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Is the Primacy of Union Law still fit for Purpose?

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Is the principle of primacy of Union law in crisis? Do the recent rulings from several national high courts confirm that the notion of primacy was only a mirage, an optic illusion created by an enthused case-law of the Court of Justice and a choir of loud supporters, blind to the crude national reality that surrounded the European project and its legal order?
Several developments point in the direction of a constant erosion of primacy as a tool that guarantees the uniformity and effectiveness of Union law in the Member States. From rulings of national courts challenging the authority of the Court of Justice, to rule of law backsliding in some Member States, it appears as if the primacy of Union law has lost force, showing its inherent limitations for all to see. However, this narrative runs in contradiction with the growing role of the Union and the expectations that citizens have put in the Union's abilities and powers to solve the most relevant existential challenges of our time: from fighting a global pandemic to supporting a war in a neighboring country, or overcoming a climate and an energy crisis, it is the Union who is entrusted by its citizens (and national governments) to deal with such matters. An organization that receives the mandate of saving the very existence of its member countries and their way of life can hardly be defined as a failed project.

In this contribution I will argue that the principle of primacy, as a fundamental criterion that ensures the uniformity and effectiveness of Union law, is indeed undergoing significant stress. However, the argument that will be made does not point in the direction of an existential crisis of primacy and the Union legal order, but of the need to adapt its physiognomy to the current reality of the European project. In contrast with the voices that rely on a pragmatic approach towards overcoming the challenges faced by the principle of primacy at the current time, this paper will support a different approach towards primacy, including some proposals of Treaty change for its reinforcement, in a way that reflects the specificities of the Union, whilst preserving the federal spirit that underscores the European project.

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The principle of primacy emerged in the 1960's as a corollary of the direct effect of EEC law. The two principles act as the two faces of the same coin, direct effect allowing individuals to invoke Union rules directly before national authorities, and primacy acting as a sword that empowers those authorities to set aside national rules that contradict the Union rules invoked in the case. Both principles are a pragmatic and original construction to empower individuals to reinfrice the private enforcement of Union law, defending their own individual interests, but indirectly contributing to improve the effectiveness of European rules in the national legal order.[1]

To conceive primacy in a static way, as a sort of "conflict rule" that simply confirms the preference of one legal rule over another, is a shortsighted approach that does not envision the broader complexities that the principle brings about. In fact, primacy is a much more complex and multifaceted principle that requires constant development, as the case-law of the Court of Justice shows since the inception of the principle in the seminal case of *Costa/Enel* in 1964.[2]

First, the primacy of Union law *vis-à-vis* national law is not a hierarchical criterion that determines validity in accordance with a predetermined rank. In contrast with what the optical impression of the word might convey, primacy does not determine validity based on hierarchy, but on a criterion of *competence*. The reason why national law must give way to Union law is the mere fact that the Union has exercised its competences in a fields of Union policy, agreed by the Member States in accordance with the procedures provided in the Treaties. Once the Union holds the competence in an area of policy of its competence, its rules prevail over national law, due to the fact that the Member State has conferred that power to the Union, either through primary or secondary Union law. The primacy of Union law reflects the competence of the Union and, at the same time, the lack of competence of the Member States. If national rules contradict Union rules, their existence undermines the competence of the Union to act on such field. That is the context in which the principle of primacy operates, thus guaranteeing the correct allocation of powers between the Union and the Member States, in a arrangement previously consented by the Institutions and Member States involved.

Second, there is a dynamic dimension to the principle of primacy. Whilst the principle can be portrayed in strictly static terms, settling a solution to situations of conflict of rules, the reality is rather different. Together with the seminal judgment in *Costa/Enel*, a broad array of rulings of the Court have paved the way to the applicative dimension of primacy, navigating the way for national judges to deal with the consequences of an incompatibility among Union and national rules. There is no duty to annul a rule of national law if the national court lacks the power to do so, in which case, according to the *Simmenthal* judgment,[3] the national court has a duty to *set aside* the conflicting rule. However, if the national court has the power to annul, annul it must, to preserve the effectiveness of Union law and the principle of legal certainty. Situations of parallelism between jurisdictions

[1] DOUGAN, M., *When worlds collide: competing visions of the relationship between direct effect and supremacy*, in *Common Market Law Review*, 44(4), 2007.

[2] *Costa/Enel* (6/64, EU:C:1964:66).

[3] *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (106/77, EU:C:1978:49).

can appear, as is the case of "double preliminarity", when the national court has a duty to refer the case to the Court of Justice and to its Constitutional Court as well.[4] Even more delicate issues arise when national courts consider that the setting aside or the annulment of the national rule can create significant harm, in which case it is inclined to limit the effects of its judgment in time.[5] In sum, primacy is not only a conflict rule that determines the fate of a provision that clashes with another, but rather a complex array of criterions guaranteeing accommodation between two legal orders, in which both deploy directly effective rules and grant rights to individuals that have a legitimate claim to justice in a court of law.

Third, in its most straight-forward dimension, what has previously been called the "static" dimension of primacy, the principle is far from having a settled status. The primacy of Union law extends over the entirety of the national legal order, including its constitutional provisions and any decision of a national authority, including its courts. This maximalist understanding of the scope of primacy has been rejected by the majority of constitutional courts of the Member States, refusing to surrender their prerogative to rule in last instance on the proper allocation of competence between the two political entities: the Union and the Member State. In some jurisdictions this scrutiny has extended beyond competence control, entering the terrain of "identity control", in a more substantive and value-oriented type of review of Union action. This tension in determining the exact scope of Union law and its primacy has kept the Court of Justice and constitutional courts busy throughout the decades, resulting in a status quo of stable instability, in which any of the players have the ability to destabilise, and even destroy, the coherence and unity of the current terms of cohabitation between Union and national law.

This situation unfortunately evolved into a scenario of open hostilities in 2020, when the German Federal Constitutional Court declared a ruling of the Court of Justice to be "objectively arbitrary" and not applicable in Germany, followed by the same outcome in reviewing a Decision of the European Central Bank. Shortly after, the Romanian Constitutional Court followed suit in refusing to enforce rulings of the Court of Justice declaring a prior case-law of the Romanian court in breach of Union law. The same path was followed, although in a different context, by the Polish Constitutional Court, in the midst of the rule of law crisis that emerged after 2015.[6] The unravelling of the stable instability that had kept the Union's legal order in peaceful coexistence with national law appeared to have no end.

Following the first shock caused by the referred rulings, the tensions seemed to lower, particularly in the relations with the German Federal Constitutional Court and the Romanian Constitutional Court. However, the scars provoked by these conflicts have shown the limits of the principle of primacy and its inherent weaknesses, including the remedial shortcomings of the judicial system. In the absence of a clear and explicit rule imposing the primacy of Union law, constitutional courts feel entitled to guarantee that the Constitution is upheld, even by the Union. The humbling of the principle of primacy has taken place at a time in which other major developments have gradually but constantly

[4] *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363).

[5] *Association France Nature Environnement* (C-379/15, EU:C:2016:603).

[6] Judgment of 7 October 2021 (case K 3/21).

changed the face of the Union itself, in an evolution that raises doubts as to whether the principle of primacy, as we know it today, is fit for purpose.

The erosion of the principle of primacy stands, however, in sharp contrast with the success of the Union as project of integration. The past twenty years, and particularly following the financial crisis that erupted in 2008, witnessed an impressive process of transformation of the Union as a political and economic project. Without having hardly amended its Treaties, the Union has undergone a process of transformation that equals, and in some respects even surpasses, the reforms of 1992 in the Maastricht Treaty. These changes have taken place through legislative, executive, or international means, but also as a result of social change in the European polity. The result is a stronger and more ambitious Union, having received from its citizens a broad array of tasks to handle, tasks that the Member States are powerless to address on their own. The paradox lies in the fact that a stronger Union comes together with a weaker primacy of its law, questioned and challenged by the same Member States that rely on the Union to protect them from existential challenges. These changes in the Union are tectonic shifts, taking place silently or gradually, or both, but transforming the very face of the European project.

First, the transformations are clearly visible in the array of new powers being exercised by the Union. These powers are not necessarily new, but they are fashioned in unprecedented ways that put the Union in a course towards an ever-growing line-up up powers that reinforce the Union's role *vis-à-vis* the Member States and its citizens. Most of these new policy approaches are the result of serious crises emerging from external shocks, namely the Covid-19 pandemic, climate change and the invasion of Ukraine by the Russian Federation. These shocks have triggered the development of unprecedented initiatives to collectively use the Union as an instrument to ensure the protection of existential interests of the Member States and its citizens. Joint purchases of vaccines or gas, the Green New Deal, or an unprecedented stimulus package under a novel fiscal arrangement (NextGenerationEU), using the Union as a financial shield and also purveyor of financial stability among the Member States. The trend has continued following the energy crisis ensuing from the invasion of Ukraine, whilst the developments in the field of defense, including the use of Union funds to finance the provision of military assistance to a neighboring country, transformed the way in which these areas of policy had been implemented to date.[7] The sum of this trend is a considerably stronger Union, receiving a mandate from the Member States and its citizens to ensure their very subsistence in the face of existential challenges. The Union is not only an instrument to ensure peace among the Member States through an internal market and an area without frontiers. It is now an instrument that guarantees the conditions of *subsistence* of its Member States.

Second, the institutional design of many of its policies is turning growingly federal. The traditional division of tasks between a Union that legislates and Member States that take care of the executive and judicial implementation, is fading and evolving towards a more robust and federal-like system of enforcement, in which Union authorities play a growing role in decision-making, as well as Union courts in settling disputes. The case of Banking Union is a telling example, in which a federal-like composite system has been put in place

[7] HAMILTON, T., *Defending Ukraine with EU weapons: arms control law in times of crisis*, in *European Law Open*, 1(3), 635-659. doi:10.1017/elo.2022.35.

in the field of prudential supervision and bank resolution. The creation of the European Public Prosecutor and its institutional design is another example of this trend, as is the case of the latest anti-money-laundering reform, in which new bodies are emerging in line with the same federal-like design. This shift has forced a new approach in the case-law towards the way in which Member States interact with Union authorities, but also to the division of tasks between national and Union courts. The traditional role of national courts as protagonists in the interpretation and enforcement of Union law in the Member States has shifted and become more centralized in favor of the Union's courts, now facing federal-like institutional arrangements in need of strong centralized powers to attain their goals.[8]

Third, fundamental rights and Union citizenship have been altered as a result of the dynamics of integration. In the case of fundamental rights, what used to be a generic array of principles is now enshrined in writing in the Charter of Fundamental Rights of the European Union, with the same rank as primary law. The difference of having fundamental rights recognized in case-law only and enacting them in a written text of primary law has become significant. Since the entry into force of the Charter, the Court of Justice receives a growing number of questions for a preliminary reference on points of fundamental rights, turning it gradually into a fundamental rights court. The importance of the questions referred have forced the Court into developing a more sophisticated approach, thus reinforcing its position as a fundamental rights court. The importance of fundamental rights goes hand in hand with the development of a growing role for Union citizenship, a status that seemed modest at first, but which is now destined to become the "fundamental status of nationals of the Member States". The status of Union citizenship is not only reflected in a succinct list of rights enumerated in Art. 20 TFEU, but also in the overall protection granted by the "substance of the rights attached to the status" of Union citizenship.[9] This evolution has put Union law closer to the very core of nationality law, to the extent of setting limits to Member State decisions on the withdrawal of nationality,[10] and even to the conditions of access and recognition.[11]

Fourth, the Union is not an economic project only, but also a project based on values. Article 2 TEU enumerates the values on which the project is based, in terms that set the core identity of the Union. The terms in which the values are expressed seemed to be declarative, but in the course of time, and because of several regressions in rule of law standards in some Member States, the values now stand as normative tools that also merit protection through law.[12] This transformation of the function of Union values stands behind the development of an "identity" of the Union, a set of normative benchmarks that act as limits to Member State action, but also to international law. The introduction of an "identity" of the Union based on values, provides tools with practical implications. For example, the Member States cannot invoke their national identities when their actions compromise the Union's "identity".[13] In symbolic terms, the Union's "identity" is the

[8] *Iccrea Banca* (C-414/18, EU:C:2019:574) and *Berlusconi* (C-219/17, EU:C:2018:502).

[9] *Ruiz Zambrano* (C-34/09, EU:C:2010:560).

[10] *Rottmann* (C-135/08, EU:C:2009:588).

[11] *Micheletti* (C-369/90, EU:C:1992:295).

[12] *Poland/Parliament and Council* (C-157/21, EU:C:2022:98).

[13] *Euro Box Promotion* (C-357/19, EU:C:2021:1034).

countermeasure of the Member State's "constitutional cores" or "constitutional identities", as defined in the case-law of the higher national courts. This new approach towards Union values has produced surprising outcomes, as is the case of the Court of Justice becoming an active defender of the independence of national courts, including supreme or constitutional courts.[14] Judicial dialogue in Europe is not only a matter of reaching optimal interpretations of Union law, but also a question of safeguarding the basic institutional infrastructure, including the judicial settings, of the Union and of its Member States.

In sum, the Union of 2022, is an organization that has evolved substantially from the project it represented back in 1964 when the judgment in *Costa/Enel* was delivered. The building blocks of the Union are made of constitutional principles and values with the force of law, giving rise to autonomous categories of citizenship, rights and democracy with a decisive impact in the everyday lives of citizens. An organization of this nature promotes and implements political agendas with a significant transformative impact. Therefore, for this Union to achieve its aims, it needs to rely on a robust normative toolbox that ensures the effectiveness of the project. To see at the present time, when the Union has achieved an unprecedented degree of ambition and sophistication in its organization, a crisis of its principle of primacy, is an outcome that seriously undermines the narrative described thus far.

The current crisis is not an isolated incident. The German Constitutional Court's judgment in the case of Weiss, declaring a judgment of the Court of Justice to be "objectively arbitrary" and an ECB decision *ultra vires*, is the tipping point of a trend that only aggravated in the course of time. It is true that the crisis in the Weiss case eventually found a pragmatic solution, but the reality is that the effect of the ruling sent a clear message to all national jurisdictions inclined to depart from the common criterion set by the Court of Justice. If the only recognition of the principle of primacy comes from the case-law and a Declaration annexed to the Treaties, the frailty of the Union's legal order is too obvious for all to see. In a Union that intends to play a transformative role in promoting societal change in times of existential challenges, this frailty is a price too high to pay.

It is tempting to affirm that challenges to the principle of primacy are an inherent feature of the integration process, and that the Union should be ready to tackle them in a pragmatic way. To some extent, the entire history of European integration has witnessed various challenges of the kind, generally solved through political compromise or discrete manoeuvrings. In the same way that the Union has struggled through many crises by focusing on problem-solving rather than problem-raising, the challenges to primacy could be approached in a similar way, relying on the good will of all the stakeholders to reach a reasonable compromise.

This approach is tempting, and it could be even considered to be the correct way forward. However, it is a strategy that gambles on the successful management of previous crises, whilst the current crisis of primacy is taking place in an entirely different context. This

[14] See PECH, L., WACHOWIEC, P. and MAZUR, D., *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action*, in *Hague Journal on the Rule of Law*, 13, 1-43, 2021.

can be seen by depicting the different scenarios that could ensue in a Union with a fragilized primacy at the basis of its legal order.

A fractured primacy is not an acceptable normative premiss on which to build essential policy measures like NextGenerationEU, joint purchases of vaccines or energy resources, or measures of support in the field of defence while a deathly war is taking place in a neighbouring country. The list of external shocks that are shaking the foundations of the Union is growing longer, now including climate change as an additional and long-term risk for the Member States and its citizens. These challenges are not internal shocks provoked by a Member State or group of Member States. On the contrary, they are external shocks that affect the Union and its Member States as a whole. The response of the Union to these shocks has an existential dimension, inasmuch its failure can risk the collective failure of all the Member States, including the risk of their very existence. Whilst a fragilized primacy was traditionally concerned with the internal market, the new and invigorated Union hardly has any margin of error, and a broken primacy that entitles any national stakeholder to depart from the uniform implementation of Union law can be a lethal manoeuvre with far-reaching implications.

The same applies to the current federal-like institutional arrangements, which demand a high degree of cooperation among the Union and the national authorities. As entire policy fields turn towards mechanisms and other forms of highly integrated administrative performance, this model can only operate on the basis of a robust principle of primacy accepted by all the players, particularly national authorities. A supervisory mechanism for credit institutions cannot be effective if the decisions of the ECB do not have primacy over the decisions of national authorities, particularly when there is a discrepancy in the interpretation of Union law. The European Public Prosecutor must rely on the uniform interpretation provided by the Court of Justice, not on the diverse national interpretations that the national higher courts can provide of the same provision. As the Union navigates towards highly integrated methods of administrative action, the principle of primacy must act as a firm foundation accepted by all the stakeholders, or otherwise the structure becomes unstable, fragilized and destined to fail, together with its policy aims.

As the Union becomes more rights-centered and a statue of citizenship evolves, questions of values and principles will emerge, in which a variety of views will create divergences among the Member States. Values-based reasoning in the case-law of the Court or in the legislative process will trigger more complex conflicts in which the final word will leave unsatisfied stakeholders. Religion in the workplace, the protection of privacy and its conflicts with public security, the protection of animals and its balancing with entrenched cultural practices, etc… The Union is called to have a say in many of the current societal debates that were traditionally separate from the discussions over the internal market. However, these debates are directly or indirectly part of Union policy now, and the Union legislature and its courts cannot be driven to have a say in these matters while the principle of primacy is questioned by the highest courts of the Member States. For the Union to have a robust fundamental rights policy and an authoritative criterion settling such matters in a complex and diverse Europe, once the decision is made it is imperative for the principle of primacy to deploy its full force.

Seen in this light, the current crisis of the principle of primacy is not just another bump in the road, as other previous crises witnessed in the past. The current challenges to primacy are a much more unsettling and significant threat that imperil the Union's efforts to provide robust responses to existential challenges. For that reason, pragmatism and low-key responses will not solve the problem that has now emerged. The crack is not in a Chinese flower vase, it is a crack that slowly and constantly expands in the concrete heart of a gigantic water dam.

The alternatives to the pragmatic approach to the crisis of primacy are not self-evident. They run from idealistic and politically naïve proposals to overcomplicated solutions with uncertain chances of success. In any event, a quick review is well deserved, whilst the use of ideal but politically challenging should not be overlooked. What seemed impossible in European integration a decade ago has become the rule today (NextGenerationEU was hardly conceivable in the midst of the euro crisis in 2012), as a sign that it is important to keep an open mind when exploring options to overcome the primacy crisis.

The first proposal is a classic: the introduction of a primacy clause in the Treaties with binding force of law in all the Member States. This option was explored in 2004 in the Constitutional Treaty, in its Article I-6, according to which "the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".[15] It can be argued that such a provision is currently in force today through the indirect means of Declaration nº 17, concerning primacy, but that is not correct. Declaration nº 17 is a non-binding act annexed to the Treaties, introduced to confirm that the non-enactment of the Constitutional Treaty and its Article I-6 in no way affected the status of the principle in Union law. Furthermore, Declaration nº17 is a reinstatement of the Court's case-law as explained by a legal opinion of the Council, not as a solemn statement of the Member States. Even in its dimension as a multilateral Declaration, its construction shows the efforts of the Member States to avoid the tipping of the balance kept between Union law's unilateral and broad conception of primacy and the limits set to it by the national higher courts.[16]

Would the introduction of a provision like Article I-6 resolve the primacy crisis? Probably not. To a certain extent, the current law, as it now stands, has already incorporated a primacy clause through the authoritative interpretation of the Treaties developed by the Court of Justice. After almost sixty years since the judgment in Costa/Enel, it can be argued that the Member States had plenty of opportunities to amend the scope of this doctrine by way of a Treaty amendment, but nothing of the kind has occurred. On the contrary, amendment after amendment the Member States seemed eager to expand the competences of the Union upon the understanding that Union law held primacy over national law, including constitutional law. This tacit acceptance of primacy by the masters of the Treaties, together with a clear and unconditional case-law of the Court of Justice, has not stopped the supreme and constitutional courts of the Member States from setting a benchmark limiting the scope of Union law's primacy. An explicit recognition of the

[15] Draft Treaty establishing a Constitution for Europe (OJ C 169, 18.7.2003, p. 1–150).

[16] See WEBER, F., *The Identity of Union Law in Primacy: Piercing Through Euro Box Promotion and Others*, in *European Papers*, Vol 7, 2022, No. 2.

principle in the articulated text of the Treaties would probably keep the *status quo* as it now stands, irrespective of the clarity of the message being conveyed in such a provision.

There is a variant to this option which would possibly change the fate of the proposal: an explicit recognition in the Treaties of the primacy clause, together with the incorporation of the very same provision in the Constitutions of all the Member States, would significantly improve the chances of success in settling the principle in a robust and stable way for the long term. By enshrining a principle of primacy in a dual fashion, in both the Treaties and national constitutions, a firm commitment from all legal orders ensues, setting a conflict rule that provides clear guidance on what legal order (and jurisdiction) prevails over the other. National courts could no longer assert that the final word on the interpretation of the Treaties, on matters such as the distribution of competence, can be assumed, even exceptionally, by a domestic jurisdiction. The mandate would be clear and the authority of Union law would prevail. The technique has already been used in the past, particularly in the Treaty on Stability, Coordination and Governance (also known as "The Fiscal Compact"), signed on 2 March 2012 by the Member States (with the exception of the United Kingdom and the Czech Republic).[17] This Treaty provides in Article 3(2) the duty of Member States to introduce rules on fiscal discipline and stability, but "preferably constitutional rules".

Despite the robustness of such a solution, and irrespective of its feasibility undergoing twenty-seven constitutional amendments, the truth is that this proposal would not dispel the risk of constitutional conflict and, eventually, another challenge to primacy. Whilst such a clause will contribute to end conflicts mostly in the field of competence (granting the Court of Justice the ultimate word in determining the scope of the Union's jurisdiction), it will not stop national constitutional courts from claiming their own constitutional identities, particularly in issues that touch on points close to values and principles, in which balancing acts are necessary. Also, in constitutions that admit "eternal clauses" or provisions that are not subject to amendment, any interference of Union law would be subject to these red lines, irrespective of the scope and terms provided in the primacy clause. These matters will be for national constitutional courts to resolve, giving them sufficient leeway to continue to claim the last word in the ongoing discussion over the authority of Union law in the Member States.

The limitations of the previous proposals explain why part of the discussions on the ways to overcome the crisis of primacy have a procedural angle, focusing not so much on the substance of the primacy clause itself, but on the procedures that allow the Union to claim its authority and that of its legal system. Procedural solutions do not solve the very crux of the matter, but they act as buffers to prevent constitutional conflict from materializing into a crisis. To this end, these proposals are a middle ground between the maximalist option of constitutional reform and the pragmatic approach.

A first procedural option is the creation of a mixed chamber in the Court of Justice, comprised of sitting judges of the Court of Justice and of the national constitutional and

[17] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (2012) (Document 42012A0302(01).

supreme courts.[18] The mixed chamber is a last-instance jurisdiction to hear actions against a decision of the Court of Justice on a point of Union competence. Its jurisdiction could also extend to hear cases on fundamental rights. But above all, the role of the mixed chamber is to settle a claim of primacy coming from the Union legal order and a national legal order. When such a conflict arises and both jurisdictions have had the chance of ruling on the matter, both the Union or the Member State concerned have the right to bring the case to the mixed chamber. The mixed chamber's decision will settle the matter and rule through the voice of the joint legitimacy granted by its composition, thus providing a robust decision with sufficient authority to overrule either the Court of Justice's or the national high court's claim. The result is not a general confirmation of the primacy of one legal order over the other, but a composite answer solving a specific dispute and settling the matter until the next dispute is raised.

There are several procedural guarantees to ensure that the mixed chamber fulfills its role in a balanced way. Its composition would be made up of thirteen judges, of which eight would be sitting judges of the Court of Justice on a rotation basis, and seven would come from national supreme and constitutional courts, also upon rotation. Although decisions can be made based on a consensus of all the sitting members of the mixed chamber, an *in dubio mitius* voting rule should apply: a decision validating a contested EU act should be supported by at least eight judges. This rule would avoid having all the judges of Court of Justice siding with the Union, thus requiring at least the support of one judge of the national high courts to validate the contested act.

Another procedural proposal focuses on the US technique of "certification", as a means of federal courts to inquire state courts about the interpretation of state law. Extended to Union law, a "certification" procedure would empower the Court of Justice to refer questions of national law, on constitutional points of principle, to the Member States' highest courts. This tool could facilitate a dialogue among the Court of Justice and the highest courts of the Member States, but more specifically it would provide the Court with binding guidance about provisions concerning national identity, national competence or constitutional limits that risk colliding with Union law. This course of action, like the mixed chamber, would require specific rules, but probably not a reform of the Statute. At the present time, Article 24 of the Statute provides that the Court may "require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings." This provision could find further development in a future reform of the Rules of Procedure, entitling the Court of Justice to request a court of a Member State guidance on a point of interpretation of national law.

Like the mixed chamber, a European "certification" procedure would not solve the challenges raised by constitutional conflicts between the Union and its Member States. However, it would mitigate the chances of further conflict by providing a channel of communication between the Court of Justice and the Member States' highest courts, even in circumstances in which there is no prior preliminary reference articulated between the two jurisdictions. This is a tool to facilitate a mutual understanding, the outcome of which

[18] SARMIENTO, D. and WEILER, J.H.H., *The EU Judiciary After Weiss*, in *Verfassungsblog*, 2 June 2020 and *The EU Judiciary After Weiss – A Reply to our Critics*, in *EU Law Live*, 6 July 2020.

is unknown in advance. The tool would also depend on the willingness of the Court of Justice to make use of it, and the Statute and Rules of Procedures have a fair share of procedural options that have become obsolete or forgotten as a result of their lack of use by the Luxembourg judges. Procedural solutions are buffers that contribute to either prevent constitutional conflict or help in fashioning an acceptable final outcome, but they do not solve the inherent tension between two colliding and legitimate claims of authority coming from the Union and one or several of its Member States.

The questioning of the principle of primacy of Union law has reached a tipping point. At the stage of European integration in which we currently stand, in which existential challenges have been delegated for their resolution to the Union's institutions, the risk of fragmenting the unity of the Union's legal order is too high. The Member States cannot confer such responsibilities to the Union while empowering their internal authorities to question the uniform implementation of Union law in their territory. The Union's institutional organization provides sufficient guarantees of democratic accountability and legitimacy for Member States and their national jurisdictions to accept that the common rules enacted by the Union are uniform standards that supersede national law in its areas of competence. The control over the exercise of Union competence is a task that is well performed by the Court of Justice, a jurisdiction with seven decades of experience in adjudicating over the Union's jurisdiction. At the present stage of European integration, the undermining of primacy is a self-destructive practice that harms the overall project, but its individual members too. Considering the relevance of the existential challenges at stake, it is worrying to witness how the ongoing defense of an indeterminate "constitutional identity", solely defined by a court of law, can rally its defenders to the point of undermining policies addressed to deal with some of society's existential challenges.

Behind the curtain of the notion of constitutional identity lies nationalism and its many faces, a force that is difficult to handle or rationalize when it touches the core of identity politics in the Member States. The history of Europe, including its most recent history, is good proof of the ability of nationalism to elude the real problems of the people and to embrace discourses that turn to be self-destructive in the long term. The challenges currently faced by the Member States, from a global pandemic, energy crises, or climate change, come together with significant numbers of vaccine sceptics, climate change deniers and conspiratorial theory supporters questioning the existence of the problem or its solutions. In such a context, it is not surprising to still observe primacy-deniers refusing to accept Union law's power to supersede national law. Primacy denialism can be as destructive as the force of nationalism, embracing core values in the name of ethereal goals, whilst sacrificing the edifice that keeps society together to address common challenges.

However, in the same way that nationalism will not disappear and it must be interiorized and channeled through the democratic process, the same should be applied to the sceptics of Union law's primacy. For that reason, the attempts to settle the matter by introducing a strict primacy clause in the Treaties or in the Constitutions of the Member States, is destined to fail. As long as primacy deniers continue to haunt the Union and its legal order, the presence of primacy clauses in writing will not repeal the underlying ideology supporting the attacks. Therefore, the way forward is to channel those claims and prove

them wrong through appropriate procedures, in a way that reflects all the interests at stake and eventually tips the balance in favor of a European majority. The mixed chamber is an example of how to proceduralise a primacy clause, refusing to eradicate the concerns of primacy sceptics, but embracing them and giving them voice in a composite procedure in which a decision must finally emerge. Nothing will stop a national court or a Member State to refuse to comply with a decision of the mixed chamber, but at such point it will be obvious that the only way forward for that Member State is to exit the European project. After a ruling of the Court of Justice followed by a decision of a body representing not only all the Member States, but also the voices of constitutional courts, the dissenting opinion must face a choice: to carry on with its European journey or take a different path. Procedures are helpful in fleshing out such outcomes, providing the necessary steps so that the final decision is acceptable and considered to be legitimate by all the stakeholders that wish to have a European future.