The EU Judiciary After Weiss – Proposing A New Mixed Chamber of the Court of Justice

A Reply to Our Critics

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A few weeks ago, we published a proposal, in the form of a Position Paper, for the creation of a Mixed Chamber at the Court of Justice as a means, in part, of addressing the issues highlighted by the May 5th *Weiss* decision of the German Constitutional Court.

This Chamber, to be composed of sitting members of the Court of Justice of the EU alongside judges of constitutional courts of the Member States, would have jurisdiction to solve, in last instance, conflicts of competence between the Union and its Member States. The full details may be found here in the original Position Paper. https://eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler/

The proposal has stirred a lively debate and produced constructive comments and critiques from colleagues and friends from many quarters. We are honored by the attention received and the best way to acknowledge our critics is by providing reasoned replies to their comments.

We received two kinds of remarks: Macro and Micro. The Macro critiques target the proposal's convenience and its general defects in the broad sense. These are principled critiques that deserve also a principled reply.

At the Micro level we received detailed inquiries into specific aspects of the proposal, questioning a particular point here or there. We will address most of them accordingly.

We will end with a more elaborate description of some of the procedural aspects of our Proposal which consider several of the comments we have been receiving.

I. The Mixed Chamber at the Macro Level

The proposal does not solve the kompetenz-kompetenz issue. The only way forward is a constitutional amendment introducing primacy over national law. What is to stop a national constitutional court, even after a decision of the Mixed Chamber, to assert the primacy of national constitutional law? We received several comments which in different ways made this same point.

This is an obvious and legitimate question, and our answer to it follows two parallel tracks.

In the first place, our proposal should not be seen as driven by and restricted to 'solving the Weiss crisis'. As we pointed out, from a legal point of view the Treaties provide and

the Member States, the Masters of the Treaty, accepted that the question of the validity of Union acts (including the issue of jurisdictional limits) should be decided by the Court of Justice. But we also pointed out that this issue, want it or not, also has a profound national constitutional dimension. We consider that the jurisdictional question is of a different genus to other potential conflicts between national law and Union law. There might for example be conflicts concerning the level of protection of fundamental human rights. We think a strong case can be made that in the sphere of application of Union law, a polity which involves 27 constitutional orders, the human rights law of the Union as defined by the Court of Justice, whether 'higher' or 'lower', should prevail. That in fact is the underlying principle which informs the primacy of Union law. In its sphere of application, Union law, for both pragmatic and principled reasons, must have primacy.

But defining and deciding what is the sphere of application of Union law is a preceding condition for addressing the issue of primacy. That is why we consider it of a different genus. And as mentioned above, the stake for the national constitutional order is correspondingly of a different genus.

At the same time, it is obviously clear that deciding on that legal frontier cannot be undertaken unilaterally by the courts of each and every Member State and that, both pragmatically and in accordance with principle, the Court of Justice needs to have the final say.

Our proposal for the Mixed Chamber, *of the Court of Justice*, tries to the best of our ability to square this circle. It reaffirms the monopoly of the Court of Justice in deciding on the validity of Union law and yet the composition of the Mixed Chamber, and the proposed rules of voting we have proposed give very significant voice to the constitutional concerns of the Member States. Our readers will be familiar with the Voice/Exit theorem. Weiss may be seen as a playing out, carelessly to be sure, of the theorem. On this issue, the preliminary reference procedure might not be seen as giving sufficient *voice* to national constitutional concerns and thus impelling towards *exit*.

Our proposal, thus, is not to be seen simply as a reaction to Weiss, a kind of rapid band-aid in response to a 'rogue' court, but as a desirable structural correction which we would advocate even absent Weiss. An early (albeit crude) iteration of this proposal was made already 22 years ago by one of us (*The European Union Belongs to Its Citizens: Three Immodest Proposals*, 22 European Law Review, 1997) and was driven then, as it is now, also by a recognition and acknowledgment of the structural conundrum of which the Weiss situation is but an example and as a better expression of the United in Diversity meta-principle in relation to the European judicature. Our proposal should not then to be seen and evaluated only in remedial or prophylactic functional terms.

Coming, however, now to the remedial and prophylactic dimension of the question posed to us.

What is to stop a national court, the same German Court, to disregard the Mixed Chamber and do a Weiss *bis*? The only solution we have been told by several of our commentators is "…*a constitutional amendment introducing primacy over national law. What is to stop a national constitutional court, even after a decision of the Mixed Chamber, to assert the primacy of national constitutional law?"*

Yes, there would be nothing to stop a national constitutional court to defy a decision of the Mixed Chamber of the Court of Justice. But our contention is that the likelihood of such would be very significantly reduced and the legitimacy of such would be correspondingly dramatically diminished. And this not only because of the enhanced authority and legitimacy of such a jurisdiction, but also because in introducing this procedure as part of a revision of the Treaties, the principle not only of primacy but also of the ultimate jurisdiction to decide such, would by implication be part of such a Treaty amendment. If this were to pose a constitutional problem in this or that Member State it will emerge at the process of ratification, necessitating perhaps a constitutional amendment. It is hard to imagine that under these circumstances a national court will break ranks.

We do not favor either a Treaty amendment confirming primacy nor a generic call for all Member States to introduce such a constitutional amendment into their constitutions. Simply putting a proposal to any future IGC to introduce an explicit affirmation of primacy would have the opposite effect. It would call into question what is already an *acquis constitutionnel* of the Union legal order. Just imagine that this or that Member State would veto such an IGC proposal? By contrast, our proposal is premised on the principle of primacy which is assumed axiomatically. It merely suggests a way of giving it greater effect.

The force or weakness of our proposal rests thus on two foundations –as a matter of principle, it is a better manner of expressing the delicate balance between Member States and the Union in our legal order, but without compromising the centrality of the Court of Justice and, as a practical matter, a vaccination (even if imperfect) against the Weiss virus.

In concluding our reply to the first and most fundamental critique of our Proposal, we are impelled to add one final consideration to which the Weiss ruling gives rise.

Once before in the history of the European legal order a similar drama was played out, once before it involved the German and the Italian constitutional courts with their totally understandable sensitivity, in that earlier instance, to the protection of fundamental human rights in their respective legal orders (given their respective national socialist and fascist history) and once before it was the Italian judges who displayed more acumen and legal integrity than their German brethren.

We refer to the well known *Internationale Handelsgesellschaft* and *Frontini* cases of the 1970s. In those cases both courts contemplated the possible situation where a national court would be faced with a Union (then Community) measure which in their eyes violated the protection of fundamental human rights in the Constitutions of Germany and Italy respectively and which, hypothetically, would have been reviewed and considered valid by the Court of Justice. The two courts dealt with the matter in a significantly different manner. The German Court stated that so long as... there were no sufficient guarantees within the Union order of fundamental human rights, it would have to uphold the fundamental rights guaranteed by the Constitution the protection of which was their charge and thus not give effect to such a Union measure within German jurisdiction. And even then, as now, it reserved to itself in exceptional circumstances the final word. *Tout Court*. The Italian Court reached the same conclusion but then, with commendable integrity added: In that situation there would be but two options: Either Italy would have to change its constitution to bring it in line with European Union law as interpreted by

the Court of Justice, or withdraw from the Union. (And we could add, as a third option, that the Member States could amend the Treaties to solve the issue). The Italian court thus understood clearly that you could not be a Member of the Union but take the law into your own hands. Put differently, that if you are a Member of the Union it is incumbent on you to accept the final authority of the European Court of Justice.

In Weiss, the German Court played the same "trick" it played in the earlier case. Attempting to have their cake (uninterrupted German Membership as if nothing happened) but also eat it (deciding unilaterally what will be acceptable and unacceptable in Germany. *Das geht aber nicht.*

Though we think, as argued above, that it is far less likely that a national court, even the august German Constitutional Court, would defy a decision of the Mixed Chamber, the mere introduction of this jurisdiction would render explicitly the Frontini logic which would be an additional disincentive to defiance.

The Mixed Chamber should only be a final option after discarding other proposals that do not alter the composition of the Court of Justice

Indeed, to add a Chamber so composed to the Court of Justice is a significant move, but it has the great virtue of reaffirming the monopoly of the Court of Justice in being the final voice on the validity of Union law. In its day to day operations the Court of Justice remains the same, its members remain as they are and so does the jurisdiction of the Court. The Mixed Chamber is only a last recourse answer to exceptional situations in which a conflict of competence has not been resolved by the Court of Justice, or not perceived as finally resolved by a Member State. The Court will carry on working as it has for the past seven decades. Only in the exceptional situation in which a Member State, whether it may be through its government, its parliament or its highest courts, considers that a conflict of competence deserves a last look, under particularly strict terms, the Mixed Chamber will have jurisdiction to rule on the matter. Overall, this is not an alternation of the Union's judiciary. In fact, it is a means to reinforce it and, in the course of time, to acquire even more legitimacy *vis-à-vis* its national counterparts.

The very notion that least restrictive alternatives should be explored prior to the enactment of a Mixed Chamber also shows the failure of the current *status quo*. To date, such alternatives have been available to all Member States, mostly through the Court's generous stance on admissibility of preliminary references, which allows national courts (including constitutional courts) to question the Court's rulings when crucial issues of constitutional relevance are at stake. That system has proved to be too fragile. When a judiciary's final authority is solely based on a generic invitation to sincerely cooperate among courts and a pragmatic approach towards judicial dialogue, an additional level of procedural safeguards is needed. That's exactly what the Mixed Chamber would do. Our view is that the mere availability of this jurisdiction would incentivize better dialogue between the Court of Justice and its national counterparts.

The proposal would not be exceptional but open a floodgate. There are many cases on competence before the Court and this would continually challenge the Court's authority, including when national courts consider that the Court of Justice acted beyond its powers,

as in the recent Polish cases on judicial independence. And who would get to decide what issue is one of competences and what is a material substantive issue.

As to the first leg of the question (floodgates) we do not believe so. In the first place, if a national court is unhappy with a decision on validity, the procedure could require going to the Court of Justice for a second time before the Mixed Chamber could be seized. This issue does not go to the core of our proposal.

Second, the Treaty would specify the strict criteria under which the Mixed Chamber would have jurisdiction - egregious overstepping of Union competence. Therefore, not every breach of competence would be annulled by the Mixed Chamber, only the blatant cases of severe overstepping. The Court of Justice, when ruling on the matter before it gets to the Mixed Chamber, might get it wrong. But it will only be overturned in cases of significant excess of Union competence. Most of the rulings of the Court of Justice will probably be upheld by the Mixed Chamber and once a *jurisprudence constante* were established the appetite for appealing to the Mixed Chamber would diminish.

In addition, introducing another instance will simulate the Court of Justice to take competence issues even more seriously, acting now under the threat of appellate review.

As to the second leg of the question, it is of course true that the issue of competences oftentimes is mixed with other material issue (if you have done investment arbitration you will be very familiar with such), but not inextricably so mixed, and sometime there can be profound disputes on this very issue. Be that as it may, should a national court consider that the Court of Justice has decided an issue on material grounds whereas it should have been seen also on competence grounds, and that under the latter, the underlying measure is *ultra vires,* this, with all the safeguards mentioned above and below, would simply trigger the procedure for eventually seizing the Mixed Chamber of the Court of Justice which would ultimately have to decide such.

The Weiss judgment of the Federal Constitutional Court does not deserve a Treaty amendment. Treaty change in response to a deeply flawed and badly-reasoned ruling is a disproportionate reply. The Weiss judgment deserves to be ignored and we should act pragmatically, underplaying the ruling and hoping to set the record straight in the course of time.

This argument cuts both ways: indeed, Weiss is a flawed ruling, but precisely because the *primus inter pares* of constitutional jurisdictions is able to make such a dubious decision, the time has come to set the record straight through Treaty change. If a judgment like Weiss came from an inexperienced and less reputed high court, we wouldn't be spending so much time and effort in discussing the consequences of the ruling. But Weiss is the outcome of Europe's *doyen* of constitutional courts, a remarkable institution with an impressive intellectual background. If *this* court is capable of doing such a thing, what could we expect from the rest? It is precisely because Weiss is a flawed ruling, but coming from a highly respectable court, that a more profound and sustainable move is needed. To rely on a pragmatic approach and to let the judgment rot through the passage of time, is too risky an experiment. The autonomy of the Union legal order cannot be sustained if constitutional judgments are floating around setting aside Court of Justice judgments and

Union legal acts. If no authoritative response is provided from the Union, pragmatism alone will not save its legal order.

We wish, in this context, to return to the Voice/Exit theorem. In the post-Brexit and post-covid environment, at a time of discussion on the future of the Union, having such a jurisdiction might give the Member States more confidence to expand the Union competences without as much fear of subsequent jurisdictional creeping. In the long run, the Mixed Chamber could be the comforting solution that could subside the fears of Member States when transferring sovereign powers to the Union. The proposal is not a menace to the autonomy of Union law or to the Union itself, but quite the contrary. It could be the measure that the Union needs to take the necessary steps into a more perfect and ever-closer Union.

Does not the history of federalism teach us that these are normal teething problems which disappear in time organically?

The lessons of federalism are oftentimes a mirror in which one sees the image one is looking for. If we take, just as one example, the American debate, for some the issue has been settled (though it took a Civil War and several decades after that) and for others it remains a live issue. Just google 'the death of federalism' and you will notice how alive this issue remains in American discourse. We do not want to take sides in that or other similar debates.

But in the context of the European Union (after close to 70 years hardly an infant with teething problems; more likely a senior in need of some tooth implants) the trajectory is complicated and what seemed once a minor issue now looms large. It is, in fact, not just the intra-court discussion provoked by Weiss, but the general mood in the Union which has made this issue live and pressing. The Brexit Slogan – *take back control* – in different guises resonates and informs the wave of Euroscepticism which has moved from the preserve of the lunatic fringe into mainstream European politics. We do not think there is room for complacency and the luxury of a hands-off approach allowing the windmills of organic history to take care of the problem.

II. The Mixed Chamber at the Micro Level

Rules on reinforced majorities in decision-making bodies are generally introduced to overrule a measure, not to confirm its legality.

This may be right, but in the particular ontology of this situation we thought it wise not to validate a measure, the jurisdictional validity of which would be challenged by all the Member State judges sitting in the Mixed Chamber. This would defeat the very logic of the proposal. But in our view this is a second-order question that could be sorted out should the proposal attract any political traction.

As an example of an intermediate solution, the role of "assistant rapporteurs" should be explored. The assistant rapporteur could be a national judge and not a member of the Court of Justice.

As a matter of “Voice”, assistant rapporteurs can provide precisely such input. However, by having no influence whatsoever in the decision-making procedure, their only added value is an authoritative view of national concerns. That value is already provided by the Member States through their written and oral submissions in the procedure. Also, the Advocate General plays such a role too, although in a broader scope and considering all the interests at stake. Although the assistant rapporteur could be an interesting means of providing further input from national quarters, it would still not suffice to settle questions of competence that haunt a Member State.

By excluding the President of the Court of Justice from sitting in the Mixed Chamber, but allowing the President of the national court that made the reference, or of the Member State bringing the action, the Mixed Chamber is unbalanced and provides an additional national bias that would endanger its impartiality.

This is a legitimate concern. However, the criticism might be the result of a misunderstanding. The President is precluded from sitting in the Mixed Chamber only when he or she was involved in the prior decision of the Court that is now under review. In the case of the President of the national court that made the reference, that court has still not made a decision on the matter. The national court refers the matter to the Mixed Chamber after the Court of Justice’s ruling, but prior to its ruling on the main proceedings. Therefore, the President of the national court that sits in the Mixed Chamber is not involved in a prior ruling, only in making the referral.

It is true that such a distinction may seem too formalistic. After all, the President of the national court has a doubt on validity that he or she will eventually be ruling on. In that case, a default option would be to ensure that the Member State of the referring court is represented by a judge that did not and will not sit in the national proceedings. As an alternative, the Mixed Chamber could be composed, on the part of the Member States, not by sitting judges of national supreme or constitutional courts, but of a roster of former Presidents of supreme and/or constitutional courts, appointed by each Member State for a fixed period of time. Again, this is a second order issue which may be discussed and resolved if the underlying logic of the proposal gains traction.

The proposal should work in both directions: if the Mixed Chamber can overrule the Court of Justice and annul an Union act, then it should also have the power to annul national acts that breach Union competence, in line with the Rimsevics judgment

There is force is in this argument, but there is also a political risk that must be avoided. The creation of a Mixed Chamber is quite a significant step forward, but a balanced one. It quietens the concerns of the national authorities concerned about Union competence creep and it does it through a subtle balance of interests. If the Mixed Chamber was also to turn into a second-instance infringement procedure, with annulment powers to strike out national acts (in the way the Court of Justice did in Rimsevics), the Mixed Chamber would become quite a different animal and the chances of reaching a consensus among the Member State to amend the Treaties could crumble.

Although this counterproposal is an interesting way of granting the Mixed Chamber even stronger powers, it also risks turning the debate about the Mixed Chamber into a different discussion, away from the issue of competence and more focused on the annulment powers of Union courts. We suggest that the Mixed Chamber should start working as a competence court to safeguard the distribution of powers by introducing a second-tier level of review within the Court of Justice. Additional powers could be explored in the future, but the process should be gradual for now.

III. Procedural Aspects of the Proposed Mixed Chamber

The Comments and Critiques we received were extremely helpful in reflecting further, and where necessary clarifying, developing and amending some of the procedural aspects of our proposal. In the following lines we formulate once again the main procedural features of the Mixed Chamber, developing some aspects in more detail and nuancing other points as a result of the comments received.

A. Access to the Mixed Chamber

In our proposal, the Mixed Chamber can only rule when the Court of Justice has made an explicit ruling, in a direct action or in a preliminary reference, on the Union's competence to enact a policy measure. Therefore, the Mixed Chamber will always use its jurisdiction as a last instance and *after* the Court of Justice has ruled on the matter.

Once the Court of Justice has delivered its ruling, there are two means of access to the Mixed Chamber open to applicants: 1) Member States (government and national parliament) and Union Institutions through a direct action, *and* 2) a constitutional/supreme court, as determined by the Member State, through a preliminary reference.

A constitutional/supreme court may request a ruling of the Mixed Chamber when the Court of Justice has previously ruled on the validity of the challenged act through an action of annulment or through a preliminary reference. The preliminary reference could have been made by the same constitutional/supreme court that is now requesting the ruling of the Mixed Chamber. For example, in the case of Weiss, the German Constitutional Court could have triggered the jurisdiction of the Mixed Chamber after the Court of Justice's ruling in the preliminary reference procedures instigated by the German Constitutional Court itself.

Of course, nothing stops the constitutional/supreme from making a second preliminary reference, instead of triggering the jurisdiction of the Mixed Chamber. It's in the spirit of the principle of sincere cooperation to exhaust the dialogue and to use all the appropriate resources in doing so. A second preliminary reference can be a source of additional dialogue that could contribute to ease the concerns of the national court that is left unconvinced after the Court of Justice's first ruling, but that will depend on the circumstances of each case. Some cases will be more suited than others to bring a second preliminary reference, whilst other cases should be brought before the Mixed Chamber immediately (being a second reference a mere waste of time). This should be left to the national court's discretion when dealing with each individual case.

B. The Challenged Measure

The challenged measure is not a judgment of the Court of Justice, but the validity of the Union act that the Court of Justice has previously ruled on. We do not conceive the Mixed Chamber as a direct appellate review of Court of Justice's judgments. If a Member State believes that the Court of Justice has overstepped its jurisdiction, the Mixed Chamber is not to rule on that. By enacting this remedy and enshrining it in the Treaties, Member States are accepting that Union policy is subject to a final look by the Mixed Chamber, but rulings of the Court of Justice are not policy measures and therefore they are not the directly reviewed acts under the jurisdiction of the Mixed Chamber.

C. Standard of Review

The Mixed Chamber does not rule on the basis of a standard competence check. That is the role of the Court of Justice. The Mixed Chamber has jurisdiction to rule only on cases of *manifest breach of Member State competence*. This distinction is already present in Union law: the standard of illegality in Union and Member State liability is a standard of "manifest breach", in the same way that the review procedure allows the Court of Justice to "exceptionally" reassess judgments of the General Court "where there is a serious risk of the unity or consistency of Union law being affected" (Art. 256 TFEU).

This is also the standard of review indicated in the jurisprudence of several national courts, including the German Constitutional Court.

In other words, standards of heightened scrutiny already exist under Union law and that is the standard that should apply to the jurisdiction of the Mixed Chamber. The Treaty provisions enshrining the basic rules of the Mixed Chamber would set such standard, in the same way that Art. 256 TFEU provides for a heightened standard for the review procedure.

D. Effects of the judgment

The judgments of the Mixed Chamber will have nullifying effects and therefore they will annul the challenged Union act and, as a result, they will also nullify the dispositive part of the Court of Justice's judgment that upheld the challenged act. The Mixed Chamber should also have the power to limit the effects of its judgments, in case that the annulment poses serious risks to legal certainty, as provided in Art. 264, second paragraph TFEU.

E. Workings of the Mixed Chamber

The Mixed Chamber rules with no Opinion of the Advocate General and it does not admit dissenting opinions. Its rulings must be agreed by a majority of at least seven judges and it will deliberate under the same rules of confidentiality as applied to the deliberations of all other formations of the Court of Justice. The Mixed Chamber, on each composition, can decide on the linguistic regime applicable to its deliberations, although the language

of proceedings will be governed by the same rules that apply to direct actions and preliminary references.

Transparency is crucial. If the Mixed Chamber is to provide legitimacy to the entire legal system it must act through an open and transparent methodology. We already explained why dissenting opinions are not an option for decisions of the Court of Justice so long as the term of its Members are not fixed in time as is the best practice among national constitutional courts. This would apply to the Mixed Chamber too, but in exchange it should act through open registers granting access to the written submission of the parties and live-streaming of its hearings. The constitutional implications of each case reaching the Mixed Chamber are so relevant, that the public deserves to have full access to understand the arguments submitted to the Mixed Chamber.