgments

Observing the previous caselaw through the lenses of their material scope it was concluded that the most severe collision occurred in the German case given, first, the exclusive nature of the policy area at stake and, second, that the *BVerfG* not only restrained the operation of EU law but preformed itself a scrutiny of its validity. Nonetheless, as pointed out, all the conflicts affected a narrow piece of EU law thus presenting a delimited scope. The identified EU law measure debated was, in all cases, associated to arguments unveiled in purely legal terms. For instance, the Italian Constitutional Court's main point against the CJEU's stance was a certain conception of the principle of legality pursuant to national criminal law. Similarly, the Danish Supreme Court yielded that the Danish Accession Act to the Union did not afford an unwritten rule of EU law to be applied to the detriment of the national legislation. The same remarks apply for the German and the Czech clashes.

These keys, namely the boundaries of the material scope and the arguments put forward by national courts, will now be applied to the new clashes occurred in Poland and Hungary in order to ascertain whether they may resemble the previous cases or, alternatively, whether they project unprecedented elements.

As for the profile regarding the material scope, the decision issued by the Hungarian Constitutional Court in December 2021 focused on asylum legislation. Its rules are headed under Article 78 TFEU which, for the purpose to construct an area of freedom, security and justice (also «AFSJ») entrusts the Union also to adopt measures for a common European asylum system. All the Directives (2013/32, 2013/33 and 2008/115) which, according to the CJEU's ruling, Hungary failed to fulfil belong to this legal framework. It goes without saying that, not only one provision, or one defined aspect of this legislation was put under challenge by the applicant but, rather, a major part of it since the petition touched the very core of the EU asylum system currently in force[91]. This reluctance toward this policy is *per se* no surprise. In fact, for several reasons, asylum law proved to be particularly sensitive and the CJEU itself acknowledged that the border States dealing with ensuing arrivals could face difficulties[92]. Despite it is realistic that the States faced with massive entries of migrants and asylum seekers could claim derogations to the functioning of the rules assigning them all the relative administrative burden, this is not exactly the case of Hungary

[91] CJEU, C-808/18, *Commission v Hungary*, cit. particularly paras 266, 302 and 315 summarising the findings of the Court on the aspects of the asylum framework violated by Hungary.

[92] See for instance CJEU, 21 December 2011, Joined cases C-411/10 and C-493/10, *N.S.*, ECLI:EU:C:2011:865 concerning the mechanisms under the then Regulation 343/2003, s.c. Dublin II. There the CJEU acknowledged that a Member State other than that of first entry can be (exceptionally responsible) to examine the asylum application.

which Government since the 2015 migration crisis has been attacking the EU policies on remarkably ideological grounds[93].

Therefore, same as in the past, the present challenge to the operation of the CJEU's ruling does not properly allege infrastructural and administrative flaws in processing the asylum applications. Instead, both the petition of the Minister of Justice and the HCC's ruling itself deal with the subject as a potential threaten to the identity of the Hungarian people shielded in the renewed text of the Constitution[94]. Put it different, the assumed obstacles to the correct implementation of EU asylum law miss a strictly practical/legal explanation and appear slightly associated to ideological and political elements. This is all news when it comes to compare this case with the other constitutional conflicts which, at first sight, were all grounded on purely legal arguments[95].

This twofold point regarding the scope and the reasons opposed in this case tends to support the idea that the petition was just seeking a green light to decouple the Governmental action from the EU constraints.

When it comes to explore the subject matter dealt with in the K 3/21 decision of the PCT, the task to demarcate its scope becomes more upsetting. Indeed, the charges miss any reference to a particular piece of EU substantive legislation. While no specific legislative measure is explicitly questioned, the decision targets the primary law provisions—Articles 1, 2, 4(3) and 19(1) TEU—devoted to defining the basic principles of the Union integration project together with the principle of primacy itself from now on supposedly entrusted to Polish law. If the investigation on the material scope is understood in the strict sense, one may argue that the K 3/21 ruling lacks one as no particular piece of legislation, nor a defined policy area is involved. Substantively speaking, the divergence highlighted by the PCT's statements goes beyond the delimited scope in which the previous clashes fell. In fact, mostly focusing on the values and the EU toolbox developed to enforce them, namely Article 19(1) and 2 TEU read in conjunction[96], it involves all the very corollaries of the Union's membership.

As regards the reasoning, the arguments currently available in the operative part of the decision all refer to the allegedly *ultra vires* interpretation of these EU norms as upheld in Luxembourg. While neither the relevant CJEU's caselaw is quoted nor a legal argument other than the peril for the national sovereignty is developed, it is crystal

[93] *Ex plurimis*, see G. Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article (2) of the Fundamental Law*, in *Review of Central and East European Law*, 2018, p. 23.

[94] Following the decision of Alkotmánybíróság, 30 November 2016, n. 22/2016 (XII.5.) announcing the general obligation to protect the Hungarian identity, the national Constitution was amended in 2018. For a deatailed analysis of the amendments occurred, see R. Daniel Keleman-L. Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, in *Yearbook of European Legal Studies*, 2019, p. 59.

[95] See above, the statements of reasons of national courts explored in Sections 1 and 3.

[96] Cfr. CJEU, C-64/16, *ASJP*, cit.

clear that the decision, by and large, aims at disputing the actions undertaken on the side of the EU to fight the rule of law backsliding since the PiS Government came to power in 2015. However, endorsing a broader understanding of the notion of material scope for the present purpose, the K 3/21 ruling ultimately contends the Union values *status* and their enforcement mechanisms. The underlying rejection of the principle of primacy for the sake of national sovereignty is nothing but one further expression of the background issue. Considering the vagueness of the stances taken in the ruling and the wideness of the subject at stake, the Polish ruling does not fall in a defined material scope within the previous terms.

As a concluding remark two questions may be addressed. First how actually far is it from Budapest to Warsaw and, second how far is it from Budapest and Warsaw to Karlsruhe[97] and the other national Constitutional Courts' claims.

As regards the first part of the question, all the features of the Polish and the Hungarian rulings highlighted in the above demonstrate that they apparently diverge in scope, as in one case asylum law, a full-fledged policy area of competence of the Union, is in the balance while, in the latter, the (T)EU core principles. Moreover, at first glance, only the Polish K 3/21 looked truly disruptive when envisaging an all-encompassing rejection of the EU basics. On the contrary, the Hungarian court left the last word up to the governmental authorities as to whether the CJEU's findings could be implemented without impairing the national Constitution.

Nonetheless, is maintained that the two cases are not so far apart. Accordingly, a link can be caught among the «enforcement of (asylum) law» at stake in Hungarian judgment and the «enforcement of values»[98] in the balance in the PCT's ruling. The connection between the «implementation gap» in the asylum policy and the rule of law/values' crisis is plainly laid out by Tsourdi[99]. Among other things, she notes that, yet before the rule of law crisis became manifest, the Dublin/Schengen asylum system had already evidenced flaws due to the lack of objective criteria to evaluate the Member States' implementation. Subsequently, she holds, the rule of law crisis (intended as the inability of the States, due to institutional, judicial, or administrative capacities and resources to implement EU law) has further worsened the functioning of the asylum system mostly based on mutual trust as regards the respect of fundamental rights[100]. The Hungarian history would epitomise this phenomenon as the flaws in the European asylum system have dramatically deteriorated since the reluctance of the values became blatant. From this perspective, it is not a coincidence that when the European

[97] Expression reshaped from S. Biernat, *How Far Is It from Warsow to Luxembourg and Karlsruhe: The Impact of the PSPP Judgement on Poland*, cit.

[98] Expression borrowed from D. Kochenov, *The Acquis and Its Principles: The Enforcement of the 'Law' versus the Enforcement of the 'Values' in the European Union*, in A. Jakab – D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, 2017, p. 9.

[99] E. Tsourdi, *Asylum in the EU: One of the Many Faces od Rule of Law Backsliding?*, in *European Constitutional Law Review*, 2021, p. 471.

[100] See CJEU, Joined cases C-411/10 and C-493/10, *N.S.*, cit.

Parliament took action to enforce the rule of law in Hungary pursuant to Article 7(1) TEU, the protection of the rights of asylum seekers was at the heart of its concern[101].

Based on this approach, the significance of asylum legislation—such as many other legislative measures based on cooperation within the AFSJ—has been highly-moralised[102]. Then, as a matter of consequence, the failure to abide by the values affects the implementation of the legislation at stake potentially jeopardising the cooperation scheme at the heart of the integration project.

Given the above, the present reflection tends to envisage that, albeit the difference in subject and in tone, the Hungarian and the Polish rulings lie on the very same page as in one case the values are explicitly tackled and in the other, they lie in the background as being a (if not the primary) cause of the rejection of the asylum framework. Indeed, while the connection among the rule of law backsliding and the gap in the enforcement of secondary law was portrayed by Tsourdi[103] as specifically concerns asylum law, AG Sharpston summarised the point at more general level in the following terms: «[…](r)espect for the rule of law implies compliance with one's legal obligations. *Disregarding those obligations because, in a particular instance, they are unwelcome or unpopular is a dangerous first step towards the breakdown of the orderly and structured society governed by the rule of law* (emphasis added) »[104].

As regards the second part of the question, the HCC and the PCT's approach does not seem to resemble the experiences tackled in Section 1 and their rulings look far from familiar.

While the absence of legal reasons strictly speaking anticipated in the first part was described as a prospective symptom of the political will behind the curtain of these judicial interventions, supplementary elements militate in favour of this thesis. Indeed, the political nature of the reasons is evidenced by the fact that both proceedings were initiated by a member of the Government who triggered a constitutional scrutiny of EU law in order to justify its rejection already in place at governmental level.

Whether the proceedings started by the Commission against Poland will end up in Luxembourg, new elements may valuably help to understand the essence of this conflict.

Ultimately it is argued that the material scope of the most recent clashes underlies a deeper disagreement not strictly related to the subject in the balance. In fact, notwithstanding that constitutional law can be a lawful vehicle to force the EU

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[101] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

[102] For this moralising effect and the s.c. *horizontal Solange* mechanism, see I. Canor, *My brother's keeper? Horizontal Solange: "an ever closer distrust among the peoples of Europe"*, in *Common Market Law Review*, 2013, p. 383.

[103] L. Tsourdi, *Asylum in the EU: One of the Many Faces od Rule of Law Backsliding?*, cit.

[104] Opinion of Advocate General Sharpston in CJEU, 2 April 2020, Joined Cases C-715-17, C-718/17 and C-719-17, *Commission v Poland, Czech Republic and Hungary*, ECLI:EU:C:2019:917, para 241.

institutions to address certain issues of legality, it is questionable whether Hungary and Poland performed «loyal opposition»[105]. A non-cooperative approach is first evidenced by the fact none of these two courts sent a preliminary request to the CJEU. Addressing the issue to Luxembourg not only would be advised by the principle of sincere cooperation but, pursuant to the very wording of Article 267(3) TFEU, is mandatory for judges of last instance as the PCT and the HCC can be considered.

For all these reasons these courts seem to portray a (yet renowned and widespread) political will to not uphold EU law and potentially display the existence of a new-fangled category of constitutional clashes. In this new typology, no paramount role is acknowledged as regards the subject at stake. Rather, any piece of EU law could be observed under the shadow of a more generalised crisis of cooperation and could be potentially challenged due to a conceptual (rather than legal) disagreement. Slightly, this new type of clashes seems characterised by an undisputed interplay among the judiciary and the governmental authorities. The statements of these domestic courts confirm that in those countries the law is subject to the politics in place and the national judiciary is not willing to uphold a view conflicting with that endorsed by the Government. This places the conflict at political rather than at judicial level and witnesses a somewhat form of disavowal of the EU integration on behalf of all the national authorities of which the constitutional courts are just an ambassador. Ultimately, all the above may corroborate the sceptical view of national courts as the best forum for advocating instances of constitutional pluralism[106].

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Abstract: In 2021 two rulings discussing the operation of EU law were issued in Poland and Hungary. Although different in tone and in subject, the statements in both decisions underly a divergence going beyond the EU law provisions at stake therein.

[105] A. Bobic, M. Dawson, *What did the German Constitutional Court get right in Weiss II?*, in *EU Law Live*, https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson/, 12 May 2020. See also, Mark Dawson's speech in the live webinar of 22 September 2020, *Legal Disintegration? Brexit, The Judgment Of The German Constitutional Court In Weiss And The Future of Europe* available at https://www.youtube.com/watch?v=KOklgjApm-Q.

[106] N. de Boer, *The False Premise of Constitutional Pluralism*, in G. Davies – M. Avbelj (eds.), *Legal Pluralism and EU Law*, Cheltenham, 2018, p. 199. The author is sceptical about this manifestation of constitutional pluralism and supports the idea that it is detrimental to the enhancement of pluralism in the political arena. At odds with this view, see, *ex plurimis*, M. Kumm, *Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism*' in M. Avbelj – J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond*, Oxford, 2012, p. 39.

This feature emphasises a major distinction with the judicial clashes arisen in the past where, supporting their claims by referring either to the *ultra vires* doctrine, or to the concept of national identity as potential obstacles to the implementation of EU law, national courts engaged in a dialogue with the CJEU. From this perspective, reflecting on the material scope of these clashes may constitute a key to catalogue them all and, also, to highlight a structural difference as regards the most recent ones which background is occupied by the crisis of values.

Keywords: constitutional clashes, national constitutional/supreme courts, identity review, *ultra vires* review, material scope

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