STUDY

Requested by the AFCO committee

Primacy's Twilight?

On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
PE 692.276 - April 2021

EN

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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, analyses the repercussions of the judgment of the German Federal Constitutional Court of 5 May 2020. It puts the decision into context, makes a normative assessment, analyses the potential consequences and makes some policy recommendations.

This document was requested by the European Parliament's Committee on Citizens' Rights and Constitutional Affairs.

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Original: EN

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Manuscript completed in April 2021
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LIST OF ABBREVIATIONS

APEX	Court at the top of the hierarchy of courts
CJEU	Court of Justice of the European Union
EC	European Communities
EC Treaty	Treaty establishing the European Community
ECB	European Central Bank
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	Court of Justice
EFSF	European Financial Stability Facility
ESCB	European System of Central Banks
ESM	European Stability Mechanism
EU	European Union
EUChFR	EU Charter of Fundamental Rights
GDPR	General Data Protection Regulation
GFCC	German Federal Constitutional Court
PSPP	Public Sector Purchase Programme
PEPP	Pandemic Emergency Purchase Programme
OMT	Outright Monetary Transactions
QE	quantitative easing
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

ABBREVIATED EXECUTIVE SUMMARY

The present study examines the *PSPP* judgment of the German Federal Constitutional Court. It puts it into context, makes a normative assessment, analyses the negative consequences, and makes some policy recommendations. After a brief introduction (1.), the study consists of five parts:

- The second part presents the key passages of the *PSPP* judgment. It describes how the Federal Constitutional Court, for the first time, defied a judgment of the European Court of Justice by declaring that the latter had acted *ultra vires* (2.).
- The third part analyses the doctrine of primacy of EU law. First, it describes the development of the doctrine in the case law of the Court of Justice. While the Court of Justice insists on the absolute primacy of EU law over the domestic law of Member States, it has shown considerable flexibility to take the interest of Member States into account (3.1.). Second, it examines the position of Member States' apex (supreme and constitutional) courts concerning the doctrine of primacy. It shows that Member States' courts have mostly accepted primacy of EU law, but carved out certain limited exceptions. The court that is commonly considered the most influential is the German Federal Constitutional Court. The GFCC has developed three exceptions – the Solange doctrine, the constitutional identity review, and the *ultra vires* doctrine, which was applied in the *PSPP* judgment. Nevertheless, before *PSPP*, the Federal Constitutional Court has never defied the Court of Justice (3.2.). Other Member States' apex courts have often been influenced by the Federal Constitutional Court. While there are two other decisions in which domestic apex courts refused to apply rulings of the ECJ, no court has gone as far as the GFCC in *PSPP* (3.3.).
- The fourth part analyses the proportionality test as an instrument to review the delimitation of competences between the EU and Member States. It shows that the Court of Justice has always applied a deferential standard when reviewing the actions of EU institutions. The *Weiss* judgment, in which the Court of Justice found the PSP program to be consistent with the EU treaties, is, therefore, in line with the Court's prior jurisprudence (4.1.). While this approach has drawn some criticism in the legal literature, it has largely been accepted even by the German EU law scholarship (4.2.).
- The fifth part provides a normative assessment of the *PSPP* judgment of the German Federal Constitutional Court and analyses the negative consequences of the judgment. It argues that the judgment does not only violate EU law (5.1.), but that it is also inconsistent with the legal framework for *ultra vires* review that the GFCC has established itself in its prior jurisprudence (5.2.). The judgment has several potential negative long-term consequences. It creates uncertainty for the monetary policy of the ECB and threatens to undermine the coherent application of EU law in all Member States (5.3.).
- The sixth part makes policy recommendations. We recommend three measures: First, we recommend that the EU Commission should initiate an infringement procedure against the Federal Republic of Germany under Art. 258 TFEU. Second, we recommend that the ECB provides a proportionality assessment in its justification of its monetary policy decisions. Third, in the long term, we recommend to discuss the introduction of a separate Chamber of the Court of Justice that is exclusively dedicated to reviewing the delimitation of competences between the EU and the Member States.

EXECUTIVE SUMMARY

Background

On 5 May 2020, the German Federal Constitutional Court (GFCC) issued a judgment concerning the Public Sector Purchase (PSP) program of the European Central Bank. Even though, the Court of Justice (ECJ) had declared the Public Sector Purchase Programme (PSPP) to be compatible with the EU treaties, the Federal Constitutional Court argued that the Court of Justice had acted outside its competences because it had not taken all relevant factors into account in its proportionality analysis and applied a too deferential standard of review. Furthermore, it also argued that the PSPP itself violated the EU treaties because the ECB had failed to justify the program sufficiently. Nevertheless, it gave the latter a three-month window to remedy this deficiency.

The judgment of the GFCC is of fundamental importance because it is the first time that the Federal Constitutional Court defies a judgment of the Court of Justice. While there have been other decisions of Member States' apex courts (with 'apex' courts we refer to courts that functionally sit at the top of the hierarchy of courts within a jurisdiction, notwithstanding their denomination as 'constitutional', 'supreme', or 'high' courts) that have refused to apply judgments of the Court of Justice, none has been as far-reaching as the *PSPP* judgment of the GFCC.

Aim

The present study puts the *PSPP* judgment into context, makes a normative assessment of the judgment and recommends policy measures in order to limit its negative consequences. In particular, the study has the following aims:

- It analyses the development and normative status of the **principle of primacy**, both from the perspective of the Court of Justice and the perspective of Member States' apex courts.
- It analyses the **principle of proportionality,** i.e. the doctrinal instrument, on which the *PSPP* judgment was based; it examines the case law of the Court of Justice, its interpretation in the legal literature and the position of other Member States' courts.
- It makes a normative assessment of the *PSPP* judgment and examines the potential consequences that it may have on the EU legal order and EU monetary policy.
- It recommends policy measures in order to limit the negative consequences of the *PSPP* judgment.

Results

1. Primacy of EU Law

The study starts out with analysing the development and the current status of the primacy doctrine, one of the cornerstones of the EU legal order. It will focus exclusively on the relationship between the EU legal order and the legal orders of the Member States. Under the doctrine, the Court of Justice claims that EU law has absolute primacy over the domestic legal order of the Member States, including the Member States' constitutions. While the Court of Justice has never explicitly renounced the absolute character of the primacy of EU law, a closer analysis reveals that it has shown considerable flexibility when taking Member States' interests into account. It has recognized that f**undamental principles of**

national constitutions have to be taken into consideration in the justification analysis in the context of EU fundamental freedoms, afforded a margin of discretion to Member States' courts when applying abstract standards of EU law to concrete cases and even changed its jurisprudence in order to react to the concerns of Member States' apex courts (3.1.).

While Member States' apex courts have generally accepted the primacy of EU law, they have carved out considerable reservations in their jurisprudence. The Court that is commonly considered to be the most influential is the German Federal Constitutional Court. The GFCC has developed three exceptions to the primacy of EU law: First, it has established the so-called *Solange* reservation. According to this reservation, the Court reserves itself a subsidiary competence to review EU legal acts on their conformity with fundamental rights of the German Constitution to the extent that EU fundamental rights protection is not adequate. Second, it has developed a constitutional identity review. According to this reservation, EU legal acts that violate core guarantees of the German Constitution, such as the guarantee of human dignity, are inapplicable within the German legal order. Finally and most controversially, the Federal Constitutional Court has also developed an *ultra vires* review, under which it reserves itself the competence to review EU legal acts on whether they are within the competence of the issuing institution. Despite these reservations, the Federal Constitutional Court has never openly defied the Court of Justice before the *PSPP* judgment. Instead, it has – often successfully – taken advantage of grey areas in the interpretation of EU law to nudge the Court of Justice in particular directions. The *PSPP* judgment is, therefore, new territory in the relationship between the GFCC and the ECJ (3.2.).

The study continues to analyse the position of other Member States' apex courts, i.e. courts that sit functionally at the top of the hierarchy of courts within a jurisdiction, notwithstanding their denomination as 'constitutional', 'supreme', or 'high' courts. This analysis shows that many courts have developed reservations that are similar to the ones of the Federal Constitutional Court. Often, they are even explicitly inspired by the jurisprudence of the GFCC. Nevertheless, open defiance of the Court of Justice has been rare. There are only two previous examples: A decision of the Czech Constitutional Court on the level of Slovak pensions declared a judgment of the Court of Justice *ultra vires*. In a decision of the Danish Supreme Court, the latter found that a decision of the Court of Justice could not be applied in Denmark because it would have forced the Supreme Court to violate the principle of legal certainty for private contracting parties. Both decisions are limited in their effects: They do not concern the actions of EU institutions, but rather the interpretation of domestic law in the light of EU law. Furthermore, the Czech decision is most probably the result of an internal dispute between the Constitutional Court and the Supreme Administrative Court so that its precedential value is limited (3.3. and 3.4.).

2. The proportionality test as a means to delimit competences

A further part of the study is dedicated to the proportionality test as a means to delimit competences. An analysis of the case law of the Court of Justice reveals that the ECJ does not always distinguish between the protection of individual interests and Member State autonomy when it applies the proportionality test while reviewing the actions of EU institutions. Concerning the standard of review, the Court of Justice is rather deferential. It examines whether the challenged measure was "manifestly inappropriate" or whether it displayed a "manifest error or constitute[d] a misuse of power or whether the authority in question clearly exceeded the bounds of its discretion". In order to determine the limits of discretion, the Court of Justice follows a procedural approach. In particular, it examines whether legislation was based on an impact review and whether the concerned institution has taken all relevant factors into account. While the standard of review is deferential, it is not toothless. There are several cases in which the Court of Justice has found that a measure of an EU institution violated the proportionality test. Overall, the application of the proportionality test in *Weiss*, the ECJ's judgment reviewing

the PSP program of the ECB, followed the standards developed in its earlier jurisprudence (4.1.). A review of the legal literature on proportionality in EU law reveals that the standard of review that the Court of Justice applies is sometimes considered to be too deferential. Nevertheless, the ECJ's approach is largely accepted in the legal literature (4.2.). Furthermore, prior to the GFCC's judgment in *PSPP*, there were no decisions of domestic courts proposing a different standard of review for the application of the proportionality test under Art. 5 (4) TEU (4.3.).

3. Normative assessment of the PSPP judgment

A normative assessment of the *PSPP* judgment shows that the judgment violates EU law and is also inconsistent with the normative standards that the Federal Constitutional Court has developed for the *ultra vires* review in its prior jurisprudence. The violation of EU law is straightforward: According to Art. 344 TFEU, the Member States undertake not to submit a dispute concerning the interpretation or application of the EU treaties to any other method of settlement than the one provided for by the treaties. Under the treaties, the Court of Justice has the ultimate authority to interpret EU law. This can be derived from the Art. 267 TFEU, according to which Member States' courts can refer a question about the interpretation of EU law to the ECJ. Under the conditions of Art. 267 (3) TFEU, they are even obliged to do so. Such an obligation necessarily requires Member States' courts to follow the interpretation proposed by the Court of Justice (5.1.).

The *PSPP* judgment is also inconsistent with the standards that the Federal Constitutional Court has developed itself under its *Honeywell* framework for the *ultra vires* review. According to this framework, an act can only be declared *ultra vires* if there is a manifest violation of EU law and if this violation is of structural importance. Both conditions are not met in the present case. By applying a deferential standard in its review of the PSP program, the Court of Justice has respected the independence of the ECB, which has its normative basis in Art. 282 (3) TFEU. The independence of the ECB is not only guaranteed by the EU treaties, but also enshrined in Art. 88 of the German Constitution, according to which Central Bank independence is a necessary precondition for transferring the competence for monetary policy to the EU level. Furthermore, the *Weiss* decision of the Court of Justice is in line with the standards of review that the Court had developed in its prior jurisprudence. Even if one might disagree with the reasoning of the Court of Justice, the *Honeywell* framework requires a violation of competences to be "manifest". However, there is no basis for arguing that the reasoning of the Court of Justice was "objectively arbitrary" or "incomprehensible" from a methodological point of view as the GFCC did in *PSPP*.

Furthermore, a potential violation of competences is not of structural importance. The GFCC has argued that the main deficiency of the PSP program was an insufficient justification of the program in the communication by the ECB. However, it argued that this deficiency could be remedied if the ECB provided an adequate proportionality assessment within three months. It is hardly justifiable how a perceived violation that can be remedied by updating the justification of a measure should have structural importance (5.2.).

4. Negative Consequences of the PSPP judgment

The *PSPP* judgment has several negative consequences for monetary policy and the EU legal order. The direct short-term consequences are probably limited. The ECB has provided the required proportionality assessment, and the German Central Bank has deemed it to be sufficient to continue to participate

in the purchasing of Member States' bonds under the PSPP. However, there is an implementation procedure pending before the GFCC that asks the Court to review whether the proportionality assessment by the ECB indeed meets the conditions established in the *PSPP* judgment.

Nevertheless, the long-term consequences are more dangerous. They concern both monetary policy and the coherence of the EU legal order. Considering the vague standards that the GFCC has developed in its *PSPP* judgment, monetary policy is under a constant threat to be reviewed by the Federal Constitutional Court, which could prohibit the *Bundesbank* from participating in monetary policy measures of the ECB. Currently, there is a procedure pending against the PEP program of the ECB that was initiated to combat the negative consequences of the COVID-19 pandemic. This could cause considerable uncertainty for the implementation of the ECB's monetary policy.

The threat for the coherence of the EU legal order might be even more severe. For a long time, the relationship between the Court of Justice and the German Federal Constitutional Court has been characterized by conflict, but also by mutual respect. If the Federal Constitutional Court believes that it does not have to continue to respect the jurisprudence of the Court of Justice, this might endanger the uniform implementation of EU law in the Member States. This does not only concern Germany, as the judgment may set examples for other Member States' courts to defy the Court of Justice. Thus, the judgment is a serious threat to the primacy of EU law, which is one of the cornerstones of the EU legal order, guaranteeing the equal application of EU law within the European Union (5.3.).

5. Policy Recommendations

The EU institutions should try to take measures that ease the conflict between the Federal Constitutional Court and the Court of Justice and facilitate a return of these courts to a respectful dialogue. Most importantly, we recommend that the EU Commission initiates an infringement procedure before the Court of Justice under Art. 258 TFEU. This would make the violation of EU law salient and put indirect pressure on the Federal Constitutional Court to end its unlawful conduct. At the same time, we recommend that the ECB performs a proportionality analysis in its communication of monetary policy decisions as suggested by the Federal Constitutional Court. This would contribute to easing tensions and only requires the ECB to communicate the factors that it, presumably, takes into account anyways when making monetary policy decisions in a slightly different way. Finally, in the long term, we propose an institutional reform of the judicial system of the EU. Following some academic commentators, we propose the introduction of a separate chamber of the Court of Justice that is composed, in equal parts, of judges of the Court of Justice and Member States' apex courts and that exclusively deals with the interpretation of EU competences. Such a Chamber would counter the perception – whether justified or not – that the Court of Justice is biased towards European integration and does not sufficiently protect Member State autonomy (6.).

1. INTRODUCTION

The *PSPP* judgment that the German Federal Constitutional Court (GFCC) issued on 5 May 2020 sent shockwaves through the European Union.[1] For the first time, the Court openly defied a decision of the Court of Justice (ECJ) and declared the latter to be *ultra vires*. Furthermore, the GFCC also argued that the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) equally exceeded the ECB's competences because the latter had failed to justify its policy adequately. However, the Court gave the ECB a three-month window to remedy this deficiency.

The *PSPP* judgment has drawn considerable criticism in the legal literature.[2] It is seen as a potential threat to the unity and coherence of EU law. For this reason, this study examines the *PSPP* judgment and its consequences for the EU legal order. The analysis proceeds in five steps: First, we will recapitulate the most important messages of the *PSPP* judgment (2.). Second, we put the judgment into context and analyse the development of the doctrine of primacy of EU law and its importance for the relationship between EU law and the domestic law of the Member States. We examine the position of the Court of Justice, the case law of the German Federal Constitutional Court and also the case law of some selected apex courts of other EU Member States (3.). Third, we analyse the principle of proportionality as an instrument to delimit competences, i.e. the doctrine on which the GFCC based its decision in *PSPP*. We review the case law of the Court of Justice, its reception in the legal literature and the interpretation of the doctrine by other Member States' courts (4.). Fourth, we provide a normative assessment of the *PSPP* judgment, both under EU law and under the *ultra vires* standards that the GFCC had developed in its previous case law, and an analysis of the negative consequences of the judgment for the EU legal order and EU monetary policy (5.). Finally, we conclude with three policy recommendations: First, we recommend that the EU Commission should initiate an infringement procedure against the Federal Republic of Germany under Art. 258 TFEU. Second, we recommend that the ECB provides a proportionality assessment in its justification of its monetary policy decisions. Third, in the long term, we recommend to discuss the introduction of a separate Chamber of the Court of Justice that is exclusively dedicated to reviewing the delimitation of competences between the EU and the Member States.

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[1] BVerfG, 5 May 2020, 2 BvR 859/15, 2020 *Neue Juristische Wochenschrift* 1647 (2020) – *PSPP II*. Official english translation available:
https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html

[2] See, e.g., Editorial Comments, 'Not mastering the treaties: The German Federal Constitutional Court's PSPP judgment', 57 *Common Market Law Review* (2020) p. 965; S. Egidy, 'Proportionality and procedure of monetary policy-making', 19 *International Journal of Constitutional Law* (forthcoming 2021); F.C. Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020', 16 *European Constitutional Law Review* (2020) p. 733; F.C. Mayer, 'To Boldly Go Where No Court Has Gone Before: The German Federal Constitutional Court's ultra vires Decision of May 5, 2020', 21 *German Law Journal* (2020) p. 1116; M. Nettesheim, 'Das PSPP-Urteil des BVerfG – ein Angriff auf die EU?' 2020 *Neue Juristische Wochenschrift* (2020) p. 1631; I. Pernice, 'Machtspruch aus Karlsruhe: "Nicht verhältnismäßig? Nicht verbindlich? Nicht zu fassen...', *Europäische Zeitschrift für Wirtschaftsrecht* (2020) p. 508; N. Petersen, 'The PSPP Decision of the German Federal Constitutional Court and Its Consequences for EU Monetary Policy and European Integration", 2020.2 *Revue Trimestrielle de Droit Financier* (2020) p. 28; S. Poli and R. Cisotta, 'The German Federal Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission', 21 *German Law Journal* (2020) p. 1078; H. Sauer, 'Substantive EU law review beyond the veil of democracy: the German Federal Constitutional Court ultimately acts as Supreme Court of the EU', *EU Law Live* (9 May 2020) p. 2; B. Wegener, 'Karlsruher Unheil – Das Urteil des Bundesverfassungsgerichts vom 5. Mai 2020 (2 BvR 859/15) in Sachen Staatsanleihekäufe der Europäischen Zentralbank', 55 *Europarecht* (2020) p. 348; M. Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', 21 *German Law Journal* (2020) p. 979. For an economists' critique see P. Bofinger, M. Hellwig, M. Hüther, M. Schnitzer, M. Schularick and G. Wolff, 'Gefahr für die Unabhängigkeit der Notenbank', *Frankfurter Allgemeine Zeitung* (29 May 2020) p. 18.

2. THE PSPP JUDGMENT OF THE GERMAN FEDERAL CONSTITUTIONAL COURT

KEY FINDINGS

In the *PSPP* judgment, the German Federal Constitutional Court declared both the Court of Justice's decision in *Weiss* and the ECB's PSP program *ultra vires*. The GFCC argued that the Court of Justice had applied a too deferential standard of review and that it had not taken all relevant factors into account in its proportionality analysis. Furthermore, it held that the ECB had provided an insufficient proportionality assessment of its PSP program. Nevertheless, it gave the ECB a three-month window to remedy this deficiency and to provide an adequate proportionality assessment.

The *PSPP* judgment of the GFCC deals with the PSP program of the European Central Bank (ECB). Under the *PSPP*, the ECB buys Member States' bonds on the secondary market (i.e. not directly from the Member States, but from third parties after they have been issued), a policy also known as Quantitative Easing (QE). This program was challenged before the German Federal Constitutional Court in May 2015. The applicants of the case argued that the German government, the German legislature and the German Central Bank, the *Bundesbank*, had violated the German constitution by refraining from taking all possible measures to stop the PSP program. By decision of 18 July 2017, the Federal Constitutional Court stayed the proceedings and initiated a preliminary reference procedure before the Court of Justice (ECJ), pursuant to Art. 267(1) TFEU,[3] raising doubts regarding the competences of the ECB to implement the *PSPP*. In particular, it argued that the PSP program violated Arts. 123 and 127 TFEU.

Answering these questions, in its *Weiss* judgment from 11 December 2018, the Court of Justice held that the PSP program did not violate the European treaties.[4] However, instead of implementing the *Weiss* decision of the ECJ, the Federal Constitutional Court argued in response to *Weiss* that both, the decision of the Court of Justice and the PSP program of the ECB were *ultra vires* and thus violated the German constitution. Nevertheless, it gave the ECB the opportunity to remedy the situation by providing a proportionality assessment of the program within three months. If the ECB did not provide an adequate assessment, the GFCC ordered the German Central Bank to stop participating in the purchasing of Member States' bonds under the program.

The GFCC derives the competence to review whether acts of EU institutions are *ultra vires* from the principle of democracy and the right to participate in elections that are guaranteed by Art. 20, para. 2, and Art. 38 of the German Basic Act.[5] According to the interpretation of the GFCC, the principle of democracy requires that competences that are transferred to a supranational organization have to be well-defined and limited. From this principle, the Court derives an obligation of the German government and the German parliament to monitor potential competence transgressions of the supranational organization and to take measures to correct such competence transgressions.[6] On this basis, the Federal Constitutional Court reserves itself the right to review the conformity of acts of EU institutions with their competences.[7]

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[3] BVerfGE 146, 216 – *PSPP I*. English translation: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718_2bvr085915en.html

[4] Case C-493/17, *Weiss*, 11 Dec. 2018, EU:C:2018:1000.

[5] BVerfG, supra note 1, at paras. 101-109.

[6] *Id.*, at para. 109.

[7] *Id.*, at paras. 110-113.

In line with its previous case law, the GFCC argued that the competences of EU institutions had to be interpreted by taking into account the assessment of the ECJ. However, it argued that it could not follow the latter if the reasoning of the Court of Justice was "incomprehensible" or "objectively arbitrary".[8] The GFCC discussed the potential violation of two norms – the prohibition to purchase debt instruments directly from Member States guaranteed by Art. 123 TFEU and the qualification of the PSP program as monetary policy under Art. 127 TFEU. While the Federal Constitutional Court raised serious doubts regarding the compatibility with Art. 123 TFEU, it still deemed the decision of the ECJ to be legally justifiable.[9]

However, it held that the Court of Justice's reasoning regarding the qualification as monetary policy was outside the realm of what was legally acceptable.[10] In particular, it took issue with the application of the proportionality test of the Court of Justice. The GFCC criticized that the ECJ had not second-guessed the aim of the PSPP:

> "In this respect, the CJEU simply accepts, as it did in *Gauweiler*, the ECB's assertion – despite the substantiated objections challenging this assertion – that the PSPP pursued a monetary policy objective, without questioning the underlying factual assumptions or at least reviewing whether the respective reasoning is comprehensible, and without testing these assumptions against other indications that evidently argue against the classification as a monetary policy measure."[11]

Furthermore, the Federal Constitutional Court argued that the Court of Justice had been too deferential in its proportionality assessment. In order to compensate for the weak democratic legitimacy of the ECB, the latter's competences had to be interpreted narrowly and the proportionality of the ECB's measures had to be scrutinized strictly.[12] From the perspective of the GFCC, the Court of Justice had failed to do so:

> "With self-imposed restraint, the CJEU limits its review to whether there is a "manifest error of assessment" on the part of the ECB (cf. CJEU, loc. cit., paras. 56, 78, 91), whether the PSPP "manifestly" goes beyond what is necessary to achieve its objective (cf. CJEU, loc. cit., paras. 79, 81, 92), and whether its disadvantages are "manifestly" disproportionate to the objectives pursued (cf. CJEU, loc. cit., para. 93 et seq.); this standard of review is by no means conducive to restricting the scope of the competences conferred upon the ECB, which are limited to monetary policy."[13]

This failure to apply a stricter standard of scrutiny led the Federal Constitutional Court to qualify the decision of the Court of Justice as "methodologically unjustifiable", "simply incomprehensible" and "objectively arbitrary".[14] By declaring the *Weiss* judgment *ultra vires*, the Federal Constitutional Court argued that it was not bound by the latter and entered into a *de novo* review of the PSP program. While the GFCC accepted that the PSPP was, in principle, capable of increasing the level of inflation, which constituted a monetary policy goal,[15] it argued that the ECB should have taken economic consequences of the program into account in its decision-making process.[16] By failing to take these factors

[8] *Id.*, at para. 118.

[9] *Id.*, at paras. 180-221.

[10] *Id.*, at paras. 123-153.

[11] *Id.*, at para. 137.

[12] *Id.*, at para. 143.

[13] *Id.*, at para. 156.

[14] *Id.*, at paras. 118, 133, 153.

[15] *Id.*, at para. 166.

[16] *Id.*, at paras. 168-175.

into account, the decision-making procedure establishing the PSPP had violated Art. 5 TEU.[17] However, the Court argued that the ECB could remedy the situation by providing an adequate proportionality assessment within three months.[18] If the ECB failed to do so, the German Central Bank was prohibited from continuing to purchase bonds under the PSPP.[19]

After the *PSPP* judgment, the ECB provided a proportionality assessment of the PSP program in the protocols of its meetings on 3 and 4 June 2020.[20] Consequently, the president of the German Central Bank considered the requirements of the *PSPP* judgment to be met and announced that the German Central Bank would continue to participate in the PSPP.[21] On 7 August 2020, several applicants of the *PSPP* judgment applied for an implementation order before the Federal Constitutional Court, asking the latter to declare that the ECB had not complied with its obligations under the *PSPP* judgment and that the German Central Bank was, consequently, obliged to discontinue its participation in the PSP program.[22] This procedure is currently pending.[23]

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[17] *Id*., at para. 177.

[18] *Id*., at para. 235.

[19] *Id*.

[20] See Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main on Wednesday and Thursday, 3-4 June 2020,
https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html.

[21] See 'Weidmann sieht Forderungen des Verfassungsgerichts als erfüllt an', Frankfurter Allgemeine Zeitung, 3 Aug. 2020, https://www.faz.net/aktuell/finanzen/jens-weidmann-verfassungsgerichtsurteil-zur-ezberfuellt-16887907.html?_GEP=s3.

[22] Case 2 BvR 2006/15.

[23] A possible controversial result of this decision is indicated by the rejection of one of the Justices for potential partiality because she had given an interview relating to some issues of the case prior to her appointment. For a sharp and critical analysis of this decision, see F. Meinel and C. Neumeier, 'Befangen?: Zur Ablehnung der Bundesverfassungsrichterin Astrid Wallrabenstein im PSPP-Verfahren', https://verfassungsblog.de/befangen/.

3. THE RELATIONSHIP BETWEEN EU LAW AND DOMESTIC CONSTITUTIONAL LAW

KEY FINDINGS

The doctrine of primacy of EU law has evolved considerably since its early days in the 1960s. This concerns the case law of both, the Court of Justice and apex courts of the individual Member States. The Court of Justice formally insists that EU law has absolute primacy over the domestic law of the Member States. Nevertheless, it has shown considerable flexibility in taking into account the interests of Member States' apex courts. It accepts fundamental principles of national constitutions as justification for the restriction of EU fundamental freedoms, gives Member States courts discretion when applying abstract legal standards to concrete cases and even changes its own jurisprudence in order to take crucial concerns of Member States' courts into account.

The German Federal Constitutional Court, which is often considered to be the most influential Member States' court, has generally accepted the primacy of EU law. However, it has carved out three exceptions: the ***Solange*** reservation for fundamental rights, the **constitutional identity reservation**, and the **ultra vires doctrine**. Nevertheless, prior to the *PSPP* judgment, the Federal Constitutional Court has never openly defied the Court of Justice. The apex courts of other Member States have often developed similar exceptions. Often, they even explicitly cite the GFCC as a source of inspiration. Nevertheless, no other Member State court has, as yet, gone as far as the GFCC in its *PSPP* judgment.

The doctrine of primacy of EU law is a fundamental pillar of the EU legal order. It aims at ensuring the unity and coherency of EU law. This part analyses the application of the doctrine by the Court of Justice and some selected apex courts of EU Member States. First, we will analyse the doctrine from the perspective of the Court of Justice. The ECJ has always formally insisted on the absolute primacy of EU law over the domestic law of the Member States. However, it has also shown considerable flexibility in taking crucial interests of Member States' courts into consideration (3.1.). Secondly, we will have a closer look at the doctrine developed by the German Federal Constitutional Court (3.2.). The third section will compare the German experience to the case law of a selection of other Member States (3.3.). The fourth section concludes (3.4.).

3.1. The perspective of the Court of Justice (ECJ)

The ECJ has always claimed ultimate authority in determining the relationship between EU and domestic law. In the landmark cases *van Gend en Loos* and *Costa v. ENEL*, the Court developed the fundamental doctrines of direct effect and primacy of EU Law.[24] According to these doctrines, EU law has absolute primacy over domestic law, and this primacy has to be taken into account by domestic courts in their decisions. The Court of Justice has confirmed these doctrines in later cases. Notably, it argued in *Internationale Handelsgesellschaft* that EU law enjoyed primacy even *vis-à-vis* fundamental rights guaranteed in national constitutions.[25]

[24] Case 26/62, *van Gend en Loos*, [1963] ECR 1; Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

[25] Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, at para. 3. See also Case 106/77, Simmenthal, [1978] ECR 629, paras. 21-26; Case 149/79, *Commission v. Belgium* [1980] ECR 3881, para 19; Joined Cases C-46 & 48/93, *Brasserie du Pêcheur and Factortame II*, [1996] ECR I-1029, para. 33; Case C-473/93, *Commission v. Luxemburg*, [1996] ECR I-3207, para. 38; Case C-213/07, *Michaniki*, [2008] ECR I-9999, paras. 62-69.

Despite the apparent rigor of the doctrine of primacy of EU law, the Court of Justice has allowed some flexibility to Member States' courts and often taken the concerns of the latter into account.[26] This flexibility is sometimes reflected in the doctrine. In the following, we would like to discuss two doctrinal tools with which the ECJ grants flexibility to Member States' courts – the acknowledgement of fundamental constitutional principles of the Member States as legal interests to justify restrictions of the EU fundamental freedoms and the discretion granted to Member States' courts on evaluating the circumstances of the specific case in the preliminary reference procedure.

The Court of Justice has recognized in its jurisprudence that fundamental principles of domestic constitutions have to be taken into account when analysing the justification of restrictions of the EU fundamental freedoms. This concerns both the national identity of Member States and the protection of fundamental rights.[27] In *Commission v. Luxembourg*, the Court of Justice acknowledged that "the preservation of the Member States' national identities is a legitimate aim respected by the Community legal order".[28] However, in the concrete case, it held that it was disproportionate to deny certain public sector jobs, such as in the field of education, to foreign nationals. Instead, the national identity could have been preserved as effectively by ensuring that the respective candidates fulfilled all conditions required for recruitment.[29]

The issue of national identity as a possible restriction of fundamental freedoms came up again in the case of *Sayn-Wittgenstein*.[30] The case concerned an Austrian national who had been adopted by a German with a noble name. When the Austrian authorities refused to acknowledge the noble title in her birth certificate, the applicant claimed that this refusal violated her freedom of movement. However, the Court of Justice argued that Austria's law abolishing the nobility and prohibiting its nationals to acquire titles of nobility was a proportionate means to pursue a goal central to Austrian national identity.[31]

In *Omega*, the ECJ acknowledged that fundamental values enshrined in the national constitution could justify restrictions of fundamental freedoms.[32] The case concerned a prohibition to operate a 'laserdrome' issued by the German administrative authorities. In the laserdrome, players could simulate war games with sub-machine-gun-type laser targeting devices and sensory tags recording whether a player had been shot. The applicant argued that the prohibition violated the freedom to provide services guaranteed by Art. 56 TFEU because the equipment was provided by a UK company under a franchising contract. The German authorities and the German Federal Administrative Court argued that the prohibition was justified because the shooting simulation offered by the applicant violated the principle of human dignity in the German Constitution. The Court of Justice accepted the argument of the

[26] See N. Petersen, 'Karlsruhe's Lochner moment? A rational choice perspective on the German Federal Constitutional Court's Relationship to the CJEU after the PSPP decision', 21 *German Law Journal* (2020) p. 995 at pp. 999-1001.

[27] See A. v. Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', 48 *Common Market Law Review* (2011) p. 1417; M. Claes, 'The Primacy of EU Law in European and National Law', in D. Chalmers and A. Arnull (eds.), *The Oxford Handbook of European Union Law* (2015) p. 178 at p. 187.

[28] *Commission v. Luxembourg*, *supra* note 25, at para. 35.

[29] *Id*.

[30] Case C-208/09, *Sayn-Wittgenstein*, 22 Dec. 2010, EU:C:2010:806.

[31] *Id*., at paras. 92-93.

[32] Case C-36/02, *Omega*, [2004] ECR I-9609, at para. 32.

Federal Administrative Court and held that the restriction of the freedom to provide services was justified.[33] In its reasoning, the Court of Justice referred explicitly to the level of protection of human dignity prevailing in Germany.[34]

Another doctrinal tool of the Court of Justice to give flexibility to Member States' courts is limiting the reach of its decisions in the preliminary reference procedure. In the preliminary reference procedure under Art. 267 TFEU the ECJ is asked to give an abstract opinion about the interpretation of the EU treaties. By contrast, it is not asked to decide the case at issue. Consequently, the Court can vary the level of guidance it gives to national courts when applying EU law to the concrete case. The less guidance the Court of Justice gives, the greater the discretion of the Member States' courts.

The Court of Justice's controversial *Åkerberg Fransson* judgment illustrates this mechanism well.[35] The referring Swedish court had asked the Court of Justice whether EU fundamental rights had to be taken into account in a criminal case concerning tax fraud. In the underlying case, a Swedish fisher had failed to fully declare his income for tax purposes. For this reason, the Swedish tax authorities had imposed an administrative penalty on him. In addition, he was put on trial for tax fraud before Swedish criminal courts. In the criminal proceedings, he argued that a criminal penalty in addition to the administrative sanction would violate the principle of *ne bis in idem* guaranteed by the EU Charter of Fundamental Rights (EUChFR).

The Court of Justice argued in its judgment that EU fundamental rights were applicable in the case.[36] Part of the withheld taxes were value added taxes (VAT). The ECJ deemed criminal sanctions to be part of the Member States' obligations to ensure a correct collection of VAT under Art. 273 of Council Directive 2006/112/EC of November 2006 and to counter illegal activities affecting the financial interests of the EU under Art. 325 TFEU.[37] Therefore, the ECJ argued that Sweden implemented EU law when prosecuting tax fraud cases involving VAT so that the EU Charter of Fundamental Rights was applicable.[38] However, the Court of Justice showed restrained when applying the prohibition of *ne bis in idem* in Art. 50 EUChFR to the concrete facts of the case. It argued that it was up to the referring Swedish court to determine whether the administrative sanction imposed by the Swedish tax authorities was actually a criminal penalty in the sense of Art. 50 EUChFR.[39] This tendency to defer the application of EU fundamental rights in the concrete case to Member States' courts can also be observed in other contexts. For example, the Court of Justice has argued that it is up to Member States' courts to resolve conflicts between the protection of privacy and the freedom of expression in the context of the General Data Protection Regulation (GDPR).[40]

The preceding discussion of the case law of the Court of Justice has shown that the ECJ has developed certain doctrinal instruments to give Member States' courts a certain amount of discretion and to take their interests seriously. However, the Court of Justice's accommodation of Member States' courts goes beyond what is reflected explicitly in the doctrine. Instead, the Court of Justice sometimes implicitly adjusts its own jurisprudence in order to take concerns of Member States' courts into account.

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[33] *Id.*, at para. 39.

[34] *Id.*

[35] Case C-617/10, *Åkerberg Fransson*, 26 Feb. 2013, EU:C:2013:105.

[36] *Id.*, at paras. 17-27.

[37] *Id.*, at paras. 25-26.

[38] *Id.*, at para. 27.

[39] *Id.*, at paras. 36-37.

[40] Cases C-73/07, *Satakunnan Markkinapörssi and Satamedia*, [2008] ECR I-9831, at para. 54; C-345/17, *Buivids*, 14 Feb. 2019, EU:C:2019:122, at para.50.

Most famously, the Court of Justice developed a fundamental rights jurisprudence under the pressure of Member States' courts.[41] After the foundation of the European Communities, the Court of Justice had initially resisted the introduction of fundamental rights into the EC legal order.[42] However, when constitutional courts of the member states resisted, the Court of Justice changed course. Pre-empting judgments of the German Federal Constitutional Court[43] and the Italian Constitutional Court,[44] the Court of Justice held that fundamental rights "form an integral part of the general principles of law" in *Internationale Handelsgesellschaft*.[45] In its subsequent case law, the Court of Justice progressively developed its fundamental rights jurisprudence,[46] which prompted the German Federal Constitutional Court to give up its initial resistance.[47]

A more recent example of the Court of Justice's flexibility is the series of *Taricco* cases.[48] The cases concerned overly short limitation periods for VAT fraud in Italy. The accused in the original procedure had committed VAT fraud, but could not be convicted because of the short limitation period and a cap concerning the time for which the limitation period could be interrupted.[49] The Court of Justice argued that short limitation periods violated Art. 325 TFEU, according to which Member States have an obligation to refrain from actions negatively affecting the financial interests of the EU, if the Member State court found that the short limitation period had the consequence that the accused escaped criminal punishment in a considerable number of cases.[50] The Court added that a retroactive disapplication of the limitation clause would not violate the prohibition of retroactive criminal sanctions guaranteed by Art. 49 EUChFR.[51] The Court referred, *inter alia*, to the case law of the European Court of Human Rights (ECtHR), according to which the retroactive extension of the limitation clause did not violate Art. 7 of the European Convention of Human Rights (ECHR).[52]

When the case reached the Italian Constitutional Court, the latter took issue with the retroactive disapplication of the limitation clause.[53] The Italian court argued that, according to its longstanding jurisprudence, limitation clauses were part of substantive criminal law so that the prohibition of retroactive application of criminal sanctions also covered limitation clauses in Italian law. Therefore, it initiated a second preliminary reference procedure. It asked the Court of Justice to reconsider its interpretation of Art. 49 EUChFR, arguing that a retroactive disapplication of the limitation clause violated the prohibition of retroactive application of criminal sanctions in Art. 25 of the Italian Constitution.

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41 See M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005) p. 262 at pp. 294-295; J.H. Dingfelder Stone, 'Agreeing to Disagree: The Primacy Debate between the German Federal Constitutional Court and the European Court of Justice', 25 *Minnesota Journal of International Law* (2016) p. 127 at p. 135; U. Haltern, *Europarecht: Dogmatik im Kontext, Vol. II: Rule of Law, Verbunddogmatik, Grundrechte*, 3rd edn. (Mohr Siebeck 2017) para. 1403.

42 Case 1/58, *Stork*, [1959] ECR 17; Joined Cases 36-38/59 & 40/59, *Ruhrkohlen-Verkaufsgesellschaft*, [1960] ECR 423.

43 BVerfGE 37, 271 – *Solange I*.

44 Corte costituzionale, 27 Dec. 1973, *Frontini*, 14 *Com. Mkt. L. Rev.* 372 (1974).

45 *Internationale Handelsgesellschaft*, *supra* note 25, at para. 4.

46 Case 4/73, *Nold*, [1974] ECR 491, at paras. 13-14; Case 44/79, *Hauer*, [1979] ECR 3727, at paras. 14-15.

47 BVerfGE 73, 339 – *Solange II*.

48 On the *Taricco* cases, see M. Bonelli, 'The *Taricco* saga and the consolidation of judicial dialogue in the European Union', 25 *Maastricht Journal of European and Comparative Law* (2018) p. 357. See further below, 3.3.6.

49 Case C-105/14, *Taricco*, 8 Sept. 2015, EU:C:2015:555.

50 *Id.*, at paras. 47-52.

51 *Id.*, at paras. 54-57.

52 *Id.*, at para. 57.

53 Corte costituzionale, 23 Nov. 2016, Order no. 24/2017.

In its response to the preliminary reference request of the Italian Constitutional Court, the Court of Justice acknowledged the concerns of the latter.[54] It argued that the retroactive disapplication of the limitation clause had to comply with the principles of foreseeability, precision, and non-retroactivity.[55] Therefore, if the retroactive disapplication of the limitation clause led to uncertainty in the Italian legal system, the Italian Constitutional Court was not obliged to disapply the Criminal limitation provisions at issue.[56] Consequently, the Court of Justice showed flexibility to accommodate the concerns of the Italian Constitutional Court.

The preceding analysis shows that the Court of Justice, despite insisting on the primacy of EU law, has shown a considerable amount of flexibility when it comes to the preservation of constitutional values important to domestic legal orders. It recognizes that the protection of these values can justify restrictions of fundamental freedoms, grants Member States' courts discretion when applying abstract legal standards to the concrete case at hand and revises its own jurisprudence in order to take serious concerns of Member States' courts into account. However, it is important to note that the Court of Justice still claims ultimate authority in determining which Member States' concerns are worthy of being taken into account when determining possible conflicts with EU law. Furthermore, all discussed judgments concern the accommodation of constitutional values of Member States. By contrast, we cannot observe similar decisions when it comes to the interpretation of the competences of the EU or its institutions.

3.2. The case law of German Federal Constitutional Court regarding European integration

The German Federal Constitutional Court has developed quite a complex case law when it comes to the relationship of German domestic law and EU law. In principle, the Federal Constitutional Court has accepted the primacy of EU law.[57] However, over the years, it has carved out three exceptions.[58] The oldest and most famous exception is the so-called *Solange* reservation, according to which the Court reserves itself the right to review EU legal acts on their conformity with fundamental rights. Secondly, the Court has established an exception for the preservation of German constitutional identity. The final exception is the *ultra vires* reservation, which was the basis for the *PSPP* decision.

3.2.1. The Solange reservation and fundamental rights review

The *Solange* reservation was developed by the Federal Constitutional Court in the early 1970s.[59] The Court had concerns about the lack of fundamental rights protection in the European Communities. When an applicant brought a case in which he claimed that an EC regulation violated his fundamental rights under the German Constitution, the Court seized the opportunity. In its *Solange I* judgment, it held that EC legal acts were reviewable on their conformity with German fundamental rights as long as

[54] Case C-42/17, *M.A.S.*, 5 Dec. 2017, EU:C:2017:936.

[55] *Id.*, at para. 51.

[56] *Id.*, at para. 59.

[57] See, e.g., BVerfGE 126, 286, at 301-302; 142, 123, at 187.

[58] On the case law of the German Federal Constitutional Court regarding the relationship between domestic law and EU law, see, generally, S. Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* (Mohr Siebeck 2016); N. Petersen, 'Germany', in F.M. Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (CUP 2019) p. 89 at pp. 90-96.

[59] BVerfGE 37,271 – *Solange I*.

there was no effective system of fundamental rights protection on the EC level.[60] Yet, in the case at issue, it found that the challenged EC regulation did not violate German fundamental rights.

This decision led to two developments: On the one hand, the Federal Constitutional Court received a significant number of constitutional complaints invoking a fundamental rights violation by EC legal acts.[61] On the other hand, the European Court of Justice continued to develop its fundamental rights jurisprudence which it had started in *Stauder*[62] and *Internationale Handelsgesellschaft*.[63] Because of these developments, the Federal Constitutional Court adapted its course in the so-called *Solange II* judgment.[64] It argued that the Court of Justice had developed a fundamental rights jurisprudence which guaranteed a sufficient level of fundamental rights protection on the European level. For this reason, it would refrain from reviewing EC legal acts on their consistency with German fundamental rights.[65] However, it reserved itself the right to intervene if, in the future, the level of fundamental rights protection in the EC turned out to be insufficient.[66]

This second *Solange* reservation has never been invoked by the Constitutional Court. To the contrary, in recent years, the Court has rather voiced concerns that the fundamental rights jurisprudence of the Court of Justice was too extensive.[67] Furthermore, when in 2000, an applicant tried to challenge the constitutionality of the EC banana market regulation through the constitutional complaint procedure, the Federal Constitutional Court swiftly declared the application to be inadmissible.[68]

Therefore, one may have wondered whether the doctrine still has any practical relevance. However, two recent decisions of the first Senate of the Federal Constitutional Court have made some decisive modifications to the doctrine and thus breathed new life into it.[69] Before we analyse these two decisions, it is necessary to look at one of the predecessors, the *European Arrest Warrant I* judgment that the Federal Constitutional Court delivered in 2005.[70] In this case, the Court had to decide about the implementation of the Framework Decision on the European arrest warrant.[71] In its judgment, the Court argued that the German legislature had to comply with German fundamental rights when it was implementing a legal act of the European Union to the extent that this legal act allowed for discretion regarding the implementation.[72]

This approach has recently been extended in a decision on Right to erasure (or "the right to be forgotten") from November 2019.[73] The decision concerned the implementation of the General Data Protection Regulation (GDPR).[74] The Constitutional Court reaffirmed its earlier jurisprudence in the *European*

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[60] BVerfGE 37, 271, at 285.

[61] See Haltern, *supra* note 41, at para. 1103.

[62] Case29/69, *Stauder*, [1969] ECR 419.

[63] See *supra* notes 45-46.

[64] BVerfGE 73, 339 – *Solange II*.

[65] BVerfGE 73, 339, 378-386.

[66] BVerfGE 73, 339, 387.

[67] BVerfGE 133, 277, at 316.

[68] BVerfGE 102, 147 – Banana Market Regulation.

[69] BVerfG, 6 Nov. 2019, 1 BvR 16/13, NJW 2020, 300 – Right to be Forgotten I; BVerfG, 6 Nov. 2019, 1 BvR 276/17, NJW 2020. 314 – Right to be Forgotten II.

[70] BVerfGE 113, 273 – European Arrest Warrant I.

[71] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA.

[72] BVerfGE 113, 273, at 300.

[73] BVerfG, 6 Nov. 2019, 1 BvR 16/13 – Right to be forgotten I.

[74] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of data and on the free movement of such data.

Arrest Warrant case and argued that the German authorities were bound by German fundamental rights to the extent that they had discretion in implementing EU law.[75] However, the Court added that German fundamental rights had to be interpreted in light of the EUChFR if German authorities implemented EU law.[76] Furthermore, the Court even reversed the *Solange* assumption and argued that the reference to German fundamental rights was not sufficient if there were indications that German fundamental rights did not provide an adequate level of protection.[77] According to the GFCC, the EU fundamental rights had to be directly taken into account in such a situation.[78] If the interpretation of EU fundamental rights was unclear, German courts had to ask the Court of Justice for an interpretation by initiating a preliminary reference procedure.[79]

In a parallel decision that was issued on the same day, the Federal Constitutional Court also addressed the situation that German authorities acted on the basis of EU legal acts in fully harmonized areas.[80] In this situation the GFCC reserved itself the right to review the acts of the German authorities on their conformity with EU fundamental rights.[81] However, the Court affirmed that it would exercise this fundamental rights review "in cooperation with" the Court of Justice.[82] If the interpretation of EU fundamental rights was unclear, it would initiate a preliminary reference procedure according to Art. 267 TFEU.[83]

The preceding discussion shows how the approach of the German Federal Constitutional Court has changed fundamentally when it comes to fundamental rights review of EU legal acts. Initially, the Court reserved itself the right to review every single EU legal act on its conformity with EU fundamental rights. Then, in *Solange II*, it argued that the EU fundamental rights protection was prevalent, but only under the reservation that the EU provided an adequate protection of fundamental rights. While the Court has not formally renounced the *Solange* reservation,[84] its existence is only of theoretical relevance after the two decisions concerning the right to be forgotten that were issued in November 2019. Nevertheless, the Federal Constitutional Court does not totally cede the right to review acts of German authorities on their conformity with fundamental rights even if these are completely determined by EU law. However, instead of insisting on the application of German fundamental rights, the Court now refers to EU fundamental rights, respecting – at least in theory – the interpretation of the latter by the Court of Justice. While this new approach is not without potential for conflict, we have to observe how the new doctrine plays out in practice for a more nuanced assessment.

3.2.2. The preservation of German Constitutional Identity

The constitutional identity reservation has its roots in the *Maastricht* judgment from 1993 on the constitutionality of the Treaty of Maastricht.[85] The judgment concerned the German ratification of the treaty of Maastricht establishing the European Union that was signed by the Member States in 1992.

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75 BVerfG, 1 BvR 16/13, supra note 73, at para. 45.

76 *Id.*, at para. 60.

77 *Id.*, at paras. 67-69.

78 *Id.*, at para. 72.

79 *Id.*

80 BVerfG, 6 Nov. 2019, 1 BvR 276/17 – Right to be forgotten II.

81 *Id.*, at para. 50.

82 *Id.*, at paras. 68-71.

83 *Id.*, at para. 70

84 See *id.*, at paras. 47-48.

85 BVerfGE 89, 155 – Maastricht.

The Court held that the European treaties could only be ratified if they complied with certain core principles of the German Constitution. It derived these core principles from the so-called eternity guarantee in Art. 79 para. 3 of the Constitution[86] which established that specific constitutional provisions could not be changed through a constitutional amendment.[87] The main focus was on the principle of democracy, where the court examined whether the perceived democracy deficit of the EU was compatible with the requirements of the Constitution. Despite expressing reservations, it finally came to the conclusion that the EU was consistent with the democracy principle of the German constitution.

The GFCC extended this approach in the *Lisbon* judgment that was issued in 2009, 16 years after *Maastricht*.[88] Again, the Court had to review a change of the founding treaties of the EU. This time, however, it did not limit itself to the examination of the principle of democracy. Instead, it developed the concept of constitutional identity and identified certain core competences of the state which could not be transferred to the EU level even through a change of the founding treaties.[89] These competences concerned, in particular, the areas of criminal law, national defense, budgetary sovereignty of the parliament, the welfare state, and cultural self-determination. However, the normative basis for identifying these areas as core competences of the state has remained unclear.[90] While the Court in *Maastricht* still referred to the eternity clause in Art. 79 para. 3 of the Constitution, the state competences doctrine developed in *Lisbon* is devoid of an explicit normative justification in the German *Grundgesetz*. Yet again, the Court stopped short of declaring the Treaty of Lisbon unconstitutional.

Both the *Maastricht* and *Lisbon* judgments concerned the moment of transferring power to the EU level. Therefore, they do not come into conflict with the primacy of EU law because there is no legal obligation to ratify a change of the foundational treaties of the EU – however inconvenient a veto of the Constitutional Court may be politically. However, a possibility for conflict emerged with the next step of the Court in developing the doctrine – the *European Arrest Warrant II* case.[91] While avoiding an open conflict with the doctrine of primacy of EU law, the Court displayed the potential for such a conflict when it applied the constitutional identity doctrine to EU secondary law.

The case concerned the Framework Decision on the European arrest warrant. The applicant was a US citizen who had been criminally convicted *in absentia* in Italy. While the Court of Justice had argued in its *Melloni* judgment that such convictions *in absentia* did not impose a necessary barrier to surrender under the European arrest warrant Framework Decision,[92] the case before the Federal Constitutional Court differed in one significant dimension: The applicant plausibly denied having been informed that a criminal procedure against him was pending in Italy.

The GFCC argued in *European Arrest Warrant II* that the right to be heard in a criminal proceeding was covered by the guarantee of human dignity as guaranteed by Art. 1 of the German Constitution.[93] Because human dignity formed part of the unamendable provisions of the constitution, it was one of the

86 BVerfGE 89, 155, at 172.

87 On unamendable constitutional provisions, see generally Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017). On the specific German case, see K. Chatziathanasiou, *Verfassungsstabilität: Eine von Artikel 146 GG ausgehende juristische und (experimental-) ökonomische Untersuchung* (Mohr Siebeck 2019).

88 BVerfGE 123, 267 – Lisbon.

89 BVerfGE 123, 267, at 344, 353-354, 359-363.

90 See the critique by C. Möllers and D. Halberstam, 'The German Constitutional Court says "Ja zu Deutschland"', 10 *German LJ* (2009) p. 1241.

91 BVerfGE 140, 317 – European Arrest Warrant II.

92 Case C-399/11, *Melloni*, 26 Feb. 2013, EU:C:2013:107.

93 BVerfGE 140, 317, at 341.

principles that make up German constitutional identity.[94] EU legal acts, like the Framework Decision on the European arrest warrant, were inapplicable in Germany to the extent that they were inconsistent with this constitutional identity.[95] Nevertheless, the GFCC did not find a violation of German constitutional identity in the case at hand. Instead, the GFCC argued that the Framework Decision could be interpreted in a way that was consistent with human dignity, i.e. that there was no obligation to extradite the applicant unless Italy gave a guarantee to repeat the taking of evidence in the criminal procedure.[96] The Court of Justice confirmed the interpretation of the Framework Decision proposed by the German Federal Constitutional Court only a few months later in its *Aranyosi* judgment.[97]

In particular, the last judgment shows that the identity reservation can potentially come into conflict with the principle of primacy of EU law. However, the Federal Constitutional Court has avoided a conflict until now. In the one case where such a conflict might have occurred, the *European arrest warrant II* decision, the GFCC interpreted the EU legal act in a way that it was consistent with the requirements of human dignity – an interpretation that was later accepted by the Court of Justice.

3.2.3. The *ultra vires* reservation

The doctrine that gave rise to the *PSPP* judgement from May 2020 was the *ultra vires* reservation. Like the constitutional identity reservation, the *ultra vires* doctrine can also be traced back to the *Maastricht* judgment from 1993.[98] However, while the analysis of the conformity of the EU institutional setting with the German principle of democracy was central to the judgment, the reference to *ultra vires* appeared in a mere *obiter dictum*. The Court referred to *ultra vires* again in its *Lisbon* judgment – in another *obiter dictum*.[99]

The *ultra vires* doctrine is supposed to capture acts of EU institutions acting outside of their own competences. Whether the measure of an EU institution was in conformity with its competences is, according to the doctrine, ultimately decided by the GFCC – not by the Court of Justice. The Constitutional Court argues that the *ultra vires* review is necessary to protect the German democratic decision-making process. EU law could not demand primacy if the measure was not covered by the competences that have been explicitly transferred to the EU by the Member States in the EU founding treaties.[100]

While it is, in principle, uncontroversial that only EU legal acts that are in conformity with EU primary law benefit of legal primacy, the controversy is centered on the question of who decides whether an EU act was within or outside of the EU's competences. According to the architecture of the EU treaty, the competence to interpret the EU treaties ultimately rests with the Court of Justice, which is expressed, in particular, by Art. 267 TFEU.

In order to reduce the potential of conflicts, the GFCC issued a decision, in which it interpreted the *ultra vires* doctrine restrictively, one year after *Lisbon*.[101] The question that was put before the Court was whether the *Mangold* judgment of the Court of Justice issued a few years earlier had been *ultra vires*.[102] In *Mangold*, the Court of Justice had indirectly extended the applicability of the Employment Equality

[94] BVerfGE 140, 317, at 341.

[95] BVerfGE 140, 317, at 337.

[96] BVerfGE 140, 317, at 366-375.

[97] Cases C-404/15 and C-659/15 PPU, *Aranyosi*, 5 April 2016, EU:C:2016:198.

[98] BVerfGE 89, 155, at 188 – Maastricht.

[99] BVerfGE 123, 267, at 353-355.

[100] BVerfGE 123, 267, at 352-353.

[101] BVerfGE 126, 286 – *Honeywell*.

[102] Case C-144/04, Mangold, [2005] ECR 9981.

Framework Directive to the phase before the implementation deadline by resorting to the general principle of non-discrimination which formed part of EU law.[103] In its ensuing *Honeywell* decision, the Federal Constitutional Court ceased the opportunity to specify the *ultra vires* doctrine. It held that an EU legal act could only be classified as *ultra vires* under three conditions: First, if there was a doubt about the interpretation of EU competences and their interpretation by the Court of Justice, the question had to be referred to the Court of Justice in the context of the preliminary reference procedure.[104] Without a decision of the Court of Justice, the GFCC may not set aside an EU legal act under the *ultra vires* doctrine.[105] Second, the violation of EU competences has to be *manifest*.[106] With this requirement, the Federal Constitutional Court acknowledged that there may be reasonable disagreement about the interpretation of legal norms, and the *ultra vires* reservation should only be used when a legal interpretation leaves the realm of the reasonable.[107] Finally, the violation of competences has to be "highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law."[108] In the concrete case, the GFCC ruled that the Court of Justice had still acted within its competences in *Mangold*, acknowledging that the latter had the power to interpret the EU treaties dynamically.[109]

In 2014, the GFCC had to deal with the *ultra vires* reservation in its *OMT* decision, which concerned – similar to *PSPP* – the competences of the ECB.[110] The decision dealt with an ECB policy announced in a press release, according to which the ECB reserved itself the right to purchase sovereign bonds of EU Member States on the secondary market.[111] The ECB announcement came at the height of the European debt crisis. Even though no Member State bonds were ever purchased under the program, it achieved its purpose to reduce the spread of the government bonds within the Euro zone. Nevertheless, a group of interested German citizens and politicians challenged the OMT policy before the GFCC, after a similar attempt before the General Court had been considered inadmissible.[112]

The GFCC held that the case against the ECB was admissible and argued that the latter had violated its competences by announcing the OMT policy.[113] It based its decision on two arguments. On the one

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[103] *Id*., at paras. 75-76.

[104] BVerfGE 126, 286, at 304.

[105] *Id*.

[106] *Id*. (highlighted by the authors).

[107] See BVerfGE 126, 286, at 307; 142, 123, at 201 ("objectively arbitrary"); BVerfGE 151, 202, at 300.

[108] BVerfGE 126, 286, at 304.

[109] BVerfGE 126, 286, at 305-307.

[110] BVerfGE 134, 366 – Outright Monetary Transactions I.

[111] ECB, Press Release on Technical features of Outright Monetary Transactions, reprinted in Case C-62/14, *Gauweiler*, EU:C:2015:400, 16 June 2015, at para. 4.

[112] Case T-492/12, *von Storch*, 10 Dec. 2013, EU:T:2013:702.

[113] For academic comments on the decision, see, e.g., U. Di Fabio, 'Karlsruhe Makes a Referral', 15 *German Law Journal* (2014) p. 107; F.C. Mayer, 'Rebels without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference', 15 *German Law Journal* (2014) p. 111; D. Murswiek, 'ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014', 15 *German Law Journal* (2014) p. 147; J. Bast, 'Don't Act Beyond your Powers: The Perils and Pitfalls of the German Constitutional Court's *Ultra Vires* Review', 15 *German Law Journal* (2014) p. 167; K.F. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs?', 15 *German Law Journal* (2014) p. 183; M. Kumm, 'Rebel without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might Do About It', 15 *German Law Journal* (2014) p. 203; K. Schneider, 'Questions and Answers: Karlsruhe's Referral for a Preliminary Ruling to the Court of Justice of the European Union', 15 *German Law Journal* (2014) p. 217; A. Thiele, 'Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program', 15 *German Law Journal* (2014) p. 241; M. Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Review', 15 *German Law Journal* (2014) p. 265; C. Gerner-Beuerle, E Küçük and E. Schuster, 'Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial', 15 *German Law Journal* (2014) p. 281; N. Petersen, 'Karlsruhe Not Only Barks, But Finally Bites: Some Remarks on

hand, it reasoned that the policy violated the prohibition to purchase sovereign bonds directly from the Member States enshrined in Art. 123 (1) TFEU.[114] While the OMT program only targeted the purchasing of bonds on the secondary market, the GFCC adopted a functional interpretation of Art. 123 TFEU, according to which purchases on the secondary market were also covered because they might circumvent the prohibition of direct purchases.[115] According to the GFCC, the Member States could sell their debt instruments to third persons who would then pass them on to the ECB. Furthermore, the activity of the ECB on the secondary market had indirect effects on the Member States' budgets because it allowed them to sell debt instruments to more favourable conditions than without the intervention of the ECB. On the other hand, the GFCC argued that the OMT program violated the mandate of the ECB to maintain price stability, which is contained in Art. 127 (1) TFEU. Instead, the GFCC reasoned, the main purpose of the ECB's press release was the promotion of economic policy,[116] particularly because it helped to keep down the refinancing costs of euro Member States with budgetary problems and contributed to the stability of the euro area.[117] Because of this reasoning, the Federal Constitutional Court initiated a preliminary reference procedure under Art. 267 TFEU in accordance with the requirement postulated in *Honeywell*.[118]

In the ensuing *Gauweiler* judgment, the Court of Justice rejected the argumentation of the Federal Constitutional Court and held that the OMT policy was in conformity with the ECB's competences.[119] The Court of Justice acknowledged that a clear circumvention of the prohibition contained in Art. 123 TFEU amounted to a violation of the provision.[120] However, this did not mean that any activity on the secondary market was automatically prohibited.[121] Instead, the Court of Justice pointed out that Art. 18.1 of the Protocol on the ESCB and the ECB explicitly authorized the ECB to buy and to sell outright marketable instruments in Euro, which includes government bonds.[122]

Moreover, the Court of Justice rejected the GFCC's attempt to qualify the OMT program as a violation of Art. 127 (1) TFEU. Instead, the ECJ argued that the measure was necessary in order to preserve the coherence and effectiveness of the ECB's monetary policy in the whole euro area.[123] While the measure

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the OMT Decision of the German Constitutional Court', 15 *German Law Journal* (2014) p. 321; D. Schiek, 'The German Federal Constitutional Court's Ruling on Outright Monetary Transactions (OMT): Another Step towards National Closure?', 15 *German Law Journal* (2014) p. 329; T. Beukers, 'The Bundesverfassungsgericht Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?', 15 *German Law Journal* (2014) p. 343; A. Pliakos and G. Anagnostaras, 'Blind Date Between Familiar Strangers: The German Constitutional Court Goes Luxembourg', 15 *German Law Journal* (2014) p. 369; M. Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference', 10 *European Constitutional Law Review* (2014) p. 263; I. Pernice, 'A Difficult Partnership between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU', 21 *Maastricht Journal of European and Comparative Law* (2014) p. 3; B. Schriewer, 'The German Federal Constitutional Court's First Reference for a Preliminary Ruling to the European Court of Justice', 57 *German Yearbook of International Law* (2014) p. 701.

[114] BVerfGE 134, 366, at 411-415.

[115] BVerfGE 134, 366, at 411.

[116] BVerfGE 134, 366, at 398-411.

[117] BVerfGE 134, 366, at 404-406.

[118] See above, note 104, and accompanying text.

[119] Case C-62/14, *Gauweiler, supra* note 111.

[120] *Id.*, at para. 97.

[121] See also S. Simon, '"Whatever it takes": Selbsterfüllende Prophezeiung am Rande des Unionsrechts?', 50 *Europarecht* (2015) p. 107 at pp. 118-122; C. D. Classen, 'Funktionsadäquate *checks and balances* statt richterlicher Vollkontrolle unter demokratischem Vorwand', 50 *Europarecht* (2015) p. 477 at p. 478.

[122] Case C-62/14, *Gauweiler, supra* note 88, at para. 97.

[123] *Id.*, at para. 50.

also had an effect on the stability of the euro area, this effect was, according to the ECJ, only secondary.[124] Furthermore, the conditionality of the OMT program did not undermine its purpose as a means of monetary policy. Instead, it was necessary to impose such conditions in order not to undermine the effectiveness of the ESM and the EFSF.[125]

In its final judgment regarding OMT, the GFCC generally accepted the interpretation of the Court of Justice.[126] While it raised certain doubts regarding the reasoning of the Court of Justice,[127] it argued that the latter's judgment did at least not manifestly violate the EU treaties.[128] In particular, the Federal Constitutional Court acknowledged that the Court of Justice's argumentation was in line with the wording of the EU treaties and its prior case law.[129]

More recently, in a judgment from 30 July 2019, the German Federal Constitutional Court had to address the constitutionality if two EU regulations, transferring the authority to supervise national banks to the ECB.[130] The GFCC argued that both regulations did not constitute a manifest violation of EU competences and thus could not be considered *ultra vires*.

For the time being, the final chapter on the Federal Constitutional Court's *ultra vires* review was written in the cases concerning the PSP program of the ECB, which we discussed above.[131] For the first time in its jurisprudence, the GFCC found that a judgment of the Court of Justice was *ultra vires*. Whether the *PSPP* judgment was an exception to the norm or the starting point to a new, more confrontational phase of the GFCC's jurisprudence remains to be seen. Some commentators have pointed out that the *PSPP* judgment of the GFCC already contains the seeds for future conflicts about the competences of the ECB.[132]

3.2.4. Conclusion

The preceding discussion has shown that the German Federal Constitutional Court has developed a quite complex doctrine regarding the primacy of EU law. While the Court has generally accepted primacy of EU legal norms even with regard to the German Constitution, it has carved out three exceptions. First, the *Solange* exception aims at safeguarding German fundamental rights. The Court reserves itself the right to intervene if fundamental rights should not be protected adequately on the EU level. In its more recent case law, the Court even applies European fundamental rights when reviewing measures of German authorities that have been determined by EU law, while generally accepting the primacy of the Court of Justice's interpretation in this field.

Second, the identity reservation aims at preserving certain fundamental values of the German constitution even against EU legal acts. This concerns, in particular, the principle of democracy and the guarantee of human dignity. Finally, the Federal Constitutional Court has developed an *ultra vires* review. While the purpose of the first two exceptions is the preservation of German constitutional values in the face of primacy of EU law, the *ultra vires* exception requires the interpretation of EU law itself. Therefore,

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[124] *Id*., at para. 52.

[125] *Id*., at para. 65.

[126] BVerfGE 142, 123 – Outright Monetary Transactions II.

[127] BVerfGE 142, 123, at 217-221.

[128] BVerfGE 142, 123, at 221-228.

[129] BVerfGE 142, 123, at 221.

[130] BVerfGE 151, 202.

[131] See above, 2.

[132] See Mayer, 'To Boldly Go', *supra* note 2, p. 1121; M. Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court', https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/.

it comes most clearly into conflict with the CJEU's ultimate authority to interpret EU law as guaranteed by Art. 267 TFEU.

For a long time, the Federal Constitutional Court has avoided an open conflict with the Court of Justice.[133] Instead, it has tried to exploit grey areas in order to nudge the Court of Justice into particular directions. This concerns, e.g., the development of an EU fundamental rights jurisprudence in the 1970s[134] or the interpretation of the Framework Decision on the European arrest warrant in conformity with the guarantee of human dignity.[135] Potentially, the recent turn of the GFCC to review legal acts derived from EU law on their compatibility with EU fundamental rights is also a move to influence the interpretation of fundamental rights in the EU. Yet, the *PSPP* Judgment might be a decisive turning point in the relationship between the two courts. Considering the more confrontational nature of the *ultra vires* review compared to the other two exceptions, it is probably not surprising that the GFCC ultimately relied on *ultra vires* for breaking open the conflict with the ECJ.

3.3. The position of other courts of EU member states

The jurisprudence of the GFCC is an important point of reference for many apex courts of other Member States, and the reservations developed by the GFCC have resonated with many of them.[136] However, as the following comparative overview will show, while the other national courts have used doctrines that are similar to the ones developed by the GFCC, the conditions under which these doctrines have been employed vary significantly. This calls for a contextualization of the judicial decisions. Relying predominantly on secondary sources, i.e. the scholarly discourse in European comparative law, the following section presents short case studies on various national legal orders and their approach to the primacy of EU law.

We have selected eight Member States for this analysis. These range from founding members, like Belgium, France, Italy, and the Netherlands, over states that have acceded later in the last century, like Denmark, to Member States that have become EU members more recently, like the Czech Republic, Hungary, and Poland. Among the chosen national orders are some, where the relationship between national law and EU law appears to be uncontentious, as is the case in the Netherlands, and others, where the relationship between national law and EU law appears highly precarious and politicized, as in the cases of Hungary and Poland. Most of the national orders appear to fall in between this range of extremes, with national high courts occasionally challenging the Court of Justice but generally conforming to its jurisprudence. The section presents the national case studies in alphabetical order.

3.3.1. Belgium

Within the spectrum of national case studies, the case of Belgium could have been considered to be an uncontentious one if it was not for some recent, prominent flashes of ambivalence. Generally, the Belgian Constitutional Court is considered to be among the courts that respect the primacy of EU law.[137] However, it has recently followed the example of the GFCC and expressed some reservations. It did so

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[133] See Petersen, *supra* note 26, pp. 998-999.

[134] See above, 3.1.

[135] See above, 3.2.2.

[136] See only M. Wendel, 'Comparative reasoning and the making of a common constitutional law: EU-related decisions of national constitutional courts in a transnational perspective', 11 *International Journal of Constitutional Law* (2013) p. 981 at p. 982.

[137] P. Gerard and W. Verrijdt, 'Belgian Constitutional Court Adopts National Identity Discourse Belgian Constitutional Court No. 62/2016, 28 April 2016', 13 *European Constitutional Law Review* (2017) p. 182 at p. 192.

in a decision from 2016 that concerned litigation against the EU's 2012 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Stability Treaty).[138]

Several societal groups were concerned that the ratification of the Fiscal Stability Treaty and the adherence to its budgetary restrictions would prohibit Belgium from fulfilling its constitutional obligations in the area of social rights. However, the Belgian Constitutional Court denied these societal groups standing, arguing that they were affected too indirectly.[139] It also held that the budgetary autonomy of the Belgian Parliament was not violated, as parliamentarians retained their liberty to draw up and approve a budget.[140]

Nevertheless, the Belgian Constitutional Court also delivered an obiter dictum on Article 34 of the Belgian Constitution that can be understood as a reference to some of the exceptions developed by the GFCC. It held that

> "[w]hen approving a treaty which [attributes new competences to EU institutions], the legislature must respect Article 34 of the Constitution. By virtue of that provision, the exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law. While these institutions may subsequently decide autonomously about how they exercise these competences, Article 34 of the Constitution cannot be interpreted as granting an unlimited licence to the legislature, when approving that treaty, or to the said institutions, when exercising their attributed powers. Article 34 of the Constitution does not allow a discriminating derogation to the national identity inherent in the fundamental structures, political and constitutional, or to the basic values of the protection offered by the Constitution to all legal subjects'."[141]

The Constitutional Court explicitly refers to the protection of national identity. Yet, there is also an implicit reference to a possible *ultra vires* review. As Philippe Gerard and Willem Verrijdt elaborate, the *ultra vires* review can "be read in the statement that the EU organs may not use the attributed powers as an 'unlimited licence (...) when exercising their attributed powers'."[142] At the same time, the emphasis by the Court on the principle of conferral and the powers that are conferred based on Article 34 of the Constitution imply the possibility of an *ultra vires* review.[143]

The judgment can be considered a warning to the Belgian national legislator and an invitation to a dialogue with the Court of Justice.[144] Nevertheless, the threat to the coherence of the EU legal order is limited. The decision concerns the ratification of an intergovernmental treaty. While a negative decision would have been inconvenient for the political response to the sovereign debt crisis, it would not

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[138] Belgian Constitutional Court, 28 Apr. 2016, No. 62/2016.

[139] See L. Lavrysen, J. Theunis, J. Goossens, P. Cannoot and V. Meerschaert, 'Developments in Belgian Constitutional Law: The Year 2016 in Review, International Journal of Constitutional Law', 15 *International Journal of Constitutional Law* (2017) p. 774 at p. 779; Gerard and Verrijdt, *supra* note 137, at p. 186.

[140] Lavrysen, Theunis, Goossens, Cannoot and Meerschaert, *supra* note 139 at p. 779: "Nonetheless, the Court considered whether the challenged acts interfered with any other aspect of the democratic rule of law which would be so essential that its protection is in the interest of all citizens. Parliament is indeed the only constitutional body empowered to not only approve the annual budgets but also to set medium-term budgetary objectives. It can enter into such commitments by way of a treaty. When parliamentarians do approve a treaty, however, they may not violate constitutional guarantees. Although the Stability Pact makes provision for detailed targets and deficit reduction, it leaves national parliaments entirely at liberty as to how they draw up and approve budgets."

[141] Belgian Constitutional Court, 28 Apr. 2016, No. 62/2016, at B.8.7. (transl. by Gerard and Verrijdt, *supra* note 137, at p. 186); official German version (https://www.const-court.be/public/d/2016/2016-062d.pdf).

[142] Gerard and Verrijdt, *supra* note 137, at p. 187.

[143] Gerard and Verrijdt, *supra* note 137, at p. 187: "*ultra vires* review is inherently present in the logic of a limited attribution of powers based on a constitutional provision."

[144] Gerard and Verrijdt, *supra* note 137, at p. 188.

have posed a challenge to the primacy of EU law because Member States courts are free to declare a new treaty or a treaty amendment incompatible with the domestic constitution without violating the principle of primacy.[145]

3.3.2. Czech Republic

The Czech Republic presents an interesting case. Generally, the jurisprudence of the Czech Constitutional Court has been considered 'integration friendly'.[146] Still, the Czech Constitutional Court was the first national court of a Member State to declare an EU legal act *ultra vires*. [147] The judgment is considered an exception to the rule, which shows the need to contextualize national jurisprudence.[148]

Generally, the jurisprudence of the Czech Constitutional Court had been following familiar lines with regard to the relationship of EU and national law: In *Sugar Quotas III* the Court recognized the primacy of EU law in principle, but also reserved for itself the right to review whether EU law conflicted with the 'fundamental core' of the Czech Constitution and State.[149] The Czech Constitutional Court further elaborated on these limits in its *ex ante* review of the Lisbon Treaty, emphasizing that the transfer of competences may not deprive the Czech Republic of its status of a sovereign state.[150] While these elements are typically reminiscing of the concept of constitutional identity, the Czech Constitutional Court did not mention the concept as such.[151] It rather relied on (and extended) the scope of the constitutional eternity clause in Article 9(2) of the Czech Constitution.

At the same time, the Court acknowledged the wide political discretion of the legislature.[152] Only if the scope of this discretion was clearly exceeded, the Court would intervene as an *ultima ratio*.[153] Here, the Court referred to the GFCC's decisions in *Solange II* and *Maastricht*. It stated that it "generally recognizes the functioning of this institutional framework for ensuring a review of the scope of exercise of conferred competences, although [the Court's] position may change in the future, should it appear that this framework is demonstrably non-functional".[154] Should the standard of human rights protection become inadequate, the authorities would have to take back the transferred powers to ensure protection of the fundamental core of the Constitution.[155]

In January 2012, the Czech Constitutional Court changed course with its *Holubec* (also called *Slovak Pensions XVII*) judgment.[156] In this judgment, it found the decision of the Court of Justice in *Landtová*[157]

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[145] M. Claes, 'The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union', 23 *Maastricht Journal of European and Comparative Law* (2016) p. 151 at p. 158.

[146] P. Briza, 'The Czech Republic: The Constitutional Court on the Lisbon Treaty,Decision of 26 November 2008' 5 *European Constitutional Law Review* (2009) p. 143 at p. 164; I. Šlosarčík, 'EU Law in the Czech Republic: The Ultra Vires of the Czech Government to Ultra Vires of the EU Court', 9 *Vienna J on Int'l Const L* (2015) p. 417; D. Kosař and L. Vyhnánek, 'Constitutional Identity in the Czech Republic A New Twist on an Old-Fashioned Idea?', in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) p. 85 at p. 85.

[147] Czech Constitutional Court, *Slovak Pensions XVII/Holubec*, 31 Jan 2012, Pl. ÚS 5/12.

[148] See only Kosař and Vyhnánek, *supra* note 146, at p. 104.

[149] Decision of 8 March 2006, case No. P. OS 50/04, *Sugar Quotas III* (English translation available at https://www.usoud.cz/en/decisions/2006-03-08-pl-us-50-04-sugar-quotas-iii); see further Briza, *supra* note 146.

[150] Decision of 26 November 2008, case No. Pl. ÚS 19/08, para 109, *Lisbon Treaty I*.

[151] Kosař and Vyhnánek, *supra* note 146, at p. 86.

[152] Briza, *supra* note 146, at p. 150.

[153] Decision of 26 November 2008, case No. Pl. ÚS 19/08, para 109, *Lisbon Treaty I*.

[154] Decision of 26 November 2008, case No. Pl. ÚS 19/08, para 139, *Lisbon Treaty I*, as transl. Briza, *supra* note 146, at p. 153.

[155] With reference to *Sugar Quotas III*; Briza, *supra* note 146, at p. 161.

[156] Czech Constitutional Court, *Slovak Pensions XVII/Holubec*, 31 Jan 2012, Pl. ÚS 5/12.

[157] Case C-399/09, *Landtová*, 22 June 2011, ECLI:EU:C:2011:415.

to be *ultra vires*. Nevertheless, due to is peculiar background, the judgment is usually regarded as an outlier that is not representative for Court's approach to EU law.[158] The background of the case is colloquially summarized as the "battle over 'Slovak Pensions'".[159] After the dissolution of Czechoslovakia the responsibility for pensions was distributed in a treaty between the Czech Republic and the Slovak Republic. The decisive criterion was the employer's place of residence or establishment on 31 December 1992. As many Czech citizens who had worked on the Slovak territory were unsatisfied with their Slovak Pensions, the Czech Social Security Administration provided in some cases a compensatory supplement. But the practice was apparently not uniform, and the Czech Constitutional Court found this to be a violation of the right to social security in old age and of the principle of equality, which required that the same pension should be paid to all Czech citizens.

The consequence, however, was deep disagreement within the national judicial system and in particular between the Constitutional Court and the Supreme Administrative Court. The problem of the Constitutional Court's decision was that it did not award the supplement equally, but restricted it to Czech citizens residing in the Czech Republic. This led the Supreme Administrative Court, which was opposed to the supplements, to make a preliminary reference to the Court of Justice.[160]

This preliminary reference led to ECJ's judgment *Landtová*. The Court of Justice held that the supplement constituted a direct and indirect discrimination on the basis of citizenship and therefore violated EU primary law.[161] Furthermore, the ECJ held that, until a non-discriminatory solution was found, disadvantaged petitioners had to be awarded the favourable treatment. Nonetheless, in the case at issue, the Supreme Administrative Court decided not to grant the supplement because it was based on a transgression of competences by the Constitutional Court.[162]

In the following case, the Czech Constitutional Court referred to its aforementioned jurisprudence on the 'fundamental values' of the Czech Constitution that the EU legal acts may not violate, and to the control of the competence of EU institutions. As it found that the Court of Justice had ignored the specific history and circumstances of the case in *Landtová*, it held the Court of Justice's judgement to be *ultra vires*.[163]

As already indicated, the judgment was issued under several special circumstances. The Court of Justice had ignored (and even returned) an explanatory letter by the Czech Constitutional Court, and in the proceedings the Czech Government did not side with the Constitutional Court. Meanwhile, the legal arguments put forward by the Czech Constitutional Court haven been strongly criticized in the literature.[164] In particular, it is unclear why it chose not to submit a preliminary reference to the ECJ itself.[165] And while it made several references to the jurisprudence of the GFCC[166], it did not grant the Court of Justice a margin of error that the GFCC affords to the Court of Justice under its *Honeywell* framework.[167]

[158] Kosař and Vyhnánek, *supra* note 146, at p. 105.

[159] R. Zbíral, 'Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12. A Legal revolution or negligible episode? Court of Justice decision proclaimed *ultra vires*', 49 *Common Market Law Review* (2012) p. 1475 at p. 1477.

[160] Zbíral, *supra* note 159, at p. 1478.

[161] Case C-399/09, *Landtová*. 22 June 2011, ECLI:EU:C:2011:415, paras. 41–49.

[162] See Zbíral, *supra* note 159, at p. 1480.

[163] Transl. by Zbíral, supra note 159, at p. 1482.

[164] Zbíral, *supra* note 159, at pp. 1483–1485.

[165] Zbíral, *supra* note 159, at p. 1485.

[166] Zbíral, *supra* note 159, at p. 1486.

[167] Zbíral, *supra* note 159, at p. 1487. See also Wendel, *supra* note 135, at pp. 994–995.

In sum, observers consider the decision rather as the result of an internal conflict of the Czech judiciary that is framed in terms of EU law than as a serious challenge to the primacy of EU law.[168] And while the decision caused some damage to the primacy of EU law and the judicial dialogue in the EU, it is still considered a unique aberration, in particular because it is deemed unlikely that the Court will continue this line of jurisprudence.[169]

3.3.3. Denmark

The Danish Supreme Court is also among the very few national courts that have recently defied the primacy of EU law. It did so in its ruling in the *Ajos* case, where it held that the ECJ's judgment was inapplicable.[170] As in the other cases, in which a national court is defying the position of the ECJ, the case has its own particularities. In the Danish legal order, the Danish Supreme Court takes a principled, very deferential position towards Parliament and Government, seeking to avoid any impression of judicial activism. As is pointed out in the literature, the Court has only one time ever found a piece of legislation to be unconstitutional.[171]

The ruling in *Ajos* is generally seen as a continuation of the Supreme Court's jurisprudence on the limits of EU law.[172] This jurisprudence rests on a Dualist conception of the implementation of international law[173], and on a very strict review of whether powers were conferred to the EU through the restrictive mechanisms foreseen by the notoriously difficult to amend Danish Constitution and the Danish *Law on accession* which supplements these mechanisms. More specifically, the Danish constitution provides one procedure for international cooperation (Art. 19), and one for the transfer of sovereignty (Art. 20). A transfer of competences may either take place under the procedure of Art. 20, or, if the competences that are transferred are not specified, through an amendment of the Constitution according to the very rigid procedure of Art. 88.[174]

The main judgments that laid the ground for the decision in *Ajos* are the Supreme Court's rulings in *Maastricht* and *Lisbon*. In *Maastricht*[175], the Supreme Court held that EU law had no primacy over the Danish Constitution, and that it is a precondition for a transfer of powers that Denmark remains an independent state.[176] According to the *Maastricht* decision, and as quoted in the subsequent *Lisbon* decision, "it is for the Danish courts to decide whether EU acts exceed the limits for the surrender of

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[168] J. Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires: Judgment of 31 January 2012, Pl. OIS 5/12, Slovak Pensions XVII', 8 *European Constitutional Law Review* (2012) p. 323 at p.324; Šlosarčík, *supra* note 146, at pp. 427–429.

[169] See Kosař and Vyhnánek, *supra* note 146, at p. 105 (who nonetheless caution against a growing gap between the 'legal' constitutional identity and the 'popular' constitutional identity of the Czech Republic).

[170] Danish Supreme Court, Case 15/2014, UfR 2017.824H, 6 Dec 2016; for an English translation see https://domstol.dk/hoejesteret/decided-cases-eu-law/2016/12/the-relationship-between-eu-law-and-danish-law-in-a-case-concerning-a-salaried-employee/.

[171] H. Krunke and S. Klinge, 'The Danish *Ajos* Case: The Missing Case from *Maastricht* and *Lisbon*', 3 *European Papers* (2018) p. 157 at p. 162.

[172] Krunke and Klinge, *supra* note 171.

[173] U. Neergaard and K. Engsig Sørensen, 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case', 36 *Yearbook of European Law* (2017) p. 275 at p. 302.

[174] H. Krunke and T. Baumbach, 'The Role of the Danish Constitution in European and Transnational Governance' (2015), in A. Albi and S. Bardutzky (eds.), *National Constitutions in European And Global Governance: Democracy, Rights, the Rule of Law, and Global Governance. National Reports* (T.M.C. Asser Press 2019) p. 269 at 272.

[175] Danish Supreme Court, U 1998.800H.

[176] Krunke and Baumbach, *supra* note 174, at p. 273; Krunke and Klinge, *supra* note 171, at p. 164.

sovereignty which has taken place by the Accession Act".[177] While the Supreme Court recognized the competences of the Court of Justice and the need for judicial dialogue, it also reserved itself the right to conduct an *ultra vires* review, based on the constitutional requirement of specificity in the conferral of powers. Consequently, national courts would have to rule an EU act inapplicable as an *ultima ratio* if this Act "is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Accession Act", even if the act was upheld by the Court of Justice.[178] Then, in the *Lisbon* judgment the Supreme Court stated that the interpretation of EU law by the Court of Justice "must not result in widening of the scope of Union powers".[179] This reasoning was also extended to EU acts and judgments by the Court of Justice that refer to the Charter of Fundamental rights.[180] It is on the Danish authorities to ensure "that there is no creeping transference of powers".[181]

This jurisprudence provided the basis for the ruling in *Ajos*. The underlying case concerned the conditions, under which an employer had to grant a dismissed employee a severance allowance. National Danish law provided for an exception from the right to a severance allowance if the employee was eligible for an old-age pension from his employer. This exception even applied in cases in which the employee continued working somewhere else, not claiming the pension from his former employer. The Court of Justice had found such practices to be a case of age discrimination in its prior jurisprudence.[182] The Supreme Court made a preliminary reference to the Court of Justice, asking whether an unwritten principle of EU law could supersede a national provision on which private actors had relied. As expected, the Court of Justice ruled that the national legislation in question was not in accordance

[177] Danish Supreme Court, Case No. 199/2012, U 2013.1451H, 20 Feb 2013, p. 12 of the English translation at: https://domstol.dk/hoejesteret/decided-cases-eu-law/2013/2/the-lisbon-treaty; see selection of main passages by Krunke and Baumbach, *supra* note 174, at pp. 273–274.

[178] Danish Supreme Court, Case No. 199/2012, U 2013.1451H, 20 Feb 2013, pp. 12–13 of the translation: "By adopting the Accession Act, it has been recognized that the power to test the validity and legality of EC acts of law lies with the EC Court of Justice. This implies that Danish courts of law cannot hold than an EC act is inapplicable in Denmark without the question of its compatibility with the Treaty having been tried by the EC Court of Justice, and that Danish courts of law can generally base their decision on decisions by the Court of Justice on such questions being within the limits of the surrender of sovereignty. However, the Supreme Court finds that it follows from the demand for specification in s. 20(1) of the Constitution, held against the Danish courts' access to test the constitutionality of acts, that the courts of law cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for surrender of sovereignty determined by the Accession Act. Therefore, Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Accession Act. Similarly, this applies with regard to community-law rules and legal principles which are based on the practice of the EC Court of Justice."

[179] Danish Supreme Court, Case No. 199/2012, U 2013.1451H, 20 Feb 2013, pp. 12–13 of the translation: "The Court of Justice of the European Union is charged with settling any disputes on the interpretation of EU law, but this must not result in widening of the scope of Union powers. As mentioned above, Denmark's implementation of the Lisbon Treaty was based on a constitutional assessment that it will not imply delegation of powers requiring application of the s. 20 procedure, and the Danish authorities are obliged to ensure that this is observed."

[180] Danish Supreme Court, Case No. 199/2012, U 2013.1451H, 20 Feb 2013, p. 15 of the translation: "If an act or a judicial decision which has a specific and real impact on Danish citizens etc. raises doubts as to whether it is based on an application of the Treaties which lies beyond the surrender of sovereignty according to the Accession Act, as amended, this may be made sub-ject to a judicial review, as stated in paragraph 9.6 of the Maastricht judgment. The same applies if EU acts are adopted – or if the Court of Justice delivers judgments – based on such application of the Treaties with reference to the Charter of Fundamental Rights."

[181] Krunke and Klinge, *supra* note 171, at p.165.

[182] Case c-499/08, *Andersen*, EU:C:2010:600.

with the prohibition of age discrimination, and that national provisions were to be interpreted in manner consistent with secondary EU legislation, here the EU Employement Directive,[183] as well as with general principles of EU law, specifically with the principle of non-discrimination on grounds of age.[184]

The Danish Supreme Court considered such an interpretation of national law to be "contra legem" because it violated the principle of legal certainty for private contracting parties.[185] While it accepted that the Court of Justice was the interpreter of EU law and it was the ECJ's role to determine whether an EU provision had direct effect, it was for the national courts to decide on the effect of that decision.[186] The Supreme Court found that the Law on accession did not confer to the Court of Justice the power to employ a dynamic interpretation and rely on a principle that did not have a textual foundation in the treaties. Specifically, the Danish Supreme Court held that the Law on accession did not allow an unwritten principle to take precedence over a written national employment law.[187] A decision that disapplied the national provision would have been beyond the Supreme Court's own judicial authority.[188] It is interesting to note that – despite obvious parallels – the judgment did not make use of the idea of constitutional identity, possibly due to a reluctance to define it, considering the textualist self-understanding of the Supreme Court.[189]

The judgment was criticized from within the Supreme Court. A dissenting opinion pointed out that the Court of Justice's dynamic approach to interpretation was known when Denmark joined the EU in 1973, and further, that the *Mangold* judgment, on which the ECJ relied in *Ajos*, was delivered before the latest amendment to the Law on accession. Thus, due to the knowledge of the legislature, the Law on accession could be understood to confer the necessary powers to the Court of Justice.[190]

In the scholarly literature, this conflict with the ECJ, which revolved around dynamic interpretation and legal certainty, had been predicted.[191] It was considered not by accident that the problem was an unwritten EU principle, as the Supreme Court places great weight on written law, and makes littles use of principles,[192] while emphasizing the importance of legal certainty for private parties.[193] At least parts of the literature reacted very critically to the judgment. It was considered to display an activist streak, while at the same time claiming to refrain from activism.[194] It also raises uncertainties about other principles of EU law that might be deemed not specific enough.[195]

3.3.4. France

Traditionally, the jurisprudence of the French *Conseil constitutionnel* has been considered as accommodating to EU law and to the Court of Justice. The lack of conflict is typically explained with the limited jurisdiction of the *Conseil constitutionnel*. On the one hand, it is only concerned with applying the

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[183] Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[184] Case C-441/14, *Ajos*, EU:C:2016:278, 16 April 2016; thus continuing its known line of jurisprudence: Case C-144/04, Mangold, [2005] ECR 9981; Case C-555/07, Kücüdeveci, [2010] ECR I-00365.

[185] Krunke and Klinge, *supra* note 171, at p. 161.

[186] Krunke and Klinge, *supra* note 171, at p. 161.

[187] Neergaard and Sørensen, *supra* note 173, at p. 297.

[188] Neergaard and Sørensen, *supra* note 173, at p. 280.

[189] Krunke and Klinge, *supra* note 171, at p. 170.

[190] Neergaard and Sørensen, *supra* note 173, at p. 299, who concur at p. 300.

[191] See Krunke and Baumbach, *supra* note 174, at p. 300 and pp. 306–308.

[192] Krunke and Klinge, *supra* note 171, at p. 169.

[193] See Krunke and Klinge, *supra* note 171, at p. 169.

[194] Neergaard and Sørensen, *supra* note 173, at p. 312; see also Krunke and Klinge, *supra* note 171, at p. 163.

[195] Neergaard and Sørensen, *supra* note 173, at p. 302–308.

French Constitution and does not use non-domestic norms as a standard of review, and on the other hand, it does not review acts by external sources but only "examines treaties and certain decisions of the Council or of the European Council, directly or indirectly through the statute authorizing the ratification of the treaty or decision at issue."[196]

Historically, it was not immediately clear whether the *Conseil constitutionnel* would accept the primacy of EU law. In 1977, the *Conseil constitutionnel* had to rule on an Act of Parliament that contained implementing provisions for a Community regulation. It refused to declare the Act unconstitutional because regulations were directly applicable under the EC Treaty (then Art. 249), an international obligation to which France had subscribed.[197] French legal academia understood the judgment in the sense that acts that provided for the implementation of a regulation enjoyed constitutional immunity.[198] This interpretation found support in the 1992 decision on the Treaty of Maastricht. The *Conseil constitutionnel* indeed held that the constitutional principle of *pacta sunt servanda* prohibited to declare an Act of Parliament, which made provisions for the implementation of a regulation, unconstitutional.[199] Further, in the wake of the ratification of the Treaty of Maastricht, Article 88-1 was introduced to the French Constitutions, which reads in its current form:

> "La République participe à l'Union européenne constituée d'Etats qui ont choisi librement d'exercer en commun certaines de leurs compétences en vertu du traité sur l'Union européenne et du traité sur le fonctionnement de l'Union européenne, tels qu'ils résultent du traité signé à Lisbonne le 13 décembre 2007."[200]

While this provision was initially considered symbolic, the *Conseil constitutionnel* now utilizes it to derive a duty to implement EU secondary law. According to the *Conseil constitutionnel*, Article 88-1 acknowledges the primacy of EU law.[201] This implies that, if a statute merely reproduces an EU secondary norm, *the Conseil constitutionnel* refrains from reviewing it.[202] Thus, it acknowledges the jurisprudence of the Court of Justice that it is only for the ECJ to rule on the validity of EU secondary law.[203]

However, the primacy of EU law is also limited, because the *Conseil constitutionnel* expressly reserves itself the right to conduct a constitutional identity review since a landmark decision in 2006.[204] According to the *Conseil constitutionnel*, the "transposition of a Directive cannot run counter to a rule or principle inherent in the constitutional identity of France unless the Constituent power has agreed to the

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196 F.-X. Millet, 'Constitutional Identity in France, Vices and – Above All – Virtues', in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) p. 134 at p. 137.

197 Conseil constitutionnel, no. 77-90 DC, 31 Dec 1977.

198 J. H. Reestman, '*Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order. Decision of June 2004, 2004–496 DC', 1 *European Constitutional Law Review* (2005) p. 302 at p.303.

199 Conseil constitutionnel, 92-308 DC, 9 April 1992; Reestman, *supra* note 198, at p.303.

200 Article 88-1: "The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007."

201 Decision no. 2004-505 DC of 19 November 2004, para. 13, Treaty establishing a Constitution for Europe, for a translation see https://www.conseil-constitutionnel.fr/en/decision/2004/2004505DC.htm.

202 See only Decision no. 2006-540 DC of 27 July 2006, para. 20, Copyright and related rights in the information Society, for a translation see https://www.conseil-constitutionnel.fr/en/decision/2006/2006540DC.htm; see also Decision no. 2008-564 DC of 19 June 2008, para. 45, Genetically Modified Organisms, for a translation see https://www.conseil-constitutionnel.fr/en/decision/2008/2008564DC.htm; see also François-Xavier Millet, 'How Much Lenience for How Much Cooperation? On the First Preliminary Reference of the French Constitutional Council to the Court of Justice', 51 Common Market Law Review (2014) p. 195–218 at 202.

203 Case C-314/85, judgment of 22 Oct 1987, Foto-Frost, ECLI:EU:C:1987:452.

204 Decision no. 2006-540 DC of 27 July 2006, para. 20, Copyright and related rights in the information Society.

same".[205] However, what forms part of constitutional identity is seen as uncertain in the scholarly literature.[206]

Prima facie, the approach to constitutional identity review seems very similar to the identity review practiced by GFCC. Yet, there is one important difference. While in Germany the constitutional identity is predefined and is immune to constitutional amendment, this is different for the French concept.[207] In France, the constitutional identity concern can be accommodated by the constituent power.[208] Thus, legislative acts that implement EU acts and fall into the scope of the constitutional provisions of Article 88-2 (European Arrest Warrant) or Article 88-3 (Municipal voting rights for EU citizens) are covered by the constituent power and thus not subject to identity review under any circumstances.[209]

Finally, it should be noted that the *Conseil constitutionnel* is not the only French court that engaged in delimiting the applicability of EU law. Famously, the *Conseil d'Etat* had, in its *Cohn-Bendit* jurisprudence[210], precluded the reliance on EU directives in administrative procedures, despite the ECJ's case law to the contrary.[211] In the meanwhile, and es expected by observers, the *Conseil d'Etat* has given up this line of jurisprudence and showed openness to judicial dialogue.[212]

3.3.5. Hungary

The Hungarian Constitutional Court had initially adopted an integration-friendly approach to the primacy of EU law. However, this case law was abolished in 2013 by the Fourth Amendment to the 2011 Fundamental Law. Since then, the relationship between EU law and national law can be considered as precarious. In particular, the Hungarian Constitutional Court has introduced an identity review and given itself the competence to review EU acts through the means of an *ultra vires* review.[213] The judgment initiating this development has to be seen in its political context: It was delivered one week after a constitutional amendment had failed that would have introduced a constitutional identity protection clause to the Fundamental Law. After the failed constitutional amendment, a national referendum, by

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[205] See Decision no. 2010-605 DC of 12 May 2010, para. 18, Act pertaining to the Opening up to Competition and the Regulation of Online Betting and Gambling, for a translation see https://www.conseil-constitutionnel.fr/en/decision/2010/2010605DC.htm.

[206] Millet, *supra* note 196, at p. 146.

[207] On the differences and commonalities, see Jan-Herman Reestman, 'The Franco-German Constitutional Divide. Reflections on National and Constitutional Identity' 5 *European Constitutional Law Review* (2009) p. 374.

[208] See only Decision no. 2006-540 DC of 27 July 2006, para. 29, Copyright and related rights in the information Society; see further Millet, *supra* note 202, p. 204.

[209] Millet, *supra* note 202, p. 216.

[210] Conseil d'Etat, Ass. 22 Dec. 1978, petition No 11604, *Ministre de l'Intérieur c/Cohn Bendit*.

[211] Case 33-70, 17 Dec. 1970, *SpA SACE v. Finance Minister of the Italian Republic*; Case 41-74, 4 Dec. 1974, *Van Duyn v. Home Office*.

[212] See C. Charpy, 'The *Conseil d'Etat* Abandons Its *Cohn Bendit* Case-Law; *Conseil d'Etat*, 30 October 2009, *Mme Perreux*', 6 *European Constitutional Law Review* (2010) p. 123 (who also points to remaining divergences between the *Conseil d'Etat* and the Court of Justice).

[213] Hungarian Constitutional Court, Decision 22/16 (XII.5). 30 Nov 2016. See T. Drinóczi, 'The Hungarian Constitutional Court on the Limits of EU Law in the Hungarian Legal System', *Int'l J. Const. L. Blog*, Dec. 29, 2016, at: http://www.iconnectblog.com/2016/12/the-hungarian-constitutional-court-on-thelimits-of-eu-law-in-the-hungarian-legal-system; G. Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law', 42 *Review of Central and East European Law* (2018) p. 23 at 32.

which the Hungarian Government sought to signal defiance of the EU's migration laws and policies, also failed.[214]

The decision at issue addressed a request by the Commissioner for Fundamental Rights from 2015.[215] This Ombudsman had asked for an abstract judicial opinion on several questions related to the limits of EU law. The background of the request was the EU Council Decision on quotas for refugee settlement in the EU.[216] In addressing this request, the Hungarian Constitutional Court held that the joint exercise of competences with EU institutions, as foreseen in Article E) (2) of the Hungarian Fundamental Law, can be reviewed by the Court, and that this joint exercise of competences is limited in several ways. As the Court stated, after referring to the jurisprudence of several Member State courts:

> "On the basis of the review of case law of the Member States' supreme courts performing the tasks of constitutional courts and of the Member States' constitutional courts, the Constitutional Court established that within its own scope of competences, on the basis of a relevant petition, in exceptional cases and as a resort of *ultima ratio*, i.e. along with paying respect to the constitutional dialogue between the Member States, it can examine whether exercising competences on the basis of Article E) (2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary."[217]

The first of the mentioned reservations concerns fundamental rights protection. While the Hungarian Constitutional Court found that the level of fundamental rights protection in the EU was adequate, it held that it "cannot set aside the ultima ratio protection of human dignity and the essential contents of fundamental rights".[218] The joint exercise of competences by the Hungarian State with the EU, as defined in the Fundamental Law, could not violate human dignity or the core of other fundamental rights.[219] In the context of this "fundamental rights-reservation review"[220], the Court referred to the GFCC's *Solange* jurisprudence, the need for cooperation with the Court of Justice, as well as the primacy of EU law.

The joint exercise of competences with EU institutions is further limited by two principles. First, it shall not violate Hungarian sovereignty ("sovereignty review reservation"), where the concept of sovereignty is elaborated with references to basic elements of statehood. Second, the joint exercise of competences shall not violate Hungary's constitutional identity.[221] According to the Court,

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[214] On the re-referendum and the failed amendment, see R. Uitz, 'National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades', *Verfassungsblog*, 2016/11/11, https://verfassungsblog.de/national-constitutional-identity-in-the-european- constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/, DOI: 10.17176/20161111-103427; Halmai, *supra* note 213, at p. 28.

[215] Halmai, *supra* note 213, at pp. 29–30, considers the petition "abandoned" but rediscovered by the Constitutional Court.

[216] Council Decision EU 2015/1601 of 22 September 2015, OJ L 248, 24.9.2015; Halmai, *supra* note 213; Drinóczi, *supra* note 213.

[217] Hungarian Constitutional Court, Decision 22/16 (XII.5), 30 Nov 2016, para. 46, official translation at http://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf.

[218] Hungarian Constitutional Court, Decision 22/16 (XII.5), 30 Nov 2016, para. 49, official translation at http://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf.

[219] E. Bodnár, F. Gárdos-Orosz, and Z. Pozsár-Szentmiklósy, 'Developments in Hungarian Constitutional Law: The Year 2016 in Review', in R. Albert, D. Landau, P. Faraguna, Š. Drugda (eds.), *The I·CONnect-Clough Center 2016 Global Review of Constitutional Law* (2017) p. 77 at p. 81.

[220] Drinóczi, *supra* note 213.

[221] Bodnár, Gárdos-Orosz, and Pozsár-Szentmiklósy, *supra* note 219, at p. 81.

> "[t]he Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal [the preamble, N.P. & K.C.] and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law."[222]

The Court argued that constitutional identity was not defined by the Fundamental Law but much rather presupposed by it and that it was the task of the Court to defend it.[223] In the scholarly literature, this use of the concept of 'historical constitution' has been harshly criticized, as it is considered vague and ambiguous.[224] Some commentators have even gone so far to characterize its use as 'abusive'.[225]

The Constitutional Court also maintains that a constitutional dialogue based on equality and collegiality is part of the protection of constitutional identity. Still, it sees itself as competent to examine whether the joint exercise of powers by EU institutions would violate the sketched limitations.[226] Notably, the limitations are understood to apply to both, the conferral to and the exercise of competences by the EU, with the Hungarian Constitutional Court thus reserving for itself an *ultra vires* review.[227] As the judgment was an abstract judicial opinion requested by the Ombudsman, no concrete EU measure was declared incompatible with Hungarian Constitution. Nevertheless, the judgment must be seen as a warning sign.

This new line of jurisprudence of the Hungarian Constitutional Court has to be understood in light of the political context. The institutional framework under which the Court operates has been changed fundamentally since 2010.[228] Critical observers paint the picture of a 'controlled' court that is loyal to the Government.[229] Given the political background of the decision, the case of Hungary illustrates how the doctrinal tools developed by the GFCC can be put to use to shield a national legal order from EU law in order to preserve political power. While the Hungarian Constitutional Court has, as yet, not openly defied the Court of Justice, the recent ruling of the Court of Justice in *Commission v. Hungary*[230], provides considerable potential for conflict. Some observers expect the Hungarian Constitutional Court to defy the Court of Justice – an option that has not become less likely with the *PSPP* judgment of the German Federal Constitutional Court.[231]

3.3.6. Italy

The case of Italy shows how national jurisprudence and ECJ jurisprudence can co-evolve over time. Generally, the Italian Constitution is regarded as open to international cooperation and the associated limitations on national sovereignty. However, the *Corte costituzionale*, the Italian Constitutional Court,

[222] Hungarian Constitutional Court, Decision 22/16 (XII.5), 30 Nov 2016, para. 64.

[223] Drinóczi, *supra* note 213.

[224] Halmai, *supra* note 213, at p. 40–41.

[225] See the pronounced critique by Halmai, *supra* note 213.

[226] Bodnár, Gárdos-Orosz, and Pozsár-Szentmiklósy, *supra* note 219, at p. 81.

[227] Drinóczi, *supra* note 213.

[228] Bodnár, Gárdos-Orosz, and Pozsár-Szentmiklósy, *supra* note 219, at p. 77; Halmai, *supra* note 213, at p. 24; see Halmai, *supra* note 221, at p. 978.

[229] Halmai, *supra* note 213, at p. 24.

[230] Case C-78/18, 18 June 2020, *Commission v. Hungary* (transparency of organizations), ECLI:EU:C:2020:476.

[231] See P. Bárd and L. Pech, 'How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The 'Hungarian model'' (Reconnect Working Paper No. 4, 2019) p. 27; P. Bárd, J. Grogan and L. Pech, 'Defending the Open Society against its Enemies: The Court of Justice's ruling in C-78/18 Commission v Hungary (transparency of associations)', *Verfassungsblog*, 2020/6/22, https://verfassungsblog.de/defending-the-open-society-against-its-enemies/.

also developed its famous 'counter-limits' doctrine to these limitations on national sovereignty.[232] This doctrine played an important role in the process that led to the recognition of EU law's primacy by the Court.[233]

Initially, the Constitutional Court did not accept the primacy of EU Law.[234] Subsequently, in the famous *Frontini* judgment, the Constitutional Court held that EC law had constitutional rank via the implementation clause for international law in Art. 11 of the Italian Constitution. However, it also expressed reservations. The institutions of the EC should not be entitled "to violate the fundamental principles of our constitutional order, or the inviolable rights of the human person."[235] In its subsequent case law, the Constitutional Court held that, if national legislation did not comply with EC law, ordinary courts could disapply it,[236] while maintaining its *Frontini* reservation.

However, the 'counter-limit' doctrine has remained largely theoretical. The Constitutional Court has only once threatened to apply it.[237] When the *Consiglio di Stato*, the Italian supreme administrative court, once applied the doctrine, the Constitutional Court held that it was the only court entitled to do so.[238] Therefore, some observers have even considered the doctrine dormant until it resurfaced in the recent, so-called *Taricco* saga.[239]

The *Taricco* cases concerned overly short limitation periods for VAT fraud in Italy. In the original procedure, the Tribunal of Cuneo submitted a preliminary reference to the ECJ. The accused had committed VAT fraud, but a conviction was not possible due to the short limitation period and a cap concerning the time for which the limitation period could be interrupted.[240] The ECJ found that such short limitation periods were contrary to Art. 325 TFEU, according to which Member States have an obligation to refrain from actions negatively affecting the financial interests of the EU, if the Member State court found that the short limitation period had the consequence that accused individuals escaped criminal punishment in a considerable number of cases.[241] Additionally, the ECJ held that a retroactive disapplication of the limitation clause would not violate the prohibition of retroactive criminal sanctions guaranteed by Art. 49 EUChFR.[242]

Lower courts in Italy were concerned that this jurisprudence of the ECJ would conflict with the criminal law principles of legality and non-retroactivity, and asked the Constitutional Court to activate the counter-limits doctrine.[243] However, the Constitutional Court only partially recognized these demands. On the one hand, the Constitutional Court took issue with the retroactive disapplication of the limitation

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[232] D. Amoroso, 'Italy', in F. Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (Cambridge University Press 2019) p. 184.

[233] Amoroso, *supra* note 232, at p. 197.

[234] Italian Constitutional Court, Costa v ENEL, 24 February/7 March 1964, No. 14.

[235] Italian Constitutional Court, 27 Dec. 1973, *Frontini*, 14 *Com. Mkt. L. Rev*. 372 (1974); for the quotation, see Amoroso, *supra* note 232, at p. 198.

[236] Italian Constitutional Court, Granital SpA v Amministrazione delle Finanze dello Stato, 9 June 1984, No. 170; see Amoroso, *supra* note 232, at p. 198.

[237] On the threat, see Amoroso, *supra* note 232, at p. 198.

[238] Council of State (Fifth Section), Admenta Italia et al. v FEDERFARMA et al., 8 August 2005, No. 4207; Constitutional Court, Criminal proceedings against De Felice et al., 28 December 2006, No. 454 (Order); see Amoroso, *supra* note 232, at pp. 198–199.

[239] Bonelli, *supra* note 48.

[240] Case C-105/14, *Taricco*, 8 Sept. 2015, EU:C:2015:555.

[241] *Id*., at paras. 47-52.

[242] *Id*., at paras. 54-57.

[243] Amoroso, *supra* note 232, at p. 200; D. Paris, 'Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco', 37 *QIL, Zoom-in* (2017) p. 5 at p.8.

clause.[244] It argued that, according to its longstanding jurisprudence, limitation clauses were part of substantive criminal law so that the prohibition of retroactive application of criminal sanctions also covered limitation clauses in Italian law. But it did not immediately invoke the counter-limits doctrine. Instead, it submitted a second preliminary reference to the ECJ, asking it to reconsider its interpretation of Art. 49 EUChFR, as a retroactive disapplication of the limitation clause violated the prohibition of retroactive application of criminal sanctions in Art. 25 of the Italian Constitution. Further, the Court requested clarifications, as the ECJ had not elaborated on the precise meaning of the conditions under which limitations should be set aside with regard to the "seriousness" of VAT fraud.[245]

In its subsequent response, the *Taricco II* decision, the ECJ acknowledged the concerns of the Italian Constitutional Court and held that the retroactive disapplication of the limitation clause had to comply with the principles of foreseeability, precision, and non-retroactivity.[246] Therefore, if the retroactive disapplication of the limitation clause led to uncertainty in the Italian legal system, the Italian Constitutional Court was not obliged to disapply the criminal limitation provisions at issue.[247]

Building on these arguments, the Italian Constitutional Court subsequently held that *Taricco* was inapplicable due to the constitutional requirements of legality in criminal law and the initial judgment's lack of precision. The handling of these preliminary references by the Italian Constitutional Court have been aptly described as a use of "carrot and stick".[248] On the one hand, it used conciliatory language and opened avenues for cooperation, while on the other hand it threatened with defiance. Nevertheless, despite these challenges, the Italian Constitutional Court largely accepts the primacy of EU law and has, as yet, refrained from openly defying the ECJ.

3.3.7. Netherlands

The case of the Netherlands is somewhat exceptional among the national legal orders in the EU. This has two main reasons. First, with regard to international law, the Dutch legal order follows a monist conception and is thus particularly open to international law.[249] Second, the idea of a 'modest' constitution also entails a lack of judicial review of legislative acts.[250] Thus, the Netherlands have not erected constitutional safeguards against European Integration, such as the reservations developed by the GFCC or the Italian Constitutional Court.[251]

Due to these conditions, Dutch courts have largely accepted the direct effect and primacy of EU law.[252] In fact, the openness of the Dutch legal order towards international law might even have been used to accelerate the development of the autonomous EU legal order as a whole. Historical research suggests

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[244] Corte costituzionale, 23 Nov. 2016, Order no. 24/2017.

[245] Constitutional Court, Criminal proceedings against Mauro Bertoni et al.; Criminal proceedings against D.B.C. et al., 26 January 2017, No. 24 (Order).

[246] Case C-42/17, M.A.S. (Taricco II), 5 Dec. 2017, EU:C:2017:936, at para. 51.

[247] *Id.*, at para. 59.

[248] Paris, *supra* note 243.

[249] L. Besselink and M. Claes, 'The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution', in A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, and Global Governance. National Reports*, (T.M.C. Asser Press 2019) p. 179; A. Nollkaemper and R. van Alebeek, 'Netherlands', in F. Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (Cambridge University Press 2019) p. 255.

[250] G. van der Schyff, 'EU Member State Constitutional Identity: A Comparison of Germany and the Netherlands as Polar Opposites', 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2016) p. 167 at pp. 176–177.

[251] Besselink and Claes, *supra* note 249, at p. 188; van der Schyff, *supra* note 250, at p. 176.

[252] Besselink and Claes, *supra* note 249, at p. 184.

that *Van Gend en Loos* was strategically litigated in the Netherlands.[253] The monist conception of the Constitution is particularly pronounced. Art. 94 of the Dutch Constitution gives international treaties and decisions of international organizations primacy over the constitution. Still, as EU law is understood as an autonomous legal order, Art. 94 does not directly incorporate EU law.[254] Instead, the direct applicability of secondary EU law derives directly from the Treaties and does not follow from a national act, as has been affirmed by the Council of State (*Raad van State*)[255] and by the Supreme Court of the Netherlands (*Hoge Raad*).[256]

The prohibition of judicial review of the constitutionality of acts of Parliament or of Treaties is found in Art. 120 of the Dutch Constitution. This prohibition provided the (partial) basis for the District Court of the Hague when it rejected a case against the Netherlands' accession to the European Stability Mechanism that was based on an alleged infringement of the legislature's constitutional budgetary right. The District Court found to have no jurisdiction to review neither the constitutionality of an act of Parliament nor the associated democratic procedure.[257]

Typically, in the Netherlands, questions of conferral of power to the EU are left to the political process and to the legislature. Art. 92 of the Constitution that provides for the conferral of powers to international institutions does not provide limitations, be it in form of a time limit or in form of a different qualification.[258] Additionally, there is generally no concept of sovereignty in the Dutch Constitution, and while the concept has been discussed in relation to EU law in constitutional law scholarship, it does not impose limits to European integration.[259]

In sum, the relationship to the EU and to EU law is regarded rather as a political than a legal question. Consequently, efforts to delimit EU integration rest rather on political opposition, as exemplified by the referendum on the EU Constitutional Treaty in 2005.[260] The Dutch experience thus provides a contrast to other Member States, where political scepticism towards EU integration is also expressed through judicial proceedings.

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[253] A. Vauchez, 'The transnational politics of judicialization. Van Gend en Loos and the making of EU polity', 16 *European Law Journal* (2010) p. 1 at p. 10: "Maybe because there was already a tradition of international lawyering in the Dutch bar, maybe because the 1956 constitutional reform had rendered its legal system compatible with the direct effect of international treaties, the Dutch section of the FIDE launched a working group in charge of identifying 'which dispositions of the Treaty establishing the EC are self-executing' (November 1961)."

[254] See van der Schyff, *supra* note 250, at p. 181: "Art. 94 is therefore only relevant with regard to international law other than EU law, especially the European Convention on Human Rights and the International Covenant on Civil and Political Rights as essential elements of the country's constitutional."

[255] Raad van State, 7 July 1995 Metten, AB 1997, 117; see M. J. M. Verhoeven, *The Costanzo Obligation. The obligations of national administrative authorities in the case of incompatibility between national law and European law* (Dissertation, Utrecht University 2011) p. 60.

[256] See Hoge Raad, 2 November 2004, ECLI:NL:HR:2004:AR1797: "3.6. The plea fails to recognize that a regulation adopted on the basis of the EC Treaty, such as the one at issue here, has effect under that treaty and not under any national act and is directly applicable in all Member States. This validity is not based on the system of art. 93 and 94 GW. The remedy is therefore defective."; Besselink and Claes, *supra* note 249, at p. 191.

[257] The Hague District Court, Preliminary Judgment 6.6.2012, ECLI:NL:RBSGR:2012:BW7242, paras. 2.2, 3.2. et seq; see van der Schyff, *supra* note 250, at p. 178.

[258] See van der Schyff, *supra* note 250, at p. 179: "This emphasis on the democratic process also explains Art. 92 of the Constitution that regulates the conferral of legislative, executive and judicial powers on international institutions by or pursuant to a treaty. The provision does not require a conferral to be for a specific period of time only, nor does the provision limit the type of power as to its character or range."; Besselink and Claes, *supra* note 249, at p. 189.

[259] See van der Schyff, *supra* note 250, at p. 178: "Dutch academics have discussed the concept of sovereignty in the context of EU law though, where they have usually indicated the need to think in terms of a limited or shared sovereignty in the European constitutional space, instead of proposing the concept as a limit to European integration in the mould of the Lisbon judgement."; see also Besselink and Claes, *supra* note 249, at p. 187.

[260] See van der Schyff, *supra* note 250, at p. 180; Besselink and Claes, *supra* note 249, at p. 189.

3.3.8. Poland

In recent years, the Polish constitutional landscape is marked by what has been called an "illiberal turn".[261] Nonetheless, our account will start by sketching the general constitutional and judicial approach to the relationship of EU law with national law, before then moving to the current contested legal and political developments. In the Polish Constitution of 1997, the relationship of EU law to national law is mainly regulated in two provisions. First, Article 90 (1) provides that Poland

> "may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters".

Then, Article 91 provides for the direct applicability of a ratified international agreement, thus providing for the direct applicability of EU primary law. As for EU secondary law, the situation is not as straightforward. According to Article 91 (3), legal norms that have been established by an international organization shall have precedence over national law. Yet, this precedence is understood to refer exclusively to ordinary statutes, not to the Constitution.[262] This understanding of the relationship of national law to EU law was developed by the Polish Constitutional Tribunal in a series of landmark judgments.

In its judgment on the Treaty of Accession[263], the Constitutional Tribunal ruled that Art. 90 (1) required that area and scope of a conferred competence have to be specified precisely.[264] This follows from the procedural requirements that are attached to a conferral of competences. Furthermore, the Tribunal held that the Polish Constitution maintained its supremacy.[265] Art. 90 (1) could not go so far as to allow the transfer of competences that would enable an international organization to enact legal acts that were contrary to the Constitution. More precisely, Poland still had to be able to operate as a sovereign and democratic state, thus maintaining "core powers".[266] This implies that EU law should take no absolute primacy and that an "integration-friendly" interpretation of national law was limited by the precedence of the Polish Constitution. The only ways to resolve an irreconcilable conflict between EU law and the Constitution were a change of the Constitution, a change of Community law, or a withdrawal from the EU.[267]

Further, in the decision concerning the Treaty of Accession, the Constitutional Tribunal, while acknowledging that national courts should, in general, not judge on the constitutionality of EU law, held that an *ultra vires* review might be necessary under certain circumstances even if only as an *ultima ratio*. Member States had the right to

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[261] S. Biernat and M. Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context', in A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, and Global Governance. National Reports*, (T.M.C. Asser Press 2019) p. 745.

[262] Biernat and Kawczyńska, *supra* note 261, at p. 750.

[263] Judgment on Treaty of Accession, 11 May 2005, ref. No. K 18/04.

[264] See A. Śledzińska-Simon and M. Ziółkowski, 'Constitutional Identity in Poland. Is the Emperor Putting On the Old Clothes of Sovereignty?', in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) p. 243 at p. 251.

[265] Śledzińska-Simon and Ziółkowski, *supra* note 264, at p. 244.

[266] See Biernat and Kawczyńska, *supra* note 261, at p. 755.

[267] Śledzińska-Simon and Ziółkowski, *supra* note 264, at p. 244. Such an amendment of the Constitution took place once in reaction to a judgment of the Polish Constitutional Court. It concerned a decision by the Constitutional Tribunal, holding that the law implementing the Framework Decision on the European arrest warrant was not compatible with the Constitutional prohibition of the extradition of Polish citizens, see Judgment of 27 April 2005, case No. P 1/05.

> "assess whether or not, in issuing particular legal provisions, the Community [Union] legislative organs acted within the delegated competences and in accordance with the principles of subsidiarity and proportionality. Should the adoption of provisions infringe these frameworks, the principle of the precedence of Community law fails to apply with respect to such provisions".[268]

In its decision concerning the Treaty of Lisbon, the Constitutional Tribunal elaborated further on its concept of sovereignty.[269] While sovereignty may be limited by Poland's accession to the EU, it was not lost. The conferral of competences could be revoked, and Poland could now participate in the EU's decision-making procedures, thus being 'compensated' for the conferral of a competence.[270]

At the same time, the Constitutional Tribunal also ruled on the limits of conferral. These limits were determined by the concept of constitutional identity[271], which the Constitutional Tribunal introduced for the first time.[272] The Tribunal provided an exemplary list of competences where conferral was thus limited. The list included the following:

> "the paramount principles of the Constitution and the provisions concerning the rights of the individual defining the identity of the state should be counted among the matters subject to a complete prohibition of delegation, including more particularly the requirement of ensuring protection of human dignity and constitutional rights, the principle of sovereignty, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure better realisation of constitutional values and a prohibition on delegating legislative authority and competencies to create competencies."[273]

The Constitutional Tribunal also emphasized that the competence of the constitutional judiciary to watch over the limits of conferral formed was part of Polish constitutional identity.[274] Thus, the Tribunal followed the general lines of decisions of other national courts regarding sovereignty and constitutional identity.[275] But the Tribunal also went beyond that in later decisions. In its *Brussels I* judgment, the Tribunal reviewed the constitutionality of a piece of EU secondary law and ruled on the merits. It held that the *Brussels I* regulation did in fact comply with the constitutional standard of protection of the right to a fair trial and equality before the law.[276] On the one hand, the judgment showed a wide understanding of the admissibility of a constitutional complaint, opening the opportunity for constitutional complaints against acts of EU institutions. On the other hand, it emphasized the need for caution and restraint in the review of EU legal acts, limiting its jurisdiction to cases initiated by a constitutional complaint and referring to the EU law principle of sincere cooperation.[277]

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[268] Judgment on Treaty of Accession, 11 May 2005, ref. No. K 18/04; as transl. by Sledzińska-Simon and Ziółkowski, *supra* note 264, at p. 244–245.

[269] Judgment of 24 November 2010, ref. No. K. 32/09; and then further confirmed in Judgment of 26 June 2013, ref. No. K 33/12 (ESM case).

[270] See Biernat and Kawczyńska, *supra* note 261, at p. 754.

[271] Biernat and Kawczyńska, *supra* note 261, at p. 755.

[272] Śledzińska-Simon and Ziółkowski, *supra* note 264, at p. 243.

[273] Judgment of 24 November 2010, ref. No. K. 32/09, para. III.2.1; as transl. by Śledzińska-Simon and Ziółkowski, *supra* note 264, at p. 253–254.

[274] Judgment of 24 November 2010, ref. No. K. 32/09, para. III.3.8; see Śledzińska-Simon and Ziółkowski, *supra* note 264, at p. 248.

[275] See Wendel, *supra* note 136, at p. 986.

[276] Judgment of 16 Nov 2011, ref. no. SK 45/09; see Biernat and Kawczyńska, *supra* note 261, at p. 755–756.

[277] Judgment of 16 Nov 2011, ref. no. SK 45/09; see Biernat and Kawczyńska, *supra* note 261, at p. 756.

The Tribunal justified its competence to review an EU legal act with the principal of conferral. It argued that it could review whether the conferred competences were exercised in conformity with fundamental rights.[278] The Constitutional Tribunal required an adequate protection of rights and freedoms by EU acts but not by the EU legal system in general.[279] It is noteworthy that the Constitutional Tribunal referred to the GFCC's judgments in *Solange* and *Honeywell* in its decision.[280]

While the aforementioned jurisprudence can be considered sceptical, it did not go beyond the scepticism that can be observed also in other domestic jurisdictions. However, in recent years events have taken a different turn, thus rendering the relationship between national law and EU law more delicate. Accounts of the current troubling situation surrounding the rule of law in Poland, commonly start with the crisis around the Constitutional Tribunal in the wake of the parliamentary elections of 2015 and a number of changes and amendments to the Act on the Constitutional Tribunal that severely limited the latter's effectiveness and impartiality.[281]

Since these changes, and according to critical observers, including former presidents of the Constitutional Tribunal, constitutional review has been turned ineffective in Poland.[282] The European Commission[283], the Venice Commission[284] and the European Parliament[285] have voiced their concern and critique of these developments. The Constitutional Tribunal itself found several of the changes introduced by the Act on the Constitutional Tribunal of 22 July 2016 to be unconstitutional.[286]

Notably, in light of judicial reforms in Poland, the European Commission initiated an Article 7 TEU procedure with regard to the guarantee of the rule of law in Poland on 20 December 2017. The defence strategy by the Polish Government *inter alia* referred to the concept of constitutional identity and the

278 Śledzińska-Simon and Ziółkowski, *supra* note 264, at p. 259.

279 Judgment of 16 Nov 2011, ref. no. SK 45/09; see Biernat and Kawczyńska, *supra* note 261, at p. 777.

280 Wendel, *supra* note 136, at p. 986.

281 For a concise account of these developments, see W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

282 Statement by the former presidents of the Constitutional Tribunal Marek Safjan, Jerzy Stępień, Bohdan Zdziennicki, and Andrzej Zoll, 29 November 2016 (https:// blogs.eui.eu/constitutionalism-politics-working-group/2016/11/29/statement-former- presidents-constitutional-tribunal-marek-safjan-jerzy-stepien-bohdan-zdziennicki- andrzej-zoll/): "When the new Acts on the Constitutional Tribunal enter into force, the period of activity of the Constitutional Tribunal of the Republic of Poland will come to an end. It will be the end of activity by which a system of constitutionality control guaranteed the efficient defence of the rule of law and a control which systematically strengthened the guarantee of our fundamental rights."

283 Commission Recommendation (EU) 2016/1374 regarding the Rule of Law in Poland, COM (2016) 5703 final, 27 July 2016; Commission Recommendation complementary to Commission Recommendation (EU) 2016/1374, COM (2016), 8950 final, 21 December 2016.

284 Opinion no. 833/2015 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), CDL-AD(2016)001; see also Opinion no. 860/2016 on the Act on the Constitutional Tribunal, Adopted by the Venice Commission at its 108th Plenary Session (Venice, 14–15 October 2016), CDL-AD(2016)026.

285 European Parliament resolution of 13 April 2016 on the situation in Poland (2015/3031 (RSP)).

286 Judgment of 11 August 2016, case No. K. 39/16; see Śledzińska-Simon and Ziółkowski, *supra* note 264, at p. 262.

idea of constitutional pluralism.[287] Since then, the situation appears to be escalating. Several of the judicial reforms, as regarding the retirement age of judges[288], disciplinary proceedings[289], judicial independence[290], and the appointment of judges[291], have led to rulings and proceedings on the EU level. The decisions of the Court of Justice have been met with defiance by the parts of the Polish judiciary.

In *A.K. and Others*[292] the Court of Justice strongly hinted that the Polish judicial reforms undermined judicial independence. Yet, the Disciplinary Chamber of the Supreme Court, a controversial decision-making-body at the Polish Supreme Court that was introduced in 2017, decided that the decision was not binding in Poland. It argued that the bench composition of the Court that had initiated the preliminary reference procedure was not lawful.[293] As Advocate General Tanchev recently emphasized[294], the Disciplinary Chamber delivered this judgment despite an interim measure by the Court of Justice.[295] In this interim measure, the ECJ had ordered that the application of national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges should be suspended until the resolution of the pending infringement procedure. As A.G. Tanchev argued,[296] the arguments provided by the GFCC in the *PSPP* judgment can strengthen the position of the Polish courts defying the Court of Justice in this situation. Similarly to Hungary, the situation appears so strongly politicized and fragile that a return to a cooperative judicial dialogue between the Court of Justice and the domestic Polish courts appears unlikely.

3.3.9. Conclusion

This section has shown the range of reactions by national legal orders to the primacy jurisprudence of the Court of Justice. Many constitutional and high courts converge on formulating limiting doctrines, especially with regard to fundamental rights protection and constitutional identity. Still, the level of confrontation with the ECJ varies strongly.

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[287] The Chancellery of the Prime Minister, White Paper on the Reform of Polish Judiciary, Warsaw, 7 March 2018, para 170: "As has already been mentioned before, the new Polish regulations cannot be an exact copy of the legislation of other EU member states. It is obvious that there are differences in legal systems within the EU, this follows from separate constitutional identities of individual states, and this diversity is protected by the Treaty on European Union."

[288] European Commission, Press Release 29 July 2017 'European Commission launches infringement against Poland over measures affecting the judiciary', https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2205; and subsequently Court of Justice, Judgment of the Court (Grand Chamber) of 5 November 2019, Case C-192/18, ECLI:EU:C:2019:924 (European Commission v Republic of Poland).

[289] See the critique of the so-called "muzzle law", e.g., by L. Pech, W. Sadurski and K. L. Scheppele, 'Open Letter to the President of the European Commission regarding Poland's "Muzzle Law"', *Verfassungsblog*, 2020/3/09, https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission-regarding-polands-muzzle-law/, DOI: 10.17176/20200309-094613-0.

[290] See the pending infringement procedure before the Court of Justice in Case C 791/19; and also European Commission, Press Release 29 April 2020 'Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland', https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772: "The new law on the judiciary undermines the judicial independence of Polish judges and is incompatible with the primacy of EU law. Moreover, the new law prevents Polish courts from directly applying certain provisions of EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the Court of Justice."

[291] See the pending Case C-824/18 before the Court of Justice and the recent Opinion by A.G. Tanchev in Case C-824/18 A.B. and others, delivered on 17 December 2020.

[292] C-585/18, C-624/18 and C.625/18, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), Judgment of 19 Nov. 2019, ECLI:EU:C:2019:982.

[293] See Opinion of A.G. Tanchev in Case C-824/18 A.B. and others, delivered on 17 December 2020, para 77, referring to Order of the Disciplinary Chamber of the Supreme Court of 23 September 2020 (II DO 52/20).

[294] Opinion of A.G. Tanchev in Case C-824/18 A.B. and others, delivered on 17 December 2020, para 78.

[295] Order of the Court in Case C-791/19, 8 April 2020, R. Commission v Poland.

[296] Opinion of A.G. Tanchev in Case C-824/18 A.B. and others, delivered on 17 December 2020, para 79.

A few legal orders accept the primacy of EU law almost unconditionally. Among our case studies, the Netherlands turned out to have a domestic legal order that is very accommodating to EU law, while challenges to the relationship to the EU are discussed in the political realm. Outside the countries that we examined in this study, there are also other Member States that recognize the unconditional primacy of EU law.[297]

Most domestic apex courts have, in principle, accepted the primacy of EU law, but carved out certain exceptions, without openly defying the Court of Justice.[298] Belgium has also traditionally been considered a legal order that is very open to European integration, but the Belgian Constitutional Court has indicated that it is prepared to engage in constitutional identity review. In France, the *Conseil constitutionnel* has relied on constitutional identity review, but not identified an unamendable core of the constitution or even come close to an *ultra vires* review.[299] Italy has developed its 'counter-limits' doctrine, but traditionally been very reluctant to challenge the ECJ. Only recently, the Italian Constitutional Court has reactivated the doctrine in *Taricco*, but gave the ECJ the opportunity to avoid an open confrontation.

In some legal orders, we have seen open challenges of the ECJ. In the Czech Republic, the Constitutional Court notably found a decision of the ECJ to be *ultra vires*. Similarly, the Danish Supreme Court has taken a confrontational route. Not willing to accept the ECJ's dynamic interpretation of antidiscrimination law between private parties, it found the ECJ to not have been endowed with such an extensive judicial competence. Nevertheless, the consequences of these judgments for the EU legal order seem limited. In the Czech Republic, the defiance of the Court of Justice seems to have been a collateral damage of an internal dispute between the Supreme Administrative Court and the Constitutional Court so that the precedential value is limited. More worrying is the Danish case. But even here, the negative effects are limited to the specific constellation decided in the concrete case so that the decision does not pose a danger to the coherency of the EU legal order as a whole.

More extreme cases of defiance of EU law are exhibited in Hungary and Poland. In Hungary, the Constitutional Court has clearly signaled that it is prepared to conduct an *ultra vires* review, and it has put forward a notion of constitutional identity review that is highly politicized. Considering the general doubts about the state of the rule of law and the impartiality of the Constitutional Court, this development might not appear all that surprising. Similarly, in Poland the situation of the rule of law is precarious, and there has recently been a confrontation over the disciplinary chamber of the Supreme Court. However, these developments are in line with the general fears about democracy and the rule of law in Poland and Hungary and cannot be explained independently of the political context. While worrying, it is unlikely that there will be significant spillover effects to jurisdictions of other Member States with independent courts.

3.4. Conclusion

Despite recent challenges, the doctrine of primacy of EU law is still the central reference point for the discussion of the relationship between EU law and the domestic legal systems of the Member States. The Court of Justice insists on the absolute primacy of EU law. While the doctrine is rather rigid, the

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[297] See Claes, *supra* note 145, at 157 (mentioning Austria, Cyprus and Luxembourg). In Austria, e.g., the Constitutional Court has explicitly accepted the primacy of EU Law even with regard to the Austrian constitution, see T. Öhlinger and M. Potacs, EU-*Recht und staatliches Recht: Die Anwendung des Europarechts im innerstaatlichen Bereich* (LexisNexis 2017) p. 88.

[298] Claes, *supra* note 145, at 157-158.

[299] Millet, *supra* note 196, at p. 146.

Court of Justice has kept it alive against resistance by showing a considerable amount of flexibility in its application. The ECJ is prepared to grant the Member State's courts some discretion and flexibility in the application of EU law, changes its own jurisprudence to take into account serious concerns of Member States' apex courts and accommodates domestic fundamental values. Nevertheless, the Court of Justice claims the ultimate authority over which national concerns and requirements are worthy of such consideration.[300] This follows from the need of a uniform application of EU law.

While we have seen that national courts have in principle accepted the primacy of EU law and the ECJ's position as EU law's ultimate arbiter, the primacy has also been met with resistance and, partly, defiance. In this context, the jurisprudence of the GFCC has proven to be a central reference point. The GFCC has developed a complex doctrine regarding the primacy of EU law,[301] thus providing national courts with various forms of doctrinal instruments to resist the primacy of EU law. While the early jurisprudence of the GFCC in *Solange* and *Maastricht* clearly influenced the delimiting jurisprudence of national courts, it is safe to assume that these reactions by other national courts had a reinforcing influence on the GFCC.

This makes the *PSPP* judgment all the more worrying as a challenge to the primacy and unity of EU law. Certainly, the GFCC was not the first national court to declare an EU measure *ultra vires*. While the *Holubec* decision by the Czech Constitutional Court came under particular national circumstances and is considered an outlier, it nonetheless questioned the ultimate authority of the ECJ.[302] More clearly, the *Ajos* decision of the Danish Supreme Court challenged the primacy of EU law by refusing to apply a decision of the Court of Justice.[303] Nevertheless, both decisions were more limited in their effects than the *PSPP* judgment because they only concerned the application of EU law in a particular constellation. By contrast, the *PSPP* judgment challenged the monetary policy of the ECB, which could potentially have severe negative effects on a whole field of EU policy.

Equally worrying is the potential precedential effect of the decision. Considering that Hungary and Poland show growing deficiencies in respecting the rule of law and judicial independence which culminate in undermining and defying EU law,[304] the question arises whether we are witnessing a 'twilight' of EU law's primacy. Yet, primacy's twilight is, by no means, a foregone conclusion. There are voices arguing that the GFCC has severely damaged its authority as *primus inter pares* of the apex courts of EU Member States.[305] Furthermore, we have also seen that judicial dialogue can still by employed effectively, as the *Taricco* cases, initiated by the Italian Constitutional Court, or even the GFCC's own approach in *Honeywell* or the more recent *Right to be Forgotten* cases demonstrate.[306] Against this complex background, it remains to be seen which reactions the *PSPP* judgment will generate.

[300] See above, 3.1.

[301] See above, 3.2.

[302] See above, 3.3.2.

[303] See above, 3.3.3.

[304] See above, 3.3.5 and 3.3.8.

[305] See J.H.H. Weiler, 'Mirror Mirror on the Wall – Who is the Most Beautiful of All? Legal Hegemony or Legal Hubris?', *Verfassungsblog*, 2020/10/10, https://verfassungsblog.de/mirror-mirror-on-the-wall-who-is-the-most-beautiful-of-all/.

[306] See above, 3.3.6.

4. THE PRINCIPLE OF PROPORTIONALITY IN ART. 5 TEU AS AN INSTRUMENT TO DELIMIT EU COMPETENCES

KEY FINDINGS

The Court of Justice has not developed a particular doctrine of proportionality regarding the competence-focused proportionality test in Art. 5 (4) TEU. Predominantly, it does not even explicitly distinguish between the competence-dimension and the protection of individuals in its proportionality analysis. When it comes to the structure of the proportionality test, the Court mostly analyses the suitability and the necessity stage. It rarely uses proportionality *stricto sensu*. Nevertheless, it does not totally refrain from using the balancing stage either. In operationalizing the proportionality test, the Court uses a rather deferential standard of review. It follows a procedural approach in order to determine the limits of the discretion it affords to EU institutions. Overall, the analysis shows that the Court of Justice's reasoning in *Weiss* is well in line with the standards that the Court developed in its prior case law. The approach of the ECJ is sometimes criticized in the legal literature. However, it is largely accepted. The analysis of the interpretation of proportionality of Member States' apex courts is not fruitful: Before the *PSPP* judgment, there are no significant cases, in which Member States' courts have referred to proportionality in Art. 5 (4) TEU.

4.1. The case law of the Court of Justice

The principle of proportionality as an instrument to review acts of EU institutions can be traced back to the early case law of the Court of Justice. In *Fédération Charbonnière de Belgique*, the Court argued that it is a "generelly-accepted rule of law" that the actions of an authority have to be "in proportion to the scale of that action."[307] In its subsequent jurisprudence, the Court refers to the principle of proportionality as a general principle of EU (formerly: EC) law, according to which EU measures have to be appropriate and necessary to attain the objective sought.[308]

In the Maastricht Treaty, the Member States explicitly included the principle of proportionality as an instrument to delimit EU competences in Art. 3b para. 3 of the EC Treaty.[309] Today, this principle is contained in Art. 5 TEU. According to this provision, "[t]he use of Union competences is governed by the principles of subsidiarity and proportionality" (para. 1). The latter is specified in Art. 5 para. 4: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." From the text of the Treaty it is not immediately obvious how proportionality is to be distinguished from the principle of subsidiarity, which already provides that the "Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States" (Art.5 para. 3 TEU).

[307] Case 8/55, *Fédération Charbonnière de Belgique*, [1956] ECR 292, at 299.

[308] See, e.g., Cases 122/78, *Buitoni*, [1979] ECR 678, at para. 16; C-167/88, *AGPB*, [1989] ECR 1678, at para. 20; C-331/88, *Fedesa*, [1990] ECR I-4057, at para. 13.

[309] On the drafting history, see J. Saurer, 'Der kompetenzrechtliche Verhältnismäßigkeitsgrundsatz im Recht der Europäischen Union', 69 *Juristenzeitung* (2014) p. 281 at p. 282.

In the case law of the Court of Justice, one can observe a clear difference between the two principles. While the subsidiarity test is exclusively focused on competences,[310] the principle of proportionality has a double dimension: On the one hand, it is focused on the protection of individual interests, while on the other hand also taking into account the autonomy of Member States.[311] Here, the Court of Justice does usually not distinguish clearly between the two dimensions. Consequently, it often does not refer explicitly to Art. 5 TEU, but instead only to proportionality as a general principle of EU law, continuing its pre-Maastricht case law.[312]

When defining the principle of proportionality, the Court usually refers to the formula developed in *Buitoni*[313] and refined in *Fedesa*,[314] according to which an EU measure has to be appropriate and necessary in order to achieve the objectives legitimately pursued by the measure in question.[315] This formula refers to three elements of the proportionality test, namely legitimacy, appropriateness and necessity, but does not explicitly mention the fourth element, i.e. the balancing test or proportionality *stricto sensu*. Indeed, in most cases, the Court does not explicitly analyse whether a particular measure is indeed strictly proportionate.[316] Nevertheless, there are a number of judgments, in which the Court of Justice makes either explicit or implicit reference to proportionality *stricto sensu*.[317]

In many cases, this reference is implicit. For example, in *Fedesa*, the Court argued that "the importance of the objectives pursued is such as to justify even substantial negative financial consequences for certain traders"[318], a clear balancing consideration. In *Nelson*, the Court also relied on implicit balancing: "Indeed, the case law shows that the importance of the objective of consumer protection, which includes the protection of air passengers, may justify even substantial negative economic consequences for certain economic operators."[319]

In other cases, particularly in its more recent case law, the Court explicitly analyses whether a measure is proportionate *stricto sensu*. In *Poland v. Parliament and Council*, the Court examines whether the challenged measure has "disproportionate effects".[320] However, instead of balancing the interests at stake itself, the Court pursued a procedural approach and only analysed whether the EU legislature had

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310 See, e.g., Case C-491/01, *British American Tobacco*, [2002] ECR I-11550, at paras. 177-183; Case 58/08, *Vodafone*, [2010] ECR I-4999, at paras. 72-79; Case C-508/13, *Estonia v. Parliament and Council*, 18 June 2015, EU:C:2015:403, at paras. 44-49.

311 Saurer, *supra* note 309, p. 285.

312 See, e.g., Case C-157/96, *National Farmers' Union*, [1998] ECR I-2211, at para. 60; Joined Cases C-27/00 and 122/00, *Omega Air*, [2002] ECR I-2599, at para. 62; Case C-491/01, *British American Tobacco*, *supra* note 310, at para. 122; Case C-380/03, *Germany v. Parliament and Council*, [2006] ECR I-11631, at para. 144; Case C-344/04, *IATA and ELFAA*, [2006] ECR I-443, at para. 79; Case C-15/10, Etimine, [2011] ECR I-6681, at para. 124; Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council*, 6 Sept. 2017, EU:C:2017:631, at para. 206.

313 Case 122/78, *Buitoni*, *supra* note 308, at para. 16.

314 Case C-331/88, *Fedesa*, *supra* note 308, at para. 13.

315 See further, e.g., Case C-157/96, *National Farmers' Union*, *supra* note 312, at para. 60; Case C-84/94, *United Kingdom v. Council*, [1996] ECR I-5793, at para. 57; Joined Cases C-27/00 and 122/00, *Omega Air*, *supra* note 312, at para. 62; Case C-491/01, *British American Tobacco*, *supra* note 121, at para. 122; Case C-380/03, *Germany v. Parliament and Council*, *supra* note 312, at para. 144; Case C-344/04, IATA and ELFAA, *supra* note 312, at para. 79; Case C-15/10, Etimine, supra note 312, at para. 124; Case C-187/12, *SFIR*, 14 Nov. 2013, EU:C:2013:737, at para. 42.

316 V. Trstenjak and E. Beysen, 'Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung', 47 *Europarecht* (2012) p. 265 at pp. 269-270.

317 Trstenjak and Beysen, *supra* note 316, p. 270.

318 Case C-331/88, *Fedesa*, *supra* note 119, at para. 17.

319 Joined Cases C-581/10 and C-629/10, *Nelson*, 23 Oct. 2012, EU:C:2012:657, at para. 81.

320 Case C-358/14, *Poland v. Parliament and Council*, 4 May 2016, EU:C:2016:232, at para. 97.

"weighed up" all relevant interests.[321] Similarly, in *Pesce*, the Court of Justice examined the "strict proportionality" of the challenged act of the EU legislature and argued that the latter was "obliged to reconcile the various interests at stake".[322]

The proportionality assessment usually entails an empirical and a normative dimension. Empirically, courts have to assess legislative prognoses when they determine whether a measure is appropriate or necessary to achieve the legislative aim. This empirical assessment poses several challenges: In the first place, courts are ill-equipped to make empirical assessments themselves because judges lack adequate training and sufficient resources. Furthermore, empirical prognoses imply uncertainty. The question which measure to adopt in the face of uncertainty is a question of societal risk preferences, and the determination of these risk preferences is a political, not a legal choice.[323] Normatively, proportionality requires a reconciliation between different competing aims, which are often incommensurable.[324] This reconciliation of competing values is also primarily a political task.[325] In the words of the Court of Justice: "[T]he Court cannot substitute its own assessment for that the [EU] legislature."[326]

For these reasons, courts generally grant the legislature and the executive a margin of discretion when it comes to the review of empirical prognoses and the weighing up of competing values. This is largely uncontested among different constitutional and supranational courts applying proportionality[327] and also generally accepted in the legal literature.[328] However, the devil is in the detail: While the general principle is uncontested, there is a controversial discussion on the degree of deference to grant to the legislature and the executive and on how to determine the limits of political discretion.

The Court of Justice usually gives EU institutions a large degree of discretion when applying the proportionality test. The justification for the broad discretion of the EU legislature and other EU institutions depends on the circumstances. In the field of the common agricultural and fisheries policies, the Court argues that the wide discretionary power is due to the broad political responsibilities that have been conferred to the Union in these fields.[329] Furthermore, the Court allows a broad discretion when a meas-

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321 *Id*., at para. 102.

322 Case 78/16, *Pesce*, 9 June 2016, EU:C:2016:428, at para. 74.

323 N. Petersen, 'Avoiding the common-wisdom fallacy: The role of social sciences in constitutional adjudication', 11 *International Journal of Constitutional Law* (2013) p. 294.

324 Fundamentally B. Schlink, *Abwägung im Verfassungsrecht* (1976); T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing', 96 *Yale Law Journal* (1987) p. 943.

325 This is largely uncontested. However, there is a complex and controversial debate on the extent to which courts should be able to review the decisions of the legislature and the executive. On this debate, see N. Petersen, *Proportionality and Judicial Activism* (Cambridge University Press 2017) pp. 38-59.

326 Joined Cases C-27/00 and 122/00, *Omega Air*, *supra* note 123, at para. 64.

327 See, e.g., BVerfGE 50, 290, 232-233 (for Germany); *Irwin Toy Ltd v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (for Canada); Case 174/82, *Sandoz*, [1983] ECR 2445, at para. 16 (for the EU); *Handyside v. United Kingdom*, 7 Dec. 1976, Series A, no. 24, at para. 48 (for the ECHR).

328 See, e.g., J. Rivers, 'Proportionality and Variable Intensity of Review', 65 *Cambridge Law Journal* (2006) p. 174; J. Rivers, 'Proportionality, Discretion and the Second Law of Balancing', in G. Pavlakos (ed.), *Law, Rights and Discourse* (Hart 2007) p. 167; J. Corkin, 'Science, legitimacy and the law: Regulating Risk Regulation Judiciously in the European Community', 33 *European Law Review* (2008) p. 359; P. Popelier, 'Preliminary Comments on the Role of Courts as Regulatory Watchdogs', 6 *Legisprudence* (2012) p. 257; I. Bar-Siman-Tov, 'Semiprocedural Judicial Review', 6 *Legisprudence* (2012) p. 271.

329 Case C-189/01, *Jippes*, [2001] ECR I-5693, at para. 80; Case C-59/11, *Association Kokopelli*, 12 July 2012, EU:C:2012:447, at para. 39.

ure "entails political, economic and social choices on its part" and when it involves "complex assessments"[330] or in the context of "risk management measures."[331] Finally, the Court has also afforded a broad discretion to the ESCB when it comes to matters of monetary policy because the latter has "to make choices of a technical nature and to undertake forecasts and complex assessments".[332] In cases in which the Court of Justice affords a broad discretion to EU institutions, it usually confines itself to analyse whether a measure was "manifestly inappropriate"[333] or whether it contained a "manifest error or constitutes a misuse of power or whether the authority in question clearly exceeded the bounds of its discretion".[334]

When the Court of Justice analyses the limits of the discretion of the different EU institutions, it increasingly relies on a procedural approach. This procedural approach does not second-guess the substantive evaluations of the reviewed institution, but examines whether the procedure of decision-making has taken into account all relevant factors. This includes whether the legislation or decision was based on the recommendations of an impact assessment[335] or on scientific data.[336] If the legislature did not follow the recommendations, the Court analyses whether the deviations have been properly justified.[337] Furthermore, the Court also assesses whether the EU institutions in question discussed the issue with the relevant stakeholders,[338] took into account and tried to reconcile all interests at stake[339] and gave reasons for its decisions.[340]

While the Court of Justice usually finds that EU institutions have acted in conformity with the principle of proportionality, its approach is not toothless. Instead, there are a few cases in which the Court found a violation of proportionality by EU institutions.[341] The reasoning of the Court in *Spain v. Council* is particularly illuminating.[342] Spain challenged a Council regulation establishing a new subsidy scheme for cotton which cut the level of aid to 35% of the level of the previous scheme. The Commission and the

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[330] Case C-491/01, *British American Tobacco*, *supra* note 310, at para. 123; Case C-210/03, *Swedish Match*, [2004] ECR I-11900, at para. 48; Case C-380/03, *Germany v. Parliament and Council*, *supra* note 123, at para. 145; Case C-344/04, *IATA and ELFAA*, *supra* note 123, at para. 79; Case C-558/07, *SPCM*, [2009] ECR I-5783, at para. 42; Case C-15/10, *Etimine*, supra note 123, at para. 125; Case C-203/12, *Billerud Karlsborg*, 17 Oct. 2013, EU:C:2013:664, at para. 35.

[331] Case 78/16, Pesce, *supra* note 322, at para. 49.

[332] Case C-62/14, *Gauweiler*, 16 June 2015, EU:C:2015:400, at para. 68.

[333] Case C-380/03, *Germany v. Parliament and Council*, *supra* note 123, at para. 145; Case C-344/04, *IATA and ELFAA*, *supra* note 123, at para. 79; Case C-558/07, *SPCM*, *supra* note 141, at para. 42; Case C-33/08, *Agrana Zucker*, [2009] ECR I-5035, at paras. 32-33; Case C-77/09, *Gowan Comércio Internacional*, [2010] ECR I-13533, at para. 82; Case C-15/10, *Etimine*, *supra* note 123, at para. 125; Case C-203/12, *Billerud Karlsborg*, *supra* note 330, at para. 35; Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council*, *supra* note 312, at para. 207.

[334] Joined Cases C-27/00 and 122/00, *Omega Air*, *supra* note 123, at para. 64; Case C-110/03, *Belgium v. Commission*, [2005] ECR I-2829, at para. 68.

[335] See, e.g., Case 58/08, *Vodafone*, *supra* note 310, at para. 55; Case C-176/09, Luxembourg v. Parliament and Council, [2011] ECR I-3727, at para. 65; Case C-358/14, *Poland v. Parliament and Council*, *supra* note 130, at para. 101; Case C-128/17, Poland v. Parliament and Council, 13 March 2019, EU:C:2019:194, at paras. 109-112; Case C-547/14, *Philipp Morris*, 4 May 2016, EU:C:2016:325, at para 189.

[336] See, e.g., Case 78/16, *Pesce*, *supra* note 132, at paras. 71-73; Case C-547/14, *Philipp Morris*, *supra* note 335, at paras. 207-208; Joined Cases C-643/15 and C-647/15, Slovak Republic and Hungary v. Council, supra note 123, at paras. 222, 242, 272.

[337] See Case C-477/14, *Pillbox 38*, 4 May 2016, EU:C:2016:324, at paras. 65-66.

[338] See, e.g., Case C-15/10, *Etimine*, *supra* note 123, at para. 127; Case C-477/14, *Pillbox 38*, *supra* note 337, at para. 66.

[339] See, e.g., Case C-127/07, *Société Arcelor Atlantique et Lorraine*, [2008] ECR I-9895, at para. 59; Case C-343/09, *Afton Chemical*, [2010] ECR I-7027, at paras. 60-64; Case C-358/14, *Poland v. Parliament and Council*, *supra* note 320, at para. 102; Case 78/16, *Pesce*, *supra* note 132, at para. 74; Case C-59/11, *Association Kokopelli*, *supra* note 329, at para. 40; Case C-547/14, Philipp Morris, supra note 146, at paras. 185-187.

[340] See, e.g., Case C-62/14, *Gauweiler*, *supra* note 332, at paras. 69-70.

[341] Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA*, [2005] ECR I-10468; Case C-310/04, *Spain v. Council*, [2006] ECR I-7318.

[342] *Id*.

Council had argued that the new scheme was sufficient to ensure the profitability of cotton farms. The Court predominantly followed a procedural approach in its argument. It started out noting that the new regulation had not been based on an impact assessment, contrary to what had been done before reforms of support schemes in other agricultural sectors.[343] While the lack of an impact assessment in itself was insufficient to find that the measure was inappropriate, the Court also argued that the EU institutions had incorrectly calculated the margin of the cotton farmers and thus failed to take into account all relevant factors in their assessment.[344] Consequently, the measure was found to be disproportionate.[345]

The Court of Justice's judgment in *Weiss* is in conformity with the standards that the Court has developed in its previous jurisprudence. The Court applied the same deferential standard to the decision of the ESCB that it also applied in other cases involving technical matters and complex empirical prognoses and assessments.[346] It pointed out that the decision was in line with economic orthodoxy and with decisions of other Central Banks so that it could not be deemed manifestly inappropriate to achieve the objective of countering the risk of deflation.[347] Concerning the necessity of the measure, the Court highlighted that a further reduction of interest rates or the purchase of private sector bonds could reasonably deemed to be inefficient.[348] The Court also argued that the ECB had taken measures in order to limit the impact of the program on the financial conditions of Member States and the balance sheets of commercial banks.[349]

Considering the proportionality *stricto sensu*, the Court emphasized that the ECB made several adjustments to the PSP program in order to remedy deficiencies of the prior OMT program. These concerned a limitation of the default risk of assets purchased under the program and the limitation of loss sharing among national central banks so that each central bank predominantly carries the default risk of its own national bonds.[350] Consequently, the Court of Justice came to the conclusion that the ESCB had "weighed up the various interests involved so as effectively to prevent disadvantages which are manifestly disproportionate to the PSPP's objective."[351]

Despite the misleading (and irrelevant) references of the German Federal Constitutional Court in *PSPP*,[352] the *Weiss* Judgment is squarely in line with the previous approach of the Court regarding the application of the proportionality test. For this reason, it is impossible to argue, as the German Federal Constitutional Court did, that the approach of the Court of Justice was "not comprehensible from a methodological perspective."[353]

343 *Id*., at para. 103.
344 *Id*., at paras. 110-133.
345 *Id*., at para. 135.
346 Case C-493/17, *Weiss*, supra note 4, at para. 73.
347 *Id*., at paras. 77-78.
348 *Id*., at para. 80.
349 *Id*., at para. 82-83.
350 *Id*., at paras. 94-100.
351 *Id*., at para. 93.
352 BVerfG, supra note 1, at paras. 146-152.
353 *Id*., at para. 153.

4.2. The legal literature

In the legal literature, the principle of proportionality in Art. 5 TEU is still considered to be understudied[354] and undertheorized[355]. This reluctance on the side of legal academia is explained with a lack of similar provisions on the national level.[356] Traditionally, the GFCC itself has refused to engage in employing a proportionality test in delimiting competences of the *Bund* and the *Länder*.[357] Following this understanding, in legal scholarship, competences are generally perceived to be binary, i.e. either existent or non-existent, thus not lending themselves to balancing exercises.[358]

However, legal scholars also highlight differences between the ordering of competences on the level of the federal state, and competences on the level of EU, which are not only potentially overlapping with competences of Member States but also subject to functional and dynamic developments.[359] Indeed, the perceived erosion of the principal of conferral was the main reason for the introduction of the subsidiarity and proportionality principles.[360] As the ECJ interpreted competences teleologically and relied on 'general' competences, such as Article 114 and Article 352 TFEU, the Member States wanted to place a limit to the so-called "competence creep".[361]

Thus, the principle of proportionality is understood to serve a dual function. On the one hand, it is derived from the traditional general unwritten principle of proportionality which aims at the protection of individual fundamental rights. On the other hand, the principle of proportionality also protects the national autonomy of the member states.[362] In this sense, it is seen as an expression of federalism. Some authors perceive this latter function to be the predominant one in the context of Art. 5 TEU.[363]

The deferential standard of review that the Court of Justice applies in its proportionality analysis draws some criticism in the legal literature. While the difficulties of balancing are acknowledged, the justifications provided by the Court have often not been considered satisfactory.[364] The reasons given by the Court, when concerns on the proportionality on the substantive intensity of a measure are raised by Member States, have been considered 'blunt'[365], and the criteria given for the choice of legal instruments as rather vague.[366] Other scholars criticize the ECJ for avoiding to engage more systematically in a proportionality assessment *stricto sensu*[367] or for the application of proportionality as reasonableness

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[354] Saurer, *supra* note 309, p. 281.

[355] M. Goldhammer, 'Kritik und Rekonstruktion kompetenzbezogener Verhältnismäßigkeit im Unionsorganisationsrecht' in B. Baade et al (eds), *Verhältnismäßigkeit im Völkerrecht* (Mohr Siebeck 2016) p. 125 at p. 143.

[356] Saurer, *supra* note 309, pp. 281 and 283.

[357] BVerfGE 79, 311, 341 – Budget Act 1981; 81, 310, 338 – Kalkar II.

[358] Goldhammer, *supra* note 355, p. 130.

[359] Goldhammer, *supra* note 355, p. 127.

[360] R. Schütze, 'EU Competences: Existence and Exercise', in D. Chalmers and A. Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) p. 75 at p. 101.

[361] Saurer, *supra* note 309, p. 282.

[362] See Schütze, *supra* note 360, at p. 97; J. Bast, 'Art. 5 EUV [Prinzipien der Kompetenzordnung]', in E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union, Band I: EUV/AEUV*, 71st edn. (C.H. Beck 2020) at para. 66.

[363] See T. Tridimas, 'The Principle of Proportionality in Community Law: From the Rule of Law to Market Integration', 31 *Irish Jurist* (1996) p. 83 at p. 99 (not suggesting "that the protection of the rights of the individual is excluded from the scope of the [former] Article 3b(3)", but rather "that the primary purpose of that provision is to control the exercise by the Community of its competence"); Schütze, *supra* note 360, p. 98.

[364] Trstenjak and Beysen, *supra* note 316.

[365] Schütze, *supra* note 360, p. 98 (referring to the ECJ's short reference to the Community legislator's decision for a minimum harmonization level in Case C-233/94, Germany v Parliament and Council [1997] ECR 2405, para 82).

[366] Schütze, *supra* note 360, p. 98 (referring to the ECJ's criteria given on the choice between a directive or a decision in Case 163/99, Portuguese Republic v Commission, [2001] E.C.R. 2613, para 28).

[367] Goldhammer, *supra* note 355, pp. 131–132.

in disguise.[368] However, despite this criticism, there is no wholesale repudiation of the Court of Justice's approach. Instead, the majority of scholars – including the German legal academy – seem to accept the deferential standard of review that the ECJ applies in its proportionality analysis in the context of Art. 5 TEU.[369] In particular, the procedural approach that the Court of Justice applies to determine the limits of political discretion draws particular praise.[370]

4.3. Interpretation by other Member States' courts

As to the perspectives of other Member States' courts on the principle of proportionality in Art. 5 (4) TEU, not much can be reported. Only a few national courts have engaged in *ultra vires* review.[371] And while the principle of proportionality in Art. 5 (4) has occasionally been mentioned in passing[372], it has not been the focus of the national courts' review prior to the *PSPP* judgment of the GFCC, which we have already discussed extensively.[373]

[368] T.-I. Harbo, 'The Function of the Proportionality Principle in EU Law', 16 *European Law Journal* (2010) p. 158 at p. 185.

[369] See W. Sauter, 'Proportionality in EU Law: A Balancing Act?', 15 *Cambridge Yearbook of European Legal Studies* (2013) p. 439 at pp. 464-466; C. Calliess, 'Art. 5', in C. Calliess and M. Ruffert (eds.), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 5th edn. (C.H. Beck 2016) at para. 51; E. Pache, 'Artikel 5 EUV [Grundsatz der begrenzten Einzelermächtigung, Subsidiaritätsprinzip, Verhältnismäßigkeitsgrundsatz]', in M. Pechstein, C. Nowak and U. Häde (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Mohr Siebeck 2017), at para. 151; G. Lienbacher, 'Artikel 5 [Subsidiaritätsprinzip]', in J. Schwarze, U. Becker, A. Hatje and J. Schoo (eds.), *EU-Kommentar*, 4th edn. (Nomos 2019) at para. 41; J. Bast, *supra* note 362, at para. 73. With particular reference to the review of decisions of the ECB, see also H. Sauer, 'Doubtful it Stood...: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment', 16 *German Law Journal* (2015) p. 971 at pp. 981-982; M. Payandeh, 'The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture', 13 *European Constitutional Law Review* (2017) p. 400 at p. 410.

[370] See references *supra* note 328.

[371] See above, 3.3.

[372] See Polish Constitutional Tribunal, Judgment on Treaty of Accession, 11 May 2005, ref. No. K 18/04; see Śledzińska-Simon and Ziółkowski, *supra* note 264, at p. 244–245.

[373] See above, 2.

5. ASSESSMENT OF THE PSPP JUDGMENT IN LIGHT OF THE PRECEDING ANALYSIS

KEY FINDINGS

This chapter makes a normative assessment of the *PSPP* judgment and analyses its consequences. The *PSPP* judgment violates EU law because it disrespects the ultimate authority of the Court of Justice to interpret EU law. It also violates German constitutional law because it is inconsistent with the standards that the GFCC has developed for the *ultra vires* review in its earlier jurisprudence. Even if one disagrees with the assessment of the Court of Justice, it is untenable to argue that the ECJ's reasoning was "objectively arbitrary" or "incomprehensible". Furthermore, it is hardly conceivable how a transgression of competences that can be healed by providing a retroactive justification could be of structural importance. The judgment has several negative consequences. While the short-term consequences are probably rather limited, the long-term consequences are more concerning. The judgment introduces uncertainty into EU monetary policy because it, *de facto*, allows German citizens an *actio popularis* against all policy measures of the ECB and does not provide clear guidance regarding the GFCC's standards of review. Furthermore, it threatens the constructive judicial dialogue between the Court of Justice and the apex courts of the Member States and thus endangers the unity of EU law.

5.1. The PSPP Judgment Violates EU Law

The *PSPP* Judgment violates EU law.[374] According to Art. 344 TFEU, the Member States undertake not to submit a dispute concerning the interpretation or application of the EU treaties to any other method of settlement than the one provided for by the treaties. And according to the latter, the Court of Justice has the exclusive competence to decide about disputes concerning the interpretation of the treaties. This can be derived from Art. 267 TFEU, which stipulates that the Court of Justice decides about all questions concerning the interpretation of the treaties and EU secondary law as well as about the validity of EU secondary law in the context of the preliminary reference procedure. Furthermore, Art. 267 (3) TFEU obliges Member States' courts of last instance to initiate a preliminary reference procedure if there are doubts about the interpretation of EU law. While Art. 267 TFEU does not explicitly mention that Member States' courts are bound by the decision of the Court of Justice, it is generally accepted that the latter are binding for the court having initiated the preliminary reference procedure.[375] Any other interpretation would lead to absurd results and be inconsistent with the Member States' obligation to ensure effective legal protection in the fields covered by EU law, which is enshrined in Art. 19 TEU. Consequently, the Court of Justice has the exclusive competence to interpret the Arts. 127 et seq. TFEU in order to determine the competences of the European Central Bank. By disregarding the *Weiss* judgment of the Court of Justice, the GFCC, therefore, violated EU law.

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[374] Explicitly, Mayer, 'Deconstructing', *supra* note 2, pp. 747-748; Poli and Cisotta, *supra* note 2.

[375] Case 29/68, *Deutsche Milchkontor*, [1969] ECR 167, at paras. 2-3. This has also been generally accepted in the German legal literature: M. Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes Ultra-vires-Vorlage an den EuGH', 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2014) p. 615 at pp. 649-650; C. Gaitanides, 'Artikel 267 AEUV', in H. v.d. Groeben, J. Schwarze and A. Hatje (eds.), *Europäisches Unionsrecht*, 7th edn. (Nomos 2015) at para. 89; U. Karpenstein, 'Art. 267 [Vorabentscheidungsverfahren]', in E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union*, 71st edn. (C.H. Beck 2020) at para. 102; B.W. Wegener, 'Art. 267', in C. Calliess and M. Ruffert (eds.), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 5th edn. (C.H. Beck 2016) at para. 49.

5.2. The PSPP Judgment Is Inconsistent with German Constitutional Law

The *PSPP* judgment did not only violate EU law, it is also inconsistent with the *Honeywell* framework that the GFCC has developed to operationalize the *ultra vires* doctrine.[376] According to *Honeywell*, an act of the EU can only be declared *ultra vires* under two substantive conditions: First, there has to be a manifest violation of EU Law; and second, the violation of EU competences has to be of structural importance.[377] As the following analysis will show, neither of these conditions has been fulfilled.

5.2.1. No manifest violation of EU law

The first condition of the *Honeywell* test requires the violation of EU law to be manifest.[378] In its subsequent decision the Court has specified this requirement with regard to the CJEU. It argued that a decision of the Court of Justice was only *ultra vires* if it was "incomprehensible" or "objectively arbitrary".[379] The central claim of the GFCC in its *PSPP* judgment is that a strict application of the proportionality principle was necessary in order to compensate for the democratic deficit of the ECB.[380]

However, this argument is open to reasonable disagreement. It has been standard practice of the CJEU to pay deference to EU institutions when applying the proportionality principle.[381] This approach has also largely been accepted by the legal literature.[382] Therefore, it is difficult to argue that the Court of Justice's reasoning in *Weiss* was objectively arbitrary. The weak democratic accountability equally does not change the calculus. First, the principle of democracy that has to be taken into account when interpreting EU competencies is the principle contained in the EU treaties.[383] It is not the principle of

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[376] BVerfGE 126, 286 – *Honeywell*. On the *Honeywell* framework, see above, note 101 and accompanying text.

[377] BVerfGE 126, 286, at 304.

[378] *Id*.

[379] BVerfGE 142, 123, at 201.

[380] BVerfG, *supra* note 1, at para. 143.

[381] See above, 5.1.

[382] See above, 5.2.

[383] H. Sauer, *supra* note 369, p. 976. On attempts to conceptualize the principle of democracy in the EU context, see, e.g., G. Majone, 'Independence vs. Accountability? Non-Majoritarian Institutions and Democratic Governance in Europe', *The European Yearbook of Comparative Government and Public Administration* (1994) p. 117; M. Jachtenfuchs, 'Theoretical Perspectives on European Governance', 1 *European Law Journal* (1995) p. 115; G. Majone, 'Regulatory Legitimacy', in G. Majone, *Regulating Europe* (Routledge 1996) p. 284; P. Craig, 'Democracy and Rule-Making Within the EC: An Empirical and Normative Assessment', 3 *European Law Journal* (1997) p. 105; C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalization of Comitology', 3 *European Law Journal* (1997) p. 273; F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999); J.H.H. Weiler, 'European Democracy and Its Critics: Polity and System', in J.H.H. Weiler (ed.), *The Constitution of Europe* (Oxford University Press 1999) p. 264; A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer 2002); A. Menon and S. Weatherill, 'Accountability and Delegation in the European Union', in A. Arnull and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (2002) p. 113; R. Dehousse, 'Beyond representative democracy: constitutionalism in a polycentric polity', in J.H.H.Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (2003) p. 135; P. Dann, 'European Parliament and Executive Federalism', 9 *European Law Journal* (2003) p. 549; A. Peters, 'European Democracy after the 2003 Convention', 41 *Common Market Law Review* (2004) p. 37; A.J. Menéndez, 'Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint', 11 *European Public Law* (2005) p. 105; N. Petersen, 'The Democracy Concept of the European Union: Coherent Constitutional Principle or Prosaic Declaration of Intent?', 6 *German Law Journal* (2005) p. 1507; B. Crum and J.E. Fossum, 'The Multilevel Parliamentary Field: a Framework for Theorizing Representative Democracy in the EU', 1 *European Political Science Review* (2009) p. 249; R. Bellamy and D. Castiglione, 'Three models of democracy, political community and representation in the EU', 20 *Journal of European Public Policy* (2013) p. 206; J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How It Is Possible', 21 *European Law Journal* (2015) p. 546; M. Shackleton, 'Transforming representative democracy in the EU? The role of the European Parliament' 39 *Journal of European Integration* (2017) p. 191.

democracy of the German Constitution – and even less so the interpretation of the latter by the German Federal Constitutional Court, which is highly controversial in constitutional law scholarship.[384]

If one widens the focus beyond the conception of democracy that the Federal Constitutional Court has developed for the German constitution, it becomes obvious that democratic accountability is not necessarily organized in a hierarchical way, i.e. that there has to be a chain of legitimation that can ultimately be traced back to the parliament. Instead, different institutions can have different accountability mechanisms.[385] While functional concepts of democratic legitimacy have predominantly been developed in the context of supranational or international decision-making mechanisms,[386] even institutional settings within nation states do not always try to maximize the democratic accountability of institutions.[387]

The most obvious example is the judiciary. While judges are often elected by parliament or appointed by the executive, they are not democratically accountable once they are in office. To the contrary, they are deliberately shielded from political influence: Judges are often only appointed for one term or for lifetime in order to strengthen their independence from the (democratically accountable) legislature or executive. The logic behind this weakening of democratic accountability is simple: If the judiciary is supposed to provide an effective control over the executive or the legislature or at least decide individual cases without taking into account political concerns, they need to be independent. The weakening of democratic accountability is thus necessary for judges to fulfil their function.

But the weakening of direct democratic accountability also concerns the democratic process itself: Many representative democracies (including Germany) have minimum vote thresholds. These minimum vote thresholds protect incumbent parties by making it more difficult for smaller parties to gain seats in parliament.[388] At the same time, they arguably protect the functioning of the political system by preventing a splintering of parliamentary groups and thus facilitating the formation of government coalitions.[389] Like in the case of the judiciary, democratic accountability is reduced for functional concerns, i.e. in order to protect the functioning of the political system against gridlock.

Therefore, central bank independence is not quite such an unusual mechanism in a constitutional democracy. The independence of central banks is based on the following reasoning: If monetary policy

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[384] For a critique of the democracy concept of the German Constitutional Court, see B.-O. Bryde, 'Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie', 5 *Staatswissenschaft & Staatspraxis* (1994) p. 305; J.H.H. Weiler, 'Der Staat „über alles": Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts', 44 *Jahrbuch des öffentlichen Rechts* (1996) p. 91; T. Blanke, 'Antidemokratische Effekte der verfassungsgerichtlichen Demokratietheorie', 31 *Kritische Justiz* (1998) p. 452; T. Groß, 'Grundlinien einer pluralistischen Interpretation des Demokratieprinzips', in T. Blanke (ed.), *Demokratie und Grundgesetz: Eine Auseinandersetzung mit der verfassungsgerichtlichen Rechtsprechung* (2000) p. 93; N. Petersen, 'Demokratie und Grundgesetz: Veränderungen des Demokratieprinzips in Art. 20 Abs. 2 GG angesichts der Herausforderungen moderner Staatlichkeit', 58 *Jahrbuch des öffentlichen Rechts* (2010) p. 137. See also A. Hanebeck, 'Bundesverfassungsgericht und Demokratieprinzip – Zwischen monistischem und pluralistischem Demokratieverständnis', 57 *Die öffentliche Verwaltung* (2004) p. 901 (tracing the democracy principle in the German constitution to the thinking of Carl Schmitt).

[385] See R.W. Grant and R.O. Keohane, 'Accountability and Abuses of Power in World Politics', 99 *American Political Science Review* (2005) p. 29. See also S. Egidy, 'Proportionality and procedure of monetary policy-making', 19 *International Journal of Constitutional Law* (forthcoming 2021) (arguing that the ECB is subject to a "complex web of accountability mechanisms of varying strengths").

[386] See Majone, 'Independence vs. Accountability', *supra* note 383; Jachtenfuchs, *supra* note 383; Scharpf, *supra* note 383.

[387] Petersen, *supra* note 384, pp. 149-150.

[388] K.-O. Zimmer, 'Nochmals: Zur verfassungsnäheren Ausgestaltung der 5%-Klausel', 38 *Die öffentliche Verwaltung* (1985) p. 101 at p. 102; D. Grimm, 'Politische Parteien', in E. Benda, W. Maihofer and H.-J. Vogel (eds.), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*, 2nd edn. (De Gruyter 1994) ch. 14 at para. 43; M. Morlok, 'Parteienrecht als Wettbewerbsrecht', in P. Häberle, M. Morlok and V. Skouris (eds.), *Festschrift für Dimitris Th. Tsatsos* (Nomos 2003) p. 408 at p. 435; M. Krajewski, 'Kommunalwahlrechtliche Sperrklauseln im föderativen System', 61 *Die öffentliche Verwaltung* (2008) p. 345.

[389] BVerfGE 1, 208, 256-257 – Minimum Quorum Schleswig-Holstein.

was left to the government, it could be abused for short-term political goals.[390] For example, political actors might lower the interest rate in order to cause short-term growth (e.g. in the run-up to elections), while jeopardizing long-term monetary stability. Consequently, the weakening of democratic accountability through Central Bank independence is a mechanism for the bank to fulfil its function of safeguarding monetary stability effectively.[391]

Certainly, central bank independence is not a functional necessity. Societies can prefer political flexibility over monetary stability.[392] However, it is a legitimate political choice. In the EU treaties, the independence of the ECB is explicitly guaranteed by Art. 282 (3) TFEU. Furthermore, the German government was one of the driving forces behind the independence of the ECB when the latter was established.[393] The central bank independence was modelled after the German *Bundesbank*, and the German Constitution even requires the ECB to be independent in Art. 88, sent. 2 GG as a precondition for transferring the competences of the German Central Bank in the area of monetary policy to the ECB.

Consequently, the reference to the abstract notion of democracy is no reason to interpret the ECB's competences restrictively because central bank independence is well compatible with democratic constitutionalism.[394] Rather, a restrictive proportionality review would endanger the ECB's independence and give courts the opportunity to substitute their own monetary policy assessment for that of the ECB.[395] In a comparative perspective, the Court of Justice's choice to give a rather broad discretion to the ECB is consistent with approaches of other apex courts in Western democracies. In particular, the U.S. Supreme Court largely refrains from reviewing monetary policy decisions of the U.S. Federal Reserve because of the latter's independence.[396] Similarly, the German Federal Constitutional Court itself has never entered into a review of the monetary policy of the German *Bundesbank*.[397]

This does not mean that the ECB can extend its competences beyond what is foreseen in the EU treaties. But there is no indication that the ECB left the realm of monetary policy with its PSPP program. Quantitative easing, as practiced by the ECB, is an accepted tool of monetary policy. Art. 18.1 of the Statute of the ESCB and the ECB explicitly allows the purchase of marketable instruments for the ESCB to carry out its tasks. Furthermore, the practice of QE was not limited to the ECB. Instead, many central banks around the world, such as the U.S. Federal Reserve, the Bank of England or the Bank of Japan, adopted similar practices in order to fight deflation in a low-interest-rate world. While the ECB policy was controversial, it is precisely the competence of the ECB to make a choice between different monetary policy instruments even if there is no consensus among economic experts.

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[390] Egidy, *supra* note 385.

[391] See J. De Haan and S.C.W. Eijffinger, 'European Central Bank: A Comment on Two Fairy-Tales', 38 *Journal of Common Market Studies* (2000) p. 393 at p. 394; Egidy, *supra* note 385.

[392] On the factors that determine whether societies prefer central bank independence, see J.B. Goodman, 'The Politics of Central Bank Independence', 23 *Comparative Politics* (1991) p. 329.

[393] See S. Mee, *Central Bank Independence and the Legacy of the German Past* (Cambridge University Press 2019); F. van Esch and E. de Jong, 'Culture Matters: French-German Conflicts on European Central Bank Independence' (Utrecht: Discussion Paper, 2011) p. 3.

[394] See M. Lehmann, 'Varying standards of judicial scrutiny over central bank actions', in European Central Bank (ed.), *Shaping a new legal order for Europe: a tale of crises and opportunities* (2017) p. 112 at p. 117 (calling connection between democracy and strict scrutiny a "trap"). See also Goldmann, *supra* note 113, pp. 267-268.

[395] *Id.*, pp. 271-272; Sauer, *supra* note 369, pp. 981-982; Payandeh, *supra* note 369, p. 410.

[396] See S. Egidy, 'Judicial review of central bank actions: can Europe learn from the United States?', in European Central Bank (ed.), *Building bridges: central banking in an interconnected world* (2019) p. 53 at pp. 57-58.

[397] Mayer, 'Deconstructing', *supra* note 2, p. 752.

In its *PSPP* decision, the Federal Constitutional Court raised doubts that the PSPP program was indeed aimed at combatting deflation and suggested that it may have served other aims not within the competence of the ECB.[398] While courts should take potential abuses of power seriously, the GFCC does not cite any evidence for its suggestion. The mere fact that the measure of the ECB has economic effects[399] does not disprove that it is an instrument of monetary policy. Instead, such effects are a necessary consequence of the latter. The majority of factors cited by the GFCC – the low interest rates, the danger of housing bubbles, the reduction of Member States' financing costs – are also affected when the ECB changes the official interest rate.[400] That the economic and monetary policy cannot be as clearly separated as the GFCC suggests is also underlined by Art. 127 (1) TFEU, according to which the ECB has a subsidiary competence to support the economic policy of the EU to the extent that it does not contradict the aim of price stability.

For these reasons, it seems reasonable if the Court of Justice takes a rather deferential approach when reviewing the proportionality of policy measures adopted by the ECB.[401] Such an approach contributes to preserving the independence of the Central Bank guaranteed by Art. 282 (3) TFEU and respects the superior expertise of the Bank in evaluating the consequences of monetary policy measures.[402] Certainly, the margin of discretion of the ECB has to be limited, in particular if there are indications for an abuse of power. But the GFCC did not substantiate its suggestion that the ECB might have had illicit motives.

Finally, it has to be kept in mind that the GFCC is supposed to apply a deferential standard itself under the *Honeywell* framework. Even if one disagrees with the assessment of the ECJ, there is no basis for arguing that the reasoning of the Court of Justice was "objectively arbitrary" or "incomprehensible" from a methodological point of view. For this reason, the GFCC has violated its own standards developed in *Honeywell* when issuing the *PSPP* judgment.

5.2.2. No structural importance of the violation

According to the doctrine of the GFCC, the second substantive condition for an EU act to be *ultra vires* is that the violation is "highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law."[403] In *OMT*, the GFCC had argued that the OMT policy was of structural importance because it had a significant redistributive effect, leading to a redistribution of funds between different Member States and their tax payers.[404] The argument assumed that the German state would be responsible for losses incurred by the ECB. However, this reasoning was already doubtful in the OMT constellation: Central banks cannot default on debt in a currency for which they have the right to issue notes so that the ESCB cannot default on euro-denominated debt.[405]

[398] BVerfG, *supra* note 1, at para. 137.

[399] See BVerfG, *supra* note 1, at paras. 170-175.

[400] P. Bofinger, M. Hellwig, M. Hüther, M. Schnitzer, M. Schularick and G. Wolff, 'Gefahr für die Unabhängigkeit der Notenbank', *Frankfurter Allgemeine Zeitung* (29 May 2020) p. 18.

[401] N. Petersen & K. Chatziathanasiou, 'Balancing competences? - Proportionality as an instrument to delimit competences after the PSPP judgment of the German Federal Constitutional Court', 17 *European Constitutional Law Review* (forthcoming 2021).

[402] Lehmann, *supra* note 394, at 117.

[403] BVerfGE 126, 286, at 304.

[404] BVerfGE 134, 366, at 393 (para. 41).

[405] M. Hellwig, 'Financial Stability, Monetary Policy, Banking Supervision, and Central Banking' (Working Paper: Bonn, 2014) pp. 9-10. On this argument, see also in more detail Petersen, *supra* note 2, p. 29.

The argument is even more tenuous regarding the PSP program. According to the conditions of the PSPP, the German Central Bank was only responsible for buying German government bonds – and to a small extent bonds of international organizations. Accordingly, there was a direct feedback loop between the German budget and the exposure of the German Central Bank. Consequently, the GFCC did not repeat the argument of the redistributive effect of the ECB monetary policy in its *PSPP* judgment. Instead, the Court argued that each interpretation of EU competences touched fundamental concerns of the Member States.[406] However, if all violations of competence norms were of structural importance, as the GFCC seems to suggest, then the second condition of the *Honeywell* test would be superfluous. Therefore, the Court also referred to the specificities of EU monetary policy and the limited democratic accountability of the ECB.[407] However, this limited democratic accountability is arguably a functional necessity and not an institutional defect.[408] The Central Bank's independence is necessary in order to shield monetary policy from political pressure. As we have seen above, this is even recognized by the German Constitution.[409]

There is a final consideration why the violation is not of structural importance. The German Federal Constitutional Court had argued that the PSPP program was not in violation of the ECB competences because of its nature *per se*, but because the ECB had provided an insufficient justification for the policy. It is a general principle of German administrative law that a lack of justification can be healed if justification is given *post hoc*.[410] Consequently, the GFCC also gave the ECB a three-month window to provide a retroactive proportionality justification in order to heal the perceived defect of the PSPP program.[411] However, it is hardly conceivable how a transgression of competences that can be healed by providing a retroactive justification could be of structural importance.[412]

5.2.3. Conclusion

While one may reasonably disagree with the Court of Justice and its argumentation in *Weiss*, it is difficult to defend the reasoning of the German Federal Constitutional Court in its *PSPP* judgment. This is because the Federal Constitutional Court had developed a deferential standard for reviewing decisions of the Court of Justice in its earlier jurisprudence, in particular in its *Honeywell* decision that spelt out the *ultra vires* doctrine for the first time. According to *Honeywell*, a judgment of the Court of Justice is *ultra vires* under two conditions: First, it has to violate EU law in a manifest way. This is only the case if the judgment was incomprehensible or objectively arbitrary. Second, the violation has to be of structural importance. Both conditions are not fulfilled. While one may reasonably disagree with the judgment of the Court of Justice in *Weiss*, the reasoning is in line with the standards that were developed in the prior case law and it comes to conclusions that are well justifiable. There is no basis for arguing that it was incomprehensible or objectively arbitrary. Furthermore, it is difficult to argue that an alleged violation of a competence that can be healed through an updated justification is of structural importance, so that also the second requirement of the *Honeywell* test is not met.

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406 BVerfG, *supra* note 1, at paras. 142 and 158.

407 *Id.*, at paras. 143 and 159-160.

408 See Petersen, *supra* note 2, p. 32.

409 See Art. 88 of the German Constitution. See also above, 5.2.1.

410 See sect. 45, para. 1, no. 2 of the German Administrative Procedure Act.

411 BVerfG, *supra* note 1, at para. 235.

412 Mayer, 'To Boldly Go', *supra* note 2, p. 1123.

5.3. Negative Consequences of the PSPP Judgment for EU Law

The negative short-term consequences of the *PSPP* judgment of the GFCC might be limited.[413] The ECB provided the required proportionality assessment within the time period laid out by the GFCC so that the *Bundesbank* continued to participate in the bond buying program.[414] However, there is currently an implementation order pending before the German Federal Constitutional Court, asking the latter to declare that the ECB had not fulfilled the requirements set out in the *PSPP* judgment. If the GFCC grants the implementation order, the German Central Bank might be barred from participating in the PSP program going forward if it decides to follow the order.

Nevertheless, the long-term consequences of the judgment are far more concerning. These relate to, on the one hand, the effectiveness of the monetary policy of the ECB, and, on the other hand, the authority of the CJEU and its relationship to the apex courts of the Member States. In terms of monetary policy, the judgment could lead to legal uncertainty, as all decision of the ECB may possibly be reviewed by the GFCC.[415] This concerns first, but not exclusively, the ECB's response to the COVID-19 pandemic, the Pandemic Emergency Purchase Program (PEPP). In an obiter dictum, the GFCC extended an implicit invitation to launch a challenge against this program.[416] The Court made a significant effort to discuss whether the purchase of Member States' bonds on the secondary market violated Art. 123 TFEU.[417] The Court identified several conditions which had to be met for a bond buying program to comply with Art. 123 TFEU.[418] While it found that the PSPP program still complied with these conditions, many of them have been relaxed for PEPP.[419] Certainly, it is not a foregone conclusion that the GFCC would find a violation of Art. 123 TFEU.[420] Nevertheless, the mere fact that the GFCC might find future ECB policies unconstitutional, the vague legal standards applied for coming to such a conclusion[421], and the uncertain consequences of such a judgment lead to considerable uncertainty, possibly reducing the effectiveness of the monetary policy of the ECB.

The negative long-term consequences of the *PSPP* ruling go beyond monetary policy. They also concern the relationship between the CJEU and the apex courts of the Member States. In our analysis of the implementation of the primacy doctrine by Member States' courts, we have seen that the GFCC has been very influential in shaping the doctrines of Member States' courts to limit the reach of EU law primacy.[422] The Czech Constitutional Court even used the *ultra vires* doctrine of the GFCC to defy the Court of Justice some years before GFCC took this step itself.[423] There is reason to fear that this trend might now accelerate. Courts may invoke the example of the GFCC to deny the authority of the CJEU.

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[413] Wendel, *supra* note 2, p. 981; Egidy, *supra* note 390.

[414] See 'Weidmann sieht Forderungen des Verfassungsgerichts als erfüllt an', *Frankfurter Allgemeine Zeitung*, 3 Aug. 2020, https://www.faz.net/aktuell/finanzen/jens-weidmann-verfassungsgerichtsurteil-zur-ezberfuellt-16887907.html?GEPC =s

[415] The Economist, 'Seeing red: Germany's highest court takes issue with European Central Bank – Its decision imperils the entire legal order', May 7, 2020, https://www.economist.com/europe/2020/05/07/germanys-highest-court-takes-issue-with-the-european-central-bank.

[416] M. Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court', https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/.

[417] BVerfG, supra note 1, at paras. 197-217.

[418] BVerfG, supra note 1, in particular para. 216.

[419] Ana Bobić and Mark Dawson, 'Making sense of the "incomprehensible": The PSPP Judgment of the German Federal Constitutional Court', 57 *Common Market Law Review* (2020) p. 1953 at p. 1991.

[420] See BVerfG, supra note 2, at para. 215 (arguing that the conditions identified in the judgment are not necessary requirements, but rather asking for "an overall assessment and appraisal of the relevant circumstances").

[421] On the vagueness of the standards applied by the GFCC, see Bobić and Dawson, *supra* note 419, at 1971.

[422] See above, 4.3. See also Bobić and Dawson, *supra* note 203, at 1964.

[423] Czech Constitutional Court, 31 January 2012, Pl. ÚS 5/12.

It is not surprising that the governments of Poland and Hungary have quickly welcomed the *PSPP* judgment.[424] Moreover, the president of the Polish Constitutional Tribunal embraced the ruling and claimed that it confirmed that Member States' courts were vested with the ultimate authority in EU matters.[425]

Certainly, there is an alternative reading of the *PSPP* judgment.[426] Some authors argue that the Federal Constitutional Court's ruling was, in fact, in line with its prior jurisprudence. According to this reading, the Court made a strategic move in order to pressure the ECJ to apply more scrutinizing standards of review when reviewing acts of EU institutions – analogous to the Court's strategy in *Solange I* –, strengthening the rule of law in the EU in the long term.[427] This reading is supported by the rather limited short-term consequences of the *PSPP* judgment: Despite defying the ECJ, the Federal Constitutional Court did not find a violation of substantive standards, but only of a procedural obligation that could easily be remedied by providing a proportionality assessment within three months. Even if this reading is correct, it is still a dangerous strategy as it could escalate the conflict between the GFCC and the ECJ. The better way to address these concerns would have been a second preliminary reference procedure, similar to the strategy of the Italian Constitutional Court in *Taricco*.[428] This would have avoided the uncertainty for the monetary policy, as well as the problematic exemplary character of the judgment.

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424 Sam Fleming, James Shotter and Valerie Hopkins, Eastern European states sense opportunity in German court ruling, Financial Times, May 10, 2020, https://www.ft.com/content/45ae02ab-56d0-486e-bea5-53ba667198dc.

425 *Id.*

426 See S. Simon and H. Rathke, '"Simply not comprehensible." Why?', 21 *German Law Journal* (2020) p. 950; Bobić and Dawson, supra note 203, at p. 1969.

427 Simon and Rathke, *supra* note 426, p. 955.

428 See H.-J. Hellwig, 'Das Bundesverfassungsgericht hätte vorlegen müssen', *Frankfurter Allgemeine Zeitung*, 12 May 2020, https://www.faz.net/-irf-9zd1w/; D. Sarmiento and J.H.H. Weiler, 'The EU Judiciary after Weiss: Proposing a New Mixed Chamber of the Court of Justice', *Verfassungsblog*, 2020/6/02, https://verfassungsblog.de/the-eu-judiciary-after-weiss/; O. Garner, 'Squaring the PSPP Circle: How a declaration of incompatibility can reconcile the supremacy of EU law with respect for national constitutional identity', *Verfassungsblog*, 2020/5/22, https://verfassungsblog.de/squaring-the-pspp-circle/; Mayer, 'Deconstructing', *supra* note 2, p. 756.

6. POLICY RECOMMENDATIONS

KEY FINDINGS

We recommend that different EU institutions adopt three measures: First, we recommend that the EU Commission initiates an infringement procedure against the Federal Republic of Germany under Art. 258 TFEU. Second, we recommend that the ECB provides a proportionality assessment in the justification of its monetary policy decisions. Third, in the long term, we recommend to discuss the introduction of a separate Chamber of the Court of Justice that is exclusively dedicated to reviewing the delimitation of competences between the EU and the Member States.

Courts, like the German Federal Constitutional Court, are independent institutions that, for good reasons, lack political accountability. Therefore, it is not easy to recommend policy measures to avoid the negative consequences of the *PSPP* judgment described in the previous section and to bring the GFCC into compliance with EU law. In the following, we will first describe potential accountability mechanisms for courts and discuss their oftentimes problematic nature before making concrete policy recommendations for the individual EU institutions.

6.1. Background: The accountability of the Judiciary

Courts are usually not politically accountable. This lack of political accountability is by design. As constitutional courts function as guardians of the constitution with the ability to review the constitutionality of measures from the legislature and the executive, they need to be independent from the latter two branches in order to be able to fulfil this function effectively. Furthermore, courts are supposed to be driven exclusively by legal considerations, independent of how popular such considerations might be politically.

However, this does not mean that courts do not enjoy any accountability as is sometimes assumed.[429] In particular, the legislature can limit the constitutional court's competences, change the number of judges or the duration of the judges' tenure, and nominate judges to the court that take into account specific concerns to a greater extent than the existing judges. The most recent examples are the measures to curb judicial influence in Poland and Hungary.[430] But there are also examples in political systems where the rule-of-law credentials are less doubtful. In the 1930s, U.S. president Franklin D. Roosevelt tried to break the veto position of the U.S. Supreme Court against his *New Deal* legislation though a court-packing plan.[431] According to this plan, six new judges would have been added to the bench of

[429] See, e.g., E.-W. Böckenförde, *Staat, Nation, Europa: Studien zur Staatslehre, Verfassungstheorie und Rechtsphilosophie* (Suhrkamp 1999) p. 180 (arguing that Constitutional Courts are free from control and accountability).

[430] On these measures, see, e.g., W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); K.L. Scheppele, 'Understanding Hungary's Constitutional Revolution', in A. von Bogdandy and Pál Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area* (Nomos 2015) p. 124.

[431] On the court-packing plan, see, e.g., W.E. Leuchtenburg, 'The Origins of Franklin D. Roosevelt's "Court-Packing" Plan', 1966 *Supreme Court Review* (1966) p. 347; R. Gely and P.T. Spiller, 'The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan', 12 *International Review of Law and Economics* (1992) p. 45; M.C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* (Fordham University Press 2002); B.E. Friedman, *The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux 2009) pp. 1-7.

the Supreme Court in order to tilt the power in the court towards the sitting president. Similar discussion are also led today after President Donald Trump increased the conservative majority on the court to 6-3 votes through the contentious appointment of Justice Amy Coney Barret.[432]

Even the history of the German Federal Constitutional Court has seen challenges to the Court's authority.[433] When the Court signalled that it might block the European Defence Community in the 1950s, the German chancellor, Konrad Adenauer, and his Minister of Justice, Thomas Dehler, tried to undermine the authority of the Court. Later, they proposed a reform that would have restricted the power of the Court by allowing judicial nomination with a simple majority and reducing the number of judges. Even today, this is not a topic that is totally moot. Recently, discussions about a "reform" the Federal Constitutional Court have resurfaced.[434] This came, ominously, after the first OMT decision of the Court, in which the latter had, for the first time, raised doubts regarding the monetary policy of the ECB.

Certainly, such measures are not costless for the legislature. There is a danger that restrictions of the competences of a constitutional court or other limitations of the court's power are perceived as a violation of the rules of the democratic game.[435] This might weaken the legitimacy of the legislative majority and lead to a lower vote-share in the next elections. Whether the tinkering with judicial competences actually hurts political actors, depends primarily on the legitimacy of the respective court.[436] The less a court is accepted in the general population, the less backlash will be caused by changes in its institutional position. The legitimacy of courts rests usually on them being perceived as neutral actors that stand above the political fray and base their decisions exclusively on legal considerations.[437] If courts were perceived as political actors in disguise who pursue a political agenda, this would undermine their legitimacy and thus facilitate attempts by the legislature to pursue institutional change.[438]

These accountability mechanisms do not only work if there is an actual institutional change that is implemented. Instead, the threat of such a change is often already sufficient to induce behavioural change.[439] The most prominent example is again Roosevelt's court-packing plan: Ultimately, Roosevelt's attempt to reform the U.S. Supreme Court failed because of massive public resistance. However,

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432 See, e.g., Q. Jurecic and S. Hennessey, 'The Reckless Race to Confirm Amy Coney Barrett Justifies Court-Packing', *The Atlantic* (4 Oct. 2020), https://www.theatlantic.com/ideas/archive/2020/10/skeptic-case-court-packing/616607/; A. Liptak, 'The Precedent, and Perils, of Court Packing', *New York Times* (12 Oct. 2020), https://www.nytimes.com/2020/10/12/us/supreme-court-packing.html.

433 See H. Laufer, *Verfassungsgerichtsbarkeit und politischer Prozess* (Mohr Siebeck 1968) pp. 169-206; R. Häußler, *Der Konflikt zwischen Bundesverfassungsgericht und politischer Führung* (Duncker & Humblot 1994) pp. 40-47; K. Chatziathanasiou, 'Die Status-Denkschrift des Bundesverfassungsgerichts als informaler Beitrag zur Entstehung der Verfassungsordnung', 11 *Rechtswissenschaft* (2020) p. 145.

434 See R. Müller, 'Berliner Gedankenspiele zur dritten Gewalt', *Frankfurter Allgemeine Zeitung* (3 April 2014), https://www.faz.net/-gpg-7o1kl.

435 G. Vanberg, The Politics of Constitutional Review in Germany (Cambridge University Press 2005) p. 74.

436 *Id.*, at pp. 49-53; W.F. Murphy and J. Tanenhaus, 'Publicity, Public Opinion, and the Court', 84 *Northwestern University Law Review* (1990) p. 985; L. Epstein, J. Knight and O. Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government', 35 *Law & Society Review* (2001) p. 117 at p. 125; C. Engel, 'Delineating the Proper Scope of Government: A Proper Task for a Constitutional Court?', 157 *Journal of Institutional & Theoretical Economics* (2001) p. 187 at p. 213; C.J. Carrubba, 'A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems', 71 *Journal of Politics* (2009) p. 55 at p. 65; J. Sweeney, 'Creating a More Dangerous Branch: How the United Kingdom's Human Rights Act has Empowered the Judiciary and Changed the Way the British Government Creates Law', 21 *Michigan State International Law Review* (2013) p. 301 at pp. 318-319.

437 A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) pp. 199-200; M. Shapiro, 'The Success of Judicial Review and Democracy', in M. Shapiro and A. Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 2002) p. 149 at p. 165.

438 G.A. Caldeira, 'Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court', 80 *American Political Science Review* (1986) p. 1209.

439 B.E. Friedman, 'The Politics of Judicial Review', 84 *Texas Law Review* (2005) p. 257 at p. 314.

it still achieved its intended result: The Supreme Court ended its opposition to Roosevelt's New Deal legislation and refrained from declaring laws enacted under the agenda unconstitutional.

This indirect accountability of courts is an important explanatory factor in the relationship between Member States' apex courts and the Court of Justice, which is commonly designated as a judicial dialogue between these courts.[440] The main characteristic of this judicial dialogue is the absence of hierarchies between the domestic and the international level. Instead, we observe an equilibrium in which the national courts and the Court of Justice both respect each other, while claiming ultimate authority.[441] Such equilibria arguably emerge when the respective courts are interdependent on each other.[442] International courts are usually dependent on domestic courts for implementing their decisions. By contrast, domestic courts can be forced to cooperate with international courts if there is a strong political and societal commitment to international integration.[443] If, under these circumstances, domestic courts endanger international cooperation by defying an international court, they may lose legitimacy and face political backlash.

Nevertheless, intentionally trying to influence courts through institutional changes is normatively highly problematic. It risks damaging the authority of the respective court and, as a consequence, also the rule of law. These considerations show that the policy options of the European institutions to hold the German Federal Constitutional Court accountable for its defiance of EU law are limited. The only institution that could create accountability is the German legislature. However, even the latter has a very restricted room for action if it wants to avoid damaging the authority of the Federal Constitutional Court and giving the impression that the political branches are interfering with the rule of law. Nevertheless, even though the European institutions do not have the possibility to hold the Federal Constitutional Court directly accountable, they have an important role in facilitating accountability through legal means. In particular, they have to highlight that the Federal Constitutional Court violated EU law in order to make salient that that critique directed against the Federal Constitutional Court and might

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[440] See, e.g., M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty', 11 *European Law Journal* (2005) p. 262; A. Paulus, 'The Emergence of the International Community and the Divide Between International and Domestic Law', in J.E. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007) p. 216; M. Rosenfeld, 'Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism', 6 *International Journal of Constitutional Law* (2008) p. 415; A. von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law', 6 *International Journal of Constitutional Law* (2008) p. 397; N. Krisch, 'The Open Architecture of European Human Rights Law', 71 *Modern Law Review* (2008) p. 183; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010); P.S. Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press 2012); A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe', 1 *Global Constitutionalism* (2012) p. 53; A. Stone Sweet, 'The Structure of Constitutional Pluralism', 11 *International Journal of Constitutional Law* (2013) p. 491; N. Petersen, 'The Concept of Legal and Constitutional Pluralism', in J. Englisch (ed.), *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (IBFD 2016) p. 1; N. Jääskinen, 'Judicial Dialogue between National Supreme Administrative Courts and the Court of Justice of the European Union', in K. Lenaerts *et. al.* (eds.), *An ever-changing Union?* (Hart 2019) p. 129. See also L. Garlicki, 'Cooperation of Courts: The role of supranational jurisdictions in Europe', 6 *International Journal of Constitutional Law* (2008) p. 509; H. Sauer, *Jurisdiktionskonflikte im Mehrebenensystem* (Springer 2008); F.C. Mayer, 'Multilevel Constitutional Jurisdiction', in A. von Bogdandy and J. Bast (eds.) *Principles of European Constitutional Law*, 2nd edn. (Hart 2010) p. 399 (observing or advocating cooperative relationships between courts); M. Klatt, *Die praktische Konkordanz von Kompetenzen* (Mohr Siebeck 2014) (proposing to conceptualize jurisdictional conflicts by using formal principles, which do not establish abstract hierarchies, but resolve them on a case-by-case basis).

[441] See A. Dyevre, 'Domestic Judicial Defiance in the European Union: A Systematic Threat to the Authority of EU Law?', 35 *Yearbook of European Law* (2016) p. 106 (who characterizes the strategic situation as a Hawk-Dove game) . But see also R.D. Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone', 23 *Maastricht Journal of European and Comparative Law* (2016) p. 136 (arguing that the conflict between the GFCC and the ECJ does not amount to an equilibrium, but rather that it is unsustainable).

[442] See Petersen, *supra* note 26, pp. 996-998.

[443] *Id*.

potentially undermine its authority, actually aims at protecting the rule of law by trying to re-establish judicial dialogue.

6.2. Possible Policy Measures of the EU Institutions

In reacting to the *PSPP* judgment, we recommend several policy measures that EU institutions could adopt. Yet, none of these concern the European Parliament directly. Instead, we advise the initiation of an infringement procedure by the EU Commission under Art. 258 TFEU in order to make the violation of EU law salient. At the same time, we recommend a de-escalation of the conflict: The ECB should justify its decisions using the proportionality framework. In the long term one can think about a modification of the EU treaties in order to introduce a special chamber of the ECJ dealing with the delimitation of EU competences. In the following, we will justify and specify these recommendations in more detail.

First, we recommend that the EU Commission initiates an infringement procedure against the Federal Republic of Germany under Art. 258 TFEU.[444] This infringement procedure should target the declaration of the Court of Justice's *Weiss* judgment *ultra vires* by the Federal Constitutional Court. There are certain disadvantages to such an action. First, an infringement procedure risks escalating the conflict between the Court of Justice and the Federal Constitutional Court. Furthermore, infringement procedures against judicial decisions are often criticized because they may endanger judicial independence.

Nevertheless, the advantages outweigh the disadvantages. In our view, it is crucial to make the violation of EU law by the Federal Constitutional Court salient. As indicated above, this could put pressure on the GFCC to re-engage in the judicial dialogue with the ECJ and signal to other national courts that defiance of EU law is not without consequences. Furthermore, the risk of escalation also exists without an infringement procedure. There are several cases pending before the Federal Constitutional Court that raise questions of a possible *ultra vires* action of EU institutions. These concern the implementation procedure following the *PSPP* judgment, an application of the party Alternative für Deutschland (AfD – Alternative for Germany) arguing that the PEPP program of the ECB violates the German constitution, and the question of the churches' autonomy to decide in their own affairs, as the ECJ requires decisions of church-controlled private companies that determine whether a managerial employee acted in accordance with a certain faith to be open to judicial review[445], while the GFCC places great weight on the autonomy of the churches to decide themselves on requirements of loyalty[446]. It is unlikely that the Constitutional Court will decide these matters in a more integration friendly way if the EU now tries an appeasement strategy by refraining from an infringement procedure. Finally, while the independence of the judiciary protects courts from political pressure, it is not designed to shield them from accountability for unlawful conduct. As a consequence, there are precedents in which the Court of Justice found an infringement of EU law by domestic courts.[447]

Secondly, we recommend that the ECB justifies its policy decisions using the proportionality framework proposed by the Federal Constitutional Court. It has already provided a *post hoc* justification of the PSP program in its policy meeting of the Governing Council on 3 and 4 June 2020.[448] It should continue to

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444 See also similar recommendations of Poli and Cisotta, *supra* note 2; Mayer, 'To Boldly Go', *supra* note 2, pp. 1125-1126; Sarmiento and Weiler, *supra* note 428.

445 See Case C- 68/17, 11 Sept. 2018, *IR v. JQ*, ECLI:EU:C:2018:696.

446 BVerfGE 137, 273 – Katholischer Chefarzt.

447 See, e.g., Case C-154/08, *Commission v. Spain*, 12 Nov. 2009, EU:C:2009:695; Case C-416/17, *Commission v. France*, 4 Oct. 2018, EU:C:2018:811.

448 See https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html.

provide such justifications going forward. To be sure, the ECB is not legally bound by the decision of the Federal Constitutional Court. Nevertheless, the aim of the Federal Constitutional Court to strengthen the rule of law by requiring a justification of far-reaching policy decisions deserves, in principle, support. The proportionality analysis consists of four steps: First, the concrete aim of the policy measure has to be stated. Second, it has to be shown how the proposed measure helps in advancing the stated aim. Third, the justification has to express that there is no alternative measure that would fulfil the purpose with equal effectiveness, but which would be less restrictive on Member State autonomy or impose lower social costs. In economic terms, the third step of the proportionality test is akin to the concept of Pareto efficiency:[449] There should not be an alternative measure that has only additional benefits without imposing additional costs. The most important step is the last one where a balancing of the advantages and disadvantages of the measure has to be performed. This balancing test amounts to a cost-benefit-analysis of the measure.[450] The ECB already performs a cost-benefit analysis to inform its monetary policy choices so that the required proportionality analysis seems to be predominantly a matter of changing the communication of its policy choices.[451] While imposing little costs on the ECB, using the proportionality framework could de-escalate the conflict with the GFCC.

Third, in the medium to long term, the European Council could consider a reform of EU treaties along the lines proposed in a contribution by Daniel Sarmiento and Joseph Weiler.[452] Sarmiento and Weiler advocate the establishment of an Appeal Chamber within the Court of Justice, which exclusively deals with the delimitation of EU competences. This chamber should be composed in equal parts of judges of the Court of Justice and judges of apex courts of the Member States. Such a chamber has an obvious advantage: The Court of Justice is often considered to be a "motor" of European integration. While such a classification underlines the influence of the ECJ, it also implies a certain partiality. It suggests that the Court of Justice might not be a neutral actor when it decides about the extent of EU competences. Instead, it is likely to side with the EU institutions. Regardless of whether this suspicion is justified, the mere impression of partiality already damages the authority of the Court of Justice. A separate chamber deciding about questions of competence could counter such an impression.

However, there are some drawbacks to this proposal. Most importantly, it is not always easy to distinguish questions of competence from questions of mere legality. The *PSPP* judgment is a case in point. There are numerous commentators arguing that the proportionality test required by the Federal Constitutional Court was merely a requirement of legality because Art. 5 TEU distinguishes between the existence of a competence and its exercise and proportionality only concerned the latter.[453] Furthermore, Member States' courts have often expressed a wide understanding of *ultra vires* according to

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[449] J.-R. Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (1990) pp. 224-225; D.M. Beatty, 'Human Rights and the Rules of Law', in D.M. Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective* (Brill 1994) p. 1 at p. 47; R. Alexy, 'Constitutional Rights, Balancing, and Rationality', 16 *Ratio Juris* (2003) p. 131 at p. 135; A. van Aaken, *"Rational Choice" in der Rechtswissenschaft: zum Stellenwert der ökonomischen Theorie im Recht* (2003) p. 329; J. Rivers, 'Proportionality and Variable Intensity of Review', 65 *Cambridge Law Journal* (2006) p. 174 at p. 198.

[450] Van Aaken, *supra* note 449, p. 330; Rivers, *supra* note 449, p. 180; C. Engel, 'Öffentliches Wirtschaftsrecht aus Sicht der ökonomischen Theorie', in D. Ehlers, M. Fehling and H. Pünder (eds.), *Besonderes Verwaltungsrecht, Band I: Öffentliches Wirtschaftsrecht* (2012), at para. 52; A. Portuese, 'Principle of Proportionality as Principle of Economic Efficiency', 19 *European Law Journal* (2013) p. 612 at p. 620.

[451] See L.P. Feld and V. Wieland, 'The Federal Constitutional Court Ruling and the European Central Bank's Strategy' (Freiburg Discussion Papers on Constitutional Economics 20/5, 2020) pp. 16-31 (proposing the use of quantitative indicators).

[452] D. Sarmiento and J.H.H. Weiler, *supra* note 428.

[453] M. Wendel, supra note 2, p. 986; J. Ziller, 'The unbearable heaviness of the German constitutional judge: On the judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 concerning the European Central Bank's PSPP programme', https://ceridap.eu/the-unbearable-heaviness-of-the-german-constitutional-judge-on-the-judgment-of-the-second-chamber-of-the-german-federal-constitutional-court-of-5-may-2020-concerning-the-european-central-banks-pspp/; Editorial Comments, supra note 2, p. 970; Bobić and Dawson, supra note 419, p. 1975.

which any decision of the Court of Justice which is perceived to be unlawful could potentially trigger an *ultra vires* review.[454] However, the competence of an additional Appeal Chamber has to be limited in order not to be the final instance for all matters concerning EU law. Therefore, it would not cover all instances in which Member States' courts invoke the *ultra vires* exception. Nevertheless, the creation (or even only the earnest discussion) of such a chamber could reinforce trust in the EU judiciary and thus be an important step to reestablish the judicial dialogue between the Court of Justice and the apex courts of the Member States.

[454] For the distinction between *ultra vires* in a narrow and a broad sense, see Mayer, 'Deconstructing', *supra* note 2, pp. 746-747. For example, the Czech Constitutional Court's decision in *Landtóva* or the GFCC's decision in *Honeywell* arguably concerned the mere illegality of a decision of the Court of Justice.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, analyses the repercussions of the judgment of the German Federal Constitutional Court of 5 May 2020. It puts the decision into context, makes a normative assessment, analyses possible consequences and makes some policy recommendations.

PE 692.276
Print ISBN 978-92-846-8001-6| doi: 10.2861/569573| QA-02-21-507-EN-C
PDF ISBN 978-92-846-8002-3| doi: 10.2861/128287| QA-02-21-507-EN-N