

SVEN SIMON¹

Constitutional Identity and Ultra Vires Review in Germany²

- **ABSTRACT:** *This article aims to provide insight into the relationship between constitutional identity and ultra vires review in Germany. First, a brief introduction is provided on the issue of the relationship between EU law and national law, then the diverging grounds for validity are presented concerning the interpretation of the CJEU and of the German Federal Constitutional Court. After the detailed analysis of the German case law, limits of a national reservation are scrutinised. In the end, a conclusion is drawn up.*
- **KEYWORDS:** constitutional identity, ultra vires review, Germany, EU law, Bundesverfassungsgericht, CJEU.

1. The relationship between Union and national law

Unlike regular international treaties, Union law has a direct effect on the national legal systems of Member States, raising the question of hierarchy between the two legal orders. Although the doctrines differ as to why, there is a consensus on the essence of the relationship between the two levels: national courts and the Court of Justice of the European Union (CJEU) have gradually come to agree that Union law should, as a matter of principle, have primacy over any conflicting national law. This was enshrined

1 Full Professor of Public International Law and European Law, Philipps-Universität Marburg, Germany, sven.simon@uni-marburg.de.

2 This paper is an adaptation of the author's professorial thesis on the boundaries of German constitutional law in the European integration process: Simon, 2016.



in Declaration 17³ of the Lisbon Treaty. This primacy also extends to national constitutional law.⁴ There is also a broad consensus that Union law not only has primacy of validity but also primacy of application over every level of national law.

2. Diverging grounds for validity

There are considerable differences of opinion regarding the basis for the validity of Union law. The CJEU and Federal Constitutional Court (*Bundesverfassungsgericht*; BVerG) have a different basic understanding of Union law as either separate or derived from national law and, consequently, on the extent of the primacy of Union law.

■ 2.1. The grounds for validity put forward by the CJEU

Since its landmark decision in the *Costa v ENEL* case, the CJEU has held that Union law has primacy over national legal provisions by virtue of its autonomy.⁵ The CJEU emphasises the autonomous nature of Union law and maintains that it takes precedence over any provision of national law, including constitutional law;⁶ otherwise, the requirement that Union law should apply in the same way throughout the European Union could not be guaranteed. The CJEU maintains that the contracting parties to the EU Treaties have, unlike the signatories to regular international treaties, established an autonomous legal order. On the relationship between the law of this autonomous legal order and national law, it argues

‘that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed,

3 Declaration 17 of the Lisbon Treaty reads: ‘The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260): Opinion of the Council Legal Service of 22 June 2007: It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (*Costa/ENEL*, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.’

4 CJEU, Case 6/64, *Costa/E.N.E.L.*, ECR 1964, 1251/1269; Case 11/70, *Internationale Handelsgesellschaft*, ECR 1970, 1125, paragraph 3. Case 106/77, *Simmenthal*, ECR 1978, 629, paragraph 17 et seq.

5 CJEU, Case 6/64, *Costa/E.N.E.L.*, ECR 1964, 1251/1269 et seq.; settled case-law: see also CJEU, Case 106/77, *Simmenthal*, ECR 1978, 629/644; Case 190/87, *Oberkreisdirektor des Kreises Borken et al./Moormann*, ECR 1988, 4689/4722; Haack, 2007, pp. 165 et seq.

6 CJEU, Case 11/70, *Internationale Handelsgesellschaft*, ECR 1970, 1125, paragraph 3.

without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.⁷

In the *Internationale Handelsgesellschaft* case, the Court of Justice clarified that the primacy of Community law over national law also extended to the constitutional law of Member States. The judgement reads thus:

‘Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in light of Community law. [...] Therefore, the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.’

The CJEU therefore justifies Union law taking uniform, direct effect in the Member States and precedence over all levels of national provisions on the grounds that this is necessary to ensure the effectiveness of the Union, the uniform application of laws across Member States,⁸ and the autonomy of the supranational legal order. It understands an autonomous *sui generis* legal order to be one that exists in and of itself rather than one derived from the Member States. Its rationale is based on a teleological interpretation of the Treaties, in particular Article 189(2) TEEC, Article 14(2) ECSC, and Article 161(2) TFEU.⁹ In the CJEU’s view, the Union can only carry out the duties conferred upon it if there is a guarantee that Union law will take full effect in the same way in all Member States, regardless of their respective constitutions.

If, then, Union law has, as a matter of principle, a primacy of application over national law which stems directly from the Treaties, it follows that the powers of the EU institutions also arise from the Treaties and, necessarily, so too do the boundaries of these conferred powers. This model casts the CJEU as the guardian of the division of powers under Union law. Its rulings are therefore predicated on the assumption that it alone has jurisdiction to decide on the validity of legal acts of the European Union and, thus, to determine whether there has been a transgression of powers.¹⁰ In the *Foto-Frost* case, the CJEU held that national courts may consider the validity of Union acts and may conclude that a legal act is completely valid because, in so doing, ‘they are not calling into question the existence of the Community measure’.¹¹ However, the CJEU went on to rule that national courts do not have the power to declare acts of EU institutions invalid.¹² This reading finds confirmation in the history of the CJEU’s creation, as Germany’s call for the primacy of national constitutions to be codified

7 CJEU, Case 6/64, *Costa/E.N.E.L.*, ECR 1964, 1270.

8 CJEU, Case 11/70, *Internationale Handelsgesellschaft*, ECR 1970, 1125.

9 These are the provisions in each treaty which provide for the direct application of regulations under that treaty in the Member States.

10 See CJEU, Case 314/85, *Foto-Frost*, ECR 1987, 4199.

11 CJEU, Case 314/85, *Foto-Frost*, ECR 1987, 4199, paragraph 14.

12 CJEU, Case 314/85, *Foto-Frost*, ECR 1987, 4199, paragraph 15; see Bast, 2014, p. 171.

was flatly rejected.¹³ This does not mean, however, that Union law is of a higher order than national law. A national law that infringes on Union law is not automatically nullified. Union law does not override national law; it must simply be granted primacy of application.

■ 2.2. *The grounds for validity put forward by the Federal Constitutional Court*

The Federal Constitutional Court accepted the primacy of the application of Union law. However, in its view, primacy is not absolute or intrinsic to Union law but is enshrined in, and therefore also circumscribed by, constitutional law.¹⁴ According to the case-law of the Federal Constitutional Court, Union law has primacy of application by virtue of the constitutional mandate, or, more specifically, by virtue of German act of approval, which acts as a bridge between the two legal systems.¹⁵ The national order of application contained in the act of approval is the basis for the integration programme, but at the same time it imposes a limit on the validity of Union law in Germany.

3. Limits on integration under the third sentence of Article 23(1) of the Basic Law

In 1992,¹⁶ Article 23 was added to the Basic Law (GG). Paragraph 1 provides special constitutional consent for the transfer of sovereign powers in the context of the European integration process. The first sentence of Article 23(1) of the Basic Law binds the Federal Republic of Germany to participation in the development of the European Union, which, according to the 'structure safeguard clause' in the second half of the sentence, 'is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law'. The second sentence authorises the federal authorities to transfer sovereign powers by law with the consent of the German government. Finally, the third sentence explains that any regulations that establish or amend the foundations of the Union, as established in the Treaties, will be subject to paragraphs (2) and (3) of Article 79 of the Basic Law. This provision is the yardstick against which the legality of Germany's European policies is measured.

A provision of this type is relatively unusual. While national constitutions often lay down provisions governing participation in the creation of European law, it is rare for them to comment on the form that European democracy is to take. In this respect, Article 23(1) makes the German Basic Law an exception.¹⁷ Should the European Union

13 Huber, 1991, p. 216 citing Friauf, 1990, p. 19.

14 Voßkuhle, 2007, pp. 158 et seq.

15 See, in particular, BVerfGE 73, p. 339 (374 et seq.) – Solange II; 123, 267 (396 et seq.) – Lisbon.

16 *Federal Law Gazette*, 1992 I, p. 2086.

17 Grimm, 2014, p. 27.

fail or cease to satisfy the structural requirements laid down in the first sentence of Article 23(1) of the Basic Law, then the mandate under the act of approval for Union law to take effect and have primacy in Germany either does not or ceases to exist. According to the third sentence of Article 23(1) of the Basic Law, the structural requirements therein should be read in light of Article 79(3) of the Basic Law. A reading of the first and third sentences of Article 23(1) in conjunction with Article 79(3) of the Basic Law therefore makes the transfer of sovereign rights to the Union conditional on the observance of the State structural characteristics safeguarded by Article 79(3) of the Basic Law. Conversely, Union law applicable by virtue of the transfer of sovereign power can only take precedence over national law in Germany if it is without prejudice to the constitutional identity within the meaning of Article 79(3) of the Basic Law. The act of approval, the substantive legal content of which is derived primarily from the EU Treaties,¹⁸ may therefore later become unconstitutional, (in part) as a result of CJEU interpretations of the EU Treaties that are also binding on the Federal Constitutional Court.¹⁹

4. Development of the case-law of the Federal Constitutional Court

The Federal Constitutional Court was one of the first European constitutional courts to expressly confirm the basic primacy of Union law.²⁰ On 18 October 1967, the First Senate of the Federal Constitutional Court held that Regulations of the Council and Commission of the European Communities could not be directly challenged by constitutional complaints because they had been issued by a new public power, which was autonomous and independent with respect to the State power of the individual Member States. As such, its acts neither needed to be confirmed ('ratified') by the Member States, nor could they be abrogated by them.²¹

■ 4.1. Reservations of the Federal Constitutional Court

It became clear with the *Solange I* judgement,²² however, that vital questions remained unanswered. The Federal Constitutional Court certainly recognised that the process of European 'supranational' integration was a new type of inter-state cooperation, which, conceptually, defied classification under the current system. It spoke of a 'sui generis' legal order, or even an 'autonomous' source of law.²³ In its decision of 29 May 1974, however, it also clearly established the limits within which the transfer of sovereign rights was acceptable. Contrary to the wording of Article 24 of the Basic Law, the First Senate of the Court argued that absolutely no sovereign rights were ceded in the context of European integration. The applicable provision at the time, Article

18 See BVerfGE 12, 281 (288) – Devisenbewirtschaftungsgesetze.

19 See Dederer, 2014, p. 315.

20 BVerfGE 31, 145 (175) – Milk powder; see, in that connection, Alter, 2001, pp. 80 et seq.

21 BVerfGE 22, 293 (296) – EEC Regulations.

22 BVerfGE 37, 271 – *Solange I*.

23 BVerfGE 37, 271 (277) – *Solange I*.

24 of the Basic Law, did not offer a *carte blanche* to change the basic structure of the constitution on which its identity was based without a constitutional amendment.²⁴ The decision reads:

‘Article 24 of the Basic Law deals with the transfer of sovereign rights to inter-state institutions. This cannot be taken literally. [...] That is, it does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity. [...] Certainly, the competent Community organs can make laws that the competent German constitutional organs could not make under the law of the Basic Law and that are nonetheless valid and to be applied directly in the Federal Republic of Germany. However, Article 24 of the Basic Law circumscribes this possibility, as it precludes any Treaty change that would be incompatible with the constitutional identity of the Federal Republic of Germany insofar as it would encroach on its constituent structures. [...] Article 24 of the Basic Law does not authorise the transfer of sovereign rights; rather, it opens up the national legal order (as appropriate) by retracting the claim to regulatory exclusivity staked by the Federal Republic of Germany in an area within the scope of the Basic Law, and by making way for the direct validity and applicability of a law from another source within the national territory. [...] The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one that forms part of the constitutional structure of the Basic Law.’²⁵

The Court thus draws attention to the limits of Article 24 of the Basic Law: Article 79(3) of the Basic Law rules out any measure that entails the forfeiture of core constitutional identity. On this point, the dissenting opinion²⁶ was also in complete agreement. As a result, the headnote to the decision states that the Federal Constitutional Court may continue reviewing European law until such time as (*solange* in German) a European catalogue of basic rights exists that ensures a comparable level of protection. The minority opinion was that, looking at CJEU case-law, these requirements had already been met at that time.

In contrast to the ‘*Solange I*’ decision, the ‘*Vielleicht*’ (or ‘*Perhaps*’) decision of the Second Senate, on 25 July 1979,²⁷ concerned the compatibility of provisions of primary Community law with the Basic Law. After the CJEU handed down its interpretation of Articles 92-94 TEEC in a preliminary ruling procedure, the administrative court, seised of the matter, referred to the Federal Constitutional Court, pursuant to Article 100(1) of the Basic Law, the question of whether these Treaty provisions were inapplicable in the Federal Republic of Germany since, according to the CJEU’s interpretation, they violated the Basic Law (in particular, the guarantee of legal recourse under Article 19(4) thereof). The Court made clear that, bound by the CJEU’s preliminary ruling, it did *not*

24 BVerfGE 37, 271 (279) – *Solange I*.

25 BVerfGE 37, 271 (279 et seq.) – *Solange I*.

26 See BVerfGE 37, 271 (291 et seq.) – *Solange I*, dissenting opinion of judges Rupp, Hirsch and Wand.

27 BVerfGE 52, 187 – *Perhaps* decision.

have the authority to decide, within the framework of the judicial review procedure, on the applicability in the German jurisdiction of provisions of primary Community law that, according to the CJEU's interpretation, were incompatible with the Basic Law.

'Article 177 TEEC [now Article 267 TFEU] assigns the Court of Justice, rather than the national courts, ultimate authority to rule on the interpretation of the Treaty and the validity and interpretation of Community acts derived therefrom.'²⁸

The Solange II decision of 22 October 1986²⁹ upheld the basic prohibition on violating the 'identity of the applicable constitutional order of the Federal Republic of Germany'.³⁰ At the same time, it was deemed that a measure of protection of fundamental rights has been established [...] within the sovereign jurisdiction of the European Communities which, in its conception, substance and manner of implementation, is essentially comparable with the standard of fundamental rights provided for in the Basic Law'.³¹ Provided that the Court of Justice of the European Community ensured effective protection of fundamental rights, the Federal Constitutional Court would, it said, refrain from conducting its own review. Legal protection under the Basic Law would then cease once the validity of fundamental rights at the European level was essentially equivalent, in substance and effectiveness, to the protection of inalienable rights under the Basic Law.³² It should be noted that the Solange II decision is based on the same doctrine as its predecessor. The Federal Constitutional Court also assumes in this decision that it is, in principle, within its jurisdiction to review secondary Community law for compatibility with the structures and values that underpin the Basic Law.

■ 4.2. Principle of democracy

After the Solange decisions essentially laid down the constitution's red lines in terms of the inalienable rights not to be violated during integration, with the Maastricht judgement, the principle of democracy moved to centre stage. The judgement imposed limits on the transfer of sovereign rights. Articles 38(1) and (2) of the Basic Law guarantee that a citizen has the right to vote for the German Federal Parliament and that the constitutional principles of the right to vote are observed in an election. In addition, this guarantee is extended to the fundamental democratic content of this right: 'Should the German Federal Parliament relinquish its duties and responsibilities, particularly concerning legislation and the election and control of other holders of State power, then this affects the area to which the democratic content of Article 38 of the GG relates. [...] Article 38 of the GG forbids the weakening, within the scope of Article 23 of the GG, of the legitimation of State power gained through an election, and of the influence on the exercise of such power, by means of a transfer of duties and responsibilities of the

28 BVerfGE 52, 187 (202) – Perhaps decision.

29 BVerfGE 73, 339 – Solange II.

30 BVerfGE 73, 339 (378) – Solange II.

31 *Ibid.*

32 *Ibid.*, 376.

Federal Parliament, to the extent that the principle of democracy, declared as inviolable in Article 79, paragraph 3, in conjunction with Article 20, paragraphs 1 and 2 of the GG, is violated.³³

From Article 38 of the Basic Law, the Court thus construed a subjective claim for compliance with the requirements of democratic legitimation. At the same time, it laid claim, on this basis, to the authority to declare European legal acts not binding in Germany if ‘European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German Act of Consent is based [...]’. Thus, the Federal Constitutional Court considers, within the context of its ‘cooperative relationship’ with the CJEU, whether legal acts passed by European institutions and bodies are within the limits of the sovereign rights conferred on them or whether they transgress such limits.³⁴ The Court continues thus: ‘If, for example, European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German Act of Consent is based, any legal instrument arising from such activity would not be binding within German territory.’³⁵

Heavily criticised by experts,³⁶ the Lisbon judgement of 30 June 2009 further delimited the boundaries of constitutional commitment. The Federal Constitutional Court considered the constitutional complaints lodged against the act approving the Treaty of Lisbon to be admissible ‘to the extent that they challenge a violation of the principle of democracy, the loss of statehood of the Federal Republic of Germany, and a violation of the principle of the social state on the basis of Article 38.1, the first sentence of the Basic Law’.³⁷ At the heart of this wide-ranging judgement is the Federal Constitutional Court’s intention to hold the European Union to its identity as a treaty-based association of sovereign states that possesses no statehood itself, thereby preventing a sovereignty grab or any encroachment on Member States’ powers.³⁸ First, the Constitutional Court cites specific areas where powers must not be transferred to the European level as doing so would mean ‘that insufficient space is left to the Member States for the political formation of economic, cultural, and social living conditions’.³⁹

Quite remarkably, the Court then substantiated five domains that would have ‘always’ been ‘[p]articularly sensitive for the ability of a constitutional state to democratically shape itself’. It listed ‘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

33 *Ibid.*, 171 et seq.

34 Both citations are from BVerfGE 89, 155 (188) – Maastricht.

35 *Ibid.*

36 See, for example, Grimm, 2009, pp. 475–496; Halberstamm and Möllers, 2009, pp. 1241 et seq.; Jestaedt, 2009, p. 503; Schönberger, 2009, pp. 535–559.

37 BVerfGE 123, 267 (328) – Lisbon.

38 Grimm, 2009, p. 486.

39 BVerfGE 123, 267 (357) – Lisbon.

and public expenditure (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). The constitution would not completely bar a transfer of powers in this ‘democratic primary area’, but such a transfer would be particularly sensitive.

In all its case-law on the euro rescue, the Court used the example of parliament’s right to decide on the budget to highlight the real crux of the matter: ‘For adherence to the principles of democracy’, the question is ‘whether the German Bundestag remains the place in which autonomous decisions on revenue and expenditure’ should be made, even with regard to international and European commitments. ‘If decisions were made on essential budgetary questions of revenue and expenditure without the requirement of the Bundestag’s consent, or if supranational legal obligations were created without a corresponding decision by free will of the Bundestag, Parliament would find itself in the role of merely re-enacting and could no longer exercise overall budgetary responsibility as part of its right to decide on the budget.’⁴⁰ ‘Against this background, the German Bundestag may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations. In particular, it may not, even by statute, deliver itself up to any mechanisms with financial effect which – whether by reason of their overall conception or by reason of an overall evaluation of the individual measures – may result in incalculable burdens with budget relevance without prior mandatory consent, whether these are expenses or losses of revenue.’⁴¹

The prohibition on relinquishing budgetary responsibility does not inadmissibly curtail the legislature’s budgetary powers, but rather aims to act as a safeguard. For this reason, the Federal Constitutional Court ruled that no permanent mechanisms may be created under international treaties ‘that are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences that are hard to calculate [...] [I]n addition, it must be ensured that sufficient parliamentary influence will continue in existence on the manner in which the funds made available are dealt with.’⁴²

■ 4.3. *Qualifying the case-law on reservations*

In its Honeywell/Mangold decision of 6 July 2010, the Federal Constitutional Court ruled that there had been no transgression of powers and qualified certain statements in the Lisbon judgement. The claimed right to perform an ultra vires review means ‘that the act of the authority of the European Union must be manifestly in violation of competences and 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.’⁴³ The decision reads: ‘If the

40 BVerfGE 129, 124 (179) – EFSF.

41 *Ibid.*

42 BVerfGE 129, 124 (180 f.) – EFSF.

43 BVerfGE 126, 286 (303) – Honeywell.

supranational integration principle is not to be endangered, ultra vires review must be exercised reservedly by the Federal Constitutional Court. Since it also has to find on a legal view of the Court of Justice in each case of an ultra vires complaint, the task and status of the independent suprastate case-law must be safeguarded. This means, on the one hand, respect for the Union's own methods of justice to which the Court of Justice considers itself to be bound and which do justice to the "uniqueness" of the Treaties and goals that are inherent to them [...]. Secondly, the Court of Justice has a right to tolerance of error. It is hence not a matter for the Federal Constitutional Court, in questions of the interpretation of Union law that, with a methodical interpretation of the statute, can lead to different outcomes in the usual legal science discussion framework, to supplant the interpretation of the Court of Justice with an interpretation of its own. Interpretations of the bases of the Treaties are also to be tolerated which, without a considerable shift in the structure of competences, constitute a restriction to individual cases and either do not permit impacts on fundamental rights to arise that constitute a burden or do not oppose domestic compensation for such burdens.⁴⁴

The Federal Constitutional Court thus claims to have the authority to perform an ultra vires review, but grants the CJEU wide discretion in interpreting the Treaties within the confines of a 'methodical interpretation of the statute [...] in the usual legal science discussion framework'. In its ultra vires review, the Court therefore simply wants to examine whether the action of an EU institution constitutes an act of transgression that encroaches on Member States' powers 'manifestly' and in a 'structurally significant' way.⁴⁵ The rationale applied here is that the European Union can only invoke the primacy of Union law if the measures it takes fall within the mandate conferred on it by the Member States.

■ 4.4. Conclusion

Since handing down its Maastricht decision on 12 October 1993, the Federal Constitutional Court has maintained that the legal acts of EU institutions must not overstep the sovereign powers conferred on them. Should such a transgression occur, the Federal Constitutional Court has the right to instruct the German authorities not to implement the impugned legal acts. Against this background, the Federal Constitutional Court issues constitutional review reservations in the form of an ultra vires review,⁴⁶ an identity review,⁴⁷ or a fundamental rights review,⁴⁸ and considers such a remedy to be an integral part of the German constitution.

44 BVerfGE 126, 286 (307) – Honeywell (author's emphasis).

45 See BVerfGE 89, 155 (187 et seq.) – Maastricht; BVerfGE 123, 267 (357 et seq.) – Lisbon; BVerfGE 126, 286 (303 et seq.) – Honeywell.

46 BVerfGE 75, 223 (240 et seq.) – Kloppenburg decision; 89, 155 (188, 209 et seq.) – Maastricht; 123, 267 (353 et seq.) – Lisbon.

47 BVerfGE 123, 267 (353 et seq.) – Lisbon having regard to BVerfGE 75, 223 (235, 242) – Kloppenburg decision; 89, 155 (188) – Maastricht; 113, 273 (296) – European arrest warrant.

48 See, in particular, BVerfGE 37, 271 (280 et seq., 285) – Solange I; 73, 339 (376, 387) – Solange II.

5. Limits of a national reservation

It is obvious that the solution proposed by the Federal Constitutional Court, derived from the Basic Law, may conflict with the unconditional primacy claim developed by the CJEU on the basis of Union law. Advocate General Pedro Cruz Villalón put it quite plainly in his opinion concerning the referral for a preliminary ruling in the OMT case: ‘It seems to me an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as “constitutional identity”. That is particularly the case if that “constitutional identity” is stated to be different from the “national identity” referred to in Article 4(2) TEU.’⁴⁹

■ 5.1. No blanket constitutional power of review

Legal problems arise, then, if the CJEU comes to a different interpretation of the law to that of the Federal Constitutional Court. It is also clear in such a case that the Federal Constitutional Court cannot rule on the validity or invalidity of Union action. It can, at most, conclude that the provision in question cannot be applied by the authorities or courts of the Federal Republic of Germany. In such a case, however, the question arises as to the scope of the Federal Constitutional Court’s power of review. First, in principle, the German legal system makes way only for the application of Union acts covered by competences conferred on the Union. Union law stems from an *autonomous*, but not *original*, source, and its scope, therefore, extends only as far as provided for in the Treaties. If the Union asserts vis-à-vis Member States a competence that has not been conferred on it under primary law, that is, by the Treaties, this action is not covered by the Treaty Act by means of which the competent German institutions have approved the TFEU in its applicable form. In principle, the German legal system makes way only for the application of Union acts covered by competences conferred on the Union.

However, this does *not* mean that the Federal Constitutional Court also has the authority to consider whether the European Union is acting ultra vires. The question of the power of procedural constitutional review must be distinguished from the substantive-law question of the scope of Union competences. The Member States have conferred on the CJEU the power to interpret Union law. Under the second sentence of Article 19(1) TEU, the Court of Justice is to ensure that in the interpretation and application of the Treaties, the law is observed. It follows from Article 263(1) and (2) TFEU that this also encompasses the power to review the EU institutions’ competence to act. There may be times when the European public authorities exceed their powers under Union law, but it is for the CJEU to rule whether they have acted ultra vires. That is also the thrust of Article 344 TFEU, under which Member States undertake not to

49 AG Villalón, Opinion of 14.1.2015, Case C-62/14, Gauweiler et al., paragraph 59.

submit a dispute concerning the interpretation or application of the Treaties to *any method of settlement other than those 'provided for therein'*.⁵⁰

Safeguarding the unity of the law is the task of the CJEU, which has the fundamental power to make the final decisions in this respect.⁵¹ This is to be guaranteed through the use of the instrument of judicial dialogue codified in Article 267 TFEU, by means of the rights and obligations of national courts to make referrals for preliminary rulings.⁵² In the context of an *ultra vires* complaint, pursuant to Article 267 TFEU, each national constitutional court must therefore not only give the CJEU the opportunity to rectify, by means of the cassation of the Union legal act, a breach of the limits to the integration programme as identified [by national courts], but the Federal Constitutional Court also has no choice but to accept the judgement of the CJEU. It is true that the Federal Constitutional Court may make the constitutional conformity of Union legal acts conditional on their conformity with Union law. However, the binding final ruling as to whether a particular action on the part of the Union institutions is in conformity with Union law must be handed down by the CJEU.

■ 5.2. Power of review in the event of a breach of constitutional identity

Restrictions can only be imposed on this construct if the *ultra vires* action by the Union, as identified by the Federal Constitutional Court, also results in a breach of constitutional identity.

5.2.1. Protection of constitutional identity

Before we get to the stage where a dispute is referred to the courts, it is primarily the responsibility of the political authorities to ensure that the constitutional identity of the Member State concerned is protected.

5.2.1.1. Identity protection by the political authorities

Decision-making procedures in the European Union, in particular in the Council, make it possible for any government and, indirectly, national parliament to lodge objections citing the need to protect constitutional identity. Although national parliaments have thus far made little use of this means of exerting influence, the legal basis for it has been established. In that connection, the identity clause in Article 4(2) TEU, which is addressed to the Member States in the context of the Council's legislative procedure, comes into play. The Council must respect 'the equality of Member States before the Treaties, as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. The Council is thus the primary locus of the political debate on identity.

50 See, in that connection, CJEU, Case C-459/03, *MOX Plant (Commission v Ireland)*, ECR 2006, pp. I-4635 et seq.

51 See Skouris, 2008, pp. 343 et seq.; see also Bast, 2014, pp. 167 et seq.; Kumm, 2014, pp. 203 et seq.

52 Sauer, 2008, p. 463.

5.2.2.2. Identity protection in dialogue between courts

Despite the availability of this means of exerting influence, conflicts may arise once the political process is complete. In such cases, it is primarily for the CJEU to enforce the identity clause in Article 4(2) TEU. In these cases, too, under Article 19(1) TEU in conjunction with Article 267 TFEU, the CJEU is required to decide on its interpretation and, if necessary, give effect to it in the proceedings for annulment under Article 263 TFEU. Since it is not possible to determine whether national identity is at stake without the involvement of the national courts, however, national constitutional courts have a crucial role to play in this regard.

5.2.2. *Emergency mechanism under Union law (Article 4(2) TEU)*

Of course, the CJEU's power of interpretation leaves room for conflict if the 'constitutional identity' issue identified by the national court cannot be squared with the CJEU's interpretation of the concept of 'national identity' under Union law. Given the general interest in the uniform interpretation and application of the law, there is a need to discuss how to settle what for many years has been seen as an insurmountable difference of opinion between those who regard provisions of Union law as having absolute primacy and those who accept restrictions in order to protect constitutional identity.

The first sentence of Article 4(2) TEU holds the key. It provides that the Union must respect the national identities of its Member States, as reflected in their fundamental political and constitutional structures. Article 4 TEU establishes, for the Member States of the European Union, an emergency right under Union law in the event of failure to observe the constitutional principles of a Member State that are fundamental to its identity. It is therefore necessary to weigh up the issue of whether Member States have a right, as a last resort, to suspend the implementation of Union acts under certain circumstances.

5.2.2.1. Background

The beginnings of this approach predate the establishment of the European Union. In 1992, at the request of Ireland, a protocol⁵³ was annexed to the Maastricht Treaty and the idea of preserving the inviolability of national constitutional provisions of particular importance for the country in question was first conceived. The Irish Protocol concerned provisions on the banning of abortion. Possibly inspired by this protocol, even prior to the entry into force of the Treaty of Lisbon, national courts began to cite constitutional identity as a criterion justifying restrictions on the application of Union law. The *Conseil Constitutionnel* implied in 2004 and 2006⁵⁴ that national constitutional

⁵³ See Protocol No 17 to the Treaty on European Union and the Treaties establishing the European Communities, which states the following: 'Nothing in the Treaty establishing a Constitution for Europe or in the Treaties or Acts modifying or supplementing it shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.'

⁵⁴ Treaty establishing a Constitution for Europe 2004 O.J. (C 310) 1; Loi 2006-961 du 3 août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information (1).

identity could constitute a limit to the primacy of Union law.⁵⁵ A similar approach can be found in a 2004 ruling of the Spanish Constitutional Court.⁵⁶ The CJEU⁵⁷ itself took this on board and began in 2010 to recognise the concept of constitutional identity as a limit to the primacy of Union law.

The first sentence of Article 4(2) TEU-Lisbon defines the concept of national identity more clearly than its predecessor did. It takes over the identity clause contained in Article 6(3)-Amsterdam and the first clause of Article F(1) TEU-Maastricht and formulates it in a more nuanced way. Previously, the provision in question merely stated the following: ‘The Union shall respect the national identities of its Member States.’ Now, the concept of national identity is linked to ‘fundamental political and constitutional structures’. The provision thus inserted in the Treaty of Lisbon can be seen as recognition under primary law of the possibility of constitutional objections to the absolute primacy of provisions of Union law, a possibility that is simultaneously circumscribed under Union law. Seen in this way, the concept of ‘national identity’ is an ‘opening clause in respect of the constitutional law of the Member States’.

According to the wording of Article 4(2) TEU, national identity does not encompass every particularity of the constitution of a Member State, only ‘fundamental political and constitutional structures’. However, this provision of Union law opens up the possibility of taking account of Member State constitutional structures that are part of a country’s national identity when justifying exceptions to the primacy of application of Union law. The legal interests protected under Article 79(3) of the Basic Law represent – at least in relation to the basic elements removed from the purview of the legislature with the power to amend the constitution⁵⁸ – just such a constitutional structure and may therefore be regarded as forming part of the ‘national (constitutional) identity’.

Although criticised in dissenting opinions,⁵⁹ at an early stage, and at the time still taking Article 24 of the Basic Law as the point of reference, the Federal Constitutional Court cited the protection of that identity and stated in the Solange I ruling that the transfer of sovereign rights should not lead to any change to ‘the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law; that is, it does not open any such way through the legislation of the inter-state institution’.⁶⁰ In any event, this applies to the inviolable core identity of the

55 See, in that connection, Mayer, 2011, p. 782.

56 Tribunal Constitucional, DTC 1/2004 (Dec. 13, 2004).

57 CJEU, Case C-36/02, Omega, ECR 2004, I-9609, paragraph 39; Case C-208/09, Sayn-Wittgenstein v Landeshauptmann von Wien, ECR 2010, I-13693, paragraphs 25 et seq., 92 et seq.

58 Similar provisions can also be found in the constitutions of other Member States. See Art. 197 of the Belgian Constitution, Art. 89(5) of the French Constitution, Art. 9(2) of the Czech Constitution.

59 See BVerfGE 37, 271 (296) – Solange I, dissenting opinion of judges Rupp, Hirsch and Wand.

60 BVerfGE 37, 271 (279) – Solange I.

Constitution, such as the federal state principle,⁶¹ the substance of fundamental rights,⁶² the ban on retroactivity,⁶³ and other fundamental constitutional principles.⁶⁴

5.2.2.2. Prevention of conflicts

Conflicts can naturally arise if the interpretations of the Union law concept of national identity laid down in the first sentence of Article 4(2) TEU, handed down by the CJEU by virtue of the sole power conferred on it by the second sentence of Article 19(1) TEU, differ from the views held by national constitutional and supreme courts. The question therefore arises as to how Article 4 TEU can be used to prevent conflicts as much as possible. In abstract terms, there must be interaction between the national constitutional court and the CJEU. This is in line with the concept of a ‘cooperative relationship’,⁶⁵ developed by the Federal Constitutional Court and the CJEU, and the ‘cooperation instrument’⁶⁶ for dealings between the Court of Justice and national courts in connection with the interpretation and application of Union law. The concept of a ‘cooperative relationship’ is apt here. It would also make sense to talk about dialogue or, even better, ‘direct interaction’⁶⁷ between the Court of Justice and the Member State courts, the term used by the CJEU in its OMT ruling. On that basis, the Federal Constitutional Court must, in principle, accept that legal protection against EU measures by means of an action before the CJEU has priority, and must limit its own task to verifying whether acts of the European institutions and bodies encroach on national identity. Since the CJEU also has a margin for discretion, which it can exercise in favour of the Member States and their constitutional and supreme courts in order to safeguard the concept of national identity, this should remain the absolute exception.

‘While the Court of Justice has the sole power to interpret the concept of national identity under Union law laid down in the first sentence of Article 4(2) TEU, its interpretation must leave room for the power of national constitutional courts to determine the constitutionally based national identity. The jurisdiction of the constitutional courts of the Member States must, in turn, be exercised in the light of European interests. The question of an overarching power of final decision, which cannot be resolved in a pluralistic constitutional association, is thus circumscribed procedurally to a very large extent by the mutual obligation of the CJEU and the constitutional courts to have regard to each other’s rulings.’⁶⁸

61 BVerfGE 92, 203 (237) – EC Television Directive.

62 BVerfGE 37, 271 (280) – Solange I; 58, 1 (40) – Eurocontrol I; 73, 339 (376) – Solange II; Polish Constitutional Court, ref. K 18/04 of 11.5.2005, EuR 2006, 236 (239 et seq.); Danish Supreme Court, ref. I 361/1997 of 6.4.1998, EuGRZ 1999, 49 (50); Spanish Constitutional Court, Case 1/2004 of 13.12.2004, EuR 2005, 339 (343); Czech Constitutional Court, ref. Pl ÚS 19/08 of 22.11.2008, paragraph 110, 196.

63 BVerfGE 73, 339 (381) – Solange II.

64 von Bogdandy and Schill, 2010, pp. 720.

65 BVerfGE 89, 155 (188, 209 et seq.) – Maastricht.

66 CJEU, Cases C-297/88 and C-197/89, Dzodzi, ECR 1990, I-3763, paragraph 33.

67 CJEU, Case C-62/14, Gauweiler et al., ECR 2015, I-0000, paragraph 15.

68 von Bogdandy and Schill, 2010, pp. 733 et seq.

In this respect, the first sentence of Article 4(2) TEU can be described as a *built-in weak point*, similar to that forming part of the design of a mechanism, to be used in interpreting the law. In the event of damage or overload, this element will fail, as it is supposed to do, in order to minimise the potential damage – for example, in the form of a withdrawal from the Union (Article 50 TEU) – in an overall system.

5.2.3. Concept of ‘national identity’

It is clear that the concept of national identity is a Union law concept. However, the first sentence of Article 4(2) TEU does not define the national identity of each Member State. The provision in the first sentence of Article 4(2) TEU does not provide for a uniform concept of national identity under European law, but refers the matter back to the Member States. Accordingly, the CJEU cannot interpret the ‘core substance of national identity’ with binding effect on the Member States; rather, it is for the national constitutional or higher courts to formalise the substance of the identity recognised under EU law, but at the same time protected by constitutional law. The Treaty allows for national ‘particularities’, which form part of national identity. Determining the boundaries of that identity is a task that needs to be carried out by means of cooperation between national constitutional courts and the CJEU in a context of mutual respect.

5.2.3.1. Union law framework

Under Union law, the protected core area of national identity can only encompass what is ‘reflected in the fundamental political and constitutional structures, including regional and local self-government’ (first sentence of Article 4(2) TEU). Hints as to how the CJEU intends to deal with the issue can be found in its case-law. In a dispute concerning the admissibility of a constitutional reservation of nationality for public education in Luxembourg, the Court of Justice determined in 1996 that, in connection with the restriction of fundamental freedoms, ‘the preservation of the Member States’ national identities is a legitimate aim respected by the Community legal order’.⁶⁹ Following the entry into force of the Lisbon Treaty, the CJEU recognised that, in order to protect the constitutionally guaranteed republican state form of a Member State, a proportionate interference in the right to free movement is possible in the form of non-recognition of a noble title acquired abroad by adoption.⁷⁰ It also subsumed the protection of official national language(s) under the concept of national identity.⁷¹ In opinions of the advocates general, the concept of national identity has been linked to the protection of local self-government,⁷² the regulatory sovereignty of the Member

69 CJEU, Case C-473/93, *Commission v Luxembourg*, ECR 1996, I-3207, paragraph 35.

70 CJEU, Case C-208/09, *Sayn-Wittgenstein*, ECR 2010, I-13693, paragraphs 81 et seq.;

71 CJEU, Case C-391/09, *Runevic-Vardyn and Wardyn*, ECR 2011, I-3787, paragraphs 84 et seq.; Case C-202/11, *Anton Las*, ECR 2013, I-0000, paragraphs 23 et seq.

72 AG Trstenjak, Opinion in Case C-324/07, *Coditel Brabant*, ECR 2008, I-8457, paragraphs 85 et seq.

States in the field of nationality law,⁷³ and the competence of the Member States for the composition and division of powers.⁷⁴

5.2.3.2. Shaping by national constitutional law

By virtue of its purpose as a protective mechanism, the concept of national identity must be interpreted in the light of national identity as defined by Member State constitutions. In that connection, provisions that shape the constitutional identities of the Member States, such as Article 79(3) of the Basic Law, are of particular importance. In most other Member States, similar provisions are in force that remove certain decisions from the purview of the legislature with the power to amend the constitution, or make those decisions subject to a particularly burdensome legislative procedure. In terms of substance, the provisions concern, for example, the protection of fundamental principles of state organisation, state objectives, state symbols, the rule of law, the principle of democracy, human dignity, or the essence of fundamental rights.⁷⁵ For the Federal Republic of Germany, the question of the scope of the opening-up of the German constitutional area is synonymous with that of the substantive-law limits to integration. With regard to the review powers of the Federal Constitutional Court, it is therefore clear that breaches of competences of the EU institutions that are not challenged by the CJEU must have an import that corresponds, in substance, to a breach of core areas of the State structure principles protected in Article 79(3) in conjunction with Article 20(1) and (2) of the Basic Law.⁷⁶ In each individual case, it must be considered whether a legal act of the EU institutions systematically and seriously infringes the limits to integration laid down in the third sentence of Article 23(1) in conjunction with Article 79(3) of the Basic Law. The question of whether CJEU rulings should be taken into account and whether it is 'permissible to stand in opposition to them and thereby generate systemic conflicts'⁷⁷ must be answered in light of the reciprocal obligations of respect.

5.2.4. *Obligation to make a referral for a preliminary ruling*

A satisfactory solution certainly cannot be achieved unless the two courts are in direct contact with each other. It is therefore necessary to enter into dialogue with the CJEU in order to enter reservations concerning the primacy of Union law. In so doing, due

73 See AG Maduro, Opinion of 30.9.2009 in Case C-135/08, Rottmann, ECR 2010, I-1449, paragraphs 23 et seq.

74 AG Colomer, Opinion of 26.6.2009 in Case C-205/08, *Umweltanwalt von Kärnten*, ECR 2009, I-11525, paragraphs 47 et seq. See also AG Kokott, Opinion of 8.5.2008 in Joined Cases C-428/06 to C-434/06, *UGT-Rioja*, ECR 2008, I-6747, paragraph 54.

75 See Armin von Bogdandy/Stephan Schill, in: Grabitz/Hilf/Nettesheim (eds), *Das Recht der Europäischen Union*, Loseblattsammlung, 55. Ergänzungslieferung 2015, EL 51 September 2013, Art. 4 TEU, paragraph 22: Art. 162 of the Estonian Constitution, Art. 77 of the Latvian Constitution, Art. 148(1) of the Lithuanian Constitution, Art. 235(6) of the Polish Constitution, Art. 168 of the Spanish Constitution or Art. 44(3) of the Austrian Constitution.

76 Proelß, 2011, p. 249.

77 Sauer, 2011, p. 95.

account must be taken, in procedural terms, of the obligation under Union law to make a referral for a preliminary ruling, from which Article 267 TFEU allows no exception for constitutional courts. It follows that the referral to the Court of Justice under Article 267 TFEU to clarify the compatibility of the act in question with Article 4(2) TEU is mandatory before a Member State court or tribunal can begin the task of determining autonomously whether domestic application is to be refused on the grounds of incompatibility with national identity. Therefore, in proceedings under Article 267 TFEU, a national court must first give the CJEU the opportunity to correct the act that is held to be contrary to Union law. In that regard, the referral for a preliminary ruling serves as a *remedial procedure*. If the national constitutional or supreme court wishes to reject an EU measure on the basis of Article 4(2) TEU, it must formulate its concerns regarding respect for national identity in the context of the referral to the CJEU for a preliminary ruling and thus submit it to the European public at the same time.⁷⁸ The national court may not make a declaration of inapplicability until the CJEU has spoken its ‘last word’ on the matter, ‘because, by virtue of the *ex ante* open nature of the judicial interpretation, the subject matter of the *ultra vires* review will only then have been established’.⁷⁹ In that connection, the ‘principle of sincere cooperation’ must, in accordance with Article 4(3) TEU, be ‘mutually’ upheld by the Member States *and* the Union in carrying out the tasks required under the Treaties.

■ 5.3. Outcome

In this respect, Article 79(3) of the Basic Law does *not* constitute a systematic review reservation available to the Federal Constitutional Court, but rather a safeguard clause to be used to deal with extreme cases of transgressions of power; it thus corresponds to Article 4(2) TEU. In such extreme cases, the Federal Constitutional Court is empowered to review conformity with the core constitutional identity of the Federal Republic of Germany, as set out in Article 79(3) of the Basic Law, in the context of European integration as well. The subject matter of an identity review of this kind is conformity with extreme boundaries that cannot be shifted even by means of constitutional amendment.

6. Conclusion

Ultimately, the dispute stems from differing views on the legal basis for the application of Union law. While the CJEU assumes that Union law emanating from an ‘autonomous source of law’ has absolute primacy over any domestic legal provision by force of autonomy,⁸⁰ in the opinion of the Federal Constitutional Court, the primacy of Union

78 von Bogdandy and Schill, 2010, p. 730.

79 Klement, 2014, p. 192.

80 Landmark CJEU decision, Case 6/64, *Costa/E.N.E.L.*, ECR 1964, 1251/1269; CJEU, Case 106/77, *Simmenthal*, ECR 1978, 629, paragraphs 17/18.

law exists by force of constitutional authority mandate and is therefore constitutionally limited.⁸¹ In our view, the validity of an ultra vires review in the event of a breach of national identity can, in principle, be derived from both legal texts (the Basic Law and the TEU). The supranational legal order of the Union is established by the Member States under international treaty law; it is autonomous, but not original. The Member States have transferred to the Union, on the basis of the principle of conferral (Article 5 TEU), individual sovereign rights, but not the power to extend the Union's competences by means other than those provided for in the Treaties. Under the second sentence of Article 19(1) TEU, the CJEU's task is to ensure that in the interpretation and application of the Treaties, the law is observed. In principle, this also applies to the question of whether the Union has a specific competence under the Treaties. The true interpretation of Union law is a matter for the CJEU. The act of approval limited national jurisdiction accordingly. The CJEU alone decides whether Union law has been infringed by means of an ultra vires act (second sentence of Article 19(1) TEU in conjunction with Article 263(2) TFEU). This decision is to be accepted as a matter of principle by the Federal Constitutional Court, and on that basis, there is no scope for a 'cooperative relationship'. That is also the thrust of Article 344 TFEU, under which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those 'provided for therein'. If the CJEU has already ruled on a question, a referral for a preliminary ruling is inadmissible, and a constitutional complaint must also be dismissed as inadmissible.

On the other hand, questions of identity review cannot, a priori, be excluded from the scope of a final review by the Federal Constitutional Court, since the issue is not the interpretation of Union law, but the interpretation of national law. The power to determine whether there has been an infringement of Article 79(3) of the Basic Law has not been transferred to the CJEU because the first sentence of Article 23(1) of the Basic Law does not allow the legislature to disregard the so-called eternity clause. If, in its referral, the Federal Constitutional Court informs the CJEU accordingly of the extent to which the constitutional identity of the Federal Republic of Germany could be affected, the Court of Justice must, in a dialogue with the national constitutional and higher courts, verify whether the Union has encroached on national identity (Article 4(2) TEU). Only if the Federal Constitutional Court reaches a different conclusion, on the basis of the interpretation of Article 79(3) of the Basic Law, can it, as a last resort, declare the relevant legal act inapplicable in Germany or declare that a breach of the constitution has arisen that the federal authorities must strive to remedy.

81 In particular, BVerfGE 73, 339 (374 et seq.) – Solange II; 123, 267 (396 et seq.) – Lisbon.

Bibliography

- Alter, K.J. (2001) *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*. Oxford: Oxford University Publishing.
- Bast, J. (2014) 'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's *Ultra Vires* Review', *German Law Journal*, 15(2), pp. 167–181.
- Dederer, H.-G. (2014) 'Die Grenzen des Vorrangs des Unionsrechts – Zur Vereinheitlichung von Grundrechts-, Ultra-vires- und Identitätskontrolle', *JuristenZeitung*, 69(7), p. 313–322.
- Friauf, K.H. (1990) 'Die Bindung der deutschen Verfassungsorgane an das Grundgesetz bei der Mitwirkung an europäischen Organakten' in Scholz, R. and Friauf K.H. (eds.) *Europarecht und Grundgesetz*, Berlin: Duncker & Humblot.
- Grimm, D. (2009) 'Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union. Zum Lissabon-Urteil des Bundesverfassungsgerichts', *Der Staat*, 48(4), pp. 475–496.
- Grimm, D. (2014) 'Die Rolle der nationalen Verfassungsgerichte in der europäischen Demokratie', in: Franzius, C., Mayer, F.C., Neyer, J. (eds.) *Grenzen der europäischen Integration: Herausforderung für Recht und Politik*. Baden-Baden: Nomos Verlag.
- Haack, S. (2007) *Verlust der Staatlichkeit*, Tübingen: Mohr Siebeck.
- Halberstamm, D. and Möllers, C. (2009) 'The German Constitutional Court says „Ja zu Deutschland!“', *German Law Journal*, 10(8), pp. 1241–1258.
- Huber, P.M. (1991) 'BVerfG und EuGH als Hüter der gemeinschaftlichen Kompetenzordnung', *Archiv des öffentlichen Rechts*, Vol. 116, pp. 216 et seq.
- Jestaedt, M. (2009) 'Warum in die Ferne schweifen, wenn der Maßstab liegt so nah? Verfassungshandwerkliche Anfragen an das Lissabon-Urteil des BVerfG', *Der Staat*, 48(4), pp. 497–516.
- Klement, J.H. (2014) 'Der Euro und seine Demokratie', *Zeitschrift für Gesetzgebung*, 29(2), pp. 169–196.
- Kumm, M. (2014) 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It', *German Law Journal* 15(2), pp. 203–215.
- Mayer, F.C. (2011) 'Rashomon in Karlsruhe', *International Journal of Constitutional Law*, 9(3-4), pp. 757–785.
- Proelß, A. (2011) 'Zur verfassungsgerichtlichen Kontrolle der Kompetenzmäßigkeit von Maßnahmen der Europäischen Union: Der "ausbrechende Rechtsakt" in der Praxis des BVerfG', *Europarecht*, 2011/2, pp. 241–263.
- Sauer, H. (2008) *Jurisdiktionskonflikte in Mehrebenensystemen*, Berlin: Springer Verlag.
- Sauer, H. (2011) 'Europas Richter Hand in Hand? – Das Kooperationsverhältnis zwischen BVerfG und EuGH nach Honeywell', *Europäische Zeitschrift für Wirtschaftsrecht*, 22(3), pp. 94–97.
- Schönberger, C. (2009) 'Die Europäische Union zwischen Demokratiedefizit und Bundesstaatsverbot. Anmerkungen zum Lissabon Urteil des Bundesverfassungsgerichts', *Der Staat*, 48(4), pp. 535–559.

- Simon, S. (2016) *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess*. Tübingen: Mohr Siebeck.
- Skouris, V. (2008) 'Stellung und Bedeutung des Vorabentscheidungsverfahrens im europäischen Rechtsschutzsystem', *Europäische Grundrechte Zeitschrift*, 35(12-15), pp. 343–349.
- von Bogdandy, A. and Schill, S. (2010) 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2010/4, pp. 701–734.
- Voßkuhle, A. (2010) 'Der europäische Verfassungsgerichtsverbund', *Neue Zeitschrift für Verwaltungsrecht*, 2010/1, pp. 1–8.