1. Introduction

I would submit that we must distinguish between several distinct constellations that might give rise to jurisdictional conflicts in the European Union. Firstly, there might be conflicts because of the adoption of new Union treaties or because of changes to them. This can cause concerns as to the preservation of a core identity of national constitutional law, such as epitomized by the identity review introduced by the German Constitutional Court (Bundesverfassungsgericht, ‘BVerfG’) that will be discussed later. Moreover, what is termed ultras vires review can also apply here if the changes to the Treaties are brought about by an act of Union institutions under a simplified amendment procedure. In this case, the Union institutions could be said to be involved as ‘second order masters of the Treaties’.

Secondly, the enactment of secondary law can give rise both to claims to the control of such acts relating to their compliance with fundamental rights, and to claims to assess their possible ultras vires nature. In the latter case, the Union lawmaker is accused of overreaching its competences, including a violation of the subsidiarity principle. In this instance, the Member States as privileged claimants can initiate a procedure for annulment. Alternatively, the national courts can request a preliminary ruling from the ECJ. Unilaterally, Member States could refuse to apply such a Union measure within their territory without taking recourse to an action for annulment. With secondary law, there is a potential overlap between ultras vires review and identity control, when the latter is also applied to ‘the adoption of a particularly wide-ranging directive on the harmonizing of criminal law’. The same ambiguity would surround the application of

---

7 Of course, the BVerfG or any other national constitutional court could have declared their inclusion in the TEU as per se unconstitutional by arguing that they confer Kompetenz-Kompetenz to the Union. This, however, has not been done by the BVerfG, who, instead, de facto transforms them into fully-fledged Treaty amendments with the same consequences as a normal Treaty amendment would have in the German legal order.

8 If the BVerfG moreover were appealed to before such a decision was taken, Germany could seek an opt-out under the emergency brakes the Treaty provides for in the area of criminal law. See Arts. 81 et seq TFEU. See D. Thym, ‘In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon judgment of the German Constitutional Court’, Common Market Law Review, (2009), 1795–1822, 1809, who has claimed on this basis that identity review could be very similar to ultras vires review. See also M. Payandeh, ‘Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice’, Common Market Law Review, 1 (2011), 9–38, 18.


10 Distinguish this from a Union law act adopted based on Art. 352 TFEU, which according to the identity control exercised by the BVerfG is not ultras vires per se, but does require specific approval under German constitutional law.

11 Thym, ‘In the Name of Sovereign Statehood’, 1806.
the new competence on foreign direct investment provided in Article 206 TFEU, which has to be construed narrowly according to the BVerfG. This could mean that an international agreement concluded by the Union on a broad interpretation of this legal basis would not have binding force for Germany.

Thirdly, judgments by the Court of Justice may be challenged on two accounts. If the Court is accused of overstepping its powers of adjudication and of acting as a quasi-lawmaker, its judgments can only be challenged under the *ultra vires* count. In other words, a conflict between the ECJ and the Member States (aka ‘Masters of the Treaties’) might lead to an *ultra vires* review. The implication here would be that such a judicial act of *ultra vires* would not be applied by a Member State. If in contrast the Court assumes the role of a maker of Union law, the conflict arises not between the ECJ and the Member States in their function as the Masters of the Treaties, but between the Court and the Member States as Union legislator in the Council. Whereas for all conflicts involving national constitutional courts the preliminary reference procedure is the designated Union law instrument of inter-court conflict prevention, this is different when the conflict lies in the relation between the ECJ and the Union legislator. There are two conceivable ways how the Court might enter into this sort of conflict with the Union legislator. The first concerns the disregard by the Court of secondary law, the other concerns the disregard by the legislator of settled case law by the Court. I will present examples for both constellations and will discuss approaches to resolving the inherent discrepancy.

The connection with loyalty is perhaps not too obvious in this Chapter, but it is there. With preliminary references, which I will start with as an example of judicial cooperation, I have already pointed to this connection in Chapter 1. In this context, I will also discuss the case of the interaction between the European Court of Justice and the European Court of Human Rights. Conflicts of legal basis, which I will discuss later, in my opinion, should also be seen as the application of institutional loyalty. The *ultra vires* issue is closely tied to the use by the Court of *effet utile* and loyalty, and with national identity review the BVerfG at least has referred to Article 4 (3) TEU in support of its stance, as I will show later.

## 2. Preliminary References and Other Interactions Between Courts in the EU

It has correctly been cautioned in the present context that cooperation may be an imprecise term in that it could imply both collaboration (*Zusammenarbeit*) and interaction (*Zusammenwirken*). While cooperation in the sense of collaboration would, among other things, involve inter-personal efforts such as informal meetings, cooperation in the sense of interaction would rather involve cross-references in the decisions of different courts. This latter form of interaction has been called ‘mutual reinforcement

---

14 As we will see, this challenge is framed in very narrow terms by the BVerfG. See Case 2 BvE 2/08 et al. *Lisbon Treaty* [2009] BVerfGE 123, 267, para 340.
15 Claims for annulment or preliminary references are not available in such a case.
17 See, both with regard to the ECJ and the ECHR, C. Timmermans, ‘The Relationship between the European Court of Justice and the European Court of Human Rights’, in A. Arnull et al. (eds), *A
of legitimation’ (gegenseitige Legitimationsverstärkung) by Grabenwarter, who has also identified two other forms of interaction, viz. a separation of judicial responsibilities in the sense of the Solange jurisprudence of the BVerfG or the Bosphorus jurisprudence of the European Court of Human Rights (ECHR), and the reinforcement of legal protection as the result of judicial dialogue. Indeed, this distinction is often not transparent in the literature. In the following, cooperation will primarily refer to what has been called interaction in the classification mentioned earlier.

In Chapter 1, I have shown that the procedure under Article 263 TFEU can be qualified as an instrument of cooperation and thus as a specification of Article 4 (3) TEU. However, de Witte has argued that the preliminary reference procedure should not be called an example of judicial conversations or even constitutional dialogue between the ECJ and the national courts. This would ignore the fact that preliminary references are mostly made by ordinary courts, that they do not raise constitutional questions, that they are not answered by the ECJ in reference to national constitutional doctrine, and that a real dialogue with a mutual exchange of arguments would therefore require an entirely different institutional setting. Besides some valid qualifications to these observations, I would argue in the same vein that while it is true that preliminary references are essentially co-operative, the ‘agenda’ and the rules of engagement under which this cooperation plays out are set by the ECJ.

Thus, in a judgment where the Court referred to preliminary rulings as an instrument of cooperation, the Court also placed the burden squarely on the national courts to determine the need for a preliminary ruling and the relevance of the questions referred to the Court. In the Atlanta case, the ECJ reminded the national court that, when deciding on granting interim relief, it ‘is obliged under Article 5 of the Treaty to respect what the Community court has decided on the questions at issue before it’. If no invalidity has been found by the ECJ, it would follow that the national court can no longer order interim measures or must revoke existing measures, unless the grounds of illegality put forward before it differ from the pleas in law or grounds of illegality rejected by the Court in its judgment. Moreover, when there has not yet been a reference to the Court of

---

20 De Witte, ‘The Closest Thing’, 40–41. Note that the BVerfG has at least paid lip service to the need to make references. In its Honeywell decision, it emphasised that a preliminary reference would have resolved the conflict between national and EU law ‘in a co-operative manner and at an early stage’. See Case 2 BvR 2661/06 Honeywell [2010] BVerfGE 126, 286, English version at <http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html>, para 100. This has been claimed to indicate that the BVerfG upholds judicial dialogue between the Union and national courts. T. Konstadinides, ‘Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement’, Cambridge Yearbook of European Legal Studies, 13 (2010–2011), 195–218, 215. But see my discussion later of ultra vires.
Justice for a preliminary ruling, but an action for annulment against a Union measure, loyalty requires the national court to stay its proceedings pending final judgment on this issue.\textsuperscript{25}

The ambivalent nature of preliminary references is further exacerbated if we consider the ‘conversations’ between the ECJ and BVerfG. On the one hand, the BVerfG has fostered the development of human rights at the Union level by supervising and encouraging the initiation of requests for preliminary rulings by lower German courts.\textsuperscript{26} The ECJ has also paid attention to national constitutional courts, adapting its findings to their prior decisions.\textsuperscript{27} As such, the preliminary reference instrument has been employed to assist the ECJ in developing its own human rights doctrine and it can indeed be argued that there was a ‘normative pull’ and a ‘synthetic and participatory nature of the resulting norms’.\textsuperscript{28} On the other hand, however, the relationship between the BVerfG and the ECJ on this matter is best described as a conflict on hold, as I will explain at the end of this Chapter. On the issue of \textit{ultra vires}, also discussed later, the BVerfG has spoken of the necessary ‘coordination’ on this matter with the ECJ.\textsuperscript{29} However, the mentioning of the preliminary ruling procedure here should be seen only as a matter of courtesy. Hence, when the BVerfG states that ‘the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question’,\textsuperscript{30} this does not mean to grant the Court a substantive say in the determination of \textit{ultra vires} acts of Union institutions. While it gives the ECJ a right to be heard in the respective matter, the BVerfG does not subject itself to an ECJ decision or even purport to consider it before it opines on the consequences of an \textit{ultra vires} act, \textit{viz.} ‘any inapplicability of Union law for Germany’.\textsuperscript{31}

This might explain why preliminary rulings are unlikely to be requested by national constitutional courts that claim to have the final authority to decide on the domestic effect of Union law. Any ruling by the ECJ in such a context would create facts that would make it difficult for the national court to ignore. It should thus come as no surprise that until today and in spite of the professions quoted earlier, the BVerfG has not referred for a preliminary ruling to the European Court of Justice.\textsuperscript{32}

A new chapter on inter-court ‘dialogue’ involving the ECJ has been opened by the accession of the EU to the European Charter of Human Rights and the ensuing need to

\textsuperscript{25} Case C-344/98 \textit{Masterfoods} [2000] ECR I-11369, para 59.

\textsuperscript{26} See Case 1 BvR 1036/99 \textit{Teilzeitqualifizierung} [2001], \textit{Europäische Zeitschrift für Wirtschaftsrecht}, (2001), 255.

\textsuperscript{27} See de Witte, ‘The Closest Thing’, 39–41, referring to the \textit{Banana} saga and the BVerfG.

\textsuperscript{28} T. de la Mare, ‘Article 177 in Social and Political Context’, in P.P. Craig and G. de Búrca (eds), \textit{The Evolution of EU Law} (Oxford: Oxford Univ. Press, 1999), 242, adopting a ‘compliance or loyalty perspective’, claiming this function of dialogue to be one of the strengths of EU law.

\textsuperscript{29} Case 2 BvR 2661/06 \textit{Honeywell} [2010], para 56: ‘The obligation incumbent on the Federal Constitutional Court to pursue substantiated complaints of an \textit{ultra vires} act on the part of the European bodies and institutions is to be coordinated with the task which the Treaties confer on the Court of Justice, namely to interpret and apply the Treaties, and in doing so to safeguard the unity and coherence of Union law (see Article 19.1 (1) sentence 2 TEU and Article 267 TFEU).’

\textsuperscript{30} Case 2 BvR 2661/06 \textit{Honeywell} [2010], para 56.

\textsuperscript{31} Case 2 BvR 2661/06 \textit{Honeywell} [2010], para 60. See also M. Claes, ‘Negotiating Constitutional Identity or Whose Identity is it Anyway?’, in M. Claes et al. (eds), \textit{Constitutional Conversations in Europe: Actors, Topics and Procedures} (Cambridge: Intersentia, 2012), 205–233, 210, who has considered these professions of cooperation and mutual understanding as ‘only partially sincere’.

\textsuperscript{32} It, is, however, expected to do so for the first time in the case on the European Stability Mechanism (ESM). An exception is the Austrian Constitutional Court, which has referred to the Court in four cases so far, most recently on the Data Retention Directive. See Case G 47/12-11 et al., Decision of 28 November 2012.
engage more directly with the European Court of Human Rights. Thus, the accession agreement gives the ECJ the opportunity to express its views on an issue of EU law pending before the European Court of Human Rights.\textsuperscript{33}

3. Loyalty, Institutional Balance, and Conflicts of Legal Basis

In Chapter 1, I have shown that because the obligation of sincere cooperation in Article 4 (3) TEU now frames the entire Union law regime, it is not limited to the relationship between the institutions and the Member States, but also applies to inter-institutional cooperation.\textsuperscript{34} Moreover, I have shown that the role of loyalty in connection with conflicts of legal basis has so far either been neglected or been denied on the basis of a misreading of case law by the ECJ.

I have argued elsewhere that conflicts of legal basis are likely to remain an issue under the Lisbon Treaty due to a number of Union policies applying special procedures and the fact that Article 40 TEU extends the pertinent regime for resolving such conflicts also to the delimitation of the former pillars.\textsuperscript{35} Moreover, I have argued that case law cannot be invoked to claim that the legal basis giving greater rights of participation to the Parliament must be chosen in resolving incompatibility.\textsuperscript{36} I would argue that such a solution to conflicts of legal basis also could not be reconciled with the principle of institutional balance. This, however, firstly requires us to take a closer look at this principle.

According to Opinion 2/00 on the Cartagena Protocol, a Union law measure must be deemed invalid ‘where the appropriate legal basis for the measure concluding the agreement lays down a legislative procedure different from that which has in fact been followed by the Community institutions’.\textsuperscript{37} Implicit in this focus on procedure is the principle of institutional balance protecting the respective powers of the institutions.\textsuperscript{38} In other cases, institutional balance has been associated with the empowerment of the Parliament vis-à-vis the other players in the Union.\textsuperscript{39} When the Council only foresaw the consultation of the European Parliament instead of a co-decision for drawing up a list of safe third countries for asylum seekers, the Court held that the procedural rules in the Treaty were not at the disposal of the Member States or of the institutions.\textsuperscript{40} If an institution such as the Council could, at will, establish ‘secondary legal bases’,


\textsuperscript{34} See Chapter 1.


\textsuperscript{36} Klamert, ‘Conflicts of Legal Basis’, 497–515. See also E. Sharpston and G. de Baere, ‘The Court of Justice as a Constitutional Adjudicator’, in A. Arnulf et al. (eds), \textit{A Constitutional Order of States?: Essays in EU Law in Honour of Alan Dashwood} (Oxford and Portland, Oregon: Hart Publishing, 2011), 123–150, 138 \textit{passim}, who claim that this was the approach by the Court, which would, however, have no basis in the Treaty.

\textsuperscript{37} Klamert, ‘Conflicts of Legal Basis’, 497–515.


\textsuperscript{40} Case C-133/06 Parliament v Council (Delegation of Legislative Power) [2008] ECR I-3189, para 54.
this would upset the principle of institutional balance.\textsuperscript{41} In the Chernobyl judgment, institutional balance was the basis for granting the European Parliament the right of legal review of (then) Community acts beyond what was possible under the wording of the Treaty at the time of the case.\textsuperscript{42} However, the Court also stated on this occasion that ‘each of the institutions must exercise its powers with due regard for the powers of the other institutions’.\textsuperscript{43}

Since the choice of procedure for lawmaking is only a function of the powers of the institutions in the Union, the choice of a legal basis is a politically charged issue causing ‘bitter disputes’ between the institutions.\textsuperscript{44} By safeguarding the correct application of procedures, the Court is thus realizing the principle of institutional balance, as expressed, among others, in Opinion 2/00.\textsuperscript{45} I would submit that this principle of institutional balance is a manifestation of institutional loyalty, requiring the Union institutions to respect each other’s rights of participation in lawmaking.\textsuperscript{46} This principle arguably is not a one-way street solely protecting the rights of the Parliament.\textsuperscript{47} It should also take the interests of the Council and the Commission into account. These, however, would be ignored if conflicts of legal basis would always be decided in favour of the rights of participation of the European Parliament.\textsuperscript{48} Suppose that two applicable provisions require different voting procedures in the Council. Suppose further that one provision does not qualify as a legal basis because it gives less rights of participation to the Parliament than the other provision. Suppose, thirdly, that the former grants shared competence, while the latter provides exclusive competence.\textsuperscript{49} The safeguarding of the institutional interests of the Parliament in this case clearly has adverse effects on the interests of the Council. The Council in this case would have no incentive to claim the invocation of the shared competence; it would do so for considerations of competence, but the result offered would be about the rights of the Parliament. The Council, furthermore, would have to accept the participation of the Parliament in lawmaking for the entire measure, including matters where it is not normally involved.\textsuperscript{50} Thus, it is submitted that always favouring the legal basis granting more rights of participation to the Parliament is not supported by arguments of institutional balance.\textsuperscript{51}


\textsuperscript{42} Case C-70/88 Parliament v Council (Chernobyl) [1990] ECR I-2041.

\textsuperscript{43} Case C-70/88 Parliament v Council (Chernobyl) [1990] ECR I-2041, para 22.

\textsuperscript{44} AG Mengozzi in Case C-91/05 Commission v Council (Small Arms and Light Weapons) [2008] ECR I-3651, para 84. It is also of constitutional significance. See Opinion 2/00 Cartagena Protocol [2001] ECR I-9713, para 5.


\textsuperscript{46} See also AG Maduro in C-411/06 Commission v Parliament and Council (Basel Convention) [2009] I-7585.

\textsuperscript{47} Similar Prechal, ‘Institutional Balance’, 278: ‘However, institutional balance does not entail a kind of one-way traffic in favour of the European Parliament.’

\textsuperscript{48} See Sharpston and de Baere, ‘The Court of Justice as a Constitutional Adjudicator’, 139 \textit{passim}, who make a similar case based on the perspective of the vertical division of competences.

\textsuperscript{49} This situation would arise for instance with a combination of Art. 192 (2) TFEU and Art. 207 TFEU.

\textsuperscript{50} See AG Kokott in Case C-155/07 Parliament v Council (European Investment Bank) [2008] ECR I-0, paras 89–90. The Council, in her view, would then ‘be deprived of its exclusive legislative competence in this field and would have to share legislative competence with the Parliament’ which would ‘be contrary to the deliberate decision of the Member States regarding the legislative procedure’. However, she argues this as criteria for establishing incompatibility. Her solution then is to give precedence to the legal basis providing for co-decision because ‘with respect to legislative procedure, the Parliament’s right of co-decision is the norm’. As explained, this does not strike us as a convincing argument.

\textsuperscript{51} The interests of the Commission would be affected in the (theoretical) case that the legal basis which has to yield is the one conferring exclusive powers. In this case the solution based on the rights of
I would thus argue that Article 4 (3) TEU and Article 13 TEU require both the institutions between themselves and in relation to the Member States to work together in good faith and to ensure that in cases of conflict between incompatible legal bases the solution chosen accommodates all interests involved.

4. The Relationship Between the ECJ and the Union Legislature

4.1 Introduction

The whole of Chapter 3 is dedicated to case law, which, by reference to the constitutionalization it engendered, can be characterized as quasi-legislative, or even as quasi-constitutional. This raises the issue of conflicting claims to lawmaking authority in the Union and who should decide on its legitimacy. Put in other words, it must be examined whether there is a hierarchy between Union law created by the Council and the Parliament on the one hand, and Union law handed down by the Court on the other. In the following section, I will start by briefly laying out examples for judicial restraint and cooperation between the Union legislature and the Court. I will then mention some examples that could be seen as more confrontational. This will be followed by a discussion of three different approaches to addressing this question of the ‘final lawmaker’ in the European Union.

4.2 Judicial Restraint and Cooperation

Challenges to the lawmaking role of the European Court of Justice can be countered by firstly referring to legal developments that have prompted Treaty amendments, and secondly, to cases where the Court has shown self-restraint vis-à-vis the Union legislature. Examples of the former are the codification of the Court’s case law on implied external competences, the Chernobyl case on the Parliament’s locus standi, and Protocol No. 2 on ex Article 119 annexed to the Maastricht Treaty following the broad interpretation of this provision by the Court in the Barber case. Moreover, hardly any declaration


53 The Court, as a party to such dispute, would hardly be impartial. The situation therefore is different compared to conflicts between other institutions, such as between the Council, the Commission, and the Parliament, which manifest themselves, among other things, in quarrels about the proper legal basis to choose for adopting a certain legal act. As I have explained earlier, these conflicts apply the principles of loyalty and institutional balance that can be enforced before the Court.

54 This relationship has so far mostly escaped the attention of the literature. But see J. Komarek, Judicial Lawmaking and Precedent in Supreme Courts: The European Court of Justice Compared to the US Supreme Court and the French Cour de Cassation, Cambridge Yearbook of European Legal Studies, 11 (2008–2009), 399–433.

55 See Chapter 7, where I have argued that this codification of the competence case law still calls for the consideration of the pre-Lisbon case law, which creates a sort of dialectic relation between case law and primary law, and thus implicitly also between the Court and the Member States.


from the Council or the Commission has expressed discontent with the Court’s rulings.\textsuperscript{58} Examples of judicial restraint are \textit{Defrenne}, where the Court did not extensively interpret ex Article 119 EC (Article 157 AEUV),\textsuperscript{59} \textit{Ruckdeschel}, where it referred to the competent organs of the Member States for taking the necessary measures to rectify a case of discrimination,\textsuperscript{60} and \textit{UPA}, where the Court held that the principle of effective judicial protection could not override the condition of individual concern ‘expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the [Union] courts’.\textsuperscript{61} Such deference by the Court to the lawmaking prerogative of the Member States can also be seen in references in judgments to the current state of Union law.\textsuperscript{62} Regarding the annulment procedure, the Common Agricultural Policy has been mentioned as an area where the Court defers to the legislative discretion of the Council and correspondingly applies a reduced standard of scrutiny.\textsuperscript{63} Moreover, various forms of the suspension of the effects of judgments, such as the invalidation of secondary law,\textsuperscript{64} can be seen in the context of cooperation between the Council and the Court.

\subsection*{4.3 Confrontation}

However, while the Court’s approach therefore is not always confrontational, various constellations tell a more conflict-prone story.\textsuperscript{65} ‘The first case where the Court acted in defiance of secondary law concerns Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the (then) Community.’\textsuperscript{66} This Regulation provided for limited coordination between the social security and healthcare systems of the Member States. Further harmonization was opposed by the Member States at that time. The Court stepped in and interpreted the Regulation in an extensive manner, thus closing gaps in the scope of application of the Regulation. Thus, the Court applied the Regulation to a pensioner by qualifying him as a worker in the sense of Article 22 of the Regulation.\textsuperscript{67} This in turn prompted the Union legislature to restrict the scope of application of the Regulation to ‘employed or self-employed’ persons.\textsuperscript{68} Consequently, the Court resorted directly to the Treaty for States for usurping the judicial function reserved to the Court and thus undermining the separation of powers in the EU.

\textsuperscript{58} Komarek, ‘Judicial Lawmaking and Precedent’, 428.
\textsuperscript{59} Case 149/77 \textit{Defrenne} [1978] ECR 1365, 1378.
\textsuperscript{60} Joined cases 117/76 and 16/77 \textit{Ruckdeschel} [1977] ECR 1753, 1771.
\textsuperscript{65} See also the conclusion by P. Syrps, ‘Theorising the Relationship Between the Judiciary and the Legislature in the EU Internal Market’, in P. Syrps (ed.), \textit{The Judiciary, the Legislature and the EU Internal Market} (Cambridge: Cambridge Univ. Press, 2012), 3–24, 7.
\textsuperscript{66} Regulation 1408/71 L 149 of 05.07.1971.
\textsuperscript{68} Council Regulation (EEC) 1390/81 extending to self-employed persons and members of their families Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1981] OJ L143/1.
upholding its expansive jurisdiction, thus circumventing the application of Regulation 1408/71. 69

Another instrument of secondary law sidelined by the Court was Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. 70 The right of jobseekers to social benefits in the host state had already been established by the Court in previous case law. 71 In its Article 24 (2), the Directive prescribed that the host Member States must not grant jobseekers—that have not yet acquired the status of workers—social benefits during the first three months of residence. In the Vatsouras and Koupantantzee cases, the Court however granted such jobseekers access to those social benefits in the host Member State ‘intended to facilitate access to employment in the labour market’. 72 The Court based this decision directly on ex Articles 39, 12, and 18 EC, thus on the free movement of workers, non-discrimination, and citizenship. Similarly, in Bidar, the Court based rights to maintenance grants for students in higher education directly on ex Articles 12 and 18 EC, in defiance of secondary law. 73

In the final version of the Services Directive, already discussed, Article 16 provides for a general prohibition of restrictions, thus the regulatory model developed by the ECJ in cases such as Säger and Gebhard. 74 In contrast to the case law regime, however, Article 16 (1) of the Directive only lists public policy, public security, public health, and the protection of the environment as reasons for the justification of national ‘requirements’. The Services Directive thus reduces Member State regulatory autonomy by removing most of the imperative reasons in the public interest that the Court has introduced in case law to compensate for the creation of the prohibition of restrictions beyond the strict wording of the Treaty. 75 The legality of this has not been challenged yet, and it is possible that it never will be. Nonetheless, I will discuss ways in which the Court might still be able to continue its ‘old’ jurisprudence, allowing the Member States more justifications than now provided in Article 16 of the Directive. Note that if the Court did rule in such a manner, the ‘beneficiaries’ of such disregard of secondary law would be the Member States, while the case law discussed earlier granted rights to individuals beyond those provided in secondary law. This distinction will prove important in the following discussion of possible lines of demarcation for the interplay between the legislature and the Court in the European Union.

---


73 Case C-209/03 Bidar [2005] ECR I-2119, especially paras 44–46.


4.4 The Functional Approach

The literature has mostly discussed the lawmaking function of the Court in the context of locating case law within the different sources of Union law. It is hardly surprising that former or current judges at the European Court of Justice have displayed a tendency to recognize case law by the Union courts as a distinct source of law in the European Union legal system.\(^{76}\)

It has been pointed out that there is mention of the Court in what is now Article 13 (1) TEU in support of its equal rank as one of the Union’s institutions with especially the Council.\(^{77}\) Against this it can be argued that Article 13 (2) TEU refers each institution to the ‘limits of the powers conferred on it in the Treaties’. For the Court this is, according to Article 19 TEU, that ‘in the interpretation and application of the Treaties the law is observed’. What ‘the law’ is in this respect is not specified in the Treaties. There is no indication in the wording of Article 19 TEU that the Court is restricted to interpreting and applying primary or secondary law.\(^{78}\) When the Court is mandated to ensure that ‘the law’ is observed this can refer to both unwritten general principles as discussed in Chapter 13 and to case law.

Thus, the Union legislature cannot claim exclusive lawmaking competence; it rather shares this with the judiciary.\(^{79}\) The Council and the Parliament may be the designated lawmakers of choice, yet it is a fact that the Court also creates Union law, as explained earlier.\(^{80}\) Some have assigned to the Court a residual role in lawmaking, allowing it to step in should the legislator not fulfil its primary responsibility for regulating.\(^{81}\) Others see the Court and its case law on the same hierarchical level as primary law, thus above secondary law.\(^{82}\) It has also been argued in this vein that there are no Community institutions to compete with the Court, that there is no constitutional voice in the Union other than that of the Court.\(^{83}\) It has thus been claimed that, since the Court has been conferred with the power ‘to interpret the Treaty in accordance with internationally recognized canons of interpretation’, political institutions must ‘work within the bounds of that interpretation unless and until the Treaty itself is amended by those who have the power to amend it’.\(^{84}\) With respect to the case of the Services Directive, this would mean that if in case law mandatory requirements have been allowed for Member States to be invoked, this cannot be reversed by a directive but only by amending the respective Treaty provisions.

\(^{76}\) See W. Schroeder, *Das Gemeinschaftsrechtssystem* (Tübingen: Mohr Siebeck, 2002), 315, with further references.

\(^{77}\) Schroeder, *Gemeinschaftsrechtssystem*, 315.


\(^{80}\) For a different perspective, see S. Griller, ‘The New Services Directive’, 411: ‘But the Court is no legislator. When it comes to legislation, the Court, in interpreting the law, has to take into account that primary law authorises the legislator to concretise.’

\(^{81}\) Borchardt, ‘Richterrecht’, 39. See also Nettesheim, ‘Normenhierarchien im EU-Recht’, 757, who refers to J. Hart Ely, seeing a role for constitutional courts in safeguarding values and interests which are not accounted for in the political process because of substantive or institutional circumstances. This would require restraint by the Court in the face of instruments passed with unanimity in the Council.


\(^{83}\) See Komarek, ‘Judicial Lawmaking and Precedent’, 428, arguing also that the Union legislature is not superior to the Court, and thus is unable to monitor or modify the Court’s activities.

\(^{84}\) Édward, ‘Will there be Honey still for Tea?’, 627.
I would argue that both approaches fail to adequately describe the interplay between case law and other sources of Union law. It is more apposite to refer to the competing powers of the Council (and the Parliament) on the one hand and of the Court on the other hand for the concretization of primary law.\(^{85}\) It seems even more to the point to speak rather of a right to develop the law and a right to concretize the law, respectively, in this context because the confines for the actions of either branch are not equally set in Union law. While the legislature must remain within the boundaries provided by the Treaty’s applicable legal basis, the ECJ is bound by its mandate set out in Article 19 TEU. This mandate, however, is a very broad one when we consider the case law on state liability. It is now an accepted principle of Union law and, at least with hindsight, must be considered as not \textit{ultra vires}. The principle of state liability, however, could not possibly have been introduced by an act of secondary law, I submit. This shows that the powers of concretization by the ECJ and the legislator are not distributed evenly.\(^{86}\) State liability or the prohibition of restrictions in the common market law regime can hardly be conceived as a mere concretization of the law. With the Court, it is thus more apposite to refer to the power to develop the law.

In theory, it would have to follow from this that if we wanted to challenge the Services Directive, the argument would have to be that it is not covered by its legal basis, ex Article 47 EC.\(^{87}\) This, however, cannot provide a viable approach here, for the following reason. Held against the Treaty freedom as it was developed by the Court before the passing of the Services Directive, the Directive further liberalizes the common market. It essentially makes it harder for Member States to put up obstacles to trade because they are deprived of reasons to justify them. However, the same argument would be more difficult to make if we assume that the Court had not developed the freedom to provide services and to prohibit restrictions that are not discrimination. In such a case, Article 16 Services Directive would introduce a prohibition of restrictions to a Treaty regime which only provides for a prohibition of discrimination. Thus, in order to qualify the Services Directive as an instrument to further the liberalization of the services market, which is the basic requirement for any legislation in this area, we must understand the Treaty as it was interpreted/developed by the Court. The Union legislature would not have had the mandate to pass the Services Directive without understanding primary law and the way it had been developed by the Court.

Thus, the Court develops the law, and the Council and the Parliament regulate on this basis and within the limits of the powers conferred by the respective legal bases in the Treaty. However, what about the health and social security cases discussed earlier, where the Court disregarded such secondary law? This would be the same as if the ECJ disregarded Article 16 Services Directive and continued ruling based on the ‘old’ list of justifications.\(^{88}\) It would effectively render the Directive pointless, ‘dead law’. When both the concretization by the Union legislator (in the form of the Services Directive) and the preceding development by the Court (the prohibition of restrictions) are equally valid and \textit{intra vires}, the functional approach cannot provide an answer. I thus turn to a perspective more focused on hierarchies in Union law.


\(^{86}\) See also Griller, arguing that the ‘competing’ powers of the legislator and the ECJ are different, but going on to defend secondary law against ‘amendments’ by the Court.


\(^{88}\) Klamert, ‘Of Empty Glasses and Double Burdens’.
4.5 The Hierarchical Approach

A provision of secondary law must be annulled if it does not conform to primary law. In order to avoid such an outcome, the former may be interpreted in light of the latter. It has been pointed out that there is no clear boundary between judicial review and ‘a strategy based on interpretation’, whereby the latter may succeed in hiding the extent of the judiciary’s disagreement with the legislature. In national law, this is reflected by the method of interpreting laws and regulations in conformity with constitutional law. The reason for the obligation to attain the conformity of the lower rank law with the superior norm is normally the latter’s higher rank. The Court, however, has argued that ‘when interpreting the provisions of a directive account must be taken of the principle of the coherence of the Community legal order which requires secondary Community legislation to be interpreted in accordance with the general principles of Community law’.

Whether its legal basis is such principle of coherence, the superiority of primary law or the duty of the judiciary to show restraint in annulling secondary law need not further concern us here. Important for the present purpose is that such interpretation may also involve the development of secondary law, just as the Court is empowered to develop the Treaties, as discussed repeatedly in this chapter. However, this must not entail an amendment of secondary law by the Court. Moreover and importantly, the wording of secondary law must be open to interpretation in the first place, by either being unclear on its meaning or being silent on a certain issue it should regulate. Thus, a provision in a directive or regulation that is clear but not in conformity with primary law must be annulled.

The relationship between secondary law and primary law, however, is a bit more complicated. A hierarchical approach would argue against a ‘reverse’ influence of secondary law on the interpretation of primary law. Nevertheless, it has been shown that the Court has repeatedly referred to secondary law for confirming its understanding of Treaty provisions. In this context, it has been argued that it is relevant for the ECJ whether the legislature has shown an intention to further integrate an area of the law, yet that it does not feel bound by this intent.

When we apply these principles to the cases discussed earlier, no clear picture emerges. The Court could interpret the Services Directive in conformity with primary law as it has been substantiated by previous case law of the Court, but this would require that Article 16 of the Directive is unclear or silent on the reasons of justification available to the Member States. Since this is not the case, it would therefore seem that the Court could not argue the extension of justification beyond the narrow reasons allowed in the Directive. However, this is not what has happened in the Bidar case. The Court did

---

90 Case C-499/04 Werhof [2006] ECR 2397, para 32.
93 See Case 218/82 Commission v Council (Lomé Convention) [1983] ECR 4063, para 12: ‘The Court takes the view that when the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty.’
95 See Nettesheim, ‘Normenhierarchien im EU-Recht’, 753.
96 See Nettesheim, ‘Normenhierarchien im EU-Recht’, 754.
97 Nettesheim, ‘Normenhierarchien im EU-Recht’, 756.
undertake a ‘reverse’ interpretation of primary law in light of the pertinent directive, but then resorted to primary law for resolving the issue at hand instead of considering secondary law. A hierarchical approach fails to explain why this circumvention of secondary law is possible in the Bidar case, but shall not be possible with respect to the Services Directive.

In the Vatsouras and Koupatantze case, in contrast, the Court did interpret a provision of secondary law, viz. Article 24 (2) of Directive 2004/38, in light of primary law, viz. ex Article 39 (2) EC. Recall that Article 24 (2) derogates from the principle of equal treatment by allowing the host Member State to not confer entitlement to social assistance on certain jobseekers. The Court held that ‘in any event, the derogation provided for in Article 24 (2) of Directive 2004/38 must be interpreted in accordance with Article 39 (2) EC’. This therefore ignores the requirement, recognized by the Court itself in other cases referred to earlier, to only interpret secondary law in conformity with primary law when it is unclear, i.e. it is open to more than one interpretation. Consequently, the Court found that ‘(B)enefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting “social assistance” within the meaning of Article 24 (2) of Directive 2004/38’. While this is thus presented as the result of an interpretation in conformity with ex Article 39 EC, it has been pointed out that there would have been other results of interpretation which would have been more in line with previous case law and with the literal meaning of Article 24 (2). It seems that the central argument of the Court here is based on the fact that it wanted to preserve its jurisprudence in cases such as Collins, granting financial benefits intended to facilitate access to employment in the host labour market based on the Treaty provision of Article 39 (2) EC. In other words, a lack of clarity of the term ‘social assistance’ could only be argued because there existed case law explicitly granting certain benefits coming within its scope.

Thus, a hierarchical approach to the understanding of the relation between primary law, secondary law, and case law cannot fully explain the cases discussed in this Chapter. A solution based on interpretation would have to consider the fact as to whether secondary law is unclear or silent on a certain issue, which would empower the Court to either clarify the respective issue or come to a result based on other sources of the law. It cannot explain the reach of the mandate of the Court in cases where provisions of secondary law exist and are sufficiently clear. I submit that the solution has to be found in the nature of the matter at hand, which is discussed in the following section.

4.6 The Subject Matter Related Approach

In general, primary law may be superior to secondary law and the latter may only concretize the former. As discussed earlier, this argues for a top-down relation for purposes of

---

100 Case C-209/03 Bidar [2005] ECR I-2119, para 45. ‘Against this background and given that with its result the ECJ confers a meaning to Art. 24(2) which is anything but obvious and therewith risks overstepping the fine line between interpreting the content of a norm and changing it, one could expect that it at least thoroughly argues what it is doing.’
interpretation. Just as this is not always true, as explained, there are other ways secondary law can influence the application of primary law.

In some areas of Union law there is a direct interplay between acts of secondary law and the application of primary law. Under the fundamental freedoms, secondary law harmonization measures curtail the rights of Member States to put up obstacles to the exercise of the freedoms. This means that there is a direct link between the mandate of the ECJ to enforce the fundamental freedoms and the decision of the Union legislator to regulate a certain matter.¹⁰³ This is ordered expressly for the area of the free movement of products in Article 114 TFEU, according to which harmonization measures replace reasons of justification on grounds of mandatory requirements with the limited reasons provided in Article 114 (4) and (5) TFEU.¹⁰⁴ In case law, the Court has stated that ‘recourse to Article 36 is no longer possible where Community directives provide for harmonization of the measures necessary to achieve the specific objective which would be furthered by reliance upon this provision.’¹⁰⁵ This means that existing Member State measures can only be maintained by invoking ex Article 30 EC or the protection of the (working) environment, with even stricter limitations applying to new state measures.

Article 20 TFEU grants Union citizens a right of movement and residence subject to ‘the conditions and limits defined by the Treaties and by the measures adopted thereunder’. The concretization by the Union legislator with regard to the rights of Union citizens has not explicitly been made subject to the condition that secondary law must have as its objective the furtherance of these rights. However, the case law discussed earlier suggests that a similar condition might apply by implication. When secondary law deprives citizens of rights already granted by the judiciary, case law suggests that such measures will not be considered by the ECJ in the same manner as when they would provide further rights to Union citizens; when they, in other words, would deepen non-market related integration in the European Union.¹⁰⁶

What I call here the subject matter related approach reflects the debate going back to Waldron on whether outcomes should be valued higher than processes. It has thus been argued that if applying an outcome-oriented criterion of evaluation, most citizenship case law of the Court where processes are sidestepped or ignored for the purpose of satisfying the desire of what is conceived to be a better outcome, would make sense.¹⁰⁷ It is thus submitted that this may be the explanation why the Court, especially in Bidar, has resorted to primary law in defiance of secondary law, and why it performed an ‘interpretation’ the way it did in Vatsouras and Koupantzitz.¹⁰⁸ This conceptualization, moreover, explains why it is unlikely that the Court will circumvent Article 16 Services Directive by applying the Treaty based reasons of justification instead. Thus,

¹⁰³ Nettesheim, ‘Normenhierarchien im EU-Recht’, note 83.
¹⁰⁴ Interestingly, Art. 16 Services Directive replicates the regime of ex Art. 95 EC.
¹⁰⁶ Nettesheim only speaks of a more flexible interplay with Union citizenship compared to the freedoms.
¹⁰⁸ See Damjanovic, ‘Annotation’, 857: ‘Here the Court clearly applies another standard. By unconditionally rejecting an interpretation option of Article 24(2) of Directive 2004/38 which contradicts its previous case law (Collins and Ioannidis), the Court makes clear that when it comes to individual rights conferred on Union citizens, there is in principle no space for the secondary legislator to correct its previous case law on the interpretation of a primary law provision. Here, the legislature has no other option than to copy case law.’
since Article 16 of the Directive qualifies as a furtherance of the market objective, the Directive can influence the application of primary law.\(^{109}\)

### 5. Constitutional Conflicts Between EU Law and Member State Legal Regimes

#### 5.1 Introduction

Commonly, Member States are divided into those where Union law takes full primacy such as in the Netherlands, Luxembourg, and Finland,\(^{110}\) those where Union law is subordinate to national constitutional law such as in France and Greece, and those Member States where supremacy is limited by constitutional law.\(^ {111}\) In most Member States coming under the latter category, the national constitutional courts have reserved for themselves the authority to review Union law in light of certain national law standards.\(^ {112}\)

Thus, the Italian Corte Costituzionale reserves the right to review Union law in respect of fundamental rights and personal freedoms, which, however, will only be done after a request for a preliminary ruling has not been successful.\(^ {113}\) Sweden and Ireland claim the power to uphold a certain fundamental rights standard for their territory.\(^ {114}\) In Austria, the supremacy of Union law over constitutional law is accepted as a matter of principle, but might be subject to qualification with regard to the core constitutional principles.\(^ {115}\) Similar reservations with regard to the integrity of national constitutional law exist in Spain.\(^ {116}\) Some of the ‘new’ Member States have adopted the model of approach of the German BVerfG, discussed in detail later.\(^ {117}\) The Polish Constitutional Court found the EU arrest warrant to be contrary to the Polish constitution, but instead of declaring it inapplicable, the Polish Constitution was amended in order to eliminate the incompatibility.\(^ {118}\) In its decision on the legality of the accession of Poland to the Union, however, the primacy of the Polish constitution over Union law was proclaimed.\(^ {119}\) Similar tendencies can be observed in Hungary.\(^ {120}\) The Czech Constitutional Court has openly taken cues from the BVerfG in its decisions on the Lisbon Treaty.\(^ {121}\) In general, however, it can be concluded that there is no open conflict between national constitutional courts and the Union courts, but a certain friction is present in some Member States.\(^ {122}\)

\(^{109}\) It is a different matter as to whether the Directive (EC) 2006/123 on services in the internal market, [2006] OJ L376/36, qualifies as a harmonization measure or a mutual recognition measure, which would make its adoption illegal. See Klarmert, ‘Of Empty Glasses and Double Burdens’.

\(^{110}\) See also Mayer, ‘Art. 19 EUV’, para 95.


\(^{112}\) See the references at Mayer, ‘Art. 19 EUV’, para 92 passim.

\(^{113}\) See Grabenwarter, ‘National Constitutional Law’, 86.

\(^{114}\) Grabenwarter, ‘National Constitutional Law’, 88–89.

\(^{115}\) cf. A. Posch, Vorrang des Gemeinschaftsrechts vor Verfassungsrecht (Vienna: Jan Sramek, 2010).


\(^{117}\) For an overview see Mayer, ‘Art. 19 EUV’, paras 100–101.


\(^{122}\) Mayer, ‘Art. 19 EUV’, para 104.
In the following section, I will briefly discuss the fault lines of the relationship between the legal system of the EU and those of the Member States. As we will see and as I have already adumbrated, it is necessary here to distinguish between *ultra vires* review, identity review, and conflicts about the prerogative to determine the fundamental rights standard applicable to EU law. I will, however, start by discussing theorems to conceptualize the relationship between the Member States and the European Union. I will show that the prevailing concepts often apply monism and dualism terminology, or are somehow based on them. Another backdrop to the concepts discussed in the following that is especially apparent in the German literature is federalism, which I have already dealt with in Chapter 2.

5.2 Theorizing the Constitutional Relation Between the EU and the Member States

There is a dizzying array of theories and monikers for overcoming the perceived inappropriateness of the monism/dualism dichotomy. As with these two concepts discussed in Chapter 3, it is certainly not my intention to add to this debate in substance beyond setting the scene for the following discussion. Constitutional pluralism is a notion that has been introduced to describe the fact that the Treaties as the constitutional law of the European Union exist alongside the national constitutions of the Member States. Walker has captured what seems to be the essence of constitutional pluralism with the following words:

Constitutional pluralism, by contrast [to constitutional monism] recognizes that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-national law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the orders, that is to say, is now horizontal rather than vertical—heterarchical rather than hierarchical.

Pluralism thus focuses on constitutional conflicts of authority, but its connotation is essentially positive, emphasizing constitutional unity in diversity. In the same vein, Poiares Maduro has introduced the metaphor of contrapunctual law, postulating the necessity to apply ‘different mechanisms of recognising the supremacy of EU law that can be perfectly compatible with each another so long as they lead to the same result’. With constitutional pluralism, communication, dialogue, and cooperation play important roles. It has thus been argued that it requires forms of reducing or managing the potential conflict

---

123 See N. Krisch, _The Case for Pluralism: Beyond Constitutionalism_ (Oxford: Oxford Univ. Press, 2011), 71–78, who argues in favour of ‘systemic pluralism’, where there is no common point of reference within the legal or institutional structure, as opposed to institutional pluralism, where such a reference on a constitutional level does exist.

124 See, among many others, N. Walker, ‘The Idea of Constitutional Pluralism’, _EUI Working Paper Law_, 1 (2002). Recall also the concept of twenty-seven legal orders plus one used by Dickson, which I have discussed in Chapter 4 on the unity of the EU legal order.


126 <http://en.wikipedia.org/wiki/Counterpoint>: ‘In its most general aspect, counterpoint involves the writing of musical lines that sound very different and move independently from each other but sound harmonious when played simultaneously.’


between legal orders and promoting communication between them.129 One condition of such communication is what has been called ‘systemic compatibility’, which refers to ‘an identity as to the essential values of the two systems’.130 Pluralism therefore frames the relationship between the EU and the Member States in terms of cooperation (‘communication’) and constitutional heterarchy.131

While I would certainly join the call for ‘cooperation’ and ‘communication’ (i.e. interaction) between legal systems that are claimed to be situated in a heterarchical relationship, the concept of pluralism does not provide a convincing answer regarding the resolution of jurisdictional conflicts in the Union.132 Thus, it has been argued that constitutional pluralism implies the recognition of the legitimacy of the constitutional claim of final authority on the part of the European Union.133 Recall that dualism refers to the idea that domestic law and international law are independent legal orders, where the international legal order is commonly seen as supreme.134 What then is pluralism other than a different expression for dualism with some edges softened by ideals of cooperation and communication? Under the pluralism theorem, the supreme authority of the European Union legal order has also been advanced by the argument that the right of national courts to adopt false decisions is owed to Union law and not to national law, because national courts were part of the EU judicial system.135 Moreover, it has been pointed out that national courts also sometimes do not have the means to enforce their decisions without putting their authority into question.136 However, as noted by Somek, EU law does not prevent national courts from handing down ‘false decisions’ that challenge the authority of Union law because of the lack of effective sanctions by the Union, which makes Member State liability the only consequence of such false decisions.137

Especially in the German literature, the constitutional relations between the EU and its Member States have been characterized as a composite constitution (Verfassungsverbund).138 This equally frames the relation between the courts in the EU in terms of ‘heterarchy’ and cooperation, and emphasizes the need for a common set of values, a common core identity, that must justify the compromises indispensable for the individual parts.139 In the non-German literature, this concept has not gained much

---

134 See Chapter 4. But see Poiares Maduro, ‘Three Claims’.
136 See, among many others, I. Pernice, ‘Die Dritte Gewalt im europäischen Verfassungsverbund’, Europarecht, (1996), 27–43. This is connected to seeing the EU and the Member States as a composite unit (Verband). Thus, it has been argued that there is a difference between the vertical distribution of competences between the Union and the Member States (Verbandskompetenzen) on the one hand, and the horizontal conferral of competences to the Union institutions (Organkompetenzen) on the other. See A. von Bogdandy and J. Bast, ‘The Federal Order of Competences’, in A. von Bogdandy and J. Bast, Principles of European Constitutional Law (Oxford and Portland, Oregon: Hart Publishing, Munich: Beck, Baden-Baden: Nomos, 2009), 284. Even in this relation, however, this comparison has been qualified by observing that competence is not conferred upon the Union as an entity, but rather upon its specific organs.
137 Maduro mentions supremacy and direct effect in this respect as core principles also accepted by the national constitutional laws. See Case 2 BvR 2661/06 Honeywell [2010], para 53b.
traction, and within Germany, it has been criticized for ignoring the structural differences between the national judiciaries and the European courts.¹⁴⁰

Multilevel constitutionalism is another concept that has been proposed as being preferable to the idea of a composite constitution when referring to the European Union as a Staatenverbund.¹⁴¹ This concept is more evocative and places the focus on the different levels within the EU. However, it has been described as 'largely neutral' in terms of hierarchy or heterarchy, since 'the image of distinct levels is not necessarily linked to superordination, supervision and subordination', and levels 'may also be understood as platforms that may be at equal height in one case and at different heights in another, or even circling freely around each other'.¹⁴² This is difficult to sustain by the ordinary meaning of 'level' in my opinion. If we speak of several levels or layers of constitutional orders within the European Union, this would rather suggest a hierarchical relationship and is, in any case, not very transparent.

Recall that I have argued in Chapter 4 that the monism/dualism label may be misleading and therefore often does not have much explicatory merit. I would suggest that all the concepts outlined earlier offer more or less convincing narratives for what is perceived to be the status of the interaction between the national and Union levels. However, none of them can fully capture the complexity of this interrelation. When the Netherlands displays monism with a primacy of Union law, the UK practices monism 'with a trigger' in the form of an anticipated general transformation, and other Member States are firmly grounded in dualism, this makes a more comprehensive and not merely descriptive picture difficult to come by. As I have mentioned in Chapter 4 with respect to monism and dualism, that they fail to provide a framework for important characteristics of the EU law regime, the same holds for the concepts discussed earlier that are even less precise. Again, I find the concept of a 'dual constitution' existing in each Member State superior to both (constitutional) pluralism and multilevel constitutionalism.¹⁴³ Besides capturing the interventionist nature of Union law, it also offers a Member State centred focus, which is something I find apposite in view of the mentioned diversity of constitutional 'responses' to the Union 'constitution' in the Member States. Moreover, any theoretical concept on the relationship between the Union and the Member State legal orders that lays the focus on its cooperative sides by evoking images of diversity or a common set of rules conceals the fact that this relationship is partly confrontational and inherently conflict-prone.¹⁴⁴

¹⁴⁴ See also J.H.H. Weiler, ‘Prologue: Global and Pluralist Constitutionalism: Some Doubts’, in G. de Búrca and J.H.H. Weiler (eds), The Worlds of European Constitutionalism (Cambridge: Cambridge Univ. Press, 2012), 8–18, 14: ‘… in my understanding, constitutional orders, whether national or transnational, inherently contain hierarchical and pluralist features. It is part of their ontology. It cannot be otherwise.’
In the following section, I will take a closer look at conflicts, where the German BVerfG and the ECJ play the roles of agonist and antagonist. From the EU law perspective, the foremost issue is the judicial control over acts of *ultra vires*, as I will explain later by distinguishing this issue from the claims to safeguard national identity and fundamental rights. I will, however, show that also those two latter issues cannot be framed in terms of a cooperative relationship.¹⁴⁵ Recall that the BVerfG, in connection with its claim to the prerogative to protect Germany’s national identity has explicitly referred to the principle of sincere cooperation provided in Article 4 (3) TEU.¹⁴⁶

5.3 *Ultra Vires*, Identity, and Fundamental Rights

In its *Maastricht* decision, the BVerfG established the prerogative of the German Bundestag in deciding on all relevant steps of integration, under the threat of a claim of *ultra vires* by German citizens under Article 38 (1) of the Basic Law.¹⁴⁷ The *Maastricht* decision has still used a term that is difficult to translate, *viz. ausbrechender Rechtsakt*, for denoting acts of *ultra vires*.¹⁴⁸ While the *ultra vires* standard has been applied by lower courts in Germany, only once did a German court qualify a Union act as *ultra vires*,¹⁴⁹ and the BVerfG itself rejected all such claims when they were brought before it.¹⁵⁰ With the *Lisbon* judgment, the BVerfG confirmed its *Maastricht* jurisprudence by adding, however, that the right to decide on this matter was reserved to itself, and by avoiding the notion of *ausbrechender Rechtsakt*.¹⁵¹

In its *Honeywell* decision, the BVerfG elaborated on what it considers an act of *ultra vires* on the occasion of the ECJ’s *Mangold* judgment.¹⁵² Thus, such review can apply to ‘acts on the part of the European bodies and institutions with regard to whether they take place on the basis of manifest transgressions of competence’, ‘and where appropriate to declare the inapplicability of acts for the German legal system which exceed competences’.¹⁵³ A breach of competences in other words must be ‘sufficiently qualified’.¹⁵⁴

¹⁴⁵ For a different perspective, see Mayer, ‘Art. 19 EUV’, para 81.
¹⁴⁶ See, critical, Thym, ‘In the Name of Sovereign Statehood’, 1796. This implies a guarantee of Germany membership in a European Union as an association of sovereign states instead of as a federal state. See at 1799.
¹⁴⁷ For the first time, the BVerfG construed this right not only as the right to vote, but also as a right to elect a Parliament having the power to decide all questions of importance for the State, thus clearing the way for judicial review of the Union Treaty. cf. J. Wieland, ‘Germany in the European Union: The Maastricht Decision of the Bundesverfassungsgericht’, *European Journal of International Law*, 5 (1994), 263–265, who has criticized this decision for disregarding ‘the danger of different interpretations of the law of the Union, and the duty of the European Court of Justice to ensure that, in the interpretation and application of the Treaty, the law is observed’.
¹⁵² Case 2 BvR 2661/06 *Honeywell [2010]*.
¹⁵³ Case 2 BvR 2661/06 *Honeywell [2010]*, para 55.
¹⁵⁴ Case 2 BvR 2661/06 *Honeywell [2010]*, para 61.
This seems to require that the ‘impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law’.\(^{155}\) A sufficiently qualified breach by the Court of Justice of the principle of conferral, which would be ‘a structurally significant shift to the detriment of Member State competences’, was therefore not found in the \textit{Mangold} case, despite misgivings by the BVerfG as to the methodology used by the ECJ in its decision.\(^{156}\)

However, in a recent judgment, the BVerfG has apparently tried to pre-empt any development by the Court that it could perceive as \textit{ultra vires} by telling the Court ‘in the spirit of cooperative collaboration’ (\textit{[I]m Sinne eines kooperativen Miteinanders}) how its decision in Case \textit{Åkerberg Fransson}\(^{157}\) would have to be understood.\(^{158}\) The pleonasm in professing ‘cooperative collaboration’ with the ECJ barely conceals the threatening connotation of this argument.

In general, however, there seems to be a high threshold for a finding of \textit{ultra vires}.\(^{159}\) Thus, not all Union measures and decisions by Union courts seem to qualify for an \textit{ultra vires} review, but only those that would somehow affect the distribution of competences between the Member States and the Union. It is difficult to think of an example where such a seismic effect could be produced by an act of secondary law.\(^{160}\) With regard to decisions of Union courts, it is also unlikely that any future judgment of the Court might have such a far-reaching effect.\(^{161}\) However, in retrospect, it is intriguing to speculate on the result of such a review, had it been applied to cases such as \textit{ERTA}, which without doubt fundamentally changed the distribution of competences in the Union.\(^{162}\)

The high threshold applied here is commendable, because should a national constitutional court claim that the Union acts \textit{ultra vires}, it thereby claims that it trespasses its competences as conferred by the Treaty. This claim therefore would not only have implications for the respective Member State but it would be a challenge of more general purport. If the decision by the Court of Justice in \textit{Mangold} had been deemed


\(^{156}\) Case 2 BvR 2661/06 \textit{Honeywell}[2010], paras 68 \textit{passim}. The main scrutiny instead was applied to whether the Court erred in applying the pertinent Directive 2000/78 to the facts of the case in the first place, thus to the scope of application of Union secondary law as determined by the ECJ. Here again the decisive issue for the BVerfG seems to have been that Case C-155/04 \textit{Mangold} [2005] ECR 1-9981 may further expand the effects of directives before their deadline of transposition has expired in the tradition of \textit{Inter-Environnement Wallonie}, but it does not ‘create any new obligations of the Member States violating the principle of conferral’. See Case 2 BvR 2661/06 \textit{Honeywell} [2010], paras 77–78. Does this mean that because the pertinent Directive itself was valid and regulated a prohibition of discrimination on grounds of age, the awarding of a greater effect of this instrument was not \textit{ultra vires}?

\(^{157}\) Case C-617/10 \textit{Åkerberg Fransson}, judgment of 26 February 2013, nyr.

\(^{158}\) Case 1 BvR 1215/07 \textit{Antiterrordateigesetz}, judgment of 24 April 2013, para 91 (<http://www. bverfg.de/entscheidungen/rs20130424_1bvr121507.html>).


\(^{160}\) \textit{This has been called a ‘Euro-friendly’ approach by T. Konstadinides, ‘Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement’, Cambridge Yearbook of European Legal Studies, 13 (2010–2011), 195–218, 215. One could, however, think of a broad understanding of the WTO principle now codified in Art. 3 (2) TFEU, according to which the Union acquires exclusive competence for the conclusion of an international agreement when this is provided for in a legislative act of the Union. I have explained in Chapter 7, however, that there are good reasons for cabining the self-conferring potential of this provision.}


\(^{162}\) See Chapter 3.
ultra vires, the reproach in such a case would not be merely in relation to Germany but to all Member States, since it would be impossible for the ECJ to rule in a manner that would exclusively affect the competences of Germany alone.¹⁶³

We must therefore conclude that the ultra vires review is targeting Union law and is essentially confrontational in nature, without giving much room for cooperation.¹⁶⁴ Thus, in the German literature, the ultra vires case law of the BVerfG has been criticized for concealing the fact that assessing the ultra vires nature of an act of Union law means to examine its legality under Union law, which would be contrary to Article 19 TEU and the duties of solidarity (sic) flowing from Article 4 (3) TEU.¹⁶⁵

Under the title of identity control, the BVerfG demarcated core areas of such statehood the control of which must remain at national level.¹⁶⁶ This was aimed at various procedures foreseen under the Lisbon Treaty to amend primary law deviating from the regular procedure for Treaty amendments provided by Article 24 TEU.¹⁶⁷ All of these procedures thus concern (simplified) Treaty amendments and require action not by the Union, but require action on the German level.¹⁶⁸ The only legal basis for the passage of secondary law which is affected by identity control are Union measures based on the so called flexibility clause of Article 352 TFEU, thus measures that also require specific parliamentary approval in Germany.¹⁶⁹ Despite the fact that identity control by the BVerfG may also result in Union law being declared inapplicable in Germany,¹⁷⁰ there is an important difference to ultra vires control. With identity control in the Lisbon judgment, the BVerfG reflected on the compatibility of the Lisbon Treaty with the German Grundgesetz, whereas the assessment of a decision such as Mangold by the BVerfG reflected primarily on the powers of the Union itself.

The third fault line in the relation between the BVerfG and the ECJ concerns the protection of fundamental rights. Suffice it to recall here that the BVerfG, on a divided vote, set out in the Solange I decision on a rather confrontational course by emphasizing its constitutional prerogatives against the supremacy of Union law as regards the protection

¹⁶³ See Mayer, ‘Art. 19 EUV’, para 90: ‘Der Vorwurf eines kompetenzwidrigen Rechtsaktes betrifft zudem auch Geltung bzw. Anwendbarkeit des Unionsrechts in den anderen Mitgliedstaaten.’ The underlying finding that these powers are limited because Germany could not confer more powers without violating its Grundgesetz, seem second in line here.

¹⁶⁴ See also Mayer, ‘Art. 19 EUV’, para 90: ‘Bei der Frage der Einhaltung sachlicher Kompetenzschranken ist kein Raum für ein Kooperationsverhältnis zwischen BVerfG und EuGH.’


¹⁶⁷ See Thym, ‘In the Name of Sovereign Statehood’, 1802.

¹⁶⁸ Such Treaty changes require the approval of the German Parliament before the German Government can consent in the Council.


¹⁷⁰ Case 2 BvE 2/08 et al. Lisbon Treaty [2009] BVerGE 123, 267, para 241: ‘To preserve the viability of the legal order of the Community, taking into account the legal concept expressed in Article 100.1 of the Basic Law, an application of constitutional law that is open to European law requires that the ultra vires review as well as the finding of a violation of constitutional identity is incumbent on the Federal Constitutional Court alone.’ One is tempted to ask what would apply in a case where German law was not open to European law.
of human rights.\textsuperscript{171} Only with the \textit{Solange II} decision of 1986 did the BVerfG retreat to foregoing its rights of final control in this matter in practice, as long as there was an effective and equivalent protection of human rights at the European level.\textsuperscript{172} Since this time, the BVerfG has only accepted complaints regarding the human rights compatibility of Union secondary law under very strict conditions, which place a heavy burden of reasoning on the complainant.\textsuperscript{173} Similar to identity control and in contrast to the \textit{ultra vires} review, the BVerfG here is rather concerned with setting up national constitutional law limits for the conferral of powers to the Union,\textsuperscript{174} while the \textit{ultra vires} claim attacks Union measures including judgments by the ECJ for being defective in light of Union law itself. However, while the tone might have become more conciliatory on the human rights issue, it remains a conflict ‘on hold’, placed under the suspending condition of an ‘emergency prerogative’.\textsuperscript{175}

6. Conclusion

Loyalty applies to all relationships within the EU, irrespective of whether they involve only the Union institutions, or whether they also involve Member State institutions. There are, however, no precise rules as to how this requirement of loyalty shall translate in constellations that are conflictive or confrontational. As I have shown, such conflicts can arise in all relationships between different actors in the European Union. Except for conflicts of legal basis as forms of institutional conflict, where the European Court of Justice is the designated arbiter, all other constellations involve the Court as actor. Thus, the Court’s case law raises issues both with respect to the lawmaking authority of the Council and the Parliament, as well as with regard to the self-perceptions as final arbiters of national constitutional courts and, above all, the German BVerfG. This Chapter has thus provided the backdrop for a methodological analysis in the remainder of this Part on Construction, where I will discuss why and how exactly the Court’s jurisprudence has often been faulted for being respectively activist and \textit{ultra vires}, and what precisely the role of loyalty is in all of this.

One finding on the role of loyalty, however, may already be made at this point. I have shown that in spite of all attempts to frame the relationship between the various levels in the EU as cooperative and pluralist, there is a confrontational side inherent in the relationship between the constitutional courts of the Member States and the ECJ, which cannot be managed by loyalty.

\textsuperscript{171} Case \textit{Solange I (Internationale Handelsgesellschaft)} BVerfGE 37, 271. On this see Mayer, ‘Art. 19 EUV’, para 80.
\textsuperscript{174} Mayer, ‘Art. 19 EUV’, para 81 and para 90.
\textsuperscript{175} Mayer, ‘Art. 19 EUV’, para 82: ‘Notvorbehalt’. 