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**Re-examining Constitutional Pluralism  
in the European Union: Article 2 TEU as  
the limit of constructive conflict**

FINAL THESIS

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Sveučilište u Zagrebu

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**Preispitivanje ustavnog pluralizma u  
Europskoj uniji: članak 2 UEU kao  
granica konstruktivnog konflikta**

ZAVRŠNI RAD

Mentorica: doc. dr. sc. Nika Bačić Selanec

Zagreb, 2026

## Authenticity Statement

I, Mihaela Jacmenović, hereby confirm that I personally wrote the paper entitled **Re-examining Constitutional Pluralism in the European Union: Article 2 TEU as the limit of constructive conflict**. All parts of the paper, findings or ideas that are quoted, paraphrased or based on other sources (whether books, scientific, professional or popular articles, online sources, regulations, court decisions or statistical data) are clearly marked in the paper as such and adequately listed in the literature list. In the creation of the paper, sources other than those mentioned in the paper were not used.

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**Abstract:**

This thesis re-examines the sustainability of constitutional pluralism through an analysis of challenges within the European Union, such as the rule of law crisis and democratic backsliding, alongside relevant jurisprudence. It offers a comprehensive approach to the topic by analyzing the national mechanisms that enable Member States' constitutional courts to monitor the principle of conferral, as well as the dynamics and relations regarding the primacy of EU law, with a particular emphasis placed on the concept of constitutional identity. In this sense, alongside the traditional concept of national constitutional identity, the constitutional identity of the European Union is introduced into the debate as an emerging construct within the power relations between the components of the European framework. Given that Article 2 of the Treaty on European Union (TEU) represents the clearest articulation of a supranational European constitutional identity, the thesis critically examines its normative nature and justiciability. The analysis concludes that Article 2 TEU constitutes the limit of constructive conflicts and the lowest common denominator required for Member States to remain part of the same constitutional community. However, the confirmation of such a *free-standing* application of Article 2 TEU by the Court of Justice of the EU does not signal the end of constitutional pluralism. The proposed approach, grounded in Article 2 TEU, serves to establish the fundamental rules of participation in a multi-level community such as the EU, marking a clear limit beyond which conflicts can no longer be considered an expression of legitimate diversity, even within the operation of constitutional pluralism, but instead become destructive, undermining the very foundations of a shared constitutional order based on the rule of law and liberal democracy.

**Keywords:** constitutional pluralism, Article 2 TEU, EU values, constitutional identity, rule of law.

## **Sažetak:**

Radom se preispituje održivost ustavnog pluralizma kroz analizu izazova unutar Europske unije, poput krize vladavine prava i demokratskog nazadovanja, te relevantne sudske prakse. Nudi se sveobuhvatan pristup problematici kroz raščlambu nacionalnih mehanizama koji ustavnim sudovima država članica omogućuju nadzor načela dodijeljenih ovlasti, kao i kroz analizu dinamike i odnosa u pogledu načela nadređenosti prava EU-a, pri čemu je poseban naglasak stavljen na pojam ustavnog identiteta. U tom se smislu, uz tradicionalni koncept nacionalnog ustavnog identiteta, u debatu uvodi i ustavni identitet Europske unije kao relativno novi konstrukt unutar odnosa moći između sastavnica europskog ustavnog okvira. Budući da članak 2. Ugovora o Europskoj uniji (UEU) predstavlja najjasniju artikulaciju supranacionalnog europskog ustavnog identiteta, u radu se kritički preispituju njegova normativna narav i mogućnost sudske primjene. Analizom se zaključuje da upravo članak 2. UEU-a predstavlja granicu konstruktivnih konflikata i najmanji zajednički nazivnik potreban da bi države članice ostale dijelom iste ustavne zajednice. Međutim, potvrda takve samostalne primjene članka 2. UEU-a od strane Suda EU-a ne označava kraj ustavnog pluralizma. Predloženi pristup, utemeljen na članku 2. UEU-a, služi za postavljanje osnovnih pravila sudjelovanja u višerazinskoj zajednici poput EU-a, označavajući jasnu granicu nakon koje se sukobi više ne mogu smatrati izrazom legitimne raznolikosti, čak ni u funkcioniranju ustavnog pluralizma, već postaju destruktivni, narušavajući same temelje zajedničkog ustavnog poretka zasnovanog na vladavini prava i liberalnoj demokraciji.

**Ključne riječi:** ustavni pluralizam, članak 2. UEU-a, vrijednosti EU, ustavni identitet, vladavina prava.

## 1. INTRODUCTION

When thinking about EU law, many tend to overlook the conflictual dimension of its development. Numerous famous cases from the rich treasury of the Court of Justice of the European Union (CJEU) clearly illustrate the contours of such conflicts. Take the example of *Costa v. ENEL*. A fundamental principle of EU law, such as the primacy, has produced a series of reactions from the highest domestic courts of the Member States (MS), whereby the most famous response by the German and Italian constitutional courts was constructing the equally foundational, yet countervailing *Solange* and *Controllimiti* doctrines. This logic of the conflictual development of EU law is also maintained in the continuous tensions between the CJEU and national constitutional courts, especially regarding the limits of jurisdiction (*ultra vires*), the protection of fundamental rights and constitutional identities.

This allows us to observe that constitutional conflicts are inherent in the development of EU law and do not necessarily entail devastating consequences for the entire legal system as such. However, even within a pluralist framework, it is necessary to clearly define the boundaries of (un)acceptable forms of conflicts. The purpose of this distinction is to provide us with a better understanding of the underlying motives behind these conflicts, their impact on the process of integration and the relations between different levels of authority in a multi-level constitutional structure, such as the EU. In this regard, attention should be paid to the terminology developed by Ana Bobić, who qualitatively distinguishes between the constructive and destructive types of such conflicts. Building on these foundations, this paper argues that the values expressed in Article 2 TEU must represent the limit of such acceptable, constructive conflict, as it represents the lowest common denominator for the Member States to remain part of the same constitutional community. Additionally, it represents the very core of the EU's constitutional identity, until recently absent from academic debates.

The last decade in the development of EU law has indeed been particularly interesting for legal scholars. In recent years, important steps have been taken in the jurisprudence of the CJEU regarding both EU and national identities and referring to the latter as a justification for derogating from the primacy of EU law. In this context, the doctrinal basis for the free-standing mobilization of an EU identity as a counterweight to developments in the Member States is disputed by a part of legal scholars and particularly by those MS whose reforms have been the subject of proceedings regarding the violations of the rule of law and democratic backsliding.

This is precisely the central area of interest of this paper. It seeks to re-examine the doctrinal positions and case law regarding the mobilization of an EU identity within a pluralist framework, the sustainability of which is becoming increasingly under strain.

In exploring these central topics, this paper is divided into six inter-related chapters. The first chapter attempts to illustrate the supranational framework within which constitutional conflicts take place. In this context, the features of constitutional identity are explored as a particularly contested concept within these debates, and the basic tenets of constitutional pluralism are introduced. The next chapter depicts the mechanisms available to national courts for monitoring the primacy of EU law, portraying the distinction between constructive and destructive conflicts, which are particularly problematic at the EU level. This development has given rise to doubts about the sustainability of constitutional pluralism by a part of legal scholars whose central arguments are examined. The third chapter introduces the EU constitutional identity as an emerging but still underexplored component in debates concerning relations between different levels of authority within the European framework by providing an analysis of how this supranational identity manifests itself. After identifying Article 2 TEU as its clearest expression, the fourth chapter offers an assessment of its normative nature and justiciability through the lens of legal theory. Chapter five considers the possibility of the mobilization of Article 2 TEU in court proceedings before the CJEU illustrating both the potential approaches and the latest developments in the Court's jurisprudence. Finally, chapter six offers an overview of the more specific criticisms that have arisen, or may arise, in relation to proposed and existing developments in this regard. In conclusion, the paper confirms the value of constitutional pluralism as a theory that most adequately reconciles tensions arising from diverse claims to authority within the EU framework. Loyal cooperation and effective dialogue between the components of the supranational framework remain the only possible balance between the primacy of European law and the demands of the Member States.

## 2. EU AND NATIONAL CONSTITUTIONAL LAW

European integration has undoubtedly outgrown its purely economic dimension and now represents a normative and political project premised on upholding mutually recognised values and safeguarding specific legal, political, and social choices integral to their preservation. Crucially, the implementation of such integration would not be possible without an appropriate transfer of competences from the respective Member States to the European Union (EU) level, whether in an exclusive, shared or supporting manner. Such division of powers is determined by the principle of conferral, which states that “the EU may only act within the limits of the competences conferred upon it by the EU Member States in the treaties to attain the treaties’ objectives.”<sup>1</sup> Conferral is the key constitutional principle governing the legal structure of the EU within this debate because, unlike the Member States, the EU can only act in the areas and to the extent that the Member States have delegated to it, thus preventing the EU from expanding its competences unilaterally. To ensure that the EU respects this division, the exercise of competences is subject to the principles of subsidiarity and proportionality, as laid down in primary legislation and the Protocol on the application of the principles of subsidiarity and proportionality. Another Treaty provision, Article 4(2) of the Treaty on European Union (TEU), sets an additional limit to be respected by Union institutions: the national identity of Member States. As will be shown, national constitutional courts are the most active authorities in ensuring respect for the principle of conferral and protection of national identities in the European framework.

Throughout the period of integration, these powers' relations have been the persistent source of tension within the EU system. On the one hand, Member States claim to retain the final say over their constitutional, political and social structures, and on the other, the EU requires the exercise of competences sufficient to ensure the uniform and effective application of EU law in the Member States. This tension resulted in the EU claiming primacy according to which EU law prevails over national law in case of conflict between them, and Member States accepting that primacy, albeit not without limits. This tension, particularly regarding the limits placed on the primacy of EU law, is one of the defining features of the *sui generis* EU system, which has been present for a long time. While the specific arguments and tools used to express these

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<sup>1</sup> European Union, *Division of competences within the European Union*, available at: <https://eur-lex.europa.eu/EN/legal-content/summary/division-of-competences-within-the-european-union.html> (accessed: 9 February 2026).

tensions have evolved over time, they essentially reflect the same underlying fear over the final authority of constitutional orders.

## 2.1 Essential Aspects of Constitutional Pluralism

Since the famous Maastricht judgment of the *Bundesverfassungsgericht* (BVerfG), constitutional pluralism has been widely regarded as the main theoretical lens through which conflicting demands can be accommodated.<sup>2</sup> However, it has faced severe criticism in the last decade, particularly for its lack of a prescriptive final decision-making authority in the EU legal framework in the light of the rule of law crisis and wider democratic backsliding. Before looking at the specific criticism aimed at constitutional pluralism, key aspects of the pluralist line of thought should be explored.

Recently, a group of scholars<sup>3</sup> described constitutional pluralism mainly as a theory of constitutional conflicts regarding the primacy of EU law. From this perspective, they view it not as “the identity of European constitutionalism itself but the nature of its relationship with other constitutional orders (national and, possibly, international).”<sup>4</sup> However, following the original and foundational work of Walker and Maduro, we can perceive constitutional pluralism not only as a tool best suited to theorize and describe conflicts, which certainly is one of its elements, but rather as a theory designed to broaden our “understanding of the nature of the European and national constitutions and their relationship with constitutionalism in general.”<sup>5</sup>

Although constitutional pluralism is a term encompassing many lines of thought, it is generally viewed as a theory which “rests on the premise that the question of who is the final arbiter among these [European] courts... [is] futile, as they co-exist in a multi-level setting.”<sup>6</sup> Constitutional pluralism moves away from state-centred rhetoric and considers the diversity of constitutional-level sources and the competing claims between two co-existing constitutional

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<sup>2</sup> Maduro, M. P., "Three Claims of Constitutional Pluralism", in: Avbelj, M.; Komárek, J. (eds.), *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing, Oxford/Portland, 2012, p. 2.

<sup>3</sup> See e.g., Kelemen, R. D.; Pech, L., "The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland", *Cambridge Yearbook of European Legal Studies*, vol. 21, 2019, pp. 59–74.

<sup>4</sup> Maduro, *op. cit.*, pp. 1–2.

<sup>5</sup> *Ibid.*, p. 4.

<sup>6</sup> Bobić, A., "Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice", *German Law Journal*, vol. 18, no. 6, 2017, p. 1396.

levels.<sup>7</sup> Another important premise, in line with moving beyond the limits of nation-statehood, is heterarchy. As opposed to the hierarchical structure present in national legal orders in the classic Kelsenian sense, which places the national constitution as the highest source of validity for all legal norms, pluralists argue “that the European order...has developed beyond the traditional confines of international law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states.”<sup>8</sup> Such a framework does not presuppose a hierarchical structure, which is not necessary to ensure the proper functioning of the system. Rather, emphasis is placed on the principle of loyal cooperation and effective dialogue between the components of the supranational framework as the only possible balance between the primacy of European law and the demands of Member States. It is in this particular setting that “national constitutional identity becomes a form of conceptual currency through which authority is claimed and negotiated.”<sup>9</sup>

## *2.2 The Concept and Characteristics of Constitutional Identity*

A degree of conceptual clarity is needed regarding the term “constitutional identity”. Even though it is often a point of contestation, characterised by ambiguity and unclear scope of application, we should nonetheless strive to unpack this loaded term and offer more precision in terms of its application in relation to the EU legal framework. This paper will by no means attempt to coin a strict, precise or a generally accepted definition, as this would be a far too ambitious project for present purposes. The goal is rather to explore its functional features important for understanding the broader implications within the multi-level constitutional debate regarding derogations from the primacy of EU law and its role in the operation of EU constitutional pluralism.

Commonly understood through a substantialist view, constitutional identity refers to the fundamental features and values of a particular constitution, which constitute the unamendable core without which we could no longer speak of the same constitution in a material sense.<sup>10</sup> Additionally, “highest courts in Europe and beyond have come to regard constitutional identity

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<sup>7</sup> Maduro, *op. cit.*, p. 4.

<sup>8</sup> Walker, N., *The Idea of Constitutional Pluralism*, EUI Working Paper LAW No. 2002/1, European University Institute, Department of Law, Florence, 2002, p. 27

<sup>9</sup> Scholtes, J., "Abusing Constitutional Identity", *German Law Journal*, vol. 22, 2021, p. 535.

<sup>10</sup> Guastini, R., *Syntax of Law*, English translation by the author, based on the Croatian edition *Sintaksa prava* translated by L. Burazin, Zagreb, Naklada Breza, 2016, pp. 167–170.

as capturing the essentials of the constitutions under their jurisdictions.”<sup>11</sup> To determine such an identity, one’s first instinct is to look at the text of the constitution itself, especially since certain national constitutions identify or emphasise the highest values of a legal order, such as the German “eternity clause”. But to view constitutional identity in such a restricted manner seems too limited, especially due to the abundance of constitutional traditions across the twenty-seven Member States. So, what then constitutes constitutional identity? Who interprets it, and what are its implications for the European Union? These are the central questions regarding the function of identity within the EU debate.

As already hinted above, parts of the constitutional text provide important insight into what might be encompassed by the term “constitutional identity”. Apart from eternity clauses or high thresholds for amendments, which can be indicative, one must consider the preamble of a given constitution, as preambles commonly contain expressions of the constitution's overarching purpose, guiding values and aspirations.<sup>12</sup> One must also note that the existence of a specific, singular text under the name of “the constitution” is not a prerequisite for having a constitutional identity. Such was the case with the former Member State, the United Kingdom, or with Austria, which has a “textual basis, although it is not found in a single document, but dispersed over various sources.”<sup>13</sup> Another component to consider is the premise that constitutional identity inherently constitutes exclusivity, or uniqueness, as terms discussed by van der Schyff. He rejects this premise, claiming that the “purpose of investigating a particular identity should not be to discern its exclusive or unique qualities, in the sense that they are not shared by other constitutions.”<sup>14</sup> In his understanding, the term should not be used “as the sum of exclusive difference, but the sum of the experience that has shaped a constitution in a fundamental manner.”<sup>15</sup> In the light of this reading, we must understand constitutional identity not merely as a product of both the values and highest norms contained in the constitutional text itself, but also take into consideration “how such content is animated by its context in a fundamental way.”<sup>16</sup>

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<sup>11</sup> Van der Schyff, G., "Constitutional Identity of the EU Legal Order: Delineating its Roles and Contours", *Ancilla Juris*, 2021, p. 3.

<sup>12</sup> Maes, C., *The Notion of Constitutional Identity and its Role in European Integration*, European Parliament, PE 760.344, Brussels, 2024, p. 15.

<sup>13</sup> *Ibid.*, p. 16.

<sup>14</sup> Van der Schyff, *op. cit.*, p. 3.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

Constitutional courts are the institutions best placed to provide such an interpretation as they, to a greater or lesser extent, have the authority to determine the constitutionality of laws and other acts, as well as the important task of protecting fundamental rights guaranteed by the constitution. Hence, their role must not be marginalised but accepted as the national institution most equipped to interpret constitutional identity under its jurisdiction. As for those Member States which have decentralized models of constitutional review, the same logic applies, as interpretation remains connected to the body or bodies exercising ultimate constitutional authority. The legislative branch can potentially play a role here as well. As the direct representative of the constituent power (the people), the legislative branch can, albeit to a certain extent, influence the shaping of the constitutional identity. This can happen either through amendments (directly) or by influencing the interpretation through the legislative process at its disposal (indirectly).

Regarding the EU framework, it was the Maastricht Treaty which brought the first explicit reference to national identities in primary legislation at the EU level. Precisely, Article 6(3) introduced an obligation to respect the national identities of the Member States, but without any further elaboration of what that respect should entail. However, it should be noted that the development of identity-based doctrines by the constitutional courts of the Member States preceded this provision. It was the Member States which developed their responses to the primacy of European law by referring to the core of their constitutions and which introduced identity-based arguments in relation to growing European integration. The real expansion of identity-based arguments in the EU constitutional sphere took place after the adoption of the Lisbon Treaty, where the previously concise Article 6(3) was replaced by a more elaborate provision in Article 4(2) of the Treaty of Lisbon, which reads:

“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”<sup>17</sup>

One must note that the text of this provision does not mention constitutional identity but rather refers to national identity as a concept protected under EU law. Nonetheless, national identity

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<sup>17</sup> Art. 4(2) Treaty on European Union (consolidated version), OJ C 202/13, 7 June 2016.

is “considered to be equivalent to the obligation to respect constitutional identity in the vast majority of the literature, as well as in some decisions of MS’s constitutional courts and also in the opinions of advocates general.”<sup>18</sup> Therefore, these terms seem to be used interchangeably<sup>19</sup> in both practice and legal scholarship as they are equated to refer to particularly important features of constitutional structures.

Taken in isolation, this provision might seem to provide for Member States with the right to unilaterally determine the content and scope of such identity *vis-à-vis* the EU. This was precisely the approach observed in the practice of "captured" constitutional courts during the rule of law crisis. What these same courts simultaneously ignore in their line of reasoning is the related Article 4(3) TEU<sup>20</sup> which binds Member States by the principle of sincere cooperation and mutual respect, and instructs them to “refrain from any measure which could jeopardise the attainment of the Union's objectives.”<sup>21</sup> The Treaties, therefore, impose both positive and negative obligations on Member States and EU institutions when they act within the framework of EU law. If we read these two articles together, we can deepen our understanding of what can be considered a valid derogation from the primacy of EU law. Thus, we can assume that the same article (Article 4 TEU) which grants the Member States a sword for the protection of their own fundamental constitutional structures, also grants the EU a shield against particular claims which go against the objectives that we assume are formed in accordance with the values of Article 2 TEU.

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<sup>18</sup> Orbán, E., "Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union", *Hungarian Journal of Legal Studies*, vol. 63, 2022, p. 145.

<sup>19</sup> For an opposing stance (differentiation of terms), see: Cruz Mantilla de los Ríos, P., "European Constitutional Identity as the Unamendable Core of the EU Treaties", *European Constitutional Law Review*, 2024; Cloots, E., "National Identity, Constitutional Identity, and Sovereignty in the EU", *Netherlands Journal of Legal Philosophy*, vol. 45, no. 2, 2016, pp. 82–98.

<sup>20</sup> For similar ideas, see: Capelli, T., "Article 4(2) TEU: The respect for national identity in the context of European integration", *Astrid Rassegna*, 2023(16), pp. 1–13; Van der Schyff, G., "The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU", *European Law Review*, 2012; Kelemen and Pech, *op. cit.*, pp. 59–74.

<sup>21</sup> Art. 4(3) Treaty on European Union (consolidated version), OJ C 202/13, 7 June 2016.

### 3. CONFLICTS IN EU LAW

Since it is understood that illiberal developments in the Member States have led to a loss of faith in constitutional pluralism among a part of legal scholars, the conceptual models of conflicts advanced by Bobić are especially useful for observing these developments, drawing a line between acceptable and unacceptable forms of challenging EU primacy and asserting national identity arguments.

Bobić rightly perceives conflicts as a common occurrence in the EU sphere but differentiates between two contrasting types – constructive and destructive conflicts. In her analysis of relevant case law, she finds that constructive conflicts are characterised by open and genuine dialogue between independent courts where mutual respect and appreciation for the values contained in Article 2 TEU remain evident, despite the tension this creates in the system. On the contrary, destructive conflicts constitute “attacks on the existence of the entire EU legal order”<sup>22</sup> characterised by a complete denial or rejection of the values enshrined in Article 2 TEU and a lack of sincere cooperation and dialogue between the courts. Moreover, in such cases, national constitutional courts often become an instrument of the executive branch in the consolidation of unconstitutional constellations in their own countries, providing a legal justification for continued violations of the rule of law and fundamental rights.

This theoretical framework on constructive and destructive conflicts advanced by Bobić is used as an analytical and theoretical basis in this paper, as it provides particularly useful concepts and terminology to comprehend the tensions emerging in EU law. Accordingly, this paper articulates the dichotomy between constructive and destructive conflicts. While constructive conflicts are illustrated here through the development of national mechanisms of control over the primacy of EU law, destructive conflicts are observed through more recent developments regarding the rule of law crisis and the ongoing democratic backsliding.

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<sup>22</sup> Bobić, A., "Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU", *Cambridge Yearbook of European Legal Studies*, vol. 22, 2020, p. 73.

### 3.1 Constructive Conflicts

Challenging the primacy of EU law is not a new phenomenon in the functioning of the EU legal framework. As briefly indicated, some constitutional courts of the Member States have developed their own doctrines to monitor the primacy of EU law. The friction between, on the one hand, the protection of national constitutions and safeguarding against the overstepping of competences (ensured by the principle of conferral), and, on the other, the primacy of EU law, has resulted in the development of three main mechanisms available to national courts in carrying out that task: fundamental rights control, ultra vires control, and the protection of constitutional identity. However, challenging primacy via these doctrines does not necessarily imply a destructive form of conflict. Indeed, an overview of the development of these mechanisms offers insight into a constructive way of resolving conflicts arising from these tensions.

The principle of the primacy of EU law was first challenged in relation to fundamental rights, given that “for most of its history, the EU possessed no charter of rights”<sup>23</sup>. This development was initiated by the Italian Constitutional Court (ICC) with its *controlimiti* doctrine, whereby, albeit accepting the primacy of EU law, it found that such primacy is limited by the fundamental rights and the highest values contained in the domestic constitutional order.<sup>24</sup> Shortly after, the German Federal Constitutional Court (*BVerfG*), in its landmark 1974 *Solange I* judgment, famously declared:

“As long as the integration process...has not progressed so far that Community law also contains an operative catalogue of fundamental rights...congruent with the fundamental rights catalogue of the Basic Law, a court ...is permitted – and required – to refer the matter to the Federal Constitutional Court ...if the court in question considers the Court of Justice’s interpretation of the relevant provision of Community law to be inapplicable on the grounds...that it conflicts with one of the fundamental rights enshrined in the Basic Law.”<sup>25</sup>

In the development of this judicial saga, the *BVerfG* issued another important ruling twelve years later, *Solange II*, where it held that the reservation constructed in *Solange I* was no longer

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<sup>23</sup> Douglas-Scott, S., "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review*, vol. 11, no. 4, Oxford University Press, 2011, p. 648.

<sup>24</sup> Maes, *op. cit.*, p. 22.

<sup>25</sup> Judgment of the Bundesverfassungsgericht of 29 May 1974, *Solange I*, BVerfG 37, 271-82, 2 BvL 52/71, para. 38.

necessary, provided that the EU now offers an "effective protection of fundamental rights *vis-à-vis* the public authority of the Communities in a manner that is essentially equivalent..."<sup>26</sup> to that guaranteed by the German Basic Law. In the background of the *Solange II* decision, an open and constructive approach by both the CJEU and the German court is visible. At first, the European Court of Justice managed to justify the protection of fundamental rights through the general principles<sup>27</sup> in its jurisprudence, and the *BVerfG* agreed, in principle, to suspend its judicial review of fundamental rights violations at the EU level and "[b]y so doing, the German court directly complied with its commitment to respect progressive integration"<sup>28</sup>. Subsequently, this issue was largely resolved<sup>29</sup> by giving the EU Charter of Fundamental Rights the status of primary law upon the entry into force of the Treaty of Lisbon. This example aptly illustrates the two-way relationship between courts in the EU framework, showing that the EU level is not immune to inputs from the Member States, but shapes its framework to some extent based on these inputs.

While the fundamental rights review is concerned with the protection of individual rights in the European Union, the ultra vires review monitors respect for the principle of conferral, allowing national constitutional courts to perform judicial review of EU acts in this respect. In the development of this tool, it was again the German Constitutional Court that paved the way with its *Maastricht* judgment<sup>30</sup> and later additionally refined it with the *Lisbon*<sup>31</sup> and *Honeywell*<sup>32</sup> judgments. In *Maastricht*, the *BVerfG* explicitly established its jurisdiction to oversee whether EU institutions had exceeded their competences, emphasizing the nature of the EU as a community of states and the Member States as Masters of the Treaties<sup>33</sup>. In doing so, it referred to the principle of democracy<sup>34</sup> and emphasised the importance of the principle of conferral in that setting. This position was reiterated in the *Lisbon* judgment, further clarifying that the "national supervisory power over ultra vires acts... [as of] subsidiary nature (if legal protection

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<sup>26</sup> Judgment of the Bundesverfassungsgericht of 22 November 1986, *Solange II*, BVerfG 73, 339-388, 2 BvR 197/83, para. 117.

<sup>27</sup> Douglas-Scott, *op. cit.*, p. 648.

<sup>28</sup> Bobić, A., "Constitutional Courts in the Face of the EU's Reconfiguration", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law*, vol. 85, no. 2, 2025, p. 529.

<sup>29</sup> However, there have been some instances regarding a suitable standard for effective protection of fundamental rights, mainly in the context of the European Arrest Warrant framework. For more clarification, see: Maes, *op. cit.*, p. 58.

<sup>30</sup> Judgment of the Bundesverfassungsgericht of 12 October 1993, *Maastricht*, BVerfG 155, 89-213, 2 BvR 2134/92, 2 BvR 2159/92.

<sup>31</sup> Judgment of the Bundesverfassungsgericht of 30 June 2009, *Lisbon*, BVerfG 123, 167-437, 2 BvE 2/08.

<sup>32</sup> Judgment of the Bundesverfassungsgericht of 6 July 2010, 2 BvR 2661/06.

<sup>33</sup> Judgment of the Bundesverfassungsgericht of 12 October 1993, *Maastricht*, para. 112.

<sup>34</sup> See especially paras. 14, 61-63, 93.

cannot be achieved at Union level) in order to consistently respect the principle of openness to European law and the obligation of sincere cooperation.”<sup>35</sup>

Further elaboration of the standards for judicial review came with the *Honeywell* judgment, in which the *BVerfG* held that an EU act could only be found ultra vires if the CJEU had first been afforded an opportunity to interpret the act in question under Article 267 TFEU.<sup>36</sup> Additionally, a high threshold was set, stipulating that to establish such a breach the EU institutions must have “exceeded their competences in a sufficiently serious manner.”<sup>37</sup> This requires “that the act in question manifestly exceeds EU competences, resulting in a structurally significant shift in the division of competences to the detriment of the Member States.”<sup>38</sup> A particularly open and friendly approach to European law is evident where the *BVerfG* states that ultra vires review should be exercised “with restraint so as not to harm the supranational principle of integration”<sup>39</sup>, while especially emphasizing the acceptance and observance of the methods and the role of the CJEU, as well as the recognition of a certain margin of error in the Court's jurisprudence.<sup>40</sup>

This friendly tone was sharpened in the judicial debate over the mandate of the European Central Bank (ECB), whose programs were challenged as ultra vires in Germany. This debate began with the *Gauweiler* case when the *BVerfG* requested the CJEU to decide on the validity of the Outright Monetary Transactions (OMT) program via the preliminary reference procedure, “warn[ing] that it would consider the scheme as ultra vires unless it was interpreted by the CJEU in the restrictive way required in its preliminary reference.”<sup>41</sup> Ultimately, the CJEU did not endorse the proposed position, instead confirming “... the validity of the OMT programme on the basis of a legal reasoning that focused in essence on the proclaimed monetary policy objective of the scheme and underlined the need to recognize a wide margin of appreciation to the ECB.”<sup>42</sup> After what appeared to be an institutional truce following the decision of the CJEU in *Gauweiler*, the *BVerfG* again challenged the validity of an ECB initiative, the Public Sector Purchase Programme (PSPP), before the CJEU through a

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<sup>35</sup> Horvat Vuković, A., „SVOGA TELA GOSPODAR“ – EUROPSKA SLOŽENA REPUBLIKA I KONTROLA ULTRA VIRES DJELOVANJA TIJELA EU-a”, *Zagreb Law Review*, vol. 8, no. 2, 2019, p. 87 (translation by the author from Croatian to English).

<sup>36</sup> *BVerfG*, Order of 6 July 2010, 2 BvR 2661/06 (*Honeywell*), Headnotes, para. 1 b).

<sup>37</sup> *Ibid.*, para. 1 a).

<sup>38</sup> *Ibid.*

<sup>39</sup> Judgment of the Bundesverfassungsgericht of 6 July 2010, 2 BvR 2661/06, para. 66.

<sup>40</sup> *Ibid.*

<sup>41</sup> Anagnostaras, G., "Activating Ultra Vires Review: The German Federal Constitutional Court Decides Weiss", *European Papers*, vol. 6, no. 1, 2021, p. 808.

<sup>42</sup> *Ibid.*

preliminary reference procedure a few years later. However, the repeated formula by which the CJEU confirmed the validity of the ECB's program led to a completely different turn in the judicial dialogue this time. In the *Weiss* judgment, the *BVerfG* declared, for the first time, an act of the Union to be *ultra vires*, holding that:

“This view [of the CJEU] manifestly fails to give consideration to the importance and scope of the principle of proportionality... which also applies to the division of competences, and is no longer tenable from a methodological perspective given that it completely disregards the actual effects of the PSPP ... Therefore, the Judgment of the CJEU ... manifestly exceeds the mandate conferred upon it in Art. 19(1) second sentence TEU, resulting in a structurally significant shift in the order of competences to the detriment of the Member States. To this extent, the CJEU Judgment itself constitutes an *ultra vires* act and thus has no binding effect [in Germany].”<sup>43</sup>

To the surprise of many, this intense judicial dialogue ultimately did not result in a serious constitutional crisis. What is important to emphasize in this context is that the national decision, although seemingly harsh, still contained a conciliatory and constructive tone, as it was not immediately applicable due to the *BVerfG* providing for a three-month grace period “for the necessary coordination with the ESCB.... [allowing for] a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives... are not disproportionate to the economic and fiscal policy effects resulting from the programme.”<sup>44</sup> What followed was exactly that. The European Central Bank, whose program was disputed, provided additional clarifications regarding the proportionality of the PSPP, which were accepted as satisfactory by the German government and parliament. This ultimately allowed the *BVerfG* to conclude<sup>45</sup> this dramatic constitutional dispute, meaning that a seemingly serious threat to the EU system had a peaceful epilogue.

The last tool at the disposal of national constitutional courts is identity review. This form of judicial review is focused on preserving the “identity” of the national constitutions, in the sense previously discussed in subchapter 2.2 of this paper. However, “developments in jurisprudence and legal scholarship suggest...that the *ultra vires* review and identity review are in a process of blending and remodeling *ultra vires* review in a sub-category of identity review.”<sup>46</sup> This view is supported by the already discussed early judgments of national constitutional courts. For

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<sup>43</sup> Judgment of 5 May 2020, 2 BvR 859/15 (*PSPP*), *BVerfG* 154, 17, para. 119.

<sup>44</sup> *Ibid.*, para. 235.

<sup>45</sup> See: *BVerfG*, Order of the Second Senate of 29 April 2021 - 2 BvR 1651/15.

<sup>46</sup> Maes, *op. cit.*, p. 61.

example, the ICC referred to both fundamental rights and the fundamental principles of the national constitutional order in developing its *controllimiti* doctrine. A similar approach was also visible in the *BVerfG's Solange*, *Maastricht* and *Lisbon* judgments, where the Court functionally connected them through the principle of democracy<sup>47</sup> in the light of the German interpretation. Although one might conclude that they are functionally related, the two models, at least in principle, differ conceptually and pursue different objectives. “[W]hereas ultra vires review is formally focused on whether the EU conforms to its conferred powers, identity review is aimed at the substantial protection of the core content of the national constitutional order.”<sup>48</sup> Direct references to constitutional identity were rare and began in parallel with the proposals of the Constitutional Treaty for Europe. Prior to that, “constitutional courts preferred to give expression to constitutional limits to European integration through other conceptual vessels, such as sovereignty, democracy, and fundamental rights.”<sup>49</sup>

The established jurisprudence of the CJEU on this tool likewise does not paint a clearer picture regarding what the concept of constitutional identity potentially encompasses in terms of protection under Article 4(2) TEU. One can argue that deciding on matters regarding fundamental EU freedoms and the exercise of public authority<sup>50</sup>, language<sup>51</sup>, nobility titles<sup>52</sup>, fundamental rights<sup>53</sup>, public policy<sup>54</sup> and environmental law<sup>55</sup>, the CJEU has failed to develop a systematically consistent and coherent jurisprudence regarding the identity-based claims of the Member States. Nonetheless, in making all these decisions, the Court referred to national identity not as an isolated Member State right existing in a vacuum, but rather as an element subject to a proportionality test where “to justify the aim as legitimate, a Member State can rely on a variety of self-defined interests that need not be shared by other Member States.”<sup>56</sup> What can be observed is that referring to constitutional identity was frequently effective for Member States.<sup>57</sup> Systemic analyses of cases concerning constitutional identity references performed by

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<sup>47</sup> See fn. 34.

<sup>48</sup> Maes, *op. cit.*, p. 61.

<sup>49</sup> Scholtes, *op. cit.*, p. 537.

<sup>50</sup> Case C-473/93, *Commission v. Luxembourg*, ECLI:EU:C:1996:263.

<sup>51</sup> Case C-391/09, *Runevič-Vardyn*, ECLI:EU:C:2011:291; Case C-37/87, *Groener*, ECLI:EU:C:1989:599.

<sup>52</sup> Case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806

<sup>53</sup> Case C-673/16, *Coman*, ECLI:EU:C:2018:385.

<sup>54</sup> Case C-36/02, *Omega*, ECLI:EU:C:2004:614; Case C-156/13, *Digibet*, ECLI:EU:C:2014:1756.

<sup>55</sup> Case C-151/12, *Commission v. Spain*, ECLI:EU:C:2013:690.

<sup>56</sup> Rodin, S., "National Identity and Market Freedoms after the Treaty of Lisbon", *Croatian Yearbook of European Law and Policy*, vol. 7, 2011, p. 22.

<sup>57</sup> Orbán, *op. cit.*, p. 166.

Maes<sup>58</sup> seem to indicate that certain requirements which fall outside the scope of areas that are fully harmonised at the EU level provide MS with a wider margin of discretion to derogate from EU rules. Ultimately, the success of a national claim depends on “balancing it with the requirements of integration and with EU substantive rules, in particular market freedoms and fundamental rights”<sup>59</sup>, which appear to be particularly important in this line of jurisprudence.

### 3.2 Destructive Conflicts

The prologue to destructive conflicts in the EU is a well-established narrative: the Fidesz party led by Viktor Orbán, won a two-thirds majority in the 2010 Hungarian elections and initiated comprehensive constitutional and institutional reforms. Five years later, Hungary found a partner in the systematic violation of EU values when the Law and Justice (PiS) party came to power in Poland after the 2015 elections. What is particularly worrisome in this context is that the leadership of these parties adopted similar terminology of constitutional law and skilfully used already developed legal doctrines on the limited primacy of EU law “to justify eroding transnational legality and divorcing their polity from the requirements of constitutionalism altogether.”<sup>60</sup> For years, an effective approach to this problem had been sought. Initial attempts are visible in early rulings against Hungary when the CJEU condemned<sup>61</sup> the compulsory retirement of judges in 2012, finding unlawful age discrimination under Directive 2000/78/EC, or in a later judgment<sup>62</sup> regarding the independence of the data protection authority, where it found a failure to fulfil obligations under Directive 95/46/EC. It soon became clear that an approach which merely found violations of obligations under specific directives was too narrow and would not suffice to counter the sophisticated constitutional arguments illustrated below.

It was the Hungarian Constitutional Court (HCC) that “had an important intermediary and instrumental role in the introduction of the concept of constitutional identity into the constitutional law of the autocratizing regime”<sup>63</sup> with its 2016 ruling concerning the EU Council Decision establishing measures in the field of EU migration law. In its *Decision*

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<sup>58</sup> Maes, *op. cit.* For additional input on this topic, see also: Capelli, T., "Article 4(2) TEU: The respect for national identity in the context of European integration", *Astrid Rassegna*, 2023(16), pp. 1–35.

<sup>59</sup> Maes, *op. cit.*, p. 63.

<sup>60</sup> Scholtes, *op. cit.*, p. 545.

<sup>61</sup> Case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:602.

<sup>62</sup> Case C-288/12, *Commission v. Hungary*, ECLI:EU:C:2014:237.

<sup>63</sup> Bárd, P.; Chronowski, N.; Fleck, Z., "Use, Misuse, and Abuse of Constitutional Identity in Europe", *SSRN Electronic Journal*, 22 February 2023, p. 20.

22/2016 (XII. 5.), the HCC explicitly referred to "positions taken by the Member States concerning ultra vires acts and the reservation of fundamental rights"<sup>64</sup>, thereby reiterating the position of the *BVerfG* on MS being the Masters of the Treaties<sup>65</sup> and establishing its own jurisdiction for judicial review. Referring to the vague notion of the "historical constitution", the "self-identity of Hungary"<sup>66</sup>, and using arguments from other constitutional courts as it saw fit, the Hungarian Constitutional Court established that "in principle, any violation of any norms that relate to the designated control areas (dignity and human rights, sovereignty, constitutional identity) – even those beyond the Fundamental Law (historical constitution) – may be considered when the HCC reviews the joint exercise of power within the EU."<sup>67</sup> This constitutes an obvious abuse of the developed doctrines.

Simultaneously, a new rule of law front was developing in Poland through institutional interventions that gradually undermined the independence of the judiciary and threatened the constitutional order as well as the relationship with European integration. In short,<sup>68</sup> the outgoing Polish government had the authority to appoint three of the five judges whose terms were expiring, since the terms of the remaining two judges were to expire after the election and the subsequent assumption of power by the new government (PiS). Despite this, all five judges were appointed, whom PiS replaced with five of its own candidates upon coming to power. This dramatic situation resulted in two rulings by the then-uncaptured Constitutional Tribunal, *K 34/15*, *K 35/15*, which in principle confirmed the legitimacy of the election of three judges by the previous government. This initial resistance of the Polish Constitutional Tribunal (PCT) ultimately "did not prevent the government majority from finally seizing the Court, overruling its decisions in the spirit of restorative constitutionalism, and embarking on a vigorous judicial reform"<sup>69</sup> which further led to the dismantling of judicial independence. Once resistance had been broken, the "captured and unconstitutionally composed Polish Constitutional Tribunal... made increasing use of the notion of constitutional identity, gradually shifting to an explicit and

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<sup>64</sup> Hungarian Constitutional Court, Decision 22/2016 (XII. 5.), para. 33.

<sup>65</sup> *Ibid.*, para. 32.

<sup>66</sup> *Ibid.*, para. 64: "The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law".

<sup>67</sup> Bárd, Chronowski, and Fleck, *op. cit.*, p. 21.

<sup>68</sup> For a detailed chronological analysis and overview of the situation in Poland, see: Pavković, D., "Challenges to the Rule of Law in the European Union – Constitutional Adjudication in Poland", in: Kostadinov, B. (ed.), *Comparative Constitutional Law – Second Book: Constitutional Adjudication*, University of Zagreb Faculty of Law, Zagreb, 2024, pp. 83–99.

<sup>69</sup> Bárd, Chronowski, and Fleck, *op. cit.*, p. 25.

particular interpretation of identity review”<sup>70</sup> invoking arguments such as “nation-values” and “social-engineering” or, later, a restrictive interpretation of human dignity on a matter regarding abortion.<sup>71</sup>

This line of jurisprudence was strengthened by White papers<sup>72</sup> published by the Polish government as a response to the activation of the Rule of Law Framework by the European Commission. In addition to referring to the importance of constitutional pluralism by citing established legal scholars like MacCormick, the Polish government drew parallels to the jurisprudence of the “German Constitutional Tribunal, which in its 2009 ruling on the Lisbon Treaty... stated that “the empowerment to embark on European integration ... applies as far as the limit of the inviolable constitutional identity.”<sup>73</sup> This distortion of a constructive argument was executed in a similar fashion to the aforementioned Hungarian decision and by ignoring all other arguments (in the same judgments they cited) of the German Constitutional Court, which imposes self-restraint on itself and emphasizes openness towards EU law.

In 2021, the constitutional courts of Poland and Hungary issued similar judgments regarding the primacy of EU law. The Hungarian court essentially confirmed its 2016 position “as Member States dispose over...[EU] treaties, their national acts on the effectiveness of such treaties shall determine the extent of primacy enjoyed by Union law in the given Member State”<sup>74</sup>, effectively expressing unilateral authority over the question of primacy. In its decision *K 3/21*, the PCT went even a step further. In its assessment of the conformity of selected provisions of the TEU with the Polish Constitution, the Constitutional Tribunal declared that the interpretations by the CJEU on Articles 1, 2 and 19 TEU, which enable it to supervise the organization of the Polish judiciary and authorise national courts to “bypass the provisions of the Constitution in the course of adjudication”<sup>75</sup> are incompatible with the Polish Constitution as “the Republic of Poland may not function as a sovereign and democratic state.”<sup>76</sup> This escalated the situation and deepened the existing crisis.

European responses to these developments were initially technical in nature and focused on market freedoms, as is evident from cases such as *Transparency of associations*<sup>77</sup>, *Lex CEU*<sup>78</sup>,

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<sup>70</sup> Maes, *op. cit.*, p. 31.

<sup>71</sup> *Ibid.*, p. 32.

<sup>72</sup> See in particular: Head VII: Rule of law as the foundation of common European values.

<sup>73</sup> Republic of Poland, *White Paper on the Reform of the Polish Judiciary*, Warsaw, 2018, para. 171.

<sup>74</sup> Hungarian Constitutional Court, Decision 32/2021 (XII. 20.), para. 69.

<sup>75</sup> Polish Constitutional Court, Warsaw, 7 October 2021, K 3/21, para. 2 a).

<sup>76</sup> *Ibid.*, para. 1 c).

<sup>77</sup> Case C-78/18, *European Commission v. Hungary*, ECLI:EU:C:2020:476.

<sup>78</sup> Case C-66/18, *European Commission v. Hungary*, ECLI:EU:C:2020:792.

Asylum system<sup>79</sup> against Hungary and Independence of the Supreme Court<sup>80</sup> against Poland. A shift became visible in the Polish case regarding the Independence of the Disciplinary Chamber<sup>81</sup> with the establishment of interim measures, where the previously mentioned decision of the Polish Constitutional Tribunal *K 3/21* was precisely a response to the interpretation of relevant provisions by the CJEU in that judgment. Some have regarded this approach as losing by winning<sup>82</sup> since nothing has changed in the diverging MS. Nevertheless, the diligent CJEU made a breakthrough with a ruling that did not concern either Poland or Hungary directly. In the Portuguese case *ASJP* (C-64/16), the Court laid the foundations that turned its jurisprudence in the direction of Article 2 TEU and EU identity, which is precisely what awakened the idea of an EU constitutional identity in a wider debate regarding conflicts in a multi-level EU constitutional space.

### *3.3 The End of Constitutional Pluralism?*

The aforementioned occurrences – the German Federal Constitutional Court declaring a CJEU decision *ultra vires*, alongside the broader democratic backsliding, rule of law crisis and fundamental rights violations in Hungary and Poland have led some scholars to conclude that the time for constitutional pluralism is over. As the argument goes, it “may have served as a useful developmental stage for the EU legal order, but it is time for the EU to mature beyond it”<sup>83</sup> and establish the full-blown supremacy of EU law. This subchapter examines the most prominent criticisms regarding constitutional pluralism in this framework, whilst the remainder of this thesis provides a broader response to these challenges.

In their critical review of the events of the last decade, Pech and Kelemen argue that constitutional pluralism possesses inherent flaws, although it arose from good intentions. Based on the Hungarian and Polish experience, they proclaim that the “days when one could assume all national judiciaries would engage in sincere cooperation and mutual accommodation have ended...[emphasizing]...the dangers that were always inherent in the concept of constitutional

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<sup>79</sup> Case C-808/18, *European Commission v. Hungary*, ECLI:EU:C:2020:1029.

<sup>80</sup> Case C-619/18, *European Commission v. Poland*, ECLI:EU:C:2019:531.

<sup>81</sup> Case C-791/19, *European Commission v. Poland*, ECLI:EU:C:2021:596.

<sup>82</sup> Scheppele, K. L.; Kochenov, D. V.; Grabowska-Moroz, B., "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, vol. 39, 2020, p. 3.

<sup>83</sup> Kelemen, R. D., "On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone", *Maastricht Journal of European and Comparative Law*, vol. 23, 2016, p. 139.

pluralism and the connected concept of constitutional identity.”<sup>84</sup> Furthermore, Fabbrini's criticism is directed at the equality-based arguments. He explains that a situation in which an individual MS could unilaterally determine the conditions of its own participation in the EU would create an asymmetry whereby obligations are valid for some MS, but not for others. Consequently, he concludes that “only the supremacy of EU law can ensure the equality of member states before the law.”<sup>85</sup> The traditional understanding of supremacy, established in EU law based on the seminal case of *Costa v. ENEL*, seems to be the only viable solution for Kelemen and Pech as well.

Their logic focuses on a material implication that “if the...courts of committed democracies such as the *BVerfG* can use constitutional identity claims to justify defiance of EU law, then so can the captured constitutional courts in Hungary and Poland.”<sup>86</sup> This assumption is, in my view, misplaced. Their argument boils down to the formal fallacy that if A is true, B is automatically true as well. However, drawing upon the conflict theory advanced by Bobić, Kelemen and Pech overlook the key qualitative difference between cases A and B (here German vs Polish and Hungarian jurisprudence). When we possess analytical tools to differentiate between these judicial claims, we cannot conclude that A is a sufficient condition for B to be true. In fact, Kelemen and Pech themselves differentiate such national claims in their work, noting that a pluralistic framework is “sustainable only so long as... national constitutional courts...exercised self-restraint and operated in a spirit of sincere cooperation.”<sup>87</sup>

Drawing further parallels between these jurisdictions, they state that “unlike the *BVerfG*, the Hungarian Constitutional Court did not rubberstamp ‘the government’s constitutional identity defense’ to justify a stricter defence of human rights...but the nativist, xenophobic migration policy of the Orbán regime.”<sup>88</sup> This confirms the reasoning that constructive demands are sustainable – and indeed desirable – as this is precisely where the greatest value of constitutional pluralism lies. The possibility of sincere cooperation and communication between the courts must remain, since it can also result in the establishment or adoption of stricter principles of protection within the EU framework. On the contrary, the main function of destructive demands is the denial of obligations under EU law to justify and consolidate illiberal measures in the

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<sup>84</sup> Kelemen and Pech, *op. cit.*, p. 3.

<sup>85</sup> Fabbrini, F., "After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States", *German Law Journal*, vol. 16, 2015, p. 1005.

<sup>86</sup> Kelemen and Pech, *op. cit.*, p. 9.

<sup>87</sup> *Ibid.*, pp. 6–7.

<sup>88</sup> *Ibid.*, p. 14.

respective Member States, which is inherently incompatible with the EU framework and constitutes a destructive conflict.

Although driven by valid concerns, the impression based on the works of these legal scholars is that every national claim in the EU system poses an unsustainable threat. A rejection of such generalisation is widely accepted in the literature. Although not explicitly using the terminology of constructive/destructive conflicts, many legal scholars have differentiated between legitimate and illegitimate claims, observing that the "decisions of the GCC remains in the territory of the so-called juristocratic turn in a constitutional democracy, while the actions of PCT and HCC need to be viewed and assessed in a different, illiberal, constitutional setting."<sup>89</sup> By generalising conflicts and putting them all in the same category, critics of constitutional pluralism ignore an important element of the *sui generis* system, mainly the constructive function of these conflicts. Such an observation of the emerging tensions can contribute to a better understanding of multi-level constitutionalism. For example, it can be argued that the *Solange* doctrine contributed to the development of a catalogue of human rights at the EU level, or that the ultra vires ruling of the German court serves as a reminder to the CJEU that it must uphold its own standards of the proportionality test, etc. Apart from the autocorrect<sup>90</sup> function of constitutional pluralism, my argument is that Article 2 TEU, which contains the very essence of EU constitutional identity, can help us demarcate these conflicts and thus maintain constitutional pluralism.

Critics propose to simply abandon the notion of constitutional identity and constitutional pluralism as such. However, this proposal is not only difficult to enforce, as it would (among other reasons) require a change to the Treaties, I argue that it is also an undesirable result of these events. It seems that a large bloc of legal scholars is equally against abandoning this line of jurisprudence as well. What are we to do then? In my opinion, we should reframe the discourse and perceive these events through the lens of EU identity. As a novel and still under-explored component in the relations between different levels of power within the European framework, the EU identity can help us better understand how far the national level can go with its demands before that supranational identity is lost.

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<sup>89</sup> Drinóczi, T.; Faraguna, P., "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in: de Poorter, J.; van der Schyff, G.; Stremmer, M.; De Visser, M.; Leijten, I.; van Oirsouw, C (eds.), *European Yearbook of Constitutional Law 2022*, T.M.C. Asser Press, The Hague, 2023, p. 15.

<sup>90</sup> See: Bobić, A., Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice, *German Law Journal*, vol. 18, no. 6, 2017, pp. 1395–1428.

## 4. EU CONSTITUTIONAL IDENTITY

Although the constitutional character of the EU Treaties is widely accepted, the existence of an EU constitutional identity has only recently come into focus within both judicial practice and legal scholarship. The remainder of this paper seeks to provide a contribution to this emerging field of interest. Observations by van der Schyff – who conceptualises constitutional identity as a product of both the content and the fundamental "animation" of that content<sup>91</sup> – provide the conceptual starting point for this analysis. This framework directly forestalls anticipated criticisms alleging that an EU identity is being constructed exclusively as a response to rule of law developments in Hungary and Poland. Although such developments could be interpreted as the “underlying reason for the scholarly attempts to create a European constitutional identity”<sup>92</sup>, through the prism of van der Schyff’s theoretical approach, this does not diminish the value of such an identity; rather, it constitutes the core component of constitutional identities universally. It is evident that the EU, having been “animated” in a fundamental way by the actions of backsliding Member States, cannot interpret its constitutional core as merely aspirational. Instead, confronted with existential challenges, an interpretative shift is required towards an autonomous constitutional identity of the EU, capable of operating as a counterbalance<sup>93</sup> to Member States’ invocations of national identity.

Another valuable response to this line of criticism is that this development, although driven by pressures, indeed represents a logical step in the integration process. In this context, von Bogdandy and Bast present important findings. Examining the CJEU’s “new constitutionalism”, they trace the roots of this development, which intensified in the 1990s, understandably around the time of discussions regarding a constitution for Europe. Although they illustrate that the “telos of ever closer union has been with European integration since 1957”<sup>94</sup>, the adoption of this principle in the operative part<sup>95</sup> of the Treaties only came about with the Treaty of Lisbon. Article 1 TEU thus serves not merely as a political proclamation or an aspiration – as was the

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<sup>91</sup> See: fns. 14-16.

<sup>92</sup> Wischhoff, J. A., "A Plaidoyer Against the Sisyphean Endeavour, to Imagine the Constitutional Identity of the EU", in: de Poorter, J.; van der Schyff, G.; Stremmer, M.; De Visser, M.; Leijten, I.; van Oirsouw, C (eds.), *European Yearbook of Constitutional Law 2022*, vol. 4, T.M.C. Asser Press, The Hague, 2023, p. 345.

<sup>93</sup> For a similar understanding, see: Drinóczi, T.; Faraguna, P., *The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States*.

<sup>94</sup> Bast, J.; von Bogdandy, A., *The Constitutional Core of the Union: On the CJEU’s New Constitutionalism*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2024-06, 27 February 2024, p. 10.

<sup>95</sup> *Ibid.*

case in earlier Treaties, where the principle was confined to the preamble – but as a “binding norm towards *creating an ever closer union among the peoples of Europe*.”<sup>96</sup> That choice was crucial in opening the space for a new stage of EU constitutionalism. Additionally, Bast and von Bogdandy point out an often-neglected fact brought about by the Treaty of Lisbon: the formal unification of EU treaties, whereas prior to Lisbon, the EU had been governed by multiple separate treaties.<sup>97</sup> This “legal merger resets the relationships within the Treaties, in formal as well as in substantive terms”<sup>98</sup>, which is crucial for understanding the potential of an EU identity in the wider debate. While this formal unification is quite self-evident, substantive differentiation shifts the balance towards the existence of an EU identity based on Article 2 TEU.<sup>99</sup>

Building on these important considerations, and in order to fully grasp the complexity of a relatively new and doctrinally contested construct such as the EU constitutional identity, the work of Spieker, Drinóczi and Faraguna is highly instructive. By combining the position of von Bogdandy and Bast with Spieker’s approach and that of Drinóczi and Faraguna, this paper seeks to establish a framework that enables the concept to be analysed in a more nuanced manner. Drinóczi and Faraguna introduce a useful perspective through which the concept of the EU identity can be viewed through two dimensions<sup>100</sup>, internal and external, whilst the multidimensional approach to EU law advanced by Spieker, von Bogdandy and Bast deepens and complements that understanding further. This combined approach offers two distinct advantages for the purposes of this paper. First, combining and further elaborating on these positions provides an adequate framework for monitoring the development and articulation of the EU identity, which the subsequent chapters will demonstrate through the analysis of key judgments and turning points in the jurisprudence of the CJEU. Second, analysing the dimensions of EU identity in this manner successfully illustrates the core of the problem in this debate, identifying precisely where the conflict regarding its articulation lies.

In that respect, it is crucial to emphasize that constitutional identity also performs a relational – or perhaps more precisely, a distinctive role, differentiating “us” from “them”. In this sense, it

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<sup>96</sup> *Ibid.*

<sup>97</sup> After 2002, two Treaties, as ECSC Treaty expired.

<sup>98</sup> Bast and von Bogdandy, *op. cit.*, p. 3.

<sup>99</sup> It should be noted they reconceptualize the term constitutional identity in favour of constitutional core as they explain the former creates unnecessary assumptions and tension. However, these terms still remain conceptually and functionally intertwined.

<sup>100</sup> Although I agree that this division is useful in this context, I must reject their premise that Article 7 TEU procedure and EU conditionality mechanism belong to this external dimension. I believe that it is more appropriate to talk about these procedures as the internal dimension of EU identity.

is understood that the “same identity of the subjects connects them...also divides them in relation to everybody else who does not share the same identity. In other words, identity serves as both comparison and differentiation.”<sup>101</sup> This manifests itself primarily in the external function of identity as it is implicitly understood by Drinóczi and Faraguna. However, within the *sui generis* system of the EU, I believe that this differentiating role is also maintained within the internal dimension, owing to the fact that “the identity of the EU is grounded in the constitutional traditions common to the Member States.”<sup>102</sup> In order to deepen our understanding of the EU constitutional identity, and especially the criticisms associated with it, it is necessary to introduce a distinction within the internal identity of the EU that reflects these multidimensional approaches. This conceptual framework requires further elaboration.

The reflection that is useful here is based on the related approaches addressed by Spieker, von Bogdandy and Bast, whereby the EU can be conceived in both wider and narrower terms. As for the latter, von Bogdandy and Bast refer to “the official designation of the organization established in Article 1(1) TEU, which has legal personality (Arts. 1(3) and 47 TEU): the European Union”<sup>103</sup>, whereas Spieker argues that it encompasses the “Member States when acting within the scope of EU law”<sup>104</sup>. In the former sense, it is addressed through the German concept of *Verbund*. This wider concept of *the union* encompasses the “totality of Member States and EU institutions”<sup>105</sup> and is regarded as the “*common whole* of EU and Member States”<sup>106</sup>. Bast and von Bogdandy emphasize that this difference is maintained in some of the languages, for example “...in German, the difference being the definite v. the indefinite article, i.e. die v. eine Union... Dutch version uses “Unie” for the organization’s name, but “verbond” in Article 1(2) TEU... the French, Italian, Spanish, etc. versions spell “union” with a small “u” in the preamble as in Article 1(2) TEU”.<sup>107</sup> Spieker reflects this difference through a “...micro perspective focusing on the EU legal order and a macro perspective that requires us to take a step back and perceive the EU and the Member States in their entirety”<sup>108</sup>. These approaches are fundamental to sustaining the logic of this division of spheres within the EU identity.

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<sup>101</sup> Wischhoff, *op. cit.*, p. 344.

<sup>102</sup> Lenaerts, K.; Gutiérrez-Fons, J. A., "Epilogue. High Hopes: Autonomy and the Identity of the EU", *European Papers*, vol. 8, no. 3, 2023, p. 1506.

<sup>103</sup> Bast and von Bogdandy, *op. cit.*, p. 11.

<sup>104</sup> Spieker, L. D., *EU Values before the Court of Justice: Foundations, Potential, Risks*, Oxford University Press, Oxford, 2023, p. 71.

<sup>105</sup> Bast and von Bogdandy, *op. cit.*, p. 11.

<sup>106</sup> Spieker, *op. cit.*, p. 69.

<sup>107</sup> Bast and von Bogdandy, *op. cit.*, p. 11.

<sup>108</sup> Spieker, *op. cit.*, p. 71.

When we connect these threads of thought into a single whole, the structural framework emerges as follows: there are distinct internal and external dimensions of constitutional identity. The EU identity is based on constitutional traditions common to the Member States, which create the building blocks of this *sui generis* supranational identity. Building on the multidimensional approach to the EU advanced by Spieker, von Bogdandy and Bast, the internal dimension in this paper also includes the *Verbund* dimension, or the broader meaning of the European Union. Since the EU identity is based on the common constitutional traditions of the Member States and the expression of such identity in the external dimension includes and is at least in part based on the *Verbund* dimension, it seems inappropriate to talk about the external dimension of the EU identity in relations with Member States as Drinóczi and Faraguna suggest. This is because the Member States inherently co-shape the broader internal dimension of the EU identity.

In my understanding, this distinction is necessary and essential for a better conceptualization of this relationship. Namely, the external dimension of the EU identity is not contested in this context and generates less tension in practice. However, the internal dimension of the EU identity, principally in its broader terms (the common whole of the EU and its Member States), lies at the core of the conflict because its articulation creates tension at the constitutional level within the EU, and it is precisely around the articulation of the EU identity in the wider internal dimension that problems arise in practice. Therefore, in this paper, the external dimension is viewed as the EU identity in relation to other external legal orders, while the internal identity is examined within the EU legal system in a broader and narrower sense based on the positions presented above. While the narrower sense refers to a strictly EU legal system that includes EU institutions and Member States only when they are within the scope of EU law, the broader sense implies the totality or the “common whole” of Member States and EU institutions and is often addressed through the German concept of *Verbund*.

#### *4.1 The External Dimension of EU Identity*

As previously analysed, identity serves as a relational tool requiring both comparison and differentiation, which is developed through an awareness of what *one* is not. In this sense, the external dimension of constitutional identity is articulated as a boundary *vis-à-vis* other legal orders. In this external sense, the *Kadi* judgment, *Opinion 2/13* and *Opinion 1/17* are prime

examples as they clearly articulated the constitutional core of the EU against elements of other legal orders which were deemed incompatible, in a constitutional sense, with the EU. The initial contours of the external dimension of EU identity in the CJEU's case law became visible in the 2008 *Kadi* judgment.

Deciding on matters concerning UN Security Council sanctions against persons associated with a terrorist organization, the CJEU made an exceptional constitutional proclamation. In its reasoning, the CJEU pointed out the “principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1)<sup>109</sup> EU as a foundation of the Union.”<sup>110</sup> By clearly identifying the principles that guide the Community, the CJEU strengthened the autonomy<sup>111</sup> of the EU constitutional order in the sense that it would not, in any event, “permit any challenge to the principles that form part of the very foundations of the Community legal order...including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.”<sup>112</sup>

The next major step in this context was *Opinion 2/13*, which “confirmed the telos of European integration and marked the difference to mere international arrangements”<sup>113</sup> concerning the accession of the EU to the European Court of Human Rights (ECHR). In its reasoning on why such “accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law”<sup>114</sup>, the CJEU established that the “essential characteristics of EU law have given rise to a structured network of principles...linking the EU and its Member States, and its Member States with each other, which are now engaged...in a ‘process of creating an ever closer union among the peoples of Europe’”<sup>115</sup>. Consequently, the Court established these principles as the inviolable foundation of such a *sui generis* community and further reinforced the telos of European integration. Building on the *Kadi* judgment, the CJEU elaborated more deeply on the “identity” of the *sui generis* EU legal order through the “fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU.”<sup>116</sup>

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<sup>109</sup> Now Article 2 TEU.

<sup>110</sup> Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461, para. 303.

<sup>111</sup> See also para 290.

<sup>112</sup> Case C-402/05 P, *Kadi and Al Barakaat International Foundation*, para. 304.

<sup>113</sup> Bast and von Bogdandy, *op. cit.*, p. 1.

<sup>114</sup> Court of Justice, *Opinion 2/13 (Accession of the Union to the ECHR)*, ECLI:EU:C:2014:2454, para. 194.

<sup>115</sup> *Ibid.*, para. 167.

<sup>116</sup> *Ibid.*, para. 168.

This approach was further elaborated in *Opinion 1/17*, which concerned the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA), where the CJEU yet again highlighted that the:

“Union possesses a constitutional framework that is unique to it. That framework encompasses the founding values set out in Article 2 TEU... the general principles of EU law, the provisions of the Charter, and the provisions of the... Treaties, which include...rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas, structured in such a way as to contribute to the implementation of the process of integration described in...Article 1 TEU.”<sup>117</sup>

All the aforementioned judicial pronouncements clearly articulate the external dimension of EU identity – positioning the EU against those legal systems (or their effects) that would significantly affect its constitutional balance. As previously indicated, the internal aspect of such a supranational identity is politically and legally more sensitive in the context of constitutional law. In this sense, this paper diverges from the understanding of Drinóczi and Faraguna, and observes the internal aspect based on a multidimensional approach to the EU. In an internal sense, the strictly EU dimension is not problematic, whereas the most dramatic consequences occur in the *Verbund* sphere.

#### *4.2 The Internal Dimension of EU Identity*

Within a narrower internal dimension, limited strictly to the EU legal order, two landmark judgments stand out. Both are closely related to the reinforcement and consolidation of the role of the European Parliament (EP) in the early constitutional architecture of the Union, a context in which the CJEU gave explicit<sup>118</sup> value to the principle of democracy.

In this regard, the first pivotal development is Case C-138/79 (*Isoglucose*), regarding the role of the EP in legislative procedures. This case concerned a Regulation adopted by the Council without prior consultation<sup>119</sup> with the European Parliament. The CJEU condemned this

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<sup>117</sup> Court of Justice, Opinion 1/17 (Comprehensive Economic and Trade Agreement between Canada and the EU - CETA), ECLI:EU:C:2019:341, para. 110.

<sup>118</sup> Notably, both judgments were made around the first direct elections to the EU parliament in 1979.

<sup>119</sup> A brief reminder that until the entry into force of the Single European Act in 1987, the European Parliament had an almost exclusively advisory role in the legislative process. and it was only after the adoption of the Maastricht

procedural violation, ruling that because the Treaty “allows the Parliament to play an actual part in the legislative process of the Community, such power represents an essential factor in the institutional balance intended by the Treaty...it reflects at Community level the fundamental democratic principle.”<sup>120</sup> Consequently, the safeguarding of this principle was deemed a ground for the annulment of the contested Regulation. Operating under a similar logic, Case C-294/83 (*Les Verts*) remains foundational. By establishing that the European Union is “a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter”<sup>121</sup>, the CJEU laid the structural foundations for what may retroactively be understood as the "strict" internal dimension of the Union's constitutional identity.

The latest development in this domain is reflected in the pending case C-225/24 *Parliament v Commission*, where the EP contends that the Commission “misused its power to decide on the fulfilment of the horizontal enabling condition under the Common Provisions Regulation as a trade-off for Hungary lifting its veto over certain urgent decisions that required unanimity in the European Council.”<sup>122</sup> The Parliament argues that the Commission acted prematurely, providing “no substantive explanations that would allow the reader to understand the reasons underlying the positive assessment of the fulfilment of the horizontal enabling condition.”<sup>123</sup> By raising these constitutional concerns, the Parliament explicitly calls upon the Commission to assume responsibility for preserving democratic principles and rule of law standards. These standards, the EP insists, must not be compromised or subordinated to political compromises, thereby demonstrating institutional will to act as a guardian of those tenets within the EU.

If, as established above, EU identity is constructed upon the common constitutional traditions of the Member States, it might appear counterintuitive to articulate that identity *vis-à-vis* those very same Member States. This assumption held true only as long as the "particular" identities of the Member States were aligned with the "general" identity of the Union. A conceptual clarification is instructive here. Faraguna and Drinóczi formulate a normative conception of constitutional identity, grounded in the classic formulation of the 1789 French Declaration of

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Treaty that the co-decision procedure was introduced, making the EP an equal legislator with the Council albeit in certain areas, and with the entry into force of the Lisbon Treaty this became the rule in most areas.

<sup>120</sup> Case 138/79, *Roquette Frères v. Council (Isoglucose)*, ECLI:EU:C:1980:249, para. 33.

<sup>121</sup> Case 294/83, *Les Verts v. European Parliament*, ECLI:EU:C:1986:166, para. 23.

<sup>122</sup> Action brought on 25 March 2024 – *Parliament v. Commission* (Case C-225/24), Third plea in law, alleging misuse of powers.

<sup>123</sup> Action brought on 25 March 2024 – *Parliament v. Commission* (Case C-225/24), Second plea in law, alleging infringement of the duty to state reasons.

the Rights of Man and of the Citizen, which states that "any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution."<sup>124</sup> Accordingly, the general dimension of constitutional identity encompasses universal tenets, such as the separation of powers, democracy, the protection of human rights, and the rule of law, etc., while the particular dimension consists of the specific institutional arrangements implementing these universal principles, such as the organization of the judiciary, the form of state, or the organization of local self-government structures. Based on this normative framework, "the *particular* aspect of constitutional identity could not contradict its *general* aspect."<sup>125</sup>

Two observations are noteworthy here. First, each Member State possesses a general dimension of constitutional identity whose substantive content consists of universal principles that have been accepted and transferred to the supranational level, and it is precisely these principles that have been accepted as part of the EU constitutional identity. Second, it is fundamentally contradictory for a Member State to claim that the dismantling of judicial independence or systemic violations of human rights form part of its protected national constitutional identity, because this would effectively negate the very concept of constitutionalism, as it cannot be reconciled with the normative conception of a constitution under any Member State's legal tradition.

A potential counterargument might challenge this normative conception. However, such criticisms are unfounded because, in the absence of a substantive, qualitative criterion, any authoritarian or illiberal state could draft a document under the formal label of a constitution and claim the status of a constitutional state. This simply cannot be the case. The fact that the Member States voluntarily accepted these universal principles and explicitly set them as a mandatory precondition<sup>126</sup> for membership in a constitutional community such as the European Union confirms that this normative conception is of pivotal value for both the MS and the EU. Additionally, the enforcement mechanism envisioned by Article 7 TEU to safeguard against a "clear risk of a serious breach by a Member State of the values referred to in Article 2"<sup>127</sup> further reinforces this position.

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<sup>124</sup> Faraguna, P.; Drinóczi, T., "Constitutional Identity in and on EU Terms", *Verfassungsblog*, 21 February 2022, available at: <https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/> (accessed: 17 February 2026). Citing Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789.

<sup>125</sup> *Ibid.*

<sup>126</sup> Article 49 Treaty on European Union (consolidated version), OJ C 202/13, 7 June 2016.

<sup>127</sup> Article 7(1) Treaty on European Union (consolidated version), OJ C 202/13, 7 June 2016.

Consequently, it is evident that Article 2 TEU constitutes the very essence of membership in the European constitutional community, forming the core of EU identity. After the consolidation of that supranational identity in its external and strictly internal dimensions, a parallel development also followed in the contested *Verbund* (wider internal) dimension, primarily as a defensive response to the deepening rule of law crises in Hungary and Poland. As previously stated, the initial responses of the CJEU to these autocratic regressions focused on technical violations through finding failure to fulfil obligations under directives. However, it quickly became apparent that such formalistic approaches were not sufficient to counter existential threats emanating from within the Member States themselves.

This environment gave impetus to the mobilization of an autonomous EU constitutional identity against the Member States that counter it. As anticipated, the CJEU made a breakthrough in this regard with the now famous *ASJP* judgment where it reiterated that “mutual trust between the Member States ... is based on the fundamental premiss that Member States share a set of common values ... as stated in Article 2 TEU”<sup>128</sup> and, for the first time, connected it with “Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU.”<sup>129</sup> Based on this, the *ASJP* ruling represents a revolutionary paradigm shift in CJEU jurisprudence for several reasons. By linking “Article 2 TEU to more specific Treaty provisions that operationalize these values and render them subject to judicial application”<sup>130</sup>, the CJEU started to “assess the Member States’ very constitutional structures for their compliance with Article 2 TEU.”<sup>131</sup> Additionally, the CJEU effectively extended the *ratione materiae* of Article 2 TEU to domestic arenas that *prima facie* do not fall within the scope of EU law, by reasoning<sup>132</sup> that the courts in question could potentially adjudicate on issues involving the interpretation or application of EU law in the respective Member States. Thus, “for Article 19(1)(2) TEU to be triggered, it is not necessary that the respective court actually adjudicates a matter of EU law in the specific case”<sup>133</sup>, but the very fact that every national court is also an EU court by virtue of the possibility that it could decide on issues of EU law is a sufficiently justified reason for triggering the scope of said provisions.

This approach was subsequently consolidated in this new line of jurisprudence, countering illiberal tendencies in Hungary and Poland and placing Article 2 TEU values at the heart of

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<sup>128</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, para. 30.

<sup>129</sup> *Ibid.*, para. 32.

<sup>130</sup> Spieker, *op. cit.*, p. 19.

<sup>131</sup> *Ibid.*, p. 20.

<sup>132</sup> See para. 29 and especially para. 40, Case C-64/16, *Associação Sindical dos Juizes Portugueses*.

<sup>133</sup> Spieker, *op. cit.*, p. 22.

constitutional debates. An early consolidation came in the twin Conditionality judgments where the CJEU confirmed that “the values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values.”<sup>134</sup> Clearly, Article 2 TEU was identified as the core expression of the supranational identity of the EU, although it remained unclear for a long time to what extent the CJEU could justify its action on this basis. A significant precedent has now been established with the recent landmark case against Hungary with a rather indicative name – *EU values*, where the Court considered, for the first time, whether Article 2 TEU constitutes separate grounds for an infringement procedure. Considering the proceeding brought against Hungary over the anti-LGBTQ+ legislation, which, among other things, prohibited or restricted the display of content concerning homosexuality and gender identity to minors, the CJEU declared that “manifest and particularly serious breaches of one or more values common to the Member States may give rise to a finding... a failure by a Member State to fulfil legally binding obligations under Article 2 TEU...”<sup>135</sup>, demonstrating a clear institutional readiness to defend the liberal-democratic nature of the Union by directly mobilizing its constitutional core through Article 2 TEU.

To summarize, an analysis of the relevant jurisprudence reveals that the articulation of EU identity was first activated in a strictly internal EU dimension. At later stages, the EU began to articulate its identity *vis-à-vis* other legal orders in the external dimension. Finally, the EU has matured enough as a legal order and, confronted with systemic internal challenges, has mobilized its identity within the *Verbund* dimension as well. Based on these judicial developments, it is clear that Article 2 TEU forms the normative core of EU identity, a space wherein “all Member States declare who they are and what they stand for; they articulate the deep logic of their institutional practice and the moral convictions of their citizens”<sup>136</sup> based on the normative conception of a constitution, as classically understood by Article 16 of the 1789 French Declaration of the Rights of Man and of the Citizen. These values have been identified and transferred from the level of the Member States to the supranational EU level and represent the minimum constitutional consensus or the lowest common denominator that allows for membership in the Union. For the EU, Article 2 TEU represents the central idea of EU

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<sup>134</sup> Case C-156/21, *Hungary v. European Parliament and Council*, ECLI:EU:C:2022:97, para. 127.

<sup>135</sup> Case C-769/22, *European Commission v. Hungary*, ECLI:EU:C:2026:326, para. 551.

<sup>136</sup> von Bogdandy, A., "Towards a Tyranny of Values? Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in Member States", *Common Market Law Review*, vol. 57, 2020, p. 79.

constitutionalism, as the values contained in it define the normative core of the constitutional identity of the European Union.

## **5. ARTICLE 2 TEU AS THE CONSTITUTIONAL CORE**

Having identified the fundamental content of EU identity, which undoubtedly finds its clearest expression in Article 2 TEU, it is time to take a step back and dissect this provision analytically in order to better understand its contested doctrinal nature. Article 2 TEU states:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”<sup>137</sup>

This provision clearly illustrates the aforementioned findings that the European Union represents a constitutional community based on pluralism and the rule of law, while affirming the acceptance of the principles that derived from the common constitutional traditions of the MS, which at the same time shape and determine the very identity of the European Union. The fact is that this provision expresses values rather than precise rules which consequently raises the question of its applicability in judicial practice. All the more so since this debate is conducted in a politically and legally sensitive context at the supranational level and represents a novel challenge in the jurisprudence of the CJEU. Despite the fact that the recent judgment in Case C-769/22 *Commission v Hungary (EU values)* confirmed the possibility of mobilising Article 2 TEU and affirmed its free-standing nature, this legal development simultaneously raises complex issues that require further examination.

### *5.1 Between Values and Norms: Normative Nature and Justiciability*

According to the understandings of the legal doctrine, the operability of norms in legal orders has two main aspects. The first refers to “the ability to produce legal effects, such as: qualifying

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<sup>137</sup> Article 2 Treaty on European Union (consolidated version), OJ C 202/13, 7 June 2016.

a factual situation, acquiring or losing a right, imposing a sanction”<sup>138</sup>, that is, it refers to their normative nature by posing the question of whether a provision is even considered a legal norm in the sense that it imposes an obligation and performs a prescriptive function. The second aspect refers to the judicial applicability of norms, raising a question of whether a court can decide based directly on that norm or its violation. These two dimensions of operability are in a state of logical co-dependence, the normative nature must be established first, and only when it is confirmed can it be examined whether that norm is sufficient for a court to adjudicate a case. In view of the wording of Article 2 TEU presented above, the question arises whether values can even be perceived as norms?

Legal literature generally distinguishes between two types of legal norms: rules and principles, and it is often unclear where values fall within this division. This is precisely one of the arguments deployed to contest the applicability of Article 2 TEU by the CJEU and therefore it requires special attention. As indicated, since justiciability depends on the normative nature of a provision, the analysis begins by examining whether it can be established that Article 2 TEU possesses a normative nature, more precisely, whether the provision is binding and has the capacity to produce legal effects. Before undertaking this detailed analysis, it is worth emphasizing the relative scarcity of literature on this topic. While many scholars have written about the specific requirements stated in Article 2 TEU, and some have raised questions about its normative nature, very few examined its judicial applicability through the lens of legal theory. In this context, Spieker's contribution on the doctrinal foundations of the judicial application of Article 2 TEU is extremely important.

## *5.2 The Normative Nature of Article 2 TEU*

While principles and especially rules are acknowledged to possess a normative nature, the same cannot be automatically said for values. Indeed, this is one of the main arguments of “captured” constitutional courts,<sup>139</sup> namely, the negation and refusal to recognise these values as legal

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<sup>138</sup> Guastini, *op. cit.*, p. 237.

<sup>139</sup> See in particularly press release after the hearing of K 3/21 judgment of Polish Constitutional Court, especially para 19. which states that “the values mentioned in Article 2 of the TEU are merely of axiological significance, and they are not legal principles”.

principles. For that reason, this serves as a valuable starting point for considering the operability of Article 2 TEU.

As previously noted, the generally accepted position is that legal orders contain two types of norms – rules and principles. While a rule is a “conditional statement that attaches a legal consequence to a specified set of facts”<sup>140</sup> which can either be complied with or not in an *all-or-nothing* manner<sup>141</sup>, principles are more complex and are usually understood through their two main characteristics – their fundamental character and a particular form of indeterminacy.<sup>142</sup> Writing about the fundamental character of norms, Guastini concludes that “every set of norms...presupposes and embodies certain values, characteristic political choices, and conceptions of justice... [where] principles are understood to be those norms that incorporate such values, conceptions of justice, and political determinations”<sup>143</sup> further classifying them according to whether they are (un)expressed, constitutional as opposed to statutory principles and those that cover the entire legal order as opposed to those referring only to a specific area (for example, civil or criminal law).<sup>144</sup> Finally, the fundamental character of principles is manifested in the fact that they provide a basis or value justification for other norms, while they themselves “do not require any value basis, any ethical-political justification, because in the existing legal culture they are perceived as obviously *just* or *correct* norms”<sup>145</sup> – at least within the most part of that culture. The second characteristic of principles is manifested in a special form of indeterminacy through open-ended factual situations, defeasibility and generality,<sup>146</sup> where they are opposed to rules which are more precise and detailed norms where “the facts in the presence of which the legal consequence provided for by that norm arises are exhaustively enumerated.”<sup>147</sup> This is precisely the reason the principles are often referred to as optimization requirements.<sup>148</sup> After this short theoretical overview, the question of whether we can consider Article 2 TEU as a legal norm becomes clearer.

Additional arguments in support of the normative nature of Article 2 TEU are evident in the work of Spieker. Drawing from the theory of Alexy, Spieker further illustrates the blurry lines

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<sup>140</sup> Guastini, *op. cit.*, p. 77.

<sup>141</sup> *Ibid.*, p. 194.

<sup>142</sup> *Ibid.*, p. 77.

<sup>143</sup> *Ibid.*, p. 78.

<sup>144</sup> *Ibid.*, pp. 81–84.

<sup>145</sup> *Ibid.*, p. 78.

<sup>146</sup> *Ibid.*, p. 79.

<sup>147</sup> *Ibid.*, p. 80.

<sup>148</sup> See: Alexy, R., *A Theory of Constitutional Rights*, trans. by J. Rivers, Oxford University Press, Oxford, 2010, Chapter 3: “The Structure of Constitutional Rights Norms”.

present in both legal theory and the jurisprudence of constitutional courts in the EU. In this view, as opposed to a strict dichotomy, the relationship between rules, principles and values is constructed in a gradual fashion such that “it seems impossible, arbitrary at the very least, to draw a firm line of legal normativity at a specific point on this scale.”<sup>149</sup> Furthermore, in his comparative analysis based on the established jurisprudence of the constitutional courts of the MS, he concludes that the “notions of values and principles are often employed interchangeably in constitutional jurisprudence.”<sup>150</sup> This interchangeability is also visible in the practice of the CJEU, as well as in the semantics of the Treaties where, as AG Ćapeta observed, “previous versions of the Treaty on European Union referred ... to principles, instead of values... [where] that change of wording could not be interpreted as an intention to negate or reduce the legal nature of the values in the present-day Article 2 TEU.”<sup>151</sup>

Rather, it seems logically sound to interpret this semantic change as to strengthen its normativity due to the fact that “records from the work of the Convention for the Constitution for Europe suggest that the intention was, in fact, to introduce a number of legal obligations for the Member States.”<sup>152</sup> Additionally, “values might have been introduced to clearly distinguish the most important principles of the EU legal order from other non-foundational principles or objectives”<sup>153</sup>, and finally “the term ‘value’ underlines the character of these principles as *supreme and final normative grounds*.”<sup>154</sup> Following this, the internal logic of the Treaties also calls for the acceptance of the normative nature of Article 2 TEU via self-referencing<sup>155</sup> through Articles 3, 8, 13, 21(2)(a), 32, and 42(5) TEU as “those provisions allow for the conclusion that upholding and promoting the values of Article 2 TEU is an obligation for the EU institutions.”<sup>156</sup>

In this context, it remains unclear whether this provision, apart from the EU institutions, creates legal obligations for the Member States as well. Apart from the fact that this provision is placed in the operative part of the text in contrast to the preamble, Spieker sees the answer to this question in the internal structure of Article 2 TEU where the “second sentence (‘These values

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<sup>149</sup> Spieker, *op. cit.*, p. 39.

<sup>150</sup> *Ibid.*

<sup>151</sup> Opinion of Advocate General Ćapeta, delivered on 5 June 2025, Case C-769/22, *European Commission v. Hungary*, para. 169.

<sup>152</sup> *Ibid.*

<sup>153</sup> Spieker, *op. cit.*, p. 47.

<sup>154</sup> von Bogdandy, “Towards a Tyranny of Values?”, p. 8..

<sup>155</sup> Opinion of Advocate General Ćapeta, delivered on 5 June 2025, Case C-769/22, *European Commission v. Hungary*, para. 171.

<sup>156</sup> *Ibid.*, para. 172.

are common to the Member States . . .') is systematically related to the first ('These values. . .') and has been read as expressing not merely a description of the status quo but a legal obligation ('are common')."<sup>157</sup> The argument that this provision creates legal obligations for the Member States can also be inferred from the briefly mentioned, Article 49 TEU, the text of which states that "any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."<sup>158</sup> This position was affirmed by the *EU Values* judgment where the CJEU clarified that "the concept of 'values' was introduced by the Lisbon Treaty, reproducing the drafting used by the Convention on the Future of Europe, according to which the fundamental European values 'must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom which are subject to sanction'."<sup>159</sup> Does this mean that once they become a member of the Union, states can overlook the requirements arising from Article 2 TEU?

The CJEU answered this unequivocally in the conditionality judgment against Hungary, building on the *Repubblika* jurisprudence, stating that "compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession."<sup>160</sup> This seems uncontroversial and is further supported by various positions, including that taken by AG Čapeta, stating that "two types of obligations for the Member States flow from this: the obligation of non-regression and the obligation to take measures to realize the values of Article 2 TEU"<sup>161</sup>, stressing that this imposes legal obligations in the sense of a result to be achieved rather than imposing a positive obligation in the sense of a uniform pathway for their realization, thereby allowing for the discretion of the Member States, which is in line with the Union's pluralistic framework and with a multidimensional understanding of the EU.

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<sup>157</sup> Spieker, *op. cit.*, p. 42.

<sup>158</sup> Article 49, Treaty on European Union (consolidated version), OJ C 202/13, 7 June 2016..

<sup>159</sup> Case C-769/22, *European Commission v. Hungary*, ECLI:EU:C:2026:326, para. 535.

<sup>160</sup> Case C-156/21, *Hungary v. European Parliament and Council*, ECLI:EU:C:2022:97, para. 126.

<sup>161</sup> Opinion of Advocate General Čapeta, delivered on 5 June 2025, Case C-769/22, *European Commission v. Hungary*, para. 182.

### 5.3 The Dual Normative Role of Article 2 TEU

The normative nature of Article 2 TEU is indisputably confirmed at EU level by a recent judgment in the *EU Values* case, where the CJEU held that:

“...values enshrined in Article 2 TEU are, per se, legally binding, as a result of which there is an obligation, for the Member States and institutions of the Union, to respect, maintain and promote those values.”<sup>162</sup>

Can this new development be reconciled with the tenets of constitutional pluralism? This question may be answered in the affirmative. To briefly recall the dual dimension of the EU, which was articulated in terms of identity in the earlier chapters, “one relating to the EU legal system (including the Member States when acting within the scope of EU law) and a broader context comprising the entirety of both the EU and Member State legal orders.”<sup>163</sup> Moreover, the work of Spieker also lays the foundations for an approach suggesting that the equivalent of this differentiation can be reflected in the dual-role of Article 2 TEU corresponding to these dimensions. Based on his analysis, Article 2 TEU performs different roles depending on the dimension in which it operates.

This multidimensional approach is based on constitutional theory, especially regarding the function and impact of a constitution through the prisms of 'thick' and 'thin' forms of constitutionalism.<sup>164</sup> Briefly, a “thicker form will usually have a stronger constituting function and exert a higher impact on the legal system [while a] thinner form of constitutionalism will feature primarily a restraining function and exert a lower impact on the legal order, political processes, and society at large.”<sup>165</sup> Based on this dichotomy, parallels can be drawn in relation to the function and impact of Article 2 TEU, which correspond to the expressions of these different forms of constitutionalism. In sum, by examining the drafting context, Spieker concludes that Article 2 TEU and its predecessor Article 6(1) TEU (the Amsterdam version) were adopted for fundamentally different reasons, supporting the intuitive conclusion that the thinner form corresponds to the broader, *Verbund* dimension, while the thicker form manifests itself in a dimension strictly limited to the EU legal order.

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<sup>162</sup> Case C-769/22, *European Commission v. Hungary*, ECLI:EU:C:2026:326, para. 536.

<sup>163</sup> Spieker, *op. cit.*, p. 72.

<sup>164</sup> *Ibid.*, p. 74.

<sup>165</sup> *Ibid.*, p. 75.

While the roots of this logic in the *Verbund* dimension stem from the Amsterdam version of the Treaty, where the main motive was “guaranteeing a certain homogeneity among the Member States”<sup>166</sup>, the underlying rationale of the Lisbon version is based on “founding the Union on a set of common values... [as] an attempt to compensate for the missing constituent power.”<sup>167</sup> Based on these different underlying drivers, the thin form of constitutionalism in the *Verbund* dimension is essentially aimed “at restraining the Member States' authority and exerts a more limited impact on their legal orders”<sup>168</sup> while in the EU dimension, an “appeal to commonly shared values could be understood as the closest thing to invoking a constituent power...suggest[ing] that Article 2 TEU was supposed to fulfil a constitutive function in the EU legal order and supports the claim that Article 2 TEU epitomizes a thicker form of constitutionalism”<sup>169</sup> in this dimension.

Based on this, and also building on the normative nature established in the previous subchapter, it seems uncontroversial to conclude that the values in Article 2 TEU actually operate as constitutional principles, conceptually similar to the way in which the general principles of EU law function or rather, if we draw a parallel with national systems, as constitutional principles in the Member States. This is justified for several reasons. First, considering the theoretical assumptions advanced by Guastini in the previous subsection, the values of Article 2 TEU are indeed principles and not just any principles, but, based on the EU constitutional identity explored in this work, the fundamental or constitutional principles of the EU legal order. Namely, both main characteristics of principles are reflected in Article 2 TEU. It is undeniable that they are marked by ambiguity or, rather, a particular form of indeterminacy, but their fundamental character in the EU legal system is also uncontested. As previously noted, *principles are understood to be norms that incorporate values, conceptions of justice, and political determinations*. As such, Article 2 TEU absolutely incorporates such conceptions. Furthermore, they are expressed constitutional principles placed in the operative part of the EU constitution covering the entire legal order and, derived from a commonly accepted normative understanding of constitutionalism based on Article 16 of the French Declaration, they do not require any value basis themselves. Instead, they provide political-ethical justifications for other norms as they are *perceived as obviously just or correct* in the constitutional systems of the

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<sup>166</sup> *Ibid.*, p. 77.

<sup>167</sup> *Ibid.*, p. 81.

<sup>168</sup> *Ibid.*, p. 79.

<sup>169</sup> *Ibid.*, p. 73.

Member States and, consequently, by virtue of derivation from those traditions, in the EU constitutional system as well.

Again, with the dual nature of Article 2 TEU in mind, this imposes negative legal obligations on Member States rather than posing positive requirements which are, in this sense, addressed to EU institutions. This corresponds to the previously discussed thick and thin versions of constitutionalism, where Article 2 displays different functions depending on the dimension in which it operates, namely, “constitutive one in its EU dimension and a restraining one in the *Verbund*.”<sup>170</sup> Obviously, these assumptions have meaningful consequences for the justiciability of Article 2 TEU.

#### *5.4 The Justiciability of Article 2 TEU*

The initial unequivocal confirmation of the legally binding nature of Article 2 TEU values came with the Conditionality judgments where the Court clarified that “Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which...are given concrete expression in principles containing legally binding obligations for the Member States.”<sup>171</sup> Thus, it seems reasonable to conclude that Article 2 TEU possesses a normative nature and creates legal obligations, albeit different in effect, both for the EU institutions and for the MS. Furthermore, Article 2 TEU can be understood as the articulation of the normative content of the constitutional identity of the EU. However, as previously established, the confirmation of a normative nature does not necessarily entail the possibility of using that provision in judicial practice. Therefore, the question arises whether the CJEU can and, if so, in what way, use the constitutional identity of the EU against the Member States in court proceedings.

In terms of justiciability, as noted by AG Ćapeta, legal norms are used “as an interpretative tool to give meaning to other legal rules, as sources of rights for individual legal subjects, or as a yardstick for the assessment of the legality of another rule.”<sup>172</sup> While the existing literature<sup>173</sup> primarily discusses the justiciability of Article 2 TEU through the prism of direct effect, it is arguable that direct effect is relevant only in the second (sources of rights for individual legal

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<sup>170</sup> *Ibid.*, p. 83.

<sup>171</sup> Case C-156/21, *Hungary v. European Parliament and Council*, ECLI:EU:C:2022:97, para. 232.

<sup>172</sup> Opinion of Advocate General Ćapeta, delivered on 5 June 2025, Case C-769/22, *European Commission v. Hungary*, para. 151.

<sup>173</sup> Spieker, *op. cit.*

subjects) of the three listed tools. While it is clear that a provision must be precise, clear, and unconditional, as established by the *van Gend & Loos* and following jurisprudence, in the case that an individual refers to that provision before the court in order to obtain the right, the same standard does not have to be fulfilled when the norm serves either as an interpretative tool or as a standard for the assessment of the legality of another norm. Therefore, raised concerns regarding the non-fulfilment of the conditions of direct effect, although valuable, go beyond the scope of this paper. Values contained in Article 2 TEU are understood as constitutional principles and in the context of this paper serve either as interpretation tools or as yardsticks for legality review, in this sense they are not required to meet the criteria for direct effect. This potentially controversial stance is supported by previous case law of both the CJEU and the Member States' constitutional courts.

Firstly, the CJEU has continuously held that a norm does not have to fulfil the standards for direct effect to be judicially applied as an interpretative tool or as a standard for legality review. Prime examples of this are the general principles of EU law such as proportionality, fundamental rights or non-discrimination. It has already been mentioned how the CJEU managed to justify the protection of fundamental rights before the adoption of the EU Charter of Fundamental Rights through general principles, which the German Constitutional Court accepted as a basis for ceasing national judicial review of fundamental rights violations at the EU level. This approach was also evident in the *Kadi* case, where the Court held that “fundamental rights form an integral part of the general principles of law whose observance the Court ensures.”<sup>174</sup> Similarly, the jurisprudence of the CJEU is full of cases that were decided on the basis of non-compliance with the principle of proportionality, and as such, no one questions the value of that principle as a standard of judicial review. Finally, the last provided example of general principles refers to non-discrimination, where the *Mangold* case provides valuable input. In that ruling, the CJEU emphasized the general principle of non-discrimination as part of EU law, which unfolds legal effects against national regulation that violates that principle by stating that it is a “responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination... setting aside any provision of national law which may conflict with Community law.”<sup>175</sup> Such a role of abstract principles has been confirmed more recently regarding the principle of solidarity in a dispute between Germany and Poland, where the CJEU held that, regardless of the contested general nature of

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<sup>174</sup>Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461, para. 5.

<sup>175</sup> Case C-144/04, *Mangold*, ECLI:EU:C:2005:709, para. 78.

the principle, said principle can “serve as a yardstick for the assessment of legality of measures of the Member States and of the European Union.”<sup>176</sup>

Based on this, it is reasonably possible to deduce that the lack of direct effect does not prevent the judicial application of norms in the EU legal order. Furthermore, the constitutional courts of the MS continuously use vague principles in their jurisprudence as interpretation tools or as yardsticks for legality review. A valuable example comes from early Italian jurisprudence, where it was initially held that “judges cannot apply [norms-principles and/or programmatic norms] until the laws necessary for their concretization have been passed... [and the Italian] Constitutional Court irrevocably rejecting this understanding in its very first judgment.”<sup>177</sup> Additionally, this paper has already illustrated the engagement of the German Constitutional Court with the principle of democracy, which has been used both as an interpretative tool and as a yardstick for legality review, especially in the sense of a fundamental expression of German constitutional identity *vis-à-vis* the permissible limits of EU action.

By analogy, if we view the values in Article 2 TEU as constitutional principles of the EU, similarly to how the German and Italian constitutional courts use their vague constitutional principles, the principles of Article 2 TEU cannot be denied applicability in a similar manner. Additionally, as already explored, Article 2 TEU can be viewed as a clause on the constitutional identity of the EU, further strengthening this provision. It seems that a similar position is taken by the CJEU based on, among other reasons, the previously mentioned position in *Opinion I/17*,<sup>178</sup> where it “described these values as part of the autonomous *constitutional basis* of EU law – along with the general principles of EU law, the provisions of the Charter ... and the provisions of the Treaties. In this way, the Court... pointed to their common belonging to the core or *constitutional basis* of EU law.”<sup>179</sup>

The question arises as to why the CJEU would rely on such a contested norm instead of on a more precise norm in the first place. This approach has several advantages that make it particularly appropriate in the context in which this discussion takes place. Crucially, Article 2 TEU is applicable regardless of the scope of other EU law “just like, inter alia, Articles 7, 49, and 50 TEU [it] transcends the scope of application of Union law as well as the scope of the

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<sup>176</sup> Opinion of Advocate General Ćapeta, delivered on 5 June 2025, Case C-769/22, *European Commission v. Hungary*, para. 105.

<sup>177</sup> Guastini, *op. cit.*, p. 162.

<sup>178</sup> See fn. 117.

<sup>179</sup> Motyl, V., "The Concept and Legal Nature of EU Values", *Review of European and Comparative Law*, vol. 60, no. 1, 2025, p. 16.

competences of the EU.”<sup>180</sup> Unlike the Charter of Fundamental Rights, which applies only when the scope of EU law is triggered, Article 2 TEU makes it possible for “the Court to address upheavals of the Member States’ internal constitutional structures – even without any other link to EU law... [additionally,] addressing such upheavals under Article 2 TEU corresponds to the gravity of the situation”<sup>181</sup> and allows for framing it in constitutional terms rather than focusing on technical violations of other primary or secondary law. Therefore, it portrays the nature of these conflicts in a more credible, meaningful way. Additionally, and especially relevant to this paper, it allows for a qualitative distinction between constructive and destructive conflicts by establishing a clear boundary contained in Article 2 TEU, which defines a minimum set of principles on which the EU as a whole functions, and whose disregard or negation would seriously undermine the democratic-liberal nature of this constitutional community.

Nevertheless, it is widely believed that “constitutional principles, due to their vagueness, cannot be applied without prior *concretization*.”<sup>182</sup> Therefore, the concretization of such vague principles is necessary, but approaches to this concretization may differ. This requires an explanation. First way to make a principle concrete is by its operationalization through specific Treaty provisions, which has been dominant in EU jurisprudence so far. This is done by referring to values which are then translated into concrete obligations – a development initiated in the *ASJP* case – in the sense of providing interpretative guidelines for understanding their content, and not as a direct or primary source of legal obligations, thereby bypassing reliance on principles themselves and deciding on other, more precise, norms. In this sense, it can be argued that Article 2 TEU serves as a (meta)interpretative tool guiding the interpretation of these norms. Second, concretization can also be achieved by relying on the principles themselves in a free-standing manner by employing a positive or negative approach. In this sense, principles can serve as a yardstick for legality review.

While positive concretization implies the further elaboration of an abstract legal norm in the sense that it requires that its content is defined through prescriptive rules, thus producing positive obligations, negative concretization is not focused on the detailed definition of the content of the norm, but rather on setting minimum thresholds (a red-line approach). It defines what this abstract norm prohibits, thus not introducing positive but negative obligations, often

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<sup>180</sup> Kochenov, D.; Klamert, M., *Article 2 TEU*, University of Groningen Faculty of Law Research Paper Series, No. 22/2019, May 2019, available at: <https://ssrn.com/abstract=3383828>, p. 4.

<sup>181</sup> Spieker, L. D., "Beyond the Rule of Law: How the Court of Justice can Protect Conditions for Democratic Change in the Member States", in: *The Rule of Law in the EU: Crisis and Solutions*, p. 74.

<sup>182</sup> Guastini, *op. cit.*, p. 389.

elaborated through the identification of breaches of these obligations in judicial proceedings. An additional clarification is important here. Based on the multidimensional approach to the EU, including that of Article 2 TEU presented above, it seems that these different approaches to concretization correspond to these two dimensions. From this perspective, a positive approach in the *Verbund* dimension would constitute a serious violation of the principle of conferral due to the lack of general jurisdiction over the constitutional structures of the MS and with Article 4(2) TEU in mind. While such a positive approach is welcome in the EU dimension, in the *Verbund* dimension, it is clear that Article 2 TEU does not function as a source of harmonized obligations but as a negative limit, setting a minimal threshold. Therefore, this paper will not deal with a positive approach, as it is in my view reserved for EU institutions, but will try to justify the already controversial negative approach in relation to MS.

## 6. MOBILIZATION OF THE EU CONSTITUTIONAL CORE

### *6.1 Approach 1: Operationalization Through Specific Treaty Provisions*

The initial mobilization of the constitutional core of the EU was based on the approach that the abstract values enshrined in Article 2 TEU find concrete expression in specific provisions of the Treaty. As explained, the constitutional principles of Article 2 TEU do not serve in a free-standing manner in this line of jurisprudence but are instead operationalized through the more detailed provisions of the Treaty, thus serving as their meta-interpretation tool.

As established, operationalization in this sense is done by relying on “a specific provision of EU law giving expression to a value enshrined in Article 2 TEU.”<sup>183</sup> This manoeuvre was initiated with the *ASJP* line of jurisprudence and relies on an interconnected interpretation of two legal provisions, whereby “the specific provision is read in light of Article 2 TEU (which reinforces its importance), Article 2 TEU is read in light of the specific provision (which renders it more specific).”<sup>184</sup> With the *ASJP* case, the CJEU achieved a breakthrough in its case-law regarding the applicability of Article 2 TEU. Until then, it was unclear how the EU could meaningfully respond to illiberal tendencies in the Member States using existing legal tools,

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<sup>183</sup> Spieker, *EU Values before the Court of Justice*, p. 50.

<sup>184</sup> *Ibid.*

since relying on technical violations had proved insufficient in this context. A particular problem in this regard was the circumstance whereby many of these contested developments in the MS appeared to escape the scope of EU law, thereby greatly limiting the Union's ability to act.

The application of Article 2 TEU in a combined reading with another, more specific, provision proved to be an appropriate and widely recognized solution, since each of these provisions complemented the shortcomings of the other. Such a combined reading endowed Article 2 TEU with more concrete content through the more precise provision of EU law, while at the same time broadening the scope of application of that specific provision, which had lacked the requisite scope to be applicable on its own. In the *ASJP* case, the substance of which concerned judicial independence, the CJEU resorted to Article 19 TEU which “gives concrete expression to the value of the rule of law stated in Article 2 TEU”<sup>185</sup>, thereby establishing an obligation<sup>186</sup> for MS to ensure judicial independence in general as national courts “may rule ...on questions concerning the application or interpretation of EU law.”<sup>187</sup> The Court was thus able to scrutinise national measures that fell, *prima facie*, outside the scope<sup>188</sup> of EU law. This approach is often referred to as mutual amplification, whereby “interpreting that [specific] provision in light of Article 2 TEU justifies an extensive reading of its scope that reaches beyond the fields covered by Union law.”<sup>189</sup> Nevertheless, it is clear that the rule of law is not the only principle that Article 2 TEU protects. While Article 19 TEU represents the first important step forward in this regard, it does not cover the totality of violations that threaten the values listed in Article 2 TEU in a broader way. Thus, a combined reading can be applied to other principles in order to further specify their content and render them judicially applicable. This understanding appears to be supported by the CJEU, as it itself observed that:

“Articles 6, 10 to 13, 15, 16, 20, 21 and 23 of the Charter define the scope of the values of human dignity, freedom, equality, respect for human rights, non-discrimination and equality ... Article 47 of the Charter and Article 19 TEU guarantee... the right to an effective remedy and the right to an independent and impartial tribunal previously established by law.. Articles 8

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<sup>185</sup> *Ibid.* in fn. 129.

<sup>186</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, para. 32.

<sup>187</sup> *Ibid.*, para. 40.

<sup>188</sup> See para. 29, Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117.

<sup>189</sup> Spieker, *EU Values before the Court of Justice*, p. 195.

and 10, Article 19(1), Article 153(1)(i) and Article 157(1) TFEU define the scope of the values of equality, non-discrimination and equality between women and men.”<sup>190</sup>

Additionally, this understanding was confirmed in a recent case, the *Golden passports scheme*, regarding the “commercialization” of the nationality of a MS, where CJEU engaged Article 2 TEU in conjunction with other primary provisions, mainly Articles 10 and 11 TEU. In short, the Republic of Malta allowed individuals to obtain citizenship in exchange for predetermined payments or investments, which in effect gave foreigners the opportunity to “buy” Maltese and, consequently, European citizenship. Although it is clear that the EU does not have general authority to set conditions for the acquisition of national citizenship, as this would interfere too deeply with the internal structures of the Member States, using Article 2 TEU as a meta-interpretative tool, the CJEU ruled that the Maltese investor citizenship scheme is contrary to EU law. The CJEU engaged with democratic principles, noting that by acquiring Maltese citizenship, EU citizenship is automatically acquired, and stating that “the exercise of the Member States’ power to lay down the conditions for granting the nationality of a Member State is not... unlimited. Union citizenship is based on the common values contained in Article 2 TEU and on the mutual trust between the Member States”<sup>191</sup> and as such “exercising the political rights conferred on them by Articles 10 and 11 TEU, Union citizens participate directly in the democratic life ... founded on representative democracy, which gives concrete expression to democracy as a value, which is, under Article 2 TEU, one of the values on which the European Union is founded.”<sup>192</sup>

Although this approach is successful in “capturing” illiberal developments in the Member States and has proved that “despite the misleading value semantics... indeterminacy, and the CJEU’s contested jurisdiction, relying on Article 2 TEU in procedures before the Court is legally possible... even in situations beyond the scope of other EU law”<sup>193</sup>, I believe it is actually based on deterrence. Since the EU indeed has an identity that is to the greatest extent contained in Article 2 TEU, I believe that serious violations of the principles stemming from that provision should be addressed through the direct activation of that identity, especially if the Member States invoke their national constitutional identity in those disputes. The previous chapters of this paper stressed that identity also has a relational role, manifested, *inter alia*, in the identification of what one is not. In this sense, I consider the red-line approach a more effective

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<sup>190</sup> Case C-157/21, *Poland v. European Parliament and Council*, ECLI:EU:C:2022:98, paras. 193–194.

<sup>191</sup> Case C-181/23, *Operation of an investor citizenship scheme*, ECLI:EU:C:2025:283, para. 95.

<sup>192</sup> *Ibid.*, para. 89..

<sup>193</sup> Spieker, *EU Values before the Court of Justice*, p. 193.

tool for identifying "differences" diverging from the common normative conception of those principles.

## 6.2 Approach 2: Defining the "Red Lines"

As established, the concretization of ambiguous EU constitutional principles in relation to the MS in the *Verbund* dimension could also be achieved through a so-called *negative approach* where constitutional principles serve in a *free-standing* manner as an identification of the minimum content of Article 2 TEU, that is, as a yardstick to check whether red lines have been crossed by Member States. Admittedly, in this context, it is also warranted to mention the distinction between finding a violation based on Article 2 TEU on *free-standing* or *autonomous* grounds, as introduced by the Opinion of AG Ćapeta in the recent *EU values* case. As opposed to *free-standing* ground, which is invoked together with other breaches of EU law, *autonomous* ground entails that “a breach of Article 2 TEU could be found even outside of the scope of application of EU law or independently of other breaches of EU law.”<sup>194</sup>

Although this distinction seems to be accepted by observers of EU law and has gained traction among legal scholars, in my understanding, its wider practical and doctrinal relevance remains unclear if we consider the development of jurisprudence that started with the *ASJP* case. To recall the key distinction formulated by the CJEU, the Court “points out that as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to ‘the fields covered by Union law’, irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.”<sup>195</sup> In this paper, it has already been established that the CJEU *de facto* expanded the material scope of primary Union law by linking Article 19 TEU in conjunction with Article 2 TEU to *fields covered by Union law*, and not only to the implementation of EU law in the sense of Article 51 of the Charter. Based on this, it appears that countering many illiberal developments in the MS that could, based on AG Ćapeta’s distinction, qualify as autonomous use of Article 2 TEU, in the current legal reality already fall under the material scope of Union law by virtue of the *ASJP* jurisprudence. Therefore, it can be argued that the negative approach to the values from Article 2 TEU can be

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<sup>194</sup> Opinion of Advocate General Ćapeta, delivered on 5 June 2025, Case C-769/22, *European Commission v. Hungary*, para. 92.

<sup>195</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, para. 29.

operationalized through its *free-standing* application within that established and accepted “extended” scope, without the need to rely on an autonomous ground outside the scope of Union law in this context. Is this in line with the previously discussed dual nature of Article 2 TEU?

Briefly, that dual nature dictates that Article 2 TEU exerts different functions regarding the dimension in which it operates. While fleshing out positive, prescriptive requirements stemming from Article 2 TEU would be an appropriate function regarding the EU institutions, the same positive obligations would be disregarded as unacceptable in the *Verbund* dimension. Precisely for this reason, a negative approach is the appropriate framework to address violations of principles stemming from Article 2 TEU in relations with the MS. This approach seeks to reconcile criticism of the overstepping of the division of powers in the EU, while at the same time ensuring a direct mobilization of the EU identity against Member States whose actions threaten it, thereby framing the EU response to those developments in meaningful, foundational manner. The following section explores how this proposed framework might operate in practice.

In this sense, “instead of providing a full-blown, positive account of each value, the Court would negatively determine what is not allowed...with a case-by-case reasoning”<sup>196</sup>. As noted by Spieker, parallels can be drawn to the jurisprudence of the European Court of Human Rights (ECHR) in this regard. Along with the proposed jurisprudence regarding judicial independence, in my understanding, this parallel is also particularly relevant regarding the interpretation of the right to free elections established by Article 3 of Protocol No. 1 to the European Convention on Human Rights. Based on ECHR jurisprudence on free-elections meaningful parallels can be drawn, simultaneously proving that employing such a negative standard is not a novelty in the functioning of the European legal system. In this context, the Court's approach to these sensitive issues is significant. I will try to illustrate this based on three well-known cases from the ECHR jurisprudence on this issue.

The first case in this analysis, *Yumak and Sadak v. Turkey*, concerned the high threshold of 10% in Turkey's parliamentary elections, where the applicants considered that it significantly limited the effectiveness of the right to vote for a significant part of the population. However, the Court did not accept the position of the applicants, pointing out that although the value of democracy is unprecedented in the *European public order*, States enjoy a wide margin of appreciation in this respect as “the rules in this area vary in accordance with the historical and political factors specific to each State [and] the large variety of situations provided for in the electoral

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<sup>196</sup> Spieker, *EU Values before the Court of Justice*, p. 54.

legislation ... shows the diversity of the possible options.”<sup>197</sup> This approach was further justified based on the fact that the rights contained in the aforementioned Protocol are not *absolute* and do not need to adhere to a specific list of *legitimate aims* that justify restrictions as is the case with other Convention rights (ex. Article 8-11 of Convention). Consequently, the “Court does not apply the traditional tests of *necessity* or *pressing social need* which are used in the context of Articles 8 to 11. ...[rather,] in examining compliance ... the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people.”<sup>198</sup> Ultimately, the Court determines whether the requirements arising from that provision have been violated in such a way as to *deprive them of effectiveness* and undermine their *very essence*.<sup>199</sup>

Another valuable input from this line of jurisprudence comes from the *Hirst v. UK* case. The case concerned Mr Hirst, a prisoner convicted of manslaughter in the UK, who was denied the right to vote in parliamentary or local elections in the UK based on national legislation, which provided for a general ban on voting for all prisoners, without distinction of circumstances such as the length of sentence or the nature and seriousness of the offenses. In this regard, the Court first conducted an analysis of the existing legal frameworks and practice in Contracting and other States. Following this, it reiterated the already presented position that the “rights bestowed by Article 3 of Protocol No. 1 are not absolute... and Contracting States must be allowed a margin of appreciation in this sphere”<sup>200</sup> and that “...the margin in this area is wide”<sup>201</sup> although *not all-embracing*.<sup>202</sup> Based on that, the “Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the [Convention] rights”<sup>203</sup>. After its analysis, the Court pointed out “that the measure lacked proportionality, essentially as it was an automatic blanket ban imposed on all convicted

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<sup>197</sup> European Court of Human Rights, *Yumak and Sadak v. Turkey* [GC], Application no. 10226/03, Judgment of 8 July 2008, para. 111.

<sup>198</sup> *Ibid.*, para. 109 iii).

<sup>199</sup> *Ibid.*, para. 109 iv).

<sup>200</sup> European Court of Human Rights, *Hirst v. the United Kingdom (No. 2)* [GC], Application no. 74025/01, Judgment of 6 October 2005, para. 60.

<sup>201</sup> *Ibid.*, para. 61.

<sup>202</sup> *Ibid.*, para. 82.

<sup>203</sup> *Ibid.*, para. 84.

prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant once his tariff ... had expired.”<sup>204</sup>

The last example refers to the exercising of the right to vote for the European Parliament. Ms Matthews, a British citizen and a resident of Gibraltar, claimed that the deprivation of the right to vote in the European Parliament 1994 elections for Gibraltar residents was a violation of Convention rights under the Protocol in question. In short, although the British government claimed that the Protocol did not apply to voting for the European Parliament, the Court held that “the European Parliament represents the principal form of democratic, political accountability in the Community system”<sup>205</sup> and although “Gibraltar is excluded from certain areas of Community activity ... there remain significant areas where Community activity has a direct impact in Gibraltar.”<sup>206</sup> After this analysis, the Court yet again reiterated “that the choice of electoral system ... whether it be based on proportional representation, *the first-past-the-post system* or some other arrangement – is a matter in which the State enjoys a wide margin of appreciation.”<sup>207</sup> However, in the specific dispute before it, the applicant “...was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament” and by that “the very essence of the applicant’s right to vote, as guaranteed by Article 3 of Protocol No. 1, was denied”<sup>208</sup>, ultimately finding a violation by the UK based on those facts.

These brief examples serve to illustrate the underlying logic of the approach taken by the European Court of Human Rights to issues that are extremely sensitive with respect to state sovereignty. In my view, this underlying *self-restraining* logic of the ECHR could be successfully translated into the EU system regarding the jurisprudence on Article 2 TEU. Of course, it is clear that the Protocol in question also entails certain positive obligations for states and can be invoked by individuals, which is a key difference from Article 2 TEU. Nevertheless, the logic of this “*I know it when I see it approach*”<sup>209</sup> may prove to be extremely relevant in this context by analogy. Through these three cases, the ECHR makes it clear that it has no intention nor authority to impose a single or uniform approach on states regarding the organization of their own systems, emphasizing their broad margin of discretion in this area,

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<sup>204</sup> *Ibid.*, para. 76.

<sup>205</sup> European Court of Human Rights, *Mathews v. the United Kingdom*, Application no. 24833/94, Judgment of 18 February 1999, para. 52.

<sup>206</sup> *Ibid.*, para. 53.

<sup>207</sup> *Ibid.*, para. 64.

<sup>208</sup> *Ibid.*, para. 65.

<sup>209</sup> Spieker, *EU Values before the Court of Justice*, p. 54.

but rather limits itself to particularly serious violations that render guaranteed rights *ineffective* or undermine their *very essence*. In that sense, it could be beneficial for the CJEU to, in my view, adopt a similar approach to that illustrated by the ECHR when addressing such sensitive questions. Emphasizing a high margin of discretion and conducting a more relaxed proportionality test, considering the pluralistic nature of the EU, can dampen criticism regarding the overstepping of competences, while conducting a comparative analysis, similar to the one carried out by the ECHR, can further strengthen the reasoning of the CJEU's judgments.

This is particularly relevant in the light of the understanding of AG Čapeta considering the negation of values as a ground for infringement procedures based on Article 2 TEU, where “in order to assess whether the legislation of a Member State can be tolerated within the EU system of values, the right question to ask is whether... a Member State negates one or more of the values enshrined in Article 2 TEU.”<sup>210</sup> Her logic is the following: “infringement of Article 2 TEU does not occur merely because the other breaches are serious... rather the reverse: because the root cause of those breaches is a negation of the values enshrined in Article 2 TEU, they themselves become both serious and systemic.”<sup>211</sup> Although some<sup>212</sup> deny the effectiveness of this approach, I believe that it is extremely useful in this context. For one, it is the closest to what the ECHR in its practice considers to be an undermining of the *very essence* of rights protected under the Convention and enables us to draw meaningful parallels between the two jurisprudences, further allowing us to conceptually understand the CJEU's approach by using already recognized methods in European multi-level jurisprudence. Additionally, through this approach, a free-standing violation of Article 2 TEU can be established and by that the nature of the conflict can be more credibly presented given the crucial importance of Article 2 TEU in the functioning of the whole common legal order, specifically mutual trust which is, as has been repeatedly emphasized in this paper, based on the fundamental premise that all MS share the values from Article 2 TEU. Furthermore, it is the clearest expression of the EU identity and as such enables us to draw a line between (un)acceptable claims within the EU framework.

The recent *EU values* case provides a crucial insight into how a *free-standing* action based on Article 2 TEU could function in the EU framework. To briefly recall, the Commission initiated infringement proceeding regarding restrictions concerning the education system, the media and

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<sup>210</sup> Opinion of Advocate General Čapeta, delivered on 5 June 2025, Case C-769/22, *European Commission v. Hungary*, para. 238.

<sup>211</sup> *Ibid.*, para. 241.

<sup>212</sup> See: Kaiser, L., "From Dialogue to Discord: Some Reflections on Advocate General Čapeta's Arguments Regarding Art. 2 TEU", *Verfassungsblog*, 10 June 2025, available at: <https://verfassungsblog.de/opinion-hungary-advocategeneral/>.

the advertising of content related to diverse gender identities and sexual orientation in Hungary. In addition to establishing that this legislation violated secondary EU law, the CJEU also found a free-standing violation of Article 2 TEU. Although not precisely in the terms proposed here or by AG apeta, the CJEU seems to have accepted the basic premise of the explored negative approach, aimed at the particularly grave disregard of the constitutional principles contained in Article 2 TEU, by claiming that “stigmatisation and marginalisation, which is tantamount to establishing, maintaining or reinforcing the social ‘invisibility’ of some members of society, runs counter to the values of respect for human dignity, equality, and respect for human rights, including the rights of persons belonging to minorities, as referred to in Article 2 TEU.”<sup>213</sup> The Court further clarified how the Hungarian “...amending law is in breach, in a way that is both manifest and particularly serious, of the rights of non-cisgender persons – including transgender persons – or non-heterosexual persons, as well as the values ... referred to in Article 2 TEU, with the result that it is contrary to the very identity of the Union as a common legal order in a society in which pluralism prevails.”<sup>214</sup> Although it is not appropriate to draw conclusions on the basis of a single judgment, it can be observed that the Court accepted the proposed logic of the negative approach where, rather than providing Hungary with detailed instructions on how to organize its society, media or education, the Court limits itself to stating that a Member State cannot, *inter alia* on the basis of constitutional identity, institutionalize treatment towards a certain group in a society that negates the fundamental values of Article 2 TEU, and consequently the very identity of the EU. Clearly, this approach is subject to many valid criticisms.

## 7. CRITICAL ASSESSMENT

In addition to the general criticisms of the contested normativity and justiciability of Article 2 TEU, which were analysed and debated in the previous chapters of this paper, there are also more specific criticisms that I will try to respond to in this part of the paper. These concern the contested jurisdiction of the CJEU in relation to Article 7 TEU (Subchapter 7.1), the perspective that this approach would potentially bring into question the pluralistic nature of the EU

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<sup>213</sup> Case C-769/22, *European Commission v. Hungary*, ECLI:EU:C:2026:326, para. 555.

<sup>214</sup> *Ibid.*, para. 556.

(Subchapter 7.2), especially in relation to the national identities of the MS, and ultimately the very purpose of finding a violation based on a free-standing Article 2 TEU (Subchapter 7.3).

### *7.1 The Jurisdiction of the CJEU?*

As noted above, a common argument invoked to challenge the jurisdiction of the CJEU in this respect is Article 7 TEU, which states that the “European Council, acting by unanimity ... may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2”<sup>215</sup>, allowing it to “decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.”<sup>216</sup> Therefore, as the Treaties already foresee a sanctioning mechanism for Member States that violate the values of Article 2 TEU, the question of the role of the CJEU naturally arises for some.

The Court itself answered the question of the exclusivity of Article 7 TEU in the judgment against Hungary, which argued that “Article 7 TEU is the only article on the basis of which it may be determined that there is a risk of a serious breach... of the values contained in Article 2 TEU... [and that] a parallel procedure with the same purpose as the procedure laid down in Article 7 TEU... [is a] breach of that article”<sup>217</sup> in an attempt to reject the lawfulness of the EU conditionality mechanism. Additionally, Hungary relied on Article 269 TFEU which states that “the Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union”<sup>218</sup>, thus arguing that the jurisdiction of the CJEU is limited only to the supervision of the procedural aspects of decisions made under Article 7 TEU. The CJEU rejected such a position stating that many<sup>219</sup> Treaty provisions “grant the EU institutions the power to examine, determine the existence of and... impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State.”<sup>220</sup> Furthermore, it pointed out that “it is permissible ... to establish... other procedures relating to the values contained in Article 2 TEU... provided that those procedures are different, in terms of both their aim and their subject matter, from the

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<sup>215</sup> Article 7(2) Treaty on European Union (consolidated version), OJ C 202/13, 7 June 2016.

<sup>216</sup> Article 7(3) Treaty on European Union (consolidated version), OJ C 202/13, 7 June 2016.

<sup>217</sup> Case C-156/21, *Hungary v. European Parliament and Council*, ECLI:EU:C:2022:97, para. 81.

<sup>218</sup> Article 269 Treaty on the Functioning of the European Union (consolidated version), OJ C 202/47, 7 June 2016.

<sup>219</sup> See fn. 190.

<sup>220</sup> Case C-156/21, *Hungary v. European Parliament and Council*, ECLI:EU:C:2022:97, para. 159.

procedure laid down in Article 7 TEU.”<sup>221</sup> Based on this it seems that as long the mechanism designed to protect values enshrined in Article 2 TEU does not have the, “in essence, same subject matter, pursuing the same objective and allowing the adoption of identical measures”<sup>222</sup> nothing in the Treaties implies the exclusivity of Article 7 TEU in monitoring or sanctioning violations based on Article 2 TEU so far it “pursues a different purpose from that of Article 7 TEU.”<sup>223</sup>

An examination of the provisions regulating proceedings before the CJEU – namely, preliminary and infringement proceedings, seems useful in this context.<sup>224</sup> Article 267 of the Treaty on the Functioning of the European Union (TFEU) governing the preliminary procedure states that the CJEU “shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”<sup>225</sup> while Articles 258-260 TFEU enable the Court to find that a “Member State has failed to fulfil an obligation under the Treaties”<sup>226</sup> in infringement proceedings. Since the values of Article 2 TEU stated in the operative part of the Treaty undoubtedly belong to the EU *acquis* and, as shown in the previous chapters, obligations arise from them (either positive obligations related to the EU institutions or negative ones for the Member States) and especially since they form the very core of the EU's constitutional identity, it seems excessive to limit the role of the CJEU in that constitutional architecture to the mere observation of procedural elements based on Articles 7 TEU and 269 TFEU which “only determines that the Court cannot review the material prerequisites of Article 7 TEU.”<sup>227</sup>

This paper has already emphasized the role of constitutional courts in the interpretation and protection of constitutional identities, and as such, even in this multi-level constitutionalism, there is no reason not to recognize the same role for the CJEU. Furthermore, one can argue that “the political procedure of Article 7 TEU does not bar parallel judicial proceedings under Articles 258, 259, and 267 TFEU.”<sup>228</sup> As can be inferred from above, the purpose of the preliminary procedure is the interpretation of EU law, and that of the infringement procedure is to determine whether the Member State has failed to fulfil an obligation under the Treaties,

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<sup>221</sup> *Ibid.*, para. 168.

<sup>222</sup> *Ibid.*, para 167.

<sup>223</sup> *Ibid.*, para 172.

<sup>224</sup> Notably, I excluded Actions for annulment as they relate to EU acts and in this context barre no added value.

<sup>225</sup> Article 267 Treaty on the Functioning of the European Union (consolidated version), OJ C 202/47, 7 June 2016.

<sup>226</sup> Article 260 Treaty on the Functioning of the European Union (consolidated version), OJ C 202/47, 7 June 2016.

<sup>227</sup> von Bogdandy, "Towards a Tyranny of Values?", p. 86.

<sup>228</sup> von Bogdandy, A.; Spieker, L. D., *The Constitutional Principles of European Society*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper Series, No. 2025-20, 2025, p. 17.

which is hardly the goal of Article 7 TEU. Therefore, these procedures clearly pursue a different purpose and entail different consequences than those envisioned in Article 7 TEU (suspending rights deriving from the Treaties and voting rights in the Council). Unlike the Article 7 mechanism, the CJEU does not establish such measures, but limits itself to interpretation in the preliminary procedure, and to the question of whether there is a violation of EU law, where it has the power to impose a lump sum and/or penalty payment in infringement procedures.

## *7.2 The End of Pluralism in the EU?*

Existing, as well as proposed, developments regarding the enforcement of EU values may call into question the existence of constitutional pluralism in the EU or, as von Bogdandy aptly puts it, lead to a 'tyranny of values'. Furthermore, some claim that “unlike the role of general principles, values have been the justification for creating new competences that allowed the Court of Justice to enter in areas that had been clearly outside of its remit.”<sup>229</sup> In particular, despite the values of Article 2 TEU having a normative nature, their justiciability and the CJEU having jurisdiction, it is not clear how such a fierce defence of EU values falls in line with the pluralistic framework and the guaranteed protection of the national identities of the Member States. To answer these crucial questions, it is worth recalling the fundamental tenets of constitutional pluralism.

First, constitutional pluralism implies that courts in the system are bound by a genuine dialogue whereby they must exercise self-restraint and not endanger the integration process by infinite claims to authority – a requirement that, apart from national courts, also applies to the CJEU itself. In this context, the CJEU would rely on the constitutional principles contained in Article 2 TEU only in particularly rare, serious situations where it becomes clear that a failure to act on this issue leads to the “emptying” of these values and violates their very essence. Special attention in this regard should be paid to AG Ćapeta's proposal of the negation of values as a relevant criterion in these proceedings. Based on this, it is also advisable to introduce a terminology and approach similar to those employed by the ECHR in its jurisdiction, where the wide margin of discretion of states is constantly emphasized and a comparative analysis is carried out in order to strengthen the persuasiveness of the judgment.

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<sup>229</sup> Mendes, J., "Beyond Shared Foundations: General Principles of EU Law, EU Values and the Perils of Forward Leaps", *European Law Open*, vol. 4, no. 4, 2025, p. 616.

The second line of criticism is reflected in the assumption that “giving legal meaning to EU values through teleological and systematic interpretation is an even more fragile process... lack[ing] anchors external to the EU legal order.”<sup>230</sup> Constitutional pluralism explicitly assumes that the constitutional orders of the MS and the EU share at least a minimal understanding of fundamental values such as democracy, the rule of law and human rights, etc. (“are common”) and as such these values represent the minimum common denominator for states to remain members of the same constitutional community. These values, as established, are actually constitutional principles and share a common normative basis in the sense of the 1789 Declaration of the Rights, where “any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution.”<sup>231</sup> It is clear that these values undoubtedly contain a normative dimension, and if we reject it or avoid the very mention of it, there is little room for effective dialogue. We cannot claim that a state sinking into democratic backsliding through the dismantling of the independence of the judiciary, the limitation of media freedom and the deprivation of the rights of its citizens – especially minority groups – acts in line with that normative conception.

Therefore, yes, there is a normative dimension in these values, but within the framework of constitutional pluralism, the crucial element is how we approach it. As has been emphasized several times, while positive obligations are reserved exclusively for the EU legal order, the negative obligations for MS arising from Article 2 TEU do not constitute a negation of constitutional pluralism. Rather, they represent a second level of control over what MS have already committed themselves to respecting – values representing common constitutional principles. In this sense, the negative approach suggested in this paper successfully balances possible tensions arising from employing Article 2 TEU in court proceedings. Crucially, this negative approach must not be interpreted as imposing uniformity on the constitutional structures of the Member States, but rather as the acceptance of a minimum set of principles on which the European Union functions and whose neglect would have serious implications for the democratic-liberal nature of this constitutional community. In a more light-hearted tone, one can draw parallels with sports, for example the Europeans' favourite – football. Football teams employ different tactics, they represent different countries or clubs which have different cultures/languages/internal policies, and they use different game styles (some play defence, while some are extremely attack-oriented or play on counterattacks). However, in order for a

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<sup>230</sup> *Ibid.*, p. 617.

<sup>231</sup> *Ibid.*, at fn. 124.

football match to take place at all, all players must agree to a minimum set of rules (not touching the ball with their hands, violations and non-compliance with the rules of the game results in penalties in the form of a red or yellow card, etc.). By analogy, the invocation of Article 2 TEU by the CJEU is not an imposition of the same style of play onto all participants, it is not an instruction by an inviolable authority from above that commands that everyone must play in an identical way. It is simply a guarantee that everyone who is on that field understands and adheres to the elementary rules without which the game becomes impossible or distorted beyond recognition.

Furthermore, the protection of national identities as envisioned by Article 4(2) TEU is “to be respected as long as they are not incompatible with EU constitutional identity, consisting of fundamental principles of constitutionalism... [or more clearly, so] long as they are not unconstitutional constitutional identities.”<sup>232</sup> To re-use sports jargon, so long as the elementary rules of the game are satisfied, any team has a legitimate right to demand respect for its unique style of play. This position is reflected in recent case law whereby AG Spielmann observes that “Article 4(2) TEU cannot be regarded as being at odds with Article 2 TEU and the fundamental values enshrined therein... the Court has emphasised, ‘whilst they have separate national identities... the Member States adhere to a concept of “the rule of law” which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times’.”<sup>233</sup> This opinion is shared and elaborated further by the CJEU itself in the *EU Values* case where it clearly states: “Article 4(2) TEU must be read in the light of provisions of the same rank, in particular Article 2 TEU, and cannot exempt Member States from the obligation to comply with the requirements arising from those provisions”<sup>234</sup>, thereby confirming that: “Article 4(2) TEU protects only a view of the national identities referred to therein which is consistent with the values enshrined in Article 2 TEU.”<sup>235</sup> This sets a minimum constitutional threshold which is a prerequisite for constructive constitutional dialogue between the components of the EU framework.

This is in line with the pluralistic framework, especially due to the suggested negative approach, as it is “fundamentally different from a conventional constitutional doctrine of principles that aims at developing from principles an ‘overall structure’ for the entire legal order.”<sup>236</sup> The way

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<sup>232</sup> Drinóczi and Faraguna, *op. cit.*, p. 2.

<sup>233</sup> Opinion of Advocate General Spielmann, delivered on 11 March 2025, Case C-448/23, *European Commission v. Republic of Poland*, para. 90.

<sup>234</sup> Case C-769/22, *European Commission v. Hungary*, ECLI:EU:C:2026:326, para. 561.

<sup>235</sup> *Ibid.*, para. 562.

<sup>236</sup> von Bogdandy, "Towards a Tyranny of Values?", p. 92.

in which this approach could potentially work was already illustrated, where it is clear that the EU would not impose “what the ideal situation should look like, but rather what must not be”<sup>237</sup> on a case-by-case basis. This logic seems to have been adopted by the CJEU based the *EU Values* judgment.

### *7.3 Why Rely on Article 2 TEU in a Free-Standing Manner?*

There is no more suitable provision than Article 2 TEU to serve as a clear boundary distinguishing constructive from destructive conflicts. This paper has attempted to illustrate the central importance of this provision in various ways: through the relations among Member States and the mutual trust between them – which is a prerequisite for the functioning of the numerous systems envisioned by the EU framework – and through its fundamental importance for the constitutional identity of the EU.

In this sense, the introduction of identity terminology in regard to the EU does not serve to impose a single identity on the Member States, which, in the spirit of pluralism, should continue to be guaranteed respect for the particularities of their own fundamental structures. Instead, it was introduced to more credibly depict the nature of a conflict within which these tensions manifest themselves. It was already pointed out that identity has a relational role, and, in this sense, it serves to identify what “we” are not. By constructing the EU identity through Article 2 TEU, this role can be translated into the EU system where the central principles of that identity must be able to be defended, not only against external orders or the strictly internal EU order but also in relations with the Member States in a broader internal, *Verbund* dimension. This is of crucial importance for maintaining the democratic-liberal nature of the EU and continuing the integration process, which in today's world seems extremely important given the erosion of these principles on all fronts. The EU must be able to *show what it is and what it stands for*, just as nation states have the right to defend their fundamental, constitutional principles both in their internal structures and in supranational frameworks, such as the European Union. More specifically, as rightly noted by AG Ćapeta, the role of declaring an infringement on free-standing grounds surpasses the symbolic dimension as it can also serve “in identifying and declaring that... a Member State has crossed ‘red lines’ ...reveal[ing] that the cause of other

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<sup>237</sup> *Ibid.*

breaches of EU law ... resides in the deviation of the Member State from EU constitutional values”<sup>238</sup> where the EU must be able to respond to these developments in a legitimate but meaningful way.

This perspective seems to be shared by the majority of Member States based on the views expressed at the oral court hearing in the repeatedly mentioned *EU values* case regarding the justiciability of Article 2 TEU on free-standing grounds in infringement proceedings. This “position shown by so many Member States sounded like an emergency call for the Court: to respond to such a large threat, they request the mobilisation of EU values as a barrier safeguarding the EU society.”<sup>239</sup> For example, “Belgium argued in favour of Article 2 TEU as a ‘*fondement unique*’ of an infringement action, as a last-solace resource for a self-defending democracy.”<sup>240</sup> Additionally, Malta suggested “a test to trigger Article 2 TEU: a violation should occur within the exclusive or exercised shared competence of the EU or, even outside these competences, when the institutional functioning of the Union and its procedures are affected, connecting the values not only with Article 19 TEU, but also to Article 10 TEU (which refers to democracy) and to Article 13 TEU (according to which ‘the Union shall have an institutional framework which shall aim to promote its values’).”<sup>241</sup>

In its landmark judgment, the Court decisively answered this emergency call. By establishing the free-standing character of Article 2 TEU, the CJEU demonstrated the institutional will to act as guardian of the fundamental values and identity of the Union. The common minimal homogeneity ensured through Article 2 TEU does not seek to eliminate diversity in the EU or the tensions that naturally arise from its pluralistic framework. It does not represent the end of pluralism in the EU system or the constructive conflicts that are an integral part of it. Rather, it lays down the basic rules of the game, marking a clear limit after which conflicts cannot be viewed as an expression of legitimate diversity and become destructive to the extent that they can no longer be tolerated within a multi-level system based on the rule of law and liberal democracy.

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<sup>238</sup> Opinion of Advocate General Ćapeta, delivered on 5 June 2025, Case C-769/22, *European Commission v. Hungary*, para. 233.

<sup>239</sup> Walter, B., "Op-Ed: Three Questions to Rule (on) Them All: the Full Court Hearing in the Case Commission v. Hungary on the Justiciability of EU Values against Member States (C-769/22)", *EU Law Live*, 25 November 2024, available at: <https://eulawlive.com/op-ed-three-questions-to-rule-on-them-all-the-full-court-hearing-in-the-case-commission-v-hungary-on-the-justiciability-of-eu-values-against-member-states-c-769-22/>.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

## 8. CONCLUSION

Conflicts are not a novelty in the development and functioning of EU law, which is arguably a natural occurrence in a multi-level constitutional community with twenty-seven Member States. Such a large number of entities whose functioning is greatly affected by these legal developments necessarily leads to differences in opinions and approaches. However, even in such a situation, the limits of acceptable disagreement should be defined. In the case of the EU, whose integration has undoubtedly grown beyond the exclusively economic dimension, it is all the more important to ensure the minimum homogeneity of the MS in crucial issues for the proper functioning of the entire supranational system and the maintenance of its liberal-democratic nature. The Member States have identified Article 2 TEU values as those crucial principles and codified them in the Treaties, set them as a prerequisite for EU membership (Article 49 TEU) and provided for one of the possible ways of sanctioning their violations (Article 7 TEU). Those principles represent the clearest elaboration of the normative content of the EU identity and, as such, should be able to be defended even in relation to MS.

This paper sought to illustrate the diversity of opinions and approaches taken by Member States in this regard. Analysing the judgments of Italian and German courts against those of the Polish and Hungarian constitutional courts illustrates the dichotomy between constructive and destructive conflicts. In particular, all the characteristics of constructive conflicts are visible in the jurisprudence of the German Constitutional Court, where openness towards European law is continuously emphasized and a sophisticated method such as that constructed in the *Honeywell* judgment has been developed for a constructive approach to disagreement within the EU framework. On the contrary, such efforts are not visible in the approaches of the Hungarian and Polish constitutional courts, which exemplify a destructive form of conflicts. For them, the analysed mechanisms of control of the primacy of EU law were used “to introduce through the backdoor unduly constitutionalized aspects of national identity, religion, and culture that serve to entrench ideological standpoints that run counter to the ideals of European integration”<sup>242</sup> and as such they significantly threaten the self-understanding of the EU and the MS as entities aligned with the normative conception of constitutionalism based on Article 16 of the 1789 French Declaration, which is crucial for preserving liberal-democratic values in Europe.

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<sup>242</sup> Scholtes, *op. cit.*, p. 545.

Constitutional pluralism appeared after the Maastricht judgment of the *BVerfG* in order to reconcile different demands for authority in the spirit of integration. It presupposes a heterarchical structure as opposed to hierarchy “which serves to accommodate points of conflict through mutual respect and sincere cooperation of all actors involved”<sup>243</sup> and represents the sole balance between the primacy of EU law and the claims for authority by Member States with no permanent winners and losers. Although it does not function convincingly enough for some<sup>244</sup> and is subject to many criticisms, based on everything presented in this paper, such dismissive positions warrant nuanced reconsideration. Contrary to the views of critics of constitutional pluralism, it empowers the EU to insert claims on equal footing with those of the Member States. This also applies to identity arguments. In this sense, this paper tried to illustrate the EU constitutional identity through Article 2 TEU, which represents its clearest articulation, invoked in various cases as a border to external legal orders, a recalibration of the strictly internal dimension of that identity and finally in the *Verbund* sphere in regard to MS.

In that sense, the proposed negative approach successfully reconciles the illustrated tensions and relies on EU constitutional principles contained in Article 2 TEU in a free-standing manner in order to more credibly portray the nature and character of the constitutional level conflicts in the EU. Unlike the positive approach, it does not impose positive obligations on Member States but rather relies on identifying violations once the "red line" has been crossed, setting a negative standard. It implies the exercise of self-restraint by the CJEU, which would lead these procedures to be potentially modelled on the ECHR jurisprudence illustrated in this paper. This does not represent imposing a single standard or a single constitutional identity in that matter. Rather, a negative approach based on “Article 2 TEU... allows variety in interpretation and does not result in a uniform monist solution in every single case. Rather... through sincere cooperation and mutual respect, different interpretations will prevail at different points in time”<sup>245</sup> maintaining and safeguarding the pluralistic framework of the EU.

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<sup>243</sup> Bobić, "Constructive Versus Destructive Conflict", p. 61.

<sup>244</sup> See: See: Kelemen and Pech, *op. cit.*; Fabbrini, *op. cit.*

<sup>245</sup> Bobić, "Constructive Versus Destructive Conflict", p. 84.

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