Constitutional Courts in the Face of the EU's Reconfiguration

Ana Bobić*
Hertie School, Berlin, Germany
bobic@hertie-school.org

Abstract 523
Keywords 524
I. Introduction 524
II. The EU's Reconfiguration 526
III. National Constitutional Courts Dealing with the EU's Recent Reconfiguration 531
1. From Individual-Oriented to Member State-Oriented in the Economic and Monetary Union (EMU) 534
2. From Cooperation to Regulation in Criminal Law 538
IV. The Relevance of Reconfiguration for Constitutional Conflict in the Future 543

Abstract

To this day, constitutional courts across the European Union (EU) use the structure of *Solange I* for challenging the primacy of EU law. Its legacy may be seen as that of a blueprint of constructive constitutional conflict: its logic introduces the idea that the principle of primacy of EU law is conditional. An important contribution of *Solange I* as a device structuring constitutional conflict is the commitment of the German court to observe the development of the EU and its law. This contribution engages with the EU's reconfiguration in respect of the EU's constitution broadly understood and explores constitutional courts' engagement with it, introduced by *Solange I*. These considerations are then tested in two areas of reconfiguration in the EU's constitutional settlement: the Euro crisis and criminal law. With that analysis in mind, the paper concludes by unveiling further areas of reconfiguration and by reflecting on the role to be played by constitutional courts in contemporary constitutional conflict in the EU.

* Senior Research Fellow at the Jacques Delors Centre and Adjunct Faculty, Hertie School, Berlin. This research is funded by the DFG Eigene Stelle Grant No 532657320 'Judicial control and the reconfiguration of control in the EU constitutional order'.

DOI 10.17104/0044-2348-2025-2-523 ZaöRV 85 (2025), 523-545

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

Keywords

Solange I – constitutional conflict – EU's reconfiguration – the Euro crisis – equality of Member States – budgetary sovereignty – criminal law – mutual recognition – admissibility of evidence

I. Introduction

Reservations to the principle of primacy of EU law by national constitutional courts[1] are, perhaps not a fully embraced, but at the very least an acknowledged reality in EU constitutional theory. The judgment that may be viewed as the original constitutional conflict – *Solange I*[2] – is today seen by EU constitutional scholars not as a one-hit-wonder, but instead as the starting point of a complex and sometimes difficult relationship between EU and national courts claiming ultimate authority. The conditionality of *Solange I* has inspired other national courts[3] as well as scholars[4] in formulating how to manage conflicts between the EU and national level.

1 I will be using the term constitutional court as a shorthand for all courts with the power of constitutional review and against whose decisions there is no legal remedy. I borrow the definition of constitutional review from *de Visser*: '[The] actor conducting the assessment of constitutional conformity is empowered to attach consequences to a finding that the acts of other State organs do not comport with the relevant constitutional yardsticks; and is thus legally able to impose its position on a constitutional issue on other State organs.' Maartje de Visser, *Constitutional Review in Europe. A Comparative Analysis* (Hart Publishing 2014), 2.

2 FCC, order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*). One should not forget, of course, that six months earlier the Italian Constitutional Court published its *Frontini* judgment, where it introduced the *controlimiti* doctrine: Italian Corte costituzionale, *Frontini v. Ministero delle Finanze*, judgment of 18 December 1973, no. 183/1973. While both judgments impose limits to the principle of primacy of EU law, *Frontini* resembles instead the *Solange II* logic: the Italian Constitutional Court retains for itself the right to an ultimate say in fundamental rights protection solely in the event of a violation of the fundamental principles of the Italian constitutional order or the inalienable rights of man. FCC, order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339 (*Solange II*).

3 Jacques Ziller, 'The German Constitutional Court's Friendliness Towards European Law. On the Judgment of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon', European Public Law 16 (2010), 53-73 (68).

4 Wojciech Sadurski, '"Solange, Chapter 3": Constitutional Courts in Central Europe – Democracy – European Union', ELJ 14 (2008), 1-35; Armin von Bogdandy, Carlino Kottmann and Johanna Antpöhler, 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States', CML Rev. 49 (2012), 489-519; Iris Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer *Distrust* Among the Peoples of Europe"', CML Rev. 50 (2013), 383-421; Armin von Bogdandy and Luke D. Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges', Eu Const. L. Rev. 15 (2019), 391-426.

 DOI 10.17104/0044-2348-2025-2-523

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

To this day, constitutional courts across the European Union use the structure of *Solange I* for challenging the primacy of EU law.[5] Its legacy may be seen as that of a blueprint of constructive constitutional conflict:[6] its logic introduces the idea that the principle of primacy of EU law is conditional[7] and that constructive critique of EU law leads to its improvement.[8] An important contribution of *Solange I* as a device structuring constitutional conflict on which I want to focus in this paper is the commitment of the German court to observe the development of the EU and its law. In its judgment, the German court stated that 'the Community is not a state, in particular not a federal state, but "a community of its own kind in the process of progressive integration"'.[9] It further stated that the current state of integration is 'of crucial importance' for determining its relationship to the protection of fundamental rights enshrined in the Basic Law.[10]

The EU changes much more quickly and more frequently than its Member States. Unlike the latter whose constitutional settlements remain more or less stable, the EU has gone through numerous changes, formally through treaty amendments, but also due to its recurring enlargement, and responses to internal[11] and external shocks and crises. The Lisbon Treaty in 2009 is the last formal change of the treaties; still, the transformations the EU is otherwise undergoing appear to take shape with greater speed than what was the case in its first few decades.[12] Without entering into the reasons behind each of the integration's critical junctures, what interests me here is to think about what this means for the commitment of national constitutional courts to accord crucial importance to such changes when they contemplate the principle of primacy of EU law.

---

5 Paolo Mazzotti, '(European) Multilevel Constitutionalism to Govern Transnational Public Goods? A Reply to Petersmann', HJIL 84 (2024), 141-157 (148).

6 This paper deals only with constructive constitutional conflict. I therefore make the assumption that constitutional courts are independent and operate in states which overall comply with the rule of law; I do not engage with captured constitutional courts (such as the Polish Constitutional Tribunal). The latter courts are, in my opinion, unable to engage in constructive constitutional conflict at all. The relationship of captured courts is therefore outside the scope of the *Solange I* legacy in terms of tracking the EU's reconfiguration.

7 The logic persists to this day. See, for example, Rui Tavares Lanceiro, 'The Portuguese Constitutional Court Judgment 422/ 2020: A "Solange' Moment?"', EU Law Live (24 July 2020).

8 See also in this issue the contribution of Matej Avbelj, '*Solange I* Between Constitutional Mimesis and Originality', HJIL 85 (2025), 503-522.

9 FCC, *Solange I* (n. 2), para. 40.

10 FCC, *Solange I* (n. 2), para. 44.

11 An example is the significant expansion of the qualified majority voting in the Single European Act in 1986.

12 The enlargement process as adding to the 'discontinuity in territorial focus' should also not be disregarded in this respect. See, Neil Walker, 'The Place of European Law' in: Gráinne de Búrca and Joseph H. H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012), 57-104 (80).

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

This inquiry is different from conflict resolution through incrementalism:[13] the question is not which methods national courts use to resolve conflicts, but whether they take into account the state of the EU's development in the moment of determining whether there is a constitutional conflict in the first place. Against the Bundesverfassungsgericht's claim to take account of the EU's progressive integration, the question asked in this paper is simply: do constitutional courts take note of the EU's reconfiguration? Whether constitutional courts take these changes of the EU seriously into account is under researched, in particular against the background of the emergence of the EU's constitutional identity as articulated in Article 2 Treaty on European Union (TEU). 50 years seems to me as an excellent stretch of time to test precisely how *Solange I* aged when it comes to its commitment to acknowledge progressive integration. This contribution therefore engages with the concept of the EU's reconfiguration in respect of the EU's constitution broadly understood and explores constitutional courts' approach to respecting it, introduced by *Solange I*.

To do so, I proceed in three steps. First, in section II., I conceptualise the notion of the EU's reconfiguration as a consideration in constitutional review. The examples of reconfiguration I discuss represent changes in the EU's normative or ideological preferences, a shift in the balance of powers between EU institutions and/or the Member States, as well as EU action that cannot be easily reconciled with what the text of the treaties might reasonably allow. Next, I explore two areas of reconfiguration in the EU's constitutional settlement and reactions from national courts: the Euro crisis and criminal law (section III.). Looking at national case law through the lens of the commitment in *Solange I* to observe the EU's changes, I place them in the broader context of constitutional conflict and its role in the EU's constitution. With those lessons in mind, in the last section I offer further areas of reconfiguration and conclude on the role to be played by constitutional courts in the contemporary constitutional conflict in the EU.

II. The EU's Reconfiguration

The EU's fundamentals were arguably formed until the Maastricht Treaty, after which a cumbersome route led to today's Lisbon Treaty. Lisbon's entrenchment is fortified thanks to external events that currently make grand

13 On incrementalism in constitutional conflict, see Ana Bobić, 'Constitutional Pluralism Is Not Dead. An Analysis of Interactions Between the European Court of Justice and Constitutional Courts of Member States', GLJ 18 (2017), 1395-1428 (1423-1426).

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

reforms with unanimous Member State support difficult to imagine.[14] However, a focus on the treaties and their iterations obscures the continuous changes the EU is undergoing: a significant reconfiguration of the EU is taking shape regardless of (or despite) the lack of a treaty reform.[15] And yet, much, if not all of the integration literature on the EU analyses it through the lens of more or less integration,[16] whereas legal scholarship focuses on the Court of Justice arguably ever expanding its powers, or on actions of the EU[17] or the Member States going outside of EU law proper to integrate.[18] Unlike those takes, this paper looks at the EU's reconfiguration as a polity, meaning significant changes in its setup, regardless of whether we might assess such reconfiguration as positive or negative, or as resulting in more or less integration[19] (although some examples will most certainly involve an increase in EU's powers). The examples of reconfiguration that I turn to below exhibit changes in the EU's normative or ideological preferences that

14 Hungary's rapprochement with Russia and its reluctance in supporting Ukraine is but one example. This might be countered however with the eagerness with which all the Member States rushed to support the EU's ReArm programme.

15 Changes arising without a formal treaty reform is what Majone called 'integration by stealth'. Giandomenico Majone, *Dilemmas of European Integration: Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005). More generally on the omnipresence of unwritten constitutional changes in polities with a written constitution, see Aileen Kavanagh, 'The Ubiquity of Unwritten Constitutionalism', I.CON 21 (2023), 968-975.

16 Ernst B. Haas, *The Uniting of Europe. Political, Economic, and Social Forces 1950-1957* (3rd edn, University of Notre Dame Press 2004); Tanja A. Börzel, 'Mind the Gap! European Integration Between Level and Scope', Journal of European Public Policy 12 (2005), 217-236; Andrew Moravcsik, 'Preferences, Power and Institutions in 21st-Century Europe', J. Common Mkt. Stud. 56 (2018), 1648-1674. Even when it fails, the EU does so in a forward-moving motion: Erik Jones, R. Daniel Kelemen and Sophie Meunier, 'Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration', Comparative Political Studies 49 (2016), 1010-1034. For a critique, see Mark Gilbert, 'Narrating the Process: Questioning the Progressive Story of European Integration', J. Common Mkt. Stud. 46 (2008), 641-662.

17 The very name of the approach, 'integration through law' suggests that law is a vehicle for expanding EU's powers. Mauro Cappelletti, Monica Seccombe and Joseph H. H. Weiler (eds), *Integration through Law: Europe and the American Federal Experience* (De Gruyter 1986). See also, Loïc Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realisation', CML Rev. 45 (2008), 1335-1355 (1340); Editorial Comment, 'The Scope of Application of General Principles of Union Law: An Ever Expanding Union?', CML Rev. 47 (2010), 1589-1596.

18 Nicole Scicluna, 'Integration Through the Disintegration of Law? The ECB and EU Constitutionalism in the Crisis', Journal of European Public Policy 25 (2018), 1874-1891.

19 Less integration as a development might lead to an interesting dynamic: national constitutional courts would arguably find themselves in a position of greater legitimacy to review EU law, from the perspective of the focus in *Solange I* on progressive integration. I discuss such a scenario further in the conclusion in relation to the EU's external powers. I am grateful to Krisztina Kovács for raising this point.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

are not mediated in the public sphere,[20] a shift in the balance of powers between EU institutions and/or the Member States, as well as EU action that cannot be easily reconciled with what the text of the treaties might reasonably allow.

What interests me, therefore, is the extent to which national constitutional courts register the EU's reconfiguration and how they reckon with it. Taking the perspective of reconfiguration will help us avoid existential questions (what is the EU?),[21] and instead focus on its specific features and characteristics as they develop over time.[22] Regardless of whether the EU's changes take the form of a treaty change or not, they significantly reconfigure the European Union in a manner that should, according to *Solange I*, be crucial for constitutional review at the national level. Here is how the Bundesverfassungsgericht assessed the state of the (then) European Community in 1974:

> 'The Community still lacks a democratically legitimate parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks, in particular, a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Basic Law and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by the standard of the Basic Law with regard to fundamental rights (without prejudice to possible amendments) in such a way that there is no exceeding the limitation indicated, set by Article 24 of the Basic Law. As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from Article 24 of the Basic Law applies. What is involved is, therefore, a legal difficulty arising exclusively from the Community's contin-

20 Paul Linden-Retek, *Postnational Constitutionalism. Europe and the Time of Law* (Oxford University Press 2023), 5-6.

21 For a summary of those debates, see Walker (n. 12), 78-79. Much of the literature on constitutional courts in the EU dealt with how they see the EU as a polity and how that in turn influences their approach towards EU law. For example, Jiri Pribán, 'The Semantics of Constitutional Sovereignty in Post-Sovereign "New" Europe: A Case Study of the Czech Constitutional Court's Jurisprudence', I.CON 13 (2015), 180-199; Henrik P. Olsen, 'The Danish Supreme Court's Decision on the Constitutionality of Denmark's Ratification of the Lisbon Treaty', CML Rev. 50 (2013), 1489-1503.

22 *Bast* and *von Bogdandy* in that respect rightly see the treaties as a living instrument and argue there is a dynamic function of the EU's constitutional core. Jürgen Bast and Armin von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New Constitutionalism', Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2024-06, available at SSRN: https://ssrn.com/abstract=4740888, 21.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

uing integration process, which is still in flux and which will end with the present transitional phase.'[23]

The main finding of *Solange I*, namely that the EU does not provide for a satisfactory level of protection of fundamental rights, no longer applies. It is well-known that the Bundesverfassungsgericht reversed its position in *Solange II*, where it found that then, in 1986, the Community of the time indeed *did* have a proper catalogue of fundamental rights protection.[24] By so doing, the German court directly complied with its commitment to respect progressive integration. On a very general level, then, we may say that the Bundesverfassungsgericht expressly acknowledged the EU's reconfiguration when it comes to the protection of fundamental rights.[25]

Differently from the rosy fundamental rights story of the mid-eighties, the European Union followed a tumultuous path marred by external and internal crises. It is no longer obvious that its original *finalité* aligns with its contemporary integration trajectory.[26] The narrative of the EU as a peace project receded from the collective memory of the younger generation.[27] At the same time, the welfare state logic[28] virtually disappeared from mainstream economic policy after the fall of the Bretton Woods system,[29] giving rise instead to the dominance of neoliberal policies, a technocratic regulatory orientation,

23 FCC, *Solange I* (n. 2), para. 44.

24 FCC, *Solange II* (n. 2). This was specified further in FCC, order of 7 June 2000, 2 BvL 1/97, BVerfGE 102, 147 (*Banana Market Order*), para. 54, whereby the two systems should generally be comparable as to their level of protection of fundamental rights. The standard of review has over the years developed also to include the Charter of Fundamental Rights in fields where the EU fully harmonised an area. See FCC, order of 6 November 2019, 1 BvR 276/17, BVerfGE 152, 216 (*Right to be Forgotten II*). For a critique, see Karsten Schneider, 'The Constitutional Status of Karlsruhe's Novel 'Jurisdiction' in EU Fundamental Rights Matters: Self-Inflicted Institutional Vulnerabilities', GLJ 21 (2020), 19-26 (21).

25 Ana Bobić, 'Developments in the EU-German Judicial Love Story: The Right to Be Forgotten II', GLJ 21 (2020), 31-39.

26 On the EU's overall lack of engagement with its contemporary and future purpose, see Linden-Retek (n. 20).

27 Peter J. Verovšek, 'Collective Memory and the Stalling of European Integration: Generational Dynamics and the Crisis of European Leadership', J. Common Mkt. Stud. Early View 63 (2025), 369-384. Although the very narrative of the EU as a peace project is today also put into question. See Aurélie D. Andry, *Social Europe, the Road not Taken* (Oxford University Press 2022) (showing how economic forces, mainly from the US, pushed the creation of the EU as an anti-communist bloc in the run-up to the Cold War); Signe R. Larsen, 'European Public Law After Empires', European Law Open 1 (2022), 6-25 (arguing that the creation of the EU was a way for failed European empires to establish a new set of external relations between Europe and its former colonies).

28 John G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', IO 36 (1982), 379-415 (392).

29 Wolfgang Streeck, 'European Social Policy: Progressive Regression', MPIfG Discussion Paper 18/11, available at SSRN: https://ssrn.com/abstract=3303811.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

and a fixation on price stability.[30] The EU faithfully followed global economic developments, with the formal separation of economic and monetary policy buttressing these developments, culminating in new unconventional modes of governance developed during the Euro crisis, thereby irrevocably transforming the EU's constitutional balance[31] and ideological focus.[32]

Despite having a fundamental rights catalogue on paper, the EU is again under pressure to justify its own human rights record, be it in relation to Frontex's actions at the EU's borders[33] or its increased outsourcing of migration control to third countries in return for hard cash.[34] Looking ahead, geopolitical pressures, thanks to the revived Trump-Putin friendship and a tariff-based muscular United States (US)-imperialism,[35] is pushing the EU into ramping up its defence spending[36] and wrestling with the need to succumb to the anti-competitive wishes of US tech giants.[37] The outlook is grim and the choices that will need to be made are without a doubt of great constitutional significance, regardless of the form in which they come about. What should constitutional courts do?

The German court's view in *Solange I* that the progress of EU integration is central to constitutional review should, in my view, lead constitutional courts to bear the responsibility of providing a public stage for deliberating matters concerning the EU's development and its future. It is not just that the EU lacks the traditional state-anchored democratic legitimacy, which thus

30 Kanad Bagchi, 'Depoliticizing Money: How the International Monetary Fund Transformed Central Banking', JIEL 27 (2024), 166-185; Anna Peychev, 'The Primacy of the European Central Bank: Distributional Conflicts Between Theory and Practice in the Pursuit of Price Stability', European View 22 (2023), 48-56 (50).

31 Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU After the Euro-Crisis', M. L. R. 76 (2013), 817-844.

32 Bojan Bugaric, 'Europe Against the Left? On Legal Limits to Progressive Politics', LSE 'Europe in Question', Discussion Paper Series 61/2013, available at SSRN: https://ssrn.com/abstract=2215158.

33 See the pending appeal, ECJ, *WS and Others v. Frontex*, case no.C-679/23 P, seeking the annulment of EGC, *WS and Others v. European Border and Coast Guard Agency*, judgment of 6 September 2023, case no. T-600/21, EU:T:2023:492, where that court dismissed the action seeking to establish the non-contractual joint and several liability of Frontex.

34 Violeta Moreno-Lax, 'EU Constitutional Dismantling Through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-Integration', ELJ 30 (2024), 29-59.

35 On these changes forming part of a more global turn away from neoliberalism, see Rune M. Stahl, 'The End of Economics Hegemony? Studying Economic Ideas in a Post-Neoliberal World', Review of International Political Economy 32 (2025), 1-18.

36 '"Watershed Moment": EU Leaders Agree Plan for Huge Rise in Defence Spending', Guardian, 6 March 2025, at <https://www.theguardian.com/world/2025/mar/06/watershed-moment-eu-leaders-close-to-agreeing-800bn-defence-plan-ukraine>, last access 15 April 2025.

37 'EU Assesses Big Tech Cases Ahead of Trump Arrival', Reuters, 14 January 2025, at <https://www.reuters.com/technology/eu-says-it-is-assessing-tech-cases-not-impacted-by-new-us-administration-2025-01-14/>, last access 15 April 2025.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

needs to be supplemented by an additional layer of control at the national level. It is rather that the EU relies on (supposedly neutral) law as the dominant method of making significant political (and constitutional) choices. But the examples of the EU's reconfiguration mentioned above are neither necessarily made through (hard) law, nor free from ideological and normative direction. Constitutional courts, also speaking the language of the law, are empowered to expose the misleadingly static character of EU law and highlight topics worthy of further deliberation, if necessary, by taking it outside the legal and into the political realm.

III. National Constitutional Courts Dealing with the EU's Recent Reconfiguration

If my reading of *Solange I* is correct, it would mean that national constitutional courts actively use the substantive and procedural means at their disposal to track the EU's development and expose its dynamic trajectory. Why should they do this? The common account of the history of constitutional courts in the EU is that, faced with the principles of primacy and direct effect and the preliminary reference procedure, these institutions found their position and their authority over ordinary national courts jeopardised. To maintain their relevance, constitutional courts one after another imposed limits to the principle of primacy in judgments starting with *Solange I*.

Besides attempting to preserve their authority in a purely rational actor fashion, the assertiveness of constitutional courts willing to engage in constitutional conflict holds (indirect) deliberative potential.[38] Litigation that directly or indirectly concerns the EU's reconfiguration is thereby given, to some extent,[39] a public forum. Strategic litigation is in this context not a surprising phenomenon: courts are important political actors before which questions of political importance may be brought and discussed.[40] They are, in the words of Farahat, a 'forum for constitutional self-reflection'.[41] Aside

38 Ana Bobić, *The Individual in the Economic and Monetary Union. A Study of Legal Accountability* (Cambridge University Press 2024), 73-80.

39 Delineated by the respective constitutional powers of constitutional courts. For an overview of those powers of constitutional courts in the EU, see Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022), 17-18.

40 Pola Cebulak, Marta Morvillo and Stefan Solomon, 'Introduction to the Special Issue: "Strategic Litigation in EU Law"', GLJ 25 (2024), 797-799.

41 Anuscheh Farahat, 'Re-Imagining the European (Political) Community Through Migration Law', Verfassungsblog, 4 March 2024, at <https://verfassungsblog.de/re-imagining-the-european-political-community-through-migration-law/>, last access 15 April 2025.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

from the courtroom as a public space, courts exert influence on political institutions, who might be compelled to ensure deliberative processes. In that respect, their responsibility for tracking the EU's development should not be underestimated.

Traditionally, constitutional courts in the EU have broadly followed the German typology of review of EU acts.[42] *Solange I* is a decision where the Bundesverfassungsgericht performed fundamental rights review of secondary EU law. In addition to this type of review, the German court added to its arsenal also *ultra vires* review[43] and *identity* review.[44] The three heads of review differ according to their admissibility standard and the object of review;[45] however, my view is that the commitment to take account of the EU's reconfiguration extends to all situations when EU action is under review before national constitutional courts. Indeed, the Bundesverfassungsgericht, in its recent review of the *Own Resources* Decision that formed part of the Next Generation EU programme (where it carried out *ultra vires* and *identity* review), also focused on the progress and development of the EU:

> 'Over time, the European Union has transitioned from the classic model of financing international organisations, which rely on state party contributions, to a financial architecture based on own resources – although it is submitted that, in terms of financial economics, the EU's own resources are basically still 'camouflaged member contributions' ([…]). It is incumbent upon the Member States to provide financing to the European Union, and the former have the final say over the allocation of financial resources to the latter. The Member States have refrained from conferring upon the European Union direct taxation or levying powers.'[46]

The obligation to observe the EU's reconfiguration in my view pervades all constitutional review of EU action at the national level. To begin with, not every constitutional conflict neatly falls into one of the three heads of review as a matter of objective truth. Rather, it does so as a matter of

42 For a detailed presentation of the three types of constitutional review before constitutional courts in the EU, see Bobić, *Jurisprudence of Constitutional Conflict* (n. 39).

43 First mentioned in its judgment concerning the German ratification of the Maastricht Treaty (FCC, order of 12 October 1993, 2 BvR 2134, 2159/92, BVerfGE 89, 155 – *Maastricht Treaty*) and elaborated upon in Honeywell (FCC, order of 6 July 2010, 2 BvR 2661/06, BVerfGE 126, 286-311 – *Honeywell*).

44 Introduced in its judgment concerning the German ratification of the Lisbon Treaty (FCC, judgment of 30 June 2009, BVerfGE 123, 267 – *Lisbon Treaty*).

45 Philip M. Bender, 'Ambivalence of Obviousness: Remarks on the Decision of the Federal Constitutional Court of Germany of 5 May 2021', European Public Law 27 (2021), 285-304 (292-295).

46 FCC, judgment of 6 December 2022, BVerfGE 164, 193-347 (para. 166) – *Own Resources*.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

construction. Put simply, choosing to engage in constitutional conflict is as much of a (small p) political decision as it is to decide to review it under one or another head of review. By constructing the case as pertaining to one category or another, constitutional courts pick their battle arena, aware of the features that each of them holds. In keeping within the parameters of constructive constitutional conflict – based on mutual respect and sincere cooperation between national constitutional courts and the Court of Justice – the commitment to take into account the EU's reconfiguration should remain a 'crucial consideration' regardless of the head of review chosen by the constitutional court.[47] The merits and pitfalls of each specific head of review generated a veritable cottage industry of academic commentary,[48] myself included.[49] In this paper, however, the choice of the head of review will be treated only tangentially: not as the central criterion of assessment of the state of the EU's constitution, but rather as one consideration among many.

In the subsections ahead I look at two examples of the EU's reconfiguration and to what extent they feature in the reflections of national constitutional courts when they decide on situations involving EU matters. The first concerns the change that took place after the Euro crisis, shifting from a rights-based focus on the individual to the Member States and the protection of their budgets. That reconfiguration should intuitively have been welcomed by constitutional courts as it moves control back to the national level. The second is a policy that pertains to core State powers and yet is increasingly regulated by the EU: criminal law. Here, EU regulation gradually moves from a paradigm of judicial cooperation and mutual recognition towards the regulation of criminal law. Again, one would expect constitutional courts to guard this area as their prerogative. What in fact happened at the EU and national level will be explored in the following subsections.

47 Or, of course, by the parties, who will have framed their case as one or another type of limit to the principle of primacy.

48 On identity review, see in this issue the contribution of Julian Scholtes, 'Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment', HJIL 85 (2025), 547-568.

49 Ana Bobić, 'Constructive Constitutional Conflict as an Accountability Device in Monetary Policy' in: Mark Dawson (ed.), *Towards Substantive Accountability in EU Economic Governance* (Cambridge University Press 2023); Ana Bobić, 'Forging Identity-Based Constructive Constitutional Conflict in the European Union' in: Mark Dawson and Markus Jachtenfuchs (eds), *Autonomy Without Collapse in a Better European Union* (Oxford University Press 2022); Ana Bobić and Mark Dawson, 'Making Sense of the "Incomprehensible": The PSPP Judgment of the German Federal Constitutional Court', CML Rev 57 (2020), 1953-1998.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

1. From Individual-Oriented to Member State-Oriented in the Economic and Monetary Union (EMU)

The EU's economic constitution has, at least until the Maastricht Treaty's inclusion of EU citizenship into primary law, been the dominant source of and rationale for granting and expanding the rights of individuals.[50] Free movement rights have been elevated to the status of fundamental rights, placing cross-border economic activity at the centre of the individual rights discourse.[51] On this view, individuals were instrumental to the greater aim of legitimising the EU as an autonomous system of law and governance.[52] With the formal introduction of EU citizenship and the subsequent decisions of the Court of Justice,[53] EU citizenship has arguably acquired a self-standing quality moving beyond its original economic mover paradigm.[54]

Even this market-oriented focus on the individual significantly changed during the Euro crisis through the application of strict conditionality in granting financial assistance to Member States in financial distress. Judicial review of measures of economic governance on both the national and EU level endorsed that logic, to the detriment of the focus on the social rights of

50 Bast and von Bogdandy, 'The Constitutional Core of the Union' (n. 22), 19; Joana Mendes, 'Taking on the Structural Weakness of EU Law's General Principles', European Law Open 2 (2023), 693-696 (694).

51 Augustín J. Menéndez, 'Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship', GLJ 15 (2014), 907-933 (908).

52 Marco Dani, 'The Subjectification of the European Citizen' in: Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law. Rights, Roles, Identities* (Hart Publishing 2016), 55-88 (61); Joseph H. H. Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy', I.CON 12 (2014), 94-103 (102).

53 For example, ECJ, *Mary Carpenter v. Secretary of State for the Home Department*, judgment of 11 July 2002, case no. C-60/00, EU:C:2002:434; ECJ, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, judgment of 8 March 2011, case no. C-34/09, EU:C:2011:124. However, the Court has backtracked from this progressive trend in ECJ, *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*, judgment of 11 November 2014, case no. C-333/13, EU:C:2014:2358 and ECJ, *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others*, judgment of 15 September 2015, case no. C-67/14, EU:C:2015:597. A similar trend is proposed to the Court in the Opinion of Advocate General Richard de la Tour in ECJ, *E. K. v. Staatssecretaris van Justitie en Veiligheid*, opinion of Advocate General Richard de la Tour on 17 March 2022, case no. C-624/20, EU:C:2022:194. See also Rui Lanceiro, 'Dano and Alimanovic: the Recent Evolution of CJEU Caselaw on EU Citizenship and Cross-Border Access to Social Benefits', UNIO – EU Law Journal 3 (2017), 63-77.

54 Eleanor Spaventa, 'From Gebhard to Carpenter: Towards a (Non-)Economic Constitution', CML Rev. 41 (2004), 743-773 (744). For a convincing critique of this narrative, see Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights', CML Rev. 53 (2016), 937-977.

 DOI 10.17104/0044-2348-2025-2-523

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

individuals.[55] Specifically, the logic of conditionality is at its core an insurance that the Member States receiving assistance will continue to pursue a sound budgetary policy. This in turn means that it would not become necessary for Member States to cover the liabilities of others in contravention of the prohibition of monetary financing under Article 125 Treaty on the Functioning of the European Union (TFEU).[56] As a result, strict conditionality that features in Article 136(3) TFEU, endorsed both in financial assistance and as a relevant consideration in designing the quantitative easing programmes of the European Central Bank (ECB), had different outcomes across the EU, with little ability for the affected citizens to contest them.

By the same token, the Court of Justice in its press release following the *Weiss* judgment of the Bundesverfassungsgericht put the equality of Member States at the heart of its argument. It restated the jurisprudence concerning the primacy of EU law, concluding: 'That is the only way of ensuring the equality of Member States in the Union they created.'[57] In the context of the EMU, this resulted in an emphasis on conditionality and a disregard of the major re-distributive effects of such decisions for citizens across different Member States and different socio-economic groups across the EU.

The way that the Court of Justice previously applied and interpreted the principle of equality of Member States differs from its current approach. First, equality of Member States was used to ensure the uniform and effective application of EU law across its territory and, importantly, to all its citizens.[58] In *Commission v. Italy*, the Court stressed that Member States' equality before EU law ensures the equal treatment of their citizens.[59] Second, the Court

55 The literature has shown that austerity permanently changed the social fabric of debtor Member States. In respect of Greece, see Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions', ELJ 21 (2015), 521-545 (523-527); Manos Matsaganis, *The Greek Crisis: Social Impact and Policy Responses* (Friedrich Ebert Stiftung 2013), 12-13; Aristea Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece', ILJ 41 (2012), 276-304.

56 ECJ, *Thomas Pringle v. Government of Ireland and Others*, judgment of 27 November 2012, case no. C-370/12, EU:C:2012:756, paras 143-147.

57 ECJ, *Press Release Following the Judgment of the German Constitutional Court of 5 May 2020*, press release of 8 May 2020, press release no. 58/20, at <https://curia.europa.eu>, last access 15 April 2025. The logic seems to be picked up from Federico Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of Member States', GLJ 16 (2015), 1003-1023. For a critique of the press release, see Justin Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment', GLJ 21 (2020), 1032-1044.

58 See also, Lucia S. Rossi, 'The Principle of Equality Among Member States of the European Union' in: Lucia S. Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017), 3-42 (15-16).

59 ECJ, *Commission of the European Communities v. Italian Republic*, judgment of 7 February 1973, case no. 39/72, EU:C:1973:13, para. 24.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

stated that equal treatment of Member States does not apply where differentiated circumstances exist. In consequence, the Court distinguished between formal and substantive equality: '[an] appearance of discrimination in form may therefore correspond in fact to an absence of discrimination in substance'.[60] Third, the principle of equality may be overridden if concerns of market unity so require.[61] The rationale is simple: the application of differentiated measures will ultimately result in homogeneous conditions across the market. Ever since the conflict between the Court of Justice and the Bundesverfassungsgericht in respect of the quantitative easing programmes of the ECB, equality of Member States is now firmly at the centre of the former court's jurisprudence concerning the primacy of EU law, which follows a standardised formula: primacy is a tool for ensuring the equality of Member States.[62]

Have constitutional courts in any way acknowledged or reacted to this reconfiguration? We may observe two opposing dynamics, and it is of course no coincidence that the different reactions follow the debtor-creditor lines among the Member States. First, constitutional courts might take an individual rights-oriented approach, given their traditional role as guardians of fundamental rights (a role that also led the Bundesverfassungsgericht to the *Solange I* outcome). In this scenario, we would therefore expect constitutional courts defying the turn towards (almost unconditionally) protecting the budgetary sovereignty of Member States. This is what we have seen unfold in Portugal,[63] where the Constitutional Court declared unconstitutional several provisions of the 2012 State Budget Law[64] enacted as part of

60 ECJ, *Italian Republic v. Commission of the European Economic Community*, judgment of 17 July 1963, case no. 13/63, EU:C:1963:20, para. 4.

61 ECJ, *Jean-François Deschamps and others v. Office national interprofessionnel des viandes, de l'élevage et de l'aviculture*, judgment of 13 December 1989, case nos C-181/88, C-182/88 and C-218/88, EU:C:1989:642, para. 21.

62 ECJ, *Proceedings Brought by RS*, judgment of 22. February 2022, case no. C-430/21, EU:C:2022:99, para. 55; ECJ, *Criminal Proceedings Against PM and Others*, judgment of 21 December 2021, case nos C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para. 249.

63 For a thorough report about legal changes and the relevant case law of the Portuguese Constitutional Court, see Rita De Brito Gião Hanek and Daniele Gallo, *Constitutional Change Through Euro Crisis Law: Portugal*. (European University Institute 2015), at <https://eurocrisislaw.eui.eu/country-reports>, last access 15 April 2025, Annex I.

64 Portuguese Tribunal Constitucional, *Suspension of the Christmas-Month and Holiday-Month Payments of Annual Salaries*, judgment of 5 July 2012, no. 353/12. The relevant provisions included a measure under which the Christmas-month (13th month) and holiday-month (14th month), or any equivalent, payments were suspended in 2012-2014, both for persons who receive salary-based remunerations from public entities and for persons who receive retirement pension via the public social security system. The same was decided in respect of the State Budget Law of 2013 in Portuguese Tribunal Constitucional, *Review of the Constitutionality of Norms Contained in the State Budget Law for 2013*, judgment of 5 April 2013, no. 187/13.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

the austerity measures agreed with the Troika, and which according to that court disproportionately disadvantaged public sector employees and pensioners, as opposed to private workers, thereby breaching the principle of just distribution of public costs. The Portuguese government of the time ultimately found a way to align the austerity obligations it undertook with constitutional requirements as interpreted by the Constitutional Court, and the case law just mentioned stands as the lone example of an attempt to resist the turn away from the individual during the Euro crisis.[65]

The second dynamic we witnessed is that of constitutional courts endorsing a shift in the focus from the individual to the Member States, under which logic the national level is the one to make crucial budgetary decisions. In the context of the litigation concerning the Public Sector Purchase Programme (PSPP) of the ECB, equality of Member States was re-emphasised as a matter of central concern: the Bundesverfassungsgericht insisted that a risk-sharing programme could not find its place under the Treaties as it would breach the prohibition of monetary financing. This is so because it would otherwise remove from the Member States their equal sovereign right to determine their budgetary policy.

It appears that the approach taken in national case law depends on whether we are looking at these issues from the perspective of a debtor or a creditor Member State. In other words, because the Euro crisis did not in fact lead to a situation where fundamental rights of German citizens were breached, the Bundesverfassungsgericht did not oppose the reconfiguration of the normative focus from the individual to the Member States that took place during the Euro crisis. And while the Portuguese Constitutional Court did take steps to oppose such a reconfiguration, courts in debtor states were ultimately not the decisive decision-makers during the crisis.[66] Reconfiguration therefore proceeded to take shape.

Another difference between the two examples is the head of review: while the Portuguese court performed a fundamental rights review, the German counterpart was instead carrying out *ultra vires* and *identity* review. While of course the respective strengths of each head of review depend heavily on the national (historical) context, one may conclude that fundamental rights review, due to significant steps taken at the EU level to demonstrate its own

65 Mariana Canotilho, Teresa Violante and Rui Lanceiro, 'Austerity Measures Under Judicial Scrutiny: the Portuguese Constitutional Case-Law', Eu Const. L. Rev. 11 (2015), 155-183.

66 See also, for example, Greek Council of State, Decision of 20 February 2012, decision no. 668/2012, at <https://www.dsanet.gr/Epikairothta/Nomologia/668.htm>, last access 15 April 2025. For further information, see Afroditi Marketou and Michail Dekastros, *Constitutional Change Through Euro Crisis Law: Greece* (European University Institute 2015), at <https://eurocrisislaw.eui.eu/country-reports>, last access 15 April 2025, Section X.8.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

capacity to protect fundamental rights, is the least 'dangerous' head of review. Likewise at the national level, it seems it is the easiest for political institutions to remedy, either by superficial changes to the relevant policy, or by providing more convincing justifications, grounded partly in their obligations under EU law. *Ultra vires* and *identity* review, conversely, directly place obligations on the political institutions to change course, even if contrary to what EU law requires.

2. From Cooperation to Regulation in Criminal Law

The idea that the monopoly of coercion belongs to states was established already by thinkers such as Bodin, Hobbes, and ultimately Weber, who called it the fundamental characteristic of statehood. Criminal law is traditionally a core State power,[67] and was in fact explicitly proclaimed part of Germany's constitutional identity by the Bundesverfassungsgericht.[68] The field is however also witnessing a slow but steady rise of EU regulation.[69] The abolition of the pillar structure in the Lisbon Treaty and today's Title V, Chapter 4 of the TFEU[70] empower the EU to pass minimum harmonisation rules concerning judicial cooperation in criminal matters based on mutual recognition, the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. The EU may also enact measures supporting Member State action in crime prevention. Besides, the Treaty authorises the establishment of Eurojust, and the possibility to establish the European Public Prosecutor's Office.

In a borderless internal market, judicial cooperation in criminal matters is an important way of ensuring criminal justice. Naturally the EU made ample use of the above listed provisions of the TFEU and continued the logic of mutual recognition to sovereign acts of coercion, such as criminal convictions and arrest warrants.[71] Yet, mutual recognition in criminal matters raised a new set of issues for fundamental rights protection and mutual trust between

67 Philipp Genschel and Markus Jachtenfuchs, 'More Integration, Less Federation: the European Integration of Core State Powers', Journal of European Public Policy 23 (2016), 42-59.

68 FCC, *Lisbon Treaty* (n. 44), para. 252.

69 Irene Wieczorek, *The Legitimacy of EU Criminal Law* (Bloomsbury Publishing 2020); Christopher Harding and Jacob Öberg, 'The Journey of EU Criminal Law on the Ship of Fools – What Are the Implications for Supranational Governance of EU Criminal Justice Agencies?', Maastricht J. Eur. & Comp. L. 28 (2021), 192-211.

70 Articles 82 to 86 TFEU.

71 Communication from the Commission to the Council and the European Parliament – Mutual Recognition of Final Decisions in Criminal Matters of 26 July 2000, COM (2000) 495.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

the Member States.[72] These issues triggered a regulatory need at the EU level. For example, in addition to judicial cooperation in criminal matters by way of the European Arrest Warrant, the EU is increasingly regulating the criminal procedure in the Member States themselves.[73] A further integration step is the creation of the European Public Prosecutor's Office, as an enhanced cooperation mechanism.[74] The logic behind this mechanism is partially to regulate also substantive criminal law, where financial interests of the EU are at stake.[75] EU regulation in other fields, such as data protection, also applies to areas traditionally in the criminal law competence of Member States.[76]

This is a new dynamic that I argue represents another reconfiguration of the EU. The EU's initial activity in criminal matters was confined to mutual recognition of decisions that were still autonomously made by the Member States. To enhance such recognition further, the EU moved towards regulation, thereby influencing not only the free movement of sovereign acts of coercion,[77] but also under what conditions such acts can be made by the Member States. At first, this concerned minimum standards of human rights in the criminal procedure. In this context, it is important to keep in mind that criminal law has a high path-dependency and is based on diverse traditions of

72 Kalypso Nicolaïdis, 'Trusting the Poles? Constructing Europe Through Mutual Recognition', Journal of European Public Policy 14 (2007), 682-698 (685); Markus Möstl, 'Preconditions and Limits of Mutual Recognition', CML Rev. 47 (2010), 405-436 (412-420). Evidence that this is a concern of national constitutional courts may be seen in the number of preliminary references asking for a fundamental rights based exception to the execution of a European Arrest Warrant. See, for example, ECJ, *E. D. L. (Motif de refus fondé sur la maladie)*, judgment of 18. April 2023, case no. C-699/21, EU:C:2023:295; ECJ, *GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*, judgment of 21. December 2023, case no. C-261/22, EU:C:2023:1017.

73 See, for example, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142/1; Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ 2016 L 65/1.

74 Council Regulation 2017/1939/EU of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, OJ 2017 L 283/1.

75 See Directive 2017/1371/EU of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ 2017 L 198/29.

76 See for example, based on the EU competence in data protection, Directive 2016/680/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ 2016 L 119/89.

77 Steve Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?', CML Rev. 41 (2004), 5-36 (24).

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

procedural and substantive criminal law across Member States.[78] That means that each directive regulating an aspect of the criminal procedure 'lands' into a very different legal system, producing a diversity of effects across the Member States. Faced with such immense changes, national courts are arguably using the preliminary reference procedure to invite the Court of Justice to extend harmonisation in this area further.

The admissibility of evidence in the criminal procedure is an area clearly demonstrating this dynamic. According to Article 82(2)(a) TFEU, the EU may establish minimum rules concerning mutual admissibility of evidence between Member States. This has not happened, which means that the Member States retain the regulation of evidence collection and appraisal in the criminal procedure. At the same time, the EU does regulate matters such as the right to information in the criminal procedure or the right to be assisted by a lawyer. These directives provide that for breaches of rights provided therein, Member States should provide effective remedies,[79] but without specifying what those are. Is this obligation met with a simple right of appeal against the criminal conviction? Or would it be necessary that evidence collected through such breaches be automatically dismissed by the trial judge? What if national legislation regulates the admissibility of evidence in the pre-trial stage? Overall, what consideration should be given to the fact that Member States have significantly different approaches to the use of evidence in the criminal procedure?[80]

National courts were not oblivious to this problem and submitted a number of preliminary references asking whether EU law now essentially requires national judges to dismiss evidence collected in breach of the minimum harmonisation directives, regardless of their powers under national

78 Martin Böse, Frank Meyer and Anne Schneider (eds), Conflicts of Jurisdiction in Criminal Matters in the European Union. Volume I: National Reports and Comparative Analysis (Nomos 2013). In the same vein, see also, FCC, Lisbon Treaty (n. 44).

79 For example, Article 19 of Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132/1; Article 8(2) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142/1; Article 12 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294/1; and Article 10 of Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ 2016 L 65/1.

80 See Katalin Ligeti, Balázs Garamvölgyi, Anna Ondrejová, and Margarete von Galen, 'Admissibility of Evidence in Criminal Proceedings in the EU', eucrim 3 (2020), 201-208.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

law.[81] At first, the Court was more or less clear in its approach that admissibility of evidence is a matter regulated exclusively by national law, to the extent that Articles 47 and 48 of the Charter are complied with.[82] It then expanded its approach somewhat, by mirroring[83] what the European Court of Human Rights (ECtHR) does when it comes to admissibility of evidence and Article 6 European Convention on Human Rights (ECHR). More specifically, the ECtHR is of the view that admissibility of evidence remains a matter for national law, while the role of the ECtHR is to assess whether the overall fairness of the procedure has been prejudiced when determining compliance with Article 6 ECHR.[84]

While acknowledging its case law described in the previous paragraph, the Court of Justice took a remarkable turn from this case law and proclaimed, in the context of the Directive concerning the European Investigation Order (EIO),[85] that if evidence is collected in breach of the rights of defence and procedural fairness, national judges *must* dismiss such evidence. To appreciate fully the innovation that took place, it is crucial to note that the EIO Directive itself is an instrument of mutual recognition, therefore an act adopted under Article 82(1)(a) of the TFEU. It therefore does not in any way touch upon the regulation of the criminal procedure itself, but merely sets up an instrument of evidence sharing across the EU. Similarly to the previously mentioned minimum harmonisation directives concerning specific rights in the criminal procedure, Article 14(1) of the EIO Directive imposes an obligation for the Member States to provide for effective remedies. The second sentence of Article 14(7) of the same directive further states: 'Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.'

---

81 See ECJ, *Criminal Proceedings against AB*, judgment of 7 September 2023, case no. C-209/22, EU:C:2023:634; ECJ, *Criminal Proceedings against M. N.*, judgment of 30 April 2024, case no. C-670/22, EU:C:2024:372; ECJ, *Criminal Proceedings against M. S., J. W., M. P.*, judgment of 5 September 2024, case no. C-603/22, EU:C:2024:685. The criminal law literature is critical of the lack of harmonisation of rules on evidence. See, Michele Caianiello, 'To Sanction (or Not to Sanction) Procedural Flaws at EU Level? A Step Forward in the Creation of an EU Criminal Process', European Journal of Crime, Criminal Law and Criminal Justice 22 (2014), 317-329 (321, 324).

82 ECJ, *Criminal Proceedings against AB* (n. 81) [58], [61].

83 ECJ, *Criminal Proceedings against K. B. and F. S.*, judgment of 22 June 2023, case no. C-660/21, EU:C:2023:498, para. 48.

84 For example, ECtHR, *Habran and Dalem v. Belgium*, judgment of 17 January 2017, case nos 43000/11 and 493380/11, CE:ECHR:2017:0117JUD004300011, para. 94.

85 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

The Court of Justice focused on that provision, taking it to mean 'that evidence on which a party is not in a position to comment effectively must be excluded from the criminal proceedings'.[86] The Court did not find it necessary to connect this to any of the minimum harmonisation directives which regulate the criminal procedure. It also did not refer at all to the ECtHR case law it previously endorsed.[87] This finding will inevitably influence divergent national rules on the use of evidence in the criminal procedure.[88] It might also raise questions as to whether it applies only to situations where an EIO is used or in all criminal law cases. The magnitude of the reconfiguration at play here is hidden behind detailed legislation in an area that most commonly escapes the attention of constitutional lawyers. Yet, it has far-reaching consequences for an aspect of criminal law, which Member States could, but did not, harmonise.

Is this the sort of reconfiguration that should fall under the scope of progressive integration that national constitutional courts should acknowledge? Or should criminal law remain among those areas of law where EU law has but a limited bite? Two decisions of constitutional courts seem to mitigate in favour of the latter approach, while relying on *identity* review. This seems to me only natural given that we are speaking about the fundamental characteristic of statehood, to recall Weber. The Italian Constitutional Court, in *MAS and MB*, concluded that substantive criminal law is not regulated by EU law and that it will continue to review it against possible encroachments into the 'supreme principles of the constitutional system'.[89] The Bundesverfassungsgericht also used *identity* review in its encounter with the European Arrest Warrant: it declared that the right to a fair trial is inextricably linked to human dignity, part of the unamendable core of the Grundgesetz.[90] To this we may add the German court's statement from its *Lisbon Treaty* judgment: 'In this important area for fundamental rights any transfer of sovereign rights beyond intergovernmental cooperation may only lead to harmonisation for specific cross-border situations on restrictive con-

86 ECJ, *Criminal Proceedings against M. N.* (n. 81), para. 130.

87 See n. 81.

88 For a detailed presentation of differences in Member State regulation of rules on admissibility and exclusion of evidence, see Elodie Sellier and Anne Weyembergh, *Criminal Procedural Laws Across the European Union – A Comparative Analysis of Selected Main Differences and the Impact They Have Over the Development of EU Legislation* (European Parliament 2018), 48-52.

89 Italian Corte Costituzionale, *MAS and MB*, judgment of 10 April 2018, Decision 115/2018, para. 8. For a further analysis of the litigation, including the two preliminary references that were submitted to the Court of Justice, see Clara Rauchegger, 'National Constitutional Rights and the Primacy of EU Law: MAS', CML Rev 55 (2018), 1521-1547.

90 FCC, order of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317 (*Identitätskontrolle*), para. 34.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

ditions; in principle, substantial freedom of action must remain reserved to the Member States here.'[91]

The Member States regulate their criminal procedures in a complete and coherent manner, which might mean that procedural safeguards are provided at different stages of the criminal procedure, such as the pre-trial or the trial stage.[92] Introducing piecemeal solutions that deal with specific parts of the criminal procedure risk intervening into the overall logic of fairness envisaged in a specific national system. *Solange* there is no harmonisation of admissibility of evidence at the EU level which addresses the regulatory differences between the Member States and takes account of the coherence of national criminal procedures, national constitutional courts should continue to review EU law that poses risks for fundamental rights protection in the criminal procedure.

IV. The Relevance of Reconfiguration for Constitutional Conflict in the Future

In this paper my aim was to show the lasting legacy of *Solange I* in shaping contemporary constitutional conflict: by committing to take account of the EU's reconfiguration (called progressive integration by the German court) as crucial for the review of EU action, the judgment created conditions for dialogue between EU and national courts in respect of its development. It also, importantly, opened up space for testing the less formal, but no less important, reconfigurations of power and competence that slowly but surely change the EU. I would like to close this paper with a brief flagging of two further areas of EU action where an important reconfiguration may be taking place and that might prove as areas where further constructive constitutional conflict might emerge.

First, the EU's external relations appear to be at an important crossroad. The Court of Justice decided in *KS and KD*[93] that its power of reviewing the EU's external action against fundamental rights standards in the Common Foreign and Security Policy stops only when it comes to reviewing 'political

91 FCC, *Lisbon Treaty* (n. 44), para. 253.

92 Silvia Allegrezza and Anna Mosna, 'Cross-Border Criminal Evidence and the Future European Public Prosecutor: One Step Back on Mutual Recognition?' in: Lorena Bachmaier Winter (ed.), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018), 141-164 (146).

93 See, ECJ, *KS and KD v. Council of the European Union, European Commission, European External Action Service and European Commission*, judgment of 10 September 2024, case nos C-29/22 P and C-44/22 P, EU:C:2024:725, paras 116-117.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

and strategic choices'. It therefore found that the Treaty limit to its jurisdiction in Article 24(1) TEU and Article 275 TFEU in the Common Foreign and Security Policy (CFSP) applies only to this elusive category, which only the Court itself is entitled to interpret. On the one hand, constitutional courts may find this contrary to the text of the treaties and see it as a sign of encroachment they should resist. On the other hand, external EU action takes place – as its name suggests – outside the EU's borders. This means that it is highly unlikely that any national court would find itself with jurisdiction to decide on possible fundamental rights breaches outside its borders.[94] While it is true that national courts might mandate its own authorities to comply with fundamental rights also when acting abroad, it is less clear whether this will be possible situations in which they act with EU agencies such as Frontex; or in situations where fundamental rights jurisdiction is increasingly blurred.[95] In that respect, constitutional courts may welcome this development as one demonstrating the EU's commitment to protect fundamental rights.

A similar dynamic seems to be taking shape in relation to the economic policies of Member States. The new Stability and Growth Pact (SGP), besides placing a strong emphasis on the ideology of austerity, appears to move, slowly but surely, beyond economic coordination into a genuine regulation of the way in which national economic policy is done. The Council is able to issue non-binding recommendations concerning national net expenditure paths, but such a recommendation then plays a strong role in the corrective arm of the SGP. Coupled with the conditionality[96] embedded in the Next Generation EU programme, economic policies of Member States seem destined to follow the trajectory of criminal law: considered a core state power (again explicitly proclaimed part of constitutional identity by the Bundesverfassungsgericht),[97] economic policy is increasingly regulated by the EU despite a formal treaty change that would explicitly confer such a competence to the EU.

94 On this point extensively, see ECJ, *KS and KD v. Council of the European Union, European Commission, European External Action Service and European Commission*, opinion of Advocate General Ćapeta on 23 November 2023, case nos C-29/22 P and C-44/22 P, EU:C:2023:901, paras 134-144.

95 Giulia Raimondo, 'Beyond Progress: Interrogating the Limits of Jurisdiction and Migrant Rights Through Negative Dialectics', HJIL 84 82024), 815-842.

96 The conditionality in the NGEU is not as 'existential' as the one that we witnessed in respect of financial assistance, but the size and interest of the Member States in using NGEU funds shows that it remains an important element for the Commission to monitor and disburse funds.

97 FCC, *Lisbon Treaty* (n. 44).

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

Are constitutional courts under the *Solange I* commitment to progressive integration always supposed to non-critically accept the EU's reconfiguration? I would think not. National constitutional courts are to keep in mind the progress of European integration when the possibility of a constitutional conflict arises. In line with their role as the Court of Justice's interlocutor and 'challenger', their role is continuously to track and monitor the EU's developments. Although politically salient issues will inevitably arise before courts,[98] they are also in an important position to reroute discussions about political choices horizontally, i. e., to the political branches of power,[99] and steer the EU's reconfiguration towards a more formal, deliberative setting.

98 This results from the new constitutionalism that we witnessed in the European Union from its very beginnings. More generally, see Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

99 If we are to take seriously the criticism in the literature that courts problematically reduce the deliberative potential offered by legislative institutions. See, Nik de Boer, *Judging European Democracy. The Role and Legitimacy of National Constitutional Courts in the EU* (Oxford University Press 2023); Martijn van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union', M. L. R. 82 (2019), 293-318.

https://doi.org/10.17104/0044-2348-2025-2-523 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA