

Fiscal Sovereignty as Part of the Constitutional Identity of Member States**Drd. Larisa-Cătălina Ionescu***Facultatea de Drept, Universitatea din București*

Abstract: *The central legal issue explored in this paper is whether constitutional courts can oversee the implementation of European Union (‘EU’) legislation through an identity control mechanism. First, the paper will examine the evolution of fiscal sovereignty in the context of globalization. Second, it will assess how constitutional courts have progressively judicialized the concept of constitutional identity, transforming it into a legal tool for challenging EU law. Finally, the study will explore whether the constitutional identity control mechanism can serve as a means of reconciling two opposing concerns: the democratic deficit in EU fiscal governance and the potential for national courts to abuse constitutional identity as a means of resisting European legal integration. A critical issue that emerges is whether EU law itself, particularly in the field of direct taxation, promotes values that align with the constitutional identity of the EU, such as tax fairness or the principle of solidarity. If this is the case, can national constitutional identity claims justifiably prevail, or should the EU’s overarching constitutional framework take precedence?*

Key words: *constitutional identity, fiscal sovereignty, democratic deficit, globalization, European integration, solidarity.*

Suveranitatea fiscală ca parte a identității constituționale a statelor membre

Rezumat: *Problema juridică centrală analizată în această lucrare este dacă instanțele constituționale ale statelor membre pot exercita un control asupra aplicării dreptului Uniunii Europene (UE) prin intermediul unui mecanism întemeiat pe identitatea constituțională. Lucrarea începe prin a analiza evoluția suveranității fiscale în contextul globalizării. În continuare, este examinată tendința instanțelor constituționale de a „judiciariza” conceptul de identitate constituțională, transformându-l într-un instrument juridic de contestare a dreptului UE. În final, studiul explorează dacă mecanismul controlului fundamentat pe identitatea constituțională poate reprezenta o cale de reconciliere între două tensiuni majore: deficitul democratic existent în guvernarea fiscală a Uniunii și riscul ca instanțele naționale să abuzeze de acest concept pentru a bloca integrarea juridică europeană. O întrebare esențială care se desprinde este dacă dreptul Uniunii Europene – în special în domeniul impozitării directe – promovează valori care reflectă identitatea constituțională a UE, cum ar fi echitatea fiscală sau principiul solidarității. Dacă răspunsul este afirmativ, pot revendicările identitare naționale să prevaleze în mod legitim sau ar trebui să primeze cadrul constituțional general al Uniunii?*

Cuvinte cheie: *identitate constituțională, suveranitate fiscală, deficit democratic, globalizare, integrare europeană, principiul solidarității.*

1. FROM WESTPHALIA TO GLOBALIZATION: THE CHANGING LANDSCAPE OF STATE AND FISCAL SOVEREIGNTY IN THE EUROPEAN UNION

Globalization and the expansion of global governance have blurred traditional distinctions between national and international law, reshaping state sovereignty without offering a clear alternative framework¹.

In response, some scholars extend domestic legal concepts, such as constitutionalism, to the global level, while others see this transformation as a chance to break from outdated frameworks². This tension is particularly evident in debates on state and fiscal sovereignty, where EU integration has significantly redefined national autonomy.

This section will examine the concept of state sovereignty, its relationship with fiscal sovereignty, and the impact of EU fiscal integration on member states.

1.1. State Sovereignty – Definition

State sovereignty has been defined as the ‘final and absolute power or authority of a governing entity within a given territory and political community’³. From an international law perspective this right means respecting the constitution of a state without allowing any other state to interfere⁴.

The notion that the state holds and exercises supreme and absolute power is a fundamental principle of constitutional law. Sovereignty has been a core element of constitutional theory since Bodin defined it as ‘the absolute and perpetual power of a commonwealth... that is the highest power of command’⁵.

In public international law, the sovereign state is integrated into the international system through a fundamental principle that upholds the equal right of all states to exist. This principle affirms that states have both the authority to exercise jurisdiction and the obligation to recognize the same right in others.

1.2. Fiscal Sovereignty

Fiscal sovereignty is the fundamental principle that grants each state the authority to define and implement its own tax policies, in line with international law. It reflects the state's exclusive right to impose and regulate taxes on individuals, assets, and businesses within its jurisdiction, reinforcing its autonomy in fiscal matters⁶.

Taxation is a fundamental function of state sovereignty, evolving as states developed

¹ *N. Krisch*, (2010), *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford University Press, p. 4.

² *Idem*.

³ *Jansen, JJM*, (2010), *Fiscal Sovereignty of the Member States in an Internal Market. Past and Future*. Kluwer Law International. Eucotax serie, p. 2.

⁴ *Idem*, p. 233.

⁵ *M. Troper*, *Sovereignty*, in *M. Rosenfeld, and A. Sajó* (2012), *The Oxford Handbook of Comparative Constitutional Law*, p. 320.

⁶ *M. Stewart*, *The Future of Tax Jurisdiction* (March 01, 2024). *Singapore Journal of Legal Studies*, Mar 2024, pp 126-148, U of Melbourne Legal Studies Research Paper no. 961, Available at SSRN: <https://ssrn.com/abstract=4897107> or <http://dx.doi.org/10.2139/ssrn.4897107>.

the ability to levy taxes. This process was instrumental in establishing the sovereign state as a territorial entity, where taxation, authority, and rights became closely interconnected.

Therefore, fiscal sovereignty is a core element of national authority, allowing states to impose taxes as a means of self-governance and societal progress. Its constitutional foundation is rooted in principles that trace back to the emergence of the modern state system, where sovereignty was understood as absolute authority within a defined territory. This concept is firmly embedded in the constitutional law of nearly all nations, affirming the state's legal right to exercise its fiscal powers without external interference⁷.

However, the cross-border movement of people, goods, services, and capital requires states to collaborate with others to generate revenue effectively. As a result, international tax law becomes closely linked to sovereign authority, shaping both domestic policies and international relations⁸.

The global financial crisis of 2008 intensified the need for countries to increase revenue and enhance transparency to fight tax fraud, evasion, and the illicit flow of capital through tax havens. In response, governments, alongside international organizations like the G20 and OECD, strengthened efforts to prevent tax avoidance and limit the exploitation of cross-border disparities, ensuring that both companies and individuals pay their fair share⁹. This collective effort aligns with an evolving perspective on sovereignty that envisions the creation of a transnational social contract. This contract imposes positive obligations and responsibilities on nations in the exercise of their taxing power, often described as a nation's 'sovereign duty' toward other states¹⁰.

As taxation increasingly extends beyond national borders, many fiscal challenges can no longer be effectively managed by individual states alone, reinforcing the need for global governance to address cross-border externalities and regulatory gaps. Global tax governance requires states to collaborate by pooling and potentially delegating aspects of their tax sovereignty at the international level. The traditional notion that taxation is solely a national prerogative is increasingly outdated, as governments face growing challenges in achieving their fiscal policy objectives¹¹.

This shift, however, raises concerns from both a democratic and sovereignty perspective. Scholars have framed these tensions as a global tax trilemma, arguing that it is impossible to fully achieve hyper-globalization, democracy, and national self-determination simultaneously. At most, only two of these three elements can coexist. If hyper-globalization and democracy are prioritized, the nation-state must be weakened. If hyper-globalization is maintained alongside the nation-state, then democracy is compromised. Conversely, if democracy is to be preserved within the framework of the nation-state, deep globalization must be curtailed. This dilemma underscores the complexities of balancing fiscal

⁷ M. Geuens, 'Substantive Tax Sovereignty Under Globalisation: Re-empowering the States?' (2024) 29(3) *Tilburg Law Review* pp. 18–24. DOI: <https://doi.org/10.5334/tlir.394>.

⁸ A. Christians, S. Dean, D. Ring, A. H. Rosenzweig (2008), *Taxation as a Global Socio-Legal Phenomenon*, 14 *ILSA Journal of International and Comparative Law* 303.

⁹ M. Valderrama, I. Johanna, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism* (October 6, 2015). In: *World tax journal*. - Amsterdam. - Vol. 7 (2015), no. 3; p. 343-382, Available at SSRN: <https://ssrn.com/abstract=4224703>.

¹⁰ *Idem*.

¹¹ R. Thomas, *Tax Competition and Inequality - The Case for Global Tax Governance* (December 13, 2010). *Global Governance: A Review of Multilateralism and International Institutions*, Vol. 17, 2011, Available at SSRN: <https://ssrn.com/abstract=1488066> or <http://dx.doi.org/10.2139/ssrn.1488066>.

sovereignty, democratic legitimacy, and economic integration in an increasingly interconnected world¹².

1.3. European Integration and Fiscal Sovereignty

In the European context, the crisis, which began with public debt issues in 2009 and escalated into intense political disputes over managing migrant inflows, revealed the weaknesses of the interpretation of the concept of sovereignty. As a result, this concept, often regarded as a key element in Europe's success, requires reassessment to better understand its true nature and inherent limitations¹³.

Both the role and evolution of sovereignty in the European Union's constitutional order have always been viewed as key questions in the literature on European integration¹⁴. Given these considerations, a brief examination of the historical development of the concept of sovereignty and its evolution over time is necessary.

Sovereignty is a concept that undergoes redefinition and reinterpretation as circumstances evolve, including shifts in political power, changes in international relations, legal developments, and societal transformations.

Some scholars define sovereignty as the expression of the actors' will to adopt rules of behavior for an organized and peaceful society; a means of departing or protecting themselves from the *bellum omnium contra omnes*¹⁵. The idea that a state must control its external policies and remain free from external authority structures originated in Europe during the sixteenth and seventeenth centuries. For over 300 years, external sovereignty was closely linked to political success¹⁶.

The international order established after the Peace of Westphalia in 1648 was based on sovereign states. This framework had several key implications. Only sovereign states could engage in international relations, while entities within a federal system lacked this power. Although some international organizations can now conclude treaties, they do so based on the agreements that created them. Moreover, sovereign equality ensured that all states held the same legal status, a principle reaffirmed by the UN Charter. Additionally, states retained internal sovereignty, shielding them from external intervention and ensuring that their citizens remained subject to domestic rather than international law¹⁷.

'The Westphalian system of international relations has been praised for bringing peace through equilibrium between sovereign states, while critics argue that peace can only result from the primacy of international law, which is incompatible with the sovereignty of national states'¹⁸.

Other scholars argue that sovereignty is closely tied to the emergence of the modern

¹² D. Rodrik, (2011) *The Globalization Paradox: Why Global Markets, States, and Democracy Can't Coexist*, Oxford University Press, p. 180.

¹³ B. Fekete, *The Limits of Sovereignty Pooling: Lessons from Europe*, in B. Melov (2018), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law*, p. 134.

¹⁴ Idem, p. 133.

¹⁵ Vercauteren, Pierre, *Which State for which Sovereignty*. In: *Carta International*, Vol. 9, no.2, p. 125-136 (juldez 2014 published in 2015) <http://hdl.handle.net/2078.1/167252>.

¹⁶ R. O. Keohane (2002), *Ironies of Sovereignty: The European Union and the United States*, *Journal of Common Market Studies*, Wiley Blackwell, vol. 40(4), pages 743-765.

¹⁷ M. Troper (2012), *op. cit.*, p. 326.

¹⁸ Idem, p. 321.

state, with its origins dating back to the early modern era. They assert that sovereignty was a fundamental political prerequisite for the formation of the modern state, which is defined by a centralized governing authority, in contrast to the fragmented and dispersed exercise of political and coercive power during the Middle Ages¹⁹.

A key historical achievement of the European Union has been institutionalizing a model of limited and pooled sovereignty. At the same time, the EU has managed to pursue relatively autonomous policies, exert influence in global politics, and uphold high living standards for its citizens²⁰.

Tax scholars²¹ have analyzed that sovereignty is not a fixed concept but has evolved over time, initially rooted in the nation-state and later influenced by the rise of supranational institutions and growing interdependence among states. They highlight a shift toward viewing sovereignty not only as a set of rights but also as a framework of responsibilities. In the fiscal sphere, this perspective suggests that states have an obligation to respect the tax policies of others and promote redistributive justice, particularly in favor of poorer states. In the modern era, the traditional understanding of Westphalian sovereignty is increasingly challenged, as state policies can affect other countries even without directly imposing authority over them²².

Technological and economic advancements, along with a growing need for collective action, have introduced new challenges to national sovereignty. While some issues can be managed within smaller communities, others surpass the capacity of individual states to address independently. Consequently, societies have increasingly engaged in cooperative efforts to tackle shared challenges²³. This idea can be seen as an application of the principle of solidarity between states, understood as an obligatory act based on legal rights and duties, although always linked with sentiments of mutual assistance²⁴.

Building on this context of cooperation and solidarity between states, it is essential to examine the extent to which the European Union, as a supranational organization formed by Member States that have ceded part of their sovereignty, can exercise its competences in tax law and shape legislation while balancing national sovereignty and EU intervention.

The TFEU grants the EU exclusive competence over customs matters (Article 3(1)(a)), while taxation largely remains under Member States' sovereignty. However, since taxation affects the internal market, where competence is shared (Article 4(2)(a)), the EU has a legitimate basis to intervene. This has led to significant harmonization in indirect taxation, such as the VAT Directives, while direct taxation remains less coordinated. The EU's approach to fiscal matters can be understood through negative and positive integration, which operate under distinct legal frameworks²⁵.

Negative integration restricts Member States from adopting tax measures that hinder

¹⁹ B. Fekete (2018), op. cit., p. 136.

²⁰ R. O. Keohane (2002), op. cit.

²¹ M. Senyk, A New System of EU Tax-Based Own Resources: How does it Affect the Fiscal Sovereignty of Member States? in J. Lindholm, A. Hultqvist (2024), *The Power to Tax in Europe*, p. 151.

²² Idem.

²³ Ibidem.

²⁴ E. Arban, The Principle of Solidarity Forging the Constitutional Identity of the European Union, in J. De Poorter, G. Van Der Schyff, M. Stremmer, M. Visser, I. Leijten and C. Van Oirsouw, *European yearbook of constitutional law 2022: A constitutional identity for the EU?* 4 (2023), p. 142.

²⁵ J. Lindholm, Squaring the Constitutional Circle: An Overview of EU Fiscal Powers, in J. Lindholm, A. Hultqvist (2024), *The Power to Tax in Europe*, p. 9.

the internal market, even in areas where the EU lacks direct competence, like direct taxation. While it limits national fiscal powers, it does not grant the EU direct fiscal authority.

Positive integration involves harmonizing laws through EU legislation, setting common standards in taxation. However, any EU fiscal measures must be explicitly based on Treaty provisions²⁶.

The European Union has progressively expanded tax harmonization to include direct taxation, despite the Court of Justice of the European Union (‘CJEU’) affirming that it remains a Member State competence. While national tax measures must comply with EU fundamental freedoms and state aid rules, recent initiatives like ATAD1, ATAD2, and BEFIT signal a growing EU role in direct taxation²⁷. In December 2022, following the release of the GloBE Model Rules, the EU enacted Directive 2022/2523 (Pillar 2), establishing a 15% minimum tax rate for multinational enterprises. The speed of this implementation and the directive's broader implications have generated debates over tax sovereignty, raising questions about the extent to which Member States can maintain control over their fiscal policies in light of EU growing influence.

Despite these concerns, Member States have progressively agreed on harmonizing aspects of direct taxation through positive integration. Although some directives, such as the Parent-Subsidiary Directive, aimed to grant rights to taxpayers, more recent measures, including ATAD and Pillar 2, impose obligations instead²⁸.

While these directives set binding objectives, governments have flexibility in their implementation. As tax integration progresses, maintaining a balance between EU coordination and national sovereignty remains a key challenge²⁹.

It remains to be examined to what extent the ongoing development and expansion of directives in the field of direct taxation align with and respect the constitutional identity of Member States.

2. THE CONSTITUTIONAL IDENTITY OF THE MEMBER STATES AND FISCAL SOVEREIGNTY

2.1. The concept of constitutional identity

Constitutional identity is a contested, vague, abstract and flexible concept with a polysemous nature, which is why studies focusing on its analysis are blooming³⁰. This is a consequence of the fact that ‘constitutional identity’ is not a term that one would find in the text of constitutions. Constitutions do not speak about their own identity. They have it, if

²⁶ J. Lindholm (2024), op.cit, p. 9.

²⁷ S. Hemels, Tax Autonomy from a Member State Perspective: Are We Faced with a Democratic Deficit? (March 29, 2024). Raymond Lujá, National (Tax) Autonomy and the European Union: Revival or Demise? IBFD GREIT series (forthcoming), Available at SSRN: <https://ssrn.com/abstract=4582555> or <http://dx.doi.org/10.2139/ssrn.4582555>.

²⁸ J. Korving, Interpretation of EU (Direct) Tax Directives: The Judges Will Decide Tax power in J. Lindholm, A. Hultqvist (2024), *The Power to Tax in Europe*, p. 205-206.

²⁹ Idem, p. 206.

³⁰ T. Drinóczy, P. Faraguna, The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States, in J. De Poorter; G. Van Der Schyff; M. Stremmer; M. Visser; I. Leijten; and C. Van Oirsouw, *European yearbook of constitutional law 2022: A constitutional identity for the EU?* 4 (2023), p. 59.

only in the sense that no constitution is exactly like the other³¹.

The roots of constitutional identity go back to Aristotle who insisted that the identity of a state did not depend on its physical characteristics, but on its constitution³². In 1995, Michel Rosenfeld formulated the concept of constitutional identity as follows: 'To create a constitutional identity that will endure over time, it is essential to weave together the past of its creators, our own present and the future of generations yet unborn'³³.

The current state of the art describes constitutional identity as a dynamic and multifaceted concept that plays a crucial role in shaping the relationship between national sovereignty and supranational governance. Constitutional identity, which shares elements with fiscal sovereignty, refers to the unique characteristics that define a state's constitutional order, encompassing its foundational principles, values, and structures³⁴.

Another approach frames constitutional identity as an evolution of Westphalian sovereignty, serving as a means to differentiate between traditional nation-states and post-Westphalian states. This perspective highlights the tension between universalism and particularism, suggesting that constitutional identity must be reconsidered beyond the Westphalian tradition to function as a bridge between Member States and supranational institutions³⁵.

Additionally, some scholars argue that constitutional identity consists of a fusion of universal values and distinctive national characteristics. It reflects both a country's historical traditions, customs, and values, as well as its broader aspirations, blending established constitutional features with evolving societal principles³⁶.

Finally, constitutional identity can be understood as the perception of a constitution by the people living under it as an enduring reflection of the popular will, shaping the organization of political authority and social relations³⁷.

The Treaty on European Union recognizes the national identity of Member States in Article 4 para 2, from which constitutional identity can be derived as the constitutional structures of the Member States, such as regional and local self-government, the essential State functions including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security, as well as national security, which are postulated as parts of national identity³⁸.

The identity clause in EU law was first introduced in the Treaties in 1992 with the

³¹ D. Grimm, Three Meanings of Constitutional Identity and Their Prospects in the European Union, in J. De Poorter; G. Van Der Schyff; M. Stremmer; M. Visser; I. Leijten; and C. Van Oirsouw, *European yearbook of constitutional law 2022: A constitutional identity for the EU?* 4 (2023), p. 14.

³² M. Rosenfeld, *Constitutional identity*, in M. Rosenfeld, and A. Sajó (2012), *The Oxford Handbook of Comparative Constitutional Law*, p. 675.

³³ M. Rosenfeld, (1995) 'Identity of the Constitutional Subject', *Cardozo Law Review*, 1995/16, pp. 1049.

³⁴ M. Geuens, 'Substantive Tax Sovereignty Under Globalisation: Re-empowering the States?' (2024) 29(3) *Tilburg Law Review* pp. 18–24. DOI: <https://doi.org/10.5334/tilr.394>.

³⁵ E. Orbán (2022) *Constitutional identity in the jurisprudence of the Court of Justice of the European Union*. *HUNGARIAN JOURNAL OF LEGAL STUDIES*, 63 (2). pp. 142-173. ISSN 2498-5473.

³⁶ R. Hirsch, Y. Roznai (2024), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity*, Cambridge, p. 2.

³⁷ D. Grimm, Three Meanings of Constitutional Identity and Their Prospects in the European Union, in J. De Poorter; G. Van Der Schyff; M. Stremmer; M. Visser; I. Leijten; and C. Van Oirsouw, *European yearbook of constitutional law 2022: A constitutional identity for the EU?* 4 (2023), p. 14.

³⁸ Z. Szente, (2022) *Constitutional Identity as a Normative Constitutional Concept*. *HUNGARIAN JOURNAL OF LEGAL STUDIES*, 63 (1). pp. 3-20. ISSN 2498-5473 (print); 2560-1067 (online).

Maastricht Treaty. At that time, its wording was rather vague and ambiguous. Its inclusion was seen as a strategic balance between opposing forces—on one hand, the push for deeper political integration, and on the other, the reluctance of Member States to transfer excessive competences to the supranational level. The political shift brought by the Maastricht Treaty was counterbalanced by the introduction of legal mechanisms aimed at addressing Member States' concerns about preserving their statehood. These mechanisms included the protocol on subsidiarity, numerous opt-outs, the development of differentiated integration tools, and the principle of respect for national identities³⁹.

For decades, the identity clause was largely seen as a political statement with minimal legal impact. Among the various safeguards introduced to balance national and supranational interests, it was the least legally significant, as it made no explicit reference to constitutional elements and remained outside the CJEU's jurisdiction. As a result, it was considered more of an interpretative tool than a binding legal provision. However, scholars analyzing its role in the Maastricht and Lisbon Treaties argue that it conveyed a clear and timely political message. This was particularly relevant in the 1990s, when the EU was undergoing significant enlargement with the accession of Central and Eastern European countries. For these new Member States, which had recently regained sovereignty after decades of Soviet influence, the identity clause served as reassurance that joining the EU would not compromise their newly restored autonomy⁴⁰.

Scholars argue that the revised formulation of 'national identity' clarified its strictly legal nature, emphasizing its role in defining core areas of national sovereignty that remain beyond the Union's interference⁴¹.

Given the context presented in this section, the residual fiscal sovereignty retained by Member States, which has not been transferred to the European Union, is seen as part of these core areas of national sovereignty, inherently linked to the constitutional identity of the Member States.

A notable precedent is the *ESM (Germany)* decision, in which the German Federal Constitutional Court held that any interference with fundamental fiscal decisions on public revenue and public expenditure and decisions on the shaping of the social state would constitute a violation of Germany's constitutional identity⁴².

2.2. The identity control mechanism

The first arguments against the primacy principle were raised even before the enactment of the Maastricht Treaty and the introduction of the identity clause. The Italian Constitutional Court, in the *Frontini* case in 1973, explicitly acknowledged the principle of

³⁹ T. Drinóczi, P. Faraguna, The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States, in J. De Poorter; G. Van Der Schyff; M. Stremmer; M. Visser; I. Leijten; and C. Van Oirsouw, *European yearbook of constitutional law 2022: A constitutional identity for the EU?* 4 (2023), p. 62.

⁴⁰ Idem.

⁴¹ A. Nicotina, E. Martini, From Monologues to Dialogue: The US "Certification" Procedure as a Source of Inspiration for EU Cooperative Judicial Federalism in J. De Poorter; G. Van Der Schyff; M. Stremmer; M. Visser; I. Leijten; and C. Van Oirsouw, *European yearbook of constitutional law 2022: A constitutional identity for the EU?* 4 (2023), p. 210.

⁴² B. Gordon, The Constitutional Boundaries of Member State Fiscal Sovereignty, in B. Gordon (2022), *The Constitutional Boundaries of European Fiscal Federalism*, p. 264.

primacy but later introduced the *controlimiti* doctrine. According to this perspective, the limitation of national sovereignty resulting from EEC membership does not constitute a violation of "the fundamental principles of our constitutional order or the inalienable rights of man." Thus, the Italian Constitutional Court asserted its authority to conduct constitutional review of the European Treaties under Article 11 of the Italian Constitution⁴³.

Similarly, one of the most well-known rulings of the German Constitutional Court, issued a year later in response to the CJEU's preliminary ruling, *Solange I*, held that the transfer of powers to European institutions must not contradict the identity and fundamental structure of the German Basic Law. The Court asserted that it could not renounce its authority to safeguard the catalogue of fundamental rights established by Parliament and enshrined in the German Constitution as long as (*Solange*) no equivalent protection existed at the Community level⁴⁴. The German Federal Constitutional Court ruled that the delegation of powers to the European Community must be assessed within the overall framework of the German Basic Law, ensuring that it does not compromise the fundamental structure and identity of the Constitution⁴⁵.

According to existing literature and the views expressed in legal doctrine, the purpose of Article 4(2) TEU is not to serve as a tool for Member States to oppose EU legislation but rather to facilitate dialogue through the mechanism of preliminary rulings. One of the key arguments supporting this perspective is that, in the absence of a clear definition of constitutional identity, Member States define their own constitutional identity, leading to inconsistent application of EU law⁴⁶. Furthermore, invoking the identity clause does not necessarily foster dialogue in line with the principle of sincere cooperation; instead, it often results in constitutional courts and the CJEU engaging in 'parallel monologues'⁴⁷ rather than genuine judicial interaction.

This dialogue-based approach has also been emphasized in the *Honeywell* decision. In this ruling the German Constitutional Court reaffirmed that Member States may only refuse to comply with EU law if the violation of conferred competences is manifest, meaning it must be obvious, structurally significant, and beyond reasonable legal disagreement. Moreover, before taking such a step, Member States are required to engage in a dialogue with the CJEU through the mechanism of preliminary rulings⁴⁸.

However, the German Constitutional Court and the Italian Constitutional Court have been regarded as dialogue partners of the CJEU in cases concerning constitutional identity. This cannot be said for Hungary, Poland, and Romania, which have been considered as having abused the identity clause provided in the Treaty. For example, as the CJEU held in *RS*⁴⁹, in response to the Romanian Constitutional Court's judgment in Case 390/2021, article 4(2) TEU 'has neither the object nor the effect of authorizing a constitutional court of a

⁴³ K. Krzyżanowska, (2024), 'Judicialization of Constitutional Identity'. *Duodecim Astra*, Issue 2, pp. 24–52.

⁴⁴ *Idem*.

⁴⁵ Z. Szente, (2022), Constitutional Identity as a Normative Constitutional Concept. *HUNGARIAN JOURNAL OF LEGAL STUDIES*, 63 (1). pp. 3-20. ISSN 2498-5473 (print); 2560-1067 (online).

⁴⁶ K. Krzyżanowska, (2024), 'Judicialization of Constitutional Identity'. *Duodecim Astra*, Issue 2, pp. 24–52.

⁴⁷ E.-S. Tănăsescu, *Curtea Europeană de Justiție și Curtea Constituțională a României*, p. 530 – monologuri paralele, in A. Săvescu, A. Matei, I. Cochintu, In Honorem Frândușa Ștefănescu, Hamangiu, 2023.

⁴⁸ J.G. Wischhoff, A Plaidoyer Against the Sisyphean Endeavour to Imagine the Constitutional Identity of the EU, in J. De Poorter; G. Van Der Schyff; M. Stremmer; M. Visser; I. Leijten; and C. Van Oirsouw, *European yearbook of constitutional law 2022: A constitutional identity for the EU?* 4 (2023), p. 40.

⁴⁹ CJEU, Judgment of 22 February 2022, *RS*, C-430/21, ECLI:EU:C:2022:99.

Member State (...) to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court.'

A clear answer has yet to be provided on whether the constitutional identity control mechanism is consistent with the European Treaties as a means of establishing a middle ground between the possible overreach of EU competences in fiscal matters and the abuse of constitutional identity.

A possible answer to the issue of disregarding the constitutional identity of Member States in the field of direct taxation can be found by looking at the forest rather than the trees. Perhaps there are values that go beyond constitutional identity, which can be discovered through the very evolution of the concept of tax sovereignty.

As mentioned in section 1.2, the evolving understanding of sovereignty emphasizes not only rights but also responsibilities, particularly in the fiscal sphere, where states are expected to respect each other's tax policies. The principle of solidarity between states, seen as both a legal obligation and an expression of mutual assistance, provides a framework for addressing the global tax challenges by fostering coordination and shared responsibility in global fiscal matters.

Historically, the European Union originated in the early 1950s as an economic alliance among six founding states, seeking to rebuild the social and economic fabric devastated by World War II. Strengthening solidarity among states and people was essential, shaping the European project from its inception. The Schuman Declaration of 1950 emphasized de facto solidarity and solidarity in production for coal and steel. Recognizing its fundamental role, the European Court of Justice later affirmed solidarity as a cornerstone of the legal framework of the European Economic Communities⁵⁰.

The Treaty of Lisbon, the most recent major addition to the EU treaty system, reinforced the concept of solidarity as enshrined in the TEU. Across various EU treaties and legal texts, solidarity is recognized both as a principle and an objective. It is explicitly mentioned in Article 2 TEU and holds a central place in the communitarian acquis. The TEU preamble emphasizes strengthening 'solidarity between their peoples,' while Article 3(3) TEU mandates the EU to promote solidarity among generations and between Member States⁵¹.

Scholars still debate the existence of an identity of EU⁵², but those who acknowledge the presence of an EU constitutional identity attribute it to the core values and principles enshrined in Article 2 TEU, among which solidarity is included.

CONCLUSIONS

In the context described above, the resolution of the initial question leads to a broader legal conclusion: when EU measures in direct taxation aim to safeguard solidarity as both an element of fiscal sovereignty and a fundamental value of the European

⁵⁰ E. Arban, *The Principle of Solidarity Forging the Constitutional Identity of the European Union*, in J. De Poorter; G. Van Der Schyff; M. Stremmer; M. Visser; I. Leijten; and C. Van Oirsouw, *European yearbook of constitutional law 2022: A constitutional identity for the EU?* 4 (2023), p. 145.

⁵¹ *Idem*.

⁵² J. De Poorter; G. Van Der Schyff; M. Stremmer; M. Visser; I. Leijten; and C. Van Oirsouw, *European yearbook of constitutional law 2022: A constitutional identity for the EU?* 4 (2023), pp. 4-9.

constitutional order, the balance of identities must be carefully assessed. While Member States retain their constitutional identity and fiscal sovereignty, their obligations under EU law, including the principles of sincere cooperation and solidarity, require deference to the overarching framework of European integration. In this context, the constitutional identity of the EU prevails when it embodies shared values and commitments that reinforce the functioning of the internal market and the collective fiscal solidarity of the Union.

In this sense, Gerhard van der Schyff argues for the idea that the EU has its own constitutional identity. Drawing on the concept of EU citizenship, he describes the EU as possessing a unique form of sovereign non-statehood. Consequently, its constitutional order is not merely a derivative of the Member States' legal frameworks but an independent system in its own right. This perspective suggests that the EU is composed of 28 constitutional identities (i.e. the 27 individual identities of the Member States and the common identity of the EU itself). When conflicts arise between the EU's common identity and those of the Member States, he argues that the common identity must take precedence to ensure the EU's effective functioning.⁵³

Finally, while EU legislation in the field of direct taxation may infringe upon the constitutional identity of Member States, the establishment of a constitutional control mechanism to counterbalance this would be inconsistent with EU law for two main reasons. First, Article 4(2) TEU does not provide for such a control mechanism but rather encourages a dialogue-based approach. When a Member State perceives an EU act as infringing its constitutional identity, the correct legal path is to refer the matter to the CJEU through a preliminary ruling, rather than imposing unilateral constitutional scrutiny. Second, solidarity, as a core value of the EU and a foundational component of its constitutional identity, should prevail over national constitutional identity claims in fiscal matters. In an era of globalization, fiscal sovereignty is increasingly defined not merely as the unrestricted power of a state to act within its own territory but rather as a responsibility to engage in coordinated and solidarity-based fiscal governance, as exemplified by directives such as Pillar 2, which seeks to establish a fairer and more stable international tax framework.

⁵³ J. De Poorter; G. Van Der Schyff; M. Stremmer; M. Visser; I. Leijten; and C. Van Oirsouw, *European yearbook of constitutional law 2022: A constitutional identity for the EU?* 4 (2023), p. 5.