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Secção I

Investigação Científica*

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Transnational impacts of the Principle of Primacy of European Union Law: Judgment n° 422/20 of the Portuguese Constitutional Court and the Politics of Constitutional Amendment

Os Impactos Transnacionais do Princípio do Primado do Direito da União Europeia: o Acórdão n° 422/20 do Tribunal Constitucional e o Processo de Revisão Constitucional

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ABSTRACT: This article adopts a broad understanding of transnational law which includes European Union (EU) Law. It focuses upon the historic decision made by the Portuguese Constitutional Court on the relationship between the 1976 Portuguese Constitution and European Union (EU) law, particularly the question concerning the extent of the application of the principle of primacy. The relationship between these two legal orders is addressed in the interpretation that the Court gives regarding section 4 of Article 8 of the Portuguese Constitution and its consideration of the doctrine of counter-limits put forward by the Italian and German Constitutional Courts. In Judgment n° 422/20, the Court recognized its lack of competence to assess the validity of an EU legal rule and its “inhibition of full access to EU law”. However, this inhibition is not without limits. Therefore, the Court designed a criterion to guide its intervention when the constitutional identity of the Republic is at stake. Then, the article goes on to discuss the criticisms found in legal scholarship concerning the Court’s reasoning and the ruling’s impacts as well as a constitutional amendment proposal designed to eliminate the constitutional norm that regulates the legal consequences stemming from Portugal’s membership in the EU which originated the decision.

KEYWORDS: Transnational law; European Union Law; Portuguese Constitution; Counter-limits; Constitutional Amendment

RESUMO: Este artigo adopta um entendimento amplo do direito transnacional, que inclui o direito da União Europeia (UE). Centra-se na decisão histórica do Tribunal Constitucional português relativamente à relação entre a Constituição da República Portuguesa de 1976 e o Direito da União Europeia, em particular sobre a questão relativa ao alcance da aplicação do princípio do primado. A relação entre estas duas ordens jurídicas é abordada na interpretação que o Tribunal faz do artigo 8.º, n° 4, da Constituição Portuguesa, especialmente no que se refere à sua consideração da doutrina dos contra-limites elaborada pelos Tribunais Constitucionais italiano e alemão. No Acórdão n.º 422/20, o Tribunal reconheceu a sua incompetência para apreciar a validade de uma norma jurídica comunitária e a sua “inibição do pleno acesso ao direito da União”. No entanto, esta inibição não é desprovida de limites. Por isso, o Tribunal

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concebeu um critério para orientar a sua intervenção quando está em causa a identidade constitucional da República. O artigo aborda, em seguida, as críticas encontradas na doutrina relativas à fundamentação do Tribunal e os impactos associados à decisão, bem como uma proposta de revisão constitucional destinada a eliminar a norma constitucional que regula as consequências jurídicas decorrentes da adesão de Portugal à UE que esteve na origem da decisão,

PALAVRAS-CHAVE: Direito Transnacional; Direito da União Europeia; Princípio do Primado; Constituição da República Portuguesa; Contra-limites.

1. Transnational law and European Union law

In this article we adopt a broad understanding of the meaning of transnational law which defends that “it is related to legal phenomenon beyond state law (or the inter-national law)”. Therefore, it can “include “transnational private regulation”, but also supranational law like European Union Law or WTO Law”.³ Including EU Law in the concept of transnational law is also plausible when Peer Zambussen defines this type of law “which transgresses, crosses and bridges bodies of law of and between different countries”.⁴ Bearing in mind this ample sense of the concept, we aim to analyse the scope of the principle of the primacy of European Union (EU) in Judgment no. 422/20, of 15 July, of the Portuguese Constitutional Court, which examined the relationship between the Constitution and EU law that is regulated by Article 8(4) of Portugal’s fundamental law.⁵ Then, it presents an analysis of the decision based upon the legal doctrine and discusses the impacts associated with the ruling as well as the nexus between the verdict and a recent proposal to amend the 1976 Constitution.

2. Legal dispute

The original legal dispute that eventually triggered the Constitutional Court’s decision began with a difference of opinion regarding the conditions relating to the granting of an export subsidy and the provision of a bank guarantee governed by Article 19 of Commission Regulation 2220/85, of 2 July, which establishes common detailed rules for the application of the system of securities for agricultural products. Following the execution of a bank guarantee, a

³ This broad understanding is proposed by the Transnational Law Working Group (TWLG). See <https://www.eui.eu/research-hub?id=transnational-law>

⁴ Peer Zumbassen, *Transnational Law: Theories & Applications*, in P. Zumbansen ed, *Oxford Handbook of Transnational Law*, Oxford University Press, 2020, p. 3.

⁵ Available at: <https://www.tribunalconstitucional.pt/tc/acordaos/20200422.html>

Portuguese company that exported wine to Angola filed a case before the national courts that reached the Supreme Court of Justice.

The company claimed that the EU Regulation was unclear as to the exact moment when the bank guarantees could be considered extinguished and that the legislative act discriminated between exporters. The national courts that heard this and another case on the same issue requested a preliminary ruling from the Court of Justice of the European Union (CJEU) and the dispute was then resolved following the clarifications provided by the Luxembourg Court.⁶ However, the decision was appealed, and the Supreme Court of Justice upheld the lower courts' rulings and it found no discrimination between exporters.

Nevertheless, the Portuguese commercial company filed an appeal to the Constitutional Court under the terms of Article 280 of the Portuguese Constitution. In this particular case, the company filed an appeal against a ruling that applied a rule whose unconstitutionality had been raised during the legal proceedings given that the Supreme Court's decision did not accept its claim that the EU Regulation violated Article 13 of the fundamental law, which enshrines the principle of equality, insofar as only exporters who opted for early repayment of the subsidy would be subject to the bank guarantee.

The Constitutional Court decided not to hear the appeal, given its interpretation of Article 8(4) of the Constitution, which limits the jurisdiction of that judicial body when it is faced with a legal dispute involving the primacy of EU law, and the decision taken by that Court is crucial because it analyses the relationship between the Portuguese Constitutional law and EU law.

3. Legal Scholarship

In their 'Annotated Portuguese Constitution', Jorge Miranda and Rui Medeiros note the existence of a very strong diversity of positions regarding the interpretation of Article 8(4) of the Portuguese Constitution within constitutional scholarship and refer that there are three positions in the legal doctrine that should be considered in any interpretative task regarding this precept.⁷

⁶ On October 23, 2015, the President of the Tenth Chamber of the CJEU issued an order in Case C-152/15, ECLI EU:C:2015:740.

⁷ See Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada*, Volume I (Universidade Católica Editora, 2017).

An example of the first position can be found in the work of Freitas do Amaral. According to this author, Article 8(4) of Portugal's fundamental law recognizes the primacy of European Union law over all Portuguese domestic law, including the 1976 Constitution. In other words, the author subscribes to an understanding of the primacy of EU law without any limits. This position does not attach any particular significance to the proviso regarding the 'fundamental principles of the democratic rule of law' contained in the second segment of the rule enshrined in the last section of Article 8, insofar as he considers it to be no more than a political statement to assuage the anxiety of nationalists.⁸

In the same vein, Fausto de Quadros argues 'that the new Article 8(4) obliges the Constitutional Court to accept the theory of primacy in the terms defined by Union law'. He also states that the Portuguese Constitution has expressly accepted the supra-constitutional primacy of the EU Treaties and that this derives from the 1976 Constitution's 'openness to supra-constitutional sources, reflected above all in the 'international openness of the constitutional order', or in the 'friendship or harmony of the Constitution with international law'.⁹

Gomes Canotilho and Vital Moreira take a different approach from the previous two authors that belong to the first perspective and consider that Article 8(4), introduced by Constitutional Law n^o 1/2004, is one of the most important changes to the system of sources of law in the Portuguese legal-constitutional order and one of the most important changes to the country's fundamental law since it came into force on the 25th of April 1976. According to these authors, the provision should be read in conjunction with Article 10 - I of the draft European Constitution that merely enshrines a principle articulated by the Court of Justice of the European Union in its case law: the principle of the primacy of Union law. This signifies 'that the rules of the treaties, as well as the rules issued by the European institutions, take precedence over the rules of domestic law, including the rules of the Constitution itself'.¹⁰

However, Canotilho and Moreira argue that the principle of primacy has a limited material scope, 'since only the rules of the treaties and the other rules

⁸ See Diogo Freitas de Amaral, *Manual de Introdução ao Direito*, Volume I (Almedina, 2004).

⁹ Fausto de Quadros, *Direito da União Europeia*, 3^a edição (Almedina, 2013) 532.

¹⁰ Jose Joaquim Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada, Artigos 1^o a 107^o* (Coimbra Editora, 2007) 265.

adopted by the European institutions in the exercise of their competencies are recognized as having a legal status of primacy or prevalence'.¹¹ Consequently, the authors maintain that primacy cannot be invoked in areas outside the powers attributed to the Union. Therefore, primacy should be understood as "a collision rule that leads to the preferential application of European law (...) and not as a strict rule of normative supremacy that could lead to the invalidity of domestic law".¹²

In Canotilho & Moreira's view, this preferential application is limited or conditioned by the constitutional reservation contained in the last segment of the precept, which requires respect for the fundamental principles of the democratic rule of law. This means that the primacy of EU law "is limited by the essential core of the Constitution - the fundamental principles of the democratic rule of law – which function as a kind of "constitutional reserve of public order (...) against possible precepts or provisions of Union law".¹³

Miguel Galvão Teles's analysis of Article 8(4) of Portugal's basic law is an example of the third and final perspective on this precept. The author in question defends a reading that points toward the primacy of the Portuguese Constitution. This position is based on the interpretation of the first segment of the rule, as well as the restriction contained in the second part of the norm. Thus, the author argues that the Constitution refers, in the first part of Article 8(4), 'to European Union law for the definition of the internal applicability of the provisions of the treaties that govern it and of the rules emanating from the respective institutions'.¹⁴ Consequently, it is up to EU law to say when there is a direct effect, direct applicability, and what the relationship is between EU rules and the internal rules of the Member States. However, Galvão Teles believes this definition has limits (i.e., it is not unrestricted). This reading derives from the last segment of the precept which, according to the author, adopted the so-called doctrine of counter-limits, in a broader sense than the one elaborated by the Italian and German Constitutional Courts, to safeguard the essential core of the Portuguese

¹¹ Ibid at 266.

¹² Ibid.

¹³ Ibid at 267.

¹⁴ Miguel Galvão Teles, 'Constituições dos Estados e eficácia interna do direito da União e das Comunidades Europeias – em particular sobre o artigo 8º, nº 4, da Constituição Portuguesa', in *Estudos em Homenagem ao Professor Doutor Marcello Caetano* (Coimbra Editora, 2006) 319.

Constitution. Specifically, this counter-limit is found in the segment that refers to the ‘fundamental principles of the democratic rule of law’.

For Galvão Teles, the counter-limit is significant, in that it is the Constitution of the Portuguese Republic that sets a limit to the applicability of the EU law and not the other way around. Therefore, it is Portuguese constitutional law that has the competence to decide on the law applicable within the internal order. This observation leads the author to sustain the following:

Article 8(4) does not mean the ‘surrender’ of the Portuguese Constitution to Union and European Community law, nor does it recognize the competence of Union and European Community law to decide on its internal effect. Rather, it recognizes a claim by Union and Community law to be internally applicable, without limitation by national law. But if this claim were recognized as such, the Portuguese Constitution could not, as it does, impose a limit on it. This presupposes that the Portuguese Constitution considers itself competent to accept or reject the claims of Community law’.¹⁵

Consequently, Galvão Teles argues that it is the criteria of Portuguese constitutional law that underlies the precept. According to the author, this statement raises the ‘question of the competence of competence and the fact that the EU does not have the power to assign itself, on its initiative, new powers, as the German Constitutional Court stated in its judgment on the Maastricht Treaty’¹⁶ as well as in its ruling upon the conformity of the Lisbon Treaty with the German Constitution.¹⁷

In sum, these groups of authors defend claims that underline and use different segments of Article 8(4) of the Portuguese Constitution to substantiate one of three possible outcomes: primacy without any limits; primacy with limits; Member-State Constitution that dictates the terms regarding the place and status of EU law in the internal or domestic order.

4. Reasoning

In its reasoning, the Portuguese Constitutional Court begins by identifying the central issue of the appeal: the appellant takes the view that the Constitutional

¹⁵ Ibid at 319.

¹⁶ Ibid at 327.

¹⁷ This position was reaffirmed by the German Constitution Court in the Judgment on the Lisbon Treaty. See [Bundesverfassungsgericht - Decisions - Act Approving the Treaty of Lisbon compatible with the Basic Law - accompanying law unconstitutional to the extent that legislative bodies have not been accorded sufficient rights of participation](#). For an analysis of this ruling in the Portuguese legal doctrine, see Mário Simões Barata, *Formas de Federalismo e o Tratado de Lisboa: Confederação, Federação e Integração Europeia* (Almedina 2016) 471.

Court must examine a legal rule of European Union law, with the interpretative meaning established by the CJEU, in terms of compliance with the constitutional principle of equality (i.e. prohibition of discrimination) enshrined in Article 13 of the 1976 Portuguese Constitution.¹⁸ Consequently, the Constitutional Court had to determine whether it could assess the constitutional conformity of an EU law (i.e., under what conditions and assumptions).

The Constitutional Court began this task by stating that the answer lies in the interpretation of Article 8(4) of the Portuguese Constitution. This provision implicitly regulates the impact of two EU law principles on the legal order of the Member States: direct effect and the primacy of EU law. It then recalled the cases of *Van Gend en Loos* (Case n° 26/62) and *Costa versus ENEL* (Case n° 6/64). The Court also pointed out that the principle of primacy is not codified in the Treaties. Although it was enshrined in the Constitutional Treaty - this treaty never entered into force and the Lisbon Treaty does not refer to this principle.¹⁹ However, the Court notes that it cannot ignore the important case law of the CJEU and the reaffirmation of this principle in the *Internationale* and *Simmenthal* cases, which are considered foundational as well as the task of the Court of Justice to ensure that, in the interpretation and application of the Treaties, the law is observed to avoid fragmentation, subordination, and the weakening of the Union.

It then went on to explain its understanding of the principle of primacy and quoted Maria Luísa Duarte who sustains that the principle of primacy affirmed in the *Costa v. ENEL* decision does not presuppose 'a typical relationship of infra and supra-ordination between rules, [not valid] as a requirement of hierarchical prevalence [: the] Euro-EU rule prevails over the domestic rule not because it is superior to it, but because it is materially competent to regulate the specific dispute'.²⁰ In other words, it's not a question of hierarchy, but of primacy over national law in situations of competition or conflict between legal rules.

For the Portuguese Constitutional Court, the principle of primacy is a decision-making model that 'is based on the superimposition of the EU law in

¹⁸ Ruling of the Portuguese Constitutional Court no. 422/20, of July 15, point 2.

¹⁹ However, one can find a declaration concerning primacy in the declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on December 13, 2007.

²⁰ Maria Luísa Duarte, *Direito Internacional Público e Ordem Jurídica Global do Século XXI* (AAF DL Editora, 2021) 339.

confrontation with national laws, which will necessarily project, by its intrinsic functionality, exclusionary effects on domestic legal orders'.²¹ This effect leads to EU rules taking precedence over national rules (i.e., over all of domestic law, regardless of its nature or hierarchical status). In its quest to explain primacy, the Court also resorted to the writings of Patrícia Frago Martins who states that the above understanding of the scope of primacy, within the reference framework constructed by the CJEU, refers indistinctly to 'all the rules of the domestic law of the Member States, regardless of their hierarchical level, including, therefore, those of a constitutional nature'.²²

The Constitutional Court further notes that this idea - that the constitutional nature of Member States' domestic law in no way excludes the primacy of EU law - was already implicit in the original construction of the principle in *Costa versus ENEL* in the following passage of that decision:

[...] the law emerging from the Treaty, emanating from an autonomous source, by its specific original nature, cannot be challenged in Court by any internal text whatsoever without losing its Community nature and without calling into question the legal foundations of the Community itself. The transfer by States, from their internal legal order to the Community legal order, of the rights and obligations corresponding to the provisions of the Treaty, therefore, implies a definitive limitation of their sovereign rights, over which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.²³

Later, the Court of Justice reaffirmed its understanding of the principle of primacy to the constitutional norms of the Member States explicitly in the *Internationale Handelsgesellschaft* judgment (Case No. 11/70).²⁴

However, the scope of the principle of primacy has not been accepted by the Italian and German Constitutional Courts concerning constitutional rules or norms. The legal scholarship points to the *Frontini* Judgment 183/1973 of the Italian Constitutional Court as an example of the doctrine of counter-limits (i.e., limits to the limitations of sovereignty),²⁵ which was later developed in the *Granital* and *FRAGD* rulings. Furthermore, it also refers to the Taricco saga as an example

²¹ Ruling of the Portuguese Constitutional Court no. 422/20, of July 15, point 2.3.3.

²² Patrícia Frago Martins, *Princípio do Primado do Direito Comunitário* (Principia, 2006) 53.

²³ Ruling of the Portuguese Constitutional Court no. 422/20, of July 15, point 2.3.3.

²⁴ For further considerations on the principle of primacy in the jurisprudence of the Court of Justice in the Portuguese legal doctrine see Eugénio Pereira Lucas, *Lições de Direito da União Europeia* (Quid Juris, 2021) 307.

²⁵ See Miguel Galvão Teles (fn 12) 299.

of a dispute between that Court and the CJEU over the scope of the primacy principle.²⁶

The decision in the *Internationale Handelsgesellschaft* case and the doctrine of counter-limits also gave rise to the Judgment known as *Solange I* where the German Constitutional Court (i.e., the *Bundesverfassungsgericht*) held ‘that, as long as (Solange) the European Community did not provide a level of protection of fundamental rights equivalent to that of the Basic Law, the Constitutional Court could not accept a projection of the principle of primacy in the absolute terms affirmed by the Court of Justice’.²⁷ This position evolved in 1986 when the German Constitutional Court observed, in the *Solange II* ruling, that there had been a favourable development in the protection of fundamental rights in the European Union and decided that as long as this level of protection was maintained, the *Bundesverfassungsgericht* would not intervene in the constitutional control of the EU law.²⁸

Having recalled the meaning of primacy, the Portuguese Constitutional Court held that it was necessary to separate two issues: the issue of rules of national law without a constitutional nature and the issue of rules of national law with a constitutional nature. Regarding the first question, the Court stated that the EU law takes precedence over national law which is not constitutional. This interpretation of the principle of primacy is in line with Article 8(4) of the Portuguese Constitution. In other words, EU law rules out national law. Nevertheless, the situation is different when the Constitution Court is dealing with constitutional rules, because section 4 of Article 8 of the Portuguese Constitution establishes an exception in the sense that primacy must respect the fundamental principles of the democratic rule of law. Thus, the first part of section 4 accepts the primacy of the EU law in relation to national law, while the second segment of the norm establishes a limit to it when we are dealing with rules of a constitutional nature, which seems to reflect the doctrine of counter-limits coined by the legal doctrine after the *Frontini* Judgment handed down by the Italian Constitutional Court.²⁹ In other words, the Portuguese Constitutional Court

²⁶ See Ruling of the Portuguese Constitutional Court no. 422/20, of July 15, point 2.4.

²⁷ *Ibid* at point 2.3.3.2.

²⁸ *Ibid*.

²⁹ *Ibid* at point 2.5.1.

sustains that Article 8 (4) of the Constitution does not recognize an absolute primacy of EU law. Consequently, it felt the need to define the terms in which the EU Treaties are accessible to it in the context of the concrete review of the constitutionality of EU rules.³⁰

According to the Portuguese Constitutional Court, Article 8(4) of the Portuguese Constitution regulates the legal consequences of Portugal's participation in the European Union, the foundations of which can be found in Article 7(5) and (6) of the nation's fundamental law. Article 7 (5) of the Portuguese Constitution states that "Portugal is committed to reinforcing European identity and strengthening the action of European states in favour of democracy, peace, economic progress, and justice in relations between peoples". According to the Portuguese constitutional doctrine, this precept consecrates the "European decision" or European clause and expresses the constitutional reception of Portugal's accession to the European Economic Community in 1986.³¹ Furthermore, Article 7 (6) regulates the transfer of sovereignty in favour of the European Union based on an international convention (treaty) and determines that the joint exercise of the powers necessary to build the European Union is subject to a reciprocity clause and the principle of subsidiarity as well as the respect for the fundamental principles of the democratic rule of law.³²

Specifically, Article 8(4) of the Portuguese Constitution regulates the Court's intervention in two situations in matters relating to the legal consequences of Portugal's participation in the European Union. The first situation concerns the first part of the legal precept, which states: 'The provisions of the treaties governing the European Union and the rules emanating from its institutions in the exercise of their respective powers shall apply in domestic law as defined by Union law'. In the Constitutional Court's opinion, this section of the rule limits national judicial control. This limitation means that European Union law acquires immunity from the Portuguese system of constitutional review and constrains or limits the intervention of the Court.³³ This position is explained by Gomes Canotilho and Vital Moreira who state that EU law cannot be declared

³⁰ Ibid at point 2.6.

³¹ See José Joaquim Gomes Canotilho and Vital Moreira (fn 8) 243.

³² Ibid at 244.

³³ See Ruling of the Portuguese Constitutional Court no. 422/20, of July 15, at point 2.6.6.2.

unconstitutional or inapplicable on the grounds of an alleged unconstitutionality or any kind of non-conformity with the rules of domestic law (organic laws, etc.). Neither the Constitutional Court nor the other courts can pass judgment on the conformity of its rules with the Constitution or any other instrument of domestic law. From this point of view, the primacy of EU law is reflected in its immunity from the constitutional system of constitutional review and "enhanced legality". Therefore, the rule in Article 8(4) implies a derogation from the constitutional rules guaranteeing the Constitution to EU law. Consequently, Article 277 (1) of the Portuguese Constitution which states that 'rules that violate the provisions of the Constitution, or the principles enshrined in it, are unconstitutional', does not apply to EU law.³⁴ In short, the Portuguese Constitutional Court uses the teachings of Rui Medeiros to state that this part of the rule gives meaning to the principle of primacy and the 'tendential prevalence of European Union law over rules of domestic law, including rules of constitutional law'.³⁵

However, the second part of the rule limits the first when it states, "with respect for the fundamental principles of the democratic rule of law". This segment re-establishes the intervention of the Portuguese Constitutional Court and the exercise of its powers or competencies. Therefore, there are situations in which primacy can be limited in the context of a conflict between EU law and the Portuguese Constitution. This means that the CJEU does not have exclusive control over the validity of EU law. Nonetheless, the Constitutional Court recognizes that this exception or limit would only apply to a restricted or limited number of situations that have to do with the characteristics of the Republic's constitutional identity. Consequently, the Constitutional Court asserted, in certain borderline and residual situations, the power to determine its jurisdiction.³⁶

In defence of the 'constitutional identity of the Republic', the Constitutional Court stated that it would intervene in cases related to its position as guardian of the Constitution and gave two examples of counter-limits: Article 5 and Article 6 of the Constitution. Article 5 refers to the territory of the Portuguese Republic and Article 6 classifies Portugal as a unitary state. In these cases, the Court states

³⁴ See José Joaquim Gomes Canotilho and Vital Moreira (fn 8) 270.

³⁵ Rui Medeiros, *A Constituição Portuguesa Num Contexto Global* (Universidade Católica Editora, 2019) 378.

³⁶ See Ruling of the Portuguese Constitutional Court no. 422/20, of July 15, at point 2.6.6.2.

that the CJEU cannot ensure a functionally equivalent control to that carried out by the Constitutional Court due to the fact that these issues go beyond the competencies that Portugal transferred to build and deepen the European Union.³⁷

5. Intervention criterion

As a result, the Constitutional Court developed a criterion or a legal filter³⁸ to guide its intervention or abstention in cases of a conflict between the EU law and the Portuguese Constitution. Thus, the Constitutional Court would intervene and not apply EU law in the following situation:

This means that the refusal to apply - and, logically, the access to the national constitutional jurisdiction - an EU law rule (i.e., the activation of the counter-limit that underlies the final section of Article 8(4)) presupposes an incompatibility with a fundamental principle of the democratic rule of law which, in this context (including, therefore, the case law of the Court of Justice of the European Union), does not enjoy a material parametric value equivalent to the one recognized in the Portuguese Constitution, namely because it is part of the constitutional identity of the Republic since such a principle necessarily imposes itself on the convention that '[...] the exercise, in common, in cooperation or by the institutions of the Union, of the powers necessary for the construction and deepening of the European Union'.³⁹

In addition, the Court stated that it would not intervene and, consequently, apply EU law in the following situation:

From this follows - and it corresponds to the second alternative that is interpreted in Article 8(4) - the following: whenever there is a question of assessing a rule of EU law in the light of a (fundamental) principle of the democratic rule of law which, within the scope of the EU law, enjoys a parametric value functionally equivalent to the one recognized in the Portuguese Constitution, the Constitutional Court does not assess its compatibility.⁴⁰

In short, this is criterion designed by the Portuguese Constitutional Court to exercise its judicial competence under Article 8(4) of the Portuguese Constitution, which reflects the European decision made by the constituent power in Article 7(6) of Portugal's fundamental law. Subsequently, the Constitutional Court decided, based on the criterion it had clearly defined, not to take

³⁷ Ibid at point 2.6.6.4.

³⁸ This idea of a filter can be found in Fátima Pacheco, 'Revisitar a primazia do Direito da União Europeia no quadro das relações entre o Tribunal de Justiça da União Europeia e os Tribunais Constitucionais – algumas considerações sobre o acórdão n^o 422/20 do Tribunal Constitucional Português', *JusGov Reserach Paper Series*, Paper 2022 – 14.

³⁹ See Ruling of the Portuguese Constitutional Court no. 422/20, of July 15, at point 2.7.

⁴⁰ Ibid at point 2.7.

cognizance of the appeal brought forward by the commercial company in the aftermath of the Supreme Court of Justice's ruling.⁴¹

6. Critical Analysis

The Portuguese legal doctrine notes that the Portuguese Constitutional Court felt that it was going to render a very important decision in Judgment no. 422/20. Observers also underline that the decision was unanimous. In other words, there is no dissenting opinion on a matter that is controversial within Portuguese constitutional scholarship. Although the decision did not raise any controversy within the legal doctrine, one cannot say that there are no criticisms relative to the reasoning and intervention criterion presented by the Portuguese Constitutional Court to reactivate its competencies.

In a commentary published in the aftermath of the Portuguese Constitutional Court's decision, Rui Medeiros criticized the judgment's understanding of constitutional identity as a counter-limit to the first part of Article 8 (4) of the Portuguese Constitution which 'accepts primacy with almost the entire scope and consequences affirmed by the CJEU'.⁴² In his opinion, the notion of constitutional identity encompasses two different ideas: the identity of the constitution and the identity of the people ruled by that constitution.⁴³ Consequently, he defends that both these ideas are included in the counter-limit that can be found in the last segment of Article 8(4) of the Portuguese Constitution which refers to the respect for the fundamental principles of a democratic state based on the rule of law.

In his comments relative to the rule of law, Medeiros finds no reason to contest the idea that 'the limit to primacy resulting from the requirement of respect for the fundamental principles of a state based on the rule of law only applies in extreme situations'.⁴⁴ Nevertheless, he criticizes the Constitutional Court's statement which includes cases surrounding the level of protection of fundamental rights in this category when it affirms '(the content and guarantee of which are already covered by EU law, and which benefit from a level of protection

⁴¹ Ibid at point 2.7.1.

⁴² Rui Medeiros, 'The primacy of European Union Law over the Portuguese Constitution according to the Constitutional Court – Comment on Constitutional Court Judgment n° 422/20' (2021) 5 *Católica Law Review* 115.

⁴³ Ibid at 119.

⁴⁴ Ibid.

within that framework that is functionally equivalent to that provided by the national jurisdiction, specifically by the Constitutional Court'.⁴⁵ This presumption of compatibility relative to the protection of fundamental rights that justifies the non-intervention of the Constitutional Court is also criticized by Catarina Botelho points out the risks of rendering the final part of Article 8 (4) of the Portuguese Constitution meaningless since 'the legal and fundamental protection offered by the Portuguese constitutional order is not identical to European legal and fundamental protection. There are countless specificities'.⁴⁶

An example of these specificities can be found in Article 57 (2) of the Portuguese Constitution which prohibits lockouts. This solution is radically different from the one found in Article 28 of the Charter of Fundamental Rights of the European Union. Another major difference lies in the consecration of detailed social rights (i.e., social security; health, housing, and urban planning; environment and quality of life; family; paternity and maternity; young people; handicapped citizens; old age) in Portugal's fundamental law. However, it seems that the Constitutional Court did not take this aspect of the Constitution into account in its judgment.⁴⁷

In his comments relative to constitutional identity Medeiros defends that the Portuguese Constitutional Court did not fully consider 'the relationship between, on the one hand, European integration and on the other, popular sovereignty and the democratic principle' expressed in the post-Solange German Constitutional case law.⁴⁸ He criticizes Judgment no. 422/20 for not reflecting upon the German Constitutional Court case law on European Integration after *Solange II* as well as the important case law from East Central European Courts: Poland, Hungary, Czech Republic, and Slovakia. He also notes the following:

Since the idea of democracy cannot be fully detached from constitutional states such as ours, and since there are still limits to the democratic dimension at the European level, representative democracy – with its one-person-one-vote rule – requires certain decisions affecting the political community to be reserved for democratically formed republican deliberation.⁴⁹

⁴⁵ Ibid.

⁴⁶ Catarina Santos Botelho, 'Acórdão do Tribunal Constitucional n^o 422/20, de 15 de julho de 2020: O lugar da Constituição portuguesa no constitucionalismo contemporâneo – A propósito de um subsídio à exportação', in Ricardo Costa (coord.), *Direito das Empresas: Reflexões e Decisões* (Almedina, 2022) 367.

⁴⁷ Ibid; see Rui Medeiros (fn 40) 123.

⁴⁸ Rui Medeiros (fn 40) 123.

⁴⁹ Ibid.

In sum, a citizen's right to democracy protected by the right to vote may be at risk if the representative body that is selected through free elections loses its authority over certain matters.

7. Impact

The Portuguese legal office Cruz Vilaça Advogados, led by a former CJEU judge, posted an interesting commentary concerning the impact of the Constitutional Court's Judgment n° 422/20. The virtual note briefly outlines the consequences associated with the decision that we will develop in this section of the article.⁵⁰ Lastly, this section will also consider the judgment's impact on national taxation policy.

Firstly, the commentary argues that the Portuguese Constitutional Court has distanced itself from its German counterpart since it has declared its incompetence to analyse the validity of an EU law rule in the light of fundamental law. This is a very broad argument that does not refer to the limited exceptions outlined by the Court. Despite this observation, the position is significant in the law office's commentary because it demonstrates that the Portuguese Constitutional Court does want to follow the confrontational path taken by the German Constitutional Court and reminds the reader of that Court's ruling on the European Central Bank's program of buying public sector assets on secondary markets.⁵¹ Thus, Judgment n° 422/20 is seen as a contribution to the legitimacy of the European Union and not as a destabilizing factor.⁵²

Secondly, the law firm positively highlights the fact that the Portuguese Constitutional Court recognizes its lack of competence or its own 'inhibition of full access to EU law' which derives from the principle of primacy and the exclusive competence of the CJEU to declare the invalidity of an EU rule. The commentary also considers that the reservation made by the Constitutional Court regarding the 'constitutional identity of the Republic' to substantiate or reactivate its competence to scrutinize EU action as residual and 'reserved for exceptional situations with a low probability of occurrence (as an 'escape valve' from the

⁵⁰ See [O acórdão n.º 422/2020 do Tribunal Constitucional português e a inibição de acesso ao direito da UE: um ponto final no “diálogo de surdos”? \(cruzvilaca.eu\)](https://www.cruzvilaca.eu/pt/acordao-n-422-2020-do-tribunal-constitucional-portugues-e-a-inibicao-de-acesso-ao-direito-da-ue-um-ponto-final-no-diologo-de-surdos/)

⁵¹ See German Constitutional Court, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, paras. 1-237, https://www.bverfg.de/e/rs20200505_2bvr085915en.html

⁵² [O TC Alemao e o Tribunal de Justica.pdf \(cruzvilaca.eu\)](https://www.cruzvilaca.eu/pt/TC-Alemao-e-o-Tribunal-de-Justica.pdf)

system which, in practice, may never be activated)⁵³. In this sense, the comments emphasize the fact that the Constitutional Court only offered scant examples of values that constitute the ‘constitutional identity of the Republic’.

Thirdly, the remarks on the impact are prospective when they underline ‘the importance of this judgment stems from the window it opens on the future use of the preliminary ruling mechanism (hitherto non-existent) by the Portuguese Constitutional Court’.⁵⁴ In our opinion, this statement is based upon the fact that the Portuguese Constitutional Court had never referred a question to the Court of Justice of the European Union for a preliminary ruling before this judgment, and the law office in question found positive prospects in the decision for the use of this judicial cooperation mechanism shortly.

We consider that this premonition materialized in December 2020, when the Constitutional Court made its first reference for a preliminary ruling in Judgment no. 711/20, which deals with the non-conformity of Article 11 of the Vehicle Tax Code with Article 110 of the Treaty on the Functioning of the European Union (TFEU), applicable in the domestic legal order under Article 8(4) of the Portuguese Constitution.⁵⁵ This judgment, proffered thirty-four years after Portugal acceded to the European Union, is, in Rui Lanceiro’s perspective, rendered ‘in a context in which the Constitutional Court had begun an unprecedented opening of dialogue with EU law’.⁵⁶

Lastly, the two judgments rendered by the Portuguese Constitutional Court referred to in this section of the article had, in our opinion, an impact on the Government’s taxation policy. For example, the effect of these judgments can be seen in the legislative proposal that the Government presented to Parliament concerning the national budget for 2021. Within the budgetary proposal, one can find a legal precept that alters the wording of Article 11 of the Portuguese Vehicle

⁵³ See [O acórdão n.º 422/2020 do Tribunal Constitucional português e a inibição de acesso ao direito da UE: um ponto final no “diálogo de surdos”? \(cruzvilaca.eu\)](https://www.cruzvilaca.eu/pt/acordao-n-422-2020-do-tribunal-constitucional-portugues-e-a-inibicao-de-acesso-ao-direito-da-ue-um-ponto-final-no-diologo-de-surdos/)

⁵⁴ Ibid.

⁵⁵ See Mário Simões Barata and Ângelo Abrunhosa, ‘Impostos sobre Veículos Usados e o Primeiro Pedido de Reenvio Prejudicial do Tribunal Constitucional Português’ (2022) Special Issue *Revista Jurídica da Portucalense*. Available at: <https://revistas.rcaap.pt/juridica/article/view/25010>.

⁵⁶ Rui Lanceiro, “Notas sobre o Conhecimento do Recurso Previsto na Alinea i) do nº 1 do Artigo 70º da LTC Quando Está em Causa a Integração Europeia – em Jeito de Comentário ao Acórdão do Tribunal Constitucional nº 711/2020” (2022) 2 *Revista Portuguesa de Direito Constitucional* 84.

Tax Code (CISV) to align domestic law with EU primary law.⁵⁷ Specifically, Article 11(1) of the CISV did not include rate reductions that reflected the depreciation of used vehicles from other European Union Member States in the environmental component of the tax, implying that the vehicle tax levied on these used vehicles is higher than the amount of vehicle tax contained in the residual value of similar domestic used vehicles (already registered in Portugal). This differentiation represents a form of discrimination prohibited by Article 110 of the TFEU which states that ‘no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products’. This legislative alteration represents a significant change for the Portuguese Tax Authority which did not apply EU law in this specific area of taxation. However, the solution was also criticized because the legislative modifications would only apply after January 1, 2021, and leave all the cases of miscalculation of the vehicle tax before this date for the Courts to adjudicate.

8. Constitutional amendment and the European Union

Since entering into force on the 25th of April 1976, the Portuguese Constitution has been modified seven times. A rigorous analysis of six out of the seven successful constitutional amendment processes reveals that the constitutional text was modified due to political and economic reasons as well as the evolution of the European Union. This can be seen in the 1989, 1992, 1997, 2001, 2004, and 2005 revisions.

In 1989 the Portuguese Constitution was modified for the second time and the legal doctrine was unanimous when they invoked that the underlying reason for the amendments was economic. In this revision, Parliament abolished the constitutional norms that considered economic nationalization as irreversible and agrarian reform. It eliminated the constitutional imposition referring to the collective ownership of the main means of production and soils. In addition, it recognized the possibility of reprivatization of the means of production and other means nationalized after the April 25th, 1974 Revolution. In sum, the second revision modified the economic part of the Constitution and opened Portugal up

⁵⁷ See Mário Simões Barata and Ângelo Abrunhosa (fn 53) 116.

to the common market (i.e., the European Economic Community) that the country had acceded to in 1986.

The signing of the Treaty of Maastricht in February of 1992 is the major reason behind the third revision of the Portuguese Constitution. The Maastricht Treaty represented a major shift in European integration because it disciplined matters related to State sovereignty such as foreign policy; defence policy; European citizenship; research, technological development; and monetary policy. Therefore, the constitutional text was altered to authorize the joint exercise of powers in these areas. Constitutional scholars usually point to three examples that illustrate the influence of the Maastricht Treaty: (1) Article 7 (6) authorizes the exercise of joint powers necessary to build the European Union; 2) Article 15 regulates the electoral capacity of EU citizens that reside in Portugal and the election of Portugal's Members of the European Parliament; 3) Article 105 eliminated the exclusive power of the Bank of Portugal to issue banknotes and coins.

In 1997 the Portuguese Constitution was revised for a fourth time. The underlying reasons for the modifications that were introduced to the constitutional text relate to the reform or the overhaul of the political system. However, the signing of the Treaty of Schengen forced Portugal to revise the constitutional rules regarding the extradition of Portuguese citizens.

The creation of the International Criminal Court following the entering into force of the Rome Statute, which was signed in 1998, is the driving force subjacent to the fifth revision of the 1976 Constitution that took place in 2001. The Portuguese Parliament seized the opportunity to revise the fundamental law to adapt it to Portugal's option to ratify the statute and introduced two modifications that are tied to the European Union. These modifications altered the wording of Article 7(6) relative to the joint exercise of power to build the European Union to accommodate the rules relative to the area of freedom, security, and justice, and Article 33 which relaxed the constitutional norm regarding the extradition of Portuguese citizens due to the application of the rules adopted under EU judicial cooperation in criminal matters.

The text of the Portuguese Constitution was also revised in 2004 following the signing of the Treaty that establishes a Constitution for the European Union. This led the Portuguese Parliament to modify Article 7(6) to contemplate the

building and deepening of the European Union and introduced Article 8(4) which regulates the legal implications that stem from Portugal's participation in the European Union, namely the scope of the principle of primacy in the Portuguese legal order.

Finally, the last revision took place in 2005 and it also has a European Union root. Article 115 of the Portuguese Constitution regulates the conditions for a national referendum and the legal provision relative to this form of direct and participatory democracy was modified in order for the Portuguese people to hold a referendum on Portugal's participation in the European Union.

This brief analysis of six of the seven revisions of the Portuguese Constitution leads us to conclude that Parliament has been modifying the constitutional text to adapt it to political and economic circumstances as well as to the evolution of the European Union in the last four decades. In other words, none of the modifications that were introduced by the parliamentary representatives sought to change the constitutional rules that govern Portugal's participation in the building and deepening of the European Union due to an unfavourable Court decision.

This changed in the fall of 2022 when the right-wing populist party CHEGA presented a comprehensive package consisting of sixty-nine proposals to amend Portugal's 1976 Constitution and adjust the text to its populist agenda. This triggered the constitutional amendment process foreseen in Articles 284 to 289 of Portugal's fundamental law for the twelfth time since the Constitution entered into force in 1976.⁵⁸ Seven other political parties followed suit and presented their amendment proposals within the thirty-day time frame established by Article 285 of the Constitution. In total, almost 400 proposals were made, and one of these concerns Article 8(4) which addresses the question of the relationship between the Constitution and EU law.⁵⁹

Specifically, the Portuguese Communist Party (PCP) proposed a constitutional amendment that sought to limit the transfer of powers to the European Union and, in our opinion, to revert the implications stemming from Judgment n° 422/2020 handed down by the Constitutional Court. To this end, it

⁵⁸ Seven of these attempts have been successful.

⁵⁹ See Maria Leitão, *Apresentação Comparada dos Projetos de Revisão Constitucional | 2022 | 12.º Processo de Revisão Constitucional* (Assembleia da República, 2022).

advocated the elimination of the rules that allow for the systematic transfer of national sovereignty to the institutions of the European Union and that permit the rules emanating from the European Union to prevail over domestic law, including the Constitution itself.⁶⁰ In other words, the Portuguese Communist Party expressed its dissatisfaction with Articles 7(6) and 8(4) of the Portuguese Constitution. To that end, it proposed the formal elimination of Article 8(4) of the Portuguese Constitution which accepts the legal implications attached to direct effect and the primacy of EU law in Portugal. This preoccupation with national sovereignty can also be seen in the Communist Party's proposal that would require a binding opinion from the Portuguese Parliament for the Portuguese Republic to be bound to the European Union in matters that fall within its competence.

However, the proposals that sought to protect national sovereignty were rejected by the parliamentary committee that was specifically set up to organize the constitutional review process since they were not supported by the remaining political parties, especially the two main political parties that are pro-European Union. Following the 2021 legislative elections, the Portuguese Communist Party held five seats in the national Parliament and a constitutional amendment required a two-thirds majority (154 out of 230 votes) for approval according to Article 284 of the Portuguese Constitution. In addition, the probability of success was limited since the only other political party represented in Parliament (i.e., the Left Block) that is critical of the European Union focuses much more on the financial implications associated with the Economic and Monetary Union. This position leads the Left Block to advocate: full autonomy for the country to make decisions on the financial system; elimination of internal market rules that condition the possibility of sovereign decisions on member states' industrial policy; definition of a minimum threshold for the taxation of capital income in all member states and territories of the European Union; exclusion of the national contribution associated with EU funds from the calculation of the deficit; Portugal's disengagement from the Budget Treaty; reversal of monetary policy priorities.⁶¹ Consequently, their negative assessment of European integration is due to economic reasons rather than the legal aspects related to the preservation

⁶⁰ See [Projecto de Revisão Constitucional | Partido Comunista Português \(pcp.pt\)](#)

⁶¹ See [26. Uma política europeia para defender o país \(bloco.org\)](#)

of sovereignty and the status of the Portuguese Constitution at the apex of the system of sources of law.

Finally, the twelfth constitutional amendment process was abandoned by the parliamentary committee that was established to oversee the process when Prime Minister Antonio Costa resigned from office on the 8th of November 2023 due to a corruption scandal (i.e., Operation Influencer) that allegedly involved his Chief of Staff and other cabinet ministers. This resignation was ultimately accepted by the President and led to the formal dissolution of Parliament in January 2024 and new elections. The dissolution of Parliament meant that all legislative proposals expired. In the aftermath of the March 10th, 2024 elections, Portugal's two main political parties which are pro-integration won the necessary number of seats to modify the Constitution, and the two political parties that are more critical of the European Union either maintained their political representation or lost representatives in the newly elected Parliament.

9. Conclusions

In Judgment no. 422/20, of 15 July 2020, the Portuguese Constitutional Court defined the terms in which the EU law is accessible to it in the context of the exercise of concrete review of the constitutionality of legal norms in an appeal filed by a commercial company against a decision handed down by the country's Supreme Court of Justice relative to the application of EU secondary law (i.e., a Regulation).

The judgment focuses on the main issue - the interpretation of Article 8(4) of the Basic Law - and considers the principle of the primacy of the EU law as defined by the Court of Justice of the European Union, as well as the doctrine of counter-limits associated with the case law of both the Italian and German Constitutional Courts.

For the Constitutional Court, the first section of Article 8(4) of the CRP recognizes the principle of the primacy of the EU law over the national law of a non-constitutional nature. However, the second part of the constitutional precept limits the scope of the principle of primacy of EU law to national law of a constitutional nature when it does not respect the fundamental principles of the democratic rule of law.

Specifically, the limit to the principle of primacy lies in the 'constitutional identity of the Republic' and the Constitutional Court offers Articles 5 and 6 of the Constitution concerning the definition of Portugal's territory and its characterization as a unitary State as examples of hypothetical and residual situations in which the EU law's immunity ceases and its competence to assess the EU law's compliance with the 1976 Constitution is reactivated.

In short, Judgment no. 422/20 of the Constitutional Court does not adopt a perspective of the primacy of the EU law without limits. However, the decision is, in the words of Catarina Botelho, 'Europe-friendly'.⁶² The Court defends a restrictive interpretation of its powers to reactivate its judicial competence of competence and consequently limit the principle of the primacy of EU law. Furthermore, the ruling expresses an openness to dialogue and judicial cooperation with the CJEU.

More recently, the Portuguese Communist Party has resorted to the constitutional amendment process to preserve Portugal's sovereignty and revert the legal implications of Judgment no. 422/20 of the Constitutional Court (i.e., that rules on the extent of the principle of primacy of EU law over the Constitution and national law) by presenting a constitutional amendment proposal that seeks to eliminate Article 8(4) from the Portuguese Constitution that was introduced into the domestic legal order almost twenty years ago.

However, the amendment proposal was not adopted by the parliamentary committee appointed to oversee the process of constitutional revision nor does a similar proposal have any probability of success, soon, because Portugal's two main political parties, which are pro-EU, can influence the outcome of any constitutional amendment process since they control 156 of the 230 parliamentary seats. In other words, more than two-thirds of the national legislative assembly is favourable to European integration and satisfied with the constitutional norms that regulate Portugal's participation in the Union as well as the legal implications that stem from integration as outlined by the Portuguese Constitutional Court in Judgment no. 422/20.

⁶² Catarina Santos Botelho (fn 44) 345.

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