Has constitutional pluralism ever been tried out?
On the comparative use of Article 4(2) TEU by some constitutional courts

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ABSTRACT
Constitutional identity has been viewed with suspicion by a number of orthodox EU law scholars. That suspicion is understandable in the light of the German approach to the issue of constitutional conflicts. The Bundesverfassungsgericht, which often sets the tone among constitutional courts in Europe, indeed tends to solve those conflicts on the sole basis of the Basic Law, with little consideration for EU law, thereby discrediting constitutional identity. This paper aims to show, against a background of comprehensive constitutional pluralism, that the German approach is not exclusive of more reasonable approaches by other constitutional courts, as witnessed in relation to the French and the Italian courts. It is on the basis of a pluralist reading of Article 4(2) TEU, as the EU law provision on the basis of which certain core elements of the national constitutions can be reasonably accommodated, that those constitutional courts have either devised constitutional identity or engaged with the CJEU within a shared constitutional framework that defines both the argumentative and substantive limits of constitutional identity. In so doing, far from representing a failure of constitutional pluralism, those constitutional courts stretch the latter to its ultimate limits in a way that has not yet been experienced.

KEYWORDS
constitutional identity, Article 4(2) TEU, primacy, constitutional pluralism, constitutional conflicts

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1. INTRODUCTION

The relationship between domestic law and international law has often been apprehended through the lenses of monism and dualism.\(^1\) Monism implies, first, the existence of a single legal order made up of ‘sub-orders’ and, second, that international law rules can deploy effects for individuals in the domestic legal order without having to be formally incorporated by state organs into domestic law. Monism also postulates a hierarchy between the international and the domestic legal orders and thus the primacy of one set of rules over the other.\(^2\) For its part, dualism refers to the existence of separate, independent legal orders.\(^3\) This doctrine presupposes that the only addressees of international law are states, as opposed to individuals. It implies that an international law rule cannot be applied until it has been transformed into an instrument of domestic law in accordance with the procedures laid down by the latter for that purpose. Since under dualism the respective spheres of application of international law and domestic law cannot overlap, both sets of rules may be supreme in their own sphere since, by definition, there cannot be conflict between them.

Monism and dualism largely appear outdated in terms of grasping the relationship between international law and domestic law nowadays. They appear even more outdated in the context of the relationship between domestic law and European Union law (EU law).\(^4\) First, as two sides of the same coin, monism and dualism aim at providing a theoretical background for tackling the issue of the effectiveness of international law or EU law in domestic law. Within both doctrines, international law and EU law are not addressed as such, but through the perspective of domestic law only. Second, domestic law has changed with the success story of constitutionalism and the establishment in many jurisdictions of constitutional courts specialised at upholding fundamental rights. Third, international law has also significantly been transformed qualitatively and quantitatively since World War II. It increasingly regulates interpersonal relationships by recognising the individual as a subject of international law. That transformation is even sharper with EU law, which has become a hybrid of international law and domestic law.

The EU is indeed an autonomous legal order that has parted with international law and is integrated into the law of the Member States, notably through its significant number of directly effective provisions whose addressees are individuals. With its wide competences, the EU has become almost akin to a domestic legal order the rules of which often conflict with the rules of the Member States since the personal, material, and territorial scopes of EU law and domestic law now frequently overlap. The EU has even acquired a constitutional dimension with the protection of both the rule of law and fundamental rights and of the ‘raison d’être of the EU’;\(^5\)

\(^{1}\)For joint analyses of monism and dualism, see for example Combacau (2001) 5; Starke (1998) 537; Sperduti (1977) 1.
\(^{2}\)Monism may embrace either the primacy of international law or that of national law. Determining which set of rules shall prevail over the others is the result of political preferences. Among the proponents of monism with the primacy of international law, see especially Kelsen (1926) 227; Scelle (2008). For a (rare) illustration favouring monism with primacy of domestic law, see Decenciere-Ferrandiere (1933) 45.
\(^{3}\)See especially Triepel (1923) 73 and Anzilotti (1999) 49.
\(^{5}\)Opinion 2/13, Accession of the European Union to the ECHR EU:C:2014:2454, para 172.
namely, integration in the form of the internal market and of the areas of freedom, security, and justice (AFSJ).

In view of the constitutionalisation of both domestic law and EU law, conflicts between these sets of rules are not simply conflicts between a 'lower law' and a 'higher law' that should obviously be settled to the benefit of the latter by virtue of an automatic and black-and-white approach to the primacy of EU law as the higher law common to several Member States. Certainly, such a straightforward conflict-solving approach prevails and maintains peace in the vast majority of cases when domestic law and EU law are at odds. However, in those few hard cases when the rules of a Member State enjoy a significant degree of both constitutional and democratic legitimacy (call this constitutional identity), the approach is contested. In this scenario, the legal conflict is indeed also a legitimacy conflict that neither monism nor dualism permit the understanding or settlement of.

Against that background, new theories have emerged to grasp the latest transformations of law and politics by globalisation and constitutionalisation. On the global stage, there have been various doctrinal proposals to that effect, be these global administrative law, transnational constitutionalism, or transnational legal pluralism. On the EU stage, the most successful proposals took the form, ahead of the drafting of the treaty establishing a constitution for Europe, of ‘constitutionalism beyond the state’ and, subsequently, ‘constitutional pluralism’. The latter theories in particular have been forged on the basis that ‘the last say’ appears as both a descriptive and normative deadlock, and that, therefore, the relationship between the EU and the domestic legal orders should be approached in a different manner.

Although theories of constitutional pluralism vary from author to author depending on their underlying political assumptions and focuses, there is a common thread running through them. First, it is considered that the various legal orders are not only equally worthy of consideration but also that they interact with one another, as witnessed by the narratives used to underline mutual accommodation, such as ‘engendrement réciproque entre l’un et le multiple’, ‘engagement’, or counterpoint. It follows that the plurality of normative sources and the points of view of the different actors of those legal orders are mutually acknowledged. The various courts, European and national, form a community of judicial interpreters in the

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6Talking about either ‘constitutional identity’ or ‘national identity’ does not really matter since these are ultimately only labels. I will, however, refer subsequently to constitutional identity rather than national identity. The latter expression appears more suitable since, first, it appears as a handy shorthand for the circumloquacious Article 4(2) TEU; second, it better accounts for the proposed purpose of that provision: to allow for the protection of core features of the national constitution as the ultimate, insurmountable stumbling block to the uniform application of EU law; third, its Habermasian connotations make it a good fit in post-sovereignty Europe.


8See Tsagourias (2007).

9See Griffith (1986) 1; Zumbansen (2010) 141.

10See Weiler and Wind (2003); Dehousse (2002).


European legal space where national courts take due account of EU law and ECHR law, the CJEU takes due account of national law and ECHR law, and the ECtHR takes due account of both EU law and national law. Second, constitutional pluralism puts emphasis on both the autonomy of each legal order but also on their interlocking, derived from their overlapping scopes of application. Third, as a departure from Kelsen’s pyramid, constitutional pluralism rests, together with the refusal of the last say inherent in any reasoning grounded in the absolute primacy of one order over another, on the heterarchy of the relationship between those orders. Fourth, since constitutional pluralism theories are neither radical nor anarchical, they feature a vertical, orderly element in the form of the principles of constitutionalism shared between the various legal orders. In this, constitutional pluralism does not appear as purely descriptive. It takes on a normative dimension whereby it is considered that pluralism is a public good worth preserving, albeit only within the limits of constitutional values that should eventually prevail. In that respect, constitutional pluralism partakes in constitutionalism.

It is on constitutional pluralism that this paper focuses, as the most promising doctrine not only to describe judicial practices and the relationship between legal orders in Europe, but also, in a more normative fashion, to overcome the conundrum inherent in the competing claims to primacy by proposing an alternative, workable, and legitimate conflict-resolution model for hard cases of constitutional conflict. In this regard, it is to be noted in first place that constitutional pluralism theories generally support the primacy of EU law over national law on the simple basis that EU law is a higher, common law. Very few authors have dared to push constitutional pluralism to its outer limits whereby the latter would be relied on to legitimise the application of a rule or principle of a Member State constitution against the primacy and uniformity of either an international law or an EU law provision.

Mattias Kumm and Armin von Bogdandy have been the two main proponents, in respect of those theories, of a primacy of international law that can sometimes be qualified by substantive considerations of constitutional legitimacy. Each of them has embraced their own thick and concrete view of constitutional pluralism that, first, acknowledges the legitimacy of certain claims based on national constitutions; second, embraces constitutionalism as a whole, be it that which is derived from national constitutions, the ECHR, the EU, or other global legal orders; third, explicitly accepts that, in practice, a national law provision may prevail in certain exceptional circumstances. Kumm even went as far as providing a shrewd conflict-resolution model whereby the formal principle of international legality shall only enjoy the presumption of authority which can be rebutted by other, competing principles.

Constitutional pluralism is quite different from radical pluralism inasmuch as advocates of radical pluralism deny the existence of a system of universally shared principles. They value competition and a lack of coordination as the best means by which to ensure a good degree of responsibility at the international level. Radical pluralism does not seek order but accepts the virtues of disorder. Arguably, radical pluralists are a new breed of dualists. To that effect, see for instance De Burca (2009).


The principle of international legality can be rebutted by the jurisdictional principle of subsidiarity, the procedural principle of adequate participation and responsibility, and the substantive principle requiring the judge to make reasonable decisions which respect fundamental rights.
Both authors subsequently extended their approach specifically to constitutional conflicts involving EU law. They did so on the basis of a specific provision of EU treaties themselves – namely, Article 4(2) TEU (or its predecessor in the constitutional treaty), whereby the Union respects the national identity of the Member States inherent in their fundamental political and constitutional structures. That hybrid provision, which has a formally EU law shell and a substantively domestic law content, may indeed be interpreted as epitomising constitutional pluralism to the extent that it mandates the EU to uphold those provisions of national constitutions that are endowed with the highest democratic legitimacy (national or constitutional identity) against certain (less legitimate) EU law provisions. This paper specifically focuses on Article 4(2) TEU with regard to its potential to settle constitutional conflicts since, as Stephen Weatherill aptly described it, that provision is a gateway through which national and subnational concerns pass and are transformed into specifically EU concerns...; a way to mediate claims of EU law which tend towards homogeneity and centralization and claims of national identity that tug towards fragmentation – and to nudge in the direction of a managed resolution that yields pluralism and mutual respect.

Indeed, Article 4(2) TEU has the trappings of constitutional pluralism and can serve, in the wake of Kumm and von Bogdandy’s work, as a tool for solving constitutional conflicts in a different, arguably richer way than the famous standard of the ‘equivalent protection of fundamental rights’ that has been used until now in one direction only: to establish the primacy of EU law and the jurisdiction of the CJEU.

While I recently assessed the interpretation of Article 4(2) TEU by the CJEU, the aim of this paper is to determine what use constitutional courts have made, if any, of Article 4(2) TEU. More specifically, as much as I previously looked at the extent to which the CJEU accepts that

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20 This is the thesis that I defended in my Ph.D, discussed at the European University Institute in 2012. See Millet (2013). For relatively similar views, see Di Federico (2019) 347; Schnettger (2019) 9.
21 Weatherill (2016) XI.
22 See the famous Solange II judgment of the German Federal Constitutional Court (BVerfGE 73, 339); Italian Constitutional Court, Frontini, 18 December 1973, sentence no. 183; Fragil, 13–21 April 1989, sentence no. 232; ECHR, no. 45036/98, Bosphorus c/Irlande, decision of 30 June 2005; CE, Ass., Société Arcelor Atlantique et Lorraine, 8 February 2008, no. 287110. While the judicial movement concerning the equivalent protection standard has spread, it is regrettable that the ECJ has not issued a decision of the Solange I type in its Kadi judgment (CJCE, 3 September 2008, Kadi et Al Barakaat c/Conseil et Commission, C-402/05 P et C-415/05 P, Rec. 6351).
23 That appealing standard, which has been relied on by several national courts and by the ECtHR, bears witness to the intuition according to which fundamental rights conflicts across legal orders can be cushioned by substituting a substantive logic of fundamental rights as opposed to a formal logic of legal order. That standard implies internormativity since it justifies in certain circumstances transforming arguments deriving from domestic law or ECtHR law into arguments of European Union law. Although the standard of the equivalent protection of fundamental rights may pacify to a certain extent the relationship between European and domestic law, it nevertheless remains imperfect because of its main function (to guarantee the primacy of EU law) and of the peculiar approach to constitutionalism that underpins it (fundamental rights as opposed to other constitutional requirements). In particular, it does not allow of itself the favouring of: a) an enhanced protection of human rights as would result from Member State law; b) the safeguarding of ‘non-fundamental rights’, such as general interest considerations or collective goods; c) anything else but EU law in the case of conflict; d) the jurisdiction of another court but the CJEU.
24 Millet (2021) 571.
Article 4(2) empowers the Member States to give substantive precedence to a national constitutional identity claim, the present paper examines to what extent constitutional courts accept going down the route of Article 4(2) TEU as a formal provision of EU law to buttress their claims: is it true, as some academics have posited in order to conclude the failure of constitutional pluralism,25 that Article 4(2) TEU has been relied on by constitutional courts in a purely instrumental manner; or are there instances that are more nuanced when constitutional courts have embraced that provision and its spirit so that the conclusion should rather be that constitutional pluralism has not yet realised its full normative potential as regards constitutional conflict resolution?

To address those issues, I look at three constitutional courts; namely, those of Germany, Italy, and France. Those courts have been chosen for both their representativeness of different models of constitutional adjudication and, of course, although they are not the only ones to do so, because they have referred to Article 4(2) TEU in their case-law. Only their case-law in relation to Article 4(2) TEU and the issue of constitutional conflicts is examined here. I will therefore leave out other aspects that are arguably crucial for the understanding of constitutional courts through the lenses of constitutional pluralism in a European legal context, in particular those courts’ increasing reliance on the EU Charter in adjudicating fundamental rights.26 Because of the limited material scope of this paper, the proposed typology does not therefore pretend to be comprehensive. It will need to be enriched by other variables in future work to offer broader conclusions regarding the overall adherence of each constitutional court to constitutional pluralism.27

Against that background, I will first examine those courts that have referred to Article 4(2) TEU in a purely instrumental manner (2) before moving on to those courts that have embraced a pluralist approach (3). I will eventually, by way of conclusion, make the normative case for a committed pluralist use of Article 4(2) TEU as a means of adjudicating constitutional conflicts (4).

2. THE INSTRUMENTAL APPROACH TO ARTICLE 4(2) TEU

The instrumental approach merely consists of a constitutional court turning Article 4(2) TEU into a weapon against EU law in order to fully and unreservedly preclude the application of EU law provisions that contradict its own national constitutional identity. There, constitutional

26For other comparative studies on the EU-related case-law of constitutional courts, see e.g. Burgorgue-Larsen (2011); Claes, de Visser, Popelier and van de Heyning (2012); Saiz Arnaiz and Alcoberro Llivina (2013); van der Schyff, (2019) 305. Regarding constitutional courts’ reliance on the EU Charter of fundamental rights, see, for a comparative approach, Rauchegger (2020) 463.
27It follows that a constitutional court that does not appear pluralist in its approach to Article 4(2) TEU and constitutional conflicts can still be pluralist in other respects. In particular, the German Federal Constitutional Court, especially its first senate, has proved pluralist on various occasions in the past. For example, the Görgülü judgment (BVerfG, 2 BvR 1481/04, 14 October 2004) is a good illustration of constitutional pluralism in action as regards the taking into account of the various sources of fundamental rights by that court. In that case, the Federal Constitutional Court interpreted the Basic Law in conformity with the ECHR, while nothing in the Basic Law requires it to be interpreted in the light of human rights treaties. By the same token, it accepted, in its Right to be forgotten II order (BVerfG, 1 BvR 267/17, 6 November 2019) that the EU Charter of fundamental rights can in certain circumstances be the only standard of constitutional adjudication in Germany.
identity is considered primarily as a national-law-based claim. Within that approach, there is no
taking into account of Article 4(2) TEU as an EU law provision that channels constitutional
identity claims. Article 4(2) is referred to at a discursive level and no concrete consequences are
drawn therefrom. The practice of the German Federal Constitutional Court is a good illustration
of such approach. a)

a) The specifics of the instrumental approach

First, the instrumental approach will either be revealed through direct reference in judgments
to Article 4(2) TEU or indirectly through reliance on the narratives contained therein; that is, to
constitutional or national identity. Since such reference is however common to the instrumental
and the pluralist approaches, it cannot be conclusive in itself. In accord with the instrumental
approach, constitutional courts will not rely on Article 4(2) TEU as a legal ground specifically
provided for by EU law to address constitutional conflicts, but merely as an argument conve-
niently borrowed from EU law to harness support for national-law-based identity claims.

Second, an instrumental approach is characterized by a lack of genuine argumentative
attempt to explain why the element of national constitutional identity that is at issue is worthy of
protection against certain provisions of EU law. A constitutional court would indeed fail to give
reasons for why, first, the national trait at issue is crucial or specific to the Member State raising
it so that the EU should show utmost respect for such a highly democratically legitimate feature;
and, second, why safeguarding it would not undermine EU values or other significant constitu-
tional provisions of EU law.

Third, the CJEU will not usually be involved in determining to what extent the constitutional
identity claim can be accommodated by EU law, either simply because no request for a pre-
liminary reference is made or, if it is, because the constitutional court does not explain why the
claim at issue concerns a national constitutional element that is more important than any others.
As a result, the CJEU is not in the position to assess whether that claim may exceptionally prevail
over EU law. To transpose Albert Hirschman’s own terminology to the field of constitutional
conflict, the ‘voice’ of constitutional courts is thus not raised in relation to overall ‘loyalty’ to-
wards the EU and the CJEU, but with an immediate ‘exit’ tone that does not necessarily take the
form of a withdrawal from the Union but that of the unilateral disapplication of EU law to the
benefit of the national constitution.

b) The German Federal Constitutional Court

When looking at each of those three criteria, it appears that the German Federal Consti-
tutional Court (FCC or BVerfG) considerably epitomises that instrumental approach to Article
4(2) TEU.

The German FCC case-law in relation to EU law is relatively well known by all those with an
interest in the relationship between EU law and national law. In particular, students with a
basic knowledge of comparative law will have heard about the ‘Solange saga’ that initially led the

28 Although they are outside the scope of this paper, it is to be noted that several Central European constitutional courts
that also referred to Article 4(2) TEU have followed ‘the German model’.


30 For a recent overview, see Calliess (2019) 153.
FCC to examine the compatibility of EU law acts with regard to the fundamental rights that are protected by the Basic Law before changing tack in 1986 by accepting the suspension of its review of EU acts as long as the EU ensured the sufficient protection of fundamental rights at its own level. That paradigmatic change is a good illustration, on the one hand, of the FCC’s keenness for fundamental rights as the paramount consideration in German constitutional law and, on the other hand, of its pragmatic readiness to somehow delegate the task of enforcing those rights to the CJEU once the latter had established a decent record in regard to that matter.

What is usually less known, at least to undergraduate students, is that the German FCC kept coming up in the following years with new types of constitutional limits to EU integration whereby it would display its reluctance to give carte blanche to EU law in general and to the CJEU in particular as regards examining the lawfulness of EU acts and their legal effects in Germany. First, in its 1993 judgment on the Maastricht Treaty, the FCC took the view that it was incumbent on it to assess whether EU institutions would act ultra vires; that is, outside of the competences that are attributed to the EU by the Member States. Second, in its 2009 judgment on the Lisbon Treaty, the FCC held that it would examine whether EU acts (or national acts implementing EU law) do not violate the ‘inviolable core content of the Basic Law’s constitutional identity.’ In other words, while the Solange II judgment was praised for its pragmatism and cooperativeness towards the CJEU, the FCC devised no fewer than two new hurdles for EU integration within a relatively short period of time.

In both judgments, some evidence has been forthcoming on the part of the FCC towards EU law. In the Maastricht judgment, the FCC spoke of a relationship of cooperation (Kooperationsverhältnis) between the CJEU and itself. In the Lisbon judgment, that narrative was abandoned and replaced by the more general but similar idea of openness towards European law (Europarechtsfreundlichkeit), with explicit mention of the need to depart from a rigid and old-fashioned conception of sovereignty and to stop seeing the state as ‘a myth, or an end in itself.’

Apart from those general and somewhat harmless hints, the FCC strikingly referred to Article 4(2) TEU in the Lisbon judgment and stated that constitutional identity was both a national law concept and an EU law concept. Relying on a particularly apt metaphor, the FCC held that ‘the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area.’ Further, ‘the principle of conferral under European law and the duty, under European law, to respect identity, are the expression of the foundation of Union authority in the constitutional law of the Member States.’

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31BVerfGE 37, 271 (Solange I), 29 May 1974.
32BVerfGE 73, 339 (Solange II), 22 October 1986.
33BVerfGE 89, 155 (Maastricht), 12 October 1993.
34BVerfGE 123, 267 (Lissabon), 30 June 2009.
35BVerfGE 123, 267 (Lissabon), 30 June 2009, para 240.
36On that concept, see for example Streinz (1995) 668 et seq.
37BVerfGE 123, 267 (Lissabon), 30 June 2009, para 223.
38BVerfGE 123, 267 (Lissabon), 30 June 2009 para 224.
39BVerfGE 123, 267 (Lissabon), 30 June 2009 para 240.
40BVerfGE 123, 267 (Lissabon), 30 June 2009, para 234.
Such reference to Article 4(2) TEU prima facie appears to embrace constitutional pluralism. However, the EU-friendly approach of the FCC largely stops at the level of its discourse. The legal reality – that is, the normative consequences drawn from Article 4(2) TEU as a Treaty provision – is pretty different. If the discourse is admittedly pluralist insofar as it acknowledges both the EU and the national levels as sites of legal authority, the actual use of constitutional identity is somewhat different. Behind friendliness rather lies suspicion, wariness, and a clear choice of constitutional identity as a purely national law concept.41

First, that suspicion and wariness already appear at that very discursive level with regard to competing narratives relied on by the FCC. In its Lisbon judgment, the FCC indeed also put emphasis on another concept that balances the openness to European law; namely, the concept of ‘responsibility for integration’ (Integrationsverantwortung).42 That concept is misleading. While it seems at first glance to suggest that more integration is imperative ‘whatever it takes’, it actually almost means the opposite: national authorities must ensure that EU integration takes places within certain limits. According to the FCC, ‘a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, … to comply internally with the requirements under Article 23.1 of the Basic Law’,43 and ‘[i]t must be possible within the German jurisdiction to assert the responsibility for integration if obvious transgressions of the boundaries occur when the European Union claims competences … and to preserve the inviolable core content of the Basic Law’s constitutional identity by means of an identity review’.44 Thus, with ‘responsibility for integration,’ the FCC requires national authorities ‘to take account of the essential democratic requirements and, eventually, vindicate a set of competences or the core elements of the constitution’45 and even ‘the withdrawal from the European Union if an imbalance between type and extent of the sovereign powers exercised and the degree of democratic legitimation arises in the course of the development of the European integration’.46

Second, the grand statements on openness and reliance on Article 4(2) TEU do not match the (lack of) normative consequences drawn from Article 4(2) TEU. The FCC unambiguously states, just after citing Article 4(2) TEU, that ‘the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect.’47 There is no longer any sign of Article 4(2) TEU and of constitutional pluralism. Worse, the sole competence of the FCC to carry out the ultra vires review or to make a finding of a violation of constitutional identity by an EU act is expressly laid out,48 while in the Maastricht judgment the

41See e.g. Mayer (2010) 237.
42BVerfGE 123, 267 (Lissabon), 30 June 2009, paras 236 to 245.
43BVerfGE 123, 267 (Lissabon), 30 June 2009, para 236.
44BVerfGE 123, 267 (Lissabon), 30 June 2009, para 240.
45BVerfGE 123, 267 (Lissabon), 30 June 2009, para 240.
46BVerfGE 123, 267 (Lissabon), 30 June 2009, para 264.
47BVerfGE 123, 267 (Lissabon), 30 June 2009, para 241: ‘The ultra vires review as well as the identity review may result in Community law or, in future, Union law being declared inapplicable in Germany. 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.’
FCC had insisted on the need to associate the CJEU through a preliminary reference. There seems, therefore, to be actual regression in the relationship of cooperation.

Third, as regards more specifically the identity review, there is no sign of the taking into account of constitutional identity as an EU law concept. The FCC has linked constitutional identity with a quintessentially German provision – namely, the Eternity Clause of the Basic Law; that is, Article 79(3), which sets substantive limits on constitutional revision. The FCC has thus conflated two pretty different issues; namely, the revision of the Constitution by the legislature or by the people itself and the impact of certain EU acts adopted by EU institutions and organs on German territory. In other words, there is nothing tailored to EU law in the German approach to constitutional identity. The latter is not defined specifically for the purposes of ‘fighting’ certain EU law provisions that would constitute a threat to that identity.

Fourth, on top of having little to do with EU law itself, constitutional identity appears to largely overlap with Member States’ competences. The Lisbon judgment makes the identity review hard to distinguish from the ultra vires review. In particular, it defined sensitive domains for the purposes of the identity review as follows:

Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5).

When looking at those fields, it appears that they refer to the current, residual competences of the Member States. They are therefore prone to be best guaranteed through ultra vires review in order to prevent the EU from adopting acts in those fields where it has, at best, only a complementary competence. Accordingly, the identity review appears superfluous.

Against that background, it is therefore little wonder that, in the PSPP judgment regarding the lawfulness of an asset purchase programme of the European Central Bank (ECB), it is through ultra vires review that the FCC declared unconstitutional both the Weiss judgment of the CJEU and the ECB programme. In view of its history and federal tradition, Germany is primarily interested in upholding the federal divide between, domestically, the Bund and the Länder. It is therefore logical that, in Germany, the issue of the distribution of competences between the EU and the Bund is salient. That issue, together with fundamental rights, is arguably

50BVerfGE 123, 267 (Lissabon), 30 June 2009, para 252. See also paras 253 to 260 for further judicial developments on these five categories.
51Case No. 2 BvR 859/15 (Public Sector Purchasing Programme, 'PSPP'), 5 May 2020.
52CJEU, Case No C-493/17, Weiss, 11 December 2018 (ECLI:EU:C:2018:1000).
the true core of Germany’s constitutional identity. As a result, it is no easy task to find an autonomous legal content for identity that would not already come under the umbrella of fundamental rights or ultra vires. Interestingly, the only FCC judgment in relation to which the identity review was carried out was its 2015 judgment on the European arrest warrant and in absentia convictions, wherein the FCC considered that human dignity was part of Germany’s constitutional identity. Although that statement is certainly true, human dignity actually also comes under the umbrella of fundamental rights and its respect could therefore have been equally assessed within the fundamental rights review. At a time when the latter is suspended, the added value of the identity review might actually precisely lie in the fact that the latter review may qualify Solange II by opening up the possibility to carry out that review for certain fundamental rights.

It follows that, in Germany, constitutional identity is primarily, if not only, a national law concept. References to Article 4(2) TEU are mainly instrumental and permit the FCC to unilaterally assert constitutional identity counter to EU law. Such a position stands in stark contrast to that of the French and Italian constitutional courts, which, in their own ways, appear to take Article 4(2) TEU more seriously.

3. THE PLURALIST APPROACH TO ARTICLE 4(2) TEU

The alternative approach to Article 4(2) TEU, which is imbued with constitutional pluralism, consists of a constitutional court genuinely accepting that the latter provision is a legal ground on the basis of which constitutional identity claims could, under certain conditions, be upheld in conjunction with the ‘European clauses’ of national constitutions – that is, those provisions of the latter that allow for the participation of a Member State in the European Union. In so doing, a constitutional court fully acknowledges the EU nature of Article 4(2) TEU and that constitutional identity claims are to be channelled through that provision. The practices of the French and Italian constitutional courts are good examples of such an approach.

a) The specifics of the pluralist approach

As stated above, the pluralist approach will be most visibly characterized by a discourse, sometimes shared with the instrumental approach, that refers to both the EU and the national

53It is to be noted that, in Honeywell, a very pluralist decision of 6 July 2010 (BVerfGE 126, 286), the FCC seemed to have given up the ultra vires review by subjecting a finding of ultra vires to a sufficiently characterized and obvious violation of the principle of attributed competences that would have considerable consequences for the distribution of competences between the EU and the Member States (para 61). The FCC held that a preliminary reference would then be needed before any finding of a breach of (para 60). That judgment seemed to herald a new era whereby the ultra vires review would become the new Sleeping Beauty after the fundamental rights review in Solange II. This, however, was not the case.

54The added value of the identity review per se is therefore contested in Germany. See for example Calliess (2019) 169 et seq.


56Undoubtedly, a third approach to Article 4(2) TEU can be intellectually contemplated whereby constitutional courts consider that Article 4(2) TEU is the only legal ground whereby they can make their constitutional identity claims. However, such an approach, which would anyhow be monist and not pluralist, is not to be found anywhere in practice, even in an EU-law-(very)-friendly country such as The Netherlands. It thus hardly requires further development here.
legal orders. In this, the dual legitimacy of constitutional identity is acknowledged, making the latter apt to bridge the gap between both legal orders. However, to distinguish it from the instrumental approach, some practical consequences must confirm that discourse.

First, constitutional courts shall accept that they are only one of the actors in constitutional identity, albeit a major one, the other key actor being the CJEU. If constitutional identity is indeed a concept shared by the national and the EU legal orders through the hybrid Article 4(2) TEU, it should be jointly interpreted by constitutional courts and by the CJEU. As a consequence, in all cases raising issues pertaining to national constitutional identity, both courts should have the opportunity to address those issues in their own capacity – that is, in accordance with their own role, constraints, and specificities. In this respect, while it is rather obvious that it should be for the sole constitutional court to define national constitutional identity and find out its actual content, it is for the CJEU to determine whether such claim may fit into EU law; that is, whether Article 4(2) TEU is to be interpreted as allowing that claim in the specific circumstances of a case.

Second, as a necessary consequence of the previous point, the use of the preliminary reference procedure is paramount. It is for now the only legal avenue that allows for such judicial interaction to unfold. That avenue is particularly appropriate since a constitutional court may, in the context of a specific case in which there is an apparent conflict between EU law and the national constitution, raise a constitutional identity claim before the CJEU and thoroughly explain to the latter why the identity element in issue is crucial and suggest ways to tackle that claim. The CJEU would for its part be able to make an enlightened decision on the basis of the precise information provided to it after pondering constitutional identity arguments and competing EU law arguments.57

Third, in relation to that pondering, the outcome of the case should meet the test of reasonable accommodation. In a truly constitutional pluralist universe, as much as constitutional identity arguments cannot always win, the same holds true for competing EU law arguments. The CJEU is to accommodate to the greatest possible extent constitutional identity claims while not undermining the essential provisions of EU law, the core of EU law – its own constitutional identity, so to speak. That pondering is to be carried out by the CJEU, not the constitutional courts of the Member States. Although it is integral to the pluralist approach, it will therefore not be further discussed here in view of the focus and aim of this paper. Emphasis should however be put on the fact that a genuinely constitutional pluralist approach requires discernment and restraint on both sides: while constitutional courts must take due account of EU law and cannot unreservedly rely on constitutional identity to try to escape EU law obligations, the CJEU is to give proper consideration to constitutional identity claims, which requires in all circumstances motivating its decisions on those claims, but also upholding them when the scales of justice and legitimacy tilt towards them rather than towards other EU law provisions.

Fourth and final, the actual content of the constitutional identity claims that are put forward by a constitutional court will also indicate the degree of adherence of a constitutional court to the constitutional pluralist approach. That element is directly connected to the abovementioned requirement of constitutional courts being reasonable when phrasing constitutional identity claims. Constitutional courts must therefore anticipate whether a constitutional identity claim is

57On that pondering by the CJEU, see e.g. Millet (2021).
acceptable in light of the spirit of the European Union. In that regard, a constitutional identity claim that conflates with a fundamental rights claim is, in all likelihood, more prone to succeed than a national competence claim or a claim to the fostering of some collective values, above all when those values prove illiberal. In any event, a pluralist approach does not require coming up with a priori and abstract definitions of what may constitute constitutional identity. Although doing so certainly fosters legal certainty, it appears more appropriate for constitutional courts to define it incrementally and concretely in the circumstances of each case brought to their attention. It is indeed in the context of specific factual situations that a judge may simultaneously become aware that that situation is governed by a specific EU law provision and that there is a conflicting key element of national constitutional law in play because EU law does not safeguard the value that is protected by the national constitution.

b) The French Constitutional Council

In relation to that framework of analysis, the constitutional identity case-law of the French constitutional court is largely imbued with constitutional pluralism.

At the level of the discourse on EU law, the Conseil constitutionnel referred to Article I-5 of that treaty, the content of which was subsequently taken over in Article 4(2) TEU in its 2004 decision on the Treaty establishing a Constitution for Europe to conclude that ‘the title of the said treaty has no effect upon the existence of the French Constitution and the place of the latter at the summit of the domestic legal order’. It added immediately afterwards, after citing Article 88-1 of the French Constitution (that is the European clause of the latter), that ‘the drafters of this provision thus formally acknowledged the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order’. In that sentence, the Conseil constitutionnel used the same discourse that was used by the CJEU in the judgment of Costa v Enel 40 years earlier. In so doing, the French Constitutional Council not only suggested a different reading of the concept of legal order in linking it to the idea of integration. It also repeated in a pluralist gesture of mutual recognition the very expression used by the CJEU. In so doing, the Constitutional Council reckoned that the very concept of integration of legal orders, far from implying their merging, rather refers to their interweaving that constitutional pluralism theories account for.

Two years later, the Conseil coined ‘the constitutional identity of France’ as a limit to the implementation of EU law into national law. While it has been previously explained that,  

58This refers to a situation when Article 4(2) TEU could be relied on together with Article 53 of the EU Charter of Fundamental Rights. Because of their hybrid character as EU law provisions with a national law content, both provisions may be seen as embodying constitutional pluralism and trigger outcomes that are favorable to national law concepts or interpretations. For further development, see Millet (2020) 441.


61It should be noted that the Court of Cassation itself referred to this expression as early as in 1975 in its famous judgment in Société des cafés Jacques Vabre (C.Cass, ch. mixed, 24 May 1975, Soc. Cafés Jacques Vabre, Bull. civ. no. 4, 6) where it started carrying out a review of the compatibility of statutes with treaties, thereby acknowledging the primacy of the latter over the former by virtue of Article 55 of the French Constitution.

62See Azoulai (2011) 311.
in Germany, constitutional identity was an additional limit to EU integration on top of fundamental rights and state competences, both the expression and its use witness a pluralist stance in France. The Conseil constitutionnel has indeed made it clear, albeit in two non-binding documents, that that concept took its cue from Article I-5 of the treaty establishing a constitution for Europe, thus indirectly from Article 4(2) TEU. Ever since, constitutional identity has been consistently relied on by the Conseil as the sole legal means to relax its review of a particular type of national legislation and of international agreements; namely, those the content of which is directly taken from EU law by subjecting it only to respect for certain features of the French constitution.

It is in the context of a directive that the Conseil constitutionnel indeed set up the constitutional identity review on the occasion of the assessment of a statute transposing the directive on the harmonisation of certain aspects of copyright and related rights associated with information society. After stating the duty of the Conseil to comply with the transposition requirement under the European clause of the French constitution, the judgment set out a limitation on that duty: the transposition of a directive cannot ‘run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto’. It derives from this judgment – and from the line of case-law that followed – that, as a matter of principle, the Conseil no longer undertakes a review of transposing laws with regard to the Constitution unless the constitutional identity of France is violated.

In so doing, on the one hand the Conseil has ultimately safeguarded the relative supremacy of the Constitution by leaving open the possibility of censoring a transposing law that goes against the ‘constitutional identity of France’. On the other hand (and primarily in my view), the Conseil constitutionnel has acknowledged, as a matter of principle, the specific nature of transposing laws and the consequences attached to the primacy of EU law in terms of judicial review: it is

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63See the official commentary related to the 2006 decision on Copyright (Cahiers du Conseil constitutionnel n° 21) and, previously, the New Year Greetings of the President of the Conseil constitutionnel to the President of the Republic in 2005 (Cahiers du Conseil constitutionnel n° 18).

64Conseil constitutionnel, decision n° 2006-540 DC of 27th July 2006, Act pertaining to copyright and related rights in the information society.

65Article 88-1 of the French Constitution provides that: ‘The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common’.


67See e.g. Conseil constitutionnel, decisions n° 2006-543 DC of 30 November 2006, Act pertaining to the energy sector; decision n° 2008-564 DC of 19 June 2008, Act on genetically modified organisms; decision n° 2010-605 DC of 12 May 2010, Act pertaining to the Opening up to Competition and the Regulation of Online Betting and Gambling. It should be noted that this case-law also applies to the concrete (as opposed to the abstract, ex ante) review of transposing statutes (decision n° 2010-79 QPC of 17 December 2010, Kamel D.).

68In practice, two situations must be distinguished depending on whether the contested legislative provision at issue is the necessary consequence of unconditional and precise provisions of a directive. If that is the case, the Conseil shall not examine whether the impugned norm is compatible with the Constitution unless a rule or principle pertaining to the constitutional identity of France is violated. If that is not the case, hence if that norm is the expression of a discretionary choice on the part of the national legislator when transposing the directive, there is then no risk to the primacy, unity, and effectiveness of EU law so that the Conseil may assess whether this discretion has been used in full compliance with the Constitution as a whole. For further development, see Millet (2019) 134.
only for the CJEU, under the Foto-Frost mandate,\textsuperscript{69} to strike down a piece of EU secondary law, not for national courts. Therefore, the Conseil’s case-law on transposing laws must be seen as a major pluralist breakthrough since it could not be taken for granted that they would easily renounce (especially to the benefit of the CJEU) the performance of their main duty – namely, controlling the conformity of statutes with the Constitution. Furthermore, unlike Germany again, the constitutional identity of France may be the subject matter of a constitutional amendment so that a finding of the Conseil whereby an EU directive breaches that identity could be legally overcome.

The scope of the Conseil constitutionnel’s identity review has subsequently been slightly (and logically) expanded to include EU regulations and international agreements concluded by the EU. First, in its assessment of the French statute adapting the General Data Protection Regulation into domestic law, the Conseil held that ‘transposing a directive or adapting a domestic law to a regulation cannot conflict with a rule or principle inherent to France’s constitutional identity, except that which has been consented to. In the absence of questioning such a rule or principle, the Constitutional Council has no jurisdiction to oversee the constitutionality of legislative provisions that merely draw the necessary consequences of unconditional and precise provisions of a directive ‘or the provisions of a European Union regulation’.\textsuperscript{70} Second, when examining the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States,\textsuperscript{71} the French constitutional court restricted its review to constitutional identity for those provisions of that agreement in which the Union had exclusive competence.

Overall, when looking at the different situations in which constitutional identity has emerged as a relevant standard, it follows from the way in which constitutional identity specifically operates in France that the Conseil should not be demonised for making of it a yardstick for its review of those different kinds of acts adopted by the Union institutions. In this respect, deference seems to be the key word. By limiting that review to constitutional identity, the Conseil indeed expresses deference towards the former by clearly suggesting that it may declare them unconstitutional only in very exceptional circumstances which, incidentally, has never happened so far. That deference also emerges from the Conseil’s explicit acknowledgment of the CJEU’s jurisdiction to monitor the respect through EU directives and regulations of both the competences set forth in the treaties and the fundamental rights guaranteed by EU law.\textsuperscript{72} The Conseil went even further as regards international agreements concluded by the EU. Not only did it quote the CJEU’s Opinion 2/15 on the compatibility with EU law of the new-generation trade agreement with Singapore, but it also relied on it in order to determine whether a certain matter pertains to the exclusive or shared competences of the EU. Far from being concerned with ultra vires, the Conseil thus takes for granted that it is for the CJEU to decide whether EU institutions have acted in accordance with the competences conferred upon them.\textsuperscript{73}

\textsuperscript{69}CJEU, Case No 314/85, Foto-Frost, 22 October 1987(EU:C:1987:452).
\textsuperscript{70}Conseil constitutionnel, decision no. 2018-765 DC of 12 June 2018, Law related to the protection of personal data, para 3 (emphasis added).
\textsuperscript{71}Conseil constitutionnel, decision no. 2017-749 DC of 31 July 2017, CETA.
\textsuperscript{72}Conseil constitutionnel, decision n°2004-496 DC of 10 June 2004, Act on trust in the digital economy, para 7.
\textsuperscript{73}To that effect, Conseil constitutionnel, decision no. 2017-749 DC of 31 July 2017, CETA, paragraph 14.
Third, the *Conseil constitutionnel* also proves reasonable in terms of anticipating preliminary references in matters when constitutional identity would be raised. Although the Conseil has made it explicit that the onus for such a reference primarily lies with ordinary courts (for reasons peculiar to the general absence of jurisdiction of the *Conseil* to examine the compatibility of parliamentary acts with treaties and other non-domestic acts), it does not rule it out for itself. The *Conseil* has already referred a case to the CJEU once, albeit in a highly specific situation regarding the European arrest warrant.\(^{74}\) Since that matter does not fall under Article 88-1 of the constitution, constitutional identity is no parameter for review in that context. As far as the EU legislation on the European arrest warrant is concerned, it has been entirely insulated from constitutional review since the revision of the constitution that introduced a specific heading for that subject; namely, Article 88-2. When called upon to indirectly examine that legislation through national transposition measures, the Conseil no longer acts as a constitutional court but as an ordinary court which looks at whether those measures are compatible with EU law. This explains why, in this situation, the Conseil would readily refer to the CJEU under Article 267 TFEU.

Apart from that very specific matter, nothing indicates that the *Conseil constitutionnel* would not also do so when it, for the first time, considers that constitutional identity is threatened by EU law. This has not materialised yet, even in the only decision so far when the Conseil discovered positive content for constitutional identity in the form of the prohibition to delegate to private entities the general administrative police powers which are inherent to the use of ‘public force’ necessary for guaranteeing rights.\(^{75}\) In that case concerning the obligation laid down by an EU directive for air transportation companies to provide return transportation to passengers that were refused entry into France, the Conseil did not even have to consider whether making a preliminary reference to the CJEU. It simply (and conveniently) held that the disputed provisions did not have the purpose nor the effect of making the respective companies responsible for the monitoring of persons that must be returned, such measures being solely within the competence of the police authorities.\(^{76}\)

It follows that the path embraced by the French constitutional court appears to a great extent harmless to EU integration. Until now, the *Conseil* has proved reasonable through a pluralist use of constitutional identity: the scope of that review is limited; it has not been devised as a limit to EU law but as a way of accommodating it to the greatest possible extent – that is, unless the constitutional identity of France is violated; and there are some escape routes since constitutional identity can be overcome through a revision of the constitution.

c) The Italian constitutional court

In addition to the decisions adopted by the French court, decisions by the Italian constitutional court are other prime examples of a pluralist approach to Article 4(2) TEU and constitutional identity, as notably illustrated by the now famous ‘Taricco saga’.\(^{77}\)

\(^{74}\)Conseil constitutionnel, decision no. 2013-314 QPC, 4 April 2013, Jérémy F, regarding the right to appeal decisions to extend the effects of European arrest warrants.

\(^{75}\)Conseil constitutionnel, decision no 2021-940 QPC, 15 October 2021, Société Air France, para 15.

\(^{76}\)Conseil constitutionnel, decision no 2021-940 QPC, 15 October 2021, Société Air France, para 17.

\(^{77}\)On that saga, see e.g. Piccirilli (2018) 814; with a more encompassing approach, Tega (2021) 369.
In *Taricco*, preliminary questions were referred to the CJEU by a local first-instance tribunal in Italy, in the context of criminal proceedings, regarding the compatibility of Italian rules limiting in time the prosecution of VAT offenders in line with EU provisions on competition law. The CJEU held that the Italian provisions on the interruption of statute of limitations were to be disapplied in view of their incompatibility with Article 325 TFEU on the grounds that they were not effective and dissuasive, since the application thereof would result in there being no criminal punishment of serious fraud in a considerable number of cases. Although the CJEU recalled that the national court must also ensure that the fundamental rights of the persons concerned are respected, it also held that the disapplication of the national provisions at issue would not infringe the principle of the legality of criminal offences and penalties as guaranteed by Article 49 of the EU Charter of Fundamental Rights.

In view of the quite far-reaching and controversial character of the *Taricco* judgment, it is no surprise that it actually came back to the CJEU only fifteen months later. Although it could have come back merely as an EU fundamental rights case, it returned on the initiative of the Italian constitutional court in *M.A.S. and M.B.* as both a constitutional identity case and a national fundamental rights case as regards the principle of legality of offences and penalties.

After explicitly acknowledging that it was not aware of certain elements of Italian constitutional law at the time it issued *Taricco*, the CJEU changed tack and held that if national courts consider that the obligation to disapply the national provisions at issue conflict with the principle of legality, those courts are not obliged to comply with that obligation, even if compliance with the obligation allowed a national situation that is incompatible with EU law to be remedied. In other words, the CJEU eventually upheld the Italian legislation on the basis of the Italian standard of protection of the principle of legality of offences and penalties. In so doing, although it did not overrule its judgment in *Taricco*, the CJEU exempted Italy from applying the solution reached therein, at least temporarily.

*M.A.S and M.B.* epitomise what has been described above as *reasonable accommodation* on the part of the CJEU. When also specifically looking at it from the perspective of the Italian constitutional court, it clearly appears that the latter embraced a pluralist approach in its reference order, perhaps under the influence of one of the judges sitting on the court at that time, Marta Cartabia, a proponent of constitutional pluralism. The constitutional court’s reference order is loaded with pluralism so that it is currently the best example of any

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79The national rules at issue provided that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the statute of limitations by only a quarter of its initial duration.

80Under Article 325(1) TFEU, ‘the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union’s institutions, bodies, offices and agencies’.


85Corte costituzionale, Case 269/2017, order no. 24 of 23 November 2016. See e.g. Martinico and Repetto (2019) 731.
constitutional court willing to understand what arguing constitutional identity before the CJEU means, and how it should ideally be done.

First, the constitutional court has embraced the pluralist discourse. It insisted in the wake of its well-known judgments in Fragd, Granital, and Frontini on both the primacy of EU law and compliance with the supreme principles of the Italian constitutional order and inalienable human rights as a prerequisite for the applicability of EU law in Italy. Further, according to the Corte,

…the legitimation for (Article 11 of the Italian Constitution) and the very force of unity within a legal order characterised by pluralism (Article 2 TEU) result from its capacity to embrace the minimum level of diversity that is necessary in order to preserve the national identity inherent within the fundamental structures of the Member State (Article 4(2) TEU). Otherwise, the European Treaties would seek, in a contradictory fashion, to undermine the very constitutional foundation out of which they were born by the wishes of the Member States. It follows as a matter of principle that EU law and the judgments of the Court of Justice that clarify its meaning for the purposes of its uniform application cannot be interpreted as requiring a Member State to give up the supreme principles of its constitutional order.

Second, instead of merely disapplying the judgment in Taricco, which it could have done, the constitutional court asked the CJEU for further clarification on the latter’s scope, especially as regards the interpretation of Article 325 TFEU. ‘It is certainly not for this Court to attribute to Article 325 TFEU a meaning different from that which it was found to have by the Court of Justice; it is in fact its duty to take note of that meaning.’ However, the Corte was adamant about the fact that ‘EU law and the judgments of the Court of Justice that clarify its meaning for the purposes of its uniform application cannot be interpreted as requiring a Member State to give up the supreme principles of its constitutional order.’

Third, the constitutional court developed important argumentative skills to convince the CJEU as regards the status and specific content of the Italian version of the principle of legality in criminal matters compared to other legal orders, including the ECHR. According to the Italian court, the principle of legality in criminal matters is ‘an expression of a supreme principle of the legal order, which has been posited in order to safeguard the inviolable rights of the individual insofar as it requires that criminal rules must be precise and must not have retroactive effect.’ It is both a procedural and a substantive principle.

Fourth, the very phrasing of the third query of the constitutional court was most appropriate. In essence, the Corte asked the CJEU whether the latter’s judgment in Taricco would be interpreted differently if the setting aside of the Italian legislation were at odds with the supreme
principles of the Italian constitutional order or with the inalienable human rights recognised under the Italian constitution.

It follows that the Corte costituzionale has gone relatively far in the taking into account of Article 4(2) TEU in order to argue, in a pluralist manner, in favour of the application of a national fundamental right which was considered a part of the constitutional identity of Italy. There is no denying that the CJEU also proved quite cooperative in its judgment in M.A.S. and M.B. It could simply have restated the application of the Taricco solution across the Union, including in Italy. Instead, the CJEU accepted the need to partly revisit it inasmuch as it did not allegedly have all the necessary information regarding Italian law in order to settle the case. That said, because the matter at issue was not fully harmonised at the time of the case, it was easier for the CJEU to be accommodating and endorse a derogation for Italy. However, it is uncertain whether, with a now (quite) fully harmonised matter, the CJEU will be so accommodating in similar future cases. It remains that the Italian constitutional court has fully embraced constitutional pluralism and brought it to its limits in the Taricco saga by convincing the CJEU that a national constitutional law provision may prevail over certain EU law obligations.

4. CONCLUSION

Because of the strong influence of the German Federal Constitutional Court, orthodox scholars of EU law (that is, those that embrace monism and the absolute primacy of EU law over national law) often perceive constitutional identity as being necessarily wrong inasmuch as it constitutes a major threat to the primacy and authority of EU law. However, it has been shown in this paper that the relationship between EU law and national law as interpreted by constitutional courts can be grasped in a more nuanced and refined, less black-and-white manner. While comparative constitutional law scholarship tends to award, for understandable reasons, major importance to the German Federal Constitutional Court, it should not indeed overlook other constitutional courts. Constitutional courts cannot be all put in the same bag. Some of them certainly use constitutional identity and Article 4(2) TEU in a purely instrumental manner as a sword against EU law. Although the German Federal Constitutional Court appears pluralist in other respects as far as EU law is concerned, its case-law on Article 4(2) TEU in no way adheres to constitutional pluralism since, ultimately, constitutional conflicts are settled on the sole basis of the Basic Law by that court. By contrast, the French and Italian constitutional courts have largely proved pluralist so far through their own use of constitutional identity and/or their engagement with the CJEU. It is not only to be hoped that they will remain faithful to constitutional pluralism, but also that their approach will eventually be followed by other constitutional courts.

When it specifically comes to constitutional conflicts, it should not be forgotten that it takes two to tango, and that this type of tango should – for once – not be danced with passion, but with reason. Reasonableness, which permeates constitutional pluralism, is indeed the key word in the context of such conflicts. Constitutional courts must prove reasonable in the sense of: a) proposing only those highly legitimate provisions of their constitution as elements of constitutional identity; b) engaging with the CJEU; that is, neither simply disapplying EU law on their own, or imposing it on the CJEU in a passive-aggressive way, but stating reasons,

94See further on this Millet (2020) 452–55.
explaining, and arguing why the provision at issue is so important for the national constitutional ethos. At the same time, the CJEU itself must also prove reasonable within its own constraints. It should thus accommodate well-argued constitutional identity claims that do not run counter to the very (liberal) constitutional identity of the EU. When putting forward such claims, a Member State cannot of course expect that the CJEU will embrace them unreservedly and wholeheartedly. While it would be inappropriate to envisage that it is for the CJEU, and not for the sole constitutional courts, to determine the specific content of those claims, it clearly appears that it is incumbent on the CJEU to evaluate those claims, as it already does with internal market law with regard to the various mandatory requirements that may justify restrictions on market freedoms. Within such evaluations, it must rather determine, in the light of other provisions of the Treaties and the spirit of the latter, whether they can be upheld at the expense of the application of an EU law provision. It follows that the CJEU necessarily has a key role in interpreting and enforcing Article 4(2) TEU within a constitutional pluralist framework.

Again, constitutional pluralism generally supports the primacy of EU law as the higher law shared by 27 Member States. To be clear, because constitutional pluralism is different from radical pluralism, EU law should prevail in most cases of legal conflict, including when a constitutional law provision of a Member State is at issue. In the version defended herein, constitutional pluralism does not indeed imply the overruling of Internationale Handelsgesellschaft and the like. It should however be equally clear and accepted that, in exceptional circumstances, constitutional pluralism may lead to the application of national law in opposition to EU law when: a) the national rule at issue has the highest democratic or moral legitimacy; b) it fits within a liberal constitutionalist framework that not only includes EU structural and material constitutionalism, but also more broadly national constitutionalism in the form of both fundamental rights and collective values or general interest considerations safeguarded at the national level. While the primacy of EU law is not only existential but also essential from the perspective of EU law as an autonomous legal order, the supremacy of national constitution, or at any rate its core features, is also decisive for the very existence of a Member State as a legal order, as a state, as a political community and, last but not least, as the primal source of constitutionalism.

It would arguably be mistaken, within an EU that itself aspires to be considered a constitutional object, to always consider, through an unqualified conception of primacy, that national constitutions are just hurdles. In some circumstances national constitutions can be seen as assets for the very development of constitutionalism in Europe. Accordingly, the main interpreters and enforcers of the constitutions together with the CJEU have a crucial role to play within the Verfassungsgerichtsverbund. However, being a member of such a Verbund requires abiding by the rules of the game. As much as the CJEU is to carefully examine and sometimes even uphold constitutional courts’ claims, constitutional courts should accept, in a pluralist fashion, that those claims must not only be channelled through EU law but also buttressed and ultimately presented to the CJEU in order for them to have any chance of success. There is nevertheless a glimmer of hope not only in view of the case-law of the Italian and French constitutional courts,

95 Some versions of it even stick to abstract, rosy statements about mutual dialogue and deference without suggesting at all that constitutional pluralism could serve as a merely relative approach to primacy.
96 CJEU, Case 11/70, 17 December 1970.
but also in view of recent CJEU judgments whereby the latter appears to be less reluctant to engage with a more normative use of Article 4(2) TEU. In order for the huge conciliatory potential of constitutional identity not to be wasted, its dual EU and national nature should be fully acknowledged by all sides. Above all, everyone, including scholars, should embrace reasonableness when addressing constitutional conflicts. Let us finally experience constitutional pluralism in its full potential.

LITERATURE

Anzilotti, D., Cours de droit international (Panthéon-Assas 1999).
Auby, J.-B., Globalisation, le droit et l’État (Montchrestien 2003).
Cassese, S., Oltre lo Stato (Laterza 2006).
Decenciere-Ferrandiere, A., ‘Considérations sur le droit international dans ses rapports avec le droit de l’État’ (1933) 40 RGDIP 45–70.

Millet, F.-X., ‘Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow is the Way’ (2021) 27 European Public Law 571–596.


Triepel, H., ‘Les rapports entre le droit international et le droit interne’ (1923) 1 RCADI 73–119.


