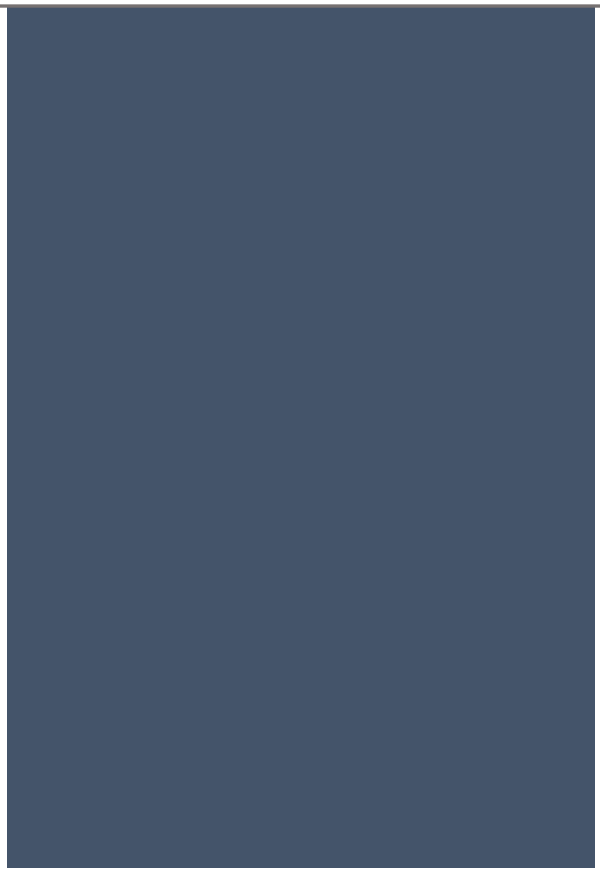

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THE NOMOPHYLACTIC FUNCTION OF THE EUROPEAN COURT OF JUSTICE IN TAX MATTERS WITHIN THE ITALIAN AND GERMAN EXPERIENCE. POSSIBLE DISPUTE SETTLEMENT SOLUTIONS FOR THE MEMBER STATES.

*Carloalberto Giusti *- Filippo Luigi Giambrone***

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This article pursues the goal to highlight, through some case law examples, the role of the ECJ, which has defined the fundamental dialectic of Community tax law, identifying positive and negative elements of the path of development of tax liberalization consistent with the aims of European integration. It can be affirmed however, that the main object of the decisions of the European Court of Justice regards the application of the principle of non-discrimination and non-restriction of Community freedoms, and in particular cases where the exercise of tax power by individual States may impede the system of competition and thus alter the functioning of the common market. The examination, in this paper, of the case law of Italy and Germany shows that the Italian legal system can transpose the judgments of the Court of Justice making them immediately applicable by its courts while the German legal system manifests legal difficulties in the automatic transposition of the judgments of the European Court of Justice. Furthermore, the EU approach also involves a further weak profile of the current system, namely the difficult settlement of the dispute between states. The friendly procedures (Mutual Agreement Procedure, so-called 'MAP'), exhausted in the direct consultation between the tax administrations of the contracting countries, do not seem in fact sufficient to settle the very copious dispute over double taxation, also due to the absence of a result constraint. More effective, however, is the recent Directive 2017/1852/EU of 10 October, whose territorial scope (EU territory) is, however, less extensive than that of the MAPs

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[184] Article 23 GG was introduced in its present form before the ratification of the Maastricht Treaty in order to make this possible because the view had previously prevailed that the original text of the German Constitution did not allow such an extensive transfer of sovereign powers to another supranational entity. Art. 23 codified the substance of the 'Solange II' judgment: at present, the protection of fundamental rights guaranteed by the European Union corresponds(va) in its essential features to that guaranteed by grundgesetz. At the same time, Article 23 placed limits on the future development of the Union, primarily as regards the safeguarding of the democratic state, the rule of law, the welfare state and the federal principle. See CH. Hillgruber, Art. 23, in: Schmidt-Bleibtreu/ Hofmann/ Henneke, 2017.

I. THE PRINCIPLE OF FINANCIAL BALANCE AND THE NEW EUROPEAN FINANCIAL GOVERNANCE.

The need to contain public expenditure and to meet the huge public debt has heavily influenced the financial choices of recent years by imposing various measures, which have profoundly redesigned constitutional frameworks and relations between state powers.[185] In this context, Constitutional Law No 11 of 20 April 2012 raised the principle of financial equilibrium to a constitutional rank, committing both central and territorial authorities through the new Articles 20 of the Treaty. 81, 97 and 119 Cost.2 More precisely, the new paragraph 1 of Art. 97 Cost., in fact, requires that all public administrations "in accordance with the order of the European Union, ensure the balance of budgets and the sustainability of public debt". The new Art. 119 Cost. grants local and regional authorities autonomy of entry and expenditure, albeit 'respecting the balance of the relevant budgets' and 'respecting the economic and financial constraints arising from the European Union's legal order'. In addition to recalling the principle of balance between revenue and expenditure in its budget and not that of balance envisaged at European level)[186], the new wording of Article 3 of the Treaty does not provide for the need for a balance between revenue and expenditure in the budget. The third paragraph of Article 81 of the Constitution provides that any law with financial effects, including the budget law, can no longer be limited to indicating the means of covering new and increased expenditure but must provide for them directly (and no longer only to indicate the resources necessary to cover expenditure)[187]. The constitutional provisions referred to are part of the new economic and financial governance which, by compressing the fiscal sovereignty of the nation states, has provided for budgetary constraints, instruments for controlling national accounts and public deficits and debts[188]. The legislative instruments adopted (six regulations and one directive, so-called Six pack) provide for a set of measures which can be summarized in the following commitments:[189] 1) obligation

[185] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[186] E. De Mita observes, The conflict between contribution capacity and the financial balance of the State, in Rass. Trib., 2016, page 563, according to which "the replacement of the expression < budget balance> with that of <equilibrio> represents the intention of the legislator to allow flexibility in the management of public finance that would otherwise be precluded. It should be recalled that Article 10 of the Directive does not state whether, in the light of the 5 of Constitutional Law No 1/2012, which provides for the allocation to the Chambers, respecting the relative autonomy of an independent body to which to assign tasks of analysis and verification of developments in public finance and observation of budgetary rules. Article 10 of the Directive is applicable to the Article 5 of the 1975 1970s regulates in detail the criteria which must be observed and which exclude the possibility that budgetary verification can be reduced to the mere consideration of the amount of a single tax. Budgetary balance is an overall assessment which invests, first of all, expenditure and which is directed, mainly to the government, it cannot be limited to a single item, that of a tax, even if high, detached from an overall assessment of revenue and expenditure".

[187] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[188] For a deeper understanding of incurring debt capacity of local authorities in Austria and Germany cfr., Cfr. Ch. Smekal, *Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften*, p. 72 ff, in, G. Kirsch/ Ch. Smekal/ H. Zimmermann, Beiträge zu ökonomischen Problemen des Föderalismus.

[189] A.F. Uricchio, *Sovranitá impositiva e vincoli del diritto europeo*, p. 9, in, Selected Issues on EU tax law.

on Member States to converge towards the objective of balancing the budget with an annual improvement in balances of at least 0.5%; (2) obligation on countries whose debt exceeds 60% of GDP to take measures to reduce it at a satisfactory rate, to the extent of at least 1/20 of the surplus above the 60% threshold, calculated over the last three years; (3) obligation to include in its internal legal systems, including with constitutional rules, the principle of budgetary balance and a commitment to coordinate debt issuance plans with the Council and the European Commission; 4) new semi-automatic procedures for imposing sanctions on countries that violate the rules of the Pact (sanctions are presumed approved by the

Council unless it rejects it by qualified majority vote - so-called "reverse majority" of euro area states with the exception of the vote of the State concerned).Further rules (so-called "two packs") were also adopted to strengthen the economic and budgetary surveillance of Member States facing or threatened by serious difficulties for their financial stability.[190] One of the main obligations of the Member States is to appoint an independent budgetary control body to monitor budgetary developments and to publish its budgetary programmes, based on macroeconomic forecasts provided by that independent body. The new model of governance of European budgetary policies takes the form of Art. 119, paragraph 3, of the Treaty on the Functioning of the European Union (TFEI) which require stable and sustainable fiscal policies oriented towards a prudent management of public affairs so-calling sound fiscal policy or one.[191] The subsequent Articles 121 and 126 of the Treaty on the Functioning of the European Union are also cornerstones of European economic governance in the field of multilateral surveillance and the excessive deficit procedure respectively192. Article 10 of the Directive is applicable to the Amendments No 121, in the third paragraph, provides for multi-level control measures aimed at ensuring closer coordination of economic policies and lasting convergence of member states' economic performance. To this end, the Council, on the basis of reports submitted by the European Commission, monitors economic developments in each of the Member States and the coherence of economic policies. This control shall be based on the transmission to the Commission of information concerning the relevant measures taken by them in the context of their economic policy. Article 10 of the Directive is applicable to the Article 126 of the TFEI, on the other hand, prohibits excessive public deficits by providing for specific sanctions in the event of infringement. The implementing provisions, which have been the subject of recent amendments and additions to give a greater level of detail in the implementation of the aforementioned TFEI provisions, have regulated the so-called preventive arm based on the surveillance of fiscal policies and the so-called

[190]Cfr. A. F. Uricchio, *Manuale di diritto tributario*, p. 115 ff.
[191] Cfr. Ch. Smekal, Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften, p. 72 ff, in, G. Kirsch/ Ch. Smekal/ H. Zimmermann, Beiträge zu ökonomischen Problemen des Föderalismus.
[192] Cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

corrective arm aimed at correcting excessive deficits[193]. On the basis of these TFEI provisions, a unitary body of stability rules common to all Member States in the field of public accounts, known as the Euro Plus Pact, has been defined, with which European governance has been consolidated, strengthening financial stability through common fiscal policies.[194]

II. THE ROLE OF THE CASE LAW OF THE COURT OF JUSTICE AND ITS POSITION WITHIN EUROPEAN TAX SYSTEM

The Court of Justice of the European Union has the function of ensuring uniform interpretation and application of European rules in each of the Member States (nomophylactic function).[195] In particular, the European Court of Justice is called upon to give preliminary rulings on the interpretation of European law and thus to carry out a work of hermeneutic reconstruction of the rules and principles expressed in the Treaty and the legislative acts of secondary European law. Indeed, even if national courts are normally required to implement European rules of national law, since European law is directly applicable in the Member States, they may raise questions referred for a preliminary ruling on the interpretation of European rules or on the compatibility of rules of national law with European law. In particular, the Court of Justice is called upon to rule on the question juris, defining the meaning of the European rule relevant to the judgment, while the national court is required to rule on the facts, so as to reach a decision on the specific case by applying the relevant rules (including the European one).[196] The content of the Decision of the European Court of Justice concerns not only the reconstruction of the European standard (and therefore interpretation in the strict sense) but also often the compatibility of internal rules with the European parameter. The historical fact tends to point out in the judgment of the Court of Justice as a delimitation of the thema decidendum, especially in order to determine the applicability or otherwise of European law (and therefore the jurisdiction of the European court).[197] The mechanism of reference for a preliminary ruling - also referred to as a European interpretative preliminary ruling - is a faculty for the various national courts and becomes an obligation only for judges of last instance[198]. Through this mechanism, national courts present themselves as a kind of instrument of the process of European integration: in order to promote uniformity and the correct application of European law, thus preventing the courts of the various

[193] Cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.
[194] A.F. Uricchio, *Sovranitá impositiva e vincoli del diritto europeo*, p. 10, in, Selected Issues on EU tax law.
[195] A. F. Uricchio, *Das geltende italienische Steuersystem*, in, A. F. Uricchio/ F. L. Giambrone, *Neue Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses.*
[196] C. Smekal, *Die Flucht aus dem Budget*, Institut für angewandte Sozial- und Wirtschaftsforschung, Jupiter Verlag 1977.
[197] A. F. Uricchio, *Manuale di diritto tributario*, Cacucci Editore, 2020, p.118.
[198] Cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

Member States from forming a case law conditioned by local legal traditions, the interpretative reference leads to judicial cooperation between separate yet coordinated legal systems and appears destined to produce centralized and European case law on the European legal order, in respect of which the contributions of national courts[199] are valued as impulses coming from separate legal systems that come together in a single ordinal context. The interpretative judgments delivered by the Court of Justice following the reference for a preliminary ruling have a binding effect on the national court which requested them (and on the subsequent grades of the same judgment). Moreover, they are intended to extend their effects beyond the judgment to which they relate, since they relate to legal questions of general application, in that sense it can be argued that interpretative judgments are binding in relation to national courts and public administrations.[200] As regards the temporal effect of judgments of the Court of Justice, the general rule of ex tunc effectiveness applies in principle, with recognition of the latitude of interpretation and the validity of the Community rule from the treaty of origin. Moreover, this criterion has often been balanced with requirements of legal certainty and the protection of the undue custody of third parties; In economic and financial matters in particular, the European Court of Justice has recognized the ex-nunc effectiveness of interpretative judgments where they interfere with the behaviour of good faith third parties who relied on the scope of national legislation before the judgment given by European Justice.[201]

III. The role of the case law of the Court of Justice in the system of sources of European tax law.

The European Court of Justice has clarified the dimensions and boundaries of Community law through a constant work of reading and recognizing the various legislative acts issued by the Community institutions. In doctrine, it has often been pointed out that the Court of Justice has made a substantial contribution to the definition of the Legal System of the European Union, including through creative contributions, so as to make up for the lack of reference standards in the European regulatory fabric.[202] The creative function has been seen, in particular, in the autonomous creation of legal norms and in the integration of European law, primary and secondary, and in any case in the continuous search for general principles that could define the axiological horizon of the regulatory discipline. From this point of view, it has been repeatedly observed that the case law of the European

[199] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[200] P. Boria, *Diritto tributario europeo*, Giuffré editore, p. 121 ff.
[201] Cfr. A.F.Uricchio, *Autonomia regionale differenziata tra criteri di riparto delle funzioni e perequazione finanziaria*, in F. Pastore (a cura di), Il regionalismo differenziato, atti del convegno di Cassino del 5.4.2019, Wolters Kluwer – Cedam, Padova, 2019.
[202] A. F. Uricchio, *Classificazioni tradizionali e classificazioni innovative die tributi*, p. 283, in, A. F. Uricchio -V. Peragine- M. Aulenta, *Manuale di scienze delle finanze, diritto finanziario e contabilitá üubblica*, Nel diritto editore 2018.

Court of Justice has made a decisive contribution to the development of Community law, also affecting the regulatory activity of the European institutions[203] through the indication of the general lines emerging from the current system and the constant comparison with the fundamental aims of supranational integration[204]. It is therefore essentially peaceful to give the case law of the Court of Justice a major role in defining the system of sources in the various areas of European law[205]. The main guidelines followed by Community case law on taxation. The essentially cognitive nature of Community case-law on VAT. The area in which the European Court of Justice takes the most decisions is undoubtedly concerned with value added tax, given the typically European nature of the tax. It is also significant that the Court of Justice is showing an essentially recognisive tendency in this area of the tax system to renounce the development of general principles of cross-cutting importance[206]. The cognitive attitude is thus expressed through the precise examination of the rules laid down in European secondary legislation acts (particularly in the DIRECTIVES on VAT) and the clarification, by way of interpretation, of the semantic

latitude assumed by the rules themselves.[207]It is true that European jurisprudence has made a decisive contribution to the definition of the basic features of VAT on the basis of the rules laid down in the various directives: the legal nature of the levy as a consumption tax has thus been recognized; the key elements of European discipline have been identified in the generality of taxation on commercial transactions, in the proportionality of the rate, in the nature of multi-phase tax and in the neutrality determined by the imposition of value added; the tax case has been pointed out both in the objective elements and in the subjective elements.[208]Moreover, the reconstruction of the qualifying features of the European tax rules is often the guiding principle of European case-law also in the definition of the application and interpretative profiles of the rules laid down by the directives for the implementation of VAT,[209] as well as in the identification of the derogatory cases permitted by the internal rules. At times, the Court of Justice's cognitive aptitude to VAT discipline is diminished to leave room for regulatory reconstructions clearly of creative value. Thus, in relation to the issue of the

[203] Ch. Smekal/ R. Sausgruber, *Determinants of Foreign Direct Investment in Europe*, in, Jr. Chen, Foreign Direct Investment, 33-42, Houndmills: McMillan Press.

[204] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[205] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[206] For a specific introduction to the role of territorial self- government in the light of the principles of subsidiarity and proximity Cfr. U.Villani, Il ruolo delle autonomie territoriali alla luce dei principi di sussidiarietà e di prossimità, in La costruzione di un'Europa "unita nella diversità". Il ruolo delle autonomie regionali e locali (a cura di M. Cardia), Aipsa Edizioni, Cagliari, 2015, p. 37 ss.;

[207] Cfr. Ch. Smekal/ Jr. Chen, *International Tax Competition: A Case for International Cooperation in Globalization*. Transition Stud Rev 11, 59–76 (2004).

[208] Lupoi, *Riflessioni comparatistiche sulla funzione creativa della giurisprudenza*, in Studi in onore di V. Uckmar, II, Padova, 1997, 811 ff.

[209] A. F. Uricchio, *Complessitá e criticitá dell´ attuazione del federalismo fiscale*, in, A. F. Uricchio, Federalismo fiscale: evoluzione e prospettive, Collana della II Facoltá di Giurisprudenza – Sede di Taranto, 2012, p. 41

possible duplication of taxation on the same basis, the Court of Justice has defined the principle of a ban on double taxation than on the principle of a ban on double taxation. finds an express regulatory reference.[210] Also with regard to the issue of the right to reimbursement of tax due to an undue payment, the European Court of Justice has developed a guideline which,[211] even in the absence of specific rules in the directives, is to reconstruct in an interpretative way the scope of individual rights and to limit the unreasonable compressions made by internal discipline.[212]Mention should also be made of the case of the abuse of the right, which was originally formulated with reference to the VAT discipline to counter the artificial negotiating constructions carried out by taxpayers in order to obtain unfair tax savings.[213]This creative attitude, however, occupies a marginal area of Community case law in the field of VAT, since the main questions raised for the attention of the courts are resolved by reconstructing the existing European framework in case studies and analysis[214].

IV. THE CONFLICT BETWEEN EUROPEAN UNION LAW AND NATIONAL LAW IN ITALY.

It is now useful to focus on the relationship between the union's legal order and the internal order. Two basic theses emerged: that of the integration of the two systems and that the same remain separate, albeit coordinated. The first argument has always been put forward by the Court of Justice, according to which the European legal order is integrated into the legal order of the Member States[215], so that the Latter cannot allow a further unilateral measure to prevail against an order which they have accepted under conditions of mutuality (such as the Community one), which cannot be opposed to the common order. In a first fundamental decision (judgment *of 05.02.1963[216] in Case C-26/62 Van Gend & Loos* on a tax issue)[217] The

European Court of Justice observes that the European Economic Community constitutes a new legal order in the field of international law in favour of which the Member States have given up, albeit in limited areas[218], their sovereign powers and to which not only the Member States are subject, but also

[210] Sentenza del 05.05.1982, causa C-15/81, Schul, sentenza del 25.02.1988, causa C-299/86, Drexl.
[211] A. F. Uricchio, *Manuale di diritto tributario*, p. 120.
[212] Sentenza del 06.07.1995, causa C-62/93, BP Soupergaz c. Grecia; sentenza del 02.12.1997, causa C- 188/95, Fantask.
[213] Sentenza del 21.02.2006, causa C- 255/02, Halifax.
[214] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[215] Cfr.A.F.Uricchio, *Autonomia regionale differenziata tra criteri di riparto delle funzioni e perequazione finanziaria*, in F. Pastore (a cura di), Il regionalismo differenziato, atti del convegno di Cassino del 5.4.2019, Wolters Kluwer – Cedam, Padova, 2019.
[216] Judgment of 05.02.1963 in Case C-26/62 Van Gend & Loos.
[217]Van Gend & Loos judgment, p. 23. In doctrinal v., per tutti, U. Villani, Una rittura della sentenza "Van Gend en Loos" dopo cinquant anni, in Studi sull'integrazione europea, 2013, pp. 225-237. It is also permissible to refer to the considerations expressed in A. Arena, Curia non facit saltus: origins and evolution of the principle of primacy before the Costa c. Enel judgment, in E. Triggiani et al. (edited by), Dialoghi con Ugo Villani, Bari, 2017, p. 949 ss.
[218] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

their citizens. The judgment of the Court of Justice of *the European Union of 15 July 1964, C-6/64, Costa v. Enel*[219]*,* is the starting point for an important development of case law, which ensured the effective protection of rights protected by supranational legislation, preventing the scope of these rights from differing in different parts of the territory of the Union itself and structurally preventing a conflict with the national laws of the Member States. Among the fundamental principles of primary Community law are the prohibition of the imposition of customs duties on the goods of the Member States and the principle of harmonizing internal rules[220] on indirect taxes, both of which are instrumental to the general principle of the free movement of goods, capital, and services. The case was raised by the lawyer Costa who, challenging the Italian law on the nationalization of electricity, L. 1643/1962, had appealed to the conciliatory court of Milan finding that certain provisions of the Treaty of Rome had been violated and implicitly of Art. 11 of the Italian Constitution. The Italian Constitutional Court had already ruled on this question and, in its judgment of 7 March 1964, No. 14, rejected Mr. Costa's action by establishing the legality of the Law on the State Monopoly based on the principle of *lex posterior derogat priori* (since the laws of ratification of the Treaty had taken place by means of an original law prior to the Monopoly Act). In detail, the Constitutional Court ruled that Community law should give way to a State law whenever the principle of succession of laws applied over time, inevitably affecting the validity and effectiveness of the new legal system[221]. That aporia was also raised by the Court of Luxembourg, which was brought before the Court of Justice by Mr. Costa by means of the reference for a preliminary ruling provided for in Article 10 of the Directive. 177 EEC[222], which had the opportunity to establish a founding principle for the nascent order and in consequential line with Van Gend. The Court ruled that the creation of a new and integrated system with the different legal systems was a choice desired by the Member States in the entry into force of the Treaty of Rome and, consequently, no legislative act, even of constitutional rank, could impose itself on it without jeopardising the uniform application of Community law[223]. The consistency between the rules of the two legal systems is therefore not resolved within the supranational one by applying the criterion of lex superior, but it still manages to prevent a national rule, even when issued after the supranational one, from derogating from the

latter. The Court continues to affirm the same principle by drawing a distinction from the traditional

[219] Judgment of the Court of Justice, Costa v ENEL, Case 6/64 (15 July 1964).

[220] In this regard cfr., Ch. Smekal/ R. Sausgruber, *Determinants of Foreign Direct Investment in Europe*, in, Jr. Chen, Foreign Direct Investment, 33-42, Houndmills: McMillan Press.

[221] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017); U. Villani,Tutela dei diritti fondamentali nel 'dialogo' tra corti europee e giudici nazionali, in Diritti fondamentali e Cittadinanza dell'Unione Europea (a cura di L. Moccia), FrancoAngeli, Milano, 2010, p. 115 ss., e, con il titolo La cooperazione tra i giudici nazionali, la Corte di giustizia dell'Unione europea e la Corte europea dei diritti dell'uomo, in La cooperazione fra Corti in Europa nel tutela dei diritti dell'uomo (a cura di M. Fragola), Editoriale Scientifica,

[222] Article 10 of the Directive. 177 EEC.

[223] Cfr. Ch. Smekal/ Jr. Chen, *International Tax Competition: A Case for International Cooperation in Globalization*. Transition Stud. Rev. 11, 59–76 (2004).

internationalist approach: unlike the common international treaties, the EEC Treaty established its own legal order, integrated into the legal order of the Member States when the Treaty entered into force and which national courts are required to observe. By establishing a community without limits of duration, with its own bodies, personality, legal capacity, capacity for representation at international level, and of effective powers having a limitation of competence or a transfer of powers of the States to the Community,[224] they have limited, albeit in limited fields, their sovereign powers and thus created a set of law binding on their citizens and for themselves. Furthermore, the Court of Justice itself continues, the transfer made by the Member States to the Community legal order, to the rights and obligations corresponding to the provisions of the Treaty, therefore implies a definitive limitation of their sovereign powers; Consequently, the obligation imposed on the Member States of the EEC Treaty is integrated into the legal order of the Member States[225], has an imperative value in them and directly concerns their citizens, to whom it confers individual rights which national courts must protect[226]. The use of the term transfer in relation to the transfer of powers from the Member States to the European Community is significant in that it indicates that Community competences retain the same character and nature as those previously belonging to the States, thus configuring themselves as sovereign rights. The position of the Court of Justice in these two decisions has remained largely unchanged over time. On the contrary, some argumentative passages have been taken up and developed: so, it has been explicitly argued that the foundation and the strength of persuasion of this rule (of the superiority of Community law) emerges from the principle of unity and functional capacity of European law. The validity of Community law can only be judged in accordance with Community law, since it is created by the founding Treaty, so that it cannot be left out by a rule of national law on the basis of Community law, so that it derives from an autonomous legal source if the legal basis of the Community itself is not to be called into question *(judgment of 17.12.1970 in Case C-11/70 International Handelsgesellschaft).*[227] The Court then goes so far as to state expressly the superiority of the Community rule over the internal rule, whether pre-existing or later, considering that the primacy of Community law is an indispensable condition for the functioning and, in some respects, for the very existence of the European Community[228]. In line with this approach, the Court of Justice has even

[224] A. F. Uricchio, *Percorsi di diritto tributario*, p. 55.

[225] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[226] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[227] Judgment of 17.12.1970 in Case C-11/70 International Handelsgesellschaft.

[228] For a better understanding oft the protection related to fundamental rights in the dialogue between European courts and national courts cfr. U. Villani, Tutela dei diritti fondamentali nel 'dialogo' tra corti europee e giudici nazionali, in Diritti fondamentali e Cittadinanza dell'Unione Europea (a cura di L. Moccia), FrancoAngeli, Milano, 2010, p. 115 ss., e, con il titolo La cooperazione tra i giudici nazionali, la Corte di giustizia dell'Unione europea e la Corte europea dei diritti dell'uomo, in La cooperazione fra Corti in Europa nel tutela dei diritti dell'uomo (a cura di M. Fragola), Editoriale Scientifica.

gone so far as to classify the Treaty of Rome as a basic Constitutional Charter capable of establishing a community of autonomous law independent of the legal systems of the Member *States (judgment of 23.04.1986 in Case C-294/83 Le verts).*[229] The effective recognition of the automatic precedence of Community rules on incompatible national law, without any need for a receptive act or even the repeal or annulment of conflicting national rules, it has been established by the Court itself that << the national court, which is responsible for applying, within the scope of its jurisdiction, the provisions of Community law, has an obligation to ensure the full effectiveness of those rules, disapplying, if necessary, on its own initiative, any conflicting provision of national law, without having to request or wait for its prior removal by legislative or other constitutional procedure>> *(judgment of 09.03.1978 in Case C-106/77 Simmenthal).*[230]

V. RELATIONSHIP BETWEEN THE PRIMACY OF COMMUNITY LAW AND STABILITY OF NATIONAL JUDGEMENT IN ITALY

The question has recently come to the attention of the Court of Justice, which is called upon to rule on the holding of the national judgment contrary to a rule of the Union. There are two principles that are highlighted: the primacy of the law of union; the certainty of legal relations, underlying the stability recognized to the judgment. The question concerns the inapplicability of Article 2909 of the Civil Code[231] as an internal rule aimed at establishing the principle of the authority of the judge, in cases where the judicial assessment, which has become final, is contrary to an EU rule.[232]The analysis postulates the need to balance the duty of loyal cooperation, which is incumbent on the Member States bound by respect for and implementation of Union law, and the principle of procedural autonomy of the States themselves[233]. The Court of Justice accepts a guideline which can be summarized in three essential points: the stability of the national judgement is bound to prevail specifically with regard to its so-called internal effects: the judgment cannot be called into question with regard to the legal relationship now defined, even if an idea of conflict with Union law is highlighted;[234] the primacy of Union law, on the other hand, returns to operate with regard to the so-called external effects of the judgment: the effectiveness of the judgment concerns a different process, even if it is pending between the same parties and in which the same legal relationship is highlighted[235],

[229] Sentenza del 23.04.1986, causa C- 294/83, Le Verts, in Racc., 1986, 1339.

[230] A. F. Uricchio, *Percorsi di diritto tributario*, p. 55.

[231] Cfr. C.A. Giusti, *La coprorate governance delle societá a partecipazione pubblica*, G. Giappichelli editore; From the same author compare, C.A.Giusti, *La gestione delle sopravvenienze contrattuali, rinegoziazione e intervento giuridico,* Edizione Scientifiche Italiane.

[232] A.F. Uricchio, *Italien der Autonomien. Sanfte Entwicklung und Föderalismus (Zusammenfassung*), in A.Uricchio, F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Cacucci editore, 2020.

[233] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[234] R. Garofoli/ G. Ferrari, *Manuale di diritto amministrativo*, 2020, p. 25 ff.

[235] cfr. U.Villani, *Istituzioni di Diritto dell'Unione europea, Bari,* Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

therefore the need to safeguard legal certainty in the national legal system cannot be established; the need to ensure the primacy of Union law once again prevails;[236]the primacy of EU law operates, in any event, in the field of State aid, also in the face of a national judgment which is incompatible with it: the conflict of the national judgment with EU law determines the disapplication of Article 2909 civil code,[237] in so far as the application of that provision prevents the recovery of State aid granted contrary to Community law (in this case, a Commission decision)[238]. The primary precedence of the union rule over the final judgment is justified by the exclusive nature of the jurisdiction assigned to the Union in this field: the judgment of the national court, which has become final, has in fact been taken in an area exceeding the competence of the Member States.[239]The Court of Justice has made it clear that the principle of the primacy of Community law has such force that it also imposes itself on the national judgment, so, where it has been formed contrary to the Community law[240], it must even be disapplied. Reference is made to the judgement Lucchini (Court of Justice, 18 July 2007, C- 119/05).[241]The case concerned the decision taken by the Public Administration to withdraw in self-protection the measure granting aid granted as State aid, as well as to recover the sums paid, in order to comply with the content of the decision taken by the European Commission which had declared the aid granted for the benefit of the company incompatible with the common market. The Administration had not considered the judgment formed internally prior to the adoption of the Decision of the European Commission, concerning the assessment of the legitimacy of the measure by which the Administration had originally ordered the granting of the aid to the company[242]. According to the Court, Community law is not the application of a provision of national law, such as Article 2909 of the Italian Civil Code,[243] which is designed to establish the principle of the authority of what is judged, in so far as the application of that provision prevents the recovery of State aid granted contrary to Community law and whose incompatibility with the common market has been declared by a Commission

[236] A. F. Uricchio, *Manuale di diritto tributario*, Cacucci Editore, 2020, p. 120,
[237] Article 2909 Civil Code.
[238] In this regard cfr., Ch. Smekal/ R. Sausgruber,*Determinants of Foreign Direct Investment in Europe*, in, Jr. Chen, Foreign Direct Investment, 33-42, Houndmills: McMillan Press.
[239] Corte Cost. 7 marzo 1964, n. 14.
[240] For a better understanding oft the protection related to fundamental rights in the dialogue between European courts and national courts cfr. U. Villani, Tutela dei diritti fondamentali nel 'dialogo' tra corti europee e giudici nazionali, in Diritti fondamentali e Cittadinanza dell'Unione Europea (a cura di L. Moccia), FrancoAngeli, Milano, 2010, p. 115 ss., e, con il titolo La cooperazione tra i giudici nazionali, la Corte di giustizia dell'Unione europea e la Corte europea dei diritti dell'uomo, in La cooperazione fra Corti in Europa nel tutela dei diritti dell'uomo (a cura di M. Fragola), Editoriale Scientifica.
[241] Corte Giust., Grande sezione, 18 luglio 2007 C-119/05.
[242] Ch.Smekal / H.Winner, *Außerbudgetäre Finanzierung und verdeckte Staatsverschuldung. Eine finanzwissenschaftliche Betrachtung vor dem Hintergrund der monetären Integration in Europa*. politicum, 74, 37-45.
[243] Article 2909 of the Italian Civil Code.

decision which has become final.[244]Subsequently, however, the Court of Justice (Cort. Giust. EC, Sez. II, 3 September 2009, Omniclub Bankruptcy)[245] watered down the scope of the Lucchini decision, stating that Community law does not require a national court to disapply the internal procedural rules which give authority to what is judged on a decision, even where that would enable an infringement of Community law[246] by that decision to be remedied. This is because, in order to ensure both the establishment of law and legal relations and the proper administration of justice[247], it is important that judicial decisions which have

become final after the exhaustion of the available remedies or after the expiry of the time limits laid down for these appeals can no longer be called into question (*judgment of 30 September 2003 in Case C-224/01 Köbler).*[248] In express reference to the Lucchini judgment, the Court of Justice, in part by distancing itself from it, states that it is not designed to call into question the analysis carried out above, since that judgment concerned a very special situation in which the principles governing the division of powers between the Member States and the Community in the field of State aid were at issue, given that the Commission of the European Communities has exclusive competence to examine the compatibility of a national State aid measure with the common market. Against this premise, however, the Omniclub judgment contains several statements which nevertheless mitigate the so-called external effectiveness of the judgment (i.e., the effectiveness of the judgment of a different trial, always pending between the same parties).[249] According to national case-law, where two judgments between the same parties refer to the same legal relationship, and one of the two has been settled by a final judgment[250], the assessment thus made with regard to the legal situation or the answer of questions of fact and law relating to a fundamental point common to both cases, forming the essential logical premise of the statute contained in the provision of the judgment with authority of what is judged, precludes the review of the same point of law established and resolved, and even if the subsequent judgment has a

[244] R. Garofoli/ G. Ferrari, *Manuale di diritto amministrativo*, Nel diritto editore,2020, p. 26 ff.

[245] Cort. Giust. EC, Sez. II, 3 September 2009, Omniclub Bankruptcy; Cfr. C.A. Giusti, *La coprorate governance delle societá a partecipazione pubblica*, G. Giappichelli editore; From the same author compare, C.A.Giusti, *La gestione delle sopravvenienze contrattuali, rinegoziazione e intervento giuridico,* Edizione Scientifiche Italiane; Cort. Giust. EC, Sez. II, 3 September 2009, Fallimento Omniclub.

[246] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[247] A.F. Uricchio, *Italien der Autonomien. Sanfte Entwicklung und Föderalismus (Zusammenfassung*), in A.Uricchio, F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Cacucci editore, 2020.

[248] Judgment of 30 September 2003 in Case C-224/01 Köbler; A. F. Uricchio/ F. L. Giambrone, *European Finance at the Emergency Test*, Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.

[249] Cfr. Ch. Smekal, *Finanzausgleich- Föderalismus- Gemeindeautonomie*, 371, in: Andreas Kohl und Alfred Strinemann (Hrsg.), Österreichisches Jahrbuch für Politik, München, Wien 1979.

[250] Cfr. C.A. Giusti, *La coprorate governance delle societá a partecipazione pubblica*, G. Giappichelli editore; From the same author compare, C.A.Giusti, *La gestione delle sopravvenienze contrattuali, rinegoziazione e intervento giuridico,* Edizione Scientifiche Italiane.

finality other than those which constituted the purpose and petitum of the first[251]. This principle is also considered to be derogated from in respect of the legal relations of duration and the periodic obligations which may constitute its content, on which the court gives an assessment of a present case but with consequences which will continue to be expressed in the future, so that the authorization of the judgment prevents the review and deduction of questions aimed at a new decision on those already resolved by final decision, which, therefore, is effective even in the time following its adoption, with the sole limitation of a fact or legal occurrence, which changes the material content of the report or amends its Regulation.[252]In Omniclub, the Court of Justice ordered that this principle be exceeded, stating that the judgment held to be contrary to Community law, although it could not be called into question as to the report on which it has given its opinion, cannot, however, explain external effects (i.e. be considered binding in other judgments, between the same parties in which the same duration ratio is inferred). Such an interpretation of the principle of the judgment, in the Court's view, ultimately results in the consequence that, where the judicial decision which has become irrevocable is based on an interpretation contrary to Community law[253], the incorrect application of those rules would be reproduced

with regard to each new period, without it being possible to correct that misinterpretation.[254] So, ultimately, it has to be considered, in the opinion of the Court of Justice, that although, in the absence of a Community matter in this field, the procedures for implementing the principle of the authority of what is judged fall within the national legal order of the Member States in accordance with the principle of procedural autonomy in which they enjoy, however, they cannot be structured in such a way as to render in practice impossible or excessively difficult the exercise of the rights conferred by the Community legal order (principle of effectiveness). It can therefore be concluded that a distinction must now be made between internal and external effects in the face of a judgment which is contrary to Community law.[255] The internal effects remain firm (the issue decided cannot be called into question), except in the case of State aid, in which the European Union has exclusive competence; external effects, on the other hand, must be excluded where the judgment to be invoked is contrary to Community law, since otherwise it would make it excessively difficult to exercise the right conferred by European law. In this case, the need to ensure the primacy of Community law, which would otherwise be undermined, prevails if the erroneous interpretation of the VAT rules, formulated by the Member State in terms different from the principles expressed in community intervention following

[251] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[252] Cass. N. 16959/2003; Cass n. 9685/2003; Cass n. 19426/2003; Cass.n. 15931/2004 e S.U.n. 13916/2006.
[253] Cfr.G. Corasaniti, *L'eliminazione della doppia imposizione nell'ordinamento italiano e nell'ordinamento federale tedesco*, in Dir. prat. trib., 1997, III, 433-453.
[254] In this matter, see, Chiné/ Fratini/ Zoppini, manuale del diritto civile, Roma 2020.
[255] A. F. Uricchio, *Manuale di diritto tributario*, Cacucci Editore, 2020, p. 120.

the formation of the judgment, could be reproduced for each new tax year.[256] The Court of Justice therefore mitigates the external effectiveness of the national judgment by imposing the primacy of Community law, which results in the disapplication of Article 2909 of the Civil Code[257]. These limitations on the external effects of the judgment were promptly transposed by the Court of Cassation with the judgment of Sez. trib., 10 May 2010, n. 12249.[258] Again on the relationship between Community law and the judgement it should also be noted the Community jurisprudence according to which the Public Administration has the obligation to review an administrative act adopted in violation of Community law, even if there is now a judgment that has ruled out the illegality of the measure itself.[259] An important stage in the evolution of the relationship between domestic law and Community law was with the recent ordinance of the Constitutional Court (15 April 2008, n.103)[260], which for the first time admitted in the constitutionality judgment of the laws the possibility of making the preliminary reference to the Court of Justice, pursuant to Art. 267 TFEU.[261] In this order, the Constitutional Court does not deny its previous case law aimed at circumventing the legitimacy to raise the question of a preliminary ruling in the courts in an incidental way - where a national judge exists - but admits it only in the judgments in the main proceedings, where the Court itself is a judge not of last, but even of the only instance.[262] The order in question shows that, as regards the existence of the conditions for this Court to raise a question before the EC Court of Justice[263] on the interpretation of Community law, it should be noted that the Constitutional Court, although in its particular position as the supreme constitutional guarantee body in national law, constitutes a national jurisdiction, in particular a jurisdiction of a single body, it is therefore in the judgments of constitutional legitimacy, unlike those promoted incidentally, this court is the only judge called upon to rule on the dispute; that consequently, if, in the judgments of constitutional legitimacy promoted in the main way, it is not possible to make the reference for a preliminary ruling referred to in Art. Article 234 of the EC Treaty[264] would affect the general interest in the uniform application of

[256] Cfr. Ch. Smekal/ R. Sendlhofer/ H. Winner, *Einkommen vs. Konsum.Ansatzpunkte zur Steuerreformdiskussion.*

[257] Cfr. C.A. Giusti, *La coprorate governance delle societá a partecipazione pubblica*, G. Giappichelli editore; From the same author compare, C.A.Giusti, *La gestione delle sopravvenienze contrattuali, rinegoziazione e intervento giuridico,* Edizione Scientifiche Italiane.

[258] Court of Cassation with the judgment of sez. trib., 10 May 2010, n. 12249.

[259] Cfr. Lang/Rust/Owens/Pistone/Schuch/Staringer/Storck/Essers/Kemmeren/Öner/Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020

[260] Constitutional Court 15 April 2008, n.103.

[261] Cfr. A. F. Uricchio, *Die zwischen der Haushaltsaufsicht den ausserordentlichen Finanzinstrumenten und der sogenannten Windfall taxes anfallenden Kosten der Sozialrechte*, p.131ss, in, A. F. Uricchio/ F.L.Giambrone, *Entwicklunegn im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses.*

[262] On this subject, Gnes, *il contenzioso*, in Giorn. Dir. amm., 2013, 5, 479.

[263] Lang/ Pistone/ Rust/ Schuch/ Staringer/ Storck, *CJEU, Recent Developments in Direct Taxation 2019*, Linde 2020

[264] For an in- depth study of European Union law cfr. U. Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

Community law[265], as interpreted by the ECJ.[266]A turning point towards the monist conception seems, however, to be carried out by the Constitutional Court which, by judgment *of 28 January 2010, no. 28,* declared the illegality of a law conflicting with a Community rule not directly applicable, after having taken note of the impossibility of disapplying it or adopting a compliant interpretation.[267] To this end, the Court has stated that the verification of compliance with internal legislation with Community rules is functional to the recognition of the self-implementing nature of EU rules[268], in particular community waste directives[269]. In support of this outcome, the Court defined the Community rules as binding and superordinate to ordinary laws in Italian law by means of Articles 11 and 117(1) of the Constitution. The Consulta thus seems to distance itself from positions that appear increasingly reargued in the face of repeated rulings by the Court of Justice aimed at encouraging an increasingly penetrating impact of Union law on the Italian legal system.[270]

VI. A VIEW TO GERMANY. CONCEPT OF THE EU AS A UNION OF STATES AND CONSTITUTIONS FROM A GERMAN POINT OF VIEW. EU AS A DYNAMIC INTEGRATION ASSOCIATION

Article 1(2) TEU describes the European Union as a new stage in the achievement of an ever-closer Union among the peoples of Europe. The wording underlines that the objective of dynamically progressive densification and deepening of integration should not yet be completed with the Maastricht Treaty and the creation of the EU. On the contrary, it emphasizes the dynamic development process of the Union's own[271], which, expressed in the contractual preambles, shaped its self-image as a special purpose association of functional integration from the outset[272], which is consistent with the intention of the founders. It has always been typical of the Union to develop the political and legal interdependence of the Member States, which, in contrast to the major allegations, has proved successful time and again in practice and which has earned the EU[273] the appropriate name

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[265] Cfr. for possible solutions regarding tax hermonization: Ch. Smekal- E. Thöni, *Tax Harmonization vs. Tax Competition. The case of indirect taxation in the European Community*, in, J.R. Chen- Ch. Smekal- Economic Effects of Regional integration in Europe and North America, Veröffentlichungen der Universität Innsbruck, p. 131 ff.

[266] Cort. Cost., ord.n. 103/2008.

[267] Art. 183, paragraph 1, paragraph n), of the Environmental Code (legislative decree of 3 April 2006, n. 152), in the text preceding the amendments introduced by art. 2, paragraph 20, d.lgs. 16 January 2008, No 4.

[268] A. F. Uricchio, *Percorsi di diritto tributario,* Prefazione di Franco Gallo, Cacucci editore 2017.

[269] Cfr. Ch. Smekal, *Stabilisierungspolitik im Bundesstaat*, Wirtschaftsdienst, Verlag Weltarchiv, Hamburg, Vol. 58, Iss. 5, pp. 231-235.

[270] Cfr. Mengozzi, *Il diritto comunitario e dell´ unione europea*, in Trattato di diritto commerciale e di diritto pubblico dell´ economia, diretto da Galgano, Padova, 1997, XV, 143 ff; Capotorti, *Corte di Giustizia della Comunitá europea, in Enc. Giur. Treccani, IX, Roma, 1988.*

[271] Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmayer/ G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II*, Duncker & Humboldt, 1980 Berlin.

[272] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).

[273] Cfr. A. F. Uricchio, *Die zwischen der Haushaltsaufsicht, den ausserordentlichen Finanzinstrumenten und der sogenannten windfall taxes anfallenden Koten der Sozialrechte*, p. 131 ff., in, A. F. Uricchio/ F.L.Giambrone, Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses, 2020.

for the Integration Association. With the dynamism of the basic treaties in order to achieve the objectives of the Treaty, the then EC has made integration its constitutional principle. In this sense, the EU is still in a constant process of communitarisation,[274] which is reflected in changes in quality towards a new, hitherto unknown form of organization, based on the model of a European federal state.[275] In the Maastricht decision[276], the Federal Constitutional Court described the EU as a union of the peoples of Europe and a dynamic network of democratic states based on the international basic treaties and politically on the adherence to the treaties of the individual Member States.[277] According to the Federal Constitutional Court, however, the Member States remain carriers of the sovereignty in this group of states. In its Lisbon decision, too, the Court of First Instance uses, for the legal classification of the current state of Integration of the EU, the concept of a union of states, which is shaped by the Maastricht judgment, which covers a close, long-term link between sovereign states, which exercises public authority on a contractual basis, but whose basic order is subject solely to the decision of the Member States and in which the peoples - that is, the national citizens - of the Member States remain the subjects of democratic legitimacy.[278]In German literature, there have long been various currents that seek an alternative classification of the EU. Among the many conceptual reprints with which the EU is to be covered, the approaches based on the concept of the network appear to be the most meaningful. In this respect, the approach developed by Pernice as a counter-draft to the group of states, according to which the primary law of the EU[279] and the constitutions of the Member States have merged into a single constitutional network, comes into focus.[280] The concept of the Constitutional Association[281] starts with the individual, the citizens of the Union: with the help of a functionally determined post-national concept of the constitution, the constitution of the European Union as a political community of the citizens of the Member

States who define themselves as citizens of the Union should be addressed without implying statehood.[282] The citizens are thus subjects of legitimacy, but also addressees of their national law and

[274] With regard of the future of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.
[275] Cfr. M. Draghi, *Stabilisation policies in a monetary union*, Speech by Mario Draghi, President oft he ECB, ath the Academy of Athens, 2019.
[276] BVerfG, 12 ottobre 1993, Az. 2 BvR 2134, 2159/92, BVerfGE 89, 155.
[277] Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform*, 1999, S. 9ff.
[278] A.F. Uricchio, *Italien der Autonomien. Sanfte Entwicklung und Föderalismus*, in, A.F. Uricchio/ F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Collana del Dipartimento Jonico in Sistemi Giuridici ed Economici del Mediterraneo: societá ambiente, culture, 2020, p. 197.
[279] Cfr. A. F. Uricchio/ F. L. Giambrone*, European Finance at the Emergency Test,* Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.
[280] Cfr. Ch. Smekal, *Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften. Ein Vergleich zwischen der Bundesrepublik Deutschland und Österreich*, p.71 ff, in, G.Kirsch/ Ch. Smekal/ H. Zimmermann, *Beiträge zu ökonomischen Problemen des Föderalismus.*
[281] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[282] Cfr. Lang/ Rust/ Owens/ Pistone/ Schuch/ Staringer/ Storck/ Essers/ Kemmeren/ Öner/ Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020.

common European standards. As formal, but related, orders form a material unit. The concept of the Constitutional Association (Verfassungsverbund) has found, although not always with the same content, at least conceptually diverse followings. In recent literature, there is also an attempt to work out the federal features of the EU and thus give a more federal character to the concept of the association of states. Federation of States as a starting point.[283] The concept of a union of states derives from the controversial Maastricht judgment of the Federal Constitutional Court, in which the EU is described as the Union of the Peoples of Europe (Article 1(2) TEU) and as a dynamic ally of democratic states.[284]It is to Kirchhof[285], the judge-rapporteur in the Maastricht judgment, that the now famous concept of the European Union as the "Union of States" ("Staatenverbund")[286] is due, a form of integration to be placed between a mere confederation of states and a real international organization. For Kirchhof, in other words, it was important to ensure that states, despite the dynamic process of integration also based on the implied powers referred to in the flexibility clause contained in Art. 352 TFEI, remained in a position of control over the "integration programme" dictated by the national parliaments, because only in this way could the democratic principle be preserved. According to the constitutional judge Paul Kirchhoff, the Association of States is based on a legal and active Community of independent States, on a European Unity in regional diversity. In this group of States, the Member States remain carriers of the sovereignty, but to what extent is disputed. However, this emphasis does not adequately capture the dynamic process in which the open constitutional State finds itself. Insufficient account is taken of the change in the statehood of the Member States in the context of European integration. The substantive specification of the concept of the association of states can therefore only succeed if it does not adhere indiscriminately to the classical concept of the concept of the nation-state. Accordingly, the focus is more on the alliance element, the union of states.[287] First, this is a perfectly correct expression of the fact that the EU is no longer just a loose federation of sovereign states, but rather a union.[288]

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[283] Cfr. A. F. Uricchio, *Die zwischen der Haushaltsaufsicht den ausserordentlichen Finanzinstrumenten und der sogenannten Windfall taxes anfallenden Kosten der Sozialrechte*, p.131ss, in, A. F. Uricchio/ F.L.Giambrone, *Entwicklunegn im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses.*

[284] F.C. Mayer, *Auf dem Weg zum Richterfaustrecht?: Zum PSPP-Urteil des BVerfG*, *VerfBlog*, 2020/5/07, *https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/.*

[285] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[286] For an in- depth study of the future of the European Union cfr. M. Draghi, *Europas streben nach einer perfekten Union*, Rede von Mario Draghi, Präsident der EZB, Malcom Wiener Lecture in international Political Economy, bei der Harvard Kennedy School, Cambridge, 9. Oktober 2013.

[287] W. Schön, *Einordnung der neuen Regelungsvorschläge in die internationale und deutsche Steuerarchitektur* (Pillar 1/2) DIHK-Fachtagung zum OECD-Projekt „Besteuerung der digitalisierten Wirtschaft“, Virtuell, November 2020.

[288] Ch. Smekal/ E. Theurl, *Finanzkraft und Finanzbedarf von Gebietskörperschaften. Analyse und Vorschläage zum Gemeindefinanzausgleich in Österreich,* Böhlau Verlag, p. 30.

VII. BRIEF INTRODUCTION TO THE SAFEGUARD CLAUSE OF THE AR. 23 PARAGRAPH 1 P. 3 OF THE FUNDAMENTAL LAW AS A LIMIT TO INTEGRATION. ITS CONSTITUTIONAL IDENTITY AND GUARANTEE OF ETERNITY (EWIGKEITSKLAUSEL).

Article 23. Paragraph 1 p. 3 of the Fundamental Law, with the possibility of enacting constitutionally amending integration laws, links the substantive legal barrier of Article 79(3) of the Basic Law[289]. The integration laws must not affect the division of the confederation into Länder, their fundamental participation in legislation, or the principles of Articles 1 and 20 of the Basic Law. In contrast to the structural safeguard clause of Article 23 sec. 3 in conjunction with Article 79(3) of the basic standard, which is coined on the conditions of integration, does not only intrusively show integration-limiting effect: it is the defensive ness of the Basic Law, in which it expressly protects its core holdings also against interference with integration. The safeguard clause can therefore be described as a barrier to integration about the German constitutional order and thus to the transferring subject. While the structural safeguard clause concerns the European Union[290] as such, the safeguard clause takes up its importance for the basic legal order.[291]At first glance, the concept of constitutional identity corresponds to the provision of Article 4(2) TEU. However, it is unclear what the term means in detail and in what relation it relates to the guarantee of eternity of Art. 79 sec. 3 GG and to Article 4(2) TEU. Although constitutional identity[292] has not only been the central concept of integration borders since the Lisbon ruling of the Federal Constitutional Court, its potential significance has been developed to a very large extent there.[293]The constitutional identity already served as a barrier to integration in the Solange I decision of the BVerfG in 1974. However, the existence of such a barrier was not simply established.[294] However, there was no exact normative location and reference to the guarantee of eternity. So, it was unclear what would result from the constitutional identity as a barrier to integration. The fact that it was itself taken from the integration authorization of Article 24(1) of the Fundamental Law suggests the following wording: but Article 24 of the Fundamental Law limits this possibility by failing to amend the Treaty[295], which would abolish the identity of the current Constitution of the Federal Republic of Germany by breaking into the constituent structures. Already in this context the question arising as to whether the concept of constitutional identity must be understood further in terms of content than the guarantee of eternity under Article 79(3) of the Basic

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289 W. Schön, *Einordnung der neuen Regelungsvorschläge in die internationale und deutsche Steuerarchitektur* (Pillar 1/2) DIHK-Fachtagung zum OECD-Projekt „Besteuerung der digitalisierten Wirtschaft", Virtuell, November 2020.

290 Cfr. A. F. Uricchio/ F. L. Giambrone*, European Finance at the Emergency Test,* Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.

291 Breuer, NVwZ 1994, 417, 422

292 Cfr. Ch. Smekal, *Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften. Ein Vergleich zwischen der Bundesrepublik Deutschland und Österreich*, p.71 ff, in, G.Kirsch/ Ch. Smekal/ H. Zimmermann, *Beiträge zu ökonomischen Problemen des Föderalismus.*

293 BVerfGE 123, 267, 353f.

294 For a deeper understanding concerning the instruments related to a comparison see, J.M.Rainer, *Introduction to Comparative Law.*

295 Cfr. A. F. Uricchio/ F. L. Giambrone*, European Finance at the Emergency Test,* Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.

Law. In addition to the protective content of the latter, for example, the part of the fundamental right (and not only in its core stock) was regarded as a barrier. There is also talk of an identity which cannot be modified without amending the constitution, but in verse by amending the constitution. However, this integration-limiting content, which goes beyond Article 79(3) of the Fundamental Law[296], was limited in subsequent decisions of the Federal Constitutional Court. Thus, in the Eurocontrol I decision, the fundamental right part was replaced as a benchmark by the fundamental legal principles, which are recognized and guaranteed in the fundamental rights of the Basic Law.[297]

VIII. Integration by constitutional replacement in accordance with Article 146 of the Fundamental Law. – 9. PSPP judgment of the BVerfG of 5.5.2020

If the controversial integration limit under Article 23(1) sentence 3 has been reached in conjunction with Article 79(3) of the Basic Law, the Federal Constitutional Court appears to still have the possibility of replacing the Basic Law with a new constitution. However, a constitutional amendment could be limited to the amendment of the norms of the Basic Law that prevent integration, but could otherwise be taken over. The Basic Law itself, with its last norm, contains a provision which is concerned with its replacement by a new constitution. However, the regulatory content of Art 146 GG is disputed. The spectrum of opinions ranges from the classification as an unconstitutional constitutional right to the accusation of content abuse to the legal form of constitutional rewriting[298]. The question, which was not clearly answered by the Federal Constitutional Court in the Lisbon judgment, is then of decisive importance as to whether the constitutional amendment in accordance with Article 146 is also subject to the substantive restrictions of Article 79(3).[299]If this is affirmed, Article 146 of the Basic Law does not, in any event, provide materially with a far-reaching possibility of integration. It is true that the Federal Constitutional Court has mentioned several times in the Lisbon judgment the possibility of constitutionally replacing integration (BVerfGE 123, 267, 343 and 347, 364), but without going into further details on their conditions and modalities[300]. While in the Maastricht judgment there is still a binding of the constitutional power by Article 79 sec. 3 GG itself

[296] Cfr. F. L. Giambrone, *Finanzföderalismus als Herausforderung des Europarech*ts, p. 135 ff; With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[297] P. Hilpold, Da Solange a PsPP: alla ricercar delle radici di un dialogo tra Corti naufragato in un incomprensibile soliloquio.

[298] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

[299] Canpenhaus/ Unruh, in, v. Mangoldt/ Klein/ Starck (Hrsg.(, GG, Bd 3, Art. 146; Dreier, Gilt das Grundgesetz ewig? 2009, p. 90; Isensee,in: Ders/ Kirchof (Hrsg.), HStR, Bd. VII, 1992, § 166, Rn. 61; Kirchof, Brauchen wir ein neues Grundgesetz?, 1992, S. 15.

[300] For an in- depth study of the future of the European Union cfr. M. Draghi, *Europas streben nach einer perfekten Union*, Rede von Mario Draghi, Präsident der EZB, Malcom Wiener Lecture in international Political Economy, bei der Harvard Kennedy School, Cambridge, 9. Oktober 2013.

or even its contents as an over-positive right also in the context of a constitutional amendment material binding effect: Whether this binding of the eternity clause applies even to the constitutional power because of the universality of dignity, freedom and equality, that is to say, in the event that the German people, in free self-determination, but in a continuity of legality to the rule of the Basic Law, gives themselves a new constitution. can remain open. (Federal Constitutional Court 123, 267, 343). There is no explicit reference to Article 146 of the Fundamental Law, so that the General Court's view of its regulatory content, as to whether a constitutional replacement to be subsumed under Article 146 of the Basic Law is subject to the bindings of Article 79(3), is unclear.[301] However, the appeal to the continuity of legality could be based on the interpretation of Article
146 GG as a normative bridge between the Basic Law and a new all-German constitution.[302] According to that provision, the provision would also have a certain regulatory effect in the context of a constitutional amendment.[303]In addition, the Court also addresses standards for accession to a European federal state[304] under the abandonment of the Basic Law: <<If, on the other hand, the threshold for the federal state and the renunciation of national sovereignty were exceeded, which in Germany presupposes a free decision of the people beyond the current validity of the Fundamental Law, democratic requirements would have to be complied with at a level that would meet the requirements for the democratic legitimacy of a state-organized ruling association. This level of legitimacy could then no longer be required by national constitutional regulations >> (BVerfGE 123, 267, 364).[305] What is to be the result of this standard of democratic legitimacy remains open. If a referral of the Federal Constitutional Act to post-constitutional questions is permissible, jurisdiction could extend to the transition to a European federal state.[306]

IX. PSPP JUDGMENT OF THE BVERFG OF 5.5.2020.

The ruling of the Federal Constitutional Court, announced on 5.5.2020, has provoked strong reactions in politics, the media, and the public. It attests to the potential to shake the foundations of the European Union (EU), since it partly disregards a preliminary ruling of the ECJ[307] which was given in

[301] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmeyer/G. Seilerd / Ch. Smekal, *Probleme des Finanzausgleichs II*, Duncker & Humboldt, 1980 Berlin.
[302] P. Hilpold, Da Solange a PSPP: alla ricercar delle radici di un dialogo tra Corti naufragato in un incomprensibile soliloquio.
[303] Dreier, in: Ders (Hrsg.), GG, Band III, Art. 146 Rn. 23 sowie zur Gegenansicht Lerche, in: Isensee/ Kirchof (Hrsg.), HStR, Bd VIII, 1995,§ 194 Rn. 63f.
[304] For a deeper understanding and analysis in this regard see, A.F. Uricchio/ F.L..Giambrone, *Schlussfolgerungen,* in A.F.Uricchio/ F.L.Giambrone, Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses, Cacucci editore, 2020.
[305] (BVerfGE 123, 267, 364.
[306] Cfr. A. F. Uricchio/ F. L. Giambrone*, European Finance at the Emergency Test,* Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.
[307] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

the referral procedure under Article 267 TFEU.[308] In the quite varied history of the relationship between the two courts, the BVerfG has, for the first time, activated the ultra-vires reservation[309] which it had conceived in its decision on the Maastricht Treaty as a control of 'breaking acts' and which, in the judgment on the Lisbon Treaty,[310] had been more conceptually understood, although much remained vague in this decision[311]. This applies not least to the relationship between the protection of the constitutional core (identity control) in order to protect compliance with the fundamental distribution of competences between the EU and the Member States (ultra-vires control).[312] Although confirmed on various occasions and elaborated in more detail in the conditions, notably in the Honeywell decision, the reservation has in fact never been applied before.[313] Now it has applied it in two directions: (I) the decision of the ECJ of 11.12.2018 (paragraph 118 et seq.)[314] and (ii) the decisions of the Governing Council (paragraphs 165 et seq.) establishing and implementing a programme for the acquisition of sovereign debt, Public Sector Purchase Programme – PSPP.[315]As a result, the BVerfG (partially) has negated the binding effect of a decision of the ECJ.[316] It is feared that the shocks

[308] Cfr. A. F. Uricchio, *Die zwischen der Haushaltsaufsicht, den ausserordentlichen Finanzinstrumenten und der spgenannten windfall taxes anfallenden Kosten der Sozialrechte,* p. 131, in, A.F. Uricchio/ F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses*, 2020.

[309] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmayer/ G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II,* Duncker & Humboldt, 1980 Berlin.

[310] BVerfGE 123, 267 (353 f., 399 f.) = NJW 2009, 2267 = EuZW 2009, 552 Ls.

[311] For an in- depth study of the future of the European Union cfr. M. Draghi, *Europas streben nach einer perfekten Union*, Rede von Mario Draghi, Präsident der EZB, Malcom Wiener Lecture in international Political Economy, bei der Harvard Kennedy School, Cambridge, 9. Oktober 2013.

[312] Restrictively, a "sufficiently qualified infringement" was required and a referral to the ECJ was required, see BVerfGE 126, 286 = EuZW 2010, 828 paragraphs 60 f., 101 f.; Calliess in LA-Stein, 2015, 446 (460 ff.).

[313] Thiele, VB vom Blatt: Das BVerfG und die Büchse der ultra-vires-Pandora, 5.5.2020, verfassungsblog.de/vb-vom-blatt-das-bverfg-und-die-buechse-der-ultra-vires-pandora/.

[314] EuGH, ECLI:EU:C:2018:1000 = EuZW 2019, 162 – Weiss.

[315] Beschluss (EU) 2015/774 der Europäischen Zentralbank v. 4.3.2015 über ein Programm zum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (Public Sector Asset Purchase Programme, EZB/2015/10, ABl EU 2015 L 121, 20); geändert durch Beschluss (EU) 2015/2101 der Europäischen Zentralbank v. 5.11.2015 zur Änderung des Beschlusses (EU) 2015/774 über ein Programmzum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (EZB/2015/33, ABl EU 2015 L 303, 106), Beschluss (EU) 2015/2464 der Europäischen Zentralbank v. 16.12.2015 zur Änderung des Beschlusses (EU) 2015/774 über ein Programm zum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (EZB/2015/48, ABl EU 2015 L 344, 1), Beschluss (EU) 2016/702 der Europäischen Zentralbank v. 18.4.2016 zur Änderung des Beschlusses (EU) 2015/774 über ein Programmzum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (EZB/2016/8, ABl EU 2016 L 121, 24) und Beschluss (EU) 2017/100 der Europäischen Zentralbank v. 11.1.2017 zur Änderung des Beschlusses (EU) 2015/774 über ein Programm zum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (EZB/2017/1, ABl EU 2017 L 16, 51).

[316] Vgl. Mayer, Das PSPP-Urteil des BVerfG vom 5.5.2020, Thesen und Stellungnahme zur öffentlichen Anhörung, Deutscher Bundestag, Ausschuss für die Angelegenheiten der Europäischen Union am 25.5.2020, Ausschussdrucksache 19 (21)103, S. 2 Nr. 8, S. 17 Nr. 8.

caused by this, which could not only bring down the entire (fragile) architecture of European unification[317], but would also serve as a model for the disobedience of the Member States of Poland and Hungary, who are often suspected in this regard.[318] This approach is methodologically and systematically questionable and is in clear contradiction to one's own jurisprudence and to the almost unanimous handling in (German) literature.[319] In substance, however, the concerns expressed in the context of the proportionality test can be essentially accepted. This applies to the rejection of the wide-ranging, non-verifiable margins of manoeuvre that the ECJ grants to the ECB and the Euro-system as a whole, and the observance of the economic effects of the PSPP. However, these are not questioning of proportionality, but the enforcement of a decision by the legislator on the distribution of powers that the legislator deliberately took in the Maastricht Treaty. If a measure no longer moves within the scope of the assigned tasks, competences, and powers, it is illegal for that reason alone and the result of a proportionality test is no longer relevant. The question of competence is logically a priority.[320]Through the PSPP judgement it is to be hoped that the cooperation relationship between the courts will become a genuine relationship of cooperation. In this respect, the PSPP ruling could lead to a salutary catharsis. It should be used constructively for the self-reflection of the main actors as well as for a new beginning with the aim of a partnership-dialogue complementarity. [321]"Business as usual" can no longer exist. Even more so, an infringement procedure proposed by some, still in categories of absolute primacy and hierarchy, would be the wrong way to go, since it would not change the basic problem, but it would harden the fronts practically irreparably and, in the end, leave only losers behind.[322] There is no way around this: the ECJ must take the task of maintaining competences in relations between Member States and the EU more seriously than before. The ECJ should be less confrontational and more restrained in terms of safeguarding national constitutional identity.[323]In its PSPP judgment[324], the highest German court, as in several previous decisions, urges compliance with the distribution of powers between the European Union and the Member States. It considers that the purchase programme risks a de facto extension of the competence of monetary union without the

[317] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmayer/ G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II,* Duncker & Humboldt, 1980 Berlin.

[318] Siekmann, *Gerichtliche Kontrolle der Käufe von Staatsanleihen durch das Eurosystem*(EuZW 2020, 491).

[319] Cfr. A.F.Uricchio/ F.L.Giambrone, *European finance at the Emergency test*, 2020.

[320] Weiter Zilioli in FS f. H. Siekmann, 2019, 257 (261 f.) unter Berufung auf auf neuere Rechtsprechung des EuGH, allerdings in anderem Zusammenhang.

[321] Cfr. Ch. Smekal, *Standortpolitik vor globalen Rahmenbedingungen,* p.259 ff, in, Ch. Smekal/ T. Theurl, Globalisierung, Mohr Siebeck.

[322] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmeyer/ G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II*, Duncker & Humboldt, 1980 Berlin.

[323] According to Streinz in Sachs, GG, 8th ed. 2018, Article 23, paragraph 102, the ECJ already contributes in part to the consideration of constitutional peculiarities through its Rspr. That is true, but there is still considerable potential for optimisation.

[324] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

amendment of the Treaties necessary for the extension of competences (paragraph 110)[325]. This view may be misguided. However, effective monitoring of compliance with the order of competence is essential in a structured community such as the European Union. Allowing the institution concerned to determine to a significant extent where the limits of its tasks and responsibilities are is problematic. The BVerfG has criticized the ECJ's handling of the delimitation of competences in unusually strong words. However, the handling of the procedure, as is the case by the ECJ, runs the risk that the 'principle of limited individual authorization under Articles 5 I and II TEU will in fact be 'empty'. Finally, the constitutional bodies are obliged to cooperate and protect each other[326]. In the interests of constitutional organization compliance, it is essential that the other constitutional bodies protect the BVerfG.[327]Some cooperative ways out of the impasse could bring to life the mutual consideration, since the duty of loyalty of Article 4 III subparagraph applies to all parties involved. 1 TEU. At European level, the ECB could, first, provide the justification required by the BVerfG, which would address more the economic policy implications of the purchase programmes. The ECJ[328] would also limit the ECB's broad discretion and carry out evidence control. Even the legal methodology requires the justification of a decision as the legitimacy of the court towards the citizen and the legislature. In the case of executive actions, the ECJ[329] has emphasized that the statement of reasons must be so clear and unambiguous that the competent court can exercise its power of review. It is therefore understandable to now reflect this in national law: because the ECB is beyond direct control by democratically legitimized representatives because of its independence, the principle of democracy and the principle of popular sovereignty of Articles 20 I, II GG require stricter judicial control.[330] There have already been cases in the past in which the ECJ has explicitly denied the competence of European institutions to adopt legal acts. A stronger substantive examination of the principle of the limited individual authorization of Article 5 I TEU[331] could also lead to the ECJ requesting the Treaty amendment procedure in the future. Secondly, the Member States, but above all the BVerfG, are also called upon. In a cooperative network of jurisprudence with mutual consideration, one should refrain

[325] For an in- depth study of the future of the European Union cfr. M. Draghi, *Europas streben nach einer perfekten Union*, Rede von Mario Draghi, Präsident der EZB, Malcom Wiener Lecture in international Political Economy, bei der Harvard Kennedy School, Cambridge, 9. Oktober 2013.

[326] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

[327] BVerfGE 142, 123 = NJW 2016, 2473 Rn. 187 ff. = EuZW 2016, 618 Ls.; BVerfGE 146, 216 = NJW 2017, 2894 Rn. 61; BVerfG, NJW 2020, 1647 Rn. 143; zu den demokratietheoretischen Einwänden vgl. Issingin FS H. Siekmann, 2019, 129 (133 f.).

[328] Cfr. Lang/ Rust/ Owens/ Pistone/ Schuch/ Staringer/ Storck/ Essers/ Kemmeren/ Öner/ Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020.

[329] A. F. Uricchio, *Percorsi di diritto tributario,* Prefazione di Franco Gallo, Cacucci editore 2017.

[330] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmayer/ G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs II,* Duncker & Humboldt, 1980 Berlin.

[331] Article 5 I TEU.

from polemics – it falls back on oneself. The BVerfG is not a European legislator[332], nor is it responsible for economic policy. It should therefore not, in principle, decide on the future of Europe. It may therefore also initiate a preliminary ruling procedure in the same case for a second time in order to clarify ambiguities. For this purpose, the Ultra-vires violation must be defined narrowly, i.e., on a narrow understanding of the eternity guarantee of Art. 23 I 3 in conjunction with 79 III GG. If the ECJ increases the test density, the BVerfG may withdraw its. Ideally, the BVerfG would row back sharply, comparable to the Solange II decision, which recognized the ECJ's exclusive examination competence in the examination of fundamental rights.[333] This would also reduce the risk of other courts emulate the PSPP[334] ruling and declare judgments of the ECJ to be non-binding.[335] Thirdly, the Member States are the masters of the Treaties. The principle of individual authorization and the catalogue of competences aims to prevent the competences of the Member States from gradually diminishing. This calls on the Federal Government at European level to fight for its positions politically and legally. The Treaty amendment procedure of Article 48 TEU[336] provides the right way to do this. Then the Euro area Member States could unanimously cede further powers to complete monetary union with an economic union.[337] The European Council is the right institution to decide on the future of the European Union and, ultimately, the distribution of competences between the EU and the Member States.[338] If all parties are willing to contribute cooperatively and constructively to the future of the European Union, the ideal of dialectical synthesis recommended by Huber would have been taken into account and the way out of the impasse would have been achieved.[339]

X. THE BVERFG´S INVASION OF EU LAW.

With regard to the use of checks in the terms outlined above, resulting from the case law of the Italian Constitutional Court[340] – which seems to us to be in accordance with a correct model of balance between national and Union law and the division of tasks between their Supreme Courts – the

[332] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.
[333] Möllers, *Ibid.*, 503.
[334] Cfr. P. Hilpold/ Piva, Da "Solange" a "PSPP": alla ricerca delle radici di un "dialogo tra Corti" naufragato in un incomprensibile soliloquio; F.C. Mayer, Auf dem Weg zum Richterfaustrecht?: Zum PSPP-Urteil des BVerfG, VerfBlog, 2020/5/07, https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht
[335] W. Schön, *Einordnung der neuen Regelungsvorschläge in die internationale und deutsche Steuerarchitektur* (Pillar 1/2) DIHK-Fachtagung zum OECD-Projekt „Besteuerung der digitalisierten Wirtschaft", Virtuell, November 2020
[336] Art. 48 TEU.
[337] Möllers, Ibidem.
[338] Cfr. A. F. Uricchio/ F. L. Giambrone, *European Finance at the Emergency Test,* Collana del Dipartimento Jonico in: Sistemi giuridici ed Economici del Mediterraneo: societá, ambiente e cultura, Cacucci editore, 2020, p. 277.
[339] Cfr. Ch. Smekal, *Transfers zwischen den Gebietskörperschaften. Ziele und Ausgestaltungsprobleme*, in, K.- H. Hansmeyer/G. Seilerd/ Ch. Smekal, *Probleme des Finanzausgleichs I*I, Duncker & Humboldt, 1980 Berlin.

[340] For an in- depth study of the future of the European Union cfr. M. Draghi, *The international dimension of monetary policy,* Speech, ECB Forum on Central Banking, Sintra, 28 June.

judgment of 5 May 2020 of the German Constitutional Court appears to be an anomalous application of the theory of controls, resulting in an "exorbitant" competence of the Constitutional Court itself[341]. It is true that, in the first place, it recognizes (of course) the competence of the Court of Justice to interpret EU law and to judge the legality of its acts[342]. However, in the course of its reasoning, the BVerfG carries out its own review of the exercise of the jurisdiction of the Court of Justice, in the light of EU law, and concluded that the judgment of 11 December 2018 is ultra vires in relation to Article 100a of the Treaty. 19, par. 1, TUE. By acting in this way, the German Constitutional Court does not, therefore, confine itself to defining the interpretation[343] of the provisions and principles of its Grundgesetz, as would be entirely correct; In many respects, however, it carries out a "field invading" in EU law. First, by its judgment, it ultimately establishes the interpretation of Article 10of the Treaty. In the present case, it is for the national court to establish that, in issuing its preliminary ruling, article 19(1) TEU has exceeded the limits of its jurisdiction. Consequently, it also considers that judgment to be flawed (ultra vires) and, therefore, devoid of effect (at least vis-à-vis Germany and its bodies and judges).In fact, moreover, the BVerfG overlaps with the Court of Justice in assessing the legality of the contested decision of the ECB, also here under EU law, in particular Article 100a of the Treaty. 123, paragraph 1, TFEI, carrying out a thorough and elaborate investigation into compliance with

the principle of proportionality. It seems to emerge, in the german court's view, a kind of substitute power vis-à-vis the Court of Justice when, in BVerfG's own opinion, it does not exercise its judicial control properly and appropriately. This 'substitute power' also appears to be more intense than that conferd by the European Treaties on the Court of Justice. Firstly, it is doubtful whether it would have the power to order the ECB to provide a supplementary statement of its decision. Secondly, the detailed and mischievous review which the German Constitutional Court carries out with regard to the proportionality of the decision ends up being a judgment of substance, no longer mere legality, which would be foreclosed to the Court of Justice; and this judgment involves not only an invasion of UNION law, but a break-in into the regulatory and administrative powers of an independent institution such as the ECB and within its discretion[344].

[341] With regard of an in-depth analysis of the abnormal use of controls in the judgement of 5 th May 2020 of the German Federal constitutional Court cfr. U. Villani, *Brevi note sull´ uso anomalo dei controlimiti nella sentenza del 5 maggio 2020 del Bundesverfassungsgericht*, p. 682, in, Studi sull´ integrazione europea, XV(2020), 682.

[342] Si vedano la citata sentenza della Corte di giustizia del 5 dicembre 2017, causa C-42/17, e quella della Corte costituzionale del 31 maggio 2018 n. 115.

[343] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

[344] For an in- depth study of the future of the European Union cfr. M. Draghi, *The international dimension of monetary policy,* Speech, ECB Forum on Central Banking, Sintra, 28 June.

XI. THE DEBATE ON THE TAXATION OF VIRTUAL CURRENCIES WITHIN BOTH THE US AND THE EUROPEAN UNION.

The spread of so-called virtual currencies has given rise to numerous application doubts, in particular with regard to anti-money laundering regulations and fiscal discipline. The issue of tax issues resulting from the use and holding of virtual currencies has given rise to numerous interpretative doubts which, in the absence of specific regulation and regulatory discipline, cannot be definitively dissolved. The basis of any interpretative reconstruction requires a complete qualification of the legal nature of the so-good virtual currencies, which at present is not universally recognized. The basic question, which is still under discussion and has no definitive answer, is whether virtual currencies should be considered and treated fiscally as a form of (non-monetary) property, or as a genuine form of currency.[345] Issues related to the taxation of virtual currencies in the USA, and related problems were first mentioned in a report published in May 2013 by the Government Accountability Office of the United States, addressed to the Senate Finance Committee, called "Virtual Economies and Currencies: Additional IRS guidance could reduce Tax Compliance Risks", in which the IRS (Internal Revenue Service) was urged to issue a Guide to Virtual Currencies in order to eliminate the possibilities taxpayers' error. The IRS responded on March 15, 2014 with the "Notice 2014-21" and, on that occasion, in a diametrically opposed direction to what is currently happening in Italy, it considered the tax regime provided for the properties to be applicable to VCs (Virtual Currencies)[346].As mentioned above, it does not seem easy to identify a legal qualification of virtual currencies that can be said to be universally recognized. With Resolution 2016/2007 (NI) of 26 May 201633, the European Parliament stressed that virtual currencies are likely to contribute positively to the well-being of citizens and economic development also in the financial sector, in many respects, stressing the need for taxation not to be avoided or circumvented. The European Union has often dealt in recent years with the phenomenon of virtual currencies, in particular to regulate their aspects for the purposes of anti-money laundering legislation[347], lastly, parliament adopted the resolution on the proposal for a Directive amending EU Directive 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and amending Directive 2009/101/EC, the text of which, adopted on 19 April 2018 at first reading, also frames and defines the phenomenon of virtual currencies.[348]The debate on the taxation of virtual currencies in the European Union. As mentioned above, it does not seem easy to identify a legal qualification of virtual currencies that can

[345] A. F. Uricchio/ G. Selicato, *Il contributo del diritto europeo alla prevenzione e composizione del conflitto tra giurisdizioni fiscali*, p. 71, in, Selected Issues of EU Tax law as EU law.

[346] For a in depth analysis of a possible WTO taxation competence with regard of digital economy see, Ch. Smekal, *Should WTO deal with tax issues in the digital economy*? Wirtschaftspolitische Blätter (Economic Policy Papers), Vienna , 283–290.

[347] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

[348] A. F. Uricchio/ G. Selicato, *La fiscalitá delle valute virtuali*, in, *Selected issues of EU tax Law*, p. 163 ff.

be said to be universally recognized. With Resolution 2016/2007 (NI) of 26 May 2016[349], the European Parliament stressed that virtual currencies are likely to contribute positively to the well-being of citizens and economic development also in the financial sector, in many respects, stressing the need for taxation not to be avoided or circumvented. The European Union has often dealt in recent years with the phenomenon of virtual currencies, in particular to regulate their aspects for the purposes of anti-money laundering legislation, lastly, the Parliament adopted the resolution on the proposal for a Directive amending EU Directive 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and amending Directive 2009/101/EC, the text of which, adopted on 19 April 2018 at first reading, also frames and defines the phenomenon of virtual currencies.[350] The European Court of Justice, in its Judgment of 22 October 2015 in Case C-264/1437, concluded that Article 2(1)(c) of Council Directive 2006/112/EC must be interpreted as constituting services provided for consideration, transactions consisting of the exchange of traditional currency against units of the virtual currency bitcoin and vice versa, made against payment of a sum corresponding to the margin constructed by the difference between the price at which the operator concerned buys the currencies and the price at which he sells them to his customers[351] and that such transactions must be considered exempt from value added tax within the meaning of Article 135(1)(c) of that Directive[352].

XII. The debate on the taxation of virtual currencies in Italy and the position of the Revenue Agency

The case dealt with by the European Court of Justice does not, of course, exhaust all aspects relating to the taxation of virtual currencies. The Financial Administration, taking on board the orientation expressed by the Court of Justice in the Hedqvist judgment mentioned above, would seem to combine the tax treatment of virtual currencies with that of foreign currencies, but these conclusions do not appear to be entirely satisfactory[353]. The judgment cited, in fact, establishes the equivalency between

[349]See:http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0228+0+DOC+XML+V0//IT

[350] The consolidated text of the Resolution is available at the following Link: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0178+0+DOC+XML+V0/EN. Among other things, the aforementioned Resolution also contains the following definition of virtual currency: "a representation of digital value which is not issued or guaranteed by a central bank or a public body, is not necessarily linked to a legally established currency, does not have the legal status of currency or currency, but is accepted by natural and legal persons as a means of exchange and can be transferred, stored and exchanged electronically.".

[351] For a in depth analysis of a possible WTO taxation competence with regard of digital economy see, Ch. Smekal, *Should WTO deal with tax issues in the digital economy*? Wirtschaftspolitische Blätter (Economic Policy Papers), Vienna , 283–290.

[352] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

[353] The equating of virtual currencies with foreign currencies for tax purposes leads to these consequences: (a) capital gains from futures disposals certainly give rise to a 26% replacement levy within the meaning of Article 67(1)(b.c b of the Tuir; (b) spot disposals, including in the form of drawings from the relevant accounts or deposits, give rise to

virtual currencies and currencies in a procedure concerning VAT[354] problems, in relation to a specific case and provides, finally, a solution only if and to the extent that virtual currencies "have been accepted by the part of a transaction as an alternative means of payment to legal means of payment and have no other purpose than that of a means of payment". The Revenue Agency, with Resolution No. 72/E of 02 September 2016, provided in response to a tax ruling, on the tax treatment applicable to companies that carry out services activities related to virtual coins, has excluded the subjection to VAT of bitcoin exchange transactions[355], assimilating them to foreign currencies for tax purposes. The abovementioned resolution, issued in response to a request

for clarification from a contributor, could not, according to the tax discipline, have a binding effect and extended to a generalized audience of taxpayers, but, nevertheless, could be considered indicative of an orientation of the Revenue Agency. Answer No. 956-39/2018 by the Revenue Agency - Taxpayers Division - Regional Directorate of Lombardy available online in full, seems to confirm this assimilation. The conclusion reached by the Revenue Agency, however, does not seem entirely satisfactory from a dogmatic and doctrinaire point of view and corresponds, perhaps, more to a practical need.[356]

XIII. CONCLUDING ASPECTS: THE CONTRIBUTION OF EUROPEAN LAW TO THE PREVENTION AND SETTLEMENT OF CONFLICT BETWEEN TAX JURISDICTIONS.

All these recommendations and measures describe a complex system, in continuous ferment, stubbornly aimed at reducing the distances that still exist in the approaches of the different tax authorities. European law, for its part, makes a special contribution in this direction by making the harmonisation process[357] faster and more effective. Moreover, the EU approach also involves a further weak profile of the current system, namely the difficult settlement of the dispute between states. The friendly procedures (Mutual Agreement Procedure, so-called 'MAP'), exhausted in the direct consultation between the tax administrations of the contracting countries, do not seem in fact sufficient to settle the very copious dispute over double taxation, also due to the absence of a result

taxable capital gains provided that, during the tax period, the total deposit and current accounts held by the taxpayer, calculated on the basis of the exchange rate at the beginning of the reference period, exceeds EUR 51,645.69 for at least seven consecutive working days, by virtue of the combined provisions of paragraphs 1 , lit.c-ter), and par. 1-ter, of art. 67 of the Tuir; (c) since these are other financial assets, the amount of deposits at the end of each year is subject to fiscal monitoring; (d) that amount is not subject to IVAFE, since it is a tax intended to affect only bank accounts and deposits.

[354] Cfr. Lang/ Rust/ Owens/ Pistone/ Schuch/ Staringer/ Storck/ Essers/ Kemmeren/ Öner/ Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020.

[355] For a in depth analysis of a possible WTO taxation competence with regard of digital economy see, Ch. Smekal, *Should WTO deal with tax issues in the digital economy*? Wirtschaftspolitische Blätter (Economic Policy Papers), Vienna, 283–290.

[356] A. F. Uricchio/ G. Selicato, *La fiscalitá delle valute virtuali*, in, Selected issues of EU tax Law, p. 163 ff.

[357] Cfr. Lang/ Rust/ Owens/ Pistone/ Schuch/ Staringer/ Storck/ Essers/ Kemmeren/ Öner/ Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020.

constraint[358]. More effective, however, is the recent Directive 2017/1852/EU of 10 October, whose territorial scope (EU territory) is, however, less extensive than that of the MAP. The latter, having been the source of the widespread model convention against double taxation and being referred to in Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in the event of adjustment of the profits of associated undertakings (so-called 'Arbitration Convention'), can be activated in a greater number of cases.[359]The directive in question (soon to be transposed into the European Delegation Law of 2018) provides for a 'double track', i.e. a friendly procedure not too dissimilar, in substance, from that provided for in the MAP (Article 3) and a subsequent and possible procedure for resolving the dispute entrusted to an advisory committee (Article 14). Significant traits of originality of this discipline, both for the provision of a completely outdated hypothesis, in this matter, of silence-acceptance, in the event that the tax authority concerned does not take any decision on the rejection or acceptance of the taxpayer's complaint in the six months following its receipt; both for the possibility of the failure of the procedure being amended by a Commission composed of between three and five independent arbitrators and a maximum of two representatives of each Member State[360]. This is an important development of the law settlement institute, since the Member States concerned must reach agreement within six months of the Commission's proposal. This understanding may also differ from the Commission's opinion but which, if not reached, will expose the States to the binding effect of that opinion, provided that the parties concerned accept it and renounce the use of internal means of appeal[361]. This is not the place to dwell on the merits and shortcomings of the European procedure[362], but certainly within the Union's borders, both in the

[358] For an in- depth study of the future of the European Union cfr. Cfr. M. Draghi, *The international dimension of monetary policy,* Speech, ECB Forum on Central Banking, Sintra, 28 June.
[359] A. F. Uricchio/ G. Selicato, *Il contributo del diritto europeo alla prevenzione e composizione del conflitto tra giurisdizioni fiscali*, in, Selected Issues of EU Tax law as EU law, p. 71ff.
[360] For a in depth analysis of a possible WTO taxation competence with regard of digital economy see, Ch. Smekal, *Should WTO deal with tax issues in the digital economy*? Wirtschaftspolitische Blätter (Economic Policy Papers), Vienna , 283–290.
[361] For an in- depth study of European Union law cfr. U.Villani, Istituzioni di Diritto dell'Unione europea, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[362] In the first comments, particular emphasis was placed on the particularly long time taken to conclude the procedure. On this subject, see. t. Wiertsema, Council directive on double taxation dispute resolution mechanisms: "resolving companies' areas of concern?, in IBFD Journal Articles, Derivatives & Financial Instruments, online publication of 13 October 2017, as well as a. Comelli, The harmonisation (and rapprochement) of taxation between the "single European vat area", the Council directive "against tax avoidance practices" and abuse of the right, in Dir. Mr Prat. Trib., 2018, p. 1417, according to which: "The overall assessment calibrated on this Directive is positive with regard to the widened extent of cases of double taxation within the EU which may give rise to activation, by the parties concerned, of a dispute settlement procedure in tax matters, also in relation to Arbitration Convention No 90/436/EEC, which has not so far been abolished and whose application was (and still is) limited to a typologically limited number of disputes. However, considering that the number of disputes in question is set to increase further in the near future, the time-lacing provided for in Directive 2017/1852 does not seem to ensure a sufficiently rapid and predictable resolution of the disputes in question and could (and perhaps should) have further compressed the timetable provided for therein."

administrative and in the tentious phase[363], more favourable conditions are affirmed for the elision of the remaining differences between the tax authorities in the field of double taxation. The directives and recommendations described so far therefore qualify a European dimension[364] of the TP, which is more complex and mature than the international one[365]. This does not allow full symmetry[366] in the estimation and possible challenge of the consequences of transfer prices within European jurisdictions but certainly offers instruments of alarm, knowledge, audit and definition of the most effective and wide-ranging disputes (because they are designed to operate symmetrically on the territory of the 28 Member States), thus returning centrality to European law on a subject that, in recent years, has , has been at the heart of developments in international law.[367]Furthermore the German Constitutional Court, in the final analysis, demonstrates an abnormal and arbitrary use of the controls, which is not justified even in the light of a 'dualist' – if correctly understood – relationship between national and EU law[368]. Indeed, its judgment invades the union's legal order, distorts its cornerstones, starting with the essential role of the Court of Justice, to which the Constitutional Court itself ends up being the ultimate judge of that right; and the latter seems almost to degrade to an external public right, echoing the distant conception of Georg Jellinek[369]. It is particularly worrying, in the judgment in question, the attack on the prestige and authority of the Court of Justice, at a time when the Court of Justice, thanks in part to an 'alliance' with national judgments, is taking decisive action to protect the rule of law, demanding the independence of judges on the basis of Article 19(1)(2) TEU, according to which The Member States establish the judicial remedies necessary to ensure effective judicial protection in areas governed by Union law[370]. There would be very little left of the case law of the Court of Justice on this matter if, in the name of a misunderstood concept of national identity, due to a domino effect, even its judgments relating to Poland were considered ultra vires and worthless in

[363] A. F. Uricchio/ G. Selicato, *Il contributo del diritto europeo alla prevenzione e composizione del conflitto tra giurisdizioni fiscali,* p. 71, in, Selected Issues of EU Tax law as EU law.
[364] For a in depth analysis of a possible WTO taxation competence with regard of digital economy see, Ch. Smekal, *Should WTO deal with tax issues in the digital economy*? Wirtschaftspolitische Blätter (Economic Policy Papers), Vienna , 283–290.
[365] For an in- depth study of European Union law cfr. U.Villani, *Istituzioni di Diritto dell'Unione europea*, Bari, Cacucci, 2008 (5 a edizione riveduta e aggiornata, Bari, Cacucci, 2017).
[366] Cfr. Lang/ Rust/ Owens/ Pistone/ Schuch/ Staringer/ Storck/ Essers/ Kemmeren/ Öner/ Smit, *Tax Treaty Case Law around the Globe 2019*, IBFD und Linde 2020.
[367] A. F. Uricchio/ G. Selicato, *Il contributo del diritto europeo alla prevenzione e composizione del conflitto tra giurisdizioni fiscali,* p. 71, in, Selected Issues of EU Tax law as EU law.
[368] U.Villani, *Sul controllo dello Stato di diritto nell´ Unione europea*, in *Freedom, Security &Justice: European Legal Studies*, 2020, p.10 ss.
[369] Cfr. Cfr. M. Draghi, *The international dimension of monetary policy,* Speech, ECB Forum on Central Banking, Sintra, 28 June.
[370] With regard of the future steps of the European Union cfr. U. von der Leyen, *Eine Union die mehr erreichen will*. Meine Agenda für Europa, Politische Leitlinien für die künftige europäische Kommission 2019-2024.

that State because they were contrary to supposed democratic principles, which express themselves, within the framework of an 'illiberal democracy', with judicial reforms restricted to the independence of judges.