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## Red Signal from Karlsruhe: Towards a New Equilibrium or New Level of Conflict?

- **ABSTRACT:** *In its PSPP decision, the German Constitutional Court for the first time declared an EU act ultra vires. The decision resulted in a flood of studies, blog posts, and comments. Most criticised the verdict raising a series of objections. We agree with some objections. However, the present study approaches the judgment from the other side. It seeks to understand the situation of the constitutional courts of Member States in the EU legal system, to examine their main dilemmas in relation to EU law, and to explore their possibilities regarding their main task, which is the protection of constitutions. The study highlights the fundamental structural tension that currently characterises the EU legal system concerning Member States' sovereignty and examines how a balance can be struck in addressing this tension.*
- **KEYWORDS:** primacy of EU law, constitutional review, *ultra vires* acts, principle of proportionality, identity review, *ultra vires* review.

On 5 May 2020, the German Federal Constitutional Court (*Bundesverfassungsgericht* – GFCC) delivered a judgment concerning the European Central Bank's Public Sector Asset Purchase Program (PSPP), stirring European talks on the boundaries between the competences of the EU and its Member States.<sup>2</sup> The GFCC's judgment questioned how the Court of Justice of the European Union (CJEU) and European Central Bank (ECB) exercised their powers in this matter and opened new perspectives in the turbulent relations between the EU and one of the most prestigious constitutional courts in Europe.

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2 *PSPP*, BVerfG 2 BvR 859/15 (Urteil vom 5. Mai 2020); available at: [https://www.bundesverfassungsgericht.de/e/rs20200505\\_2bvr085915.html](https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915.html) (accessed: 30 October 2020).



## 1. Background

The PSPP, launched in 2015, enables the ECB and national central banks to buy bonds and other marketable debt instruments issued by Member States' governments or other recognised organisations (i.e. local governments) in the Eurozone.<sup>3</sup> It aims to ease monetary conditions to return the average inflation rate to the 2% level, the ECB's inflation target, and to reinvigorate the economy of Eurozone states. Under PSPP, complex eligibility criteria exist for securities that can be purchased by the ECB or national central banks.

The four constitutional complaints insisted that the PSPP violated the principle of the conferral of competences under Article 5(1) of the Treaty on European Union (TEU), prohibition of monetary financing by central banks of Member States budgets' under Article 123(1) of the Treaty on the Functioning of the European Union (TFEU), and constitutional identity as it encroached on the German parliament's budgetary powers. In the proceedings, the German Federal Constitutional Court (GFCC) referred five questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling, raising the validity of the ECB decisions concerning the PSPP (*Weiss* case). This was not the first occasion the GFCC has questioned the validity of ECB's decisions. In the *Gauweiler* case, it also had doubts regarding the ECB's Outright Monetary Transactions (OMT) Programme designed to buy government bonds. The OMT Programme finally passed the test as the CJEU found no evidence that the ECB exceeded its mandate by adopting the programme.<sup>4</sup> The CJEU has also not found any factor in *Weiss* that would affect the validity of the ECB decisions.<sup>5</sup>

The GFCC has — in essence, and given the CJEU's *Weiss* ruling — reached the following conclusions. (i) As the ECB has failed to demonstrate and substantiate that the PSPP is in accordance with the principle of proportionality, the programme constitutes — in a procedural sense — an *ultra vires* act (para. 116.). Consequently, the *Bundestag* and federal government are required to take steps to ensure that the principle prevails when the ECB implements the PSPP and to restore conformity with the Treaties. (ii) An *ultra vires* act of the EU has no binding effect within the German jurisdiction, and German state organs may not implement and execute them. After a transitional period of no more than three months, this also holds for the *Bundesbank* unless the ECB demonstrates 'in a comprehensible and substantiated manner' that objectives of its monetary policy are not disproportionate to the economic policy effects resulting from the programme (para. 235.). (iii) Furthermore, the CJEU's *Weiss* judgment is an *ultra vires* act to the extent that it considered the ECB's PSPP decisions to be appropriate

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3 PSPP is one of the four components of the (expanded) Asset Purchase Programme (APP). The constitutional complaints also challenged the Corporate Sector Purchase Programme (CSPP). The Court separated this part of the proceedings for future decision.

4 C-62/14 *Gauweiler and Others*, ECLI:EU:C:2015:400.

5 C-493/17 *Weiss and Others*, ECLI:EU:C:2018:1000.

and proportionate. The interpretation of the Treaties and delimitation of EU and Member States' competences put forward by the CJEU in its preliminary ruling was clearly untenable or incomprehensible (i.e. objectively arbitrary). This act of the CJEU is not binding on the GFCC. The CJEU exceeds its mandate conferred in Article 19(1) TEU if it manifestly disregards the general legal principles and traditional methods of interpretation common to the legal systems of Member States (para.112). (iv) The Bundestag and German federal government violated the complainants' constitutional rights because they did not challenge the ECB decisions concerning the PSPP, which were insufficient in bearing out that the programme satisfies the proportionality requirement (para. 116.).

The conflict revolved around the delimitation of EU monetary policy (EU competence in the Eurozone) and economic policies, which fall basically within Member State competences, and around the assessment of the effects of PSPP as a monetary instrument in the field of economic policy.<sup>6</sup> For the GFCC, the principle of proportionality seemed a necessary instrument according to Article 5 TEU in solving the dilemmas pertaining to delimitation. For the GFCC, if EU institutions do not give due consideration to this principle in such a context, their acts may qualify *ultra vires* in a constitutional review. The ECB has not substantiated in its PSPP decisions that the adopted monetary measures were proportionate. In *Weiss*, the CJEU did not apply a coherent standard of proportionality review (its reasoning being 'simply not comprehensible', paras. 116. and 153.); therefore, it was unable to properly delimit the ECB's competences. For the first time in the history of European integration, the GFCC declared that it is not bound by a preliminary decision of the European Court adopted at its own referral.

The *PSPP* judgment puts an external constitutional control on how EU institutions (the ECB and CJEU in this case) exercise the competences conferred on them by Member States. This leads to the main legal battlefield, where one party raises the flag of the primacy of EU law and competences of the CJEU having the last word on the EU's law. The other side brings about the principle of conferral of competences and requirements of democratic legitimation and control.

## 2. The context

The relationship between the constitutions (and constitutional courts) of Member States and EU legal order has two sensitive aspects that raise practical dilemmas.<sup>7</sup> These dilemmas might be exacerbated in proceedings before the CJEU or in the constitutional adjudication in Member States, raising specific jurisdictional issues and problems of legal and constitutional interpretation.

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<sup>6</sup> For a detailed analysis presented on this issue in light of the PSPP ruling, see Goldmann, 2020, pp. 1073–1075.

<sup>7</sup> Hereinafter, by constitutional court I also mean the supreme courts of some Member States, which conduct constitutional adjudication.

### ■ 2.1. The dilemma of checking or not checking the exercise of EU competences

The first sensitive aspect is the possible control of the exercise of EU competences. The powers conferred to the EU and enshrined in EU Treaties are general and vague. Their boundaries are formed continuously during the functioning of the Union in adopting certain EU legal acts or settling various legal disputes. Provisions of general EU competences only make sense *ex post* in the light of subsequent CJEU case law. The question is of whether Member States' constitutional courts can play a role in this diversified process in which EU competences are given specific substance.

This need arises because the EU legislation and CJEU tend to draw the boundaries of EU competences very broadly to meet the goals of integration and ensure the effective operation of the EU. Various techniques have been developed to extend EU competences, such as the doctrine of implied powers; extension of powers on the basis of non-discrimination clauses; or extensive interpretation of competence clauses based on Union objectives supported by a general, subsidiary competence clause (Article 352 TFEU).<sup>8</sup>

Although the CJEU is the final arbiter of the interpretation of the Treaties and competence clauses contained therein, the constitutional courts are not disinterested in the matter. There is sometimes a need for constitutional courts to interpret those constitutional provisions based on which competences have been conferred to the EU. As the EU competences set out in the Treaties and State powers conferred under the relevant constitutional clauses necessarily coincide,<sup>9</sup> interpretations from the opposite direction might easily give rise to conflict.

The dilemma of a constitutional court is whether to act if it appears that a specific EU measure has exceeded the powers conferred on the EU (the possibility of *ultra vires* review). However, there are strong arguments against this regular *ultra vires* review. (i) The powers conferred are reflected and specified in the Treaties of the Union (and not in the constitutions of Member States). The CJEU is ultimately responsible for the interpretation of the Treaties, not the constitutional courts. (ii) The interpretation of a provision in the Treaties may carry a great deal of uncertainty, and typically, more than one reasonable interpretative alternative is conceivable. A constitutional court could find itself in an impossible situation if it tried to engage in a detailed interpretation of the Treaties in competition with the EU court. (iii) Insurmountable problems may arise if through its constitutional court, a Member State regularly examined and disputed on different grounds and perceptions the exercise of EU competences even where other Member States do not raise specific objections to relevant EU legal acts.<sup>10</sup>

These considerations presumably play a role in that *ultra vires* review is considered by constitutional courts that maintain this possibility as an extraordinary tool. The constitutional court steps in from the background when an EU act adopted *ultra*

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8 In its Lisbon ruling, the Danish Supreme Court examined this rule of competence at length but did not raise any objection to it, *Hausgaard*, Højesteret 199/2012 (20/02/2013) UfR 2013,1451 H, para. 3. available at: <https://domstol.dk/media/0xebqufh/199-12-english.pdf> (accessed: 30 October 2020).

9 Cf. *Lissabon*, BVerfG 2 BvE 2/08 (Urteil vom 30. Juni 2009) para. 234.

10 See also Blutman, 2017, p. 2.

*vires* slips through the CJEU's scrutiny (typically in annulment or preliminary ruling proceedings).

## ■ 2.2. The dilemma of primacy

The second sensitive aspect is the question of primacy (i.e. priority in application). This problem arises when a constitutional rule and an EU legal act are incompatible concerning a specific legal issue.

The CJEU's approach is simple. The primacy of EU law extends to this situation, and any EU rule takes precedence over constitutional provisions in the same way as over Member States' sub-constitutional law.<sup>11</sup> This is based on the need for uniform, equal, and effective enforcement of EU law.<sup>12</sup> The relevant practice of the CJEU has been consequent since the early 1970s.

Thus, it is primarily for the constitutional courts to find a way to resolve such conflicts. The dilemma of the constitutional courts is as follows. They are also bound by the principle of sincere cooperation in EU matters [Article 4(3) TEU], and more generally, by the EU legal order of which Member States have become part. However, their main task is to protect the constitution, which does not provide explicitly for the primacy of EU law. Even the Treaties are silent on any primacy of EU law.

In some Member States, this situation has been clarified.<sup>13</sup> Some constitutional courts have clear, explicit reservations about the Luxembourg approach, for at least one fundamental reason. The EU is not a federal state, but an international organisation based on the cooperation of sovereign states, which must also be reflected in deciding the primacy dilemma. The EU must show '*constitutional tolerance*' towards Member States.<sup>14</sup> The constitution of a Member State is the most fundamental legal embodiment of the sovereignty and cannot in all its parts simply be subordinated to EU law. Following such considerations, there are constitutional courts that theoretically do not recognise the primacy of EU law over constitutional rules.<sup>15</sup>

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11 11-70 *Internationale Handelsgesellschaft mbH*, EU:C:1970:114, para. 3. Similarly for example, C-473/93 *Commission v Luxembourg* EU:C:1996:263, paras. 10. and 50.; C-285/98 *Kreil*, EU:C:2000:2, paras. 5. and 32.

12 The CJEU press release issued after the PSpP ruling emphasised the legal equality of Member States without mentioning the primacy of EU Law, Press Release No. 58/20, Press release following the judgment of the German Constitutional Court of 5 May 2020 (May 8, 2020), available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf> (accessed: 30 October 2020).; see also Chronowski, 2020, p. 78. For a criticism of equality arguments applied to support the primacy of EU law, see Lindeboom, 2020, pp. 1037-1040.

13 For a detailed comparative analysis, see Fazekas, 2009, pp. 61-188.

14 For the question of constitutional tolerance, see for example, Martinico and Pollicino, 2008, pp. 106-108.

15 Such is the case with the Spanish Constitutional Court, which stated in Opinion 1/1992. that EU (Community) law did not take precedence over the Spanish Constitution; García, 2005, pp. 1003-1005. It seems that the Polish Constitutional Court's decision on the Accession Treaty of 2003 now also falls here; K 18/04. (11.05.2005); available at: [https://trybunal.gov.pl/fileadmin/content/omowienia/K\\_18\\_04\\_GB.pdf](https://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf) (accessed: 30 October 2020). For the relevant practice of Member States' constitutional courts, see also Tatham, 2013, pp. 205-268.

In this precarious situation, the majority of constitutional courts are reluctant to rule explicitly, even in a declarative manner, on the issue of the primacy of EU law.<sup>16</sup> However, an aspect of the constitutional adjudication indirectly refers to the position a constitutional court takes concerning the relationship between EU law and the constitutional rules. The crucial question is whether a constitutional court is willing to subject existing EU legal acts to constitutional review.<sup>17</sup>

### ■ 2.3. *Limited constitutional review as a possible reply to the primacy dilemma*

Some constitutional courts reserve, at least in theory, the power to exercise constitutional review over EU acts, although they do not do so on the same basis.<sup>18</sup> Theoretically, a model for such a review was already formed in the early stages of European integration. In the 1970s, two constitutional courts (GFCC and the Italian Constitutional Court) were willing to protect fundamental constitutional rights against the effects of EU (Community) law.<sup>19</sup> If a review based on constitutional fundamental rights is possible,<sup>20</sup> one based on other standards might also be possible. EU legal acts can also be reviewed to determine whether they infringe on a Member State's sovereignty (sovereignty review). In this area, the cornerstone ruling is the GFCC's *Maastricht* decision (1993).<sup>21</sup> The Treaty of Lisbon introduced a further opportunity to apply in principle a third type of standard underlying constitutional reviews. Under Article 4(2) TEU, the EU must respect the national identity of its Member States, including their political and constitutional order (identity review). Thus, at least three types of constitutional review can be distinguished: (i) review based on fundamental rights, (ii) sovereignty review, and (iii) identity review.<sup>22</sup>

The practice of constitutional courts that maintain the possibility of constitutional review is mixed in terms of the use of constitutional standards. For example, the Hungarian Constitutional Court recently declared that it was willing to apply any

16 Lindeboom claims that most constitutional courts in the EU do not recognise the primacy of EU law over their constitutions; Lindeboom, 2020, p. 1041.

17 See also Blutman, 2017, pp. 1-2.

18 These courts seem to include for example, the German, Polish, Czech, Hungarian Constitutional Courts, perhaps the French *Conseil d'État* and Danish Supreme Court.

19 These were, at least theoretically, the heydays of fundamental rights review from the *Frontini* and *Internationale Handelsgesellschaft (Solange I)* decisions to the 1984 *Granital* and 1986 *Wünsche Handelsgesellschaft (Solange II)* rulings. For a detailed overview of these events, see Craig and de Búrca, 2015, pp. 278–304.

20 *Solange I*, BVerfG 2 BvL 52/71 (Beschluss vom 29.05. 1974) BVerfGE 37, 271; point B/I/4.

21 *Maastricht*, BVerfG (Urteil vom 12. 10. 1993) 2 BvR 2134/92 und 2159/92; BVerfGE 89, 155; point C/I/3. (para. 106). Sovereignty review is primarily, though not necessarily, aimed at examining whether in adopting an act, the EU has remained within the powers conferred on it by Member States (*ultra vires* review). For an overview of the GFCC's *ultra vires* doctrine, see Schneider, 2020, pp. 968–970.

22 These three types of constitutional review do not entirely accord with the GFCC's practice, for example, Petersen, 2020, p. 999. Note that from a procedural viewpoint, a constitutional review is conceivable either as *direct or indirect*. In the case of direct control, the constitutional court reviews directly an EU legal act and limits its effects if it violates the constitution. In the case of an indirect review, it scrutinises an internal legal act promulgating, implementing, or transposing an EU act with a view to declaring it unconstitutional due to its content originating from EU legal acts.

of the three reviews, but did not clarify the range of constitutional provisions to be protected this way.<sup>23</sup> The Czech Constitutional Court essentially applies an *ultra vires* review.<sup>24</sup> In the practice of the GFCC, in addition to *ultra vires* review, identity review came to the fore and absorbed the fundamental rights review.<sup>25</sup> However, it seems the Polish Constitutional Court wants to protect the entire constitution from EU law, not only some of its provisions.<sup>26</sup>

Since the primacy dilemma cannot be resolved,<sup>27</sup> the actors (primarily the constitutional courts) have begun to look for soft solutions to avoid sharpening the conflict and to find an intermediate path. Traces of self-restraint (*cooperative constitutionalism*) can clearly be detected on the side of the constitutional courts. The responsibility is enormous: the EU legal order can be fragmented along the constitutional rules of the 27 Member States.<sup>28</sup> This type of self-restraint has at least two aspects. Constitutional courts reserving the possibility of constitutional review typically do not want to protect the whole constitution against EU law, but only certain essential provisions or features thereof (e.g. articles of sovereignty, constitutional fundamental rights). Furthermore, constitutional review is not automatic, but exceptional and used as a last resort (limited constitutional review).

This cautious approach seemed sufficient to deal with the primacy dilemma in practice. A practical balance has been established in the spirit of cooperative constitutionalism. The CJEU has consistently insisted on the primacy of EU law. On the other hand, some constitutional courts declared the possibility of constitutional review, and exercised it, but almost exclusively in the form of indirect review, which at most led to the repeal of internal acts. This practical balance was upset by the PSPP judgment.<sup>29</sup> As such, the latent conflict became visible and again exacerbated.

### 3. New balance or a new level of conflict?

#### ■ 3.1 Some effects of the PSPP ruling

The PSPP ruling is incompatible with the Treaties in that, it deprived the CJEU's preliminary ruling of its effects within the German jurisdiction and made the application of other binding EU acts (ECB decisions) contingent on further requirements. This is not the

23 Decision 22/2016. (XII. 5.)AB; ABH 2016, 456.

24 See the notable case of *Slovak pensions* (Pl. ÚS 5/12, 2012/01/31.); however, the Czech Constitutional Court only wants to protect the constitutional order and substantive core of the constitution, Pl. ÚS 19/08: Treaty of Lisbon (I) (2008/11/26) para. 85.

25 *Gauweiler*, BVerfG, (Urteil vom 21. Juni 2016) 2 BvR 2728/13, para. 153.

26 K 18/04. (2005/05/11) (cited above) especially paras. 1. and 13.; however, in the subsequent practice, the possibility of identity review has been emphasised, see Skomerska-Muchowska, 2017, pp. 128-133.

27 Both the absolute primacy approach and application of constitutional review over EU legal acts have their own, although incompatible, logic, Wendel, 2020, p. 982.

28 All this is also acknowledged by the GFCC, for example, *Lissabon*, BVerfG 2 BvE 2/08 (Urteil vom 30. Juni 2009) BVerfGE 123, 267; para. 240.

29 Some features of this practical balance are analysed by Petersen, 2020, pp. 996-998.

first time a constitutional court in a Member State considered a CJEU judgment an *ultra vires* act or explicitly and deliberately disapplied a preliminary ruling in the same case.<sup>30</sup> However, the PSPP ruling makes a significant difference as follows. (i) GFCC might easily be seen as *primus inter pares* among European constitutional courts.<sup>31</sup> Its patterns and constructions of constitutional reasoning are usually followed by other constitutional courts, especially in Central European countries. (ii) The GFCC decided on a major issue, as APP is at the foundation of European economic crisis management in the EU. (iii) The PSPP ruling concerns one of the exclusive competences of the Union (monetary policy), where it is especially important that the unity of EU rules is maintained. (iv) The authority of the GFCC meant the decision had extremely wide press coverage and provoked innumerable – and mostly negative – professional comments.<sup>32</sup>

The PSPP ruling did not cause substantial damage. It was the *Bundesbank* that the most got stuck between the cogwheels of the EU and German constitutional mechanism. Its president did not hesitate to state that they were convinced of the proportionality of the PSPP.<sup>33</sup> The ECB Governing Council made public its proportionality considerations relating to the APP, concluding that the APP (and another programme) ‘were proportionate measures’.<sup>34</sup> Thereafter, the Bundestag, approving a motion filed by four fractions, concluded on 2 July 2020 that the proportionality requirements set out in the PSPP ruling by the GFCC were met.<sup>35</sup>

The PSPP ruling exemplifies the dangers of the situation when a national court considers and interprets EU acts applicable in 27 Member States from its own viewpoint. We have seen that the GFCC has tried to delimit EU competences using the principle of proportionality. Some commentators have shown how wrong this is, as the principle under Article 5 TEU is not to delimit EU competences, but to limit the way in which existing (and established) EU competences are exercised.<sup>36</sup> In addition, the GFCC applied a specific, three-pronged version of the principle of proportionality, which is

30 Czech Constitutional Court in case Pl. ÚS 5/12 (judgment of 31 January 2012) point VII; available at: [https://www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Decisions/pdf/Pl US 5-12.pdf](https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl US 5-12.pdf) (accessed: 30 October 2020); or Supreme Court of Denmark in case 15/2014 *DI*, acting on behalf of *Ajos A/S v Estate of A* (December 6, 2016); <https://domstol.dk/media/2udgvvvb/judgment-15-2014.pdf> (accessed: 30 October 2020).

31 Editorial Comments, 2020, p. 965.

32 For an overview of the reactions, see Giegerich, 2020, p. 12.; Goldmann, 2020, pp. 1058–1059.; Chronowski, 2020, pp. 77–78.

33 ‘The trough is likely to be behind us now’ Interview with Jens Weidmann, *Frankfurter Allgemeine Sonntagszeitung* (21.06.2020); available at: <https://www.bundesbank.de/en/press/interviews/-the-trough-is-likely-to-be-behind-us-now--835032>; (accessed: 30 October 2020).

34 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; point 1, available at: <https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html> (accessed 30 October 2020).

35 For the text of the motion, see <https://dip21.bundestag.de/dip21/btd/19/206/1920621.pdf>; for the decision of the Bundestag, see [https://www.das-parlament.de/2020/28\\_29/europa\\_und\\_die\\_welt/704622-704622](https://www.das-parlament.de/2020/28_29/europa_und_die_welt/704622-704622); (accessed: 30 October 2020).

36 Wendel, 2020, pp. 985–986.; Editorial Comments, 2020, pp. 969–971.; Giegerich, 2020, p. 7.; Meier-Beck, 2020, point [4].



not generally known and applied in the courts of other Member States or by the CJEU.<sup>37</sup> It was also said that the GFCC acted like an appeal court superior to the CJEU when setting aside the CJEU's judgment for arbitrariness.<sup>38</sup>

Even if the ruling is mainly theoretically significant, one of the most prestigious constitutional courts in the EU has certainly set a model for other constitutional courts in terms of applying constitutional review over certain EU acts. Moreover, it rightly expressed the need for a greater emphasis on the clear statement of reasons in the EU legal acts including certain decisions of the CJEU. However, most importantly, the decision has highlighted the fundamental tension in the structure of EU legal order that has existed since its creation. Next, I examine this last issue more closely because it has been somewhat overshadowed in the comments.

### ■ 3.2. *Fundamental structural tension in the EU legal order*

The PSPP ruling is a sign of fundamental tension existing within the EU legal order. It is easy to find flaws in the decision and to point out which Treaty provisions this ruling has violated. Moreover, it is easy to see how this unilateral national decision could damage the idea of European cooperation. However, the constitutional courts of Member States are to some extent entrapped. They must defend the constitution of a sovereign state within a larger legal system claiming primacy for itself.

In the EU legal order, fundamental structural tension exists between the following factors. On one side is the sovereignty of Member States and opportunities for that sovereignty to be exercised in the EU. On the other are three basic features of the EU legal order: (i) majority-based decision-making in the legislative organs of the EU (as a general rule), (ii) absolute primacy of EU law (which is thus far only a principle derived by the CJEU from the general characteristics of the EU legal order), and (iii) the monopoly of the common court (CJEU) in the interpretation of EU law and EU competences. Combined, these three characteristics of the EU legal order are better suited to a federal state than to the features of an international organisation made up of sovereign states. This underlying tension could lead to conflicts of competence between the EU and a Member State at any time, even in the area of exclusive EU competences, as the PSPP judgment shows.<sup>39</sup> This underlying tension may also lead to conflicts between the CJEU and national constitutional courts.<sup>40</sup>

If we take it in an operative sense that the EU Member States are sovereign and think about its consequences, two further factors must be acknowledged. One is that the sovereignty of Member States must have indispensable and state-specific elements that make these states sovereign. If the constitution is the supreme embodiment of sovereignty in the legal sense, then these essential and state-specific features of

37 Editorial Comments, 2020, p. 972.; Chronowski, 2020, p. 77.; Simon and Rathke, 2020, p. 954.

38 Editorial Comments, 2020, p. 966.

39 Some contend that such claims about structural tensions and jurisdictional conflicts are misleading because Member States can collectively change the law; for example, Editorial Comments, 2020, p. 968.

40 Cf. Simon and Rathke, 2020, p. 955.

sovereignty appear in basic constitutional norms (*sovereign identity core of the constitution*). This core is context-dependent and formed in political and legal disputes.<sup>41</sup> The other factor is that relations with the EU need procedures and legal remedies to protect this core of the constitution.

Hereinafter, I refer to claims or concerns of Member States relating to the sovereign identity core of their constitution as *essential, exceptional, and specific constitutional claims or concerns*. Thus, this is not about any interest of a Member State. Member States may experience harm to their various interests in EU decision-making. This is almost natural in collective decisions based on compromises. Here, I refer to an interest of a Member State that in an exceptional situation raises constitutional concerns in relation to its sovereign identity core of its constitution. All this must be reckoned with if we take seriously the consequences of the proposition that an EU Member State is sovereign.

The enforcement of an essential, exceptional, and specific constitutional claim can typically be seen as a type of *ultra vires* claim (qualified *ultra vires* claim). There may be other objections from Member States that the EU has adopted *ultra vires* acts, but that do not affect the sovereign identity core of the constitution (but to some extent, necessarily violates sovereignty — normal *ultra vires* claims).<sup>42</sup>

Conflicts can only be prevented and balanced if there are channels through which Member States can raise their essential, exceptional, and specific constitutional concerns at the EU level. If such channels do not exist or are malfunctioning, constitutional courts can use their constitutional means to signal and temporarily resolve their problems. Obviously, their aim cannot be to break the unity of EU law and reduce its effectiveness. However, they may not in exceptional or final cases waive the use of constitutional protection means. In this sense, the GFCC's (now) ex-President Andreas Voßkuhle wrote about the 'emergency brake procedure' (*Notbremse-Verfahren*) to be applied *ultima ratio*.<sup>43</sup>

Based on this, in practice, there are three levels in which a Member State can protect essential, exceptional, and specific constitutional interests (institutional-procedural background): (i) in EU legislative procedures (basically in the Council or European Council), (ii) before the CJEU, and (iii) by the use of constitutional review.

41 For an attempt to identify the range of such constitutional rules as inalienable constitutional competences, see for example, the *Lisbon ruling* of the Polish Constitutional Court, K 32/09 (24.11.2010.) point III.2.1. available at: [https://trybunal.gov.pl/fileadmin/content/omowienia/K\\_32\\_09\\_EN.pdf](https://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf) (accessed: 30 October 2020); cf. Skomerska-Muchowska, 2017, p. 160. or the *Lisbon ruling* of the GFCC [*Lissabon*, BVerfG 2 BvE 2/08 (Urteil vom 30. Juni 2009) BVerfGE 123, 267] especially paras. 208–243.

42 A separate question is whether an essential, exceptional, and specific constitutional concern can be raised against an *intra vires* EU act. For example, before the Hungarian Constitutional Court, identity review can be not only an *ultra vires* review, but also *intra vires* review; Decision 22/2016. (XII.5.) AB, para. 46. It depends on whether the sovereign identity core of a Member State constitution delimits EU competences or only restricts the way in which EU competences are exercised. I left this issue open because it would need detailed further consideration.

43 Voßkuhle, 2009, p. 28.

### ■ 3.3. *In search of a balance at the second level: procedures before the CJEU*

As in EU decision-making procedures, issues are mostly decided by a majority vote, and a Member State cannot always prevent a decision detrimental to its interests. This is the case even if it is about its essential, exceptional, and specific constitutional interests or if the Member State considers the decision-making body of the EU to be acting *ultra vires*. An individual Member State has procedurally lost control of decision-making in the common organisation, but its constitutional interests may be protected by the CJEU against *ultra vires* acts of the Union (second level of protection).

At the second level of protection, a normative background exists that allows essential, exceptional, and specific constitutional interests to be asserted before an EU court. In the case of *ultra vires* claims, this includes all Treaty provisions that describe the competences of the Union (*competence clauses*), that allow Member States to derogate from a general EU obligation (*saving clauses*), and possibly basic procedural rules governing the adoption of EU legal acts (*basic procedural rules*). The institutional-procedural background is also ensured (annulment and preliminary ruling procedures before the CJEU).

In EU matters where decisions are taken by majority vote, the CJEU has a key role in alleviating the fundamental structural tension. All depends on how the CJEU interprets the competence provisions and saving clauses in the Treaties. There are good examples in this regard (*Omega* ruling)<sup>44</sup> but there are also examples of a restrictive approach (*Melloni* ruling).

The Treaty of Lisbon introduced two provisions that can be considered as gates for general constitutional reservations. One is Article 4(2) TEU, which protects national identity against decisions of the EU (*reservation concerning national identity*). The other is Article 53 of the Charter of Fundamental Rights, according to which the Charter shall not be interpreted as restricting the protection of fundamental rights under Member States' constitutions (*reservation concerning fundamental rights*). These two provisions would be suitable for neutralising identity and fundamental rights reviews as developed by some constitutional courts. However, the CJEU took a restrictive approach in their interpretation.<sup>45</sup>

The CJEU has strongly limited the practical effects of the reservation contained in Article 53 of the Charter. In its notable *Melloni* judgment, it placed severe restrictions on the application of a national (constitutional) level of protection of fundamental rights. The national treatment must not jeopardise the level of protection as defined by the Charter and as interpreted by the Court and the primacy, unity, and effectiveness of EU law.<sup>46</sup> Article 53 of the Charter as interpreted therefore recognises only a narrow

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44 EU: C: 2004: 614, where human dignity as a *national principle* proved to be a valid public policy exception, cf. Petersen, 2020, p. 1001.

45 Articles 346 and 347 TFEU (of pre-Lisbon origin) have functions similar to those of Article 4(2) TEU or Article 53 of the Charter. They list situations or fundamental State interests in respect of which States do not have to apply certain provisions of EU law. However, these provisions have a narrow scope, and at this time, no practical significance.

46 C-399/11 *Melloni*, EU: C: 2013: 107, para. 60. The wording of this statement is not accidental, the finding was confirmed by the Court, for example, in Opinion 2/13 Accession of the European Union to the ECHR, ECLI:EU: C: 2014: 2454, para. 188.

or even theoretical reservation. Moreover, this restriction is extremely vague and even contradictory. It is difficult to imagine specific cases where the application of a higher, national level of fundamental rights protection against EU acts would not in principle ‘jeopardise’ the coherence or effectiveness of EU law. Such reservations reflect the need precisely for individual treatment in exceptional cases.

Article 4(2) TEU protects the national identity inherent in Member States’ constitutional and political systems and may serve as a counterweight to the primacy of EU law.<sup>47</sup> This is not easy to interpret, but if necessary, the CJEU will give the final word. Thus far, the Court has been very cautious, although it has had to rule on this Article primarily in internal market cases. Accordingly, the protected element of the constitutional and political system is the protection of the official language of the state,<sup>48</sup> the question of the status of the State and abolition of noble titles,<sup>49</sup> or the division of powers within the state.<sup>50</sup>

However, the Court considers this Treaty provision to be simply one of the saving clauses, the application of which is subject to at least three restrictions. The first is that the legal equality of Member States must also be respected. This is a counterbalance to the protection of national identity, as Member States have the same obligations under EU law and the effects of the reservation call for exceptional, individual treatment, in other words, *ad hoc* exemption from certain obligations based on EU legal acts. The second limitation is that there may be competing interests possibly enforceable against the protection of national identity. It is only an aspect of a comprehensive assessment made in a case against the free movement of persons,<sup>51</sup> for example, or the principle of non-discrimination.<sup>52</sup> The third limitation is that the CJEU considers the protection of national identity a normal, usual saving clause subjected to the scrutiny of necessity and proportionality.<sup>53</sup>

The court’s approach can hardly be considered generous. Thus, it is questionable whether the essential, exceptional, and specific constitutional interests of Member States can prevail by the application of general saving clauses before the CJEU.

### ■ 3.4. In search of a balance at the third level: constitutional review?

The question is whether a third level of filter is needed to balance the structural tension in the EU legal order, in other words, to maintain the possibility of constitutional review. In the current situation, some constitutional courts believe this is needed. It is a warning that care must be taken to maintain equilibrium at the EU level as well. On the other hand, it is an emergency brake procedure in the sense used by Voßkuhle.

47 von Bogdandy and Schill, 2011, p. 1447. However, the principle of equality of Member States enshrined in the same provision might support the primacy of EU law over national legal rules, see Lindeboom, 2020, especially p. 1042.

48 C-391/09 Runevič-Vardyn, EU: C: 2011: 291, para. 86.

49 C-208/09 Sayn-Wittgenstein, EU: C: 2010: 806, paras. 83. and 92.

50 C-51/15. Remondis, EU: C: 2016: 985, para. 40.

51 C-208/09 Sayn-Wittgenstein, EU: C: 2010: 806, para. 83.

52 C-393/10 O’Brien, EU: C: 2012: 110, para. 49.

53 E.g. C-202/11 Anton Las, EU: C: 2013: 239, para. 33. or C-438/14 Bogendorff von Wolffersdorff, EU: C: 2016: 401, para. 73.

The practice of the constitutional courts of Member States in this respect differs. (i) Some constitutional courts accept the absolute primacy of EU law and consider the remedies available before the CJEU sufficient to protect any constitutional interests that may arise. (ii) Numerous constitutional courts do not recognise the absolute primacy of EU law over constitutional norms, but have not established a procedure or have no jurisdiction to conduct a procedure to enforce this reservation. (iii) Some constitutional courts have in principle established the possibility of constitutional review over EU law, but this is either not or only indirectly exercised (over internal acts because their content is based on EU legal acts). For a long time, the GFCC did so by floating the possibility of constitutional review. Maybe we can call this a yellow signal. It means nothing more than readiness, an intention to actually apply such a review. The constitutional courts long considered this sufficient. According to Voßkuhle, ‘emergency brake procedures’ are justified when they do not have to be used.<sup>54</sup> (iv) Three constitutional courts have limited the effects of EU legal acts in exercising constitutional review. One of these is the GFCC. With its PSPF ruling, the yellow signal turned red. All three constitutional courts essentially limited the effects of EU acts on the grounds that they were adopted *ultra vires* by EU institutions.

The concern of the constitutional courts is clear. How can a Member State find protection against the CJEU’s sometimes strong integrationist approach when the State’s essential constitutional interests or sovereignty may clearly be harmed? There is currently no such forum within the EU. This is the point where some constitutional courts need to make their presence felt. Constitutional courts that retain the possibility of exercising constitutional review show extreme caution. They do not want to question the CJEU’s authority, but do want to signal when the fundamental constitutional interests of a Member State are at stake. They do not provide any excuse for breaches of EU law, but want to make it clear that there is a limit to sincere cooperation in exceptional situations.

The self-restraint of constitutional courts is reflected at least in four respects. (i) Thus far, they have kept themselves away from exercising *intra vires* review by which a Member State seeks individual, exceptional treatment not only vis-à-vis the EU but also vis-à-vis the other Member States. Notwithstanding, the possibility of such a review is open at some constitutional courts (e.g. GFCC or the Hungarian Constitutional Court). (ii) They do not seem to intend to escape the second level, namely the procedure before the CJEU. In practice, this means that in the event of a relevant constitutional problem, the court will have to seek a preliminary ruling from the CJEU (*ultra vires* review as an *ultimate tool*).<sup>55</sup>

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54 Voßkuhle, 2009, p. 28.

55 The Hungarian Constitutional Court, which keeps itself away from the preliminary ruling procedure, did not envisage such a step in its Decision 22/2016. (XII.5.) AB, where it laid the foundations of a possible constitutional review procedure. However, if a reference for a preliminary ruling is taken as a mandatory step in the case of *ultra vires* review, the constitutional court will not only confront an EU legal act considered *ultra vires* but will also have to subject to criticism the preliminary ruling of the CJEU delivered in the case in assessing the relevant legal act. The problem of double-control turned out well in the PSPF case. However, it raises the question of seeking a second preliminary ruling on the previous CJEU judgment, which is suspected to be *ultra vires*; cf. Simon and Rathke, 2020, p. 955.

(iii) In the system of EU cooperation, the constitutional review cannot be a usual tool. Its *exceptional nature* is declared and the conditions of its use are more or less described. (iv) As to the *ultra vires* review, constitutional courts want to exercise it only if there is a suspicion of a clear (manifest) excess of competence by the EU.

#### 4. Concluding remarks

The possibility of national constitutional review by constitutional courts is a reality in the EU legal order as it currently stands. This exceptional and limited tool serves to maintain the equilibrium between the drifts of integration and Member State sovereignty. This follows from the sovereignty of Member States, and is consistent with common ideas we use daily relating to the EU legal system.

Is there *multilevel constitutionalism* or *legal pluralism* or *constitutional pluralism* in the EU? However, the essence of pluralism is that there is no hierarchical relationship between its autonomous elements.<sup>56</sup> If we talk about *constitutional tolerance* on the part of the EU, it expects from the CJEU to exercise judicial self-restraint with regard to the constitutional systems of Member States.<sup>57</sup> *European judicial dialogue* is a nice idea, but can only be considered if it is mutual and meaningful.<sup>58</sup> The CJEU could decrease the reservations expressed by constitutional courts by being more open to their essential constitutional concerns and establishing a higher or more intensive level of review for competence disputes.<sup>59</sup>

Constitutional review does not mean that national courts should not follow CJEU decisions. It shall not serve as an excuse for failure to fulfil EU legal obligations and may not damage the authority of the CJEU. This exceptional and ultimate instrument should be provided as a remote option to the constitutional courts to protect essential, exceptional, and specific constitutional interests. This is the basis for maintaining equilibrium. As Schneider puts it, *ultra vires* review 'is a constitutional mechanism that does not play hell with European law, but truly complements any union based on multi-level cooperation'.<sup>60</sup>

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56 Skomerska-Muchowska, 2017, p. 106.; Wendel, 2020, p. 982. Moreover, one important feature of the pluralist model is that the ultimate judicial authority is not determined, Petersen, 2020, p. 996.

57 Martinico and Pollicino, 2008, p. 107.

58 The GFCC could not have been a good experience with the preliminary ruling proceedings. Even in the *Gauweiler* judgment, the CJEU hardly responded reassuringly to the GFCC's concerns. In *Weiss*, it was striking how briefly it dealt with the proportionality problem relating to the strong effects of the relevant ECB decisions on economic policy; cf. Grimm, 2020, pp. 947-948.

59 Simon and Rathke, 2020, p. 955.

60 Schneider, 2020, p. 970.

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