CORTE COSTITUZIONALE DELLA REPUBBLICA ITALIANA

Constitutional Court of the Italian Republic

CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA

Court of Justice of the European Union

GIORNATA DI STUDIO – *Study Meeting*

IDENTITÀ NAZIONALE DEGLI STATI MEMBRI, PRIMATO DEL DIRITTO DELL'UNIONE EUROPEA, STATO DI DIRITTO E INDIPENDENZA DEI GIUDICI NAZIONALI

Member States' National Identity, Primacy of European Union Law, Rule of Law And Independence of National Judges

CELEBRAZIONI DEL 70° ANNIVERSARIO DELLA CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA

Celebrating the Court of Justice of the European Union's 70th Anniversary

ROMA, PALAZZO DELLA CONSULTA, 5 SETTEMBRE 2022

Rome, Palazzo della Consulta, September 5th, 2022

Il presente volume raccoglie gli atti dell'incontro bilaterale tra la Corte costituzionale della Repubblica italiana e la Corte di giustizia dell'Unione europea, dedicato allo studio dei temi dell'identità nazionale degli Stati membri, del Primato del diritto dell'Unione europea, dello stato di diritto e dell'indipendenza dei giudici nazionali, secondo una visione interpretativa e sistematica. L'incontro si è svolto nell'ambito delle celebrazioni per il settantesimo anniversario della istituzione della Corte di giustizia dell'Unione europea.

This volume collects the proceedings of the bilateral meeting between the Constitutional Court of the Italian Republic and the Court of Justice of the European Union, dedicated to the issues of National identity of Member States, the Primacy of European Union Law, the Rule of law and the Independence of national judges, according to an interpretative and systematic view. The meeting took place as part of the celebrations for the 70th anniversary of the establishment of the Court of Justice of the European Union.

Testo a cura di – Edited by – Bruno CAROTTI

Consigliere della Corte costituzionale – Segreteria generale
Counsellor of the Constitutional Court – Secretary General

Roma, ottobre 2022

NATIONAL IDENTITY, THE EQUALITY OF MEMBER STATES BEFORE THE TREATIES AND THE PRIMACY OF EU LAW

KOEN LENAERTS

National Identity, the Equality of Member States before the Treaties and the Primacy of EU law

Koen Lenaerts*

1. Premise

It is an honour and a pleasure to be with you today in the Eternal City of Rome to celebrate the 70th anniversary of the Court of Justice of the European Union (the 'Court of Justice'). Reasons for celebration would be incomplete without Italy's contribution to the development of EU law. Allow me to highlight three of those contributions.

First, preliminary references coming from Italy have contributed enormously to the development of EU law. Suffice it to mention cases such as *Costa*[1], *Simmenthal*[2], and *Francovich*[3], which have laid the foundations of the EU system of remedies. More recently, *M.A.S. and M.B, Consob* and *INPS* are three examples that show the pathway towards a productive dialogue between the Court of Justice and national Constitutional Courts[4]. Second, Italy has always sent its best and brightest to the Court of Justice. I had the privilege of working with Professors Antonio Mario La Pergola, Antonio Tizzano and Paolo Mengozzi and, currently, with Professors Lucia Serena Rossi and Giovanni Pitruzzella, all of whom are amongst the best legal minds of their

* President of the Court of Justice of the European Union and Professor of European Union Law, Leuven University. All opinions expressed herein are personal to the author.

[1] ECJ, judgment of 15 July 1964, *Flaminio Costa v. ENEL*, case 6/64, EU:C:1964:66.

[2] ECJ, judgment of 9 March 1978, *Simmenthal*, case 106/77, EU:C:1978:49.

[3] ECJ, judgment of 19 November 1991, *Francovich and Others*, cases C-6/90 and C-9/90, EU:C:1991:428.

[4] CJEU, judgments of 5 December 2017, *M.A.S. and M.B.*, case C-42/17, EU:C:2017:936, of 2 February 2021, *Consob*, case C-481/19, EU:C:2021:84, and of 2 September 2021, *INPS*, case C-350/20, EU:C:2021:659 (*Childbirth and maternity allowances for holders of single permits*).

generation. Third and last, as the birthplace of Roman law, the Italian legal system plays an important role when it comes to the adoption of EU harmonisation measures, in particular, in the field of private law.

This shows that Italy has played a leading role in European integration. Just as Europe would not be the same without Tommaso d'Aquino, Leonardo da Vinci and Giuseppe Verdi, EU law would not be the same without the influence of the Italian legal culture. Yet, one may argue that Tommaso d'Aquino would not have been an influential thinker, had he not studied in Paris and Cologne. Maybe da Vinci would not have become one of the greatest painters of the Renaissance, had he not been a keen student of Flemish painting. Perhaps Verdi's repertoire would not have been so rich, had he not drawn on Dumas to compose *La traviata*, on Schiller to compose *Don Carlo*, and on Lord Byron to compose *Il corsaro*. Similarly, in order for the Italian legal culture to build a legacy for generations to come, it must be open to European integration.

This brings me to the topic that I would like to discuss with you today. I would like to reject the idea that national identity is to be understood as a means of building walls that seek to keep the influence of EU law at bay. According to this understanding, national identity would serve to draw red lines that EU law cannot cross. If those lines are crossed, national courts would be entitled to call the primacy of EU law into question. However, I respectfully disagree with this type of antagonistic understanding – or rather misunderstanding – of national identity. Instead, I believe that the notion of 'national identity', within the meaning of Article 4, paragraph 2, TEU, must be based on mutual respect and dialogue between legal orders. This is because national and European identities complement each other, since they both must rest on a set of common values that are shared and cherished by all Europeans.

Just like some of Verdi's operas, I shall divide my contribution into three parts. I can promise you though that my speech will not last that long.

First, I shall explain the relationship between national identities and EU identity, arguing that both must revolve around the founding values of the

EU, i.e. respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Since EU law opposes national measures that undermine the values of respect for the rule of law, democratic principles and fundamental rights, such measures cannot be grounded in protecting or promoting national identity, within the meaning of Article 4, paragraph 2, TEU.

Second, Article 4, paragraph 2, TEU reads as follows: "[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities". Until recently, academic literature paid a lot of attention to the last part of that sentence[5], whilst little or almost no attention was paid to the first part[6]. I shall therefore explain the basic meaning of the principle of equality of Member States before the Treaties, arguing that it gives concrete expression to the values of respect for the rule of law and equality. This means, in essence, that national identity must respect those values and, thus, the principles given concrete expression to them. In turn, since the primacy of EU law seeks to guarantee the equality of Member States before that law, claims based on national identity cannot call into question that primacy.

Third and last, the case law reveals that, in interpreting EU law, the Court of Justice does take national identities into account. National courts and, in particular, national Constitutional Courts play a key role in drawing to the attention of the Court of Justice the elements that they consider essential for protecting and promoting their own national identities. I shall argue that national identity, within the meaning of Article 4, paragraph 2, TEU, may only be defined through a constructive dialogue between the Court of Justice and national Constitutional Courts. By contrast, *ultra vires* doctrines and national identity claims that unilaterally seek to call into question the interpretation of

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[5] See, for example, the special volume that *European Public Law* dedicated to the notion of national constitutional identity. See, in this regard, D. FROMAGE and B. DE WITTE, *National Constitutional Identity Ten Years on: State of Play and Future Perspectives*, in 27 *European Public Law*, 2021, p. 441.

[6] For a notable exception, see L. S. ROSSI, *The Principe of Equality Among Members of the European Union*, in L. S. ROSSI and F. CASOLARI (eds.), *The Principe of Equality in EU Law*, Berlin/Heidelberg, 2017, p. 3. See also S. JOLIVET, *L'égalité des États membres de l'Union européenne: vers une conception de l'égalité étatique autonome du droit international ?*, in *Revue du droit de l'Union européenne*, 2015, p. 383.

EU law put forward by the Court of Justice have simply no room in the EU legal order.

2. EU Identity and National Identities

The EU is a Union of values. Those values are not the result of a 'top-down' approach, by which the authors of the Treaties decided to impose certain values on the Member States. On the contrary, those values are the result of a 'bottom-up' approach, since they stem from the constitutional traditions common to the Member States[7]. In the *Conditionality Judgments*, the Court of Justice made this crystal clear. It held – and I quote – that "[t]he values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties"[8]. The defence of those values has, in my view, three direct implications.

First, as the Court of Justice held in *Repubblika*, a candidate State for EU membership must align its own constitution (or Basic law) – including institutional and substantive provisions – with the values on which the EU is founded. The so-called Copenhagen Criteria – which are now set out in Article 49 TEU – implied, *inter alia*, a strict control of those values[9]. Needless to say, as the Court of Justice held in *Euro Box Promotion and Others* as well as in *RS*, EU law does not impose a "particular constitutional model", but it is for each Member State to choose the model that best reflects the choices made by its

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[7] In relation to the value of respect for the rule of law, see CJEU, judgments of 16 February 2022, *Hungary v. Parliament and Council*, case C-156/21, EU:C:2022:97, para. 237, and of 16 February 2022, *Poland v. Parliament and Council*, case C-157/21, EU:C:2022:98, para. 291.

[8] *Hungary v. Parliament and Council*, *cit.*, para. 127; *Poland v. Parliament and Council*, *cit.*, para. 145.

[9] See, to that effect, CJEU, judgments of 20 April 2021, *Repubblika v. Il-Prim Ministru*, case C-896/19, EU:C:2021:311, paras 61 and 62, and of 21 December 2021, *Euro Box Promotion and Others (Criminal Proceeding against PM and Others)*, cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paras 160 and 161.

own people, provided that those choices comply with the values on which the EU is founded[10].

For example, the constitutional model chosen by a Member State may organise the judiciary in a way that is different from that of another Member State. Member State 'A' may decide to establish a Constitutional Court whose decisions are binding upon ordinary courts. By contrast, Member State 'B' may prefer not to have such a court, because of its legal tradition and culture. The EU must respect both choices, provided that they adhere to a concept of the rule of law that stems from the constitutional traditions common to the Member States. This means for Member State 'A' that its Constitutional Court whose decisions are binding upon ordinary courts must be independent, since only respect for that independence may guarantee effective judicial protection of EU rights.[11]

The principle of procedural autonomy also illustrates the idea that there is no particular constitutional model that EU law promotes. Provided that there are no EU rules on the matter, it is, in accordance with that principle, for the national legal order of each Member State to establish procedural rules providing for remedies that ensure the effective protection of EU rights. However, those procedural rules must comply with both the principles of equivalence and effectiveness. Subject to compliance with those twin principles, it is for each Member State to determine, inter alia, the relationship between civil and administrative courts of last instance. In *Randstad Italia*, for example, the Court of Justice held that in circumstances where an effective legal remedy exists, "it is … entirely open – from the point of view of EU law – to the Member State concerned to confer jurisdiction on the highest court in its administrative order (*Consiglio di Stato*) to adjudicate on the dispute at last instance, in relation both to the facts and to points of law, and consequently to prevent the dispute from being open to further substantive examination in an appeal in cassation before the highest court in its judicial order (*Corte*

[10] See also CJEU, *Euro Box Promotion and Others*, *cit.*, para. 229, and judgment of 22 February 2022, *RS*, case C-430/21, EU:C:2022:99, para. 43 (*Effect of the decisions of a constitutional court*).

[11] See CJEU, *Euro Box Promotion and Others*, *cit.*, para. 230.

suprema di cassazione)"[12]. This was so even if the highest court in the administrative order of the Member State concerned had delivered a judgment that was inconsistent with EU law, in so far as interested persons were allowed "to bring an action before an independent and impartial tribunal and to assert effectively that EU law… had been infringed"[13]. In any event, the Court of Justice recalled that parties adversely affected by that judgment could bring an action in damages against that Member State in accordance with the *Köbler* line of case law[14].

The decision to align its own constitutional arrangements with EU values is a sovereign choice of the candidate State for EU membership[15]. However, if such State fails to do so, Article 49 TEU bars it from becoming a member of the EU[16]. Acquiring the status of 'Member State' is, therefore, a 'constitutional moment' for the State concerned since at that very moment, the legal order of the new Member State is deemed by the 'Masters of the Treaties' to uphold the values on which the EU is founded. The judgment of the Court of Justice in *Getin Noble Bank* illustrates this point[17]. From the moment of accession onwards, interlocking the legal order of the *new* Member State with the EU legal order and the other Member States' legal orders takes place and gives rise to mutual trust.

Second, the Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That ongoing commitment means that there is 'no turning back the clock' when it comes to respecting the values contained in Article 2 TEU. This was made clear by the Court of Justice in the *Conditionality Judgments*, ruling that "[c]ompliance with those values cannot be reduced to an obligation which a candidate State must meet in order

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[12] CJEU, judgment of 21 December 2021, *Randstad Italia*, case C-497/20, EU:C:2021:1037.

[13] *Ibid*., para. 78.

[14] *Ibid*., para. 80 (referring to ECJ, judgment of 30 September 2003, *Köbler*, case C-224/01, EU:C:2003:513).

[15] The same applies where a Member State decides to withdraw from the EU. See CJEU, judgment of 10 December 2018, *Wightman and Others*, case C-621/18, EU:C:2018:999, para 50.

[16] That provision states that "[a]ny European State *which respects the values referred to in Article 2* and is committed to promoting them may apply to become a member of the Union" (Emphasis added). CJEU, *Repubblika v. Il-Prim Ministru*, *cit.*, para. 61.

[17] CJEU, judgment of 29 March 2022, *Getin Noble Bank*, case C-132/20, EU:C:2022:235.

to accede to the [EU] and which it may disregard after its accession"[18]. The Member States must respect those values "at all times"[19].

The level of value protection provided for by a Member State when it joined the EU is a starting point and the trend of constitutional reforms must always be towards strengthening that protection. As the Court of Justice held in *Repubblika*, "[a] Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU"[20]. It follows from that judgment that the EU legal order prohibits 'value regression'.

The defence of the values contained in EU law amounts to protecting 'the very identity of the EU as a common legal order'. That commonality implies that EU identity draws, in turn, on the constitutional traditions common to the Member States. Authoritarian drifts have simply no room in the EU legal order, since they would call into question the effectiveness of Articles 2, 19, paragraph 1, and 49 TEU and would entail a departure from those common traditions.

Third and last, the defence of those values is not a political question that exclusively falls within the scope of Article 7 TEU. Those values are not "merely a statement of policy guidelines or intentions"[21], but may be protected by EU law, either at the level of primary or secondary law. Again, in the *Conditionality Judgments*, the Court of Justice observed that those values pervade the entire body of EU law. It held – and I quote – that "numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for

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[18] CJEU, *Hungary v. Parliament and Council*, *cit.*, para. 126, and *Poland v. Parliament and Council*, *cit.*, para. 144.

[19] CJEU, *Hungary v. Parliament and Council*, *cit.*, para. 234, and *Poland v. Parliament and Council*, *cit.*, para. 266.

[20] CJEU, *Repubblika v. Il-Prim Ministru*, *cit.*, para. 63.

[21] CJEU, *Hungary v. Parliament and Council*, *cit.*, para. 232, and *Poland v. Parliament and Council*, *cit.*, para. 264.

breaches of the values contained in Article 2 TEU committed in a Member State"[22]. In relation to secondary EU law, the Court of Justice pointed out, however, that the EU legislature may, within the scope of its competences, provide for procedures protecting those values, provided that they are not parallel to the procedure laid down in Article 7 TEU. This was, for example, the case of the conditionality mechanism laid down by Regulation 2020/2092 since it pursues an objective and provides for the adoption of measures that are different from those set out in that Treaty provision.

The national identity of a candidate State for EU membership must therefore be in keeping with the values contained in Article 2 TEU. Otherwise, such a State may not accede to the EU. Similarly, after accession, constitutional reforms or legislative measures that undermine the level of protection of those values constitute a violation of the principle of no regression. That is so, regardless of whether those reforms and legislative measures seek to protect or promote national identity. In any event, the reforms and legislative measures at issue would fall outside the scope of Article 4, paragraph 2, TEU, since they do not respect the values contained in Article 2 TEU.

3. National identity and the Principle of Equality of Member States before the Treaties

Therefore, national identity, within the meaning of Article 4, paragraph 2, TEU, must comply with the values contained in Article 2 TEU and, in particular, with the value of respect for the rule of law within the EU.

In light of the case law of the Court of Justice that draws on the constitutional traditions common to the Member States, respect for the rule of law means, inter alia, that public authorities must not call into question the

[22] CJEU, *Hungary v. Parliament and Council*, *cit.*, para. 159, and *Poland v. Parliament and Council*, *cit.*, para. 195.

position taken by a court in a final decision. As the Court of Justice held in *Torubarov*, "the right to an effective remedy would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party"[23]. In the same way, 'the fact that the public authorities do not comply with a final, enforceable judicial decision', the Court wrote in the seminal *Deutsche Umwelthilfe*, "deprives [Article 47 of the Charter] of all useful effect"[24].

In the EU legal order, the principle of finality of judgments also applies to those issued by the Court of Justice. Accordingly, when it comes to the interpretation of EU law, the Court of Justice has the *final* say[25], and when it comes to the validity of that law, it has the *only* say[26]. Otherwise, if public authorities, in general, and national courts, in particular, were to second-guess the interpretation of EU law put forward by the Court of Justice, the rule of law within the EU would become no more than the rule of lawlessness[27].

It is worth noting that the *Corte Costituzionale* has recognised the exclusive jurisdiction of the Court of Justice to have the final say as to what the law of the EU is. Most recently, it has reiterated that recognition in its judgment no. 67/2022[28].

Respect for the rule of law also means compliance with the principles of equality before the law and non-discrimination. In that regard, allow me to draw your attention to the wording of Article 4, paragraph 2, TEU. Before providing that the EU must respect the identities of the Member States, that Treaty provision states that the EU must respect the equality of Member

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[23] CJEU, judgment of 29 July 2019, *Torubarov*, case C-556/17, EU:C:2019:626, para. 57.

[24] CJEU, judgment of 19 December 2019, *Deutsche Umwelthilfe*, case C-752/18, EU:C:2019:1114 , para. 37.

[25] See, in this regard, CJEU, judgments of 2 September 2021, *Republic of Moldova*, case C-741/19, EU:C:2021:655, para 45, and *RS*, *cit.*, para. 52 (*Effect of the decisions of a constitutional court*).

[26] CJEU, *RS*, cit., para. 71.

[27] See, on this point, K. LENAERTS, *No Member State is More Equal than Others*, in A. von Bogdandy and A. Peters, *German Legal Hegemony? MPIL Research Paper Series*, no. 2020-43, p. 37. See also the Opinion of ADVOCATE GENERAL TANCHEV in *A.B. and Others*, case C-824/18, EU:C:2020:1053, points 80-84 (*Appointment of judges to the Supreme Court – Actions*).

[28] CORTE COSTITUZIONALE, *judgment of 11 march 2022, No. 67*, IT:COST:2022:67, *Considerato in diritto*, Point No. 10.2.

States before the Treaties. Since *equality comes before identity*, one may argue, in light of that wording, that national identity may not call into question the principle of equality of Member States before the Treaties, i.e. before EU law. Most importantly, since that principle stems directly from the value of respect for the rule of law, national identity must comply with it.

Writing extra-judicially[29], I have advocated that the principle of primacy enjoys a transnational dimension that is grounded in the principle of equality before the law. That transnational dimension is not something new but may be found in the seminal judgment of the Court of Justice in *Costa*[30]. More recently, the link between primacy and the equality of Member States before the Treaties was explicitly recognised by the Court of Justice in *Euro Box Promotion and Others* as well as in *RS*[31].

The rationale underpinning that transnational dimension may be summarised as follows. The principle of equality of Member States before the Treaties means, in essence, that all provisions of EU law are to have the same meaning and to be applied in the same fashion throughout the EU, from Italy to Estonia and from Portugal to Poland. That is so regardless of conflicting provisions of national law. Three direct implications flow from the principle of "equality of Member States before the Treaties". First, the uniform interpretation and application of EU law are key for guaranteeing that

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[29] See, for example, K. LENAERTS, *Éditorial : L'égalité des États membres devant les traités : la dimension transnationale du principe de primauté*, in *Revue du droit de l'Union européenne*, 2021, no. 1, 1, and *La primauté du droit de l'Union et l'égalité des États membres devant les traités*, in E. Dubout (ed.), *L'égalité des États membres de l'UE*, Bruxelles, 2022, p. 37.

[30] ECJ, *Flaminio Costa v. ENEL*, *cit.* The relevant passage of the judgment reads as follows: "[t]he integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a *unilateral* and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5, paragraph 2, and giving rise to the *discrimination* prohibited by Article 7" (emphasis added).

[31] See also CJEU, *Euro Box Promotion and Others*, *cit.*, para. 249, and *RS*, *cit.*, para. 55. In those judgments, the Court of Justice held that "[a]rticle 4, paragraph 2, TEU provides that the Union is to respect the equality of Member States before the Treaties. However, the Union can respect such equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature".

equality. Second, the uniform interpretation of EU law needs to be ensured by one court and one court only, i.e. the Court of Justice. Third and last, the principle of primacy underpins the uniform interpretation and application of EU law. That law – as interpreted by the Court of Justice – is "the supreme law of the land" as primacy guarantees that normative conflicts between EU law and national law are resolved in the same fashion. Primacy thus guarantees that both the Member States and their peoples are equal before the law.

This shows that there is a link between the principle of primacy of EU, the principle of equality of Member States before that law and the value of respect for the rule of law within the EU. In my view, those two principles and that value are deeply intertwined. Without primacy, there is no equality, and without equality before the law, there is no rule of law within the EU.

4. National Identity and the Primacy of EU law

This brings me to the last part of my speech, where I want to stress the fact that national identity, within the meaning of Article 4, paragraph 2, TEU, is to be built in keeping with a constructive dialogue between the Court of Justice and national courts, in particular, national Constitutional Courts. By contrast, unilateral measures that call into question the primacy of EU law are not, in my view, the way forward.

When interpreting EU law, national identity, within the meaning of Article 4, paragraph 2, TEU, has been taken into account by the Court of Justice. To begin with, it has served to highlight the importance of the objectives pursued by a national measure that derogates from the fundamental freedoms. For example, in *Las*, the Court of Justice recognised that "the Union must also respect the national identity of its Member States, which includes

the protection of the official language or languages of those States"[32]. More recently, in *Boriss Cilevičs and Others*, the Court of Justice held that it was legitimate for a Member State to protect its national identity by adopting measures that sought to promote and develop the use of the official language in higher education. In implementing that policy, the Court of Justice acknowledged that the Member States enjoy 'broad discretion', 'since such a policy constitutes a manifestation of national identity for the purposes of Article 4, paragraph 2, TEU"[33].

Next, it has also served to interpret secondary EU law. For example, in *Remondis*, a public procurement case, the Court of Justice found that a reallocation or transfer of competence from one public authority to another does not meet all of the conditions required to come within the definition of 'public contract' for the purposes of Directive 2004/18. That was because Article 4, paragraph 2, TEU protects the division of competences within a Member State. "Since that division is not fixed", the Court of Justice wrote, "the protection conferred by Article 4, paragraph 2, TEU also concerns internal reorganisations of powers within a Member State"[34]. Accordingly, those internal reorganisations could not be subject to EU public procurement rules.

Last, but not last, the Court of Justice has also interpreted the notion of national identity, within the meaning of Article 4, paragraph 2, TEU, as allowing room for diversity. This means, in the words of the Court of Justice, that "the specific circumstances which may justify recourse to [a legitimate objective that is grounded in national identity] may vary from one Member State to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty"[35]. The *Coman* case, a preliminary reference made by

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[32] CJEU, judgment of 16 April 2013, *Las*, case C-202/11, EU:C:2013:239, para. 26.

[33] CJEU, judgment of 7 September 2022, *Cilevičs and Others*, case C-391/20, EU:C:2022:638, para. 83. However, in the same paragraph, the Court of Justice pointed out that that broad discretion could not 'justify a serious undermining of the rights which individuals derive from the provisions of the Treaties enshrining their fundamental freedoms'.

[34] CJEU, judgment of 21 December 2016, *Remondis*, case C-51/15, EU:C:2016:985, paras 40 and 41.

[35] See, in this regard, CJEU, judgments of 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH contro Oberbürgermeisterin der Bundesstadt Bonn*, case C-36/02, EU:C:2004:614,

the Romanian Constitutional Court, is an excellent example that illustrates the limits of such a margin of discretion. In that case, the Court of Justice held that it is for each Member State, according to its own identity, to decide the meaning of the institution of marriage. EU law is neutral as to whether that meaning should include or not same-sex couples. However, the exercise of such a margin of discretion cannot go as far as adversely affecting the free-movement rights of same-sex couples that got legally married in another Member State. Within the meaning and for the purposes of the relevant provisions of EU law, those couples are to be considered 'spouses' and thus, members of the same family.

Moreover, Constitutional Courts may also enter into a dialogue with the Court of Justice in order to clarify the meaning and scope of overriding principles of its own legal order. For example, in *M.A.S. and M.B.*, a case concerning VAT fraud, the *Corte Costituzionale* stressed the importance that the principle that criminal offences and penalties must be defined by law has within both the EU and Italian legal orders. It also brought to the attention of the Court of Justice the fact that rules on limitation form part of substantive criminal law.

In that regard, the Court of Justice recalled that in light of Article 325 TFEU, the Member States must ensure, in cases of serious VAT fraud, that effective and deterrent criminal penalties are adopted. Nevertheless, in the absence of EU harmonisation, it is for the Member States to adopt rules on limitation applicable to criminal proceedings relating to such cases. This means, in essence, that while a Member State must impose effective and deterrent criminal penalties in cases of serious VAT fraud, it is free to consider, for example, that rules on limitation form part of substantive criminal law. If that is the case, the Court of Justice pointed out that the Member State concerned must comply with the principle that criminal offences and penalties must be defined by law, a fundamental right enshrined in Article 49 of the

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para. 31 and the case-law cited, and of 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, case C-208/09, EU:C:2010:806, para. 87.

Charter which corresponds to Article 7, paragraph 1, ECHR[36]. Accordingly, even where the rules on limitation at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious VAT fraud, the national court is under no obligation to disapply those rules in so far as that obligation is incompatible with Article 49 of the Charter. However, the margin of appreciation enjoyed by Italy in qualifying rules on limitation as substantive criminal law could not go as far as maintaining the *status quo*. Whilst national courts did not have the obligation to disapply those rules, the same could not be said in relation to the Italian legislature. The Italian rules on limitation had to be amended so as to avoid impunity in a significant number of cases of serious VAT fraud.

These examples show, in my view, that judicial dialogue is an appropriate means of drawing the contours of the margin of appreciation that the Member States enjoy under the concept of 'national identity', within the meaning of Article 4, paragraph 2, TEU. However, the same cannot be said in respect of judicial unilateralism. That is why in *RS*, the Court of Justice expressly rejected that a Member State may unilaterally rely on its national identity in order to call into question the primacy of EU law. It is worth mentioning the relevant passage of that judgment in full. It held that Article 4, paragraph 2, TEU "has neither the object nor the effect of authorising a [C]onstitutional [C]ourt of a Member State, in disregard of the obligations under, in particular, Article 4, paragraphs 2 and 3, and the second subparagraph of Article 19, paragraph 1, TEU, which are binding upon it, to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national [C]onstitutional [C]ourt"[37].

In the same way, the Court of Justice rejected the so-called *ultra vires* doctrine, according to which a Constitutional Court may second-guess and depart from the interpretation of EU law contained in a judgment of the Court of Justice. Again, the relevant passage of *RS* merits quotation in full: "since […] the Court [of Justice] has exclusive jurisdiction to provide the definitive

[36] CJEU, *M.A.S. and M.B.*, *cit.*, para. 55.
[37] CJEU, *RS*, *cit.*, para. 70.

interpretation of EU law, the [C]onstitutional [C]ourt of a Member State cannot, on the basis of its own interpretation of provisions of EU law […] validly hold that the Court [of Justice] has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from the Court"[38].

The *RS* judgment is, in my opinion, an important development in defining the relationship between national Constitutional Courts and the Court of Justice. It contains two powerful statements ruling out judicial unilateralism. Still, those two statements must be read in light of judicial dialogue. That is why in the same judgment, the Court of Justice indicated the path that a Constitutional Court must follow when having doubts as to the compatibility of secondary EU law with the concept of 'national identity' laid down in Article 4, paragraph 2, TEU. That path imposes the obligation for the Constitutional Court concerned to refer a preliminary question of validity to the Court of Justice[39].

I am happy to note that, in judgment no. 67/2022, the *Corte Costituzionale* referred explicitly to the judgment of the Court of Justice in *RS* and, in particular, to the passage of the judgment that makes the link between the principle of primacy of EU law and the equality of Member States before that law. Most importantly, I welcome the conclusion that the *Corte Costituzionale* draws from that judgment of the Court of Justice. It held – and I quote from the English translation contained in its website – that "the principle of [primacy] of EU law and Article 4, paragraphs 2 and 3, TEU, are the cornerstone on which the community of national courts rests, held together by convergent rights and duties. This Court has consistently upheld that principle, affirming the value of its driving effects with regard to the domestic legal system"[40].

Similarly, judicial dialogue may also serve national courts as a means of urging the Court of Justice to reconsider its previous findings. For example, in

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[38] *Ibid.*, para. 72.
[39] *Ibid.*, para. 71.
[40] CORTE COSTITUZIONALE, *judgment of 11 march 2022, No. 67*, *cit.*, *Considerato in diritto* No. 11.

Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)[41], the referring court asked the Court of Justice to clarify the consequences that flow from finding a national legislation to be incompatible with the principle of proportionality of penalties set out in an EU Directive. It asked whether that principle could produce direct effect and if so, whether the principle of primacy required it to set aside the national legislation at issue as a whole or only the part necessary to enable the imposition of proportionate penalties. Following the Opinion of AG Bobek, the Court held that the principle of proportionality of penalties was unconditional and sufficiently precise to produce direct effect. The Court reasoned that that principle was not qualified by any condition. Nor was it subject, in its implementation or effects, to the taking of any measure either at EU or at national level. On the contrary, the principle of proportionality of penalties imposes on the Member States in unequivocal terms a precise obligation as to the result to be achieved. It is worth noting that, in paragraph 29 of that judgment, the Court of Justice expressly overruled its previous findings in *Link Logistik N&N* in which it had reached the opposite conclusion[42]. Moreover, the Court of Justice held that the national legislation at issue had to be set aside only to the extent that it prevented the imposition of proportionate penalties, whilst ensuring that those penalties remain effective and dissuasive[43].

The judgment of the Court in *Bezirkshauptmannschaft Hartberg-Fürstenfeld* shows that the Court of Justice takes judicial dialogue seriously. In the context of that dialogue, it is not afraid of rectifying its case law. As AG Bobek wrote, "to find, in a system that defines itself as being based on judicial dialogue, a dialogue partner that is never wrong may perhaps be rather

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[41] CJEU, judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, case C-205/20, EU:C:2022:168 (*Direct effect*).

[42] CJEU, judgment of 4 October 2018, *Link Logistik N&N*, case C-384/17, EU:C:2018:810.

[43] CJEU, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, *cit.*, paras 40 and 41. In this regard, the Court of Justice observed that the "combination of various characteristics" of the national legislation at issue made it disproportionate (e.g. the accumulation of pecuniary penalties without an upper limit of fines). However, this was not the case when those characteristics were taken in isolation (e.g. the fact that the amount of pecuniary penalties varied according to the number of workers affected by violations of certain obligations in the field of employment law was not, in itself, disproportionate).

surprising and occasionally frustrating"[44]. However, as is apparent from this judgment, the Court of Justice is not such a dialogue partner, but one who leaves the door open for reconsideration in the light of concerns and doubts raised by national courts and, in particular, by national constitutional courts.

5. Concluding remarks

As I mentioned in a speech that I delivered last year in the context of an international conference organised by the Latvian Constitutional Court[45], and again in the 29th FIDE conference, the Court of Justice is not the new kid on the block as its looming 70th anniversary shows.

The Court of Justice's commitment to upholding the rule of law, democracy and fundamental rights is beyond doubt. The Court of Justice has incorporated many constitutional traditions common to the Member States into the constitutional fabric of the EU, thereby ensuring that EU law and national constitutional laws are deeply intertwined. EU identity seeks to ensure that EU law remains a "common legal order" where the Member States may express their own identities.

In *Repubblika*, the Court of Justice sent the clear message that authoritarian tendencies have simply no room in the EU legal order and in so doing, it protects the very principle of democracy that national Constitutional Courts are called upon to uphold. This shows that the Court of Justice and the Constitutional courts of the Member States are allies.

The principle of primacy serves, in my view, to protect and to strengthen that alliance. It is a means of preventing Member States from departing from

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[44] ADVOCATE GENERAL, Opinion of the 23 September 2021, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, case C-205/20, EU:C:2021:759, point 141.

[45] K. LENAERTS, *Dinner Speech*, in *EUnited in diversity: between common constitutional traditions and national identities International Conference Riga, Latvia – 2-3 September 2021 Conference Proceedings* (Court of Justice and Constitutional Court of Latvia, Luxembourg and Riga, 2022), available at eUnited in Diversity - Riga - September 2021 - Conference proceedings.pdf.

their own common constitutional traditions and from establishing "new illiberal traditions". By virtue of the principle of primacy, a national court – and in particular, a national Constitutional Court – may rely on EU law with a view to setting aside constitutional reforms that undermine the values on which the EU is founded. In particular, EU law protects national Constitutional Courts from reforms that undermine their independence, as only an independent Constitutional Court may issue rulings that are binding upon ordinary courts.

An antagonistic understanding of 'national identity' undermines that alliance. National identity must be construed in light of a constructive dialogue between the Court of Justice and national Constitutional Courts that revolves around upholding common values.


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