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A European Ministry of Finance? Charting and testing the national constitutional limits to EU fiscal integration

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A European Ministry of Finance?

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Charting and Testing the National Constitutional Limits to EU Fiscal Integration

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I Introduction

1 Charting and testing the national constitutional limits to EU fiscal integration

The EU financial and sovereign debt crisis – better known as the Eurocrisis – erupted in late 2009 with destructive force. It threatened the survival of the EU's single currency and thereby endangered the entire European integration process.[1] The crisis revealed that the Euro suffers from major structural deficiencies, formally embedded into the Economic and Monetary Union's (EMU) legal framework.[2] Despite the emergency fixes undertaken during the peak of the Eurocrisis – including reinforced budgetary constraints for Member States,[3] the creation of the Eurozone loan facility ESM,[4] and the initiation of

1 Matthias Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' in Francesca Bignami (ed), *EU Law in Populist Times - Crises and Prospects* (Cambridge University Press 2020) 33-34; Damian Chalmers, Damian Jachtenfuchs and Christian Joerges, 'The Retransformation of Europe' in Damian Chalmers, Damian Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats' Dream - Adjusting to European Diversity* (Cambridge University Press 2016) 1-2; B. Ritterberger and F. Schimmelpfennig, 'Kontinuität und Divergenz. Die Eurokrise und die Entwicklung europäischer Integration in der Europaforschung' (2015) 56 Politische Vierteljahresschrift 389, 389-390; Barry Eichengreen, 'European Monetary Integration with Benefit of Hindsight' (2012) 50 Journal of Common Market Studies 123, 133; Matthias Ruffert, 'The European Debt Crisis and European Union Law' (2011) 48 Common Market Law Review 1777, 1777; On the general importance of the Euro for the EU integration process, cf. Rosa M. Lastra and Jean-Victor Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' (2013) 32 Yearbook of European Law 57, 57.

2 Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, vol Revisited (Oxfored University Press 2013) 458; Nicolas Jabko, 'The Divided Sovereignty of the Eurozone' in Philipp Genschel and Markus Jachtenfuchs (eds), *Beyond the Regulatory Polity?: The European Integration of Core State Powers* (Oxford University Press 2013) 125; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 61-62; Alicia Hinarejos, 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration ' (2012) 14 Cambridge Yearbook of European Legal Studies 243, 244.

3 Notably, under the 'European Semester', cf. Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis - A Constitutional Analysis* (Cambridge University Press 2014) 108; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 121-122; And under the Fiscal Compact, which requires Member States to introduce a balanced budget rule, cf. Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' 37-38; Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials* (6th edn, Oxford University Press 2015) 737; Tuori and Tuori, *The Eurozone Crisis –*

the Banking Union[5] – it is largely acknowledged that more comprehensive reforms are necessary to remedy the deficient EMU structure.[6]

According to the most authoritative reform proposals, any structural remedy to improve the resilience of the EMU has to comprise EU fiscal integration, which could entail the creation of a Eurozone-budget or even a form of centralized economic governance under the guidance of a Eurozone Ministry

A Constitutional Analysis 109; Mark Dawson and Floris De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 The Modern Law Review 817, 826.

4 Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' 36-37; Tuori and Tuori, *The Eurozone Crisis - A Constitutional Analysis* 93-95; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 143, 192.

5 Luca Lionello, *The Pursuit of Stability of the Euro Area as a Whole - The Reform of the European Economic Union and Perspectives of Fiscal Integration* (Springer 2020) 172-175; Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' 38-39; Paul Craig and Menelaos Markakis, 'EMU Reform' in Fabian Amtenbrink and Christopf Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 1428; Federico Fabbrini, 'Fiscal Capacity' in Federico Fabbrini and Marco Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Edward Elgar Publishing Limited 2019) 112.

6 Apparent from the different reform proposals established at the EU-level, notably: Mario Monti and others, *Future Financing of the EU - Final report and recommendations of the High Level Group on Own Resources December 2016* (EU High Level Group on Own Resources (HLGOR), 2016); Jean-Claude Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* (European Commission 2015); In the academic debate, it was emphasized that the EMU is not 'viable' in its current form, Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' 34; Mark Dawson, Henrik Enderlein and Christian Joerges, 'Introduction: The Governance of the Transformation of Europe's Economic, Political, and Constitutional Constellation Since the Euro-Crisis ' in Mark Dawson, Henrik Enderlein and Christian Joerges (eds), *Beyond the Crisis - The Governance of Europe's Economic, Political, and Legal Transformation* (Oxford University Press 2015) 3; And it is widely argued that a stabilization of the EMU requires fiscal integration, cf. *inter alia* Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' 48; Stefaan Van den Bogaert and Armin Cuyvers, 'Of Carrots and Sticks - What Direction to Take for Economic and Monetary Union?' in Bernard Steunenberg, Wim Voermans and Stefaan Van den Bogaert (eds), *Fit for the Future? Reflections From Leiden on the Functioning of the EU* (Eleven International Publishing 2016) 133; Fritz W. Scharpf, 'The Costs of Non-Disintegration: The Case of the European Monetary Union' in Damian Chalmers, Damian Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats' Dream - Adjusting to European Diversity* (Cambridge University Press 2016) 37-39; Pier D. Tortola, 'Coming Full Circle: The Euro Crisis, Integration Theory, and the Future of the EU' (2015) 50 The International Spectator 125, 131; Jean Pisani-Ferry, 'Rebalancing the Governance of the Euro Area' in Mark Dawson, Henrik Enderlein and Christian Joerges (eds), *Beyond the Crisis - The Governance of Europe's Economic, Political, and Legal Transformation* (Oxford University Press 2015) 62; Miguel Poiares Maduro, 'Foreword: Fiscal Capacity and Constitutional Reform in the EMU' in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) vi; Hinarejos, 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration ' 267.

of Finance.[7] These proposals hence imply that EU fiscal integration is *indispensable* for the Euroarea to effectively tackle macroeconomic imbalances and to stimulate economic convergence. The apparent imperative for EU fiscal integration is currently further accentuated by the unfolding economic consequences of COVID-19, which could leave the Euroarea even more economically, politically and fiscally divided.[8] It can therefore be argued that swiftly addressing the underlying structural EMU deficiencies is not an elitist reform vision pursued by the '*Brussels-bubble*'. Instead, it is a matter of general concern as only a reinforced Euro can preempt future Eurozone-crises (with their associated high socio-economic and sovereignty costs) and thereby secure the continuation of European cooperation more generally.[9]

At the same time, the room for EU fiscal integration steps seems strictly delimited by national constitutional concerns, as only recently illustrated by the German PSPP-judgment[10] and the reluctant stance of the Finnish Constitutional Law Committee on the EU's COVID-19-recovery strategy *Next Generation*

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7 As put forward by the EU Five Presidents' Report, cf. Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 14-15: Cf. for example as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole - The Reform of the European Economic Union and Perspectives of Fiscal Integration* 162-163; Craig and Markakis, 'EMU Reform' 1420; George Pagoulatos, 'EMU and the Greek Crisis: Testing the Extreme Limits of an Asymmetric Union' (2020) 42 Journal of European Integration 363, 367, 373; Fabbrini, 'Fiscal Capacity' 107; Charles Wyplosz, 'The Six Flaws of the Eurozone' (2016) 31 Economic Policy 559, 561-562, 572, 592-594.

8 As pointed out by EU Commissioner Gentiloni, cf. Jennifer Rankin, 'EU Faces 'Existential Threat' if Coronavirus Recovery is Uneven' *The Guardian* (London 13 May 2020) <https://www.theguardian.com/world/2020/may/13/eu-faces-existential-threat-if-coronavirus-recovery-uneven-paolo-gentiloni> accessed 20 December 2020; Andrew Walker, 'Coronavirus: EU facing 'Deep and Uneven Recession'' (*BBC Online News,* 6 May 2020) <https://www.bbc.com/news/business-52557191> accessed 20 December 2020; And as pointed out in the Commission's European Economic Forecast – Spring 2020, cf. European Commission, 'European Economic Forecast - Spring 2020' (*Publication Office of the European Union,* 2020) <https://ec.europa.eu/info/sites/info/files/economy-finance/ip125_en.pdf> accessed 20 December 2020 31-32.

9 As prominently stressed by German chancellor Angela Merkel: 'Scheitert der Euro, dann scheitert Europa' (in English: 'A collapse of the Euro will cause a collapse of Europe', cf. Angela Merkel, *State of the Nation Address - Regierungserklärung der Bundeskanzlerin (19 Mai 2010)* (German Government 2010); Also cited in: Herman van Rompuy, *Europe in the Storm - Promise and Prejudice* (Davidsfonds Uitgeverij nv 2014) 31; Alexander Nicoll, 'Fiscal Union by Force' (2011) 53 Survival 17, 17.

10 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/15 *Quantitative Easing (PSPP) Final Judgment* [2020] (German Federal Constitutional Court) paras 163, 178; Cf. as well: Ulrich Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' (2020) 39 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 817, 818; Christian Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' (2020) 39 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 897, 898; Paul Kirchhof, 'Die Rechtsarchitektur der Europäischen Union' (2020) 73 Neue Juristische Wochenschrift (NJW) 2057, 2057; Stefaan Van den Bogaert and Vestert Borger, 'Hoog spel in Karlsruhe - Het Duitse Constitutionele Hof over het Public Sector Purchase Programme van de ECB' (2020) Nederlands Juristenblad 2978, 2978-2979.

EU.[11] Metaphorically speaking, these two constitutional decisions are the tip of a much larger *iceberg* of critical national constitutional views formulated against the conferral of core state powers to the supranational level – including in particular national budgetary and fiscal prerogatives that would ultimately be altered by the proposed EU fiscal integration steps.[12] The emerging national constitutional concerns appear to be rooted in – or to be at least connected to – the national constitutional principles of sovereignty and democracy.[13] Furthermore, these critical national constitutional decisions suggest – either directly or implicitly – that the available national constitutional space for EU integration steps that impact core state powers is restricted by national constitutional law. Obviously, this seemingly limited national constitutional space equally applies to the envisaged EMU-reforms and puts into question the attainability of EU fiscal integration ambitions.

11 PeVL 16/2020 vp *Commission's Draft EU Recovery Plan and MFF Planning* [2020] (Finnish Constitutional Law Committee) 18; Päivi Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU' (*Verfassungsblog*, 18 June 2020) <https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/> accessed 20 December 2020.

12 For example apparent in the various national *constitutional identity limits*, cf. Luke Dimitrios Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize *Modus Vivendi* Between the Court of Justice and Constitutional Courts' (2020) 57 Common Market Law Review 361, 362; Gerhard Van der Schyff, 'Exploring Member State and European Union Constitutional Identity' (2016) 22 European Public Law 227, 228; Elke Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) 45 Netherlands Journal of the Legal Philosophy 82, 84-85; Monica Claes, 'National Idenity: Trump Card or Up for Negotiation?' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013) 123-124.; Alejandro Saiz Arnaiz and Carina Alcoberro Llivina, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013) 3.

13 On democracy, cf. for example the German concept of *overall budgetary responsibility* is based on German democracy, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; Cf. as well: Christian Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' (2019) 38 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 684, 688; On sovereignty, cf. for example France, where the *Conseil Constitutionnel* identified economic and fiscal competences as particularly important sovereign competences, cf. Decision 2012-653 DC *Fiscal Compact* [2012] (French Conseil Constitutionnel) para 16; Cf. as well: Erich Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' (2013) 19 European Public Law 525, 540; Or the Polish Constitutional Tribunal, which equally protects certain competence areas against EU integration based on the concept of Polish sovereignty, cf. K 32/09 *Treaty of Lisbon* [2010] (Polish Constitutional Tribunal) Section III 2.1.; Cf. as well: Anna Śledzińska-Simon and Michał Ziółkowski, 'Constitutional Identity in Poland - Is the Emperor Putting on the Old Clothes of Sovereignty' in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 253; Andrzej Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' (2013) 13 ERA Forum - Journal of the Academy of European Law 491, 499.

Consequently, EMU reform is confronted with a fundamental dilemma which constitutes the departure point of this research: effective EU fiscal integration appears to be both necessary to stabilize the single currency and at the same time legally impossible to achieve given the limits that national constitutional systems impose. Confronted with this dilemma, the present research evaluates and deconstructs the dilemma's *legal-constitutional* parameter and hypothesizes, first, that seemingly strict national constitutional obstacles to EU fiscal integration can be construed in a more flexible manner thereby offering additional leeway for a reform of the EMU. And second, the research argues that the resulting more flexible protection of the national constitutional core cannot be equated with weaker constitutional safeguard, but in fact with a more effective contemporary protection of the underlying national constitutional values at stake.

To investigate the dilemma's *legal-constitutional* parameter, the research conducts a comparative assessment of a selection of national constitutional limits that are applicable to EU fiscal integration. It thereby determines how similarly – or differently – national constitutional systems address the very same EU integration ambition in order to determine what EU integration steps are compatible with national constitutional law. The research is hence divided into two different conceptual parts. In the first part, the available national constitutional space for EU fiscal integration is *charted* and *deconstructed*. The chosen comparative setting allows to focus on a selection of representative national constitutional approaches and to identify national constitutional *best practices* that could potentially be employed in other Member States to locate additional constitutional space for EU fiscal integration whilst maintaining or even increasing the effective protection of core constitutional concerns. In the second part, the previously charted national constitutional space is tested against the most authoritative fiscal integration reform proposals debated within the EU in order to *evaluate* and *determine* their national constitutional attainability.

Drawing on the findings of this assessment, the research develops two *transformative propositions* that could reduce the apparent friction between EU fiscal integration ambitions and national constitutional concerns – thereby ultimately refuting the existence of the outlined dilemma. First, the research proposes to thoroughly include the direct and implicit benefits resulting from EU fiscal integration steps into the national constitutional appraisal thereby replacing the prevailing state- or competence-centric interpretation of national constitutional principles, including sovereignty and democracy. Second, the research proposes to alter the design of EU fiscal integration steps in order to constructively engage with the national constitutional concerns charted throughout the research and to devise integration steps in tandem with the national constitutional debate. Ultimately, these two *transformative propositions* could allow for the implementation of the seemingly required EU fiscal integration steps in order to stabilize the single currency by equally fully respecting

national constitutional limits and effectively protecting the underlying national constitutional values.

2 Making the case for EU fiscal integration

The Eurocrisis demonstrated that the EMU suffers from serious structural flaws, specifically imbalances that result from a centralized EU monetary policy with no corresponding fiscal-economic competences at the EU-level. These structural deficiencies result in an apparent inability to effectively contain and manage macroeconomic imbalances across Member States – as for example visible in the different levels of economic competitiveness and the sharply diverging national unemployment rates,[14] the EU lacking the capacity to tackle large asymmetric macroeconomic shocks[15] or persistently fragile national public finances – despite the existing EMU-rules on sound national budgeting – which entail the continuous risk of contagion within the Eurozone.[16] Contrary to the initial assumption – which suggested that centralized monetary policy at EU-level could operate without more significant centralized fiscal and economic integration – the Eurocrisis thus exposed the need for fiscal integration within the Eurozone to foster economic convergence and to better shield the single currency area against asymmetric macro-economic shocks.[17] More generally speaking, the experiences during the Eurocrisis indicate that the centralized monetary policy conducted by the ECB[18] cannot sustainably operate without

14 Michael Hume, 'Macroeconomic Imbalances in the Euro Area - Can They Be Managed?' in Nauro F. Campos, Paul De Grauwe and Yuemei Ji (eds), *Economic Growth and Structural Reforms in Europe* (Cambridge University Press 2020) 141-142; Pagoulatos, 'EMU and the Greek Crisis: Testing the Extreme Limits of an Asymmetric Union' 366; Wyplosz, 'The Six Flaws of the Eurozone' 561-562, 592-594.

15 Craig and Markakis, 'EMU Reform' 1420; Fabbrini, 'Fiscal Capacity' 107; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15.

16 Hume, 'Macroeconomic Imbalances in the Euro Area - Can They Be Managed?' 142; Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' 35-36; Lionello, *The Pursuit of Stability of the Euro Area as a Whole - The Reform of the European Economic Union and Perspectives of Fiscal Integration* 161-163; Fabbrini, 'Fiscal Capacity' 107-109; Wyplosz, 'The Six Flaws of the Eurozone' 572; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 14.

17 Lionello, *The Pursuit of Stability of the Euro Area as a Whole - The Reform of the European Economic Union and Perspectives of Fiscal Integration* 180-181; European Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* (European Commission 2017) 23; Tuori and Tuori, *The Eurozone Crisis - A Constitutional Analysis* 77.

18 Which seemingly forced the ECB to employ unconventional monetary policy, cf. Jörg Bibow, 'Making the Euro Viable: The Euro Treasury Plan' (2015) Levy Economics Institute Working Paper Collection, 2; And which triggered harsh criticism by the German Federal Constitutional Court, cf. *Quantitative Easing (PSPP) Final Judgment* paras 163, 178; 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 *Final OMT-Judgment* [2016] (German Federal Constitutional Court) para 212; Cf. as well: Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 818; Calliess, 'Konfrontation statt Kooperation zwischen

attributing at least limited fiscal competences to the Eurozone.[19] Taken together, the prevailing structural EMU-deficiencies leave the Eurozone vulnerable to future crisis and illustrate the imperative to swiftly initiate EMU-reforms that increase the budgetary, fiscal and economic capacities within the Eurozone.

However, instead of implementing concrete new and solid foundations for a stronger Euro, the political debate so far has mainly introduced draft proposals, even as a new existential challenge for the Eurozone is already looming on the horizon.[20] COVID-19 does not only constitute an immediate global health emergency but has also triggered serious economic disruption that is forecasted to culminate in a severe recession within the Eurozone.[21] In its European Economic Forecast for spring 2020, the European Commission warned that Member States might recover at different speeds[22] as certain economic sectors are comparably hit harder[23] leaving in particular the tour-

BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 898.

19 Cf. for example: Pagoulatos, 'EMU and the Greek Crisis: Testing the Extreme Limits of an Asymmetric Union' 364, 373; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 90-91.

20 Richard Partington, 'Inflation Collapses Around the World Amid Coronavirus Pandemic' *The Guardian* (London 5 May 2020) <https://www.theguardian.com/business/2020/may/05/inflation-collapses-world-coronavirus-pandemic-global-economy-business-great-depression-recession> accessed 20 December 2020; Joshua Posaner, 'Merkel Warns Against Trade Barriers in Face of Coronavirus Recession' *Politico* (Brussels 20 May 2020) <https://www.politico.com/news/2020/05/20/merkel-warns-against-trade-barriers-in-face-of-coronavirus-recession-271945> accessed 20 December 2020; Also identified by businesses as greatest economic risk stemming from the COVID19-crisis, cf. World Economic Forum, *COVID-19 Risks Outlook - A Preliminary Mapping and Its Implications (Insight Report)* (<http://www3weforumorg/docs/WEF_COVID_19_Risks_Outlook_Special_Edition_Pagespdf>, 2020) 8, 12.

21 Eszter Zalan, 'EU Set for Record Recession, Putting Euro at Risk' *EU-Observer* (Brussels 7 May 2020) <https://euobserver.com/coronavirus/148283> accessed 20 December 2020; After France already entered into a recession in the first quarter of 2020, cf. Martin Arnold and Valentina Romei, 'Eurozone Economy Shrinks by Fastest Rate on Record' *Financial Times* (London 30 April 2020) <https://www.ft.com/content/dd6cfafa-a56d-48f3-a9fd-aa71d17d49a8> accessed 20 December 2020; More generally, the GDP in the Eurozone is forecasted to shrink by 7,7% in 2020, cf. Commission, 'European Economic Forecast - Spring 2020' 168 (Table 1).

22 Rankin, 'EU Faces 'Existential Threat' if Coronavirus Recovery is Uneven'; Walker, 'Coronavirus: EU facing 'Deep and Uneven Recession''; And as pointed out in the Commission's European Economic Forecast – Spring 2020, cf. Commission, 'European Economic Forecast - Spring 2020' 31-32.

23 As highlighted for example by the official communication of the European Commission, cf. European Commission, *Coordinated Economic Response to the COVID-19 Outbreak (Communication from the Commission) - COM(2020) 112 final* (European Commission 2020) Point 3.2. and 3.3; Cf. as well: Rankin, 'EU Faces 'Existential Threat' if Coronavirus Recovery is Uneven'; Barbara Wesel, 'EU fällt in tiefste Rezession seit Jahrzehnten' *Deutsche Welle* (Bonn 6 May 2020) <https://p.dw.com/p/3brIB> accessed 20 December 2020.

ism-reliant economies in the geographical *South* of the EU highly exposed.[24] Consequently, the predicted uneven recovery could aggravate national economic, budgetary and fiscal problems that already existed prior to COVID-19.[25] The economic consequences of COVID-19 put thus further pressure on the same fault lines – specifically the inability to effectively manage asymmetric shocks – as the Eurocrisis. Yet this time the *fire powers* of the ECB has already been spent, heralding another potential existential crisis for the Euro. Notably, the feared slow economic recovery is not only problematic for the *South*; in fact it could leave the Eurozone more divided and economically disintegrated than ever before – which is problematic according to established economic theories.[26] In light of the severity of the potential economic implications of COVID-19, national governments[27] as well as the EU[28] announced large-scale financial

24 According to a recent OECD-report, 10% of all employment in Greece and 13,5% of all employment in Spain was directly in the tourism sector in 2018, in Italy, almost 15% of all employment was either directly or indirectly linked to tourism. Furthermore, the report indicates that 13% of the Italian GDP are either directly or indirectly generated through tourism, and in Spain 11,8% of GDP are directly linked to the tourism sector, cf. OECD, *OECD Tourism Trends and Policies 2020* (OECD Publishing, 2020) 181, 206, 278.

25 According to the data of the Commission's Economic Forecast Spring 2020, the unemployment rates were highest in Greece (17,3 %), Spain (14,1 %) and Italy (10%) in 2019 and are forecasted to jump in 2020 to 19,9 % in Greece, 18,9 % in Spain and 11,8 % in Italy. Similarly, the highest debt rates (in percent of GDP) can be found in 2019 in Greece (176,6 %), Italy (134,8 %) and Portugal (117,7 %), which are expected to increase in 2020 to 196,4 % in Greece, 158,9 % in Italy and 131,6 % in Portugal. For the data, cf. Commission, 'European Economic Forecast - Spring 2020' 179, 188; Cf. for a similar observations based on this data: Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' 33-34.

26 As this would, for example, conflict with a core requirement under Mundell's optimum currency area theory, which presupposes economic convergence across members of a currency union, cf. Jennifer Jager and Kurt A. Hafner, 'The Optimum Currency Area Theory and the EMU - An Assessment in the Context of the Eurozone Crisis' (2013) 48 Intereconomics - Review of European Economic Policy 315, 316; Barry Eichengreen, *European Monetary Unification : Theory, Practice, and Analysis* (MIT Press 1997) 51-52.

27 For example, the German program included 353 €billion additional spending and up to €800 billion in state guarantees, cf. Albert Funk, 'Erst die 'Bazooka', dann der 'Wumms' – reichten die Corona-Hilfen?' *Der Tagesspiegel* (Berlin 31 August 2020) <https://www.tagesspiegel.de/politik/patient-wirtschaft-erst-die-bazooka-dann-der-wumms-reichten-die-corona-hilfen/26141752.html> accessed 20 December 2020; Or France, which announced a€100 billion stimulus package, cf. Elisa Braun, 'French Government Lays Out Fresh€100B Stimulus Package' *Politico* (Brussels 3 September 2020) <https://www.politico.eu/article/france-coronavirus-100-billion-stimulus-package/> accessed 20 December 2020.

28 Notably, Next Generation EU which amounts to €750 billion in financial support, cf. European Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) - EUCO 10/20* (General Secretariat of the Council 2020); As initially proposed by the European Commission, cf. European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committe and the Committee of the Regions - Europe's moment: Repair and Prepare for the Next Generation (COM (2020) 456)* (2020); Cf. as well: Cinzia Alcidi and Daniel Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' (2020) 55 Intereco-

intervention in order to mitigate social and economic disruption.[29] However, the immediate consequences stemming from such expensive public intervention combined with shrinking national economies are soaring annual deficits and accelerating debt rates across the Eurozone, which prompts anew concerns regarding the viability of the Euro.[30] Therefore, the current COVID-19-related economic disturbance only increases the urgency and necessity of reforming the Euro in order to correct the remaining structural deficiencies and to achieve a resilient single currency.

Yet, how to make the Euro stronger and remedy the existing structural weaknesses? One element which features in many different reform plans devised to stabilize the Euro is deeper EU *fiscal* integration. This could potentially even include the creation of a fully-fledged EU Fiscal Union, as advocated by the EU Five Presidents' Report.[31] According to this authoritative EU pro-

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nomics - Review of European Economic Policy 202, 203; Jennifer Rankin, ''Defining Moment' as EU Executive Pushes for€500bn in Grants' *The Guardian* (London 27 May 2020) <https://www.theguardian.com/world/2020/may/27/defining-moment-coronavirus-as-eu-executive-pushes-for-500bn-in-grants> accessed 20 December 2020; Karoline Meta Beisel, Björn Finke and Matthias Kolb, 'Attacke auf die sparsamen Vier' *Süddeutsche Zeitung* (Munich 27 May 2020) <https://www.sueddeutsche.de/politik/750-milliarden-paket-attacke-auf-die-sparsamen-vier-1.4919406> accessed 20 December 2020.

29 For example, the German state supports the salary payment of almost one quarter of all German employees as their employers had to reduce economic activity, so-called 'Kurzarbeitergeld' cf. Arnold and Romei, 'Eurozone Economy Shrinks by Fastest Rate on Record'; Jack Ewing and Matina Stevis-Gridneff, 'European Slump Is Worst Since World War II, Reports Show' *The New York Times* (New York City 30 April 2020) <https://www.nytimes.com/2020/04/30/business/europe-economy-coronavirus-recession.html> accessed 20 December 2020; Or, the new temporary EU scheme SURE, which was established to mitigate the unemployment risks in crisis situations throughout the EU, cf. European Commission, 'SURE - Supporting Member States to Help Protect People in Work and Jobs' (*European Commission,* 2020) <https://ec.europa.eu/info/sites/info/files/economy-finance/sure_factsheet.pdf> accessed 20 December 2020; Proposal for a Council Regulation on the Establishment of a European Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency (SURE) Following the COVID-19 Outbreak - COM(2020) 139 final - 2020/0057(NLE).

30 With a predicted government deficit in the Eurozone of 8,5% in 2020 and 3,5% in 2021, given the different measures taken to tackle the economic consequences of the unfolding crisis and the shrinking economy, cf. Commission, 'European Economic Forecast - Spring 2020' 185 (Table 36); Cf. as well: Guntram B. Wolff, 'EU Debt as Insurance against Catastrophic Events in the Euro Area: the Key Questions and aome Answers' (*Bruegel*, 22 April 2020)<https://www.bruegel.org/2020/04/eu-debt-as-insurance-against-catastrophic-events-in-the-euro-area-the-key-questions-and-some-answers/> accessed 20 December 2020; Sam Fleming and Martin Arnold, 'Eurozone Faces Economic Strains as Government Debt Piles Up' *Financial Times* (London 16 April 2020) <https://www.ft.com/content/a58cbfba-9f3e-4a91-85ca-e5090d2489bd> accessed 20 December 2020.

31 Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union*; Which builds on previous EU reports, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole - The Reform of the European Economic Union and Perspectives of Fiscal Integration* 163; Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Consti-

posal, the Eurozone should be equipped with a genuine budgetary capacity by 2025 in order to achieve economic cohesion and to effectively tackle future macro-economic shocks. Such a Fiscal Union would be administered by a Eurozone Ministry of Finance that could be empowered to thoroughly monitor and possibly even veto national budgeting. These ambitious reform steps were supplemented by recommendations of the EU high-level group on own resources (HLGOR), which emphasized the importance of establishing an independent Eurozone revenue stream that could sustain the proposed budgetary capacity.[32] Subsequently, the reform ideas were reaffirmed by the European Commission in its 2017 White Paper on the Future of Europe[33] and its Reflection Paper on the deepening of EMU.[34]

Similar reform proposals were formulated at the national level, most notably by the Franco-German axis that suggested the creation of a separate Eurozone budget as part of the Multiannual Financial Framework (MFF) from 2021 onwards[35] under the administration of the Euro Summit.[36] Most recently both Member States triggered with their proposal the EU's COVID-19 recovery

tutional Law' 44-45; Craig and Markakis, 'EMU Reform' 1404; Fabbrini, 'Fiscal Capacity' 114-115.

32 Monti and others, *Future Financing of the EU - Final report and recommendations of the High Level Group on Own Resources December 2016* 67-69; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole - The Reform of the European Economic Union and Perspectives of Fiscal Integration* 164; Fabbrini, 'Fiscal Capacity' 116; Peter Becker, 'Haushaltspolitik' in Werner Weidenfeld and Wolfgang Wessels (eds), *Jahrbuch der Europäischen Integration 2017* (Nomos 2017) 272.

33 Reforming the EMU as envisaged by the EU Five Presidents' Report is part of Scenario 5 presented by the Commission, cf. European Commission, *White Paper on the Future of Europe - Reflections and Scenarios for the EU27 by 2025* (European Commission 2017) 24-25.

34 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union*; Cf. as well: Craig and Markakis, 'EMU Reform' 1414.

35 As announced in the *Meseberg Declaration*, Franco-German Ministerial Meeting, *Erklärung von Meseberg - Das Versprechen Europas für Sicherheit und Wohlstand erneuern* (German Government 2018); Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole - The Reform of the European Economic Union and Perspectives of Fiscal Integration* 164, 186; Fabbrini, 'Fiscal Capacity' 122; Peter Becker, 'Haushaltspolitik' in Werner Weidenfeld and Wolfgang Wessels (eds), *Jahrbuch der Europäischen Integration 2019* (Nomos 2019) 250-251; Marijn van der Sluis, 'A Euro Area Budget: Another Seedling? ' (2019) Maastricht Law - Faculty of Law Working Paper series 18, 23; Silvia Merler, 'The Meseberg Declaration and Euro-zone Reform' (*Bruegel*, 25 June 2018) <https://www.bruegel.org/2018/06/the-meseberg-declaration-and-euro-zone-reform/> accessed 20 December 2020; Ruth Berschens, 'Das haben Merkel und Macron in der Meseberger Erklärung vereinbart' *Handelsblatt* (Düsseldorf 20 June 2018) <https://www.handelsblatt.com/eu-reform-das-haben-merkel-und-macron-in-der-meseberger-erklaerung-vereinbart/22713150.html?ticket=ST-1195381-1mhV5xNNDISeuJcQkU2H-ap1> accessed 20 December 2020.

36 Fabbrini, 'Fiscal Capacity' 122; Becker, 'Haushaltspolitik' 250-251; Sluis, 'A Euro Area Budget: Another Seedling? ' 23.

strategy.[37] Taken together, the multitude of submitted supranational and national reform proposals illustrates a widely shared understanding that EU fiscal integration steps are an essential building block for the reform of the single currency.

Despite the necessity and the apparent political support for (limited) fiscal integration across some Eurozone Member States, as evidenced by the aforementioned Franco-German initiatives, other Member States remain less receptive to EU integration steps with fiscal implications.[38] This national political reluctance concerns in particular the conferral of *re-distributive* and taxation competences which could lead to permanent fiscal transfers across Eurozone Member States with far-reaching consequences for domestic political decision-making.[39] Therefore, the adoption of EU fiscal integration steps remains politically contested, as was recently illustrated by the European Council's negotiations surrounding *Next Generation EU*.[40] Notably, Member States initially disagreed on the ratio of grants and favorable loans under the recovery instrument as well as the potential rebates for 'net-contributors', thereby under-

37 Bundeskanzlerin, *Press Release 173/20: A French-German Initiative for the European Recovery from the Coronavirus Crisis* (Presse- und Informationsamt der Bundesregierung 18 May 2020); Cf. as well: Christina Großner and Sarah Lawton, 'Merkel and Macron Roll Out €500 Billion COVID-19 Recovery Initiative' *EURACTIV* (Schiphol 19 May 2020) <https://www.euractiv.com/section/economy-jobs/news/merkel-and-macron-roll-out-e500-billion-covid-19-recovery-initiative/> accessed 20 December 2020; Bojan Pancevski and Laurence Norman, 'France, Germany Propose €500 Billion EU Pandemic Recovery Fund' *The Wall Street Journal* (New York City 18 May 2020) <https://www.wsj.com/articles/france-germany-propose-500-billion-eu-pandemic-recovery-fund-11589826351> accessed 20 December 2020; Daniel Brössler and Björn Finke, 'Merkel und Macron setzen die Zauderer unter Druck' *Süddeutsche Zeitung* (Munich 19 May 2020) <https://www.sueddeutsche.de/politik/merkel-macron-corona-hilfspaket-1.4912662> accessed 20 December 2020; Hendrik Kafsack, ''Alte Zwistigkeiten hintanstellen'' *Frankfurter Allgemeine Zeitung* (Frankfurt 21 May 2020) <https://www.faz.net/aktuell/wirtschaft/eu-kommissar-thierry-breton-ueber-deutsch-franzoesische-wiederaufbauplaene-16780172.html> accessed 20 December 2020.

38 In relation to Next Generation EU, cf. Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203; On the more general opposition against a fiscally more integrated EMU, cf. Magnus G. Schoeller, 'Preventing the Eurozone Budget: Issue Replacement and Small State Influence in EMU' (2020) Journal of European Public Policy 1, 11-12.

39 Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 823; Erik Oddvar Eriksen, *Contesting Political Differentiation - European Division and the Problem of Dominance* (Palgrave Macmillan - Springer 2019) 249-250; Stefan Oeter, 'Bundesstaat, Föderation, Staatenverbund – Trennlinien und Gemeinsamkeiten föderaler Systeme' (2015) 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 733, 750; Albrecht Weber, 'Die Reform der Wirtschafts- und Währungsunion in der Finanzkrise' (2011) 22 Europäische Zeitschrift für Wirtschaftsrecht 935, 938; On the notion of '(re-) distributive policy' cf. Tom Sefton, 'Distributive and Redistributive Policy' in Robert E. Goodin, Michael Moran and Martin Rein (eds), *The Oxford Handbook of Public Policy* (Oxford University Press 2008) 607.

40 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) - EUCO 10/20* 2-3; Cf. as well: Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203.

scoring the sensitivity of any form of *redistribution* or *transfer*.[41] Although Member States were ultimately able to agree on a € 750 billion recovery plan financed through EU borrowing, which signals the general capability to initiate EU action with large budgetary implications for the Member States, the design, the volume, the financing and the permanence of fiscal integration measures remain politically highly contested particularly in an increasingly Euroskeptical political climate across the Member States.[42]

3 EU FISCAL INTEGRATION BETWEEN A FISCAL ROCK AND A CONSTITUTIONAL HARD PLACE?

In addition to uncertain political support, the attainment of far-reaching EU fiscal integration is increasingly restricted by national constitutional law. At least since the failed EU Constitutional Treaty and the adopted Lisbon Treaty, a tendency can be observed amongst national constitutional authorities to engage in a stricter and more comprehensive review of EU integration steps. Based on national constitutional limitations and in particular national *constitutional identity limits*,[43] national constitutional authorities restrict the available domestic legal space for EU integration steps. The result appears to be a unidirectional dependency of EU integration on the legal space that national constitutional systems allow for EU cooperation. Notably, a potential violation of national constitutional limits can result in the incompatibility of EU integration measures with the domestic constitutional framework and thereby ultimately result in the unattainability of the envisaged EU measures.[44] Given

41 Notably, this political opposition was formulated by the 'frugal four', cf. Mehreen Khan and Michael Peel, ''Frugal Four' Fight to Protect EU Budget Rebates' *Financial Times* (London 18 August 2020) <https://www.ft.com/content/55f6796e-4a9f-43b2-8d94-da0804d1f83b> accessed 20 December 2020; Cf. as well: Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203.

42 Francesca Bignami, 'Introduction - EU Law, Sovereignty, and Populism' in Francesca Bignami (ed), *EU Law in Populist Times - Crises and Prospects* (Cambridge University Press 2020) 3-5; Luuk Van Middelaar, 'Taking Decisions or Setting Norms? EU Presidencies Between Executive and Legislative Power in a Crisis-Driven Union' in Bernard Steunenberg, Wim Voermans and Stefaan Van den Bogaert (eds), *Fit for the Future? Reflections From Leiden on the Functioning of the EU* (Eleven International Publishing 2016) 11-12.

43 Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize *Modus Vivendi* Between the Court of Justice and Constitutional Courts' 362; Schyff, 'Exploring Member State and European Union Constitutional Identity' 228; Saiz Arnaiz and Alcoberro Llivina, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' 3.

44 Monica Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure' (2015) 16 German Law Journal 1331, 1334; Namely, in case the legislator intends to confer 'non-transferable competences' to the EU, cf. Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law Review 96, 100; Frank Schorkopf, 'The European Union As an Association of Sovereign

that fundamental EU reforms generally depend on unanimous adoption,[45] a constitutional conflict in one Member State can endanger the adoption of the reform in the entire EU. Consequently, EU reform proposals have to fit within the legal space that national constitutions offer. Ambitious EMU-reforms can therefore only be adopted with full respect of Member States' constitutional frameworks.[46]

The disruptive potential of national constitutional opposition for EU integration was recently demonstrated by the German Constitutional Court's PSPP-judgment. In this decision, the German Court declared the ECB's PSP-Program, and the CJEU's preliminary ruling on this program, to be a manifest and structurally relevant excesses of power.[47] In addition to constituting a concrete threat to the exercise of the ECB's monetary policy mandate, the German PSPP-judgment also forms part of a larger body of cross-EU constitutional decisions[48] that contest an increasing supranationalization of budgetary and

States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10 German Law Journal 1219, 1232; Christian Wohlfahrt, 'The Lisbon Case: A Critical Summary' (2009) 10 German Law Journal 1277, 1280, 1284; The German Constitutional Court characterized a set of competences as being 'beyond the reach of European integration' ('integrationsfest'), cf. *Quantitative Easing (PSPP) Final Judgment* para 101; *Final OMT-Judgment* para 115; 2 BvE 2/08 *Lisbon-judgment* [2009] (German Federal Constitutional Court) para 235.

45 Referring to EU reforms that require Treaty amendment in the sense of Article 48 TEU, which have to be approved by all 27 EU Member States, cf. Lucia Serena Rossi, 'A New Revision of the EU Treaties After Lisbon?' in Lucia Serena Rossi and Federico Casolari (eds), *EU after Lisbon: Amending or Coping with the Existing Treaties?* (Springer 2014) 12; Jean-Victor Louis, 'The Unexpected Revision of the Lisbon Treaty and the Establishment of a European Stability Mechanism' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union After the Treaty of Lisbon* (Cambridge University Press 2012) 289-290.

46 Claes, 'National Idenity: Trump Card or Up for Negotiation?' 110; Even partly described as apparent constitutional 'threats of some Member States' formulated against a too far-reaching EU integration process, cf. Constance Grewe, 'Methods of Identification of National Constitutional Identity' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013) 39.

47 And thus, an *ultra vires* act, cf. *Quantitative Easing (PSPP) Final Judgment* paras 163, 178; Cf. as well: Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 818; Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 898; Kirchhof, 'Die Rechtsarchitektur der Europäischen Union' 2057; Van den Bogaert and Borger, 'Hoog spel in Karlsruhe - Het Duitse Constitutionele Hof over het Public Sector Purchase Programme van de ECB' 2978-2979.

48 On the extensive German constitutional jurisprudence: *Quantitative Easing (PSPP) Final Judgment*; 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/15 *Quantitative Easing (PSPP) Reference* [2017] (German Federal Constitutional Court); *Final OMT-Judgment*; 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 *OMT-reference* [2014] (German Federal Constitutional Court); 2 BvR 1390, 1421, 1438, 1439, 1440/12, 2 BvE 6/12 *ESM-Treaty and Fiscal Compact* [2014] (German Federal Constitutional Court); 2 BvR 1390, 1421, 1438, 1439, 1440/12, 2 BvE 6/12 *ESM-Treaty and Fiscal Compact (interim relief)* [2012] (German Federal Constitutional Court); 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 *Financial Support for Greece and EFSF* [2011] (German Federal Constitutional Court); *Lisbon-judgment*; 2 BvR 2134/92 and 2159/92 *Maastricht-Judgment* [1993] (German Federal Constitu-

fiscal competences.[49] It appears that this national constitutional contestation is either rooted in the importance of the affected competences for national democracy[50] and sovereignty,[51] or in the concern that the EU is currently

tional Court); On the possible far-reaching impact of the German Court's rulings, cf. Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' 40-42; With an overview on the German identity review: Monica Claes and Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' (2015) 16 German Law Journal 917, 919-931; Or, for example, the Polish Constitutional Tribunal, which equally established constitutional limits to EU integration, cf. *Treaty of Lisbon* Section III 2.1. and Section III.3.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland - Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Magdalena Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' (2009) 44 Europarecht (EuR) 145, 157-158; On the Danish *Ajos*-judgment, cf. Mikael Rask Madsen, Henrik Palmer Olsen and Urs?ka S?adl, 'Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' (2017) 23 European Law Journal 140, 147-148; Ulla Neergaard and Karsten Engsig S¿rense, 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case' (2017) 36 Yearbook of European Law 275, 279-280; And on the Czech *Landtová*-judgment cf. Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10 European Constitutional Law Review 54, 54-55; Jan 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. ÚS 5/12, Slovak Pensions XVII' (2012) 8 European Constitutional Law Review 323, 332-333.

49 Generally based on the national *constitutional identity limit* employed by constitutional courts, cf. Saiz Arnaiz and Alcoberro Llivina, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' 3; Gary J. Jacobsohn, 'The Formation of Constitutional Idenities' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing Limited 2011) 130; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 125-128; Considering the German constitutional jurisprudence, the German Constitutional Court developed the concept of *overall budgetary responsibility* to address specifically EU fiscal integration steps, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; *Financial Support for Greece and EFSF* para 120; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

50 As the already mentioned German concept of *overall budgetary responsibility* is based on German democracy, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688.

51 See for example in France, where the *Conseil Constitutionnel* identified economic and fiscal competences as particularly important sovereign competences, cf. *Fiscal Compact* para 16; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Or the Polish Constitutional Tribunal, which equally protects certain competence areas against EU integration based on the concept of Polish sovereignty, cf. *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland - Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499.

not democratically legitimate enough to receive further powers in these sensitive competence areas.[52] Furthermore, budgetary and fiscal decision-making powers are traditionally referred to as the 'crown jewels' of modern national parliaments.[53] Decisions on expenditure and revenue, including the level of taxation, social welfare benefits, or the funding of education, are not just shaping national political debates, but they equally have a direct (financial) impact on citizens. Political leaders compete in elections on fiscal policy decisions, such as *inter alia* tax breaks or high-income taxation, which impact the voter's choice in favor or against a political party. The result is a close link between budgetary and fiscal competences on the one hand, and democratic self-determination of the people and sovereign (political) discretion of state institutions on the other hand, which national constitutional actors aim to protect. In light of this constitutional opposition, the conferral of budgetary and fiscal competences to the EU appears constitutionally highly contentious.[54]

The precise constitutional limitations formulated against the conferral of further fiscal competences, however, vary from Member State to Member State.[55] For example, whereas the Finnish Constitutional Law Committee characterized EU cooperation as an important exercise of national sovereignty in a globalizing world,[56] the German Constitutional Court concluded that

52 Particularly, in light of the well-documented EU democratic-deficit, cf. Craig and de Búrca, *EU Law Text, Cases, and Materials* 151-159; Cesare Pinelli, 'The Discourses on Post-National Governance and the Democratic Deficit Absent an EU Government' (2013) 9 European Constitutional Law Review 177, 183-184.

53 Which relates to their historic significance, but equally underscores their current constitutional importance, cf. Carsten Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts - ein Praxisbericht' in Werner Gatzer and Tilmann Schweisfurth (eds), *Öffentliche Finanzwirtschaft in der Staatspraxis* (BWV - Berliner Wissenschafts-Verlag 2015) 295; Sonja Puntscher Riekmann and Doris Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' (2013) 35 Journal of European Integration 565, 567; Dawson and De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' 827; Denis Baranger, 'The Apparition of Sovereignty' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press 2010) 61; Anne Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' (1998) 4 European Public Law 517, 527.

54 As highlighted by the German Constitutional Court, cf. *Quantitative Easing (PSPP) Reference* para 56; *ESM-Treaty and Fiscal Compact (interim relief)* para 106; *Financial Support for Greece and EFSF* paras 121-124; Cf. as well: Christoph Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' (2012) 23 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 805, 808; Martin Nettesheim, '"Euro-Rettung' und Grundgesetz - Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' (2011) 46 Europarecht (EuR) 765, 770.

55 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 525.

56 Framed as 'qualified sovereignty', cf. Tuomas Ojanen, 'The EU at the Finnish Constitutional Arena' (2013) 4 Tijdschrift voor Constitutioneel Recht 242, 246; Tuomas Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' (2007) 52 Scandinavian Studies in Law 203, 217.

too far-reaching competence conferrals would undermine German democracy.[57] What is more, the legal-constitutional barriers erected against further fiscal integration also differ in nature and intensity between Member States. Notably, in Germany, the legislator is prevented from overcoming a conflict between the German Constitution and EU integration, if an interference with the so-called *eternity clause* in Article 79 (3) Basic Law[58] is established.[59] In contrast, the French legislator can remedy constitutional conflicts identified by the *Conseil Constitutionnel* by amending the French Constitution,[60] and similarly, the Finnish Parliament can approve EU integration steps that challenge Finnish constitutional principles.[61]

Taken together, this suggests that EU fiscal integration proposals are confronted with a multi-layered national constitutional space that includes some

57 And thereby violate their protected right to 'democratic self-determination', cf. *Quantitative Easing (PSPP) Final Judgment* paras 99-101; *Final OMT-Judgment* paras 126, 129; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 233, 264; Cf. as well: Nicolas De Sadeleer, 'The New Architecture of European Economic Governance' in Niels Philipsen and Guangdong Xu (eds), *The Role of Law and Regulation in Sustaining Financial Markets* (Routledge 2015) 36.

58 In German: *Grundgesetz*; Hereafter: GG or Basic Law.

59 For example, in case EU integration violates the core of German democracy, as protected under Article 20 (1) and (2) in conjunction with Article 79 (3) Basic Law, cf. *Quantitative Easing (PSPP) Final Judgment* paras 103-104; *Lisbon-judgment* paras 252, 256; Cf. as well: Christian Calliess, 'Constitutional Identity in Germany - One for Three or Three in One?' in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 164-165; Stefan Pilz, 'Ein Schatzamt für die Eurozone? - Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' (2017) 28 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 637, 643-644; Mehrdad Payandeh, 'The OMT Judgment of the German Federal Constitutional Court - Repositioning the Court within the European Constitutional Architecture' (2017) 13 European Constitutional Law Review 400, 408; Christian Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' (2012) 31 Yearbook of European Law 402, 407.

60 As explicitly emphasized by the *Conseil Constitutionnel* itself, cf. Decision 92-308 DC *Review of Maastricht Treaty (Maastricht I)* [1992] (French Conseil Constitutionnel) paras 36-44; On the fact that the French legislator accommodated all constitutional concerns regarding EU integration steps by amending the French Constitution, cf. Eva Steiner, *French Law - A Comparative Approach* (Oxford University Press 2018) 7; Jaques Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' (2015) 21 European Public Law 765, 772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 535.

61 Päivi Leino and Janne Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' (2013) 9 European Constitutional Law Review 451, 463; Ojanen, 'The EU at the Finnish Constitutional Arena' 247; Which can, however, be politically unattainable, cf. J. Jokela, 'Finland: Towards a More Cautious Europeanization' in C. Bretherton and M. Mannin (eds), *The Europeanization of European Politics* (Palgrave Macmillan 2013) 49; Tuomas Ojanen, 'Constitutional Amendment in Finland' in Xenophon Contiades (ed), *Engineering Constitutional Change - A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013) 95.

insurmountable constitutional hurdles.[62] The result of this increasing national constitutional opposition is the previously outlined constitutional dilemma: EU fiscal integration, as for example envisaged by the EU Five Presidents' Report, appears to be both necessary to stabilize the single currency and at the same time legally impossible to achieve given the limits that national constitutional systems impose against the conferral of required competence on the EU.

4 RESEARCH QUESTION, METHODOLOGY AND STRUCTURE OF THE RESEARCH

If the existence of this dilemma cannot be refuted, deeper fiscal integration, including the envisaged creation of a common Eurozone budget, a Eurozone Ministry of Finance and close EU scrutiny of national budgeting would be unattainable by 2025.[63] However, declaring the seemingly required EU fiscal integration steps constitutionally unfeasible could severely undermine the long-term viability of the single currency. Therefore, this research explores what the legal space for EU fiscal integration is – or can be. Arguably, EU fiscal integration steps are only legally impossible if national constitutional law irreconcilably opposes their attainment. It cannot be ruled out that even seemingly strict national constitutional limits entail a degree of *constitutional flexibility*, permitting, for example, the implementation of selected EU fiscal integration steps. Hence, the focus of this research rests on *identifying* and *charting* the legal-constitutional space for EU fiscal integration steps available in the Member States in order to subsequently *evaluate* and *determine* what

62 As for example the case in Germany, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 138; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 250-252; Cf. as well: Calliess, 'Constitutional Identity in Germany - One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? - Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court - Repositioning the Court within the European Constitutional Architecture' 408; Mattias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) 10 European Constitutional Law Review 263, 285; Beke Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' (2012) 61 International & Comparative Law Quarterly (ICLQ) 665, 682-683.

63 As envisaged by the EU institutions, cf. Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 20-21; Cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' 45; Craig and Markakis, 'EMU Reform' 1404.

form of fiscal integration is achievable within the charted space. The resulting research question is two-fold:

1 *What is the available legal space under national constitutional law for EU fiscal integration steps?*
2 *Considering the growing number of EU and national proposals regarding deeper fiscal integration, what form of EU fiscal integration is achievable within the charted national constitutional space?*

In order to tackle this two-fold research question, the research combines traditional legal doctrinal methods with comparative research methods (4.1.). As previously indicated, the underlying research claims are that the seemingly strict national constitutional limits to EU fiscal integration can in practice be interpreted or applied more flexibly. And second, that the resulting more flexible constitutional protection might offer not less but rather more effective constitutional protection for the invoked constitutional values. The research conceptualizes these claims through the concept of *constitutional flexibility* which operates within the assessment as a tool to locate additional legal-constitutional space in the national constitutional approaches to EU fiscal integration (4.2.). To activate this *constitutional flexibility*, the research conducts a *consistency assessment* that evaluates whether national constitutional authorities vary their constitutional reasoning when reviewing EU-related measures compared to similar domestic proceedings. In addition, the comparative setting of the research allows to identify national *best practices* within the evaluated national constitutional systems which could stimulate a greater constitutional receptiveness towards EU fiscal integration steps by at the same time offering an effective constitutional protection of the constitutional value at stake. Combined, this translates into the research structure which consists of two main parts, namely, the initial charting of the available national constitutional space and the subsequent testing of concrete EMU reform proposals against the charted national constitutional space (4.3.).

4.1 Comparative research methodology

Confronted with 27 national constitutional strategies to manage EU integration, the following research is delimited to a representative sample of national constitutional approaches and limitations imposed against EU fiscal integration ambitions. Despite an inherent element of uniqueness, the different national constitutional approaches bear similarities and draw in fact inspiration from one another. Notably, national constitutional courts have started to reference the constitutional jurisprudence employed in other Member States to support

their own findings,[64] which results in a transnational exchange of legal-constitutional arguments and reasoning.[65] A direct consequence stemming from this exchange is a conceptual convergence between national constitutional reasoning and the resulting EU-related constitutional approaches. In addition to such conceptual overlap, these national constitutional approaches largely fulfill the same function, namely to provide a domestic constitutional framework to *engage* with EU cooperation whilst at the same time *protecting* core constitutional elements from EU integration.[66]

Taken together, this illustrates the functional-conceptual proximity amongst the 27 national constitutional approaches that regulate EU cooperation, which justifies the comparative methodology adopted to tackle the research question. The subsequent outline introduces first the general distinction between more rigid and more flexible national constitutional approaches which serves as conceptual foundation of the comparative assessment (4.1.1.). And second, the specific two-tiered comparative approach employed within the research to address the underlying research question is introduced (4.1.2.).

4.1.1 General distinction – on rigid and flexible constitutional approaches

Despite a degree of similarity, two main *archetypes* of how constitutional systems approach EU integration can be distinguished. On the one hand, a range of national constitutional systems developed more *rigid*[67] or *stable*[68] constitutional approaches to EU integration. These approaches are characterized by substantive limits that sketch out what *Wendel* refers to as legal *red-lines*

64 See for example the German Constitutional Court in its *Lisbon*-judgment, where it referenced the French and the Czech constitutional jurisprudence, cf. *Lisbon-judgment* paras 312, 338; Cf. as well: Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 136-137; Or, for example, the French *Conseil Constitutionnel*, which drew inspiration from the Austrian constitutional jurisprudence regarding the constitutional scrutiny of national implementations of EU secondary law, cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 546; Or finally, the Polish Constitutional Tribunal, which extensively referenced the constitutional jurisprudence from other Member States in its *Lisbon*-judgment, cf. *Treaty of Lisbon* Section III.3.3; Cf. as well: . Jo'l Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013) 253.

65 Tom Ginsburg and Rosalind Dixon, 'Introduction' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing Limited 2011) 4.

66 Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure' 1334-1335.

67 Referring to constitutions that limit the 'substantive scope of constitutional amendments', cf. Aalt Willem Heringa, *Constitutions Compared - An Introduction to Comparative Constitutional Law* (4th edn, Intersentia Ltd 2016) 7-8.

68 Terminology employed as opposite term to *constitutional mutability* cf. Rosalind Dixon, 'Constitutional Amendment Rules: a Comparative Perspective' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing Limited 2011) 102.

for EU integration.[69] These *red-line* limits are traditionally determined by a strong and independent constitutional actor – most notably constitutional courts – on the basis of the domestic constitutional text itself.[70] Of particular importance for constitutional courts when establishing such constitutional *red-lines* is the prescribed procedural framework for enacting constitutional amendments.[71] Obviously, in case the domestic constitution restricts the available scope or imposes rigid (parliamentary) majority requirements for constitutional amendments, these may not be circumvented through supranational cooperation and therefore extend to EU integration steps, too.[72]

Such constitutional *red-line* limits, moreover, are increasingly framed by constitutional courts as *national constitutional identity* concerns.[73] Commonly, the concept of *constitutional identity* refers to core principles or structural

69 Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123.

70 As for example exemplified in the jurisprudence of the Polish Constitutional Tribunal, cf. Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252-253; Or in the jurisprudence of the German Constitutional Court, cf. *Quantitative Easing (PSPP) Final Judgment* para 101; *Final OMT-Judgment* para 115; *OMT-reference* para 29; *Lisbon-judgment* para 216; Cf. as well: Calliess, 'Constitutional Identity in Germany - One for Three or Three in One?' 156-157; Tilman Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' (2018) 53 Europarecht (EuR) 140, 144-146.

71 Such 'rigidity' can relate to the prescribed national constitutional amendment procedures required to accommodate EU integration proposals, cf. for the typology: Grewe, 'Methods of Identification of National Constitutional Identity' 40; Yet, also within more rigid constitutional systems that impose substantive limits one can distinguish between *'red-line'*-limits and limits that can be overcome by constitutional amendments, cf. Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123.

72 Cf. for example Article 79 (3) Basic Law in Germany or Article 89 (5) French Constitution in France which exclude certain constitutional matters from the scope of the constitutional amendment procedure, cf. Samuel Edward Finer, Vernon Bogdanor and Bernard Rudden, *Comparing Constitutions* (Clarendon Press 1995) 13, 15-16.

73 The first emergence of the national *constitutional identity* logic can be traced back to the early judgments both by the *Italian Constitutional Court* with its *controlimiti*-doctrine, cf. Judgment of 27. December 1973 - No. 183 *Frontini* [1973] (Italian Constitutional Court); Judgment of 8. June 1984 *Granital* [1984] (Italian Constitutional Court); Cf. as well: Schyff, 'Exploring Member State and European Union Constitutional Identity' 228; As well as by the German Constitutional Court in BvL 52/71 *Solange I-Decision* [1974] (German Federal Constitutional Court) paras 43-44; Where the German Court explicitly refers to *constitutional identity*, cf. as well Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14 International Journal of Constitutional Law 411, 426-427; Subsequently particularly the German *Lisbon*-judgment triggered a comprehensive debate on the concept of national *constitutional identity*, cf. Saiz Arnaiz and Alcoberro Llivina, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' 7-8; Which emphasized the difference between the concept of *constitutional identity* employed by national constitutional courts and the concept of *national identity* protected at the European level, cf. Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' 84-85; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 123-124.

characteristics of the Member State that coin its respective constitutional order and include, for example, national sovereignty, national democracy, respect for fundamental rights or the rule of law.[74] These *stricter* substantive limits towards EU integration measures are *inter alia* emerging in the Czech Republic,[75] France,[76] Germany,[77] Italy,[78] Poland,[79] and Spain.[80] In these

74 And thus, the basic structure of the national constitutional order, cf. Schyff, 'Exploring Member State and European Union Constitutional Identity' 228-229; On the protected principles, cf. as well: Claes, 'National Idenity: Trump Card or Up for Negotiation?' 129.

75 Zdenek Kühn, 'Ultra Vires Review and the Demise of Constitutional Pluralism - The Czecho-Slovak Pension Saga, and the Dangers of State Court's Defiance of EU Law' (2016) 23 Maastricht Journal of European and Comparative Law 185, 186-187; Schyff, 'Exploring Member State and European Union Constitutional Identity' 228; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 254-255; Note, the different understanding apparent in the Czech and the German constitutional approach, cf. Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 127-128.

76 Article 89 (5) French Constitution, which protects the 'republican' status against constitutional change, cf. for example: Jacobsohn, 'The Formation of Constitutional Idenities' 130; Loïc Azoulai and Felix Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' (2005) 42 Common Market Law Review 871, 877-878; Jaques Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 271; Overall, the French *Conseil Constitutionnel* is a key player behind the *identity*-discourse at the European level, cf. François-Xavier Millet, 'Constitutional Identity in France - Vices and – Above All – Virtues' in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 134-135; Saiz Arnaiz and Alcoberro Llivina, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' 7; At the same time, any conflict with the French *constitutional identity* can be resolved by the constituting power, cf. Schyff, 'Exploring Member State and European Union Constitutional Identity' 228; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 98.

77 Article 79 (3) GG and its absolute nature, cf. *Quantitative Easing (PSPP) Final Judgment* para 101; *Final OMT-Judgment* para 115; *OMT-reference* para 29; *Lisbon-judgment* para 216; Cf. as well: Calliess, 'Constitutional Identity in Germany - One for Three or Three in One?' 156-157; Stephan Jaggi, 'Revolutionary Constitutional Lawmaking in Germany – Rediscovering the German 1989 Revolution' (2016) 17 German Law Journal 579, 618-620; Angela Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' (2015) 50 Europarecht (EuR) 290, 293-294; Jo Murkens, 'Identity Trumps Integration – The Lisbon Treaty in the German Federal Constitutional Court' (2009) 48 Der Staat 517, 519.

78 The mentioned *controlimiti*-doctrine, cf. *Frontini*; *Granital*; Cf. as well: Diana-Urania Galetta, 'European Union Law in the Jurisprudence of Italian High Courts: Is the Counter-Limits Doctrine a Dog That Barks but Does Not Bite?' (2015) 21 European Public Law 747, 750.

79 The Polish Constitutional Tribunal limits the set of competences that can be transferred to the EU, cf. *Treaty of Lisbon* Section III 2.1.; Cf, as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland - Is the Emperor Putting on the Old Clothes of Sovereignty' 249-251; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252-253; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 128-129; Adam Łazowski, 'Case Note: Accession Treaty

Member States, the constitution limits the *substantive* constitutional space that is available for EU integration steps. Consequently, EU integration is not merely a question of political ambition and support – but increasingly a question of legal-constitutional feasibility as well.

Not all Member States, however, adopt a rigid constitutional approach. As a conceptual opposite to constitutional rigidity, some Member States have adopted more *flexible*[81] or *mutable*[82] constitutional approaches.[83] In contrast to rigid systems, these flexible approaches refrain from imposing substantive *red-line* limits to EU integration, thereby offering a wider and less restricted legal-constitutional space for EU cooperation by at the same time seemingly allowing for an effective protection of core constitutional values. Instead, the main constitutional *hurdle* for EU integration is political-procedural in nature. Namely, to attain the prescribed majority-thresholds to confirm the conferral of competences to the EU-level as prescribed by the applicable national constitu-

– Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' (2007) 3 European Constitutional Law Review 148, 156-157; The Tribunal relies in particular on Polish sovereignty, which constitutes a core value of Polish constitutionalism, cf. Jacek Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' (2014) 17 Yearbook of Polish European Studies 15, 32-33; Cf. as well: Schyff, 'Exploring Member State and European Union Constitutional Identity' 228.

80 Sentencia 26/2014 *Constitutional Complaint Melloni* [2014] (Spanish Constitutional Tribunal) Section II. 3.; Decision 2004-505 DC *Treaty Establishing a Constitution for Europe* [2004] (French Conseil Constitutionnel) Section II.2.; Cf. as well: Schyff, 'Exploring Member State and European Union Constitutional Identity' 228; Rafael Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013) 77; Pablo Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013) 270-271; Carmen Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' (2006) 12 European Public Law 353, 361; Fernando Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' (2005) 42 Common Market Law Review 1169, 1176.

81 Referring to constitutions that are more open to amendments and that do not contain substantive limits, cf. Heringa, *Constitutions Compared - An Introduction to Comparative Constitutional Law* 9.

82 Dixon, 'Constitutional Amendment Rules: a Comparative Perspective' 102.

83 Based on the previous outline of national constitutional amendment procedures, systems that do not contain substantive or material obstacles to constitutional amendments, but that rather have a 'formal' conception of constitutional amendments may be perceived as more adaptable to the EU integration process, cf. for the typology Grewe, 'Methods of Identification of National Constitutional Identity' 43.

tional procedures.[84] Examples of such more flexible national constitutional approaches to EU integration include the Netherlands[85] and Finland.[86]

When comparing both constitutional strategies, it appears that the determining factors for identifying a constitutional approach as either rigid or flexible are the domestic institutional set-up as well as the general constitutional design. First, as substantiated above, strong constitutional authorities – mostly constitutional courts in the traditional sense[87] – are a central driving force for the emergence of substantive *red-line* limits. An illustrative example in this regard is the authoritative German Constitutional Court that developed the German *constitutional identity limit* as a comprehensive and absolute German *red-line* to EU integration on the basis of Article 79 (3) GG.[88] More flexible systems generally lack such authoritative independent constitutional courts with similarly far-reaching competences. Secondly, specific national constitutional features appear decisive for the resulting national constitutional strategy to EU integration as well. Notably, considering once again the German example, specifically the constitutional *eternity clause* in Article 79 (3) GG, which excludes a list of constitutional principles from constitutional amendments and which extends to EU integration according to Article 23 (1) (3) GG, serves as textual basis for the jurisprudence of the German Constitutional Court.[89] In contrast, more flexible constitutional approaches are likely to emerge in cases where

84 Heringa, *Constitutions Compared - An Introduction to Comparative Constitutional Law* 9.

85 Particularly, given that the Dutch legal order does not include constitutional review, cf. Schyff, 'Exploring Member State and European Union Constitutional Identity' 230; Heringa, *Constitutions Compared - An Introduction to Comparative Constitutional Law* 252-253.

86 Grewe, 'Methods of Identification of National Constitutional Identity' 43; Note as well that Finland has no constitutional court in the traditional sense and constitutional review is limited, cf. Kaarlo Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' in Armin von Bogdandy, Christoph Grabenwarter and Peter Michael Huber (eds), *Handbuch Ius Publicum Europaeum - Band VI (Verfassungsgerichtsbarkeit in Europa: Institutionen)* (C.F. Müller 2016) 171-172 paras 30-31; Overall, on the Finnish constitutional adaptability, cf. Pekka Länsineva, 'Fundamental Principles of the Constitution of Finland ' in Kimmo Nuotio, Melander Sakari and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Univeristy of Helsinki 2012) 111; Tuomas Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' (2004) 10 European Public Law 531, 534-535.

87 Referring to specialized courts, different from ordinary and administrative courts, with the task to supervise the constitutionality of state acts, cf. Victor Ferreres Comella, 'The Rise of Specialized Constitutional Courts' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing Limited 2011) 265-266.

88 *Lisbon-judgment* paras 249-252; Cf. as well: Calliess, 'Constitutional Identity in Germany - One for Three or Three in One?' 157; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 147; The German Constitutional Court already interpreted the *eternity clause* in great detail, cf. Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 126; And will subsequently take a crucial role in further defining it, cf. Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 923.

89 *Lisbon-judgment* para 240; Cf. as well: Claes, 'National Idenity: Trump Card or Up for Negotiation?' 124-125; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 126.

such an explicit restriction to political decision-making – including the scope of EU integration – is less pronounced or developed within the constitutional system.

4.1.2 A two-tiered comparative approach

Facing these two general strategies, it appears that EU fiscal integration proposals have to be compatible with both rigid and flexible constitutional approaches. Given that EU fiscal integration proposals will have to fit the constitutional space available under rigid as well as flexible constitutional approaches, a comparative assessment is warranted. The comparative assessment conducted within this research is divided into an initial *wide macro-comparative* assessment (4.1.2.1.). It is completed by a subsequent *targeted micro-comparative* evaluation of a selection of national *constitutional identity limits* (4.1.2.2).

4.1.2.1 Macro-comparison of constitutional systems

In the first comparative step, building upon the previously established general distinction, a comprehensive *macro-comparison*[90] is undertaken to identify the national constitutional space available for EU fiscal integration in Member States with a more rigid constitutional approach and in Member States with a more flexible constitutional approach respectively. Given that a detailed comparison of all 26 national constitutional systems[91] would exceed the framework of this research, the comparison analyzes the relevant constitutional framework for EU matters within one rigid and one flexible constitutional system.

As an example of a rigid constitutional approach, the German constitutional order is examined. Germany appears to provide for an excellent basis to conduct a case study given its specific constitutional structure with a protected constitutional core and a strong constitutional court as well as its overall

90 In comparative law methodology, the term *macro-comparison* refers to a *wider* research into the legal system or culture assessed more generally, cf. Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 394; Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 378, 381; Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) Law and Method 1, 21-22.

91 The number 26 Member States refers to the EU Member States that are either already part of the Eurozone, or that are under a legal obligation to join. Only Denmark retains an explicit opt-out from the single currency grounded in primary law, cf. Sergio Fabbrini, 'The Constitutional Conundrum of the European Union' (2016) 23 Journal of European Public Policy 84, 89.

prominence in the EU constitutional debate.[92] In contrast to the rigid German constitutional approach, the Finnish constitutional order will be examined as an example of a more flexible constitutional approach. Finland does not have a constitutional court, but instead a parliamentary committee that decides on the constitutionality of legislative action, namely the Constitutional Law Committee.[93] This institutional feature reflects the decisive institutional role that the constitution assigns to the Finnish Parliament. Furthermore, although the Finnish Constitution contains an explicit provision that seemingly limits the scope for constitutional amendments in Section 94 (3) Finnish Constitution, this provision is not enforced and the Finnish Constitutional Law Committee refrained from establishing any substantive limits for EU integration on the basis of it.[94] Instead, the Committee supervises compliance with the constitutionally prescribed procedural conditions.[95] Overall, as visually summarized in *Figure 1*, both countries are illustrative examples for the respective constitutional strategy and they can be positioned at opposite ends on a linear scale that distinguishes between flexible and rigid constitutional approaches towards the EU. Therefore, the resulting research findings on Germany and Finland can offer representative insights into constitutional limitations that can possibly emerge in other Member States.

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92 Arguably, the German constitutional limits are the most severe 'red-lines' for EU integration, given the underpinning constitutional mechanism, cf. Schyff, 'Exploring Member State and European Union Constitutional Identity' 228; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 125-126; Arthur Dyevre, 'The German Federal Constitutional Court and European Judicial Politics' (2011) 34 West European Politics 346, 346-347.

93 Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' in John Bell and Marie-Luce Paris (eds), *Rights-Based Constitutional Review - Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing Limited 2016) 219; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 172 para 32; Anu Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* (Hansaprint Oy 2015) 324; Maartje De Visser, *Constitutional Review in Europe - A Comparative Analysis* (Hart Publishing 2015) 26; Ojanen, 'The EU at the Finnish Constitutional Arena' 252.

94 Tuomas Ojanen and Janne Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 372-373; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Jaakko Husa, *The Constitution of Finland - A Contextual Analysis* (Hart Publishing 2011) 34; Veli-Pekka Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' (2007) 52 Scandinavian Studies in Law 133, 140.

95 Visible, for example, from the substantive evolution and transformation of Finnish sovereignty, cf. Tuomas Ojanen, 'The Europeanization of Finnish Law' in Paul Luif (ed), *Österreich, Schweden, Finland - Zehn Jahre Mitgliedschaft in der Europäischen Union* (Böhlau Verlag 2007) 153-155.

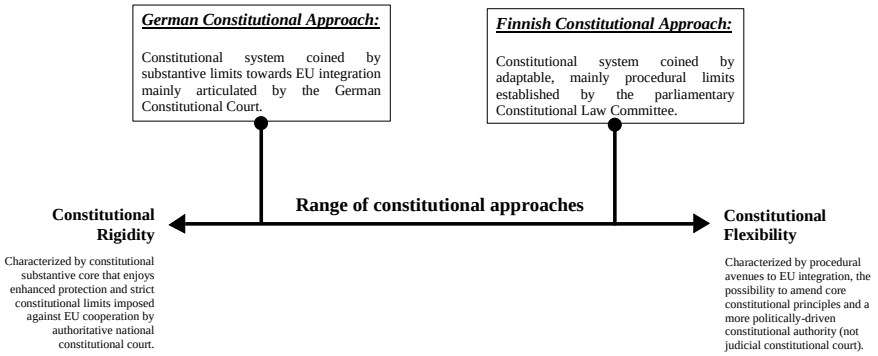

Figure 1: Underpinning comparative conceptualization of constitutional system

The overall aim of this *macro-comparison* is to determine the available constitutional space for EU fiscal integration proposals under both approaches. As Germany and Finland will function as case studies, the research findings will first and foremost have significance for these two Member States. Given the particularity of any constitutional system, the research cannot draw detailed conclusions on the specific constitutional space for EU fiscal integration in the other national constitutional systems. However, fully acknowledging the resulting limitations, the subsequent comparison can be indicative and illustrative for a wider constitutional trend for two reasons. First, it was already established that Germany and Finland are representative systems of broader strategies given their specific constitutional features. In addition, it was substantiated that constitutional arguments are rooted in similar constitutional principles which are exchanged across jurisdictions and that the resulting constitutional approaches have similar functions. Therefore, the conclusions on the evaluated national constitutional approaches seem to be largely echoed by constitutional systems with conceptually similar constitutional features. Second, as the research centers around determining the most severe constitutional obstacles for EU fiscal integration steps, it appears expedient at this stage of the assessment to focus on general tendencies of how the respective constitutional strategy reacts to such integration ambitions.

4.1.2.2 Micro-comparison of national constitutional identity limits

In the second comparative step, the assessment turns to a broader but more narrowly delineated *micro-comparison*[96] of the most relevant and significant

96 In contrast with the term '*macro-comparison*', the term *micro-comparison* generally refers to a more targeted comparative assessment of a specific rule or institution in comparative law terminology – in this specific case national *identity clauses*, cf. Dannemann, 'Comparative Law: Study of Similarities or Differences?' 394; Michaels, 'The Functional Method of

constitutional limits that EU fiscal integration faces. Thereby, the terms 'relevance' and 'significance' refer to the probability of triggering as well as overcoming a conflict between national constitutional law and EU fiscal integration ambitions, which alludes to the absoluteness of the respective constitutional limit. To that end, the comparison's focus rests on national constitutional limits that impose strict constitutional requirements and that therefore reduce the political decision-making space for EU fiscal integration steps.

Resulting from the findings in the *macro-comparative* assessment,[97] such obstacles are mainly the substantive *constitutional identity limits* that are apparent in more rigid constitutional systems. As highlighted, the precise constitutional function of these limits is to shield the national constitutional order against changes that deprive it from its unique and distinguishing constitutional features – namely, its *constitutional identity*. The underlying claim is that the national constitutional system contains a stable core which may not be affected or altered by EU integration.[98] Effectively, these limits reduce the extent of powers that can be transferred to or affected by the EU. Therefore, the conducted *micro-comparison* focuses on the assessment of strict *constitutional identity limits* that formulate obstacles to the attainment of EU fiscal integration steps in a representative sample of Member States. As the term *identity* already suggests, these limits take different shapes and vary in content. To cover a possibly wide range of *constitutional identity* arguments, the research considers four specific national *constitutional identity* limitations. Based on constitutional and political relevance and based on geographical variation considerations, the comparative assessment considers the French[99], the Spanish[100], the

Comparative Law' 381; Hoecke, 'Methodology of Comparative Legal Research' 21-22.

97 Also based on the current academic opinion and further emphasized by the literature, cf. for example: Grewe, 'Methods of Identification of National Constitutional Identity' 40; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123; Also deriving from the fact that the concept of *constitutional identity* is both uncompromising and exclusionary in nature, cf. Schyff, 'Exploring Member State and European Union Constitutional Identity' 240-241.

98 Defined by the German Constitutional Court as 'integrationsfeste Verfassungsidentität der Mitgliedstaaten', so the part of the *constitutional identity* of the Member States that is resistant towards EU integration, cf. *Lisbon-judgment* para 239; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 148; Claus Dieter Classen, 'Schwierigkeiten eines harmonischen Miteinanders von nationalem und europäischem Grundrechtsschutz' (2017) 52 Europarecht (EuR) 347, 365.

99 Namely, Article 89 (5) French Constitution; cf. Grewe, 'Methods of Identification of National Constitutional Identity' 40-41; With a general overview: Leonard F.M. Besselink and others, *National Constitutional Avenues for Further EU Integration* (European Parliament - Directorate General for Internal Policies 2014) Annex III.

100 *Constitutional Complaint Melloni* Section II. 3.; *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 361; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176.

Polish[101] and the German[102] *constitutional identity* limits to determine their limiting potential for EU fiscal integration ambitions.

Notably, the French *constitutional identity* limit to EU fiscal integration is assessed, given both the constitutional importance of the French legal system as well as the political-economic importance of France when considering EMU-reforms.[103] Arguably, any EMU-reform will require the support of the French-German axis, simply based on their relative political influence as well as their economic impact within the Eurozone. Furthermore, the French constitutional text formulates an explicit limit to the powers of the constitution-amending legislator in Article 89 (5) French Constitution[104] and the authoritative *Conseil Constitutionnel*[105] introduced a sovereignty-based limitation that conditions the French legislator in EU integration steps.[106] Finally, the *Conseil* developed an explicit *constitutional identity limit*, which is, however, only applied to the French implementation of EU secondary law.[107] This French particularity offers a highly interesting perspective on an alternative design of *constitutional identity limits* for the following comparative assessment.

The Spanish *constitutional identity limit* is assessed as a representative example of a group of Mediterranean Member States that received financial assistance during the Eurocrisis. The limit was established by the Spanish

101 Grewe, 'Methods of Identification of National Constitutional Identity' 42-43; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 128-129.

102 Christian Tomuschat, 'The Defence of National Identity by the German Constitutional Court' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013) 210-214.

103 See for example the calls for EMU-reforms by Emmanuel Macron already expressed during the presidential elections, cf. Reuters, 'Euro Will Fail in 10 Years Without Reform, Emmanuel Macron Says' *The Guardian* (London 11 January 2017) <https://www.theguardian.com/world/2017/jan/11/euro-will-fail-in-10-years-without-reform-emmanuel-macron>accessed 20 December 2020.

104 Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 124; Jan-Herman Reestman, 'The Franco-German Constitutional Divide - Reflections on National and Constitutional Identity' (2009) 5 European Constitutional Law Review 374, 388-389; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 270-271.

105 In English: Constitutional Council.

106 *Fiscal Compact* para 10; Decision 2007-560 DC *Lisbon Treaty* [2007] (French Conseil Constitutionnel) para 9; *Treaty Establishing a Constitution for Europe* para 7; Cf. as well: Millet, 'Constitutional Identity in France - Vices and – Above All – Virtues' 138; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540-541.

107 Decision 2018-765 DC *National Law Related to the Protection of Personal Data Under the GDPR* [2018] (French Conseil Constitutionnel) paras 3, 26; Decision 2017-749 DC *Comprehensive Economic and Trade Agreement (CETA)* [2017] (French Conseil Constitutionnel) para 14; Decision 2006-540 DC *Copyright and Related Rights in the Information Society* [2006] (French Conseil Constitutionnel) para 19; Cf. as well: Millet, 'Constitutional Identity in France - Vices and – Above All – Virtues' 140-142; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 547-548; Reestman, 'The Franco-German Constitutional Divide - Reflections on National and Constitutional Identity' 386.

Constitutional Tribunal in its decision on the EU Constitutional Treaty[108] and invoked one additional time in the Tribunal's *Melloni*-judgment on the European Arrest Warrant.[109] The restricted judicial use of the *constitutional identity limit* surprises in light of the indicated major impact the Eurocrisis had on Spain. Notably, the country had to request EU financial assistance for its banking sector, which came attached with strict national reform conditions.[110] Based on the apparent absence of judicial references to the *constitutional identity limit* in Eurocrisis-related cases, the assessment focusses particularly on the seemingly limited scope of the Spanish limit and determines whether this *constitutional identity limit* has the potential to develop into a constitutional obstacle for EU fiscal integration proposals in the future.

The Polish *constitutional identity limit* is analyzed as a model example of the Eastern and Central European Member States and their – partly more skeptical – approach towards EU integration. Although Poland is not yet a member of the Eurozone, it is under a legal obligation to join the single currency.[111] Therefore, the currently discussed EMU-reform proposals could politically and legally affect the prospect of Polish Euro-membership, particularly in case a reformed EMU would conflict with Polish *constitutional identity*.

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108 *Treaty Establishing a Constitution for Europe* Section II. 2. and 3.; Cf. as well: José Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain - Commitment to European Integration Without Giving Up the Essence of the Constitution' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 278-279; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 269-270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

109 For the reference to the material constitutional core, cf. *Constitutional Complaint Melloni* Section II.3.; And the initial reference, cf. AUTO 86/2011 *Preliminary Reference Concerning EAW (Melloni)* [2011] (Spanish Constitutional Tribunal); Cf. as well: Aida Torres Pérez, 'Constitutional Dialogue on the European Arrest Warrent: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011' (2012) 8 European Constitutional Law Review 105, 105-107.

110 Sebastián Royo and Federico Steinberg, 'Using a Sectoral Bailout to Make Wide Reforms: the Case of Spain' in Michele Chang, Federico Steinberg and Francisco Torres (eds), *The Political Economy of Adjustment Throughout and Beyond the Eurozone Crisis - What Have We Learned?* (Routledge 2019) 164-166; Franz-Josef Meiers, *Germany's Role in the Euro Crisis - Berlin's Quest for a More Perfect Monetary Union* (Springer 2015) 91, 116-117; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 122; On the internal receptiveness for the protection awarded by the EU legal order, cf. Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 359.

111 Jeno Czuczai, 'Accession to the EU, But to Which EU? The Legal Impact of the Constantly Evolving EMU Acquis on the EU Enlargement Process' in Stanislas Adam and others (eds), *The European Union in the World : Essays in Honour of Professor Marc Maresceau* (Martinus Nijhoff Publishers 2014) 595; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 72-73; Marie-José Rinaldi-Larribe, 'Is Economic Convergence in New Member States Sufficient for an Adoption of the Euro?' (2008) 5 The European Journal of Comparative Economics 269, 269-270; Jean-Victor Louis, 'The Economic and Monetary Union: Law and Institutions' (2004) 41 Common Market Law Review 575, 605.

This identity doctrine was established by the Polish Constitutional Tribunal based on Article 90 Polish Constitution – the constitutional basis for conferring powers to the EU.[112] The choice to include the Polish *constitutional identity limit* is further warranted in light of geographical diversity as well as the economic and political impact of Poland within the EU. In addition, the assessment of the Polish constitutional perspective on EMU fiscal integration proposals extends the scope of the existing debate, as it adds the constitutional perspective of an EMU-*candidate* state. Ultimately, the recent political developments and the undertaken constitutional reforms could entail negative repercussions for the developed Polish constitutional jurisprudence on EU integration,[113] which of course triggers the question as to how such risks can be factored into the feasibility evaluation of EU (fiscal) integration steps.

Finally, the research findings developed within the previously outlined *macro-comparison* on the German *constitutional identity limit* are included in the *micro-comparison*, too. Germany provides for a particularly interesting example, given that Article 79 (3) GG protects an abstract set of principles, which largely resemble constitutional principles protected in other EU Member States.[114] The set of abstract constitutional principles is translated into an absolute integration limit by the Constitutional Court.[115] Given this constitutional particularity as well as the prominence of the German constitutional approach

112 The Polish Constitutional Tribunal emphasized that Article 90 Polish Constitution only allows for a transfer of 'certain matters', which in return restricts the scope available for EU integration, cf. K 33/12 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* [2013] (Polish Constitutional Tribunal) Section 5.1.2.; *Treaty of Lisbon* Section 2.1. and 2.5.; K 18/04 *Poland's EU Membership* [2005] (Polish Constitutional Tribunal) Point 7; Cf. as well: Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 124-125.

113 In light of the different Polish constitutional reforms and concerning the appointment of the constitutional judges, cf. Pablo Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' (2019) 15 European Constitutional Law Review 48, 57-58; Martin Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' (2019) 15 European Constitutional Law Review 544, 547-548; Armin Hatje and Jürgen Schwarze, 'Der Zusammenhalt der Europäischen Union' (2019) 54 Europarecht (EuR) 153, 179-181; Piotr Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' (2018) 64 Osteuropa Recht (OER) 5, 5-6; Anna Rytel-Warzocha, 'The Dispute over the Constitutional Tribunal in Poland and Its Impact on the Protection of Constitutional Rights and Freedoms' (2016) 3 International Comparative Jurisprudence 153,.

114 Tomuschat, 'The Defence of National Identity by the German Constitutional Court' 212.

115 As can be seen, for example, in the German *Lisbon*-judgment, cf. *Lisbon-judgment* paras 240, 249-252; Cf. as well: Claes, 'National Idenity: Trump Card or Up for Negotiation?' 124-125; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 125-126; Or as can be deduced from the *overall budgetary responsibility* doctrine, which was introduced by the Court during the Eurocrisis, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; *Financial Support for Greece and EFSF* para 120; Cf. as well: Matthias Herdegen, 'Art. 79 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 167-169, 177; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? - Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644.

within the academic debate,[116] and both Germany's political as well as economic impact, the German *constitutional identity limit* is equally included in the *micro-comparative* assessment.

Overall, the more targeted and delineated *micro-comparison* thereby provides insights into how *constitutional identity* is employed across different constitutional systems and what this implies for EU fiscal integration steps. Given that the *constitutional identity limits* have different features and shapes across the four Member States, a comprehensive picture emerges, with relevance for all Member States with comparable *constitutional identity limits*. In order to structure the assessment, the *micro-comparison* employs a specifically developed *constitutional identity classification board* illustrated in *Figure 2*.

	Components of the Constitutional Identity Classification Board
1	Which institutional actor enforces the constitutional limit?
2	How can the *constitutional identity limit* be triggered?
3	What is the constitutional basis of the *constitutional identity limit*?
4	What constitutional principles and substantive content are covered?
5	How – if at all – can the *constitutional identity limit* be overcome (longevity/ absoluteness of the limit)?

Figure 2: Design of the Constitutional Identity Classification Board

4.1.3 Resulting comparatively charted constitutional space for fiscal integration

Taken together, the two-tiered comparison provides a general outline of the compound national constitutional space that EU fiscal integration proposals face as well as an in-depth analysis of the most severe constitutional obstacles in this regard. Although this comparison cannot cover all 26 EU constitutional systems relevant for EMU, the comparative conclusions on the analyzed, representative systems are indicative for the wider constitutional debate. Consequently, the research does not claim that EU fiscal integration proposals that are deemed compatible with the charted constitutional space are necessarily achievable in all Eurozone Member States. Instead, the research claim is that the likelihood of constitutionally achieving these proposals is significantly increased if they fit within the charted constitutional space, given the representativeness of the compared systems and limits as well as the overlap in the underpinning constitutional concerns – and *vice versa* proposals that do not fit into the available constitutional space would run into severe legal-constitutional problems.

116 Craig and de Búrca, *EU Law Text, Cases, and Materials* 278-279.

4.2 Constitutional flexibility as employed research tool

The research is based on the further hypotheses that seemingly strict and rigid constitutional limitations formulated against EU fiscal integration ambitions entail a degree of *constitutional flexibility* which can be used to implement the currently debated EMU reform plans – and which offers effective protection to the underlying national constitutional value. *Figure 3* visually conceptualizes the function of *constitutional flexibility* within the research. Notably, *constitutional flexibility* operates as a research tool to render national constitutional limits – in particular *constitutional identity limits* – more receptive for EU fiscal integration ambitions.

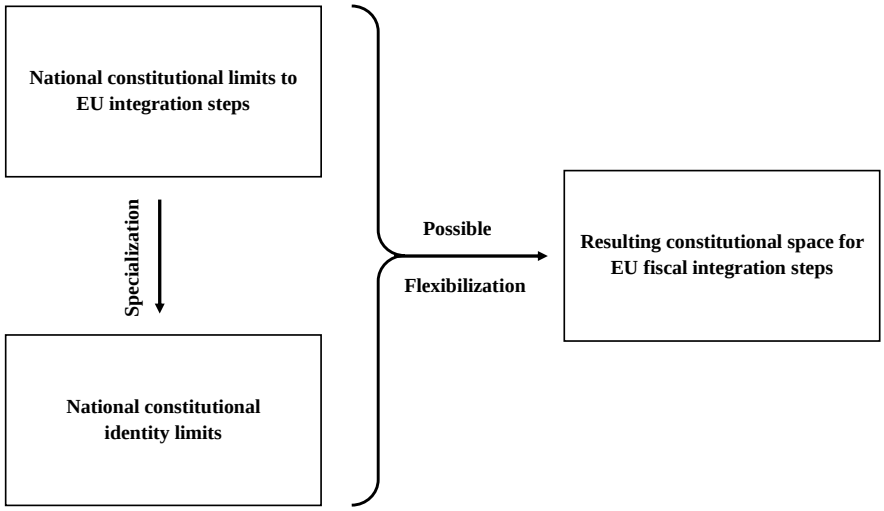

Figure 3: Interrelation of employed research concepts

Figure 4 visualizes the two major means employed within this research to locate and activate *constitutional flexibility*: a constitutional consistency assessment (4.2.1.) as well as a comparative identification of national *best practices* (4.2.2.), which might inspire other national constitutional actors to reconceptualize their national constitutional limits. Furthermore, *Figure 4* illustrates that the research employs the possible *re-conception* of EU cooperation – both within the national constitutional debate as well as at the policy proposal stage at the national and the EU-level – as a supportive means to generate *constitutional flexibility*.

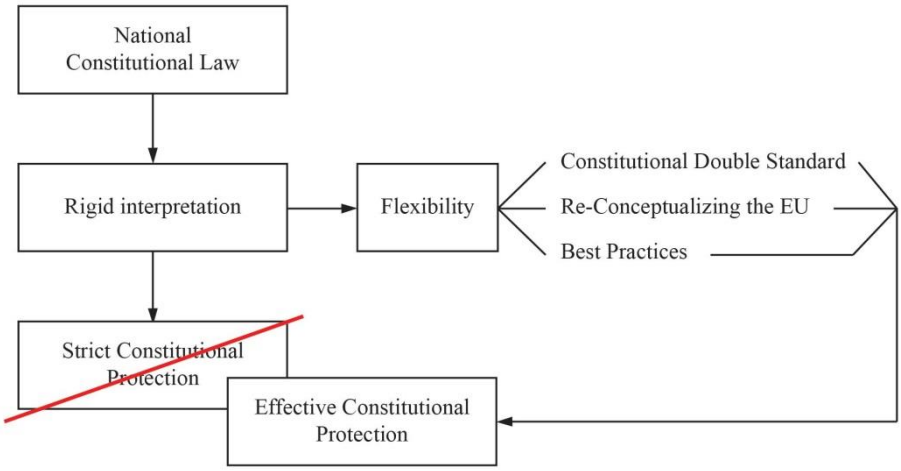

Figure 4: The research concept of constitutional flexibility

4.2.1 Constitutional consistency assessment

As substantiated within the comparative research methodology, national *constitutional identity limits* – that are apparent in more rigid constitutional systems – seem to constitute the most severe hurdle for EU fiscal integration steps. This is particularly visible when considering the German *constitutional identity limit*.[117] In light of the German limit's absolute design, which derives from its constitutional basis in Article 79 (3) GG, it seems even questionable whether the German *constitutional identity limit* could be transformed through the proposed transnational exchange of constitutional arguments[118] or

117 For example: *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 138; *ESM-Treaty and Fiscal Compact* paras 107-109; *Lisbon-judgment* 249, 251-252; Cf. as well: Murkens, 'Identity Trumps Integration – The Lisbon Treaty in the German Federal Constitutional Court' 519; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294.

118 It appears that the German Constitutional Court mainly relies on comparative arguments to support its own conclusions and not to extend its reasoning, cf. Mattias Wendel, 'Comparative Reasoning and the Making of a Common Constitutional Law: EU-Related Decisions of National Constitutional Courts in a Transnational Perspective' (2013) 11 International Journal of Constitutional Law 981, 984; Heiko Sauer, 'Verfassungsvergleichung durch das Bundesverfassungsgericht - Zur Bedeutung der Verfassungsvergleichung für die Auslegung des Grundgesetzes' (2010) 18 Journal für Rechtspolitik 194, 199; Which also roots in the functional problems of comparative reasoning relating to determining the comparative framework and the required additional effort to conduct a comprehensive comparative analysis, which often exceeds the possibilities within the proceedings, cf. Anna-Bettina Kaiser, 'Verfassungsvergleichung durch das Bundesverfassungsgericht - Ein Kommentar' (2010) 18 Journal für Rechtspolitik 203, 206.

through the application of constitutional *best practices* as envisaged by the research. It illustrates that a possible flexibilization of the national constitutional approach depends on the receptiveness of the competent national constitutional actors[119] as well as the ability of the national system to accommodate this proposed flexibilization. Therefore, the research introduces a constitutional consistency assessment to generate *constitutional flexibility* within particularly rigid constitutional approaches. It is applied in an exemplifying manner to the particularly strict German constitutional approach.

The proposed consistency assessment is rooted in the assumption that judicial decisions in a constitutional system based on the rule of law are not taken arbitrarily.[120] In order to pre-empt arbitrariness, courts employ established legal methods when interpreting legal provisions.[121] The reliance on accepted interpretive methods renders the judicial decision objectively comprehensible.[122] The constitutional consistency assessment departs from this rule-of-law-requirement, arguing that the same (constitutional) rule may in principle not be interpreted differently based on the particular case before the constitutional authority, as the judicial methods employed for interpreting the rule cannot depend on the concrete proceedings. Although the application of a rule may be influenced by the concrete circumstances of the proceedings, which allows courts to distinguish based on justified grounds, the general interpretation and the conception of the rule may not. Therefore, the argument put forward here is that the constitutional scrutiny based on the same constitutional provisions, and with it the respective interpretation of the constitutional legal framework, may not differ, given that the constitutional authority would otherwise introduce a constitutional double standard.

As will be substantiated in the research, one example of such apparent constitutional double standard is the *Bundesverfassungsgericht*'s jurisprudence on the interpretation of the procedural standing requirements for initiating constitutional complaints.[123] Internally, the German Court adopts a restrictive

119 Wendel, 'Comparative Reasoning and the Making of a Common Constitutional Law: EU-Related Decisions of National Constitutional Courts in a Transnational Perspective' 986-987; Ginsburg and Dixon, 'Introduction' 4.

120 Under German law, so-called 'Willkürverbot', cf. Uwe Kischel, 'Artikel 3 GG - Gleichheit vor dem Gesetz' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) para 83.

121 Dominik Schäfers, 'Einführung in die Methodik der Gesetzesauslegung' (2015) 55 Juristische Schulung (JuS) 875, 876.

122 On the importance of interpretative methods in the German constitutional order, cf. Reinhold Zippelius, *Juristische Methodenlehre* (JuS Schriftreihe, 11th edn, C.H. Beck 2012) 17-19, 35-37.

123 *OMT-reference*; Critical assessment of the extensive interpretation of the constitutional standing requirements employed by the German Constitutional Court, cf. Klaus Ferdinand Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' (2014) 15 German Law Journal 183, 186-187, 192; Mattias Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' (2014) 74 Zeitschrift für ausländisches öffentliches

interpretation, requiring the existence of a so-called 'subjective gravamen'.[124] Externally, *vis-à-vis* the EU, the *Bundesverfassungsgericht* follows a broad interpretation of the same standing requirement in constitutional complaints with an EU dimension, which results in an EU *actio popularis*.[125] Comparing both, it appears that the German Constitutional Court employs a more lenient interpretation of constitutional standing in cases with an EU dimension, thereby facilitating the initiation of constitutional complaints against EU law. Through the employed consistency assessment, additional constitutional space can be generated by applying the same interpretation for cases with and without an EU dimension. Notably, such consistent interpretation would enable the Court to declare constitutional complaints with an EU dimension more readily inadmissible, given that the German Constitution restricts the admissibility of constitutional complaints to a subjective violation of constitutional rights.

The subsequent research also extends the consistency assessment to the application of specific constitutional concepts and the *eternity clause* in order to determine whether the German Constitutional Court equally varies in the adopted constitutional scrutiny. Albeit the consistency assessment is only conducted in relation to the German approach, this assessment can be similarly applied to other constitutional approaches in order to locate and activate additional constitutional space for EU integration steps.

4.2.2 National best practices

In addition, a particular focus throughout the research rests on how national constitutional authorities perceive and portray the EU in their respective constitutional approaches in order to identify national *best practices*. The research defines *best practices* as those national constitutional approaches, interpretations or concepts that do not exclusively conceptualize EU integration steps as an outright threat to national constitutional law but also assess the advantages EU integration offers for national constitutional ambitions. The research argues that these national *best practices* can function as comparative inspiration across other Member States through transnational exchanges of

Recht und Völkerrecht (ZaöRV) 615, 641-642.

124 Markus Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' (2015) 34 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 537, 540.

125 Alexander Thiele, 'Friendly or Unfriendly Act? The 'Historic' Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' (2014) 15 German Law Journal 241, 251-253; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 641-642.

constitutional reasoning – in which national constitutional authorities already engage.[126]

Notably, when considering national constitutional decisions, the different accentuation of potential constitutional benefits and risks stemming from EU integration becomes obvious. For example, some national constitutional authorities construe EU integration measures as an *increase* in the impact of sovereign powers, given that a union of 27 Member States can more effectively defend shared interests in a globalized world.[127] In contrast, other national constitutional authorities primarily focus on the loss of autonomous, independent decision-making in the competence areas conferred to the EU-level.[128] Concretely, this suggests that the perception of advantages and risks for constitutional principles stemming from EU cooperation is a deciding element for the resulting design of national constitutional approaches and possible *constitutional flexibility* towards EU integration. Specifically, by focussing on the constitutional advantages that EU cooperation offers for national constitutional priorities, as apparent in some constitutional approaches, additional *constitutional flexibility* can potentially be located and activated in order to accommodate EU fiscal integration.

Therefore, the research identifies national best practices that address EU integration steps in a balanced and effective manner. These best practices are then tentatively applied to seemingly more restrictive national constitutional approaches and limits in order to soften the constitutional reservations and to subsequently identify additional space for EU fiscal integration within the respective Member State.

126 Ginsburg and Dixon, 'Introduction' 4; Which can be, for example, observed in Poland, where the Polish Constitutional Tribunal extensively refers to constitutional arguments from other constitutional orders, cf. *Treaty of Lisbon* Section III.3.3.

127 As, for example, the case in Finland, cf. Ojanen, 'The EU at the Finnish Constitutional Arena' 246; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 217; Similarly, the Polish Constitutional Tribunal developed a *modern* interpretation of sovereignty that considers the benefits of EU integration for national sovereignty, cf. *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; Cf. as well: *Treaty of Lisbon* Section III.2.1.; Miroslaw Granat and Katarzyna Granat, *The Constitution of Poland - A Contextual Analysis* (Hart Publishing 2019) 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Cf. more generally: Finer, Bogdanor and Rudden, *Comparing Constitutions* 26.

128 As, for example, the case in Germany, cf. *Quantitative Easing (PSPP) Final Judgment* paras 99-101; *Lisbon-judgment* paras 233, 264; Cf. as well: De Sadeleer, 'The New Architecture of European Economic Governance' 36; Or in Poland, where EU integration is also perceived as a challenge to national constitutional values, cf. Grewe, 'Methods of Identification of National Constitutional Identity' 38.

4.3 Structure of the research

In light of the employed methodology and the two-fold research question, the structure of the research consists of two conceptually different parts. The first part *maps* and *deconstructs* the national constitutional space for EU fiscal integration following a two-tiered comparison (PART I). The research topology applied to map the available space is divided into an initial wide mapping process (Section I), which focuses on how constitutional systems with fundamentally different characteristics – notably Finland and Germany – approach EU fiscal integration ambitions more generally, and a subsequent narrow mapping process (Section II), which centers around the strictest national constitutional limits formulated against EU fiscal integration. As substantiated, in light of constitutional relevance, as well as based on political, economic and geographical considerations, the French, Spanish and Polish *constitutional identity limits* are assessed. Taken together, the result of this two-tiered comparison is a representative outline of the national constitutional space available for EU fiscal integration.

Once this comparative and analytical framework has been established, the second part *evaluates* and *determines* what form of EU fiscal integration is compatible with the charted national constitutional space (PART II). This requires first the identification of the most relevant and authoritative EU fiscal integration proposals. These proposals are subsequently deconstructed following a two-fold functional approach, which organizes the proposed fiscal integration steps first based on substantive elements and second based on the envisaged degree of EU control. Subsequently, the deconstructed EU fiscal integration steps are tested against the charted national constitutional space to determine their attainability. The resulting overview outlines possible constitutional conflicts and remedies to address such conflicts both at the national constitutional level as well as when devising these EMU reform plans.

Finally, the resulting concrete research findings are summarized and contextualized within the wider academic debate (Chapter IX). From the concrete findings, a general estimation is established as to how national constitutional systems can most effectively address EU integration steps that increasingly challenge the core of national constitutional orders. Furthermore, contextualizing the research allows for a wider reflection on the future of national constitutionalism in a changing global context – this may in itself require pioneering new national approaches in order to secure the protection of core constitutional values. Here, the research concludes that EU cooperation can play a crucial role if national constitutional authorities are willing to alter their perception of EU integration both by firmly embracing its added benefit for national constitutional law and by acknowledging that increasing EU integration creates a new decision-making space that would not be available without supranational cooperation.

Taken together, the research argues for a new legal-constitutional relationship between the national and the EU-level, which is built on the assumption that both legal-organizational layers are mutually reinforcing instead of mutually exclusive. To better reflect this reinforcing bond, the research proposes the initiation of a *Eurozone Forum of National Parliamentary Delegates* which would allow national parliaments to jointly discuss EU budgetary and fiscal matters at the EU-level before taking a national decision. The establishment of this *Forum* would create a supranational *institutional* platform that could render joint national parliamentary action more effective, for example by coordinating parliamentary votes within the yellow and orange card procedure.[129] Overall, this would allow for a more comprehensive involvement of national parliaments within the EU's institutional framework thereby addressing core national constitutional concerns relating to the potential bypassing of national parliaments and the criticized erosion of national democracy as a result of EU fiscal integration.

5 Constructing a resilient Euro within the national constitutional framework

The unfolding disastrous economic consequences of COVID-19 have once again put the Eurozone in the limelight; the current situation might even evolve into a new breaking-test for the single currency. The taken financial remedies may operate as breathing aid in the short run; however, they cannot provide the vaccine or cure required to correct the structural flaws in the current design of the Euro.[130] Hence, additional reforms, including especially further fiscal integration, are indispensable to establish a stable single currency in the long run. Yet, any EU fiscal integration runs into increasing national constitutional opposition. In order to refute the existence of the apparent dilemma between EU fiscal integration ambitions and existing national constitutional limits, this thesis provides a structured, comparative overview and outlook on how the available national constitutional space could be adapted to the political as-

129 Federico Fabbrini and Katarzyna Granat, ''Yellow Card, but no Foul': The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50 Common Market Law Review 115, 118-119; Although national parliaments already employ informal means of coordination, for example in the COSAC-framework, cf. Ian Cooper, 'A yellow card for the striker: national parliaments and the defeat of EU legislation on the right to strike' (2015) 22 Journal of European Public Policy 1406, 1412.

130 As initially proposed by the EU Five Presidents' Report and subsequently confirmed, cf. Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union*; Commission, *White Paper on the Future of Europe - Reflections and Scenarios for the EU27 by 2025* 24-25; Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union*; Cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union - Issues of Constitutional Law' 44-45; Fabbrini, 'Fiscal Capacity' 114-115.

pirations aiming at implementing EU fiscal integration steps by at the same time effectively protecting the national constitutional values at stake.

The research thereby makes a valuable contribution to both the legal-academic as well as political-societal debate on the future of the Euro. By identifying constitutionally feasible EU fiscal integration steps, this research can inform the EU constitutional legislator when devising concrete EMU-reforms. As substantiated, these reforms are essential to stabilize the single currency. Through the mapping of constitutionally attainable EU fiscal integration steps, the research therefore contributes to a genuine societal and economic objective, namely to transform the Euro into a crisis-resistant currency. Finally, as the research departs from the assumption that EU fiscal integration steps have to be devised within – and in due respect of – the existing national constitutional framework, it illustrates how national constitutional concerns and EU integration steps can be construed and understood in tandem rather than as two competing components.

PART I

Charting the national constitutional space

SECTION I

Macro-Comparative Assessment of Finland and Germany

INTRODUCING THE *MACRO-COMPARATIVE* ASSESSMENT

The national constitutional reception of the measures enacted during the Eurocrisis such as the Fiscal Compact, the ESM or the Six-Pack-Legislation varied considerably across Member States. For example, the Finnish Constitutional Law Committee established that all Eurocrisis-measures could ultimately be adopted by simple parliamentary majority which illustrates an apparent openness towards closer EMU-cooperation.[1] In contrast, the German Federal Constitutional Court raised severe constitutional concerns over an increasing EU influence on national budgetary and fiscal decision-making which are summarized in its *overall budgetary responsibility* concept.[2] These concerns were confirmed in the recent PSPP-judgment, where the Court declared that the challenged EMU-related EU acts constituted a transgression of the conferred mandate and were hence unconstitutional.[3]

Comparing both national constitutional approaches, it appears that these can be placed at two opposite points on the previously introduced linear scale

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1 Although the Constitutional Law Committee raised constitutional concerns in relation to a draft ESM-Treaty, cf. Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 174-175 para 39; Päivi Leino and Janne Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* (European University Institute - Law Department Project, 2014) VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247; Jokela, 'Finland: Towards a More Cautious Europeanization' 49.

2 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' paras 167-169, 177; Hans H. Klein, 'Art. 38 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 145-146; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? - Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Christian Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' (2012) 31 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1, 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 807.

3 *Quantitative Easing (PSPP) Final Judgment* paras 163, 234; Cf. as well: Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 818; Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 898; Kirchhof, 'Die Rechtsarchitektur der Europäischen Union' 2057.

that distinguishes between more flexible and more rigid constitutional approaches towards the prospect of EU integration. On that scale, Finland can be characterized as a more flexible constitutional system,[4] which stems from its institutional design[5] and an absence of substantive constitutional limitations to EU integration.[6] Notably, the Eurocrisis-related decisions of the Constitutional Law Committee indicate a particular focus on procedural safeguards that secure the comprehensive participation of the Finnish Parliament in EU decision-making.[7] By contrast, Germany can be located on the other end of that scale, given the authoritative institutional position of the Constitutional Court in the appraisal of EU law as well as the highlighted *eternity clause* that formulates an absolute restriction to the available space for EU integration steps.[8] Based on this clause, the Constitutional Court developed its *constitutional identity* review,[9] which gained particular importance in the constitutional

4 Grewe, 'Methods of Identification of National Constitutional Identity' 43; Markku Suksi, 'Finland' in Oliver Dawn and Carlo Fusaro (eds), *How Constitutions Change - A Comparative Study* (Hart Publishing 2011) 114.

5 As Finland has no constitutional court, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 76; Ojanen, 'Constitutional Amendment in Finland' 97.

6 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 324-325; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 26-27; Ojanen, 'Constitutional Amendment in Finland' 109.

7 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

8 *Lisbon-judgment* para 230; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686; Alexander Thiele, 'Die Integrationsidentität des Art. 23 Abs. 1 GG als (einzige) Grenze des Vorrangs des Europarechts' (2017) 52 Europarecht (EuR) 367, 371; Jaggi, 'Revolutionary Constitutional Lawmaking in Germany – Rediscovering the German 1989 Revolution' 619; On the difficulty to amend the *eternity clause*, cf. Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-145; Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 430; Tobias Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' (2012) 45 Zeitschrift für Rechtspolitik (ZRP) 33, 33; Burkhard Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' (2011) 43 Juristische Arbeitsblätter (JA) 885, 892; Jaques Ziller, 'The German Constitutional Court's Friendliness Towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' (2010) 16 European Public Law 53, 68.

9 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-146; Matthias Kottmann and Christian Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' (2009) 69 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 443, 447-448.

review of Eurocrisis-related measures.[10] Especially the financial implications of these measures triggered constitutional concerns regarding their compatibility with German democracy.[11]

From this indicative comparative overview, it can be deduced that the national means to address EU integration steps as well as strategies to control the constitutional impact of EU cooperation differ significantly in both Member States. Triggered by these apparent differences, the subsequent analysis will *chart*, *deconstruct* and *contrast* the Finnish and German constitutional framework for EU fiscal integration steps from a holistic perspective. In light of the constitutional handling of the mentioned Eurocrisis-related measures, the institutional and procedural framework applicable to EU integration measures as well as possible substantive limitations to such fiscal integration ambitions are evaluated. This assessment includes the localization and potentially activation of *constitutional flexibility* in order to possibly reduce national constitutional concerns against such integration steps. The result of this initial *macro-comparative* assessment is a clear overview of the respective Finnish and German constitutional approach to EU fiscal integration (Chapters II and III).

In a second step, both constitutional approaches are compared and contrasted in order to identify the opportunities and risks that each respective system entails for EU fiscal integration proposals, including the determination of potential national *best practices* (Chapter IV). These *best practices* are characterized as approaches that offer an effective protection to the underlying national constitutional value by yet allowing for EU integration. Specifically, as further substantiated in the *Second Part* of this dissertation, EU cooperation might in fact offer an important means for national constitutions to attain constitutional aims and secure constitutional principles in a globalized international context. At the same time, the capability of *best practices* stemming from one Member States to modify strict constitutional limits established in another Member States ultimately depends on the national constitutional order – particularly national constitutional courts. The comparative assessment in this Section concludes that the German *constitutional identity* limit appears to be the most severe constitutional limiting factor which imposes an absolute

10 A tendency that can be observed across different EU Member States, cf. Antti Suvanto and others, *Improving the resilience of Europe's Economic and Monetary Union (37b/2015)* (Finnish Ministry of Finance Publications, 2015) 60; Hinarejos, 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration ' 14.

11 Based on the initial findings of the Court in its *Lisbon*-judgment, cf. *Lisbon-judgment* paras 252, 256; Most recently reiterated: *Quantitative Easing (PSPP) Final Judgment* paras 103-104; Cf. as well: Calliess, 'Constitutional Identity in Germany - One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? - Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court - Repositioning the Court within the European Constitutional Architecture' 408; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

restriction to the prospect of EU fiscal integration.[12] Subsequently, this comparative conclusion serves as basis for the *micro-comparative* assessment in Section II.

12 *Lisbon-judgment* paras 249-252; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 296-297; Murkens, 'Identity Trumps Integration – The Lisbon Treaty in the German Federal Constitutional Court' 519; The *eternity clause* can only be overcome following the complete replacement of the constitutional text, cf. Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

II Macro-Comparative Assessment of Finland

1 FINLAND AND EU INTEGRATION

The Eurocrisis can be described as a drastic turning point in the Finnish political debate on EU integration. Since Finnish accession to the EU in 1995, the country was praised as a commendable EU Member State.[1] From its inception, EU membership was perceived as beneficial and supported by a cross-party, political consensus.[2] This consensus translated into a positioning at the center of the EU, which made possible opt-outs from integration steps politically undesired[3] and which *inter alia* resulted in the introduction of the Euro in 2002.[4] An apparent underlying motive of this strong commitment to EU cooperation is to compensate for Finland's geographical position at the EU's periphery as well as to obtain political insurances against possible interferences from neighboring Russia.[5] Therefore, EU membership continues to entail

1 Tapio Raunio, 'Refusing to Be Sidelined: The Engagement of the Finnish *Enduskunta* in Foreign Affairs' (2016) 39 Scandinavian Political Studies 312, 316; Juha Jokela, *Finland and the Eurozone Crisis* (Palgrave Macmillan 2014) 29; Jokela, 'Finland: Towards a More Cautious Europeanization' 40.

2 Sanna Salo and Jens Rydgren, 'Politicisation of the Eurozone Crisis in Finland: Adaptation Toward the Radical Right?' (2018) 34 Journal of International and Comparative Social policy 234, 243; Raunio, 'Refusing to Be Sidelined: The Engagement of the Finnish *Enduskunta* in Foreign Affairs' 316; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 451; Ojanen, 'Constitutional Amendment in Finland' 95.

3 Jokela, *Finland and the Eurozone Crisis* 26; Jokela, 'Finland: Towards a More Cautious Europeanization' 39-40; Teija Tiilikainen, 'Finland - An EU Member State With a Small State Identity' (2006) 28 Journal of European Integration 73, 77-78; Tapio Raunio and Teija Tiilikainen, *Finland in the European Union* (Frank Cass Publishers 2003) 13.

4 Jokela, *Finland and the Eurozone Crisis* 29; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 455; Jokela, 'Finland: Towards a More Cautious Europeanization' 48; Tiilikainen, 'Finland - An EU Member State With a Small State Identity' 78.

5 Salo and Rydgren, 'Politicisation of the Eurozone Crisis in Finland: Adaptation Toward the Radical Right?' 243; Mark C. Miller, 'Finnish Judges and the European Union: An American Perspective' (2016) 24 Michigan State International Law Journal 495, 498; Jokela, *Finland and the Eurozone Crisis* 29.

tangible geopolitical benefits for Finland, which initially resulted in a pragmatic approach to supranational cooperation.[6]

At the national constitutional level, EU membership coincided with and contributed to a more general process of fundamental constitutional transformation[7] which *inter alia* established the Finnish Parliament as central national actor in all EU-related decisions.[8] Notably, under the new constitutional framework the Finnish Parliament has to approve the conferral of competences to the EU and it is subsequently involved in the domestic *ex ante* preparation of EU secondary law.[9] As can be deduced from this involvement, the Finnish Constitution appears to extend internal parliamentary prerogatives to international and EU cooperation, too. But the highlighted constitutional transformation did not only impact the procedural rules established within the Finnish Constitution. It equally introduced a more flexible interpretation of substantive constitutional principles, most prominently Finnish sovereignty.[10] Overall, this illustrates that the Finnish constitutional system actively addressed the constitutional challenges that resulted from increasing supranational cooperation and the constitution-amending legislator in fact seized the opportunity to integrate the Finnish Constitution into a globalizing reality.

An important institutional particularity of the Finnish constitutional order that contributes to the identified constitutional openness towards EU cooperation, is the Finnish Constitutional Law Committee, which conducts constitutional review in Finland. The Committee adopted a comparably flexible interpretation of Finnish constitutional principles and it refrained until now

6 Which can be, for example, deduced from the Finnish support for increasing EU qualified majority voting, cf. Tiilikainen, 'Finland - An EU Member State With a Small State Identity' 79-80; Raunio and Tiilikainen, *Finland in the European Union* 14.

7 Which culminated in the 2000 constitutional reform, cf. Suksi, 'Finland' 88.

8 As now enshrined in Sections 94, 95 and 96 Finnish Constitution, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459; Ojanen, 'Constitutional Amendment in Finland' 102; And as EU matters are now governmental and not presidential matters, cf. Suksi, 'Finland' 111-112.

9 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 456-457; Ojanen, 'The Europeanization of Finnish Law' 168-171; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 554-556. Raunio and Tiilikainen, *Finland in the European Union* 86.

10 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334-335; Tuomas Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' in Kimmo Nuotio, Melander Sakari and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (University of Helsinki 2012) 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 540-541.

from imposing substantive limits to Finnish EU integration efforts.[11] The reluctant constitutional scrutiny appears to result from a strong focus on parliamentary sovereignty[12] rendering the Finnish legal order highly receptive to EU integration proposals. Taken together, all three outlined aspects coin the apparent political and constitutional dedication to EU cooperation and the constructive, pro-EU approach adopted in Finland over time.

However, the eruption of the Eurocrisis changed this relatively unquestioned dedication to EU cooperation. It triggered an intense national debate on how to best react to the then unfolding crisis which prominently featured in the 2011 Finnish parliamentary election[13] and which resulted in a clear electoral success of the Euroskeptical 'Finns'-party.[14] The 'Finns' obtained 39 out of the 200 parliamentary seats, a share it could largely defend in the 2015 and 2019 parliamentary elections.[15] This implies that significantly more Euroskeptical voices have been represented in the Finnish Parliament since 2011, which altered the political debate and impacted the EU-agenda of the established political parties.[16] Given that the Eurocrisis was the most important non-domestic matter fueling the electoral success of the 'Finns' in

11 Which was confirmed in the Finnish statements on the Eurocrisis-measures, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Instead, the Constitutional Law Committee strengthened through its review the institutional role of the Finnish Parliament, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 392; Although, the financial ability to comply with internal constitutional obligations in relation to social and health care might transform into such a constitutional limitation, as noted by: Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

12 Suksi, 'Finland' 88, 97.

13 Salo and Rydgren, 'Politicisation of the Eurozone Crisis in Finland: Adaptation Toward the Radical Right?' 243; Jokela, *Finland and the Eurozone Crisis* 36; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 455; Ojanen, 'Constitutional Amendment in Finland' 95.

14 Note, the political party was previously called the 'True Finns'.

15 The party received 19,1% of the votes in 2011 compared to 4,05% in 2007, cf. Salo and Rydgren, 'Politicisation of the Eurozone Crisis in Finland: Adaptation Toward the Radical Right?' 243; Jokela, *Finland and the Eurozone Crisis* 33; Jokela, 'Finland: Towards a More Cautious Europeanization' 49; Ojanen, 'Constitutional Amendment in Finland' 95; Juha Jokela and Kaisa Korhonen, *A Euroscpetic Big Bang - Finland's EU Policy in Hindsight from the 2011 Elections* (The Finnish Institute of International Affairs 2012) 3.

16 Tuomas Iso-Markku, 'Finland - Pro-European Arguments Prevail Despite the Rise of Euroscepticism' in Karlis Bukovskis (ed), *Euroscepticism in Small EU Member States* (Zinātne 2016) 65, 73; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 455; Jokela, 'Finland: Towards a More Cautious Europeanization' 49; A more critical stance towards the EU amongst the Finnish people was seemingly already apparent before 2011, but simply not reflected by the political parties, cf. Husa, *The Constitution of Finland - A Contextual Analysis* 36.

2011,[17] other political parties altered their positions and embraced a more critical stance towards the EU as well. Despite the changed tone in the political appreciation of EU cooperation, which was recently showcased in the negotiations of Next Generation EU,[18] the constitutional system itself, however, remains open for EU integration. This enabled the Finnish Parliament to play an influential role in the drafting of the various Eurocrisis-measures[19] and allowed the Constitutional Law Committee to refrain from imposing substantive limitations to EU integration ambitions.[20] This confirms the identified flexible legal-constitutional nature of the Finnish constitutional order, which proved adaptive towards EU cooperation.[21]

The following assessment will focus on this apparent *constitutional flexibility* by analyzing the structural constitutional framework for EU cooperation (2.) as well as the procedural (3.) and substantive constitutional framework (4.) that EU fiscal integration proposals are confronted with. As indicated, a particular focus will rest on charting the flexible constitutional handling of the Eurocrisis. Contouring the high degree of *constitutional flexibility* will subsequently help to determine whether and to what extent Finnish flexibility could serve as a *best practice* example for other constitutional systems.

2 Introducing the Finnish Constitutional Order

Finnish accession to the EU entailed a firm political commitment to the EU's values and an economic orientation towards the EU single market. It required a renunciation of the policy of 'active neutrality' that Finland followed during

17 Salo and Rydgren, 'Politicisation of the Eurozone Crisis in Finland: Adaptation Toward the Radical Right?' 243.

18 As Finland partly sided with the *frugal four*, cf. Dolores Utrilla, 'Insight: 'The European Deal for Post-Pandemic Economic Recovery: Content and Meaning'' (*EU Law Live*, 21 July 2020)<https://eulawlive.com/the-european-deal-for-post-pandemic-economic-recovery-content-and-meaning/> accessed 20 December 2020.

19 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458, 478.

20 As previously highlighted, cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 324-325; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 26-27; Ojanen, 'Constitutional Amendment in Finland' 109; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463.

21 Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 222; Ojanen, 'The EU at the Finnish Constitutional Arena' 242; Länsineva, 'Fundamental Principles of the Constitution of Finland ' 111; Suksi, 'Finland' 114; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 534-535.

the Cold War.[22] Therefore, the Finnish commitment to EU integration can be characterized as genuine political decision, confirmed by public referendum,[23] which translated into the already highlighted constructive approach to EU cooperation.[24]

At the same time, Finland acceded to a highly integrated EU, which had just ratified the Maastricht Treaty that transformed the Community into a Union. Contentious concepts such as the direct effect or primacy of EU law were (judicially) established.[25] In short, EU cooperation was politically, economically and legally advanced, which challenged the Finnish Constitution – as it stood during accession – that did not contain a constitutional framework for supranational or international cooperation. The doctrine of absolute sovereignty, then proclaimed in Section 1 (1) Finnish Constitution, seemingly excluded the transfer of competences to the supranational level, which rendered EU membership incompatible with the constitutional text.[26] Finnish EU membership was only constitutionally achievable by adopting a limited constitutional derogation, so-called 'exceptive enactment'.[27] At the same time, it can be submitted that accession to such highly integrated EU entailed for

22 Coined by the term 'active neutrality', cf. Frank Emmert and Siniöa Petroviæ, 'The Past, Present, and Future of EU Enlargement' (2014) 37 Fordham International Law Journal 1349, 1372; Tiilikainen, 'Finland - An EU Member State With a Small State Identity' 76; Raunio and Tiilikainen, *Finland in the European Union* 12, 21; A. Rosas, 'Finland - Finland's Accession to the European Union: Constitutional Aspects' (1995) 1 European Public Law 166, 166; For a thorough overview of the Finnish 'neutrality' policy over time: cf. Miller, 'Finnish Judges and the European Union: An American Perspective' 500; Juha Jokela, *Europeanization and Foreign Policy* (Routledge 2011) 46.

23 In a public referendum 56,9% voted in favor of EU accession, cf. Emmert and Petroviæ, 'The Past, Present, and Future of EU Enlargement' 1373; Ojanen, 'The EU at the Finnish Constitutional Arena' 244; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 537; For the absolute numbers, cf. Rosas, 'Finland - Finland's Accession to the European Union: Constitutional Aspects' 166.

24 Characterised as most constructive approach to EU integration of all Nordic countries, cf. Jokela, *Finland and the Eurozone Crisis* 26, 30; Also referred to as 'community-centred approach', cf. Tiilikainen, 'Finland - An EU Member State With a Small State Identity' 78.

25 Miller, 'Finnish Judges and the European Union: An American Perspective' 519.

26 As Section 1 (1) Finnish Constitution proclaimed absolute sovereignty, cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 331-332; Ojanen, 'The EU at the Finnish Constitutional Arena' 245-246; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 100; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 216; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 537.

27 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 364; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 344; Suksi, 'Finland' 94; Rosas, 'Finland - Finland's Accession to the European Union: Constitutional Aspects' 168.

Finland a constitutional *ad hoc* adaptation which was based on a clear political decision in favor of EU membership.[28] This experience is fundamentally different to that of the EU founding Member States, whose constitutional systems had to evolve alongside EU integration.[29] Subsequently, it enabled the Finnish constitution-amending legislator to reform the Finnish Constitution in light of the new EU obligations.[30] The resulting amended Finnish Constitution provides for a clear balancing of national with EU interests and for the active national parliamentary involvement in the EU decision-making process. The precise reform process, which contributed to this 'Europeanization' of Finnish constitutional law,[31] will be subsequently outlined in order to investigate the evolutionary potential of the Finnish Constitution.

2.1 Finnish constitutional reforms to accommodate EU cooperation

When Finland acceded to the EU, the Constitutional Act of 1919 was still in force. The Act was adopted following Finnish independence from Russia,[32] which was reflected in its design. Notably, the Constitutional Act focused on the internal organization of state power. The apparent constitutional intro-

28 Miller, 'Finnish Judges and the European Union: An American Perspective' 519; Raunio and Tiilikainen, *Finland in the European Union* 2-3; More generally, cf. C. Curti Gialdino, 'Some Reflections on the *Aquis Communautaire*' (1995) 32 Common Market Law Review 1089, 1090-1091.

29 Notably, new Member States are required to accept a fully developed legal framework, whereas the founding Member States developed this framework and their legal systems evolved alongside, cf. Gerda Falkner, 'How Pervasive Are Euro-Politics? Effects of EU Membership on a New Member State' (2000) 38 Journal of Common Market Studies 223, 224; On the Finnish experience: Raunio and Tiilikainen, *Finland in the European Union* 4.

30 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 456-457; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 100-101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 563.

31 Husa, *The Constitution of Finland - A Contextual Analysis* 24; A process, which however already started before EU membership with the accession to the ECHR and the EEA, cf. Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 International Journal of Constitutional Law 505, 512-513; Ojanen, 'The Europeanization of Finnish Law' 145-146; The term 'Europeanization' refers to the transformative impact of EU law on the national legal order, cf. Paul Luif, 'Grundlagen der Analyse' in Paul Luif (ed), *Österreich, Schweden, Finland - Zehn Jahre Mitgliedschaft in der Europäischen Union* (Böhlau Verlag 2007) 18-21.

32 Finland declared its independence from Russia in late 1917, cf. Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 164 para 9; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 276; Suksi, 'Finland' 92; For a general overview of Finnish history, cf. Raunio and Tiilikainen, *Finland in the European Union* 9-11.

version cumulated in the conception of Finnish sovereignty as an absolute constitutional principle established in Section 1 (1) Constitutional Act.[33] Historically, Section 1 (1) Constitutional Act constituted the constitutional confirmation of Finnish independence from Russia and it anticipated Finland's new international role amongst other sovereign states.[34] The absolute conception of Finnish sovereignty, however, collided with Finnish EU membership[35] and led to the indicated constitutional reforms that equipped the Finnish Constitution for EU as well as international cooperation.[36] This thorough reform process was initiated after Finnish accession to the European Convention of Human Rights (ECHR) in 1989 as well as Finnish EU membership in 1995, and it was completed in 2012 with the explicit acknowledgment of EU membership in Section 1 (3) Finnish Constitution.[37]

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33 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 280, 331-332; Ojanen, 'The EU at the Finnish Constitutional Arena' 245-246; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 100; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 216; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 537.

34 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 280.

35 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 364; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 344; Ojanen, 'The EU at the Finnish Constitutional Arena' 244; Ojanen, 'Constitutional Amendment in Finland' 105; Husa, *The Constitution of Finland - A Contextual Analysis* 22; Rosas, 'Finland - Finland's Accession to the European Union: Constitutional Aspects' 168.

36 In particular the acknowledgement of the 'specificity of the EU' and the conception of EU membership as 'exercising Finland's sovereign powers', cf. Miller, 'Finnish Judges and the European Union: An American Perspective' 501; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 301; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 218-219; Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' 134; The Finnish discussion emphasizes that a shared exercise of sovereignty at the EU-level allows for greater reach of Finnish sovereign powers, cf. Husa, *The Constitution of Finland - A Contextual Analysis* 37.

37 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 456; On the first two stages of the constitutional reform process, cf. Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 170-171 paras 27-29; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 217-218.

The current constitutional text qualifies Finnish sovereignty and explicitly mentions the possibility to engage in international and EU cooperation (Section 1 (3) Finnish Constitution).[38] Furthermore, it establishes a specific procedural framework for the conferral of competences to the EU (Sections 94 and 95 Finnish Constitution) and it lays down a procedural framework for parliamentary involvement in the national preparation of EU matters (Section 96 Finnish Constitution), including a parliamentary right to be informed on EU developments (Section 97 Finnish Constitution). The reform also introduced a limited *ex post* judicial review of legislative acts (Section 106 Finnish Constitution). In addition, it modified the power-balance between the Finnish President and the Finnish Government, as the Finnish Constitution now explicitly characterizes EU affairs as governmental prerogatives (Section 93 (2) Finnish Constitution).[39] Thus, the reform cemented the departure from a 'presidential democracy' to an increasing dominance of the Finnish Parliament and the Finnish Government, which is confirmed by and dependents on the support of a parliamentary majority.[40]

2.2 The Finnish Constitutional Law Committee

The most authoritative Finnish actor in constitutional matters is the parliamentary Constitutional Law Committee.[41] This *quasi-judicial* authority assesses the compatibility of proposed national legislation and EU law with the Finnish

38 Note also the 'special status' that the Constitutional Law Committee awards to the EU in its decisions, cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 301; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 218.

39 Suksi, 'Finland' 112; The Finnish Government depends on continuous parliamentary support and can face a vote of no-confidence if parliament loses trust into the governmental work according to Section 43 (2) Finnish Constitution cf. Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556; Generally speaking, the Finnish model is based on broad parliamentary support, cf. Ojanen, 'Constitutional Amendment in Finland' 65; Raunio and Tiilikainen, *Finland in the European Union* 45.

40 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 285; Ojanen, 'The EU at the Finnish Constitutional Arena' 247-248; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 547-548.

41 In Finnish: *Perustuslakivaliokunta*.

Constitution.[42] The Committee's precise mandate is enshrined in Section 74 Finnish Constitution,[43] which establishes:

> 'The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.'

Although its institutional mandate can be compared to other constitutional authorities in the EU, the Constitutional Law Committee is peculiar in several regards. It is a standing committee of the Finnish Parliament composed of 17 parliamentarians.[44] Therefore, its composition changes after every parliamentary election.[45] Furthermore, the Committee's members are not required to have any legal qualification.[46] To ensure continuity and legal expertise, the Committee is assisted by a permanent secretary, composed of civil servants

42 Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 219; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 172 para 32; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 324; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 26; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 453; Ojanen, 'Constitutional Amendment in Finland' 96; Ojanen, 'The EU at the Finnish Constitutional Arena' 252; Juha Lavapuro, 'Constitutional Review in Finland' in Kimmo Nuotio, Melander Sakari and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (University of Helsinki 2012) 132; Suksi, 'Finland' 91; Lavapuro, Ojanen and Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' 510-511.

43 The function of the Constitutional Law Committee is traditionally occupied by constitutional courts, cf. Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 219; Ojanen, 'The EU at the Finnish Constitutional Arena' 252; Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' 140; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 204-205.

44 As established in Sections 35(1) and 74 Finnish Constitution, cf. Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 226; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 29; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459-460; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 532.

45 Although, traditionally members are re-elected into the Committee to guarantee stability, cf. De Visser, *Constitutional Review in Europe - A Comparative Analysis* 29.

46 Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 172 para 33; Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 226.

with constitutional expertise.[47] In addition, the Committee consults constitutional law experts, which provide it with legal arguments.[48] Although the final decision is taken by the 17 parliamentarians, the consulted experts have a major impact on the decision.[49]

As the Constitutional Law Committee is a parliamentary committee, its constitutional review is embedded in the parliamentary process. Upon referral by either the plenary, based on governmental recommendation,[50] or by a specialized parliamentary committee,[51] the Constitutional Law Committee engages with the constitutional questions put before it.[52] Hence, the Committee cannot act *ex officio* or request a referral.[53] Furthermore, its statements are embedded in the parliamentary process, which results in the adoption of a 'final' parliamentary decision. Given that the considered matters are not yet enacted laws when assessed by the Committee, the Committee's review is only

47 Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 173 para 34; Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 226; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 27.

48 Despite the fact that this consultation is not prescribed by law, but merely optional as laid down in Section 37 Rules of Procedure, the Constitutional Law Committee routinely consults constitutional law experts, cf. Tuomas Ojanen, '§ 296: Grundrechte in Finland' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa - Band X (Grundrechte in West-, Nord- und Südeuropa)* (C.F. Müller 2018) 380 para 122; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 172 para 35; Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 226; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; Ojanen, 'The EU at the Finnish Constitutional Arena' 252.

49 Which raised concerns regarding the dominance of a small selection of constitutional professors, cf. Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 173-174 para 36; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 27.

50 Following Section 6 No. 2 Rules of Procedure and subsequently approved by the parliament's plenary according to Section 32 (1) (2) Rules of Procedure; Cf. Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 176 para 44; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 27; Suksi, 'Finland' 102.

51 Suksi, 'Finland' 102; For example, as part of the procedure established in Section 96 Finnish Constitution, cf. Ojanen, 'Constitutional Amendment in Finland' 109; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 555; As exemplified during the Eurocrisis in relation to the EU Six-Pack legislation, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 460.

52 As established in Section 38 (2) Rules of Procedure, cf. Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 177 paras 45-46; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 27.

53 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325.

exercised in an abstract, anticipatory *ex ante* manner,[54] which prevents the materialization of constitutional conflicts as the Committee considers *draft* legislation or EU commitments prior to their adoption.

Once the Constitutional Law Committee adopts a statement, it is either communicated to the plenary or the referring parliamentary committee. Traditionally, statements are formulated in a formalistic fashion in order to minimize political debates and to allow for unanimous support.[55] In its statements, the Committee includes a general assessment of the matter as well as suggestions for potential amendments and the applicable procedural requirements.[56] Overall, the statements are widely respected and considered as constitutionally binding, although formally lacking legal binding force.[57] At the same time, the statements are not intended to establish strict constitutional limits. Instead, the Finnish Parliament can employ the available *constitutional flexibility* in order to overcome possible constitutional concerns, by adopting an exceptive enactment or by initiating constitutional amendments, as outlined subsequently. The Finnish Constitutional Law declared, for example, the EU Accession Treaty to be in conflict with the Finnish Constitution, yet, the Finnish Parliament could overcome this conflict by adopting the Treaty through exceptive enactment by two-thirds majority.[58]

Overall, this indicates that the Constitutional Law Committee is peculiar regarding its composition, its embedment in the parliamentary process and

54 As it is a parliamentary committee involved in the drafting of legislation, cf. Ibid 324-325; Ojanen, 'The EU at the Finnish Constitutional Arena' 251-252; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 324.

55 Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 178 para 50; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 29.

56 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 27-28; Without, however, directly including these changes into the referred proposal itself, cf. Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 178-179 para 51.

57 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 27-28; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459-460.

58 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 364; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 537; Niilo Jääskinen, 'The Application of Community Law in Finland: 1995-1998' (1999) 36 Common Market Law Review 407, 409-410; Rosas, 'Finland - Finland's Accession to the European Union: Constitutional Aspects' 168.

the effect of its decisions.[59] This institutional design appears to reflect the strong constitutional position of the Finnish Parliament within the Finnish constitutional order.[60] Hence, the review of the Constitutional Law Committee is not intended to limit parliamentary action within certain preordained substantive boundaries, including in EU matters, but instead to ensure the sound exercise of the parliament's constitutionally secured prerogatives, which includes altering the substantive interpretation of constitutional provisions by, for example, exceptive enactment.[61]

2.3 Interim conclusion: Constitutional embracement of EU membership

Taken together, the implemented national constitutional reforms transformed the Finnish constitutional order into an outward looking constitutional system that embraces EU membership. The constitutional text provides for comprehensive parliamentary involvement in EU decisions, which ensures that the conferral of powers to the EU-level is not equated with a loss of influence for the Finnish Parliament. The open outlook of the Finnish constitutional system on EU cooperation is also fostered by the decisions of the Constitutional Law Committee. Given that this parliamentary committee considers the constitutionality of EU commitments *ex ante*, possible constitutional obstacles can be identified and removed in the parliamentary process.

3 Procedural and institutional framework applicable to EU fiscal integration

The Finnish Constitution contains different procedures to engage with EU cooperation. These distinguish between the conferral of new competences to the EU (Sections 94-95 Finnish Constitution) and the exercise of already conferred competences (Sections 96-97 Finnish Constitution), as illustrated in *Figure 5*. As the precise design of future EU fiscal integration may either require

59 Ojanen, '§ 296: Grundrechte in Finland' 380 para 122; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 179 para 53; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 26.

60 Ojanen, 'The EU at the Finnish Constitutional Arena' 254; Lavapuro, Ojanen and Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' 509.

61 As showcased during the Eurocrisis, cf. Klaus Tuori and Juha Raitio, 'Finland' in Ulla Neergaard;, Catherine Jacqueson; and Jens Hartig Danielsen (eds), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU (The XXVI FIDE Congress in Copenhagen)*, vol 1 (DJØF Publishing Copenhagen 2014) 331; As the Constitutional Law Committee mainly focussed on the procedural implications of the different measures, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463.

new EU competences or the use of conferred competences, the subsequent analysis outlines the procedural framework for the conferral of budgetary and fiscal competences (3.1.), the adoption of EU secondary law (3.2.) and the conducted constitutional review (3.3.).

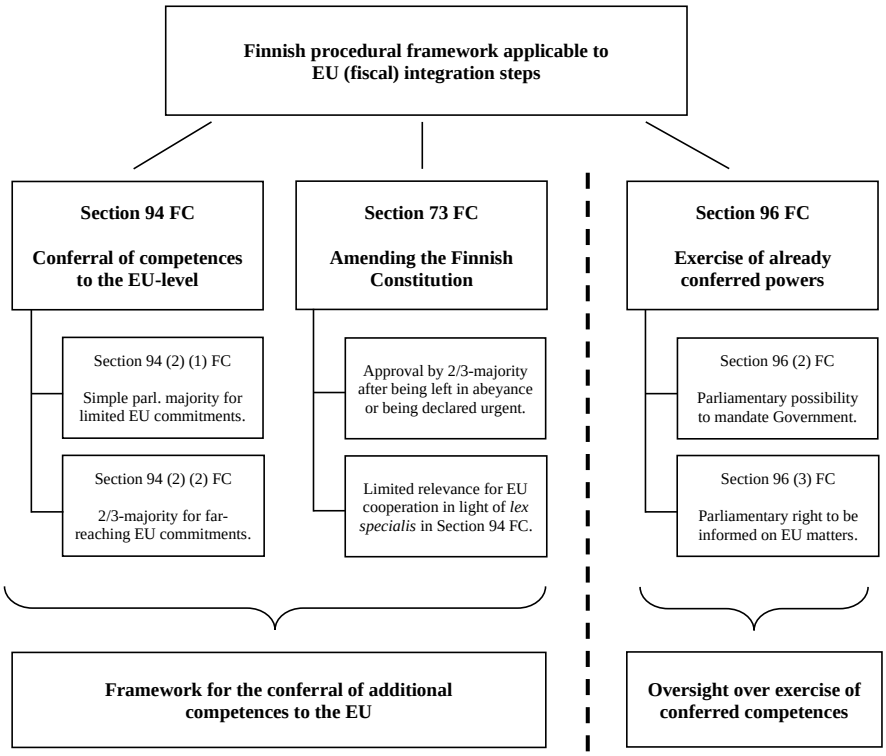

Figure 5: Finnish Procedural Framework for EU fiscal integration steps

3.1 Transferring budgetary and fiscal competences to the EU

Section 94 Finnish Constitution explicitly regulates the transfer of competences to the EU.[62] This procedure can be classified as a *lex specialis* to Section 73 Finnish Constitution, which governs constitutional amendments. While Section 94 Finnish Constitution seems to constitute the most relevant basis for the conferral of powers to the EU, the subsequent assessment will equally consider

62 Ojanen, 'The EU at the Finnish Constitutional Arena' 247; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 206.

Section 73 Finnish Constitution, which could provide an additional constitutional basis to accommodate EU fiscal integration steps in Finland.[63]

3.1.1 *Preliminary step: Scope for EU cooperation*

As a preliminary step, Section 1 (3) (1) Finnish Constitution prescribes that Finland only participates in international cooperation that serves '[...] the protection of peace and human rights and [...] the development of society'. Thus, international cooperation is connected to broader constitutional aims. In light of the broad framing, the Constitutional Law Committee appears to take a lenient approach and deems the requirement easily fulfilled.[64]

Furthermore, Section 1 (3) (2) Finnish Constitution now explicitly mentions Finnish EU membership, which might even render the application of the scope restriction superfluous. In any case, fiscal integration proposals aim to stabilize the Eurozone and therefore contribute to the development of society, which corresponds to the requirements listed in Section 1 (3) (2) Finnish Constitution.

3.1.2 *Conferral of competences under Section 94 Finnish Constitution*

As indicated, the primary basis for conferring competences to the EU is Section 94 Finnish Constitution. The provision lists three different situations to which it applies. First, it applies in case the envisaged conferral contains provisions of 'legislative nature'. Although the Finnish Constitution does not explicitly define this concept, its meaning can be deduced systematically. Section 3 (1) Finnish Constitution establishes that all legislative power is exercised by the Finnish Parliament, which suggests that legislative power is a parliamentary prerogative. This legislative power is exercised by adopting 'acts' following the prescribed procedure in Section 70 Finnish Constitution. In addition, Section 2 (3) Finnish Constitution clarifies that the exercise of all public power has to be based on parliamentary acts. This extends in particular to measures that affect 'the rights and obligations of private individuals', which have to be established in their core content by a legislative act according to Section

63 Particularly, the institute of exceptive enactment was of crucial importance for adopting and implementing EU obligations in the past, cf. Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 180-181 para 57; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 307-308, 344; Ojanen, 'The EU at the Finnish Constitutional Arena' 244; Rosas, 'Finland - Finland's Accession to the European Union: Constitutional Aspects' 168.

64 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 336; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366.

80 (1) (2) Finnish Constitution.[65] Overall, this suggests that EU integration steps, which provide the supranational level with the ability to enact directly applicable, binding rules concerning the exercise of public power, are legislative in nature and require parliamentary approval. Second, the provision applies in case the EU commitment affects matters that require parliamentary approval according to the Finnish Constitution. An example is the prerogative to establish the annual budget, which is assigned to the Finnish Parliament according to Section 3 (1) in conjunction with Section 83 (1) Finnish Constitution.[66] And third, it applies in case the EU commitment contains provisions that are otherwise significant, which is broadly interpreted by the Constitutional Law Committee as a sort of *catch-all-clause*.[67]

Considering this wide framing, it is likely that EU fiscal integration proposals that involve the conferral of powers to the EU require parliamentary approval under Section 94 Finnish Constitution. Notably, budgetary and fiscal competences are currently assigned to the Finnish Parliament, following Section 3 (1) in conjunction with Chapter 7.[68] These matters concern decisions that require parliamentary approval under the second mentioned alternative, which prompted the application of Section 94 Finnish Constitution in relation to various Eurocrisis-measures.[69] Therefore, it seems highly likely that EU

65 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 305; Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* V.2.; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458.

66 Section 3 (1) Finnish Constitution establishes firstly that the parliament exercises legislative power and, subsequently, that it decides on the State finances – which suggests that both matters are different in nature.

67 Exemplified with the Eurocrisis-measures, which were considered by the Committee as EU obligations to secure wide parliamentary involvement despite their (partly) intergovernmental nature, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458.

68 For example highlighted by the Constitutional Law Committee in: PeVL 13/2012 vp *Final Assessment Draft ESM-Treaty (III.)* [2012] (Finnish Constitutional Law Committee) 2; PeVL 49/2010 vp *Adoption of the EU Six-Pack Legislation* [2010] (Finnish Constitutional Law Committee) 3; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

69 For the opinions of the Committee in chronological order: *Adoption of the EU Six-Pack Legislation*; PeVL 1/2011 vp *First Assessment Draft ESM-Treaty (I.)* [2011] (Finnish Constitutional Law Committee); PeVL 5/2011 vp *Amendment to the EFSF (Increase in State Guarantee)* [2011] (Finnish Constitutional Law Committee); PeVL 6/2011 vp *Amendment of Article 136 (3) TFEU* [2011] (Finnish Constitutional Law Committee); PeVP 11/2011 vp *Protocol on the EFSF* [2011] (Finnish Constitutional Law Committee); PeVL 22/2011 vp *Second Assessment Draft ESM-Treaty (II.)* [2011] (Finnish Constitutional Law Committee); PeVL 24/2011 vp *Preliminary Assessment of Fiscal Compact (I.)* [2012] (Finnish Constitutional Law Committee); PeVL 3/2012 vp *Additional Amendment to the EFSF* [2012] (Finnish Constitutional Law

fiscal integration proposals would also have to be approved by the Finnish Parliament following this procedure.

Once it is established that parliamentary approval is required, the significance of the envisaged competence transfer is crucial to determine the applicable majority requirement.[70] Section 94 (2) Finnish Constitution imposes a two-thirds majority requirement for EU commitments that conflict with fundamental constitutional doctrines, whereas, all other obligations merely require approval by simple majority. Section 94 (2) (2) Finnish Constitution states:

> 'However, if the proposal concerns the Constitution or an alteration of the national borders, or such transfer of authority to the European Union, an international [organization] or an international body that is of significance with regard to Finland's sovereignty, the decision shall be made by at least two thirds of the votes cast.'

The provision determines three cases that trigger the stricter parliamentary threshold. First, a qualified majority is required in case an EU obligation directly affects the Finnish Constitution. Such conflict is given in case constitutional principles or constitutional provisions are altered or modified by the envisaged EU obligations.[71] It can be submitted that in this case the internally applicable requirements for constitutional amendments enshrined in Section 73 (1) Finnish Constitution are extended to EU cooperation. Internally, the Finnish Constitution requires a qualified majority requirement for the amendment of the constitutional text.[72] Thus, whenever such constitutional amend-

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Committee); *Final Assessment Draft ESM-Treaty (III.)*; PeVL 37/2012 vp *Final Assessment of Fiscal Compact (II.)* [2012] (Finnish Constitutional Law Committee); On the ESM-Treaty assessment, which triggered the widest constitutional concerns, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

70 Cf. the different thresholds established by Section 94 (2) Finnish Constitution, Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366-367; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

71 Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 224.

72 Cf. Section 73 (1) Finnish Constitution establishes an even higher threshold, given that the matter has to be either approved by two consecutive parliaments or declared urgent by a five-sixths majority; however, under the 1919 Finnish Constitution, a special threshold for accepting international cooperation was recognised under Section 69 (1) Parliament Act of 1928, merely imposing a two-thirds threshold for constitutionally relevant international obligations, cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of*

ments occur due to EU commitments a qualified majority is equally required. Second, an alteration of the Finnish border has to be approved by qualified majority. And third, competence transfers that are significantly affecting Finnish sovereignty require approval by a two-thirds majority.

A thorough assessment of the principle of sovereignty will be conducted further below.[73] Here, it can be concluded that under the current understanding of Finnish sovereignty[74] a transfer of authority is significant in case it either transfers decision-making abilities to the EU-level, which can be exercised independently from any Finnish control, or in case the EU would be transformed into an entirely new entity.[75] Considering the third mentioned qualification, significant overlap with the first one can be observed, as the principle of sovereignty is established in Section 1 (1) Finnish Constitution, and an alteration of this principle would therefore equally 'concern the Constitution'. Consequently, the separate mentioning of sovereignty might indicate, on the one hand, that the principle of sovereignty enjoys elevated constitutional importance. On the other hand, it might indicate that EU cooperation involves a particular risk for national sovereignty, which is explicitly recognized by the constitutional legislator. All other competence transfers, can be approved by simple majority following Section 94 (2) (1) Finnish Constitution.[76]

Hence, the extent and significance of the envisaged conferral is important to determine the applicable majority threshold, which is conducted by the Constitutional Law Committee.[77] As indicated, EU fiscal integration steps will

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Sovereignty in Finland and Certain other EU Member States 291; Rosas, 'Finland - Finland's Accession to the European Union: Constitutional Aspects' 168.

73 Cf. within this Chapter under Section 4.1.

74 Note in particular the openness to EU cooperation, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 301; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 218-219; Ojanen, 'The Europeanization of Finnish Law' 154; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 539.

75 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'; This threshold was not met with regard to the Eurocrisis measures, which were not perceived as to significantly alter Finnish sovereignty, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458-459; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

76 This underscores that the two-thirds majority requirement under Section 94 (2) (2) Finnish Constitution constitutes a qualification of the otherwise applicable simple majority threshold, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366-367; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

77 Cf. Section 74 Finnish Constitution; And cf. within this Chapter Section 2.2.

likely alter parliamentary budgetary and fiscal prerogatives, which are constitutionally assigned to the Finnish Parliament, as well as particularly relevant under the Finnish sovereignty doctrine. Therefore, it seems likely that the Constitutional Law Committee would consider several forms of EU fiscal integration, for example the creation of a Eurozone budget, the introduction of new EU funding streams, the establishment of a Eurozone government, or additional supervisory competences on national budgeting, as significant encroachments on the Finnish parliamentary prerogative to establish and administer the state budget, as laid down in Section 3 (1) in conjunction with Section 83 (1) Finnish Constitution. The resulting potential constraints on the Finnish Parliament regarding the exercise of its budgetary prerogatives and on Finnish sovereignty would likely require the approval by qualified majority following Section 94 (2) (2) Finnish Constitution.

Overall, this underscores that the Finnish Parliament is the central actor when considering a transfer of additional competences to the EU. Although it might prove practically difficult to attain a qualified majority threshold on EMU-reforms given the outlined national political controversy on the EU, it should be emphasized that the constitutional text explicitly allows for the transfer of core constitutional competences by qualified majority – even if these could fundamentally alter the Finnish constitutional order. Interestingly, the applicable procedural requirements for approving EU conferrals that impact the Finnish Constitution are more lenient than the requirements applicable to internal constitutional amendments.[78] However, Section 94 (3) Finnish Constitution might alter this conclusion, as only EU commitments that are in accordance with the 'democratic foundation' of the Finnish Constitution may be approved by parliament.[79] A detailed assessment of this provision follows.[80] Yet, it can be already pointed out here that although the principle of democracy appears to enjoy enhanced constitutional protection through Section 94 (3) Finnish Constitution, the Constitutional Law Committee has

78 As highlighted, Section 73 (1) Finnish Constitution establishes an even higher procedural threshold, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 368-369; Ojanen, 'Constitutional Amendment in Finland' 104; Suksi, 'Finland' 105.

79 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 372-373; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Ojanen, 'Constitutional Amendment in Finland' 106.

80 Cf. assessment within this Chapter under Section 3.3.

so far refrained from enforcing this provision.[81] Therefore, its limiting impact on EU fiscal integration proposals remains uncertain.

3.1.3 Constitutional amendments according to Section 73 Finnish Constitution

In addition to the special procedure for the transfer of competences to the EU enshrined in Section 94 Finnish Constitution, the Finnish Parliament could amend the constitutional text itself in order to accommodate EU fiscal integration steps. Such amendment can be either adopted as an exceptive enactment, which introduces a limited constitutional derogation, or as explicit modification of the constitutional text.

3.1.3.1 Fiscal integration via exceptive enactment?

Exceptive enactments are a distinct instrument of the Finnish constitutional order. The underlying idea is that the Finnish Parliament can enact derogations to the Finnish Constitution, without altering the constitutional text. The instrument originated during Russian occupation and has to be seen in this specific historic context. At that time, exceptive enactments were employed by the Finnish Parliament to adapt the Finnish Constitution to changing socio-economic realities, whilst at the same time preserving the integrity of the constitution, which was used as a shield against too far-reaching Russian interferences.[82] Subsequently, the constitutional practice was preserved under the 1919 Constitutional Act[83] and frequently employed, as 888 exceptive enactments were adopted between 1919 and 2000.[84] Under the reformed Finnish Constitution, both the legislator and the Constitutional Law Committee stressed that exceptive enactments should be restricted to, as the wording in Section 73 (1) Finnish Constitution suggests, 'a limited derogation of the Constitution'.[85]

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81 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 372-373; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Husa, *The Constitution of Finland - A Contextual Analysis* 34; Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' 140.

82 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 360; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 98.

83 Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 180-181 para 57.

84 Suksi, 'Finland' 94-95; Ojanen, 'The Europeanization of Finnish Law' 148; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 535.

85 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 369-370; Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 220; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 307-308; The Constitu-

Therefore, it seems unlikely that EU fiscal integration, especially any more far-reaching steps, could be based on an exceptive enactment. Section 94 Finnish Constitution provides for a special procedure to enact EU commitments which largely resembles an exceptive enactment. Notably, the Finnish Parliament can overcome conflicts with the Finnish Constitution by following the procedure laid down in Sections 94 and 95 Finnish Constitution without amending the constitutional text itself. An exceptive enactment under Section 73 Finnish Constitution seems not to offer additional parliamentary options and it would impose, moreover, higher majority requirements.

3.1.3.2 Fiscal integration via constitutional amendments?

Consequently, only an explicit constitutional amendment could constitute an alternative to Section 94 Finnish Constitution. Section 73 Finnish Constitution does not restrict the extent or scope for an envisaged constitutional amendment.[86] Thus, the constitution-amending legislator is able to fundamentally alter the Finnish Constitution under this procedure, which can be distinguished into the ordinary and the expedited procedure for constitutional amendments.

The ordinary procedure requires that a constitutional amendment proposal is forwarded to the Finnish Parliament and left in abeyance after the second reading in the Finnish Parliament, confirmed by a simple majority. Only after parliamentary elections are held and the newly elected parliament convenes the amendment process is resumed.[87] Then, the Constitutional Law Committee issues a statement on the proposed constitutional amendment, which is subsequently debated in a final reading in the parliamentary plenary. Finally, the originally proposed amendment – without any changes to the content of the amendment – has to be confirmed by a two-thirds parliamentary majority. Hence, constitutional amendments enacted under the ordinary amendment procedure are lengthy and their success remains uncertain, as two consecutive parliaments have to support them. Obtaining such wide and lasting parliamentary support for EU fiscal integration measures might prove challenging, as the Eurocrisis triggered major political division in Finland.[88] When adopting the ESM-Treaty, for example, the Finnish Government modified the interna-

tional Law Committee emphasised the 'principle of avoidance of exceptive enactments', cf. Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 181-182 para 60; Lavapuro, 'Constitutional Review in Finland' 133; And it is equally emphasized by the *travaux preparatoires* to the reformed Section 73 Finnish Constitution, cf. Suksi, 'Finland' 104.

86 Different to the German *eternity clause*, which explicitly restricts the scope for constitutional amendments, cf. Calliess, 'Constitutional Identity in Germany - One for Three or Three in One?' 164-165.

87 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 368; Suksi, 'Finland' 91; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 536.

88 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 454; Ojanen, 'Constitutional Amendment in Finland' 95.

tional commitment in order to escape the two-thirds requirement, which seemed difficult to attain.[89] Although adopted under Section 94 Finnish Constitution, it illustrates the apparent difficulty of uniting a two-thirds majority for EMU-related matters. At the same time, in case successfully adopted, such constitutional amendment could ground EU fiscal integration on a solid democratic foundation.

In the alternative, the Finnish Parliament could employ the expedited procedure. Following Section 73 (2) Finnish Constitution, a five-sixths parliamentary majority can declare an envisaged constitutional amendment urgent and thereby directly approve the amendment with a two-thirds majority after the second reading.[90] The required almost consensual parliamentary support seems hard to achieve for EU fiscal integration proposals in light of the mentioned political disagreement. For instance, the Euroskeptical 'Finns'-party currently occupies 38 of the 200 seats in the Finnish Parliament. This means that the 'Finns'-party alone could block any 'urgent' constitutional amendment. Consequently, it seems very unlikely that an expedited procedure to accommodate EU fiscal integration proposals would be successful under the current circumstances.

Therefore, the ordinary constitution-amending procedure could theoretically provide an alternative to Section 94 Finnish Constitution. However, Section 94 Finnish Constitution enjoys priority given its *lex specialis* status and given that it imposes more lenient procedural requirements. Notably, limited conflicts with the Finnish Constitution can be approved by a simple majority and more comprehensive constitutional conflicts can be overcome by a two-thirds majority under Section 94 Finnish Constitution. In contrast, Section 73 Finnish Constitution requires that any constitutional amendment is approved by a two-thirds majority, after being left in abeyance or after being declared urgent by a five-sixths majority. Consequently, accommodating EU fiscal integration proposals by amending the Finnish Constitution would trigger significantly higher parliamentary majority requirements, which seems challenging in times of increasing Euroskepticism in Finland. Yet, constitutional amendments remain possible and are not *per se* constitutionally excluded.[91]

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89 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 174-175 para 39.

90 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 368; Suksi, 'Finland' 91.

91 Cf. assessment within this Chapter under Section 2.1.; Cf. as well; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 456-457; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 100-101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 563.

3.1.4 *Application of the framework during the Eurocrisis*

The outlined procedural framework was employed to address the different Eurocrisis-measures, which has indicative value for EU fiscal integration proposals given the overlap in the affected competence areas. To start, the Fiscal Compact required parliamentary approval following Section 94 Finnish Constitution as it altered Finnish parliamentary prerogatives. The Constitutional Law Committee noted that the proposed measures affected the national budgetary decision-making process and the state budget, which constitute prerogatives of the Finnish Parliament as enshrined in Section 3 (1) in conjunction with Chapter 7 Finnish Constitution. Although the Fiscal Compact reiterated in large parts already existing EU commitments, enshrined in the EU Stability and Growth Pact, the Committee emphasized that new reference values for the cyclically adjusted deficit of public finances were to be introduced.[92] The Committee saw in these new reference values a modification of the original commitment under the Stability and Growth Pact, which was deemed to have an effect on parliamentary prerogatives and thus required anew approval following Section 94 (1) Finnish Constitution.[93] However, given that the Fiscal Compact largely reiterated existing EU commitments and given that the Finnish Parliament could decide how to implement the balanced budget rule in Article 3 (2) Fiscal Compact, a simple majority was sufficient for its adoption.[94]

Similarly, the simplified EU Treaty revision introducing Article 136 (3) TFEU required parliamentary approval under Section 94 Finnish Constitution.[95] From the outset, the Constitutional Law Committee stressed that the proposed Treaty amendment was merely of declaratory and clarifying nature, as required

92 *Final Assessment of Fiscal Compact (II.)* 3; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 472.

93 Already highlighted in the first decision on the matter: *Preliminary Assessment of Fiscal Compact (I.)* 2; *Final Assessment of Fiscal Compact (II.)* 3; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 472-473.

94 *Final Assessment of Fiscal Compact (II.)* 3; Cf. as well: Tuori and Raitio, 'Finland' 330; As Finland is a dualist system, EU obligations require implementation following the procedure established in Section 95 Finnish Constitution, thus Article 3 Fiscal Compact did not impose additional obligation, cf. generally Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 288; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 473.

95 *Amendment of Article 136 (3) TFEU* 2; Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* V.2.; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 469.

under the simplified revision procedure in Article 48 (6) TFEU[96] – as the CJEU would later also confirm in its *Pringle*-judgment.[97] Given its declaratory nature, it was questioned whether parliamentary approval would be at all required. The Committee concluded that the envisaged Treaty amendment did neither entail additional legislative obligations nor affect parliamentary prerogatives. However, the amendment was 'otherwise significant' under the third alternative of Section 94 (1) Finnish Constitution,[98] as it altered the Lisbon Treaty, which was adopted by the Finnish Parliament.[99] At the same time, given the highlighted declaratory nature of the amendment, a simple parliamentary majority was sufficient for the approval of the EU Treaty amendment.[100]

In contrast to these two instances, the constitutional assessment of the ESM-Treaty and the temporary EFSF triggered wider constitutional concerns.[101] From the outset, it was uncontested that the EFSF and ESM-Treaty required parliamentary approval under Section 94 Finnish Constitution.[102] The Constitutional Law Committee confirmed this as both intergovernmental Treaties were found to affect parliamentary budgetary prerogatives established in Section 3 (1) in conjunction with Chapter 7 Finnish Constitution.[103] In its

96 *Amendment of Article 136 (3) TFEU* 2; Cf. as well: Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* V.2.

97 C-370/12 *Pringle* [2012] (CJEU) paras 61-76; Cf. on the findings of the CJEU: Vestert Borger, 'The ESM and the European Court's Predicament in Pringle' (2013) 14 German Law Journal 113, 122.

98 *Amendment of Article 136 (3) TFEU* 2; Cf. as well: Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* V.2.; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 469.

99 *Amendment of Article 136 (3) TFEU* 2; Cf. as well: Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* V.2.; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 469.

100 *Amendment of Article 136 (3) TFEU* 2; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 469.

101 For the opinions of the Committee: *First Assessment Draft ESM-Treaty (I.)*; *Second Assessment Draft ESM-Treaty (II.)*; *Final Assessment Draft ESM-Treaty (III.)*; On the ESM-Treaty, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

102 As already indicated in relation to the EFSF, cf. *Amendment to the EFSF (Increase in State Guarantee)* 3; And the first draft ESM-Treaty, cf. *First Assessment Draft ESM-Treaty (I.)*.

103 Although both measures were intergovernmental agreements, the Constitutional Law Committee found that they had a close link with EU law, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 465.

statement, the Committee also determined that the envisaged Treaties could constitute State guarantees, which require parliamentary approval according to Section 82 (2) Finnish Constitution.[104] The subsequent question was whether the simple or qualified parliamentary majority requirement would be applicable.[105] The Constitutional Law Committee was particularly concerned that the ESM-Board could increase the Member States' financial commitment under the emergency voting procedure by qualified majority – and thus against Finnish opposition. The Committee considered that such a mechanism could have far-reaching consequences for parliamentary prerogatives and sovereignty, which would have required approval by a qualified majority.[106] However, given that the attainment of a two-thirds majority was uncertain,[107] the Finnish Government successfully renegotiated the ESM-Treaty. In its final appraisal of the amended ESM-Treaty, the Constitutional Law Committee concluded that the new voting arrangement safeguarded parliamentary prerogatives and that the budgetary commitment was sufficiently limited. Therefore, a simple majority was sufficient to adopt the ESM-Treaty. In this instance, the continous involvement of the Constitutional Law Committee illustrates the advantages of the Finnish *ex ante* constitutional review, as the issued statements can *inform* the negotiations – even at EU-level – instead of merely *scrutinizing* the final legislative outcome – as is the case in judicial *ex post* appraisal, which is, for example, conducted in Germany.

3.1.5 *Interim conclusions: EU fiscal integration with parliamentary approval*

Overall, both Section 94 and Section 73 Finnish Constitution can be employed to accommodate EU fiscal integration steps. However, given its *lex specialis* status Section 94 seems to take precedence when considering new EU commitments. This conclusion corresponds to the view of the Constitutional Law Committee which identified Section 94 Finnish Constitution as relevant procedure to adopt the various Eurocrisis-measures. From these decisions, it can be deduced that EU commitments with budgetary implications require parliamentary approval, given that Section 3 (1) and Chapter 7 Finnish Constitution assign budgetary prerogatives to the Finnish Parliament. Hence, EU fiscal

104 *Final Assessment Draft ESM-Treaty (III.)* 2; *First Assessment Draft ESM-Treaty (I.)*; Cf. as well: Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 465.

105 *Final Assessment Draft ESM-Treaty (III.)* 4; *Second Assessment Draft ESM-Treaty (II.)* 2; *First Assessment Draft ESM-Treaty (I.).*

106 *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 467.

107 Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 174-175 para 39.

integration steps, which transfer budgetary competences or impact the exercise of these competences, require parliamentary confirmation following Section 94 Finnish Constitution.

Furthermore, the various obligations approved during the Eurocrisis could be approved by simple parliamentary majority, given their only limited impact on constitutionally enshrined parliamentary prerogatives and on the Finnish sovereignty doctrine. This suggests that limited EU fiscal integration steps could potentially be adopted by simple majority. However, more far-reaching proposals that limit the final authority of the Finnish Parliament in budgetary decisions might trigger the qualified majority threshold.[108] Thus, even far-reaching proposals are constitutionally feasible as long as they are supported by the required parliamentary majority, which might prove challenging under the current political circumstances.[109]

3.2 The Finnish model of national engagement in EU matters

In addition to the constitutional framework for the conferral of competences, the *ex ante* involvement of the Finnish Parliament in the preparation of EU secondary law seems to be equally relevant for the exercise of potentially conferred budgetary and fiscal competences. The parliamentary involvement is based on an extensive right to receive information enshrined in Section 97 (1) Finnish Constitution.[110] This obligation extends to the Finnish Prime Minister, who has to inform the Finnish Parliament about the deliberations of the European Council as clarified in Section 97 (2) Finnish Constitution. In addition to this extensive right, Section 96 Finnish Constitution introduces a special mandating practice for all EU decisions that affect constitutionally assigned competence areas of the Finnish Parliament.[111]

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108 As illustrated in relation to the draft ESM-Treaty, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 467; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

109 Jokela, 'Finland: Towards a More Cautious Europeanization' 49; Ojanen, 'Constitutional Amendment in Finland' 95.

110 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 365; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 555.

111 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 365; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452; Husa, *The Constitution of Finland - A Contextual Analysis* 47; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 554-555.

3.2.1 *Mandating the Finnish vote in the Council of Ministers*

The internal Finnish 'monitoring system' starts operating when conferred competences are exercised at the EU-level. It ensures parliamentary involvement in the national *ex ante* preparation of EU decisions and empowers the Finnish Parliament to mandate the Finnish representative in the EU Council.

3.2.1.1 The procedural steps

Section 96 (1) Finnish Constitution applies to all envisaged EU 'acts, agreements [or] other measures' that affect parliamentary prerogatives, according to the Finnish Constitution. In the first place, this suggests that the Finnish procedure is not restricted to specific EU acts.[112] Second, the matter has to fall within the constitutionally assigned competences of the Finnish Parliament, which include legislative acts as well as budgetary and fiscal competences as established in Section 3 (1) in conjunction with Chapter 7 Finnish Constitution.[113] Obviously, the latter is particularly relevant when considering EU fiscal integration. It implies that the Finnish Parliament would likely be involved in the national preparation of EU secondary law that might be required by fiscal integration proposals, which corresponds to the stance that the Constitutional Law Committee adopted during the Eurocrisis.

Notably, in its review of the proposed EU Six-Pack legislation, the Committee illustrated that the legislation contained provisions that limit government spending, fiscal planning, as well as the overall government debt level – with a sanction possibility in case of non-compliance.[114] The proposed legislation thus impacted constitutionally guaranteed parliamentary competences and had to be considered by the Finnish Parliament under Section 96 (1) Finnish Constitution.[115] An additional interesting element of this constitutional decision is the apparent *implied ultra vires* assessment, given that the Committee equally considered whether the Six-Pack legislation required approval under

112 In line with the interpretation of the Constitutional Law Committee to ensure the 'effective participation' of the Finnish Parliament, cf. Ojanen, 'The Europeanization of Finnish Law' 169; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 554-555.

113 For example established by the Constitutional Law Committee in: *Final Assessment Draft ESM-Treaty (III.)* 2; *Adoption of the EU Six-Pack Legislation* 3; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 457.

114 *Adoption of the EU Six-Pack Legislation* 4; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 471.

115 *Adoption of the EU Six-Pack Legislation* 4-5; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

Section 94 Finnish Constitution.[116] In its very brief assessment, the Committee pointed out that the legislation did not extend the Finnish EU commitment and that Section 96 Finnish Constitution thus applied.[117] Implicitly, the Committee evaluated whether the proposed secondary law corresponded to the conferred competences. However, different to the *ultra vires* assessment in Germany,[118] the conclusion that envisaged EU law exceeds the EU-Treaties would not automatically lead to the illegality of such acts in Finland but would simply trigger a different procedure.

Once it is established that Section 96 Finnish Constitution applies, the matter has to be immediately referred to the Finnish Parliament in order to allow for sufficient time for parliamentary assessment. The procedure is initiated by an official communication of the Finnish Government, as laid down in Section 96 (2) (1) Finnish Constitution. It is referred to the Grand Committee, which is generally in charge of EU matters, and, if deemed necessary, to other specialized committees.[119] For example, the Constitutional Law Committee is consulted when proposed EU measures raise constitutional concerns.[120] The specialized committees issue reports and forward these to the Grand Committee, which takes them into account when drafting the overall appraisal. The final position is forwarded to the Finnish Government, if deemed necessary in the form of an official statement, as provided for in Section 96 (2) (4) Finnish Constitution. Particularly important matters can also be considered by the plenary, according to Section 96 (2) (5) Finnish Constitution,[121] which takes, however, no final decision.

Overall, these procedural arrangements guarantee that the Finnish Parliament actively participates in the national *ex ante* preparation of EU decisions.

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116 *Adoption of the EU Six-Pack Legislation* 4; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 471.

117 *Adoption of the EU Six-Pack Legislation* 4-5; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 470-472.

118 On the German *ultra vires* review, cf. for example: *Quantitative Easing (PSPP) Final Judgment* para 110; 2 BvR 2661/06 *Honeywell-judgment* [2010] (German Federal Constitutional Court) paras 54-61; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293.

119 As established in Section 96 (2) (2) Finnish Constitution, the speaker of the Finnish Parliament assigns the matter to the committee, cf. Section 30 (1) (2) Rules of Procedure, which will be announced during plenary session, cf. Section 30 (2) Rules of Procedure.

120 Miller, 'Finnish Judges and the European Union: An American Perspective' 503; Ojanen, 'Constitutional Amendment in Finland' 96-97; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 555.

121 Particularly during the Eurocrisis, matters were frequently referred to the parliamentary plenary for debate, cf. Katrin Auel and Tapio Raunio, 'Debating the State of the Union? Comparing Parliamentary Debates on EU Issues in Finland, France, Germany and the United Kingdom' (2014) 20 The Journal of Legislative Studies 13, 19.

Furthermore, this participation is comprehensive as several parliamentary committees can consider the matter, thereby extending the internal parliamentary *modus operandi* to EU affairs. For possible EU secondary law required to implement EU fiscal integration proposals this suggests that a comprehensive parliamentary assessment will be conducted, which may ultimately result in a political mandate for the Finnish Government to approve these possible EU secondary acts.

3.2.1.2 The effect of the parliamentary mandate – real scrutiny?

The final position issued within this procedure by the Grand Committee[122] is not legally binding.[123] Nevertheless, practice shows that the Finnish Government tends to follow the communicated positions[124] given the government's institutional dependency on continuous parliamentary support. Notably, if the Finnish Parliament is dissatisfied with the government's voting at EU level, it can consider taking additional *internal* steps, including the initiation of a motion of no confidence following Section 43 (2) Finnish Constitution. Thus, it can be argued that parliamentary positions have a political *binding force* yet nevertheless award the government with some leeway for EU negotiations as well.[125]

Moreover, the factual importance and power of the Grand Committee should be underscored. It issues the final parliamentary position, based on the views communicated by the specialized committees, and it thereby takes political decisions on behalf of the entire institution. One could raise the question whether the Committee's 25 members[126] can adequately represent the Finnish Parliament. Yet, the Grand Committee mirrors the parliament's composition in a proportionate manner, ensuring that all political parties are represented accordingly.[127] Furthermore, the outlined procedure merely concerns the exercise of already transferred competences. The prior transfer of these competences involved the entire parliament. Therefore, debating EU

122 Normally, these are formulated in a broad, general manner providing for some discretion, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459-461.

123 Section 96 (2) Finnish Constitution does not specify the status of the statement, cf. Ojanen, 'The Europeanization of Finnish Law' 170; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556.

124 Ojanen, 'The Europeanization of Finnish Law' 170; Raunio and Tiilikainen, *Finland in the European Union* 86.

125 Ojanen, 'The Europeanization of Finnish Law' 170; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556.

126 As established by Section 35 (2) Finnish Constitution.

127 Classified as 'broad and oversized' coalition, cf. Raunio and Tiilikainen, *Finland in the European Union* 44-45.

matters amongst specialized parliamentarians can ensure a goal-oriented, speedy assessment.[128]

3.2.2 Section 97: Scrutinizing the Finnish vote in the European Council

The Finnish Constitution also establishes parliamentary involvement in decisions of the European Council.[129] The Finnish Prime Minister informs the Finnish Parliament, prior to European Council meetings, about the agenda and, subsequently, on the positions taken during the meeting, as established in Section 97 (2) Finnish Constitution. In contrast to the scrutiny of the Council vote, Section 97 (2) Finnish Constitution is not restricted to 'parliamentary prerogatives'.

Thus, the Finnish Prime Minister is required to always brief the Finnish Parliament, which ensures that parliament is continuously informed about important EU developments. Given that the European Council sets, *inter alia*, the political agenda of the EU,[130] the right to be fully informed on these developments is crucial for all other decisions on EU matters. In case deemed politically necessary, the Finnish Parliament can communicate a statement to the government under Section 97 (3) Finnish Constitution. Although this also lacks legal force,[131] it is of political importance thereby offering parliament a powerful tool to influence the Finnish Prime Minister in her or his decisions – and where the European Council acts by consensus even the final decision taken by European Council.

3.2.3 Conclusive appraisal and outlook: Exemplary parliamentary involvement?

Overall, this shows that the Finnish Parliament occupies a pivotal position in the exercise of conferred competences, which is constitutionally secured by a right to be informed on EU policies and the outlined 'mandating' system. Through such a mandate, parliament is able to influence EU decision-making by the Finnish representative at EU-level and it arguably vests the adopted Finnish position with additional democratic authority. Furthermore, the early involvement of the Finnish Parliament in the adoption of EU law can possibly

128 Eurocrisis imposed tight schedule, which made consideration very difficult, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 461.

129 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 365; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 555.

130 Cf. Article 15 (1) (1) TEU; Cf. Craig and de Búrca, *EU Law Text, Cases, and Materials* 47-48.

131 Cf. conclusions drawn in this Chapter under Section 3.2.1.2.

trigger a greater politicization of EU matters and hence stimulate a public debate, as could be observed during the Eurocrisis.[132]

Although such a mandating system entails the risk that parliaments focus merely on national benefits, the overall involvement of the Finnish Parliament provides an interesting example of how to enhance the position of national parliaments in the EU decision-making process. Given the extensive, continuous involvement and the strong procedural tools available to the Finnish Parliament, this model might serve as *best practice* example. The outlined exemplary Finnish system might accommodate democratic concerns and, in light of the general importance of parliamentary involvement in budgetary and fiscal decision-making, the resulting thorough national parliamentary involvement might partially address national constitutional concerns related to EU fiscal integration steps. Ultimately, the better national parliaments are involved – and connected across each other – the more legal-constitutional, political and normative space may be available for EU fiscal integration.

3.3 *Ex ante* Constitutional review and *ex post* judicial scrutiny

As established, the Finnish system relies on *ex ante* constitutional review *in abstracto*, which is conducted by the Constitutional Law Committee upon referral.[133] Given the Committee's institutional position within the Finnish Parliament, the Finnish constitutional order does not provide for *ex post* review of legislative acts. This equally impacts other forms of judicial review in Finland, which are traditionally based on formalistic and rule-based reasoning,[134] thereby relying on the authority of the contested measure and legislative supremacy.[135]

132 Suvanto and others, *Improving the resilience of Europe's Economic and Monetary Union (37b/2015)* 17-18, 22; Tapio Raunio, 'The Finnish Eduskunta and the European Union: The Strengths and Weaknesses of a Mandating System' in Claudia Hefftler and others (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave Macmillan 2015) 407; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 453.

133 Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 176 para 44; Suksi, 'Finland' 102; Ojanen, 'The Europeanization of Finnish Law' 146.

134 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361-362; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 179 para 53; Ojanen, 'The Europeanization of Finnish Law' 150; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 205

135 Ojanen, 'Constitutional Amendment in Finland' 109; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 106; Lavapuro, Ojanen and Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' 509.

The initial outright prohibition of judicially reviewing parliamentary acts was altered during the constitutional reform process. Currently, Section 106 Finnish Constitution allows for the review of legislative acts by Finnish courts under strict conditions.[136] Notably, Section 106 Finnish Constitution limits the judicial review to an 'evident conflict [of a legislative act] with the Constitution'.[137] Such 'evident conflict' is given in case no available interpretative method could resolve the conflict and in case the Constitutional Law Committee did not explicitly confirm the constitutionality of the act.[138] Furthermore, the respective court can only declare the act of parliament inapplicable to the case at hand and not generally invalidate it,[139] which illustrates the limited mandate of Finnish courts *vis-à-vis* the Finnish legislator.[140] This equally suggests that successful judicial challenges against EU fiscal integration measures will be unlikely once adopted.

3.4 Applicable procedural and institutional framework to EU fiscal integration

EU integration contributed to a major transformation of the Finnish constitutional order. It triggered comprehensive constitutional reforms which introduced a specific procedural framework to interact with the EU. This framework applies to EU fiscal integration proposals. In the first place, the Finnish Parliament can confer budgetary and fiscal competences to the EU based on Section 94 Finnish Constitution. Given the likely implications of such a conferral for Finnish sovereignty and parliamentary budgetary prerogatives, it seems

136 Cf. parallel to the British doctrine of parliamentary sovereignty, Miller, 'Finnish Judges and the European Union: An American Perspective' 503.

137 Only reluctant application of Section 106 Finnish Constitution, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361-362; Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' 136, 140.

138 Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 184 para 67; Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 227; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 29; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 108; Suksi, 'Finland' 102; Ojanen, 'The Europeanization of Finnish Law' 173.

139 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361; Lavapuro, 'Constitutional Review in Finland' 135.

140 Which is stemming from the limited use of Section 106 Finnish Constitution, cf. Miller, 'Finnish Judges and the European Union: An American Perspective' 504; Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' 146.

possible that a qualified two-thirds majority would apply.[141] Once conferred, Section 96 Finnish Constitution extends the internal parliamentary decision-making process to EU matters and the Finnish Parliament can mandate governmental action at EU-level. This suggests that even if (fiscal) competences are conferred to the EU, the Finnish Parliament retains an active role in the domestic preparation of EU decisions that are taken based on this conferral.[142]

The central position of parliament in the Finnish constitutional system is further underscored by the system of constitutional review. Notably, constitutional review is conducted by a parliamentary committee, which issues statements on the constitutionality of the envisaged acts. This review is conducted *ex ante* and *in abstracto*. When considering EU integration, the Constitutional Law Committee generally emphasizes the specificity of EU law and that Finnish law and EU law work 'in tandem'.[143] As a result, the Committee refrained until now from detecting open conflicts between Finnish and EU law,[144] and continuously highlighted the discretion of the Finnish Parliament when taking EU integration steps. Once adopted, no additional constitutional challenge can be initiated.

Therefore, it appears that the special Finnish constitutional set-up – which enables parliament to initiate fundamental constitutional reforms and which underscores parliamentary discretion – is the main source for Finnish *constitutional flexibility*. A potential risk in relation to such seemingly unconditional parliamentary empowerment is, of course, that decisions depend on attaining the prescribed majority. At this point, it is only hardly predictable whether continuous parliamentary support for further EU fiscal integration steps can be secured.

4 Substantive framework applicable to EU fiscal integration

The Finnish Constitution contains substantive principles in its first chapter entitled 'fundamental principles' which are relevant when considering EU fiscal integration steps. These fundamental principles function as substantive reference point when interpreting the Finnish Constitution.[145] At the same time,

141 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 392; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

142 Even if intergovernmental in nature, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 460

143 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366-367; Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 238.

144 Miller, 'Finnish Judges and the European Union: An American Perspective' 533.

145 Länsineva, 'Fundamental Principles of the Constitution of Finland ' 115.

given their systematic position at the very beginning of the constitutional text and given their framing as 'fundamental principles', they equally represent core characteristics of the Finnish Constitution. The mentioned principle of sovereignty and the recognition of Finnish EU membership are both 'fundamental principles' enshrined in Section 1 Finnish Constitution. Similarly, the principle of democracy, enshrined in Section 2 Finnish Constitution, and parliamentary responsibility for budgetary decisions, enshrined in Section 3 (1) Finnish Constitution, form part of these fundamental principles as well.

This indicates that the debated fiscal integration steps might interfere with Finnish sovereignty (4.1.)[146] and could undermine the democratic decision-making process as well as the pivotal role of the Finnish Parliament in budgetary matters (4.2.).[147] Finally, Section 94 (3) Finnish Constitution might evolve into a supra-constitutional provision *vis-à-vis* EU fiscal integration ambitions (4.3.).[148]

4.1 Finnish sovereignty: An evolutionary conception

Given the systematic importance of Finnish sovereignty for the Finnish constitutional order,[149] the transformation triggered to accommodate EU cooperation seems remarkable. This transformation can be traced back to statements of the Constitutional Law Committee on Finnish EU accession. Notably, although

146 In particular, 'budgetary sovereignty' which gained particular importance during the Eurocrisis, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 465-467; Ojanen, 'The EU at the Finnish Constitutional Arena' 247; With an extensive overview, cf. Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 536-541.

147 Reflected in prevailing legislative sovereignty; cf. Ojanen, 'The EU at the Finnish Constitutional Arena' 254; Lavapuro, Ojanen and Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' 509; As well as parliamentary sovereignty, cf. Suksi, 'Finland' 88.

148 Although this remains uncertain, as the provision has never been employed as limit to EU integration, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 372-373; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Husa, *The Constitution of Finland - A Contextual Analysis* 34; Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' 140.

149 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 370-372; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 281; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 216; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 540-541.

Section 1 (1) Constitutional Act proclaimed absolute sovereignty, the Committee considered the factual benefits stemming from EU membership when evaluating the impact of EU accession on Finnish sovereignty.[150] This *qualified understanding* of Finnish sovereignty was subsequently codified by the 2000 constitutional reform which introduced Section 1 (3) Finnish Constitution and with it the principle of internationality as a counterbalance to sovereignty.[151]

The subsequent analysis retraces the important constitutional transformation of Finnish sovereignty in order to determine its limiting potential for EU fiscal integration ambitions as well as to determine the *substantive* flexibility of Finnish constitutional order.

4.1.1 The historic origin of Finnish sovereignty

Initially, Section 1 (1) of the 1919 Constitutional Act declared the sovereignty of the Finnish Republic without providing for any derogation. Arguably, this absolute conception of sovereignty is historically rooted. When enacting the 1919 Finnish Constitutional Act, Finland just gained independence from Russia of which it formed an autonomous part since 1809.[152] Hence, the emphasis on sovereignty can be seen as expression of this then newly acquired independence. It was also perceived as a necessary prerequisite for its new role on the international stage and possible cooperation with other sovereign states.[153] When considering the historic constitutional framework it is apparent that the overall focus of the Constitutional Act rested on the domestic organization of public power, which was mirrored in the conception of Finnish

150 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 328-332; Ojanen, 'The EU at the Finnish Constitutional Arena' 245; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 100; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 540-541.

151 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334-335; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 540-541; The formal constitutional reform of 2000 then codified the existing constitutional practices, cf. Suksi, 'Finland' 96.

152 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 360; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 161 para 1; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 275-276; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 98.

153 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 280.

sovereignty.[154] Furthermore, the Constitutional Act did not elaborate on the sovereignty doctrine in broader detail, apparently conditioned by the time pressure under which the Act was drafted in 1919.[155] Consequently, the absolute constitutional conception of Finnish sovereignty stems from the particular historic context in which the Constitutional Act was adopted and it fits the dominant legal-positivist approach of that time.[156]

Based on the unambiguous wording of Section 1 Constitutional Act, Finnish sovereignty was traditionally construed as an absolute, unconditional principle. Consequently, the Constitutional Law Committee initially considered any form of international cooperation, which involved the ability to use public power at the international level or which required Finland to change internal legislation, as conflicting with Finnish sovereignty.[157] This suggests that the Constitutional Law Committee adopted a highly formalistic interpretation of Section 1 Constitutional Act and with it a formalistic conception of Finnish sovereignty, which focused on whether international cooperation limited internal decision-making abilities. At the same time, this strict conception of sovereignty could be remedied under the Finnish Constitution by adopting the mentioned exceptive enactments, which enabled the Finnish Parliament to implement international obligations despite conflicting with Finnish sovereignty.[158] Although exceptive enactments had to be adopted following the constitutional amendment procedure, Section 69 (1) Finnish Parliament Act established a simplified procedure for implementing international obligations into Finnish law via exceptive enactment. Notably, the Finnish Parliament

154 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 362; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 332; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 100.

155 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 282-283.

156 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 360, 368-369.

157 Ojanen, 'The EU at the Finnish Constitutional Arena' 245; Ojanen, 'The Europeanization of Finnish Law' 151; As the constitutional text did not provide for a possible derogation of this absolute principle, cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 299; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 216.

158 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 364; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 344; Ojanen, 'Constitutional Amendment in Finland' 105; Suksi, 'Finland' 94; Rosas, 'Finland - Finland's Accession to the European Union: Constitutional Aspects' 168.

could enact a derogation from the constitutional text with a two-thirds majority without having to leave the act in abeyance or declare it urgent.[159] Obviously, this rendered the implementation of international obligation more feasible compared to ordinary constitutional amendments and enabled the Finnish Parliament to remedy the identified substantive conflicts with Finnish sovereignty.

This formalistic conception of Finnish sovereignty partially prevailed after Finnish accession to the EU. As highlighted, when confronted with the Finnish EU Accession Treaty, the Constitutional Law Committee identified a conflict with Finnish sovereignty, given the significant transfer of responsibility involved. Although at this point a changing understanding of Finnish sovereignty was already emerging, as the Committee considered, for example, wider constitutional implications of the then envisaged EU membership beyond only sovereignty concerns, the Accession Treaty was declared to be in conflict with Finnish sovereignty.[160] This conflict was overcome by exceptive enactment.[161] Taken together, this constitutes the starting point of a wider shift in the Committee's interpretation of Finnish sovereignty and a diversification in the substantive constitutional review of EU commitments under the Finnish Constitution.[162]

4.1.2 A new conception of Finnish sovereignty

The emerging qualified interpretation of Finnish sovereignty was embedded in the new constitutional text, which entered into force in 2000. As highlighted, the constitution-amending legislator introduced Section 1 (3) Finnish Constitution, which now states:

> 'Finland participates in international co-operation for the protection of peace and human rights and for the development of society.'

159 So-called 'narrow procedure of constitutional enactment', cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 291; Rosas, 'Finland - Finland's Accession to the European Union: Constitutional Aspects' 168.

160 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 331; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 537.

161 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 364; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 537; Jääskinen, 'The Application of Community Law in Finland: 1995-1998' 409-410; Rosas, 'Finland - Finland's Accession to the European Union: Constitutional Aspects' 168.

162 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 331-332.

Hence, today Section 1 Finnish Constitution explicitly recognizes the possibility to engage in international cooperation. The *travaux preparatoires* documents of the constitutional reform process suggest that the legislator intentionally altered the conception of the sovereignty doctrine and that according to the new understanding Finnish sovereignty was qualified in light of international and more specifically EU obligations.[163] This constitutional codification resonated with the Constitutional Law Committee, which underscored that the new Section 1 (3) Finnish Constitution established the principle of internationality, which from a legal-systematic point of view qualifies the sovereignty doctrine embedded in Section 1 (1) Finnish Constitution.[164] Despite the fact that the text in Section 1 (1) Finnish Constitution remained unchanged ('Finland is a sovereign republic.'), the new constitutional context and the legislator's intention to alter the conception of the principle resulted in a qualification of Finnish sovereignty.

This changed constitutional context enabled the Constitutional Law Committee to further pursue its altered understanding of Finnish sovereignty. Now, the Committee departs in its reasoning from the constitutional assumption that Finnish sovereignty is indeed qualified in light of EU membership[165] and it employs the concept of 'specificity of EU cooperation'.[166] Based on this principle, the Constitutional Law Committee appears to be more readily accepting limitations to Finnish sovereignty stemming from EU commitments given the particularly close cooperation between EU Member States, which

163 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 336; Ojanen, 'The Europeanization of Finnish Law' 154.

164 See within this Chapter under Section 2.1.; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 335; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 100.

165 Ojanen, 'The EU at the Finnish Constitutional Arena' 246; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 217.

166 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 301; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 218-219; Ojanen, 'The Europeanization of Finnish Law' 154; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 539.

is distinguished from other forms of international cooperation.[167] Furthermore, the Committee construes Finnish participation in EU affairs as an exercise of sovereign powers together with other sovereign countries secured by the specific arrangements at EU-level.[168] Moreover, as stressed by the Committee, given the increasing trends to international cooperation more generally, states are required to take decisions commonly at the supranational level in order to retain control.[169] Overall, the Constitutional Law Committee appears to accept EU-related limitations of Finnish sovereignty more easily, given the specific safeguards included in EU law, as well as the factual benefits stemming from acting jointly as 27 Member States in a globalized world. Since 2012, the special status of EU cooperation is reflected in Section 1 (3), which now acknowledges EU membership and it is equally reflected in the previously assessed procedural framework in Chapter 8 of the Finnish Constitution.[170]

The new constitutional approach to sovereignty can be further deduced from the Constitutional Law Committee's opinion on the Lisbon Treaty.[171] The Committee acknowledged the qualified status of sovereignty in light of EU membership, equally highlighting that the Lisbon Treaty is a consolidation of the EU legal order and not an entirely new form of agreement – in contrast to the previously considered EU Constitutional Treaty.[172] Yet, due to the abolishment of the three pillar structure, the consequential wider reach of the CJEU's jurisprudence and changes to the institutional structure with the formal introduction of the European Council as an EU institution, the Constitutional

167 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366- 367; Ojanen, 'The EU at the Finnish Constitutional Arena' 246; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 218.

168 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 371-372; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Europeanization of Finnish Law' 156; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

169 PeVL 13/2008 vp *Adoption of the Lisbon Treaty* [2008] (Finnish Constitutional Law Committee) 4-5; Thus, incorporating the factual benefits stemming from EU law into its assessment, cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 371-372; Ojanen, 'The Europeanization of Finnish Law' 156.

170 As previously highlighted within this Chapter under Section 2.1.

171 *Adoption of the Lisbon Treaty* 4-5.

172 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 357.

Law Committee nevertheless required a qualified majority for the approval of the Lisbon Treaty.[173]

Overall, this illustrates the fundamental transformation from absolute to qualified sovereignty, which was enabled by the constitutional reform process and implemented by the Constitutional Law Committee. As *Ojanen* points out, Section 1 (3) Finnish Constitution offered the opportunity to break with the traditional, formalistic conception of Finnish sovereignty.[174] The newly adopted approach especially centers around the participation at the EU-level as an exercise of sovereign powers amongst sovereign states. This conception underscores the derived nature of the EU, as it constitutes the shared exercise of sovereign powers.[175] In addition, the constitution-amending legislator was able to initiate these changes by introducing the mentioned Section 1 (3) Finnish Constitution. Put differently, despite the overall importance of the principle of sovereignty from a systematic and a historic point of view, this change was constitutionally permissible. Thus, the principle of sovereignty is not an insurmountable object for constitutional reforms. Taken together, it illustrates that the Finnish Parliament can overcome substantive constitutional concerns raised by the Constitutional Law Committee by amending the constitutional framework through the outlined procedures established within the constitutional text.[176]

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173 *Adoption of the Lisbon Treaty* 4, 11; Cf. as well: Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 357; Ojanen, 'The EU at the Finnish Constitutional Arena' 244.

174 Ojanen, 'The EU at the Finnish Constitutional Arena' 246; Ojanen, 'The Europeanization of Finnish Law' 154; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 540-541.

175 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 371-372; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Europeanization of Finnish Law' 155-156; The 'derived nature' of the EU also features in the German constitutional jurisprudence, cf. *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* paras 130-131; *ESM-Treaty and Fiscal Compact (interim relief)* para 105; Cf. as well: Martin Nettesheim, 'Art. 1 AEUV - Regelungsbereich' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union - Kommentar* (67th edn, C.H. Beck 2019) para 18; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 151.

176 Traditionally through exceptive enactment, as now specifically regulated in Section 94 Finnish Constitution for EU cooperation, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 372-373; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 180-181 para 57; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

4.1.3 *Application during the Eurocrisis and implications for EU fiscal integration*

Obviously, Finnish sovereignty was an important constitutional benchmark in the assessment of the various Eurocrisis-measures. As indicated, the Constitutional Law Committee was particularly concerned about the compatibility of the ESM-Treaty with Finnish sovereignty. In its initial assessment, the Committee concluded that the draft ESM-Treaty could be approved by simple parliamentary majority, given that the proposed agreement did neither modify the Finnish Constitution nor significantly alter Finnish sovereignty in the sense of Section 94 (2) Finnish Constitution.[177] In particular, the Committee considered that the budgetary implications of the ESM-Treaty were limited without undermining parliamentary budgetary prerogatives and the underpinning Finnish sovereignty. Importantly, the Committee had already emphasized in its assessment of the EFSF that all major decisions had to be taken unanimously by the then EFSF board of governors, which is composed of the Member States' finance ministers. Given that parliament could mandate the Finnish Minister of Finance based on Section 96 Finnish Constitution and given that the Finnish vote on an EFSF-decision was constitutive, the Committee concluded that the Finnish Parliament retained full control over EFSF-decisions.[178] The general structure of the EFSF was replicated by the first draft ESM-Treaty. Based on its prior constitutional reasoning, the Constitutional Law Committee emphasized the possibility to veto ESM-decisions and concluded that the proposed ESM-Treaty neither transformed the Finnish EU commitment as such – which is relevant under the Finnish sovereignty doctrine – nor fundamentally altered parliamentary budgetary prerogatives, as the Finnish Parliament retained final control over financial commitments. Therefore, the first draft ESM-Treaty could be approved by simple majority.

In the following assessment of a slightly altered version of the ESM-Treaty, the Committee then became concerned about the changed voting procedure in the ESM board of governors for emergency situations, as enshrined in Article 4 (4) draft ESM-Treaty. According to this emergency voting, the Member States' financial commitments could be increased by qualified majority vote.[179] The Committee was particularly troubled that the conditions and scope of this

177 *First Assessment Draft ESM-Treaty (I.)*; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 467.

178 *Amendment to the EFSF (Increase in State Guarantee)* 4; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 468.

179 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391;Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

emergency voting procedure were not sufficiently limited. It feared that financial commitments could be increased against the explicit will of the Finnish Parliament which would significantly affect parliamentary budgetary prerogatives and, furthermore, constitute a major interference with Finnish sovereignty. Notably, Finland would be deprived from taking an independent decision and instead be bound by the decision of a majority of Eurozone Member States. According to the Constitutional Law Committee, this would modify the relationship between Member States and the EU,[180] given that the EU could determine national financial commitments without support of the Member States. In addition, an increase of the Finnish financial commitment could ultimately impact the state's ability to fulfil its constitutionally enshrined obligations.[181] Therefore, the Committee established that the second draft of the ESM-Treaty could only be approved by qualified parliamentary majority under Section 94 (2) (2) Finnish Constitution.[182]

Given that the Finnish Government feared it could not achieve the required parliamentary majority,[183] Finnish representatives at the EU-level successfully re-negotiated the ESM-Treaty to escape the stricter majority requirement. Subsequently, the Constitutional Law Committee was confronted with a final draft version of the ESM-Treaty. In its assessment, the Committee reiterated that the envisaged Treaty needed parliamentary approval under Section 94 Finnish Constitution given that it affected budgetary prerogatives. The Committee considered the possible impact of the financial commitments under the envisaged ESM-Treaty on the Finnish state budget. In order to determine this impact, the Constitutional Law Committee conducted a detailed assessment of the financial commitments (roughly € 12.5 billion callable capital, thereof € 1,44 billion paid-in capital) in relation to the overall volume of the Finnish state budget – which, as an orientation, amounted to around € 54 billion in

180 *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; This reasoning features equally in subsequent decisions, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 17-18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

181 Cf. for example: PeVL 12/2018 vp *On the Establishment of a European Monetary Fund* [2018] (Finnish Constitutional Law Committee) 3-4.

182 *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 467.

183 Tuori and Raitio, 'Finland' 328; Jokela, *Finland and the Eurozone Crisis* 35-36; Jokela and Korhonen, *A Euroscpetic Big Bang - Finland's EU Policy in Hindsight from the 2011 Elections* 4.

2015[184] – and the Finnish state debt level – which, to put it in perspective, amounted to 63,2% of the Finnish GDP in 2016.[185] It concluded that although the financial commitment was considerable compared with both indicators, the commitment was sufficiently limited and that the Finnish Parliament could influence ESM-decisions. The most important question for the Committee appeared to be to determine whether the Finnish budget remained 'under the control' of the Finnish Parliament.[186] Different to the previous draft, national financial commitments could no longer be increased by qualified majority, which thus ensured sufficient Finnish parliamentary influence, as it could mandate the Finnish Minister representing Finland at the ESM.[187] The Constitutional Law Committee also pointed out that the financial commitment of up to € 12.5 billion could potentially negatively impact the ability of the Finnish State to fulfil its constitutional obligations, including to provide for social welfare as established in Sections 19, 88 Finnish Constitution.[188] Although this risk did ultimately not manifest in relation to the ESM-Treaty, future financial commitments at the EU-level will have to comply with this constitutional benchmark – or would otherwise have to be approved by a qualified parliamentary majority under Section 94 (2) (2) Finnish Constitution.

In addition to considering the extent of the financial commitments, the Committee focused extensively on the question whether the modified ESM-Treaty involved a conferral of competences that is relevant under the Finnish sovereignty doctrine. The Committee reiterated that, in order to determine a potential violation of the Finnish sovereignty doctrine, the extent and the nature of the delegated powers are of particular relevance.[189] In a first step, based on the previous decisions, it examined the voting procedure applicable

184 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 466.

185 Eurostat Online Publications, 'Government Finance Statistics' (*Eurostat*, 2020) <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1137.pdf> accessed 20 December 2020.

186 *Final Assessment Draft ESM-Treaty (III.)* 4; *Second Assessment Draft ESM-Treaty (II.)* 2; *First Assessment Draft ESM-Treaty (I.)*.

187 *Final Assessment Draft ESM-Treaty (III.)* 3; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

188 *Final Assessment Draft ESM-Treaty (III.)* 3; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 466.

189 *Final Assessment Draft ESM-Treaty (III.)* 4.

to decisions by the ESM board of governors.[190] As outlined, given that the final ESM-Treaty did not provide for a possible increase in the Member States' financial commitments by qualified majority vote within the ESM, the Constitutional Law Committee concluded that the Finnish financial commitment was sufficiently confined and limited.[191] In addition, the Committee underscored that Eurocrisis-measures, such as the ESM-Treaty, were necessary steps that had to be taken to guarantee the stability of the Eurozone. Obviously, Finland as member of the Eurozone has a particular interest in stabilizing the Euro. The Constitutional Law Committee summarized that Finnish participation in the ESM constituted a joint exercise of national sovereignty of the Euro Member States, which enhanced the stability of the single currency to the benefit of the Finnish state.[192] Therefore, the Committee found that neither the parliamentary budgetary prerogatives nor Finnish sovereignty were significantly limited and that the final ESM-Treaty could be adopted by a simple majority in the Finnish Parliament.

More recently, the Constitutional Law Committee had to determine the compatibility of the proposed Next Generation EU recovery strategy.[193] In its decision, the Committee reiterated its conception of sovereignty established during the Eurocrisis, which appears to emphasize the importance of budgetary and financial decision-making powers for the Finnish Parliament as protected under the sovereignty doctrine.[194] Following this conception, the Committee focused in its constitutional appraisal on the possible financial responsibilities and limits to budgetary decision-making, which entailed the evaluation of the overall Finnish financial liabilities at the EU-level, the level of Finnish parliamentary influence as well as the likelihood that these liabilities ultimately materialize.[195] Moreover, the Committee reiterated the importance of strictly limited Finnish financial liabilities to secure Finnish parliamentary budgetary

190 *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. final assessment: *Final Assessment Draft ESM-Treaty (III.)* 4; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392.

191 *Final Assessment Draft ESM-Treaty (III.)* 3; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

192 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

193 *Commission's Draft EU Recovery Plan and MFF Planning* 10; Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

194 Which the Committee terms 'budgetary sovereignty', cf. *Commission's Draft EU Recovery Plan and MFF Planning* 11; PeVL 13/2018 vp *Proposal for Council Directive Laying Down Provisions for Strengthening Fiscal Responsibility and the Medium-Term Budgetary Orientation in the Member States (COM (2017) 824 final)* [2018] (Finnish Constitutional Law Committee) 8.

195 *Commission's Draft EU Recovery Plan and MFF Planning* 12; Cf. as well: *Proposal for Council Directive Laying Down Provisions for Strengthening Fiscal Responsibility and the Medium-Term Budgetary Orientation in the Member States (COM (2017) 824 final)* 8; *On the Establishment of a European Monetary Fund* 3-4.

sovereignty.[196] Regarding Next Generation EU, the Committee raised specific concerns regarding the envisaged funding through EU borrowing, which according to the Committee constituted a crucial modification in EU cooperation as such a recovery strategy including the proposed design could not have been anticipated when Finland ratified the EU-Treaties, as it seemingly extends the Treaty-mandate given to the EU in Article 310 TFEU and as it can thus not be classified as a 'normal evolution' of EU membership.[197] Overall, the Committee concluded that the envisaged recovery strategy, and more specifically the proposed Own Resources Decision which would authorize EU borrowing, constituted a significant interference with Finnish (budgetary) sovereignty that would likely require approval by a two-thirds majority, which the Grand Committee, however, rejected in its final position as *Leino-Sandberg* highlighted.[198] At the same time, it should be emphasized that the Committee then only considered the draft version submitted by the European Commission and therefore an additional evaluation of the final recovery strategy can be expected.

Taken together, the constitutional appraisal of Next Generation EU and the ESM-Treaty, both illustrate the advantages of the Finnish constitutional assessment. It allows for an institutionalized and formal dialogue between the Constitutional Law Committee, the Finnish Parliament and the Finnish Government on envisaged EU commitments during the on-going negotiations at the national as well as the EU-level. Therefore, the *ex ante* review exercised by the Constitutional Law Committee may be seen as a constructive and goal-oriented means to design EU integration steps in compliance with the Finnish constitutional requirements. It allows to evaluate the national constitutional implications of debated EU matters before possible unsurmountable conflicts manifest. In that regard, one could even argue that the *negative* opinion of the Constitutional Law Committee on the second draft version of the ESM-

196 *Commission's Draft EU Recovery Plan and MFF Planning* 10; Also apparent in relation to the ESM and the possible increase of liabilities by unanimity, which was considered to require the support of a qualified majority under Section 94 (2) (2) Finnish Constitution, cf. *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

197 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

198 Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

Treaty[199] increased the authority of the Finnish position in the supranational negotiation process.[200]

The analyzed decisions of the Constitutional Law Committee indicate that budgetary and financial commitments have a close connection to Finnish sovereignty – apparent from the Committee's terminology 'budgetary sovereignty' – given that the ability to decide on budgetary and financial commitments is construed as an important sovereign prerogative of the Finnish Parliament. Therefore, each modification of EU commitments with financial implications requires anew Finnish parliamentary involvement. In addition, conferring such budgetary or financial competence irrevocably to the EU-level would according to the Committee significantly alter the characteristics of EU cooperation,[201] which would require the confirmation by a qualified parliamentary majority following Section 94 (2) (2) Finnish Constitution. At the same time, such conflict appears not to be a constitutional hard limit, as it can be overcome by complying with the prescribed procedural requirements.

Taken together, the assessment illustrates that the Constitutional Law Committee appears to have developed the concept of essential features of the parliament's budgetary competences based on Finnish sovereignty.[202] Notably, the Committee specified in its appraisal of the ESM-Treaty and subsequently of Next Generation EU that an overall assessment of the financial impact of the proposed EU obligations had to be undertaken. In these decisions, the benchmarks for the assessment were the annual Finnish state budget and the overall debt level in order to determine whether the Finnish state would be able to fulfil its constitutional obligations[203] as well as the level of parlia-

199 *Second Assessment Draft ESM-Treaty (II.)* 2.

200 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Jokela, 'Finland: Towards a More Cautious Europeanization' 49.

201 On the conception of Finnish sovereignty and the special form of cooperation in the EU, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366-367; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

202 As recently emphasized by the Constitutional Law Committee, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 13; PeVL 12/2020 vp *EIB Proposal for EU Covid-19 Guarantee Fund* [2020] (Finnish Constitutional Law Committee) 4; Also described as Finnish budgetary autonomy, cf. Tuori and Raitio, 'Finland' 328; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392.

203 Cf. Section 19 in conjunction with Section 88 Finnish Constitution; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 467; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

mentary control and the likelihood that financial liabilities would manifest.[204] This benchmark is highly relevant when determining the feasibility of EU fiscal integration steps in Finland. Overall, it can be submitted that the concept of 'budgetary sovereignty' is a relevant benchmark to identify the applicable parliamentary majority requirement, without, however, constituting an absolute or legally insurmountable constitutional *red line* for the constitution-amending legislator regarding EU fiscal integration.

4.2 Finnish democracy

The principle of Finnish democracy is enshrined in Section 2 (1) and (2) Finnish Constitution. Considering its systematic positioning within the Finnish Constitution, democracy occupies a primary position amongst the 'fundamental principles',[205] which is reflected in the central position that the Finnish Parliament enjoys in the overall constitutional framework.[206] The constitutional importance of the principle of democracy is underscored by Section 94 (3) Finnish Constitution, which excludes EU cooperation that conflicts with the basic understanding of Finnish democracy. The emerging question is whether Finnish democracy has an additional substantive core which extends beyond the outlined procedural guarantees that secure parliamentary involvement in EU matters and beyond the constitutional protection afforded by Finnish sovereignty.

4.2.1 A normative core of Finnish democracy?

In the course of the Finnish constitutional reform process, EU matters were assigned to the government under the control of the Finnish Parliament, instead of labelling these as foreign affairs under the control of the Finnish

204 *Commission's Draft EU Recovery Plan and MFF Planning* 12; *Proposal for Council Directive Laying Down Provisions for Strengthening Fiscal Responsibility and the Medium-Term Budgetary Orientation in the Member States (COM (2017) 824 final)* 8; *On the Establishment of a European Monetary Fund* 3-4.

205 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 281-282; Länsineva, 'Fundamental Principles of the Constitution of Finland ' 115.

206 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 282; Jokela, 'Finland: Towards a More Cautious Europeanization' 44; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 453; Ojanen, 'The EU at the Finnish Constitutional Arena' 248; Ojanen, 'The Europeanization of Finnish Law' 162; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 547.

President.[207] Obviously, given the continuous process of EU integration, this resulted in increasing parliamentary influence. Overall, this indicates the evolutionary potential of Finnish democracy, which evolved from being semi-presidential by the end of the 20th century to being increasingly parliamentarian especially in EU affairs. This evolution is underscored by the Constitutional Law Committee, which, for example, accords primary importance to parliamentary participation rights in EU matters.[208]

The highlighted evolution equally illustrates that constitutional amendments to the principle of democracy are permissible in Finland. Neither an absolute normative nor systematic limit to protect Finnish democracy against EU fiscal integration is apparent. As will be argued in the subsequent part, even Section 94 (3) Finnish Constitution could be constitutionally amended. Taken together, the conception of Finnish democracy seems to focus on the high degree of discretion that the Finnish Parliament enjoys in domestic and EU affairs.[209] This discretion regarding the content of parliamentary decisions seemingly resulted in a focus on procedural elements, notably to ensure that parliamentary decisions are based on the correct procedure, instead of developing substantive requirements or limitations to these decisions. This procedural focus translates into a detailed constitutional framework on parliamentary rights and prerogatives *vis-à-vis* the EU embedded in Chapter 8 of the Finnish Constitution.

Furthermore, the previous outline of Finnish sovereignty indicates the close interconnection between Finnish sovereignty and democracy. Notably, parliamentary budgetary prerogatives appear to be institutionally relevant for parliament, as noted in Section 3 (1) Finnish Constitution. These prerogatives are equally democratically relevant, as Section 2 (2) Finnish Constitution establishes that individuals have the right to influence societal developments which arguably includes decisions on revenue and expenditure. And finally, these competences are also relevant for Finnish sovereignty, as budgetary competences are characterized as essential sovereign powers to shape the state.

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207 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 285; Ojanen, 'The EU at the Finnish Constitutional Arena' 247-248; Ojanen, 'The Europeanization of Finnish Law' 162.

208 Jokela, 'Finland: Towards a More Cautious Europeanization' 44; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452-453; Ojanen, 'The EU at the Finnish Constitutional Arena' 248; Ojanen, 'The Europeanization of Finnish Law' 162; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 547.

209 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452-453; Ojanen, 'Constitutional Amendment in Finland' 109; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 106; Lavapuro, Ojanen and Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' 509.

4.2.2 *Consequences for EU fiscal integration steps*

The consequences for EU fiscal integration proposals appear to be mainly procedural in nature. As concluded, proper parliamentary participation is a key requirement to secure the functioning of the Finnish parliamentary democracy. This parliamentary participation in relation to EU integration consists of different layers. First, parliamentary approval is required for the transfer of constitutionally relevant powers to the EU, as established in Section 94 Finnish Constitution. Second, the Finnish Parliament can mandate Finnish representatives at the EU-level following Section 96 Finnish Constitution. And finally, the parliament enjoys a comprehensive right to receive information on EU, as laid down in Section 97 Finnish Constitution. This suggests that the principle of democracy is operationalized through detailed procedural involvement and parliamentary participation in EU affairs.

A violation of Finnish democracy seems to occur in case the Finnish Parliament is not properly involved in the decision-making process. This considerably distinguishes the Finnish approach from, for example, the German conception of democracy, which contains a set of abstract competence areas that are declared particularly democratically relevant.[210] The *internal* reliance on procedural and participatory safeguards for the Finnish Parliament extends to the EU-level and it ultimately generates a predictable legal framework for the assessment of whether the democratic requirements were complied with. Therefore, EU fiscal integration proposals seem to be substantively compatible with the principle of Finnish democracy as long as the procedural framework is respected. Obviously, this might require that EU fiscal integration steps are designed in light of the Finnish parliamentary participatory requirements, as exemplified during the ESM-Treaty negotiations.[211]

4.3 Section 94 (3) Finnish Constitution: A Finnish *eternity clause*?

Of particular interest is Section 94 (3) Finnish Constitution, which requires that any form of EU cooperation respects the basic democratic fundaments of the Finnish constitutional order. Notably, Section 94 (3) Finnish Constitution states:

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210 Cf. German constitutional approach: *Lisbon-judgment* para 250; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 926-927.

211 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 174-175 para 39; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 467.

> 'An international obligation shall not endanger the democratic foundations of the Constitution.'

Until now, this provision did not gain particular prominence in the constitutional debate. The Constitutional Law Committee did not conclusively position itself with regard to the normative content of this restriction and its potential procedural implications.[212] This may either suggest that all forms of EU and international cooperation up to today were clearly in compliance with the democratic foundation of the Finnish Constitution – which would in return restrict the application of Section 94 (3) Finnish Constitution to forms of cooperation that fundamentally challenge the Finnish constitutional structure. Or it may indicate that the provision is, in fact, not enforceable, thereby merely formulating a constitutional reminder when additional competence conferrals are considered by the Finnish Parliament. In both cases it seems that Section 94 (3) Finnish Constitution is not intended to exclude certain state powers from conferral, but it is rather intended as a condition for an envisaged conferral, notably that the EU respects democratic standards and that the Finnish Parliament retains a central role in EU-related decisions.[213]

Section 94 (3) Finnish Constitution was introduced into the Finnish constitutional order by the constitutional reform process in 2000. It is thus a relatively new constitutional provision, which might explain the rather limited constitutional application so far.[214] Furthermore, the authoritative preparatory documents drafted during the reform process merely state that the provision was new to the Finnish Constitution, without providing additional information on the protected content or the intended function.[215] Generally speaking, one may infer from the introduction of Section 94 (3) Finnish Constitution an

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212 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 372-373; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 307; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Husa, *The Constitution of Finland - A Contextual Analysis* 34; Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' 140.

213 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 373.

214 Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' 140; As highlighted, for now the provision was not comprehensively applied, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 372-373; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 307.

215 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 372-373; Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' 142.

apparent shift in the constitutional focus away from sovereignty to (procedural) democracy concerns.[216] Systematically speaking, it is interesting to observe that Section 94 (3) Finnish Constitution has no equivalent provision 'internally'. This means that (internal) constitutional amendments or exceptive enactments are not restricted in a comparable manner, even in case such reforms would challenge the democratic foundation of the Finnish Constitution. Hence, Section 94 (3) Finnish Constitution is specific to EU and international cooperation. Furthermore, given that the restriction does not apply to constitutional amendments, the constitution-amending legislator could arguably alter Section 94 (3) Finnish Constitution following Section 73 Finnish Constitution.

As it stands, the function of Section 94 (3) Finnish Constitution is yet to be determined. Given that the Constitutional Law Committee did not provide guidance, it is hardly predicable whether Section 94 (3) Finnish Constitution will function as authoritative reminder for preserving democratic standards in supranational cooperation or whether it could develop into a substantive limitation for EU fiscal integration steps. It seems that Section 94 (3) Finnish Constitution could provide a degree of rigidity to the otherwise very open and flexible constitutional approach to supranational cooperation. As will be elaborated in the comparison, other constitutional systems rely on provisions comparable to Section 94 (3) Finnish Constitution to impose substantive obstacles to EU integration to protect democracy.[217]

4.4 Conclusive appraisal: Substantive flexibility towards European fiscal integration

In conclusion, the assessment of Finnish sovereignty, democracy and Section 94 (3) Finnish Constitution revealed that substantive constitutional principles have a minor limiting effect on EU fiscal integration ambitions. In fact, the Finnish Parliament appears not to be limited by substantive obstacles when deciding on EU cooperation. Instead, the assessment revealed the adaptability and the evolutionary potential of these constitutional principles.

Overall, the connecting element between sovereignty, democracy and Section 94 (3) Finnish Constitution appears to be the centrality of the Finnish Parliament. In relation to sovereignty, budgetary decisions were considered an important, sovereign competence of the Finnish Parliament, which could be affected by too far-reaching EU integration steps. In relation to democracy, the focus on procedural safeguards aims at a comprehensive involvement of the Finnish Parliament in all central budgetary decisions both at the national

216 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307.

217 Hautamäki, 'Novel Rules in the Finnish Constitution - The Question of Applicability' 142.

and the EU-level. And the additional protection of the Finnish Constitution's democratic fundament laid down in Section 94 (3) Finnish Constitution appears to underscore the importance of the Finnish Parliament in democratic decision-making processes. Taken together, this suggests that the effective influence of the Finnish Parliament on decisions taken in a more fiscally integrated EMU is of central importance, in order to escape the qualified parliamentary threshold and in order to be desirable for the Finnish Parliament in a generally more Euroskeptic climate in Finland.

5 Resulting constitutional space: The Finnish road to EU fiscal integration

The Finnish constitutional system vests the Finnish Parliament with far-reaching discretion when deciding on EU cooperation. The assessment revealed that the Finnish constitutional system entails a specific procedure for the conferral of competences to the EU-level in Section 94 Finnish Constitution, which distinguishes between the regular conferral of competences – that are deemed required for EU cooperation – as well as more significant conferrals – that impact the Finnish Constitution or the Finnish sovereignty doctrine and that can only be adopted by a qualified parliamentary majority. Once competences are conferred, the Finnish Constitution awards parliament with an extensive right to receive information as well as a mandating system through which the Finnish Parliament can shape Finnish EU positions. This comprehensive procedural framework secures the central position of the Finnish Parliament in decision-making processes at both the national and the EU-level. Furthermore, the assessment of the Finnish constitutional appraisal of the various Eurocrisis-measures illustrated the flexible Finnish approach to increased EU cooperation in budgetary and fiscal matters. This *constitutional flexibility* appears to stem from various constitutional elements.

In the first place, it stems from the general design of the Finnish constitutional system which relies heavily on parliamentary sovereignty and which does not entail explicit limits to parliamentary discretion. This wide discretion is illustrated by the 2000 constitutional reform process, which altered core features of the Finnish Constitution including the system of governance, judicial review, the framework for EU and international cooperation, as well as essential constitutional principles, such as democracy and sovereignty. In light of the wide constitutional transformation, it can be submitted that Finnish *constitutional flexibility* appears to cover all parts of the Finnish constitutional order and it appears to result from the strong reliance on the parliament as the nucleus of constitutional decision-making.

Secondly, the Finnish mode of constitutional review provides for additional *constitutional flexibility*. This stems from the *ex ante* review that the Committee conducts, which enables the legislator to draft EU integration steps in light

of constitutional concerns rather than being *ex post* scrutinized for exceeding constitutional limits. Furthermore, as the Committee is composed of parliamentarians, its institutional approach arguably differs from a traditional constitutional court. Notably, reflecting its institutional position, the Committee refrained from imposing substantive limits to EU integration steps. Instead, the Committee focused on procedural requirements and adequate involvement of the Finnish Parliament.

Consequently, Finnish *constitutional flexibility* appears to derive from a combination of structural, conceptual and institutional features. Although the resulting flexible constitutional approach seems to allow for EU fiscal integration steps, it should be equally pointed out that such integration steps could be confronted with high procedural requirements as budgetary and fiscal competences are nevertheless construed as important national powers protected by democracy as well as sovereignty. The attainability of these procedural requirements remains uncertain in light of the highlighted more Euroskeptical political climate in Finland.

III Macro-Comparative Assessment of Germany

1 GERMANY AND EU INTEGRATION

In contrast to the flexible Finnish constitutional approach, German constitutional law appears to impose strict limitations on further EU fiscal integration steps despite the overall importance of EU cooperation for post-war German constitutionalism. Historically, the adoption of the Treaty of Paris in 1951 and of the Treaty of Rome in 1957[1] initiated a crucial step in the on-going German redemption process to address the atrocities committed between 1933 and 1945. Hence, for Germany European cooperation was a means to internationally showcase a commitment to fundamental rights protection, to establish peaceful relations amongst European countries, but also to regain political trust and to foster economic development. Hence, EU cooperation is of historic importance for post-war Germany and it is supported by a broad political consensus.[2] However, the Eurocrisis also triggered intense domestic debates on the future direction of the EU in Germany. Notably, when drafting the various Eurocrisis-measures, the dominant German political view was that financial support had to be tied to strict (austerity) conditions.[3] This view translated into a persistent reluctance towards conferring additional fiscal competences to the EU-level. At the same time, this initial political hesitation towards a more fiscally integrated EU appears to slowly soften, as apparent from Next Generation EU, which is based on a Franco-German proposal.[4]

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1 Rupert Scholz, 'Art. 23 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) para 11; Paul Craig, 'Development of the EU' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, Oxford University Press 2017) 13-15; Craig and de Búrca, *EU Law Text, Cases, and Materials* 3-4.

2 Although, the support is less enthusiastic, cf. Angelika Scheuer and Hermann Schmitt, 'Sources of EU Support: The Case of Germany' (2009) 18 German Politics 577, 578; Stephen Wood, 'Germany and the Eastern Enlargement of the EU: Political Elites, Public Opinion and Democratic Processes' (2002) 24 Journal of European Integration 23, 29-30.

3 Federico Fabbrini, 'Austerity, the European Council, and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council' (2015) 22 Indiana Journal of Global Legal Studies 269, 271, 278-281.

4 Bundeskanzlerin, *Press Release 173/20: A French-German Initiative for the European Recovery from the Coronavirus Crisis*; Cf. as well: Großner and Lawton, 'Merkel and Macron Roll Out €500 Billion COVID-19 Recovery Initiative'; Pancevski and Norman, 'France, Germany Propose €500 Billion EU Pandemic Recovery Fund'; Brössler and Finke, 'Merkel und Macron setzen die Zauderer unter Druck'; Kafsack, ''Alte Zwistigkeiten hintanstellen''.

The political resistance against EU fiscal integration apparent during the Eurocrisis was echoed by the German Federal Constitutional Court,[5] the guardian[6] of the German Constitution[7] and, in EU-related disputes, as *Weiler* put it, a *barking dog that never bites*.[8] This metaphor captures the German constitutional jurisprudence of the past four decades, during which the Court established rigid abstract limits against EU integration steps without, however, annulling any concrete EU measure.[9] The Court's latest jurisprudence suggests that this barking dog turned into a biting one as it declared the ECB's PSP-program and the *Weiß*-judgment *ultra vires*.[10] Although the German Court elaborated how the ECB could remedy the German concerns and ultimately escape incompatibility with the German Constitution, the PSPP-judgment could be exemplary of a new German judicial readiness to more actively challenge EU law. The prevailing question is whether the PSPP-judgment constitutes a singular instance, or whether it marks the start of a stricter application of the established German constitutional limits. In light of this new development, it seems likely that the Court will closely scrutinize any future EU fiscal integration steps and that it might in certain cases not refrain from declaring these incompatible with the German Constitution, which could impede the reform plans for the Euro.

Whilst the apparent readiness to enforce the existing limits is novel, the constitutional limits themselves are not. The German Constitutional Court clearly displayed its concerns towards EU fiscal and budgetary integration in the Eurocrisis-related case law.[11] Although it ultimately accepted all adopted

5 In German: *Bundesverfassungsgericht*.

6 Mehrdad Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' (2011) 48 Common Market Law Review 9, 15; In the context of EU integration, the German Court appears to see itself as advocate of the Member States, cf. Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 537-538; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 300.

7 In German: *Grundgesetz*.

8 Joseph H. H. Weiler, 'The 'Lisbon Urteil' and the Fast Food Culture' (2009) 20 The European Journal of International Law 505, 505.

9 In chronological order: *Solange I-Decision* ; 2 BvR 197/83 *Solange II-Decision* [1986] (German Federal Constitutional Court); *Maastricht-Judgment*; *Lisbon-judgment*; *Honeywell-judgment*; *OMT-reference*; *Final OMT-Judgment*; *Quantitative Easing (PSPP) Reference*; *Quantitative Easing (PSPP) Final Judgment*.

10 *Quantitative Easing (PSPP) Final Judgment* paras 163, 178.

11 *Financial Support for Greece and EFSF* (issued in September 2011); 2 BvE 8/11 *Participation of Members of German Parliament in the EFSF* [2012] (German Federal Constitutional Court) (February 2012); 2 BvE 4/11 *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* [2012] (German Federal Constitutional Court) (issued in June 2012); *ESM-Treaty and Fiscal Compact (interim relief)* (issued in July 2012); *OMT-reference* (issued in January 2014); *ESM-Treaty and Fiscal Compact* (issued in March 2014); *Final OMT-*

measures, the Court defined substantive, competence-based limits in its *constitutional identity* review. In this case law, the *eternity clause* enshrined in Article 79 (3) GG emerged as the pivotal constitutional reference point for EU (fiscal) integration ambitions.[12] The increasing use of the *eternity clause* has significant practical implications, as every element that the Constitutional Court subsumes under Article 79 (3) GG is immune against constitutional change[13] and EU fiscal integration reforms might thus be heading into a German constitutional dead-end. In light of these serious German constitutional obstacles, the following Chapter investigates the apparent rigidity of the German constitutional approach towards EU fiscal integration proposals. It thereby not only charts existing constitutional limits, but also explores whether additional flexible constitutional space exists, or may be created, under the current German Constitution in order to accommodate such EU proposals without lifting effective protection of the German constitutional core.

Following the structure adopted in the assessment of the Finnish constitutional approach, the analysis of the German constitutional approach first outlines the relevant components of the German constitutional system (2.). Subsequently, the applicable procedural-institutional framework will be assessed (3.). This is followed by the evaluation of the substantive German framework for EU fiscal integration (4.). It is followed by a conclusive overview of the resulting constitutional space under the German Constitution (5.). In a subsequent step, this initially charted constitutional space is deconstructed based on *constitutional flexibility* (6.).

2 SETTING THE STAGE: EU MEMBERSHIP AND THE GERMAN CONSTITUTION

Different to the Finnish constitutional order, which had to incorporate an existing and advanced body of supranational law, German constitutional law

Judgment (June 2016); *Quantitative Easing (PSPP) Reference* (issued in July 2017); *Quantitative Easing (PSPP) Final Judgment* (issued in May 2020).

12 As the *identity review* based on Article 79 (3) GG sets absolute limitations to the German Parliament, cf. Christoph Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' (2015) 34 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1001, 1002.

13 Herdegen, 'Art. 79 GG' paras 60-63; Johannes Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 19-20; Ziller, 'The German Constitutional Court's Friendliness Towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' 68; Only the constituting power may decide to replace the German Constitution and thereby overcome Article 79 (3) GG, cf. Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

evolved alongside the process of EU integration.[14] The subsequent section outlines the origins of the German Constitution which might explain core constitutional design choices (2.1.), before then considering the mentioned authoritative German Constitutional Court (2.2.).

2.1 Origin of the German Constitution and its EU features

The German Constitution was adopted in 1949. Haunted by the horrors of the *Hitler*-dictatorship that emerged under the *Weimar Constitution*, the drafters of the *Grundgesetz* designed a resilient constitutional system that is based on irreversible constitutional values and devoted to peaceful European cooperation. Hence, the commitment to a unified Europe in the preamble and the initial possibility to confer state powers to the supranational level established in Article 24 GG[15] as well as the prominent commitment to human dignity in Article 1 GG, the following catalogue of fundamental rights in Articles 2-19 GG and the *eternity clause* can be understood as direct reactions to these historic experiences. Specifically, the latter is devised as constitutional shield against constitutional abuses by locating core constitutional principles outside the reach of the constituted state institutions.[16] This resilient constitutional design is paired with a central constitutional authority that supervises all state action,

14 For example, with the ratification of the Maastricht Treaty when Article 23 GG was introduced, cf. Wolff Heintschel von Heinegg and Robert Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 1, 21-23; Christian Hillgruber, 'GG Präambel' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 16-16.2; Herdegen, 'Präambel des Grundgesetzes' paras 69, 74; Claudio Franzius, '70 Jahre Grundgesetz und Europa: Passt das zusammen?' (2019) 54 Europarecht (EuR) 365, 366-367; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 685-686; Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (C.F. Müller 1993) para 106.

15 Christian Calliess, 'Art. 24 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, 2020) paras 1-2.

16 Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002; Rainer Wahl, 'Elemente der Verfassungsstaatlichkeit' (2001) 41 Juristische Schulung (JuS) 1041, 1042; These powers are outside the reach of the constitution-amending legislator, cf. Herdegen, 'Art. 79 GG' paras 60-61; Armin von Bogdandy and Stephan Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 701, 715; The protection of the *eternity clause* extends to EU integration steps, cf. Klaus F. Gärditz, 'Glaubwürdigkeitsprobleme im Unionsverfassungsrecht' (2020) 31 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 505, 505; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150.

the German Constitutional Court.[17] It is constituted as the independent authority that ensures the compliance with the German Constitution. Different to courts in other EU Member States,[18] the German Court is empowered to review compliance with all constitutional provisions, including the *eternity clause*.[19] Overall, this suggests that the constitutional design and the Court's authoritative position are historically rooted design choices. Throughout the process of EU integration, both elements became more relevant. For example, although the *eternity clause* was originally drafted as *internal* constitutional safeguard, it is increasingly applied to EU integration.[20] Notably, the German constitutional jurisprudence illustrates that the *eternity clause* is mainly employed as constitutional benchmark or shield against too far-reaching EU integration steps.[21]

As EU cooperation increased over the past six decades, the constitution-amending legislator introduced a specific EU clause when adopting the Maastricht Treaty into Article 23 GG which regulates the conferral of competences to the EU and the participation of German institutions in EU affairs[22] thereby introducing a distinctive constitutional framework for European cooperation.

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17 Michaela Hailbronner and Stefan Martini, 'The German Federal Constitutional Court' in András Jakab, Arthur Dyevre and Giulo Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 356-359; Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* (Duke University Press 1997) 1.

18 Cf. for example the French *Conseil Constitutionnel* which has no power to review constitutional amendments, cf. Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 434-435.

19 At the same time, constitutional jurisprudence is also confronted with criticism, for example in relation to the wide standing requirements in EU matters that were criticized as introducing a *de facto* actio popularis in Germany, cf. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 190-197; Volker Epping, *Grundrechte* (6th edn, Springer Verlag 2015) 183; Oliver Klein and Christoph Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' (2007) 60 Neue Juristische Wochenschrift (NJW) 945, 949; Yet, the German Federal Constitutional Court maintains internally that no such *actio popularis* exists under the German Constitution, cf. 1 BvR 2980/14 *Fundamental Rights for Residents of Nursing Homes* [2016] (German Federal Constitutional Court) para 22.

20 As obvious from the strict limits that the German Court developed based on this provision, cf. Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 147; Franz C. Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' (2011) 9 International Journal of Constitutional Law 757, 780-782.

21 Martin Nettesheim, 'Wo 'endet' das Grundgesetz – Verfassungsgebung als grenzüberschreitender Prozess' (2012) 52 Der Staat 313, 332, 354; Cf. as well: Herdegen, 'Art. 79 GG' paras 177-179.

22 Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686; Jörg-Uwe Hahn, 'Die Mitwirkungsrechte von Bundestag und Bundesrat in EU-Angelegenheiten nach dem neuen Integrationsverantwortungsgesetz' (2009) 20 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 758, 758.

The provision allows for the conferral of competences in Article 23 (1) (2) GG,[23] by yet recalling the applicability of the *eternity clause* in Article 23 (1) (3) GG.[24] Therefore, Article 23 GG functions as both the framework for and the limit to German EU membership.[25] The then newly introduced provision complemented the previous constitutional framework, which consisted of a firm commitment to European cooperation in the preamble[26] and Article 24 GG. Today, the Constitutional Court employs all these provisions to construe the general openness of the German Constitution towards EU integration.[27]

2.2 The German Constitutional Court

As highlighted, the constitution establishes the German Constitutional Court as an independent, centralized judicial authority in charge of constitutional review. Its judgments are binding on all state institutions,[28] and through its interpretation of the *eternity clause* it can identify matters that are located outside the mandate of even the constitution-amending legislator.[29] Its authority in relation to other institutions is historically rooted[30] and unique from

23 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 21-23; Herdegen, 'Präambel des Grundgesetzes' paras 69, 74; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 106; Note also the explicit wording which indicates a dynamic process, rather than a mere participation in a static supranational organization, cf. 'Art. 23 (1) (1): With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union (...).'

24 Cf. for example the *OMT*-reference, *OMT-reference* paras 27-29; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 685; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Peter Häberle, *Das Grundgesetz zwischen Verfassungsrecht und Verfassungspolitik* (Nomos 1996) 449.

25 Thiele, 'Die Integrationsidentität des Art. 23 Abs. 1 GG als (einzige) Grenze des Vorrangs des Europarechts' 371; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 106.

26 Marcus Schladebach, 'Staatszielbestimmungen im Verfassungsrecht' (2018) 58 Juristische Schulung (JuS) 118, 120.

27 Cf. further discussion within this Chapter under Section 4.1.3.1.

28 As stipulated in § 31 BVerfGG, decisions of the Constitutional Court are binding for all state actors and decisions on the constitutionality of legislative acts have the force of law, cf. Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* (11th edn, C.H. Beck 2018) paras 495-496; Helmut Philipp Aust and Florian Meinel, 'Entscheidungsmöglichkeiten des BVerfG – Tenor, Systematik und Wirkungen' (2014) 54 Juristische Schulung (JuS) 25, 26.

29 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 147; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294, 307.

30 Hailbronner and Martini, 'The German Federal Constitutional Court' 357-360; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 1.

a comparative angle.[31] Article 93 GG assigns to the *Bundesverfassungsgericht* the exclusive power to supervise the constitutionality of legislative and other public action,[32] the competence to adopt binding decisions on the interpretation of constitutional provisions[33] as well as the power to settle constitutional disputes between institutions.[34] Proceedings can be initiated by institutional actors but also by private individuals,[35] which is of particular relevance in EU matters.[36] Today, around 95% of all applications are initiated by private individuals.[37] On the one hand, this ensures a steady caseload and, on the other hand, it elevates the individuals in relation to state actors.

The judges serving in the Court's two senates[38] are independent, as guaranteed by Article 97 (1) GG.[39] This underscores the judicial nature of the Court, which exclusively adjudicates on the basis of constitutional law.[40] The sixteen constitutional judges are appointed in equal parts by Bundestag and Bundesrat. The appointed candidates have to have the qualification to work as judge[41] and their appointment has to be confirmed by a two-thirds major-

31 In comparison, the German Federal Constitutional Court is one of the most powerful constitutional courts globally, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 1-3; Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2005) 17.

32 As established by the Court based on Article 100 GG, cf. 1 BvL 13/52, 1 BvL 21/53 *Law on Direct (Financial) Support* [1955] (German Federal Constitutional Court) para 33.

33 As specified in § 31 BVerfGG (Law on the Bundesverfassungsgericht), cf. Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; also stressed by the Court, cf. 2 BvR 1018/74 *Driving Licence Regulation* [1975] (German Federal Constitutional Court) para 12.

34 Cf. the different proceedings listed in Article 93 GG; For an overview, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 9.

35 For example: ibid paras 79, 194.

36 Which is highly controversial, cf. Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305, 307.

37 Epping, *Grundrechte* para 147.

38 The Bundesverfassungsgericht consists of 16 judges that are divided into two Senates consisting of 8 judges, cf. § 2 (1) and (2), § 14 BVerfGG; Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 38-39.

39 And further specified in § 1 (1) BVerfGG; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 670.

40 The *Bundesverfassungsgericht* pointed out itself that it was not conducting politics, cf. 2 BvF 1/73 *Treaty concerning the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic* [1973] (German Federal Constitutional Court) para 75; Cf. as well: Gerd Morgenthaler, 'Art. 93 GG – Bundesverfassungsgericht, Zuständigkeit' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) para 4; Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 501-504; Hailbronner and Martini, 'The German Federal Constitutional Court' 357-358.

41 Following § 2 (3) BVerfGG at least three judges per Senate have to be recruited from the other highest German courts with a minimum of three-year working experiences at these courts; Additionally, they have to poses the qualification to become a judge under German

ity. These requirements ensure that the appointed judges are both qualified and enjoy support beyond a specific political party.[42] Therefore, constitutional judgments are less politically driven, in contrast to, for example, the US Supreme Court,[43] which likely contributes to the wide acceptance of Court.[44]

Taken together, this illustrates the authoritative and important position the German Constitutional Court occupies under the *post-war* German constitutional system. As is apparent from its extensive case law, the Court extends this authoritative position to EU law, too. Through its constitutional review,[45] the Court continues to determine the relationship between the German and the EU constitutional order, which has clear implications for the feasibility of EU fiscal integration steps.[46]

3 Procedural and institutional framework for EU cooperation

Article 23 GG extensively regulates German EU membership, as visualized in *Figure 6*. It aims to ensure the comprehensive involvement of the German Parliament and Federal Council in EU matters.[47] Article 23 GG prescribes parliamentary approval for the transfer of competences, it establishes a right to receive information,[48] and it enables both institutions to participate in the

labor law, following § 3 (2) BVerfGG, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht - Stellung Verfahren, Entscheidungen* para 41.

42 Ibid paras 46-47; Hailbronner and Martini, 'The German Federal Constitutional Court' 365-366.

43 Christoph Hönnige and Thomas Gschwend, 'Das Bundesverfassungsgericht im politischen System der BRD – ein unbekanntes Wesen?' (2010) 51 Politische Vierteljahresschrift 507, 513.

44 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 550; Vanberg, *The Politics of Constitutional Review in Germany* 119-124.

45 For an overview cf. Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; For an outline of the possible conflict between EU and German legal order, cf. Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 305-306.

46 As the Court protects budgetary prerogatives under the *eternity clause*, cf. Herdegen, 'Art. 79 GG' paras 182-184; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-145; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7.

47 *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 91, 96-98; 2 BvE 6/99 *NATO-Concept* [2001] (German Federal Constitutional Court) paras 149-150; 2 BvE 13/83 *Deployment of Atomatic Weapons* [1984] (German Federal Constitutional Court) paras 144-145; Cf. as well Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 33.

48 Note that the right to information is not restricted to specific EU acts, cf. *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 100-101.

exercise of conferred powers. Furthermore, Articles 23 (3) (3) and (7) GG empower the German legislator to regulate the institutional interaction between parliament and government, now laid down in the Law on the cooperation of the German Government and the German Parliament in matters of the European Union (EUZBBG),[49] as well as the regional and the federal state level, now laid down in the Law on the cooperation of the federal level and the regional level in matters of the European Union (EUZBLG)[50].[51]

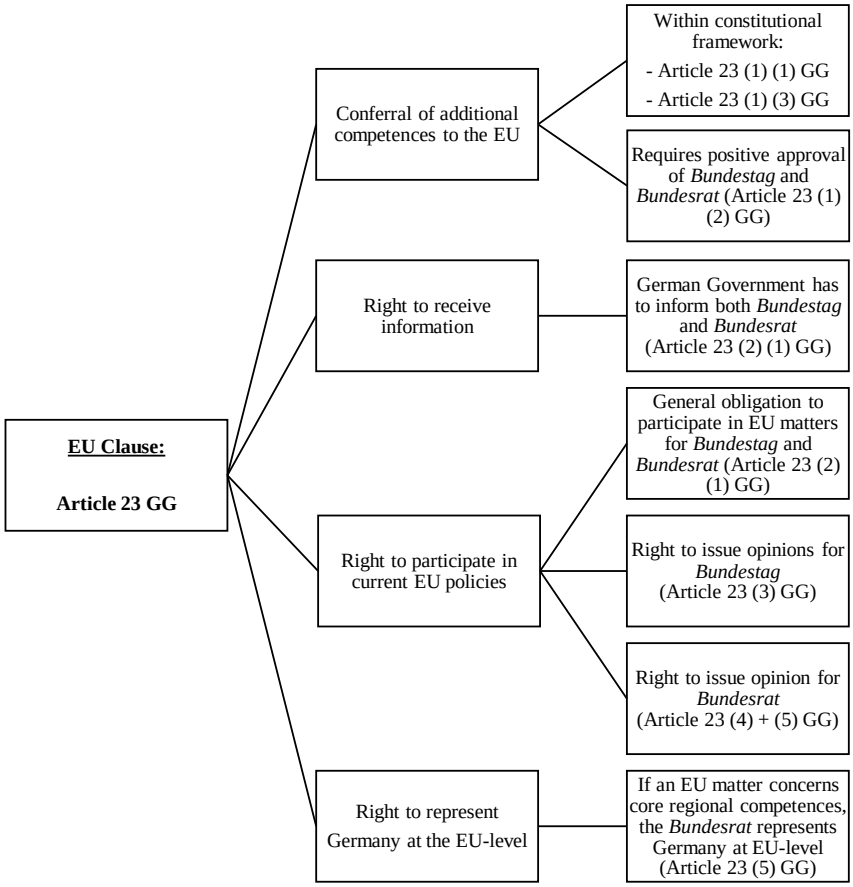

Figure 6: Different components of German EU membership clause

49 *EUZBBG* is the abbreviation for: Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union.

50 *EUZBLG* is the abbreviation for: Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union.

51 Timm Beichelt, 'Recovering space lost? The German Bundestag's new potential in European Politics' (2012) 21 German Politics 143, 145; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 106.

In the subsequent assessment, the constitutional framework for the conferral of competences to the EU (3.1.) and the involvement of the German Parliament (3.2.) as well as the Federal Council (3.3.) in the exercise of conferred competences are analyzed. Finally, the procedural requirements for initiating constitutional review are assessed (3.4.).

3.1 Conferral of additional competences to the EU under Article 23 GG

Article 23 (1) (2) GG permits the conferral of competences from the German to the EU-level.[52] Following the jurisprudence of the Constitutional Court, a conferral of powers is given in case of explicit Treaty amendments,[53] in case EU voting requirements are altered according to Article 48 (7) TEU,[54] or in case the EU's flexibility clause in Article 352 TFEU is employed.[55] In all three instances, the German legislator enjoys a so-called *parliamentary reservation*,[56] which prescribes parliamentary approval. Moreover, it is questionable whether a conferral of competences in the sense of Article 23 (1) (2) GG could also occur through an EU secondary act. However, following the case law of the German Constitutional Court[57] as well as the Treaty-logic[58] a transfer of competences to the EU seems to require an explicit recognition in the Treaties.

This conferral of competences is restricted in two regards. First, Article 23 (1) (1) GG establishes structural requirements that EU cooperation has to comply with (3.1.1.). And second, Article 23 (1) (3) GG reiterates that the majority requirement for constitutional amendments laid down in Article 79 (2) GG as well as the *eternity clause* apply to any envisaged conferral (3.1.2.).

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52 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 21-23; Scholz, 'Art. 23 GG' paras 61-64; Hans D. Jarass, 'Art. 23 GG – Europäische Union' in Hans D. Jarass and Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland – Kommentar* (9th edn, C.H. Beck 2007) paras 17-20.

53 In the sense of Article 48 (1) – (6) TEU; As the Bundesverfassungsgericht clarified, a textual modification of EU primary law always requires approval under Article 23 (1) (2) GG, cf. *Lisbon-judgment* para 243.

54 Ibid para 316; Cf. as well: Scholz, 'Art. 23 GG' para 149.

55 *Lisbon-judgment* para 328.

56 In German: *Parlaments- oder Gesetzesvorbehalt*; Then, the approval of the legislator is constitutive, cf. Scholz, 'Art. 23 GG' para 152.

57 *Lisbon-judgment* para 243; Also inherent in the *ultra vires* review, which scrutinizes EU secondary acts, cf. Andrej Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' (2018) 55 Common Market Law Review 923, 929; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274.

58 Notably, the principle of conferral enshrined in Article 5 (2) TEU.

3.1.1 Structural requirements applicable to the conferral of powers

EU cooperation has to comply with the requirements established in Article 23 (1) (1) GG, which states:

> '(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.'

As becomes obvious from the wording, Germany can only participate in supranational cooperation in case the EU complies with the listed structural requirements, which in fact largely correspond to the EU's foundational values. Hence, the legislator has to establish that the EU conforms to these requirements before approving the conferral. However, in contrast to the *eternity clause*, Article 23 (1) (1) GG does not formulate absolute limits. Instead, it sketches a general framework for EU cooperation[59] and aims to steer integration towards compliance with core German constitutional values.[60] This is equally reflected in the jurisprudence of the *Bundesverfassungsgericht*, which emphasized, for example, that the fact that EU democracy differed from the concept of German democracy did not render the EU undemocratic under Article 23 (1) (1) GG. It illustrates that the provision is interpreted in an open manner[61] and therefore unlikely to restrict EU fiscal integration ambitions.

3.1.2 Constitutional requirements for the conferral

Article 23 (1) (3) GG reiterates the internally applicable procedural requirements for constitutional amendments. It reads:

> '(1) [...] The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.'

Article 79 (2) GG establishes that constitutional amendments require approval by a two-thirds majority in parliament and federal council. Article 79 (3) GG

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59 Note the distinction between 'integration goal' in Article 23 (1) (1) GG and 'integration limits' in Article 23 (1) (3) GG, cf. Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 685-686.

60 Scholz, 'Art. 23 GG' paras 70- 71; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686.

61 Yet, respecting Article 23 (1) (3) GG, cf. *Maastricht-Judgment* paras 92-94; Cf. as well: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 10-11.

precludes amendments to the core constitutional values. By referencing these provisions, Article 23 (1) (3) GG clarifies that the internally applicable constitutional framework extends to the EU, too. Thereby Article 23 (1) (3) GG alters the previously applicable constitutional arrangement established under Article 24 (1) GG, which did not refer to Article 79 (2) GG.[62]

Now, Article 23 (1) (3) GG prescribes a two-thirds majority for all EU conferrals that directly or indirectly alter the German Constitution.[63] A constitution-amending majority was for example deemed necessary for adopting the ESM and the Fiscal Compact,[64] given the instruments' implications on constitutionally enshrined parliamentary prerogatives and their effect on *overall budgetary responsibility*.[65] Less far-reaching EU commitments can be approved by simple majority.[66] Yet, the precise delimitation, which was already disputed in the initial adoption process of Article 23 (1) GG,[67] remains ambiguous and a detailed assessment of the envisaged conferral is required in order to determine the applicable majority requirement.[68]

62 Scholz, 'Art. 23 GG' para 114; Jarass, 'Art. 23 GG – Europäische Union' para 21.

63 Everything that would internally be characterised as a (material) constitutional amendment requires constitution-amending majority, cf. Wissenschaftliche Dienste des Deutschen Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* (German Parliament 2020) 5; Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 25; Ralph Alexander Lorz and Heiko Sauer, 'Verfassungsändernde Mehrheiten für die Stabilisierung des Euro? – Mehrheitserfordernisse bei der Zustimmung zum Fiskalpakt, zum ESM-Vertrag und zur Änderung des AEUV' (2012) 47 Europarecht (EuR) 682, 685.

64 Although both instruments are intergovernmental agreements, the German Court clarified that in case such agreements have a close connection to EU law they are considered EU matters under German constitutional law and Article 23 GG is applicable, cf. *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 135-137; Cf. as well: Matthias Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' (2020) 39 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1777, 1779; Lena Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* (Freiburger Rechtswissenschaftliche Abhandlungen, Mohr Siebeck 2016) 359.

65 Ariane Richter, *Funktionswandel im Mehrebenensystem? Die Rolle der nationalen Parlamente in der Europäischen Union am Beispiel des Deutschen Bundestags* (Herbert Utz Verlag 2016) 176; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 6, 277; Christian Calliess, 'Finanzkrise als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' in Wolfram Höfling (ed), *Grundsatzfragen der Rechtsprechung und Rechtsfindung* (Walter de Gruyter 2012) 160.

66 Otherwise, Article 23 (1) (2) GG would have mentioned the constitution-amending majority immediately, cf. Scholz, 'Art. 23 GG' para 118; Jarass, 'Art. 23 GG – Europäische Union' para 21.

67 Scholz, 'Art. 23 GG' paras 118-119; Rüdiger Breuer, 'Die Sackgasse des neuen Europaartikels (Art. 23 GG)' (1994) 13 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 417, 423.

68 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 24, 27; Scholz, 'Art. 23 GG' para 118; Overall, it remains highly debated when an act requires constitution-amending majority following Article 23 (1) (3) GG and a detailed assessment has to be conducted, cf. German Parliament, *Parlamentarische Zustimmungserfordernisse bei*

3.1.3 Application of Article 23 (1) GG to EU fiscal integration

Overall, Article 23 (1) (2) GG empowers the German legislator to confer competences to the EU. This conferral has to comply with the outlined structural requirements in Article 23 (1) (1) GG and the procedural requirements in Article 23 (1) (3). Therefore, EU fiscal integration steps that involve the conferral of additional competences to the EU will have to be approved by the German legislator. The core question is which parliamentary majority requirements would apply. In light of the constitutional experiences during the Eurocrisis,[69] it seems possible that a qualified two-thirds majority will be required to approve EU fiscal integration steps in particular in light of the implications of EU fiscal integration steps for the budgetary prerogatives that the German Parliament enjoys.[70]

Notably, it seems likely that EU fiscal integration proposals have direct implications for *overall budgetary responsibility* which protects the constitutional responsibility of the German Parliament for budgetary and fiscal decisions. Hence, the envisaged conferral would seemingly alter and amend the current constitutional framework. Consequently, EU fiscal integration steps will likely have to be adopted by a two-thirds majority in the German Parliament and the German Federal Council, as prescribed by Article 23 (1) (3) in conjunction with Article 79 (2) GG. As recently established by the German Constitutional Court, the application of the appropriate constitutional majority-requirement can also be challenged by individuals.[71] This recent decision underscores the constitutional importance of the legislator's decision regarding the applicable majority-threshold for the adoption of EU commitments and makes it near certain that any choice for a simple majority would be challenged in front of the German Constitutional Court. Finally, the conferral of competences to the EU generally presupposes that the envisaged commitments are compatible with the *eternity clause*, which is evaluated below.

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der Umsetzung des Vorschlags COM (2017) 827 final zur Errichtung eines Europäischen Währungsfonds (German Parliament 2018).

69 Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 359; Parliamentary Fraction of CDU/CSU und FDP, *Drucksache 17/9046 – Gesetzentwurf der Fraktionen der CDU/CSU und FDP: Entwurf eines Gesetzes zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion* (German Parliament 2012).

70 Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' 1779; In particular, in case the proposed act impacts 'democratic self-determination' and entails a high degree of EU-control, cf. Frank Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' (2020) 73 Neue Juristische Wochenschrift (NJW) 3085, 3089.

71 2 BvR 739/17 *Decision on the Unified Patent Court* [2020] (German Federal Constitutional Court) paras 95-99; Cf. as well: Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' 1779; Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3089.

3.2 Participation of parliament in the exercise of conferred powers

Following Article 23 (2) (1) GG, the German *Bundestag* participates in EU matters. This includes a general right to be informed by the government on EU developments, as established in Article 23 (2) (2) GG.[72] The information has to be comprehensive[73] and occur at the earliest moment possible[74] so that the *Bundestag* can internally debate the matter.[75] Once parliament is informed on envisaged EU legislative acts, an internal parliamentary decision-making process follows, which may result in the issuing of a parliamentary position, following Article 23 (3) GG.[76] Given the parliamentary workload and the required expertise, decisions are prepared in specialized committees.[77] These committees are established by the rules of procedures[78] or the German Constitution itself, including the Committee for EU Affairs (hereafter: EU Committee).[79] After an initial screening process supported by a specialized unit of the legal service of the *Bundestag*,[80] the chairman of the EU Committee recommends to the president of the Bundestag the referral of the respective matter to a leading committee. Based on this recommendation, the president then assigns the matter. This leading committee issues a voting recommenda-

72 As emphasized by the *Bundesverfassungsgericht* 'matters of the EU' indicate that also decisions with close link to the EU are covered, cf. *ESM-Treaty and Fiscal Compact (interim relief)* para 182; *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 101-104; On the obligation of the German Government to inform parliament, cf. Hahn, 'Die Mitwirkungsrechte von Bundestag und Bundesrat in EU-Angelegenheiten nach dem neuen Integrationsverantwortungsgesetz' 762.

73 The Bundesverfassungsgericht adopts a wide definition of the obligation to 'inform', cf. examples provided *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 118-124; Yet, some executive discretion is preserved, cf. Scholz, 'Art. 23 GG' para 157.

74 Which is why Article 45 (2) and (3) GG allows for a delegation of EU matters to the specialized parliamentary committee, cf. Heintschel von Heinegg and Frau, 'Art. 45 GG – Ausschuss für Angelegenheiten der EU' paras 1, 6, 14; Scholz, 'Art. 23 GG' paras 156-157; Scholz, 'Art. 45 GG' para 8.

75 *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 125-127; Cf. as well: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 34.

76 Following Article 40 (1) (2) GG, it is for the *Bundestag* to organise its internal decision-making process, cf. *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* para 131.

77 Scholz, 'Art. 45 GG' para 3.

78 In German: *Geschäftsordnung des Bundestages (GO-BT)*.

79 Article 45 GG was included in the *Grundgesetz* together with the EU enabling clause in Article 23 GG, cf. Heintschel von Heinegg and Frau, 'Art. 45 GG – Ausschuss für Angelegenheiten der EU' para 1; Scholz, 'Art. 45 GG' para 1.

80 The *Bundestag* moved away from the idea of a centralized and exclusive parliamentary committee for EU affairs. Instead, a specialized administrative unit was created that evaluates all EU matters determining their importance for parliament, cf. Beichelt, 'Recovering space lost? The German Bundestag's new potential in European Politics' 148.

tion to the plenary of the Bundestag[81] but it is the plenary that takes the final decision.[82] Although Article 45 (2) GG in conjunction with § 93b (2) GO-BT allows to delegate the power to issue parliamentary positions to the EU Committee, this possibility has not yet been employed.[83]

Subsequently, the parliamentary view on the envisaged EU legislation is communicated to the government. The wording of Article 23 (3) GG reveals that the government is not legally bound by the forwarded position,[84] but has to thoroughly consider it.[85] Hence, the position can affect the final governmental view given the politically dependency of government and parliament. Nevertheless, Article 23 (3) GG does not prescribe parliamentary approval.[86]

3.3 The involvement of the German Federal Council

Given the federal structure of Germany, the federal *Länder* exercise a central role in the constitutional decision-making mainly through the federal council. Article 23 GG extends the federal council's internal prerogatives to EU decisions. It entails a comprehensive right to be informed on EU developments[87] as well as the federal council's participation in EU decisions that would have required its involvement internally.[88] Furthermore, it can issue a position on EU matters that impact its own interests, as established in Article 23 (5) GG. These positions

81 Following Article 93 GO-BT.

82 Conceptually different to the situation in Finland where all matters are decided in specialized committees, cf. Auel and Raunio, 'Debating the State of the Union? Comparing Parliamentary Debates on EU Issues in Finland, France, Germany and the United Kingdom' 19.

83 Against the original intention of the constitution-amending legislator that aimed to incentivise delegation of decision-making competences under Article 23 GG to the Committee for EU affairs, cf. Heintschel von Heinegg and Frau, 'Art. 45 GG – Ausschuss für Angelegenheiten der EU' para 1; Scholz, 'Art. 45 GG' para 3.

84 Article 23 (3) GG states that the government has to 'take into account' the parliamentary position.

85 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 39; Martin Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' (2010) 63 Neue Juristische Wochenschrift (NJW) 177, 181; The Constitutional Court raised concerns regarding the participation of Bundestag and Bundesrat in EU matters in its *Lisbon*-decision, after which the German Integration Law was amended, cf. Ulrich Everling, 'Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte' (2010) 45 Europarecht (EuR) 91, 105.

86 Scholz, 'Art. 23 GG' para 159.

87 The right of the *Bundesrat* and the *Bundestag* to receive information are identical, and the previously made conclusions apply correspondingly here, cf. Ibid para 164; Patrick Melin, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' (2011) 46 Europarecht (EuR) 655, 657.

88 For example, the *Länder* enjoy prerogatives in the legislative process, cf. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 510-519; These equally apply to EU legislation, cf. Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 40.

can be adopted by the so-called Europe-Committee, which is empowered to take decisions on behalf of the entire institution to ensure speedy decision-making.[89] The legal effect of this position depends on the nature of the affected competences. In case the envisaged EU act alters exclusive federal competences or concurring federal competences,[90] the federal council's position is non-binding. However, in case the envisaged EU act mainly affects exclusive competences of the *Länder*, the establishment of *Länder* institutions or their administrative procedures, the forwarded position is generally binding for the German EU vote.[91]

Finally, in case EU matters fall within the exclusive competences of the *Länder* in the areas of school education, culture or public broadcasting,[92] Germany is represented by a member of the *Bundesrat* in the EU Council of Ministers.[93] Although the *Bundesrat* is required to coordinate with the government and has to take federal interests into due account, it negotiates on behalf of Germany. This central involvement mirrors the internal responsibility for these policy areas and underscores the constitutional importance of federalism, which is protected by the *eternity clause* in Article 79 (3) GG.[94]

3.4 Constitutional oversight: Proceedings before the *Bundesverfassungsgericht*

Once the legislator conferred competences to the EU, the conferral can be challenged before the *Bundesverfassungsgericht*. Any constitutional challenge has to be admissible, as the German Court cannot proceed *ex officio*.[95] As the history of constitutional proceedings reveals, EU acts are mainly challenged

89 Scholz, 'Art. 45 GG' para 3; Melin, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' 680.

90 Scholz, 'Art. 23 GG' para 168; Thomas Würtenberger and Eugen Kunz, 'Die Mitwirkung der Bundesländer in Angelegenheiten der Europäischen Union' (2010) 42 Juristische Arbeitsblätter (JA) 406, 408-409.

91 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 45-47; Scholz, 'Art. 23 GG' paras 168-170; Melin, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' 658-659.

92 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 49; Scholz, 'Art. 23 GG' para 176; Melin, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' 660-662.

93 Melin, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' 661-662; Wiland Tresselt, *Die Vertreter der Länder im Rat der Europäischen Gemeinschaft* (Books on Demand (BoD) 2006) 205.

94 Herdegen, 'Art. 79 GG' para 89; Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' para 52.

95 Following § 23 (1) BVerfGG, the *Bundesverfassungsgericht* proceeds upon an application, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 58.

by either individuals through constitutional complaints[96] or by institutional actors through inter-institutional proceedings.[97]

3.4.1 Individuals initiating constitutional proceedings

The constitutional complaint, enshrined in Article 93 (1) no. (4a) GG and further specified by ordinary statute in §§ 13 no. (8a), 90 ff. BVerfGG,[98] is the most prominent procedure used to challenge EU integration measures before the *Bundesverfassungsgericht*. Its frequent use was arguably encouraged by the *Maastricht*-judgment, where the Court established that EU measures could be challenged based on the individual's right to vote.[99] The complaint offers legal protection against public acts that infringe the applicant's individual fundamental or equivalent rights.[100] Therefore, *subjective gravamen* is a particularly important standing requirement.[101] It reflects the legislator's choice not to include a general constitutional complaint that could have entitled individuals to proceed in the public interest. Instead, individuals have to demonstrate that their subjective constitutional rights are violated by a public act, as abstract constitutional review is reserved to privileged institutional actors in Germany.[102] Yet, this standing requirement is less strictly applied in EU-related proceedings.

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96 In German: *Verfassungsbeschwerde*; The most important EU-related constitutional challenges by individuals are in chronological order: *Maastricht-Judgment*; *Lisbon-judgment*; *Honeywell-judgment*; *ESM-Treaty and Fiscal Compact*; *OMT-reference*; *Quantitative Easing (PSPP) Reference*.

97 In German: *Organstreitverfahren*; The most important EU-related constitutional challenges by German institutions are in chronological order: *Lisbon-judgment*; *ESM-Treaty and Fiscal Compact*; *OMT-reference*.

98 Specified by simple law in § 13 (8) (a) and §§ 90 ff. *Bundesverfassungsgerichtsgesetz (BVerfGG)*.

99 Cf. Thiele, 'Friendly or Unfriendly Act? The 'Historic' Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' 251-253; Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 189.

100 As becomes obvious from the wording in Article Article 93 (1) no. (4a) GG, which requires a 'violation' of 'own' fundamental rights, cf. Christian Walter, 'Art. 93 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) para 350; cf. also: Christian Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 251, 266.

101 For a full overview, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 215-242; Thiele, 'Friendly or Unfriendly Act? The 'Historic' Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' 250; Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 186; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 689.

102 1 BvR 213/08 *Copyright-Law Amendment I* [2009] (German Federal Constitutional Court) para 52; Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.

3.4.1.1 Possible violation of individual constitutional rights

The German Constitutional Court established, that individuals have to substantiate how the challenged act violates their constitutional rights. This requires that applicants demonstrate that the alleged violation personally, immediately and directly affects them in their constitutional rights.[103] Personal concern is given in case the challenged measure is capable of directly affecting the applicants in their constitutional rights,[104] an 'abstract' possibility is therefore not sufficient.[105] The violation is immediate if it has an on-going effect on the applicants' rights and is therefore not merely hypothetically possible.[106] Nevertheless, the German Court constantly held that a constitutional complaint can also be directed against future violations, in case such violations are serious and presumably difficult to reverse.[107] And finally, applicants are directly affected whenever the challenged measure does not require further implementation.[108]

In case applicants can substantiate all three conditions, subjective gravamen is given. As recognized by the *Bundesverfassungsgericht*, these conditions ensure that constitutional complaints can only be initiated in case the applicant has a genuine, subjective legal interest[109] and they prevent the initiation of an *actio popularis*, which is alien to the German constitutional system.[110]

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103 1 BvR 1509/91 *Interest-Rate Adjustment for Mortgage Awarded by the GDR* [1993] (German Federal Constitutional Court) para 93; 1 BvR 602/78 *Non-Contributory Health Insurance* [1982] (German Federal Constitutional Court) para 36; 1 BvR 385/77 *Nuclear Plant Mülheim-Kärlich* [1979] (German Federal Constitutional Court) para 35; Cf. as well: Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 215.

104 1 BvR 539/96 *Casino-Regulation of the German Region of Baden-Württemberg* [2000] (German Federal Constitutional Court) para 48; *Non-Contributory Health Insurance* para 38; Cf. as well: Epping, *Grundrechte* para 183.

105 1 BvR 2062/09 *Copyright-Law Amendment II* [2010] (German Federal Constitutional Court) para 16.

106 *Casino-Regulation of the German Region of Baden-Württemberg* para 48; 1 BvR 220/51 *Survivor's Pension I* [1951] (German Federal Constitutional Court) paras 27-29.

107 *Casino-Regulation of the German Region of Baden-Württemberg* para 48; Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 234.

108 2 BvR 2292/13 *Vereinten Dienstleistungsgewerkschaft (ver.di)* [2015] (German Federal Constitutional Court) para 64; *Casino-Regulation of the German Region of Baden-Württemberg* para 48.

109 *Survivor's Pension I* paras 26-27; Cf. as well: Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 215, 217.

110 Cf. *Fundamental Rights for Residents of Nursing Homes* para 22; 1 BvR 131/14 *Alleged Violation of Protective Duties by State Organs Towards Individuals in Nursing Homes* [2014] (German Federal Constitutional Court) para 2; *Survivor's Pension I* para 27; Cf. as well: Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 217; Epping, *Grundrechte* para 183; Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 540; Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.

3.4.1.2 Application of subjective gravamen in EU matters

An assessment of the case law reveals that the German Court applies subjective gravamen differently when adjudicating on EU-related matters than when it adjudicates on internal cases. Notably, individuals can proceed against EU acts based on their right to vote, enshrined in Article 38 (1) GG.[111] According to the Court, Article 38 (1) GG entails the subjective right to participate in German parliamentary elections.[112] By participating, individuals legitimize the exercise of power by the *Bundestag*. This presupposes that the *Bundestag* is able to take political decisions.[113] Together, this constitutes the core of the right to vote which is protected as part of German democracy, enshrined in Article 20 (1) and (2) GG, and rooted in human dignity, enshrined in Article 1 (1) GG, as covered by the *eternity clause.* According to this jurisprudence, the conferral of competences to the EU could potentially undermine this democratic bond, in case either important political decisions can no longer be taken by the German Parliament or in case EU institutions exercise competences not conferred upon them.[114] In both cases, the individual's right to elect a functioning representation is at risk.[115] The Court initially established in its *Maastricht*-judgment that Article 38 (1) GG precluded the conferral of constitutional prerogatives to the EU-level in conflict with the basic democratic requirements formulated in Article 20 (1) and (2) GG, protected by the *eternity clause*.[116] Notably, this entailed in the view of the Court that individuals elect a German

111 Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 304-305; Erich Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' (2013) 14 German Law Journal 75, 108-109.

112 *Lisbon-judgment* para 174; *Maastricht-Judgment* para 61; Cf. as well: Klein, 'Art. 38 GG' para 145.

113 *Lisbon-judgment* paras 251-252; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294; Martin Nettesheim, 'Verfassungsrecht und Politik in der Staatsschuldenkrise' (2012) 65 Neue Juristische Wochenschrift (NJW) 1409, 1412; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 723-724; Jan-Herman Reestman and Leonard F. M. Besselink, 'Editorial – On the Lissabon-Urteil: Democracy and a Democratic Paradox' (2009) 5 European Constitutional Law Review 341, 341.

114 *Quantitative Easing (PSPP) Final Judgment* para 113; *OMT-reference* para 19; *Maastricht-Judgment* paras 61-62.

115 Which would violate German 'political self-determination', cf. *Final OMT-Judgment* para 81; *OMT-reference* para 52; *Financial Support for Greece and EFSF* para 98.

116 *Maastricht-Judgment* paras 61-63; Cf. as well: Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 768-769; Elmar Brok and Martin Selmayr, 'Per Popularklage zurück nach Nizza? Zu den Verfassungsklagen gegen den Reformvertrag von Lissabon' (2008) 19 Europäische Zeitschrift für Wirtschaftsrecht 487, 488.

Parliament that remains in charge of central, substantial policy decisions.[117] This constitutional interpretation was consolidated in the *Lisbon*-judgment[118] and subsequently specified in relation to Eurocrisis-measures, where the Court established that compliance with *overall budgetary responsibility* could be challenged by individuals based on Article 38 (1) GG.[119] Most recently, the Constitutional Court clarified that individuals can equally challenge the constitutionality of the applied parliamentary majority-requirement under Article 23 (1) GG based on their right to vote enshrined in Article 38 (1) GG, which has clear implications for EU fiscal integration ambitions.[120]

Hence, based on Article 38 (1) GG, private applicants can claim that EU integration measures impact parliamentary powers in an unconstitutional way,[121] specifically in budgetary matters.[122] In this case, applicants challenge the German act of approval and the accompanying national legislation. In the alternative, applicants may claim that German institutions did not take sufficient steps against an alleged *ultra vires* act committed by the EU.[123] In that case, applicants challenge the omission of the competent German institutions that did not intervene.[124] The formulated constitutional concern is that individuals should have been protected against a shift of core competences to the

117 Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' 264.

118 *Lisbon-judgment* paras 172-175; Cf. as well: Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' 269; Jürgen Schwarze, 'Die verordnete Demokratie – Zum Urteil des 2. Senats des BVerfG zum Lissabon-Vertrag' (2010) 45 Europarecht (EuR) 108, 114; Jörg Philipp Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 20 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 724, 726.

119 *Quantitative Easing (PSPP) Final Judgment* paras 102-104; *OMT-reference* paras 28, 102; *ESM-Treaty and Fiscal Compact (interim relief)* para 108; Cf. as well: Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 770.

120 *Decision on the Unified Patent Court* paras 95-99; Cf. as well: Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' 1779; Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3089.

121 This claim can also be put forward in conjunction with another constitutional principle, for example the social state principle enshrined in Article 20 (1) GG, cf. *Lisbon-judgment* para 182.

122 *OMT-reference* paras 28, 102; *ESM-Treaty and Fiscal Compact (interim relief)* para 108; Cf. as well: Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 771-772.

123 *Quantitative Easing (PSPP) Reference* paras 69-74; *Final OMT-Judgment* paras 76,78; Cf. as well: Carl Nägele, 'German Constitutional Law Cases 2012-2015' (2016) 22 European Public Law 439, 442.

124 *Quantitative Easing (PSPP) Final Judgment* paras 105-110; Cf. as well: Wolfgang Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' (2018) 58 Juristische Schulung (JuS) 1046, 1047; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 178-179.

EU-level beyond the reach of democratic legitimation as guaranteed by Article 38 (1) GG thereby guaranteeing the constitutional claim of the voter to democratic self-determination.[125] Overall, this enables individuals to challenge EU primary and secondary law based on their right to vote as enshrined in Article 38 (1) GG. Obviously, this would extend to EU fiscal integration steps, which will likely be challengeable by private individuals in light of the OMT- and the PSPP-proceedings.[126]

3.4.1.3 Emerging constitutional double standard

The following comparison between the internal interpretation and the EU-related interpretation of *subjective gravamen* is based on the assumption that legal systems have to apply a consistent interpretation of legal provisions.[127] Consistent interpretations generate predictability, minimize arbitrariness and contribute to legal certainty. In addition, German participation in the EU entails a responsibility towards the EU and the other 26 EU Member States.[128] It seems that this responsibility extends to the Constitutional Court – for example as an obligation under sincere cooperation, which might require the Court to apply a consistent interpretation of constitutional provisions. However, in the case law of the Constitutional Court significant discrepancies can be detected. Notably, the Court *internally* requires individuals to substantiate a violation of their specific subjective right. Although *subjective gravamen* equally applies to constitutional complaints against EU acts, the Court's interpretation of this requirement is less strict in these EU-related proceedings. Notably, every individual that is entitled to vote in the sense of Article 38 (1) GG can challenge EU-related measures, whereas individuals are unable to challenge the allocation of competences between the federal and the regional level, although this may also affect ones right to vote.

While traditionally limiting the admissibility of constitutional complaints internally by requiring that individuals are personally, immediately and directly affected in their subjective constitutional rights, applicants that initiate constitutional complaints against EU measures can rely on Article 38 (1) GG without demonstrating a particular subjective risk for their right to vote. In its jurisprudence, the Constitutional Court seemingly accepts that a general risk for the German constitutional order – namely that either measures taken

125 Friedemann Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' (2020) 31 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 533, 534; Klein, 'Art. 38 GG' paras 145-146; Hermann Butzer, 'Art. 38 GG – Wahl' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 38-39.

126 Both initiated by private individuals, cf. *Quantitative Easing (PSPP) Final Judgment* paras 97-104; *Final OMT-Judgment* paras 78-84.

127 Lon L. Fuller, *The Morality of Law* (Revised Edition edn, Yale University Press 1969) 38-40.

128 Particularly visible during the Eurocrisis, cf. Christopher Klotz, 'Die Machtbalance zwischen Politik und verfassungsgerichtlicher Rechtsprechung' (2012) 45 Zeitschrift für Rechtspolitik (ZRP) 5, 5.

by EU institutions,[129] or the conferral of additional competences[130] undermine constitutional law – entitles every individual who enjoys the general right to vote to proceed against that act.[131] The Court's lenient interpretation of standing in EU-based proceedings may be explained by the reluctance of constitutionally empowered institutional actors, such as the German Parliament or Government, which largely refrained from challenging EU integration steps, possibly leaving the Court without means to scrutinize EU integration.[132] The now adopted approach enables the Constitutional Court to adjudicate on the compatibility of EU integration with German constitutional benchmarks. Despite this possible functional explanation, it has to be pointed out that the adopted approach results in a situation where a wide range of applicants is empowered to proceed against EU matters.

This development raises two major conceptual concerns. First, the constitutional complaint is designed to protect subjective, individual rights. This is obvious from Article 93 (1) (4) (a) GG and was continuously advocated by the *Bundesverfassungsgericht* itself.[133] Although it cannot be disputed that EU integration affects the existing German constitutional framework, it is debatable whether such changes indeed directly affect individuals in their subjective rights. It seems that competence conferrals first and foremost affect institutional prerogatives. This conclusion resonates with the traditional internal jurisprudence. Notably, the Court declared, when confronted with a constitutional complaint against the dissolution of the *Bundestag* based on Article 38 (1) GG, that the dissolution of parliament affected institutional and not subjective rights as required to establish *subjective gravamen*.[134] More specifically, it concluded that the principle of democracy did not entail the subjective right to constitutionally review the dissolution of parliament.[135] Following this logic, it can be submitted that competence transfers to the EU primarily affect institutional rights. Therefore, it appears that the constitutional system intents to conceptually prevent the individual from protecting these institutional rights through constitutional complaints. Instead, it is for the entitled institutional actors to

129 Notably against the ECB, cf. *OMT-reference*; *Quantitative Easing (PSPP) Reference*.
130 Ratification of a new EU Treaty, cf. *Lisbon-judgment*; *Maastricht-Judgment*.
131 Which results in an increasing number of applicants, for example, obvious from the almost 12.000 applications in the *OMT*-case, cf. *OMT-reference*; Also observed by: Nägele, 'German Constitutional Law Cases 2012-2015' 439.
132 As for example observed by Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 768-769.
133 Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.
134 2 BvQ 4/82 *Dissolution of the German Parliament* [1983] (German Federal Constitutional Court) as indicated in: BVerfG, 'Kein Rechtsschutz des Bürgers gegen Auflösung des Bundestages' (1983) 36 Neue Juristische Wochenschrift (NJW) 383, 383; Cf. as well: Franz Reimer, 'Vertrauensfrage und Bundestagsauflösung bei parlamentarischer Anscheinsgefahr' (2005) 45 Juristische Schulung (JuS) 680, 683.
135 BVerfG, 'Kein Rechtsschutz des Bürgers gegen Auflösung des Bundestages' 383.

apply for constitutional protection.[136] Yet, a different logic seems to apply to voters when challenging EU measures.

Second, it should be recalled that the purpose of the constitutional complaint is not to deliver general answers to abstract constitutional questions.[137] This is convincing, as the constitutional complaint is a subjective legal remedy. It entitles individuals to challenge state acts that violate their subjective rights.[138] However, now that every German citizen that enjoys the right to vote can challenge EU measures, the factual outcome seems to suggest the existence of a general constitutional procedure against EU matters. Ultimately, the constitutional complaint would become a legal remedy that delivers general answers to abstract legal questions. This arguably blurs the distinction between abstract judicial review – reserved to privileged institutional applicants – and subjective constitutional complaints on EU matters.[139]

The internal formalistic approach regarding standing requirements more generally was illustrated in a decision on the constitutional debt brake.[140] Here, the Court was confronted with an application for federal proceedings enshrined in Article 93 (1) (3) GG by the *Land* Schleswig-Holstein. The regional parliament initiated the proceedings against the debt brake, claiming that this mechanism interfered *inter alia* with regional budgetary rights.[141] However, the Constitutional Court declared the application inadmissible, explaining that regional parliaments could not be parties under Article 93 (1) (3) GG.[142] Here, it can be noted that the Court employed a formalistic approach, referring back to the constitutional text. Interestingly, and although budgetary rights are important for the democratic process in Germany, the Court was unwilling to widen the established standing criteria. Although this case was based on a different constitutional procedure, it confirms the tendency to – at least intern-

136 By initiating inter-institutional proceedings, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 79.

137 In contrast to the abstract judicial review of norms, cf. *Copyright-Law Amendment I* para 52; Cf. as well: Herbert Bethge, '§ 90 BVerfGG – Erhebung der Verfassungsbeschwerde' in Theodor Maunz and others (eds), *Kommentar zum Bundesverfassungsgerichtsgesetz* (60th edn, C.H. Beck 2020) para 336.

138 Which is clear expression of the legislator's choice not to include a *popular* constitutional complaint, cf. Patric Urbaneck, 'Die Zulässigkeitsprüfung im Verfassungsrecht' (2014) 54 Juristische Schulung (JuS) 896, 898; Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.

139 Namely, the Court allows for abstract constitutional review under the constitutional complaint, cf. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' 269.

140 2 BvG 1/10 *Constitutionality of the German Debt Break* [2011] (German Federal Constitutional Court).

141 Ibid para 17; Cf. as well: Walter, 'Art. 93 GG' para 279; Maxi Koemm, *Eine Bremse für die Staatsverschuldung?* (Mohr Siebeck 2011) 274-277.

142 *Constitutionality of the German Debt Break* paras 30-34.

ally – rely on the traditional formalistic interpretation of the established standing requirements.

The result of this variable interpretation of the *subjective gravamen* requirement is a *de facto* 'EU constitutional complaint'.[143] *Gärditz* and also *Wendel* conclude that the result of this jurisprudence is a *popular action* in the name of democracy against EU integration.[144] Such an *actio popularis* is alien to the German constitutional order.[145] The wide interpretation of *subjective gravamen* in EU matters indeed triggered a major number of applications before the Constitutional Court. For example, more than 190.000 individuals initiated constitutional complaints against the envisaged TTIP-agreement based on their right to vote.[146] Ultimately, this could negatively impact the German Court itself in light of this significant inflow of constitutional complaints against EU-related measures. Although it is important that EU integration conforms with the German Constitution, it seems equally crucial that the Constitutional Court respects the applicable constitutional framework. If different standing requirements for EU-related proceedings were necessary,[147] it would be for the constitution-amending legislator to alter the current constitutional framework.[148]

143 For example, in relation to the constitutional challenges against the CETA-agreement, cf. 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16 and 2 BvE 3/16 *Interim Relief against Comprehensive Economic and Trade Agreement (CETA)* [2016] (German Federal Constitutional Court) paras 51, 66.

144 Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 641-642; Also, Article 38 GG does not contain a general subjective content, cf. Bethge, '§ 90 BVerfGG – Erhebung der Verfassungsbeschwerde' para 112.

145 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 217; Epping, *Grundrechte* para 183; Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 540; Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 197; Eckhard Pache, 'Das Ende der europäischen Integration? Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon, zur Zukunft Europas und der Demokratie' (2009) 36 Europäische Grundrechte-Zeitschrift (EuGRZ) 285, 287; Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.

146 The recent TTIP-application had 193.092 applicants, cf. 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16 *Transatlantic Trade and Investment Partnership (TTIP)* [2016] (German Federal Constitutional Court); And the *OMT*-proceedings, as noted, almost 12.000 applicants, cf. Nägele, 'German Constitutional Law Cases 2012-2015' 439.

147 Henner Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' (2014) 49 Zeitschrift Europarecht (EuR) 514, 533.

148 Particularly, in light of the Court's own reasoning insisting that the German Parliament has to take central democratic decisions, cf. *Quantitative Easing (PSPP) Reference* paras 128-129; *Final OMT-Judgment* para 138; *Lisbon-judgment* para 250.

3.4.2 Institutional actors initiating constitutional proceedings

In addition to private actors, German institutions can initiate constitutional proceedings.[149] In relation to EU law, inter-institutional proceedings[150] enshrined in Article 93 (1) no. (1) GG and specified in §§ 63 ff. BVerfGG, are the most frequently employed proceedings.[151] They are adversarial in nature and occur between two institutions, which are in dispute about the extent of their constitutional powers.[152]

3.4.2.1 Constitutional requirements for initiating inter-institutional proceedings

Following Article 93 (1) no. (1) GG in conjunction with § 63 BVerfGG, the German President, Parliament, Federal Council, Government as well as parts of these organs that have own rights under the German Constitution, or the rules of procedure of the Parliament or the Federal Council, can initiate inter-institutional proceedings. For example, parliamentary committees,[153] parliamentary fractions[154] as well as single parliamentarians[155] have such own rights and can thus initiate proceedings.

Through these proceedings, the institutions can challenge an action or omission of another institution that allegedly violates the applicant's constitutional prerogatives. An example in EU matters is the parliamentary right to receive information on EU policies, following Article 23 (2) (2) GG. During the Eurocrisis, the parliamentary fraction BÜNDNIS 90/DIE GRÜNEN initiated inter-

149 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 77-78; Walter, 'Art. 93 GG' para 187; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 673-690.

150 In German: *Organstreitverfahren*.

151 The Member of the Bundestag of the political party 'DIE LINKE' initiated inter-institutional proceedings against the Lisbon Treaty, the ESM, and the OMT program, cf. *Lisbon-judgment*; *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact*; *OMT-reference*.

152 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 79, 83; Constitutional Court only clarifies the interpretation of the challenged provisions, but leaves it to the institutions to act upon this, cf. Morgenthaler, 'Art. 93 GG – Bundesverfassungsgericht, Zuständigkeit' para 17; Walter, 'Art. 93 GG' para 188.

153 Parliamentary committees may initiate proceedings to warrant their own rights, cf. 2 BvE 11, 15/83 *Committee of Enquiry in the Flick-Matter* [1984] (German Federal Constitutional Court).

154 Parliamentary fractions may initiate proceedings on behalf of the *Bundestag*, cf. *OMT-reference* para 106; *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* para 77; *Lisbon-judgment* para 202.

155 Although ultimately not admissible, the possibility of parliamentarians to initiate inter-institutional proceedings was (implicitly) recognized in EU matters, cf. *Lisbon-judgment* paras 198-199; Cf. as well: Morgenthaler, 'Art. 93 GG – Bundesverfassungsgericht, Zuständigkeit' para 21; Walter, 'Art. 93 GG' para 213.

institutional proceedings against the government on behalf of the German Parliament claiming a violation of this parliamentary right.[156]

3.4.2.2 Application of adversarial nature of proceedings in EU matters

In EU-related proceedings, the German Constitutional Court adopted a specific interpretation of this requirement and accepted that parliamentary fractions can invoke parliamentary rights against the German Parliament itself.[157] According to this jurisprudence, parliamentary fractions are able to rely on parliamentary prerogatives where they see these prerogatives violated by a parliamentary majority decision. In the Lisbon-judgment, for example, the Court declared an application of the fraction DIE *LINKE* admissible, which claimed that the German act approving the Lisbon Treaty interfered with the parliamentary reservation to deploy the German army.[158] The result is, however, that a parliamentary fraction invoked prerogatives on behalf of the German Parliament against the German Parliament itself.[159] This alters the traditional understanding of the proceedings' adversarial character. Namely, fractions were previously entitled to invoke fraction or minority prerogatives, but not parliamentary prerogatives.[160] Instead, one-fourth of the members of the *Bundestag* were entitled to initiate these inter-institutional proceedings against another institution.[161] In comparison, a fraction may only represent

156 *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* para 79.

157 *Lisbon-judgment* paras 204-206; Cf. as well: Max-Emanuel Geis and Heidrun Meier, 'Grundfälle zum Organstreitverfahren, Art. 93 I Nr. 1 GG, §§ 13 Nr. 5, 63ff. BVerfGG' (2011) 51 Juristische Schulung (JuS) 699, 703.

158 As established by the *Bundesverfassungsgericht* based on Article 87a GG, cf. 2 BvE 3/92, 5/93, 7/93, 8/93 *German Participation in NATO Actions* [1994] (German Federal Constitutional Court) paras 321-339; Cf. as well: Volker Epping, 'Art. 87a GG – Streitkräfte' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) para 24; Manuel Ladiges, 'Grenzen des wehrverfassungsrechtlichen Parlamentsvorbehalts' (2010) 29 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1075, 1076.

159 Which is criticized, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 94a; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305-306; Franz C. Mayer, 'Der Vertrag von Lissabon im Überblick' (2010) 50 Juristische Schulung (JuS) 189, 194; Critical in that regard also Constitutional Judge Gerhardt, cf. *OMT-reference* dissenting opinion Gerhardt para 24.

160 2 BvE 1/18 *Constitutional Challenge of German Migration Policy Initiated by the AfD* [2018] (German Federal Constitutional Court) para 18.

161 In light of the constitutional entitlement of 1/4 of the members of the *Bundestag* to initiate an investigation committee laid down in Article 44 (1) GG, the *Bundesverfassungsgericht* concluded that the intention of the inter-institutional proceedings was comparable, namely, to inquire into the legality of the parliamentary majority decision and accepted that attaining the 1/4 threshold is sufficient to initiate inter-institutional proceedings on behalf of the *Bundestag*, cf. *Committee of Enquiry in the Flick-Matter* para 134.

5% of parliamentarians,[162] which thus circumvents the initial procedural threshold.

Arguably, this wide interpretation transformed the inter-institutional proceedings into an *intra*-institutional proceeding. The apparent transformation was confirmed in the *ESM*-proceedings, where the Court found that fractions could invoke parliamentary budgetary prerogatives on behalf of parliament against the parliamentary approval of the *ESM*.[163] It reiterated this approach in the *OMT*-reference.[164] According to the Court's reasoning, this interpretation secures the rights awarded to parliamentary minorities, given that these can now judicially challenge governmental policies that are supported by the coalition majority in parliament.[165]

Although this wide standing requirement was developed in the context of EU law,[166] the Court highlighted that it equally applied this approach internally.[167] Importantly, this finding of the Court suggests that the Constitutional Court itself confirms the importance of applying the same interpretation of the constitutional standing requirements in internal and in EU-related proceedings. Considering the content of the proceedings that the Court referred to, the fraction *DIE LINKE* challenged the procedural requirements for minority and opposition rights in light of the then vast coalition majority of *CDU/CSU* and SPD. These two fractions united 503 of the 630 members of Parliament, whereas the opposition of *DIE LINKE* and *BÜNDNIS 90/DIE GRÜNEN* had only 127 seats.[168] Due to this small number, several constitutional minority rights were unavailable, including, for example, the initiation of a parliamentary 'committee of inquiry' which requires the support of one-fourth of the parliamentary members.[169] *DIE LINKE* proposed several constitutional amendments to alter the majority requirements, which were ultimately rejected and triggered the mentioned constitutional proceedings.[170] However, it seems that the opposition in these proceedings was indeed concerned about their minority rights including the possibility to initiate constitutional proceedings, and not about a genuine parliamentary prerogative. This appears to set this *internal* case apart from the highlighted understanding in EU-related proceedings and therefore to constitute a variable interpretation of the standing requirements.

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162 As enshrined in § 10 (1) GO-BT.

163 *ESM-Treaty and Fiscal Compact* para 125.

164 *Final OMT-Judgment* paras 106-107; *OMT-reference* para 54.

165 *Final OMT-Judgment* para 106.

166 Namely in the Lisbon-judgment for the first time, cf. Mayer, 'Der Vertrag von Lissabon im Überblick' 194.

167 As the Court references its EU-related jurisprudence in this 'internal' case concerning minority rights of the German Parliament, cf. 2 BvE 4/14 *Opposition Rights in the German Parliament* [2016] (German Federal Constitutional Court) para 67.

168 Ibid para 2.

169 Cf. Article 44 (1) GG; ibid paras 3-17.

170 Ibid paras 66-67.

3.4.2.3 Possible constitutional double standard

The above suggests that the traditional conception of inter-institutional proceedings as adversarial[171] is especially altered in EU-related cases. Yet, this adversarial character is essential as inter-institutional proceedings are not devised as abstract constitutional review of an institutional act, but rather to clarify the extent of institutional powers under the German Constitution.[172] For example, in the outlined *internal* proceedings, the fraction *DIE LINKE* was concerned about the extent of parliamentary minority rights guaranteed by the German Constitution. Thus, the challenge of the opposition concerned its own rights as parliamentary opposition and not an alleged violation of general rights of the entire parliament.[173] In contrast to this internal case, the proceedings against EU acts challenged parliamentary decisions, claiming that these would alter parliamentary prerogatives.[174] Therefore, it can be argued that these institutional challenges were not aimed to defend opposition rights, but essentially challenged the material decision made by a parliamentary majority claiming that the *Bundestag* was not entitled to confer the respective powers to the EU. This leads to the paradoxical situation that the opposition proceeds on the basis of the *Bundestag*'s rights against the *Bundestag* itself. The criticism one might raise is, that the chosen approach undermines the outlined constitutional framework and the applicable standing requirements to initiate, for example, abstract constitutional review.[175]

Overall, following the assessment, political fractions of the *Bundestag* can challenge EU (integration) measures on behalf of the *Bundestag* claiming that the *Bundestag* violated its own institutional rights. It appears that this new interpretation of the constitutional standing requirement[176] was developed in the context of[177] and is now only applied in relation to EU matters.[178] The result is that the standing requirements for institutional actors to initiate a constitutional review of legislative acts are lowered in EU-related proceedings.

171 *Deployment of Atomatic Weapons* para 109.

172 *NATO-Concept* paras 112-114; *Deployment of Atomatic Weapons* para 109.

173 Here, not the refusal as such was challenged, but rather the underlying question of rights granted to parliamentary minorities and the opposition, cf. *Opposition Rights in the German Parliament* paras 67-69, 76, 80.

174 More precisely, the budgetary prerogatives that the *Bundestag* enjoys following Art. 110 GG, cf. Herdegen, 'Art. 79 GG' paras 182-188; Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' para 33.2.

175 As laid down in Article 93 (1) no. (2) GG, the status as a fraction is not required, cf. Walter, 'Art. 93 GG' para 235; enumeration in Article 93 (1) no. (2) GG is exhaustive, cf. Morgenthaler, 'Art. 93 GG – Bundesverfassungsgericht, Zuständigkeit' para 30.

176 As indicated, cf. *NATO-Concept* paras 112-114; *Deployment of Atomatic Weapons* para 109.

177 *Lisbon-judgment* paras 204-206; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305-306; Mayer, 'Der Vertrag von Lissabon im Überblick' 194.

178 As pointed out, cf. *Opposition Rights in the German Parliament* paras 65-69.

As was obvious during the Eurocrisis,[179] the *Bundesverfassungsgericht* considers applications brought by (small) political groups against an erosion of parliamentary prerogatives in the framework of Article 93 (1) no. (1) GG admissible.

3.4.3 An apparent procedural double standard

The *internal-external-comparative* assessment of the standing requirements indicates that the German Constitutional Court applies a divergent interpretation of the established constitutional standing requirements, rendering the initiation of proceedings against EU acts comparably easier for both individuals and institutions. This raises concerns, as the constitutional framework does not distinguish between domestic and EU-related proceedings. Consequently, a consistent standard should be applied, which was equally confirmed by the Constitutional Court itself.[180] As the *traditional* applicants seemingly refrain from proceedings against EU acts, the broad interpretation of the established *standing requirements* could be seen as a means to ensure that the Court can adjudicate on the compatibility of German constitutional and EU law.[181] Yet, it is for the constitution-amending legislator to address these concerns and possibly modify the standing requirements for initiating constitutional proceedings. Applying the traditional interpretation of the standing requirements to proceedings that involve EU matters could thereby ensure that the Constitutional Court is not constantly confronted with highly political questions in the first place. Overall, a consistent application would result in higher admissibility hurdles for proceedings against EU acts, which corresponds to the underpinning choice of the constitution-amending legislator.

3.5 Applicable procedural and institutional framework for EU fiscal integration

Article 23 GG – together with Article 24 GG – comprehensively regulates German EU membership. The assessment illustrated that the provision applies to the conferral of additional competences to the EU. Depending on the impact

179 *OMT-reference* para 54; The Court also stressed that budgetary responsibility could be invoked by the fraction, cf. *ESM-Treaty and Fiscal Compact* para 125.

180 As highlighted in relation to the standing in *inter-institutional proceedings*, cf. *Opposition Rights in the German Parliament* para 67.

181 As noted, this approach is criticized, cf. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 198; Matthias Ruffert, 'Europarecht: Vorlagebeschluss des BVerfG zum OMT-Programm – Die Europarechtswidrigkeit des Kaufs von Staatsanleihen durch die EZB im Rahmen des OMT-Programms ist vom EuGH zu prüfen.' (2014) 54 Juristische Schulung (JuS) 373, 374.

of the envisaged integration steps on the German Constitution, either a simple or a qualified two-thirds majority applies. Given that EU fiscal integration proposals will likely affect the German constitutional framework, in particular parliamentary budgetary prerogatives, such integration steps will likely require support by a qualified majority.[182] This is supported by evidence from the Eurocrisis, where the Fiscal Compact and the ESM-Treaty were held to have such effect and had to be approved by a constitution-amending two-thirds majority.[183] In addition, Article 23 GG regulates the German institutional interaction in EU matters. The enhanced involvement of parliament and federal council in EU affairs reflects the impact of EU cooperation, which increasingly affects internal domestic decisions.[184] Importantly, the participation of both institutions under Article 23 GG is not designed as a right but rather as an obligation,[185] which is emphasized by the Constitutional Court's integration responsibility doctrine.[186]

All this illustrates that the German Constitution contains a detailed procedural and institutional framework to address EU integration. This framework is complemented by the constitutional supervision of the *Bundesverfassungsgericht*, which frequently adjudicates on the relationship between German constitutional law and EU law. However, the identified double standard in the interpretation of the admissibility criteria raises concerns as it renders the initiation of EU-related proceedings comparably easier. One consequence of this more lenient interpretation of admissibility in EU-related proceedings is that the Court continues to further flesh out and define the *eternity clause*, one of the major obstacles for EU fiscal integration, which will be considered in the following.

182 As it will, most likely, affect the constitutionally enshrined budgetary prerogatives of the parliament, which will have *constitutional relevance* in the sense of Art. 23 (1) (3) GG and therefore trigger the parliamentary majority requirement enshrined in Article 79 (2) GG, cf. Scholz, 'Art. 23 GG' paras 117-118.

183 Richter, *Funktionswandel im Mehrebenensystem? Die Rolle der nationalen Parlamente in der Europäischen Union am Beispiel des Deutschen Bundestags* 176; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 6, 277; Calliess, 'Finanzkrise als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' 160.

184 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 33; Scholz, 'Art. 23 GG' para 127.

185 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 35; In contrast to this view, it can also be argued that Article 23 (2) (1) GG is designed as a right for *Bundestag* and *Bundesrat* obligating the *Bundesregierung*, cf. Scholz, 'Art. 23 GG' para 128.

186 Cf. *Quantitative Easing (PSPP) Reference* para 47; *OMT-reference* para 31; Cf. also the responsibility of institutional actors to responsibly engage in EU matters: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 33.

4 SUBSTANTIVE FRAMEWORK APPLICABLE TO EU FISCAL INTEGRATION

EU integration has to comply with the German *eternity clause*, as clarified in Article 23 (1) (3) GG. However, as the *eternity clause* is framed in an abstract manner, the protected substantive content is determined by the jurisprudence of the German Constitutional Court. The constitutional jurisprudence on the Eurocrisis provides valuable insights into possible conflicts between the *eternity clause* and EU fiscal integration steps.[187] Based on this jurisprudence, the subsequent assessment will determine the protected constitutional content by deconstructing the overlapping layers employed by the Court. In a first step the underpinning constitutional mechanisms will be considered (4.1.) before subsequently assessing the protected constitutional principles (4.2.).

4.1 Underpinning mechanisms

The *eternity clause* provides the mechanism for the protection of core principles against constitutional change (4.1.1.). To operationalize this constitutional protection against EU cooperation, the Court introduced the fundamental rights, *ultra vires* and *constitutional identity* locks (4.1.2.) as well as the guiding concepts of EU law friendliness and integration responsibility (4.1.3.).

4.1.1 Eternity clause

The German *eternity clause* shields a set of constitutional principles against change. Notably, the provision states:

> '(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.'

Systematically, Article 79 (3) GG forms an exception to the general rule in Article 79 (2) GG, which stipulates that constitutional amendments can be adopted by a two-thirds majority. It limits the power of the constitution-

187 Starting with the Lisbon-judgment and then in relation to all Eurocrisis-measures, cf. overview of the most important judgments on that matter in chronological order: *Lisbon-judgment* (issued in June 2009); *Financial Support for Greece and EFSF* (issued in September 2011); *Participation of Members of German Parliament in the EFSF* (February 2012); *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* (issued in June 2012); *ESM-Treaty and Fiscal Compact (interim relief)* (issued in July 2012); *OMT-reference* (issued in January 2014); *ESM-Treaty and Fiscal Compact*(issued in March 2014); *Final OMT-Judgment* (June 2016); *Quantitative Easing (PSPP) Reference* (issued in July 2017); cf. as well Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005.

amending legislator by exempting core constitutional principles from the scope of constitutional amendments. Changes to this core[188] require the complete replacement of the German Constitution, following Article 146 GG.[189] Therefore, the *eternity clause* emerges as strict limit, which equally applies to EU fiscal integration steps.[190] Given the current rather limited likelihood of a replacement of the *Grundgesetz*, it seems that German institutions have to work with the *eternity clause*.[191] Therefore, the resulting questions relate to the nature of the limit, the covered EU-relevant content as well as the role of the German Constitutional Court in its interpretation.

When considering the provision its ambiguous design becomes obvious. Notably, on the one hand, its wording suggests that Article 79 (3) GG constitutes an absolute prohibition that excludes any interference. Hence, no balancing of different legal considerations is possible.[192] The mere fact that one of the covered principles is affected suffices to establish a violation of Article 79 (3) GG. On the other hand, the protected material content is restricted to the principles enumerated in Article 79 (3) as well as Articles 1 and 20 GG, without, however, prohibiting changes to these constitutional provisions themselves. Thus, Articles 1 and 20 GG could be changed, as long as the established principles are not altered.[193] This narrow conception of the material scope of the *eternity clause* corresponds to its function as an exception to the general possibility of constitutional amendments following Article 79 (2) GG. Thus, despite its absolute framing, the *eternity clause*'s substantive reach is limited to essential components of the protected principles.[194]

188 Referred to as core *constitutional identity*, cf. Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 430; Ziller, 'The German Constitutional Court's Friendliness Towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' 68.

189 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

190 *Lisbon-judgment* para 216; As the German Court stressed, a balancing of the protected core principles is not possible, cf. *OMT-reference* para 29; Cf. as well: Jaggi, 'Revolutionary Constitutional Lawmaking in Germany – Rediscovering the German 1989 Revolution' 619.

191 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150.

192 Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' para 21; Herdegen, 'Art. 79 GG' paras 74-76.

193 Cf. for example a 5% threshold for entering parliament is permissible to guarantee the functioning of the German Parliament, cf. Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 760; Christoph Sennekamp, 'Alle Staatsgewalt geht vom Volke aus! – Demokratieprinzip und Selbstverwaltung der Justiz' (2010) 29 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 213, 217.

194 Given the potential wide reach of Article 79 (3) GG, the scope is limited by only protecting core components of the protected principles, cf. Herdegen, 'Art. 79 GG' para 62.

Article 79 (3) GG covers the organization of the federation into *Länder*, the general participation of the *Länder* in the legislative process, as well as the principles laid down in Articles 1 and 20 GG, which include human dignity (Article 1 GG), as well as democracy (Article 20 (1) and (2) GG), the social state principle (Article 20 (1) GG), federalism (Article 20 (1) GG), the rule of law (Article 20 (3) GG) and the right to protest against violations of the principles established by Article 20 GG (Article 20 (4) GG). Combined, these principles form the unamendable core of the German Constitution, which is also referred to as the German *constitutional identity*.[195] As established by the Constitutional Court, this identity differs from the EU protection in Article 4 (2) TEU.[196] Notably, the *eternity clause* establishes an absolute limit, whereas the EU concept allows for the balancing of conflicting interests and it is defined by the CJEU.[197]

The covered principles are framed in an abstract manner and it thus has to be determined which elements of the principles fall under the *eternity clause* and which are merely ancillary.[198] This task is exercised by the Constitutional Court[199] and it has immediate implications for the constitution-amending legislator. Whatever the Court identifies as substantive part of the *eternity clause* is a direct off-limit, which underscores the powerful position of the Constitutional Court.[200] Although the Court appears to be aware of its constitutional responsibility and generally displayed a cautious application of the *eternity*

195 With particular importance for EU integration, cf. *Quantitative Easing (PSPP) Reference* para 54; *Final OMT-Judgment* paras 136-138; Interestingly, the concept of *constitutional identity* emerged in relation to EU and international measures, not in internal disputes, cf. Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 431.

196 As highlighted by the Constitutional Court, cf. *OMT-reference* para 29; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 145-146; Article 79 (3) GG falls under the exclusive jurisdiction of the Court, cf. Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

197 Cf. the CJEU states that national identity can be considered as legitimate interest and subsequently balanced, cf.: C-208/09 *Sayn-Wittgenstein* [2010] (CJEU) para 83; Cf. as well: Schyff, 'Exploring Member State and European Union Constitutional Identity' 233-234.

198 Rolf Grawert, 'Homogenität, Identität, Souveränität – Positionen jurisdiktioneller Begriffsdogmatik' (2012) 51 Der Staat 189, 197-198.

199 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 34-35; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 147; Through its jurisprudence in EU matters, the German Court underscores its constitutional 'referee position', cf. Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 461-462.

200 Christoph Schönberger, 'Die Europäische Union zwischen 'Demokratiedefizit' und Bundesstaatsverbot – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48 Der Staat 535, 553; As the German constitutional court defines in its jurisprudence the limits for EU integration, cf. Everling, 'Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte' 106.

clause,[201] it seems to follow a more active approach when confronted with EU cooperation.[202] Notably, the Court appears to be concerned that EU integration could undermine German statehood and the ultimate authority of the German Constitution,[203] which is why it continuously underscored the derived status of the EU and the authority of the German Constitution over EU cooperation.[204]

Historically, the *eternity clause* is a constitutional reaction to the *Hitler*-dictatorship.[205] It was designed as a constitutional security mechanism to prevent an anew erosion of constitutional values, as experienced between 1933 and 1945. Recalling this historic origin, one may question whether the *eternity clause* is designed to apply to a potential *external* erosion of core constitutional principles triggered by supranational cooperation as well as whether the EU constitutes a comparable existential threat. In fact, the EU is based on similar values as enshrined in the EU-Treaties in Article 2 TEU.[206] Given this substantive overlap, it appears that EU cooperation offers an external layer of constitutional protection for the principles covered by the *eternity clause*. The immediate benefits of this additional supranational protection can be seen in Poland or Hungary.[207] In both EU Member States the rule of law is at risk due to

201 2 BvR 1938, 2315/93 *Conception of Safe Third Countries* [1996] (German Federal Constitutional Court); 2 BvF 1/69, 2 BvR 629/68 und 308/69 *Wiretapping I* [1970] (German Federal Constitutional Court); Cf. as well: Schönberger, 'Die Europäische Union zwischen 'Demokratiedefizit' und Bundesstaatsverbot – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 553.

202 By defining competence areas that form part of the essence of the principle of democracy, cf. *Lisbon-judgment* paras 251-252; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 723-724; Frank Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' (2010) 104 The American Journal of International Law 259, 263-264.

203 Framed as Kompetenz-Kompetenz concern, cf. *Lisbon-judgment* para 233; Cf. as well: Nettesheim, 'Art. 1 AEUV – Regelungsbereich' para 18; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 151.

204 *Quantitative Easing (PSPP) Reference* para 55; *OMT-reference* para 102; *Lisbon-judgment* para 231; Cf. as well Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 667; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 452.

205 Ulrich Preuss, 'The Implications of 'Eternity Clauses': the German Experience' (2012) 44 Israel Law Review 429, 439.

206 Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 5 European Papers 255, 258-260.

207 Walter Rech, 'Some Remarks on the EU's Action on the Erosion of the Rule of Law in Poland and Hungary' (2018) 26 Journal of Contemporary European Studies 334, 334; Dimitry Kochenov and Laurent Pech, 'Better Late Than Never? On the European Commission's

national reforms.[208] Seemingly, the available national constitutional safeguards were insufficient to prevent the unfolding erosion of this core constitutional value.[209] The EU intervened to secure the compliance with the common foundational values.[210] Although one might question the effectiveness of the existing EU tools,[211] the benefit of securing core constitutional principles at the national *and* the supranational level is evident. Notably, the EU can act as an external mediator that identifies constitutional risks, confronts national governments and ultimately sanctions them[212] in case national safeguards fail. Although a comparable erosion of the rule of law appears less likely in Germany precisely because of the *eternity clause*, the diversification of constitutional safeguards seems to equally entail constitutional benefits. From that perspective, EU cooperation offers an additional layer of protection for German constitutional principles and thereby even supports the underlying intention of the *eternity clause*.[213]

This shows that the overall function of the *eternity clause* is to establish an outer, absolute limit for state action, which is why Article 79 (3) GG can be construed as a constitutional *ultima ratio*.[214] This means, that the *eternity*

Rule of Law Framework and its First Activation' (2016) 54 Journal of Common Market Studies 1062, 1067-1068.

208 The Polish Law and Justice (PiS) party has 235 of the 460 seats in the Polish Parliament (Sejm) and 61 of the 100 seats in the Senate, cf. Monika Moens De Fernig, 'Factsheet: The Polish Sejm' (*European Parliament – Directorate-General for the Presidency*, 2018) <http://www.epgencms.europarl.europa.eu/cmsdata/upload/0398faee-9664-4eb0-8e1b-ac615ab65a49/Factsheet_PL_-_Sejm.pdf> accessed 20 December 2020; Victor Orbán even attained a 2/3 majority with his Fidesz party in 2018, cf. Corinne Deloy, 'General Elections in Hungary: Viktor Orbán easily sweeps to victory for the third time running in the Hungarian elections' (*Fondation Robert Schuman*, 10 April 2018) <https://www.robert-schuman.eu/en/doc/oee/oee-1765-en.pdf> accessed 20 December 2020.

209 Rech, 'Some Remarks on the EU's Action on the Erosion of the Rule of Law in Poland and Hungary' 338-339; Jens Brauneck, 'Rettet die EU den Rechtsstaat in Polen?' (2018) 37 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1423, 1424-1425.

210 For example, through the order of the CJEU that required Poland to undo the retirement of supreme court judges, cf. C-619/18 R *Commission v. Poland* [2018] (CJEU).

211 Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' 269, 277; Luke Dimitrios Spieker, 'Breathing Life Into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182, 1184-1185.

212 Either through infringement actions following Articles 258 ff. TFEU, or by initiating the Article 7 TEU procedure, cf. Craig and de Búrca, *EU Law Text, Cases, and Materials* 449-450; Uladzislau Belavusau, 'On age discrimination and beating dead dogs: *Commission v. Hungary*' (2013) 50 Common Market Law Review 1145, 1159-1160.

213 Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 763; Stressing that the original intention of Article 79 (3) GG was to shield the state against drifting into another dictatorship, cf. Schönberger, 'Die Europäische Union zwischen 'Demokratiedefizit' und Bundesstaatsverbot – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 553.

214 The *Bundesverfassungsgericht* established that Article 79 (3) GG had to be interpreted restrictively, cf. 1 BvR 2378/98 and 1 BvR 1084/99 *Wiretapping II* [2004] (German Federal Constitutional Court) paras 108-111; And highlighting the exceptional nature of Article 79 (3) GG

clause is designed as mechanism in case traditional means of constitutional dispute resolution fail. Such a case is given when constitutional values are blatantly disregarded.[215] Restricting the application of the eternity clause to such extreme cases corresponds to the original intention underlying this provision, namely to function as *ultima ratio*. In addition, a restrictive application of the eternity clause strengthens the provision's authority and mitigates the threat of watering down the provision's protective force through excessive use. In the internal constitutional jurisprudence such more restricted application can be observed. In contrast, the Court appears to increasingly employ Article 79 (3) GG in EU proceedings, at least since its *Lisbon*-judgment,[216] which challenges the eternity clause's original conception as constitutional *ultima ratio*.

4.1.2 The different limits employed by the German Constitutional Court

Furthermore, the Constitutional Court established different locks to address EU integration and to operationalize *inter alia* the outlined *eternity clause* in EU-related proceedings. These locks provide the Court with the framework for the substantive assessment of the German EU commitments.[217] The first lock was the *fundamental rights* review,[218] which was later complemented by the *ultra vires*[219] and the *constitutional identity* review.[220]

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and that it may not be interpreted in a manner that renders fundamental – yet compatible with the overall system – constitutional amendments *impossible,* cf. *Wiretapping I* paras 99-100; Cf. as well: Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 763; Arguing that the Court seems to contradict this *ultima ratio* status in its EU-related jurisprudence, cf. Thomas M. J. Möllers and Katharina Redcay, 'Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union?' (2013) 48 Europarecht (EuR) 409, 425-426.

215 2 BvB 1/13 *Procedure to Prohibit the Political Party NPD* [2017] (German Federal Constitutional Court) paras 536-537; Cf. as well: Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 263.

216 By defining this autonomous competence catalogue, cf. *Quantitative Easing (PSPP) Reference* paras 54-56; *Final OMT-Judgment* para 138; *Lisbon-judgment* paras 249, 252.

217 Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-294; Craig and de Búrca, *EU Law Text, Cases, and Materials* 279-289; Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 101-110.

218 *Solange II-Decision* para 132; *Solange I-Decision* para 43; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292; Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 106.

219 *Quantitative Easing (PSPP) Final Judgment* paras 105-111; *Maastricht-Judgment* para 106; Cf. as well: Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 900-901; Everling, 'Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte' 100-101.

4.1.2.1 Fundamental rights review

The fundamental rights review constitutes the Court's first lock.[221] Concerned about the lack of fundamental rights protection at EU-level, the German Court reserved itself the competence to assess whether EU measures complied with German fundamental rights in its infamous *Solange* I-decision.[222] Once the European Court of Justice established its own fundamental rights regime, the German Court declared that it would refrain from conducting a fundamental rights assessment of EU measures *as long as* the EU warranted a level of fundamental rights protection similar to the German one.[223]

This illustrates that the fundamental rights limit evolved over time, which could have implications for the *ultra vires* and the *identity* review, too.[224] It was submitted by *Payandeh* that the German Court seemingly followed a strategic agenda when introducing the fundamental rights review. Notably, the German Court indirectly invited the EU to improve the EU protection of fundamental rights.[225] Once the EU addressed this concern, the Court relaxed its scrutiny. Although, this evolution is specific to the fundamental rights review, a similar pattern could perhaps be envisaged in relation to the other

220 Which became particularly important during the Eurocrisis, cf. Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 12, 17.

221 *Solange II-Decision* para 132; *Solange I-Decision* para 43.

222 *Solange I-Decision* para 56; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 689-690; Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 426-427; Craig and de Búrca, *EU Law Text, Cases, and Materials* 280-282; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292.

223 *Solange II-Decision* para 132; Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 99-100; Importantly, the Court retains the possibility to apply this limit, cf. Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 689-690; Claus Dieter Classen, 'Europäische Rechtsgemeinschaft à l'allemande? Anmerkung zum Urteil des BVerfG vom 21.06.2016, 2 BvR 2728/13 u. a.' (2016) 51 Europarecht (EuR) 529, 535.

224 Andreas Voßkuhle, 'Der Wandel der Verfassung und seine Grenzen' (2019) 59 Juristische Schulung (JuS) 417, 419; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292; Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 28.

225 Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 28; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 308-309.

two limits mentioned.[226] Yet, it seems questionable whether the EU would so willingly address the concerns underpinning the *ultra vires* and the *constitutional identity* review, as this could limit the effect and reach of EU law.

4.1.2.2 Ultra vires review

In its *Maastricht*-judgment, the Constitutional Court then introduced its *ultra vires* review to determine whether EU institutions acted within their conferred mandate.[227] Hence, the *ultra vires* review constitutes the German supervision of the EU law principle of conferral.[228] In the recent PSPP-judgment, the Court for the first time declared EU acts *ultra vires*,[229] which possibly ushers into a new phase of a stricter enforcement of the constitutional limits.

Considering the design of the limit, since its Honeywell-judgment,[230] the Court follows a three-stepped approach.[231] First, the Court determines whether the challenged EU act potentially exceeds the limits of the conferred competences in an manifest way and whether this results in a '[...] structurally significant shift in the division of competences to the detriment of the Member States'[232].[233] Following this jurisprudence, a structurally significant over-

226 Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 28.

227 *Maastricht-Judgment* para 48; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 929; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 629-630.

228 *Maastricht-Judgment*; Cf. as well: Craig and de Búrca, *EU Law Text, Cases, and Materials* 282; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 628.

229 *Quantitative Easing (PSPP) Final Judgment* paras 105-111; Cf. as well: Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 900-901; Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 817; Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' 533.

230 *Honeywell-judgment* para 56; Cf. as well: Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 22-23.

231 Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 690-691; Voßkuhle, 'Der Wandel der Verfassung und seine Grenzen' 419; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 538; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274; Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 19-23.

232 *Quantitative Easing (PSPP) Final Judgment* para 110.

stepping is *inter alia* given in case a Treaty amendment would be required to allocate the disputed competence to the EU[234] or in case the challenged EU act conflicts with the *eternity clause*.[235]

Once the German Court identifies an excessive overstepping, it issues in a second step a preliminary reference to the CJEU.[236] Here, the Constitutional Court underscored that it was essential to provide the CJEU with the opportunity to address *ultra vires* concerns in order to preserve the unity of EU law and to respect the CJEU's mandate. At the same time, these considerations can never justify *ultra vires* acts, as the CJEU could otherwise extend the reach of the EU-Treaties beyond the intention of the Member States.[237] Therefore, the German Court will follow the CJEU's guidance on the interpretation of EU law *as long as* this interpretation is based on the traditional European methods of judicial interpretation, coherent and sufficiently motivated.[238]

Until now, the German Court initiated two preliminary references, notably in the OMT[239]- and PSPP-proceedings.[240] In the OMT-proceedings, the Court followed the CJEU's guidance. However, in the PSPP-proceedings the Court considered the CJEU's interpretation of EU law as 'manifestly incomprehensible' and therefore declared the CJEU's judgment partially *ultra vires* – the seemingly now third step under the *ultra vires* review – before then concluding that the initially challenged PSP-Program was *ultra vires*.[241] This suggests that the *ultra vires* finding always involves a close scrutiny of the CJEU's guiding judgment, and that declaring the initially challenged act *ultra vires* appears to always require declaring the CJEU's judgment *ultra vires*, too.

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233 *OMT-reference* para 37; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 927; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 538.

234 *Quantitative Easing (PSPP) Final Judgment* para 110.

235 *OMT-reference* para 37; *Honeywell-judgment* para 65.

236 *Quantitative Easing (PSPP) Final Judgment* para 111; *Honeywell-judgment* paras 60-61; Cf. as well: Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' 23-24; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 891.

237 *Quantitative Easing (PSPP) Final Judgment* para 111; Cf. as well: Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' 534; Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 818, 821.

238 *Quantitative Easing (PSPP) Final Judgment* para 112; Cf. as well: Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' 535; Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 819.

239 *OMT-reference*.

240 *Quantitative Easing (PSPP) Reference*.

241 Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' 536; Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 822; Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 901.

4.1.2.3 Constitutional identity review

Finally, the German Court introduced the *constitutional identity review*.[242] Based on the *eternity clause*, EU integration cannot undermine core constitutional values protected by Article 79 (3) GG.[243] According to the Constitutional Court, the limit requires that certain competence areas remain under the control of the German Parliament and may therefore not be conferred to the EU-level in order to preserve German democracy protected by Article 20 (1) and (2) GG.[244] In case a conflict between EU integration steps and the *eternity clause* occurs, the German legislator is precluded from engaging in these, as it is not competent to overcome Article 79 (3) GG.[245]

Hence, the identity review enforces the *eternity clause* and protects indispensable constitutional values, which can neither be altered at the German state level nor by engaging in EU integration.[246] In its assessment, the Court takes the German act of approval – and not EU law itself – as its reference point for the constitutional assessment. One could therefore conclude that the identity review is less invasive towards EU law compared to the *ultra vires* review, as argued by *Schwerdtfeger*.[247] At the same time, the *constitutional identity* review sets absolute substantive limits to EU integration. Therefore, the implications of the *constitutional identity limit* are more far-reaching, as it restricts the structural development of the EU.

4.1.2.4 Overlap of ultra vires and identity review

Ultra vires and *identity* review are independent limits safeguarding different constitutional interests. Notably, under the *ultra vires* review the German Constitutional Court supervises the principle of conferral as to measures adopted based on the EU-Treaties. In contrast, through the *constitutional identity* review the Court determines whether EU integration exceeds the available scope

242 *Lisbon-judgment*; Cf. as well: Murkens, 'Identity Trumps Integration – The Lisbon Treaty in the German Federal Constitutional Court' 519; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294.

243 *Lisbon-judgment* para 240; Cf. as well: Herdegen, 'Art. 79 GG' para 60; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 177.

244 *Final OMT-Judgment* para 138; *ESM-Treaty and Fiscal Compact* paras 107-109; *Lisbon-judgment* paras 251-252.

245 Cf. distinction between constituted power and constituting power, Herdegen, 'Art. 79 GG' paras 60-61; Grawert, 'Homogenität, Identität, Souveränität – Positionen jurisdiktioneller Begriffsdogmatik' 197; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 715.

246 Andreas Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' (2013) 32 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 27, 27.

247 Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 296-297.

under Article 79 (3) GG and it thus primarily applies when additional EU integration steps are considered.

Although both limits remain conceptually independent,[248] they can overlap. Since the German Court introduced its qualified *ultra vires* limit, which requires a manifest and structurally significant excess,[249] such overlap can in fact materialize. Notably, an excess of the conferred competences which conflicts with the *eternity clause* is considered as such structurally significant excess of the conferred powers.[250] Consequently, a violation of the German *constitutional identity* by EU institutions is always a structurally significant *ultra vires* act.[251] In this specific instance, an overlap of both limits can occur – but is not mandatory.[252]

4.1.3 Guiding concepts for constitutional jurisprudence on EU integration

Finally, the Constitutional Court developed further concepts that, in conjunction with the established locks, guide the interpretation of German constitutional law in order to adequately address EU cooperation.

4.1.3.1 EU law friendliness of the German Constitution

The concept[253] of *Europarechtsfreundlichkeit*[254] is based on the preamble read in conjunction with Article 23 GG[255] and Article 24 (1) GG.[256] It suggests

248 As emphasized by the *Bundesverfassungsgericht*, cf. *Final OMT-Judgment* para 153; Cf. as well Martin Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' in Peter Brandt (ed), *Verfassung und Krise*, vol 16 (Berliner Wissenschafts-Verlag (BWV) 2015) 27.

249 *OMT-reference* para 37; *Honeywell-judgment* paras 60-61, 71.

250 *Final OMT-Judgment* para 153.

251 Cf. the slightly changed wording from ibid para 153 to *Quantitative Easing (PSPP) Reference* para 63, where the court limits the finding of a structurally significant competence overstepping to violations of the principle of democracy.

252 Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 294-295; Cf. for example the assessment in the *OMT*-reference, where the *Bundesverfassungsgericht* focused in the first place on the *ultra vires* review, only mentioning the *identity* review, cf. Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 541; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 277-279; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 522.

253 *Honeywell-judgment* para 111; *Lisbon-judgment* para 225; cf. also Franz C. Mayer and Maja Walter, 'Die Europarechtsfreundlichkeit des BVerfG nach dem Honeywell-Beschluss' (2011) 33 Juristische Ausbildung (JURA) 532, 539; Daniel Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48 Der Staat 559, 559.

254 In English: *European law friendliness*.

255 *Quantitative Easing (PSPP) Reference* para 58; Cf. as well: Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 75-76.

that the German Constitution is generally open towards EU cooperation[257] and that German constitutional law will be interpreted – as far as possible – in conformity with EU law. It also requires that the Constitutional Court cooperates with the CJEU.[258] Furthermore, it entails that the compatibility assessment of EU law with the German Constitution is centralized with the German Constitutional Court[259] and that the different constitutional limits are applied in a favorable manner towards the EU.[260] Notably, as just outlined, the Court restricts its *ultra vires* review to structurally significant transgressions of the conferred competences and consults the CJEU.[261] Similarly, the *constitutional identity* review is exercised in an *EU-friendly manner* as well.[262]

One can detect clear similarities with obligations stemming directly from EU law itself, notably, the obligation to harmonious interpretation[263] and the obligation for last instance courts to refer preliminary questions to the CJEU.[264] However, it appears favorable, from a German constitutional perspective, to internalize these EU law obligations. This implies that the German Court remains *master* of the concept and can determine scope and requirements attached to it.

256 Both the Preamble and Article 24 (1) GG are expression of the original openness of the German Constitution, cf. Mayer and Walter, 'Die Europarechtsfreundlichkeit des BVerfG nach dem Honeywell-Beschluss' 539.

257 Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' 28.

258 *Honeywell-judgment* paras 58-59; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 691; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 676-677.

259 Dana Burchardt, 'Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht – Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ('Solange III'/'Europäischer Haftbefehl II')' (2016) 76 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 527, 540; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 628.

260 *Lisbon-judgment* para 240; Cf. as well: Voßkuhle, 'Der Wandel der Verfassung und seine Grenzen' 419-420; Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' 29; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 678-679.

261 *Quantitative Easing (PSPP) Reference* para 63; *Final OMT-Judgment* paras 148-150; *Honeywell-judgment* para 61.

262 *Quantitative Easing (PSPP) Reference* para 58; *Final OMT-Judgment* paras 121, 154-155; Cf. as well: Burchardt, 'Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht – Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ('Solange III'/'Europäischer Haftbefehl II')' 533.

263 Craig and de Búrca, *EU Law Text, Cases, and Materials* 209-211; Jürgen Kühling, 'Die richtlinienkonforme und die verfassungskonforme Auslegung im Öffentlichen Recht' (2014) 54 Juristische Schulung (JuS) 481, 482.

264 Craig and de Búrca, *EU Law Text, Cases, and Materials* 468-469.

4.1.3.2 Continuous institutional responsibility for EU integration

EU law friendliness is complemented by the concept of *Integrationsverantwortung*,[265] which applies to German institutions when conferring competences to the EU and when supervising the exercise of conferred competences.[266] Its primary aim is to balance the constitutional obligation to participate in EU cooperation with continuous responsibilities under the constitution.[267] The concept is now codified.[268] Integration responsibility requires that the relevant institutional actors determine a specific and limited EU integration program.[269]

An increasingly important element deriving from integration responsibility is the continuous supervision of EU action, which gained relevance during the Eurocrisis.[270] Notably, the Constitutional Court requires German institutions to monitor EU action in order to ensure compliance with the determined integration program.[271] During the Eurocrisis, the German Court continuously employed integration responsibility in conjunction with the *ultra vires* review and the individuals' right to vote enshrined in Article 38 (1) GG.[272] Following this constitutional framework, the *Bundestag* has an obligation to shield individuals against potential *ultra vires* acts committed by EU institutions.[273] It suggests that integration responsibility requires German institutions to consider EU integration as a continuous institutional task and that they cannot discharge themselves from their constitutional obligations by adopting an EU integration step. Obviously, this concept equally enables the Constitutional Court to hold

265 In English: *Integration responsibility*.

266 *Quantitative Easing (PSPP) Final Judgment* paras 106-107; Cf. as well: Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1047; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 178-179.

267 Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1046; Andreas Engels, 'Die Integrationsverantwortung des Deutschen Bundestags' (2012) 52 Juristische Schulung (JuS) 210, 210-211; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 177.

268 In the direct aftermath of the Lisbon-judgment, the *Bundestag* adopted the integration responsibility law, cf. Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 178.

269 As the Court emphasised itself, cf. *Quantitative Easing (PSPP) Final Judgment* paras 106-107; *Quantitative Easing (PSPP) Reference* para 47; *OMT-reference* para 31; Also highlighted by: Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 761; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung'.

270 *Quantitative Easing (PSPP) Final Judgment* paras 106-107; *OMT-reference* paras 160 ff; Cf. as well: Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1047; Engels, 'Die Integrationsverantwortung des Deutschen Bundestags' 212-213.

271 *Quantitative Easing (PSPP) Reference* paras 47-49; *Final OMT-Judgment* paras 164-165.

272 *Quantitative Easing (PSPP) Reference* para 50; *Final OMT-Judgment* para 166; Cf. as well: Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1049; Engels, 'Die Integrationsverantwortung des Deutschen Bundestags' 213.

273 Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1048.

German institutions directly accountable for power excesses of EU institutions, which could otherwise not be constitutionally scrutinized in Germany.

4.2 Constitutional principles

Based on this constitutional toolbox, the German Constitutional Court evaluates the effect of EU integration on substantive principles of the German Constitution. In this assessment, one may identify two tendencies that appear to render the application of the *eternity clause* to EU integration highly likely. First, the Court seems to perceive the EU-related transformation of decision-making processes that result in increasing EU control as a potential threat for the state structure. Resulting from this perception is a general tension between the aim of the *eternity clause* – namely the preservation of the German state structure – and the prospect of EU integration – namely the transformation of decision-making processes. And second, given the constitutional indeterminacy of the content protected by the *eternity clause*, EU integration can easily be portrayed as an interference when interpreting the *eternity clause* in light of EU integration.[274] This is particularly obvious in the Court's Eurocrisis-related jurisprudence, where the concept of *overall budgetary responsibility* was introduced in light of increasing EU budgetary commitments.[275]

The focus of the subsequent assessment will rest on the principle of democracy (4.2.1.), the concept of *overall budgetary responsibility* (4.2.2.) as well as German sovereignty (4.2.3.), as these are the main substantive limits relevant for EU fiscal integration.

4.2.1 Democracy

The principle of democracy is mentioned in several provisions of the German Constitution. It serves as a justification for limiting fundamental rights and

274 For example, from the developed competence catalogue developed by the Court, cf. *Lisbon-judgment* paras 251-252; Which was criticized as arbitrary, cf. Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 723-724.

275 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 898-899; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 152-153; Nettesheim, 'Verfassungsrecht und Politik in der Staatsschuldenkrise' 1410; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 460-461.

for police as well as security actions.[276] It is also connected to the constitutional role of political parties as established in Article 21 GG.[277] Furthermore, it is a structural requirement for EU integration measures under Article 23 (1) (1) GG,[278] a requirement for the constitutional organization of the *Länder* following Article 28 (1) GG,[279] and finally part of the core state structure following Articles 20 (1) and (2) GG.[280] Although all these provisions shape the current conception of democracy, Article 79 (3) GG only covers the core components of the principle laid down in Article 20 (1) and (2) GG.[281]

Considering the Court's EU-related jurisprudence on democracy in conjunction with the *eternity clause*, three core components appear vital to guarantee the overarching function of democracy, namely legitimizing the exercise of state powers (4.2.1.4.).[282] According to the Constitutional Court, the German people, as legitimizing subject under the German Constitution (4.2.1.1.), have to be able to determine through elections (4.2.1.2.), an institutional representation which takes political decisions (4.2.1.3.), as visually conceptualized in *Figure 7* below. Jointly these elements constitute the core

276 For example, in: Articles 10 (2), 11 (2), 18, 91 (1) GG, cf. Ulrich Jan Schröder, 'Das Demokratieprinzip des Grundgesetzes' (2017) 49 Juristische Arbeitsblätter (JA) 809, 809-810.

277 *Procedure to Prohibit the Political Party NPD* paras 515-518; Cf. as well: Martin Morlok, 'Kein Geld für verfassungsfeindliche Parteien?' (2017) 50 Zeitschrift für Rechtspolitik (ZRP) 66, 68; Daniel Volp, 'Parteiverbot und wehrhafte Demokratie – Hat das Parteiverbotsverfahren noch eine Berechtigung?' (2016) 69 Neue Juristische Wochenschrift (NJW) 459, 461.

278 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 10-12; Scholz, 'Art. 23 GG' paras 73-75; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 685-686; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 809.

279 Veith Mehde, 'Art. 28 Abs. 1 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 52-55; Johannes Hellermann, 'Artikel 28 GG – Verfassung der Länder' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 5-6, 9; Klaus Ritge, 'Das Recht der kommunalen Selbstverwaltung in den Verfassungsräumen von Bund und Ländern' (2018) 37 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 114, 115.

280 Stefan Huster and Johannes Rux, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 55-60; Bernd Grzeszick, 'Art. 20 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 1, 11-15, 60-77; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 809-810; Bodo Pieroth, 'Das Demokratieprinzip des Grundgesetzes' (2010) 50 Juristische Schulung (JuS) 473, 474.

281 Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' paras 21-22; Herdegen, 'Art. 79 GG' paras 62-63; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 816; Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 474-475; Sennekamp, 'Alle Staatsgewalt geht vom Volke aus! – Demokratieprinzip und Selbstverwaltung der Justiz' 217.

282 Herdegen, 'Art. 79 GG' para 127; Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' paras 35-36; Huster and Rux, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' para 63; Grzeszick, 'Art. 20 GG' paras 117-119; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 479, 481; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 154-155.

of German democracy in the sense of Article 79 (3) GG, which has to be respected by EU fiscal integration steps (4.2.1.5.).

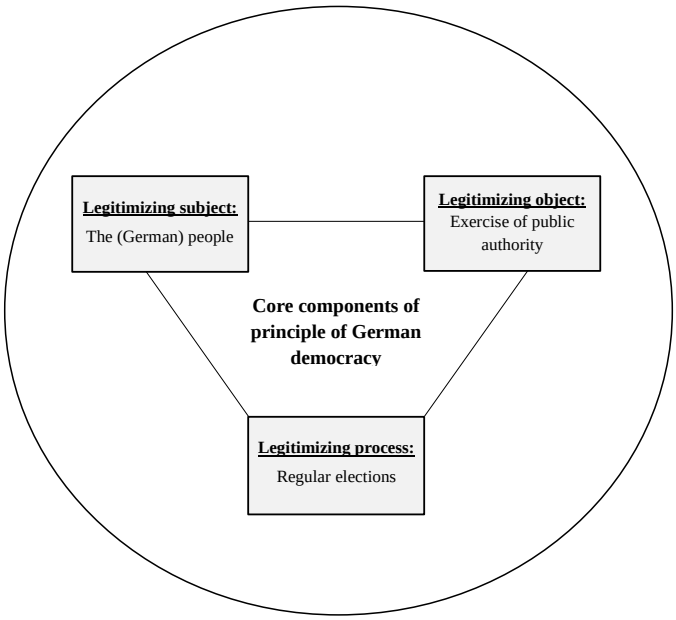

Figure 7: Core components of German democracy

4.2.1.1 Legitimizing subject ('Volkssouveränität')

The first element is the German people as origin and source of legitimacy for the exercise of (state) authority.[283] The people mandate a representative institution through regular elections to exercise state power and to take political decisions on behalf of them within the available constitutional framework.[284] Given that the people legitimize the exercise of state power, it must be possible

283 Cf. the explicit wording of Article 20 (2) (1) GG: 'All state authority derives from the people.'; Cf. as well: Huster and Rux, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' paras 62, 66-68a; Grzeszick, 'Art. 20 GG' para 61; Lars Vinx, 'The Incoherence of Strong Popular Sovereignty' (2013) 11 International Journal of Constitutional Law 101, 114-115; Sennekamp, 'Alle Staatsgewalt geht vom Volke aus! – Demokratieprinzip und Selbstverwaltung der Justiz'; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 130-133; Rudolf Weber-Fas, *Das Grundgesetz* (Duncker & Humblot 1983) 52-53.

284 *Lisbon-judgment* para 216; Cf. as well: Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' para 16.1; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150.

to trace state actions back to the people.[285] The German Parliament is directly legitimized and can enact laws through which implementing powers can be conferred upon, for example, the government. The resulting governmental acts can then be traced back to the parliamentary law and ultimately the people. Here, a legitimization chain emerges, which constitutes the backbone of German representative democracy and which illustrates that the people form the conceptual starting point of state authority.[286]

This triggers the question *who* the people in the sense of Article 20 (2) (1) GG are. The Constitutional Court concluded that the term refers to the German people,[287] which corresponds to the scope of the German Constitution.[288] The Court highlighted that Article 20 (2) (1) GG refers to the 'people' and *not* to affected individuals, which implies a particular connection to the state. The German people have a particular bond with the German state, which distinguishes them from other individuals.[289] As this special bond is required, only German nationals can participate in the process of legitimizing state action under the German Constitution.[290] According to Article 38 (1) GG, only Germans, constitutionally defined as individuals with German nationality in the

285 2 BvF 3/89 *Right to Vote for Foreigners II* [1990] (German Federal Constitutional Court) para 39; Cf. as well: Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 726; Christian Burkiczak, 'Die verfassungsrechtlichen Grundlagen der Wahl des Deutschen Bundestages' (2009) 49 Juristische Schulung (JuS) 805, 806.

286 Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Andreas Voßkuhle and Anna-Bettina Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' (2009) 49 Juristische Schulung (JuS) 803, 804; Matthias Jestaedt, 'Demokratische Legitimation – quo vadis?' (2004) 44 Juristische Schulung (JuS) 649, 650.

287 *Lisbon-judgment* para 281; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 148; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 446.

288 Hans H. Klein, 'Art. 145 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) para 13; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 446; On the scope of application of the German Constitution, cf. *Law on Direct (Financial) Support* paras 34-36; 1 BvR 102/51 *Decision on the Consumer Mortgage Law* [1953] (German Federal Constitutional Court) para 48.

289 2 BvF 2, 6/89 *Right to Vote for Foreigners I* [1990] (German Federal Constitutional Court) para 56; *Right to Vote for Foreigners II* para 59.

290 Cf. as well the additional categories included in Article 116 (1) GG for individuals with a special status under the German Constitution, Schröder, 'Das Demokratieprinzip des Grundgesetzes' 810; Ewgenij Sokolov, 'Wege zur Partizipation für Inländer – Volksbegriff und Einbürgerung im Lichte des Demokratieprinzips' (2016) 35 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 649, 650.

sense of Article 116 GG,[291] enjoy the right to vote in federal and regional elections.[292]

Taken together, all state action has to be directly or indirectly legitimized by the people.[293] Under the current German Constitution, the legitimization subject is defined as German people.[294] However, the Constitutional Court highlighted that the German Parliament can modify the composition of the people by changing the nationality rules.[295] Nevertheless, it seems unlikely that a European people could emerge under the current German Constitution.[296]

4.2.1.2 Elections as mechanism to determine representation

The mandating of the exercise of public power by the people occurs through elections, which have to comply with the basic requirements established in Article 38 (1) (1) GG. These entail that elections are direct, regular, allow for free choice with secret ballot and that each vote casted has an equal success rate.[297] This equally impacts the composition of the German Parliament.[298]

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291 *Right to Vote for Foreigners II* para 38; Cf. as well: Herdegen, 'Art. 79 GG' para 135; Sokolov, 'Wege zur Partizipation für Inländer – Volksbegriff und Einbürgerung im Lichte des Demokratieprinzips' 653-654; Burkiczak, 'Die verfassungsrechtlichen Grundlagen der Wahl des Deutschen Bundestages' 806.

292 *Quantitative Easing (PSPP) Reference* paras 45-46; *Final OMT-Judgment* paras 122-126; *Lisbon-judgment* paras 130-133; Cf. as well: Schröder, 'Das Demokratieprinzip des Grundgesetzes' 810-811; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 444; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 726.

293 Through legitimization chain, cf. *Procedure to Prohibit the Political Party NPD* para 545; *Right to Vote for Foreigners II* para 40; Cf. as well: Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 481; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

294 Klein, 'Art. 38 GG' para 68.

295 Given that Article 116 GG is not covered by the *eternity clause*, as pointed out by the Court, cf. *Right to Vote for Foreigners I* para 56.

296 Huster and Rux, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' paras 136-137; Grzeszick, 'Art. 20 GG' para 268; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-145; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 812; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 464-465; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804-805; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 728-729.

297 As highlighted by the *Bundesverfassungsgericht*, these election principles are rooted in Art. 20 (2) GG, cf. 2 BvR 1953/95 *Bavarian Municipal Elections* [1998] (German Federal Constitutional Court) paras 62-65; Cf. as well: Klein, 'Art. 38 GG' paras 82-86.

298 Meaning, for example, that every parliamentarian is representing a comparable number of voters, cf. 2 BvF 3/11, 2 BvR 2670/11, 2 BvE 9/11 *New Allocation of Seats in the German Parliament* [2012] (German Federal Constitutional Court) paras 52-57; Cf. as well Heiko

Namely, it requires that the *Bundestag* represents the vote and views of the people accurately.[299] The equal representation requirement renders degressive proportionality for a directly representative institution incompatible with German democracy.[300] Such degressive representation, for example employed within the European Parliament, is only permissible for indirectly representative bodies such as the German Federal Council.[301]

The only institution that is directly elected by the entire German people is the German Parliament.[302] It constitutes the primary institutional representation directly accountable to the people and enjoys the highest degree of democratic-political authority.[303] Although the Constitutional Court highlighted that democracy did not shield the existing German institutional set-up, it established that the process of determining a representing institution through free, equal and fair elections constituted a core component of German democracy.[304]

4.2.1.3 Legitimizing object: Components allowing for a political process

The final component of German democracy is state authority. Through elections the people mandate the exercise of state powers for a determined time. Yet, the exercise of public authority presupposes that state powers exist in the first

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Holste, 'Demokratie wieder flott gemacht: Das neue Sitzzuteilungsverfahren im Bundeswahlgesetz sichert das gleiche Wahlrecht' (2013) 32 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 529, 529; Burkiczak, 'Die verfassungsrechtlichen Grundlagen der Wahl des Deutschen Bundestages' 808.

299 Martin Morlok and Hana Kühr, 'Wahlrechtliche Sperrklauseln und die Aufgaben einer Volksvertretung' (2012) 52 Juristische Schulung (JuS) 385, 388.

300 Schröder, 'Das Demokratieprinzip des Grundgesetzes' 813; Morlok and Kühr, 'Wahlrechtliche Sperrklauseln und die Aufgaben einer Volksvertretung' 387; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 453.

301 Cf. the logic employed by the German Constitutional Court in relation to the degressive proportionality that applies to the European Parliament, cf. *Lisbon-judgment* paras 281-286; Cf. as well Matthias Ruffert, Friederike Grischek and Moritz Schramm, 'Europarecht im Examen: Grundfragen und Organisationsstruktur' (2019) 59 Juristische Schulung (JuS) 974, 977; Burkiczak, 'Die verfassungsrechtlichen Grundlagen der Wahl des Deutschen Bundestages' 808; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 153-154.

302 Klein, 'Art. 38 GG' paras 30-31; Herdegen, 'Art. 79 GG' para 127; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 516, 527; Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 477; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

303 The government is indirectly legitimized through the parliament, cf. Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

304 Rooted in human dignity and the non-discrimination doctrine, cf. *Final OMT-Judgment* para 124; *New Allocation of Seats in the German Parliament* para 52; *Lisbon-judgment* para 211; *Bavarian Municipal Elections* paras 62-65.

place[305] and that the German Parliament can take political decisions.[306] Subsequently, representatives have to justify their political decisions in front of the voter in order to secure re-election.[307] During elections, political parties compete with ideas on how to fill the political space available. Two main conclusions result from this.

First, the Constitutional Court emphasizes the importance of a plural, party-political environment for the principle of democracy itself. Only if political parties offer alternatives do voters have a choice. Therefore, the protection of political parties occupies a crucial role in the German constitutional logic.[308] It is a precondition for the democratic political process. Second, the *Bundesverfassungsgericht* established that the elected institution has to preserve central political decision-making powers over time.[309] In other words, German democracy requires that the directly legitimized institution retains the ability to take decisions in core political areas, including citizenship rules, military operations, fiscal and budgetary decisions, criminal law and cultural questions according to the Constitutional Court.[310] It should be emphasized that this

305 *Lisbon-judgment* para 250: '[...] Democracy first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition of government and opposition. [...]'; *Quantitative Easing (PSPP) Reference* para 56; *Final OMT-Judgment* paras 124, 135-138; Cf. as well: Wolfram Cremer, 'Lissabon-Vertrag und Grundgesetz' (2010) 32 JURA – Juristische Ausbildung 296, 299-300; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 447-448.

306 Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 516, 527; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

307 As well as changing previous parliamentary decisions, cf. 2 BvL 1/12 *Relation Between International Law and the German Legal Order* [2015] (German Federal Constitutional Court) para 53.

308 Article 21 GG awards political parties with an explicit constitutional recognition, cf. *Procedure to Prohibit the Political Party NPD* paras 516-517; 2 BvF 1/65 *Party-Financing I* [1966] (German Federal Constitutional Court) paras 136-139; 1 BvB 1/51 *Procedure to Prohibit the Political Party SRP* [1952] (German Federal Constitutional Court) para 34; Cf. as well: Klein, 'Art. 21 GG' paras 5, 12-13.

309 *Final OMT-Judgment* paras 127-128; *Lisbon-judgment* paras 211-212; 2 BvF 1/92 *Participation Law Schleswig-Holstein* [1995] (German Federal Constitutional Court) paras 137, 141-143; Cf. as well: Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' para 36.

310 *Lisbon-judgment* para 252; Although it is unclear whether these areas protect German democracy or statehood, cf. Herdegen, 'Art. 79 GG' paras 177-178.

selection of the Court was criticized as arbitrary[311] and the extent of required protection of the enlisted competence areas remains unclear.[312]

Overall, German democracy appears to presuppose a political space in which voters can chose between competing political programs and in which the elected institution can take own, political decisions. Hence, the principle of democracy contains a temporal dimension that secures decision-making powers at the parliamentary level over time, which limits the political space available to the current representatives.[313]

4.2.1.4 Delegation of public authority

As illustrated in *Figure 7* above, all outlined components are interrelated. The German people determine their representatives through elections which then exercise political authority. Thus, the core task of democracy is to secure the delegation of state authority to an institutional representation. Yet, the preservation of political discretion at the level of institutional representation does not prevent the delegation of public authority to the EU.[314]

Namely, Article 23 (1) (2) GG empowers parliament to engage in EU integration steps without putting parliamentary powers into question. Arguably, EU action is based on parliamentary approval and future parliaments retain the possibility to initiate EU Treaty-change or to withdraw from the EU.[315] Therefore, it can be argued that the German Parliament retains crucial political decision-making abilities, despite continuous EU integration. Nevertheless, parliament has to consider the impact of an envisaged conferral on the political

311 Particularly, given that the *Bundesverfassungsgericht* justifies the selected competence areas merely by stating that these areas where 'since always' part of a constitutional state, cf. *Lisbon-judgment* para 252; As for example criticized by: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 460-461.

312 Particularly given the active position that the Court has taken in defining these competences, cf. Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 690; Cremer, 'Lissabon-Vertrag und Grundgesetz' 300; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 460-461.

313 As highlighted by the Court, when emphasizing that political decision must be reversible, cf. *Relation Between International Law and the German Legal Order* para 53; Also raised during the Eurocrisis, cf. *Quantitative Easing (PSPP) Reference* para 56; *ESM-Treaty and Fiscal Compact (interim relief)* para 106; *Financial Support for Greece and EFSF* paras 121-124.

314 Herdegen, 'Art. 79 GG' paras 131-132; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 816.

315 Alexander Thiele, 'Der Austritt aus der EU – Hintergründe und rechtliche Rahmenbedingungen eines 'Brexit'' (2016) 51 Europarecht (EuR) 281, 291-292; Although, Germany might be constitutionally required to engage in other forms of supranational European cooperation, cf. Thomas Groß, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' (2018) 53 Europarecht (EuR) 387, 403-404.

space that remains at the disposition of future parliaments.[316] As it stands, the *Bundestag* represents the primary layer of legitimization and has to remain in charge of central political decisions. The primary aim of the German Constitutional Court in its conception of democracy seems to be to ensure that the political process remains centrally at the national level – insisting that an opening of this process to the EU is impossible, given that no comparable accountability and legitimation exists.[317]

4.2.1.5 Resulting challenge for EU (fiscal) integration

The Court's conception of German democracy leads to several points of conflict with EU fiscal integration.[318] A first challenge is the conception of the legitimization subject as the 'German people'.[319] The German Court negated that this 'German people' could evolve into a 'European people' based on various constitutional arguments. First, the German Constitution is limited in its scope to Germany.[320] Second, the German Constitution was constituted by the German people and is expression of their decision to organize the German state in its current manner.[321] As becomes obvious when considering the constitutions in other Member States, these fundamental constitutional

316 *ESM-Treaty and Fiscal Compact (interim relief)* paras 120, 124.

317 *Lisbon-judgment* para 213; As the European Parliament remains a representation of the Member States and not a European people, cf. Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 264; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 452-453.

318 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 898-899; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 152-153; Nettesheim, 'Verfassungsrecht und Politik in der Staatsschuldenkrise' 1410; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 460-461.

319 As was noted, the German Constitutional Court employed 'Deutsches Volk' written with a capital letter and therefore used as an established expression, as opposed to 'deutsches Volk', which was the previous way the Court employed the concept and as would be the case if 'German' functions grammatically as an adjective, cf. Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 445.

320 Klein, 'Art. 145 GG' para 13; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 446; Weber-Fas, *Das Grundgesetz* 21-22; Walther Fürst and Günther Hellmuth, *Grundgesetz – Das Verfassungsrecht der Bundesrepublik Deutschland in den Grundzügen* (Studienbücher Rechtswissenschaft, 3. edn, Verlag W. Kohlhammer 1982) para 27.

321 Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 476; Klaus Kröger, *Grundrechtsentwicklung in Deutschland – von ihren Anfängen bis zur Gegenwart* (Mohr Siebeck 1998) 78-83; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 177-178; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* 17-21; Fürst and Hellmuth, *Grundgesetz – Das Verfassungsrecht der Bundesrepublik Deutschland in den Grundzügen* paras 26-27.

decisions vary based on national history and constitutional ambition.[322] As the Court highlighted, the people have to be construed as the collective of people with German nationality.[323] Although, the legislator can change the rules on nationality following Article 73 (1) No. (2) GG,[324] this does not entail an opening of democratic rights beyond the scope of the German Constitution. Yet, the German Parliament can confer competences to the EU.[325] When transferring such competences, the directly legitimized parliament mandates the EU with the exercise of specific powers. This initial parliamentary approval is the basis for EU action. Therefore, the EU act is based on the German parliamentary mandate, which establishes a link to the German people. Consequently, the 'German people' as core component of German democracy appear to only emerge as limiting factor for EU fiscal integration that challenges the Member States' (political) existence and that entails the creation of a 'European people' as new – not even partial – legitimizing-subject.[326]

The more immediate limiting factors for less far-reaching fiscal integration steps are the core material competences that the Constitutional Court portrayed as essential for the political process, which are summarized in *Figure 8*.[327] According to the Court, these competences are particularly relevant for the political process[328] and have to remain under direct control of the German

322 Cf. for example the variation in the concept of *constitutional identity*, Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 433-438; Or in relation to the design of constitutional courts, cf. Vanberg, *The Politics of Constitutional Review in Germany* 17; Or in relation to the national enabling clauses, cf. Häberle, *Das Grundgesetz zwischen Verfassungsrecht und Verfassungspolitik* 448-456.

323 *Right to Vote for Foreigners I* para 56; Cf. as well: Sokolov, 'Wege zur Partizipation für Inländer – Volksbegriff und Einbürgerung im Lichte des Demokratieprinzips' 650; Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 476; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 803.

324 Following the procedure in Article 79 (2) GG, cf. *Right to Vote for Foreigners I* para 56.

325 *Lisbon-judgment* para 226; *Maastricht-Judgment* para 136; Cf. as well: Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 727.

326 Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 448-449.

327 Möllers and Redcay, 'Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union?' 415-417.

328 *Quantitative Easing (PSPP) Reference* para 56; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 109; *Lisbon-judgment* paras 262-264; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 142-143; Möllers and Redcay, 'Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union?' 415-417; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 731.

Parliament.[329] Otherwise, the political powers of the German Parliament could be undermined by supranational decisions and the German people could no longer effectively scrutinized political decision-making.[330]

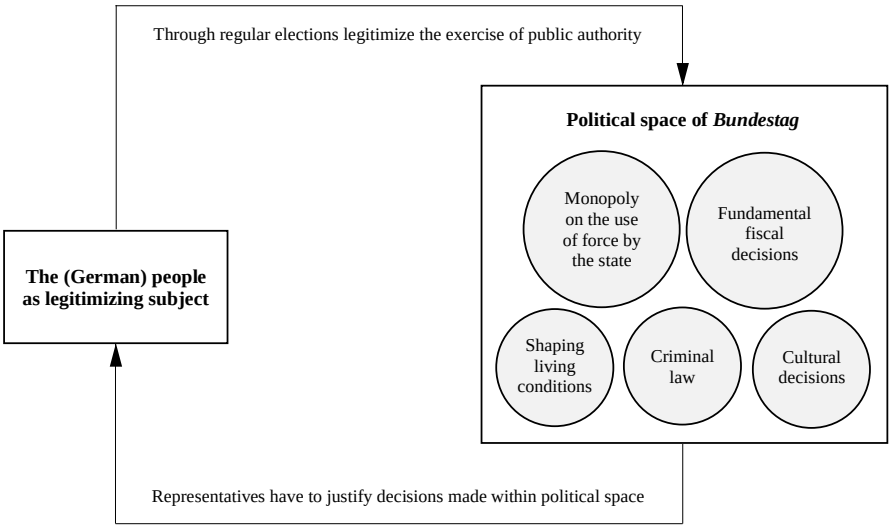

Figure 8: Democratic political space at disposition of Bundestag

Although the identification of particular material policy areas under Article 79 (3) GG is novel and, until now, only occurred towards EU integration proposals,[331] some similarity with the established internal constitutional jurisprudence can be observed. Notably, the German constitutional order contains so-called legislative[332] and parliamentary reservations.[333] According to these

329 *Lisbon-judgment* paras 250-252; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 142-143; Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 429-431; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 689-691; Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 264; Cremer, 'Lissabon-Vertrag und Grundgesetz' 302-303.

330 *Lisbon-judgment* paras 262-264.

331 Extending to protecting German statehood, cf. Schröder, 'Das Demokratieprinzip des Grundgesetzes' 816; Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 264; Cremer, 'Lissabon-Vertrag und Grundgesetz' 304.

332 In German: *Vorbehalt des Gesetzes*.

reservations, central political decisions have to be taken by parliament in a legislative act.[334] Furthermore, certain decisions cannot be delegated and have to be taken by parliament, given their inherent political nature. The German Court applies a *case to case* assessment in order to determine whether measures fall under such reservation.[335] This assessment includes the primary question of whether a legislative act is required, but also subsequently how the matter has to be regulated.[336] The Court found, for example, that the peaceful use of nuclear energy,[337] the deployment of chemical weapons,[338] the conditions for the keeping of laying hens,[339] as well the German spelling reform,[340] fall within the ambit of particularly important decisions that require a legislative act. Furthermore, certain matters are considered to be so essential that only parliament can decide them. A prominent example is the deployment of the German army, which constitutes a historically rooted[341] parliamentary reservation.[342] Overall, the concepts of parliamentary and legislative reservation indicate that specific *internal* decisions require direct involvement of the German Parliament.

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333 In German: *Parlamentsvorbehalt*; The German constitution requires in certain areas that the legislator adopts a law that lays down all central (political) decision, which constitutes then a reservation of law (a formal legislative act is required in this case); in contrast, certain matters may not be delegated but have to be decided by the parliament, so they form a reservation of parliament, which the Constitutional Court described as a reservation of law without delegation possibility, cf. 2 BvF 4/98 *High Financial Authority* [2002] (German Federal Constitutional Court) paras 88-90; Cf. as well: Wissenschaftlicher Dienst des Deutschen Bundestages, *Reichweite der Wesentlichkeitslehre – Grenzfälle der Wesentlichkeit (WD 3 – 3000 – 043/15)* (Deutscher Bundestag, 2015) 4-5; Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 477-478; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

334 Andreas Voßkuhle, 'Grundwissen – Öffentliches Recht: Der Grundsatz des Vorbehalts des Gesetzes' (2007) 47 Juristische Schulung (JuS) 118, 118.

335 2 BvL 8/77 *Peaceful Use of Nuclear Energy in Germany* [1978] (German Federal Constitutional Court) para 77; Cf. as well: Voßkuhle, 'Grundwissen – Öffentliches Recht: Der Grundsatz des Vorbehalts des Gesetzes' 119.

336 Based on the 'essentiality theory', cf. Pieroth, 'Das Demokratieprinzip des Grundgesetzes' 477-478; Voßkuhle, 'Grundwissen – Öffentliches Recht: Der Grundsatz des Vorbehalts des Gesetzes' 119.

337 *Peaceful Use of Nuclear Energy in Germany*.

338 2 BvR 624, 1080, 2029/83 *Deployment of Chemical Weapons* [1987] (German Federal Constitutional Court).

339 2 BvF 3/90 *Conditions for the Keeping of Laying Hens* [1999] (German Federal Constitutional Court).

340 1 BvR 1640/97 *German Spelling Reform* [1998] (German Federal Constitutional Court).

341 *German Participation in NATO Actions* para 330.

342 As established by the *Bundesverfassungsgericht*, cf. Ibid; Cf. as well: Mattias G. Fischer and Manuel Ladiges, 'Evakuierungseinsätze der Bundeswehr künftig ohne Parlamentsvorbehalt' (2016) 35 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 32, 32; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 730-731.

Interestingly, the Court refrains internally from defining entire competence areas under such reservations. Instead, it requires a *case-to-case* assessment in which the policy area as well as the concrete measures envisaged are evaluated in order to determine whether parliament was (and can be in the future) sufficiently involved.[343] This differs from the Court's EU approach, where entire competence areas were marked as particularly important for parliament. At least two explanations might be relevant here.

First, in contrast to *internal* shifts of competences, the conferral of competences to the EU is more difficult to reverse, simply because other Member States have to jointly agree on a possible Treaty-changes or the German Parliament could otherwise only decide to withdraw based on Article 50 TEU.[344] Also, the 'return' of competences from the supranational to the national level is not part of the EU logic that conceptualizes European integration as process that strives for an 'ever-closer Union'. Thus, even if the Constitutional Court would find that EU actions required additional legitimization by the German Parliament, it is questionable whether such a judicial view could be adequately respected. This risk does not emerge in the same manner internally, given that the German Court is the undisputed final arbiter and other German institutions have to implement its rulings.

Second, the protected areas are connected to competences that are traditionally attributed to a sovereign state.[345] Thus, by identifying these areas as components of the *eternity clause*, the Constitutional Court equally preserves German sovereignty and statehood, which ultimately secures the Court's own powerful position in the German constitutional order.[346]

Based on these findings it appears that EU fiscal integration steps should award a decisive role to national parliaments in the EU-level decision-making process. The central involvement of national parliaments could preserve the central position and final authority of Member States in decisions on the identified core state competences – which are closely linked with German democracy according to the jurisprudence of the German Constitutional Court. Moreover, the central involvement of national parliaments would ultimately preserve the national constitutional authorities' oversight, which seems to constitute a particularly important concern of the German Constitutional Court. Taken together, this indicates that EU fiscal integration is not necessarily incompatible with German democracy – rather specific forms of EU fiscal integration that merely aim at centralizing powers at the EU level appear

343 Given that the Court employs a flexible and open approach, cf. Bundestages, *Reichweite der Wesentlichkeitslehre – Grenzfälle der Wesentlichkeit (WD 3 – 3000 – 043/15)* 6-7.

344 Although this raises constitutional concerns in itself, cf. Groß, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' 403-404.

345 Herdegen, 'Art. 79 GG' para 178; Schröder, 'Das Demokratieprinzip des Grundgesetzes' 816.

346 Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 774.

incompatible with the current interpretation of German democracy. Thus, following the jurisprudence of the German Constitutional Court, it seems that the design of EU fiscal integration steps ultimately determines their constitutional attainability.

4.2.2 Overall budgetary responsibility

Based on the outlined competence-based core of German democracy, the Constitutional Court developed the concept of *overall budgetary responsibility*[347].[348] Since its first explicit formulation in the judgment on the Greek loan package and the EFSF,[349] the *Bundesverfassungsgericht* employed *overall budgetary responsibility* as the main constitutional vehicle to decide on the compatibility of various Eurocrisis-related measures with the German Constitution.[350] The underlying premise of *overall budgetary responsibility* is that central budgetary and fiscal decisions have to be made by the democratically legitimized representation of the German people, the German Parliament.[351]

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347 In German: *haushaltspolitische Gesamtverantwortung*.

348 Since defining budgetary and fiscal matters as part of the material core of the *eternity clause* in the *Lisbon*-decisions, cf. *Lisbon-judgment* paras 250-252 (issued in June 2009); subsequently refined in the Eurocrisis-related jurisprudence, cf. *Financial Support for Greece and EFSF* (issued in September 2011); *Participation of Members of German Parliament in the EFSF* (issued in February 2012); *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* (issued in June 2012); *ESM-Treaty and Fiscal Compact (interim relief)* (issued in July 2012); *OMT-reference* (issued in January 2014); *ESM-Treaty and Fiscal Compact*(issued in March 2014); *Final OMT-Judgment* (issued in June 2016); *Quantitative Easing (PSPP) Reference* (issued in July 2017); *Quantitative Easing (PSPP) Final Judgment* (issued in May 2020); Cf. as well Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005.

349 *Financial Support for Greece and EFSF* para 120; Cf. as well: Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 285; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 682-683; Antje von Ungern-Sternberg, 'Parliaments – Fig Leaf or Heartbeat of Democracy? German Constitutional Court – Judgment of 7 September 2011 – Euro Rescue Package' (2012) 8 European Constitutional Law Review 304, 314-315.

350 Jan-Herman Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' in Thomas Beukers, Bruno de Witte and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) 259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12.

351 *Quantitative Easing (PSPP) Final Judgment* para 104; *Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

Based on this premise, the Constitutional Court introduced a competence-specific, absolute – given its partial constitutional basis in Article 79 (3) GG – limit for the conferral of fiscal and budgetary competences to the EU.[352]

The subsequent analysis focuses on the underpinning democracy-theoretical considerations (4.2.2.1.), before then considering its constitutional conditions (4.2.2.2.) as well as their concrete application (4.2.2.3.).

4.2.2.1 Underpinning democracy-theoretical considerations

Overall budgetary responsibility requires that fundamental fiscal and budgetary decisions remain under the direct control of the German Parliament.[353] The concept aims at preserving an open, democratic political process on revenue and expenditure in Germany.[354] Traditionally, budgetary and fiscal competences are characterized as core powers of modern parliaments,[355] given that most political decisions are intertwined with decisions on revenue and expenditure. Political parties campaign based on their budgetary and fiscal planning, which may include proposals on taxation or social welfare. These fiscal proposals then impact the voter's choice and consequently influence the final election result. Given this crucial link, one may conclude that budgetary and fiscal decisions are highly important competences of the German Parliament, which is reflected in the parliamentary work. For example, the annual budgetary deliberations in the parliamentary plenary are characterized by the Constitutional Court as general debates on the political work of the governing

352 Herdegen, 'Art. 79 GG' paras 182, 185; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Franz C. Mayer, 'Rebels Without a Cause? Zur OMT-Vorlage des Bundesverfassungsgerichts' (2014) 49 Europarecht (EuR) 473, 497.

353 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' para 185; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 807-808.

354 *ESM-Treaty and Fiscal Compact (interim relief)* para 118; Referred to as discretionary decision-making space, cf. Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 19.

355 Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295; Described as 'crown jewels' of modern parliaments by former German constitutional judge Udo di Fabio; cf. Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' 567; Traditionally, also referred to as 'regalian' powers or rights of the crown, cf. Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

coalition.[356] Given the importance of these competences for the political sphere, the Court concluded that a sitting parliament must be able to autonomously reverse budgetary and fiscal decisions taken by preceding parliaments.[357] Hence, the underpinning objective of *overall budgetary responsibility* is the protection of the interconnection between the democratic and the political process, which ultimately protects the 'democratic self-determination' of the people.[358]

In addition, preserving the democratic decision-making abilities of the German Parliament requires that fiscal and budgetary competences remain permanently within its powers.[359] The so-called future openness of the German budget guarantees that a newly elected *Bundestag* has the ability to take self-responsible budgetary decisions.[360] Here, the *Bundesverfassungsgericht* identified a negative obligation, namely to refrain from pre-empting budgetary powers through, for example, supranational commitments.[361] This general reversibility of fiscal decisions also requires political parties to continuously justify their fiscal decisions and budgetary planning before the voters.[362] At

356 *Financial Support for Greece and EFSF* para 123; *Lisbon-judgment* para 256; Cf. as well: Sven Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess*, vol 253 (Jus Publicum, Mohr Siebeck 2016) 69; De Sadeleer, 'The New Architecture of European Economic Governance' 36.

357 *Financial Support for Greece and EFSF* para 124; Cf. as well: Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 404-405; Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 772.

358 *Quantitative Easing (PSPP) Final Judgment* paras 99-101; *Final OMT-Judgment* paras 126, 129; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 233, 264; Cf. as well: De Sadeleer, 'The New Architecture of European Economic Governance' 36.

359 *Quantitative Easing (PSPP) Reference* para 56; *ESM-Treaty and Fiscal Compact (interim relief)* para 106; *Financial Support for Greece and EFSF* paras 121-124; Cf. as well: Herdegen, 'Art. 79 GG' paras 182, 185; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 808; Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 770.

360 *Financial Support for Greece and EFSF* para 127; *Lisbon-judgment* para 256; Cf. as well: Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 285; Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 772.

361 *Financial Support for Greece and EFSF* para 127; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 70; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 13; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 411.

362 *Final OMT-Judgment* para 130; *ESM-Treaty and Fiscal Compact (interim relief)* para 122; *Financial Support for Greece and EFSF* para 127; *Lisbon-judgment* para 256.

the same time, the Court accepted parliamentary discretion to make limited budgetary and fiscal commitments at the EU-level.[363]

Finally, the German Constitution establishes the German Parliament as the central institutional decision-maker on budgetary matters.[364] Given its institutional position, it carries the overall responsibility for revenue and expenditure as well as for achieving a viable annual state budget.[365] The *Bundestag* is the institution that exercises comprehensive control over all budgetary commitments, which are cumulated in the annual budget. This annual budget serves then as legal basis for governmental and administrative measures.[366] Moreover, the German Parliament has to include in its appraisal of the annual budget broader constitutional considerations imposed by the German Constitution.[367] Hence, allocating overall responsibility for budgetary planning to the *Bundestag* ensures that the budget is both viable and compatible with wider constitutional requirements.

4.2.2.2 Requirements of budgetary responsibility

Based on these underpinning considerations, the Court identified various requirements which derive from *overall budgetary responsibility*. These can be broadly distinguished into procedural and institutional characteristics, on the one hand, and substantive characteristics, on the other hand.

On the procedural side, the German Court underscored that the constitutive approval of the German Parliament is compulsory for all budgetary and fiscal commitments that impact the German state budget.[368] Consequently, no finan-

363 The Court identified two extreme positions here, namely: No limits for the budgetary decisions taken by the current parliament, non-regarding the implications of these decisions for future parliaments and generations; the other extreme being full limitation of budgetary decisions to retain future decision possibilities, which would pre-empt all decisions by a currently sitting parliament; Cf. as well: Herdegen, 'Art. 79 GG' para 182.

364 As established in Article 110 (2) Basic Law, the annual budget has to be approved by the parliament through a legislative act, cf. Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295-296; Ekkehard Moeser, *Die Beteiligung des Bundestages an der staatlichen Haushaltsgewalt* (Duncker & Humblot 1978) 114-116.

365 *ESM-Treaty and Fiscal Compact (interim relief)* para 109; Cf. as well: Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 808.

366 *Financial Support for Greece and EFSF* para 122; *Lisbon-judgment* para 256; In fact, governmental and administrative actions are based on the budgetary planning made by the German, Parliament, cf. Moeser, *Die Beteiligung des Bundestages an der staatlichen Haushaltsgewalt* 114-116.

367 For example, the social state principle, cf. *Lisbon-judgment* para 252; Cf. as well: Herdegen, 'Art. 79 GG' para 157; Nigel Foster and Satish Sule, *German Legal System and Laws* (4. edn, Oxford University Press 2010) 188.

368 *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 107; *Participation of Members of German Parliament in the EFSF* paras 109-111; *Financial Support for Greece and EFSF* para 124; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the

cial burden for the German state can arise without prior parliamentary approval. This entails that the German state cannot be liable for budgetary decisions taken by third parties.[369] Instead, the German Parliament has to debate commitments with budgetary implications and evaluate possible financial benefits or risks. Furthermore, large financial commitments might require subsequent constitutive parliamentary approvals at various occasions, in case they are not sufficiently specific and financial risks are not entirely foreseeable.[370] This procedural requirement was decisive in the Court's judgments on the EFSF and ESM, where it concluded that the German Parliament's approval of the general scheme was not sufficient, but instead constitutive approvals of every country-specific financial support program drafted under these schemes were required in order to safeguard *overall budgetary responsibility*.[371] At the same time, the Court acknowledged and accepted that factual circumstances especially in crisis moments might limit parliamentary choices when approving such budgetary and fiscal commitments.[372]

In order to enable the German Parliament to comprehensively evaluate the financial benefits and risks of supranational commitments,[373] the *Bundestag* has to have all relevant information at its disposal.[374] This requirement corresponds to the internally applicable Article 114 (1) Basic Law, which requires the German Minister of Finances to inform parliament on all budgetary matters, including revenue, expenditure and possible debts.[375] Following Article 23 (2) Basic Law, the parliamentarian's right to be informed applies

National Courts' 259.

369 According to the Court, the Basic Law prohibits such automatic liability, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213.

370 Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23.

371 Particularly, in order to guarantee that all essential budgetary decisions are made by parliament, cf. *Participation of Members of German Parliament in the EFSF* para 112; Cf. as well: Herdegen, 'Art. 79 GG' para 183; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

372 Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7.

373 Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 808.

374 *ESM-Treaty and Fiscal Compact (interim relief)* para 111; Cf. as well: Hanno Kube, 'Art. 114 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 17-19; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 515.

375 *ESM-Treaty and Fiscal Compact (interim relief)* para 111.

to supranational matters, including budgetary-related decisions.[376] Based on the received information, parliament can then independently decide whether or not to engage in a proposed supranational financial commitment, warranted that this commitment is specific and limited. Thus, the Court formulated qualitative requirements for the act of approval, which mirror the constitutional requirements imposed for the transfer of competences to the EU. Namely, the conferred budgetary or fiscal competences have to be limited in their extent and the conferral has to be specific concerning the substantive and procedural conditions attached to it.[377] Therefore, the German Parliament cannot confer a so-called *carte blanche* which would empower EU institutions to determine autonomously to what extent national budgetary or fiscal powers are to be exercised at the supranational level.[378] Finally, the German Parliament is obliged to continuously monitor the exercise of the conferred powers.[379] As a general rule, the Court indicated that the parliamentary intervention and veto possibilities during the monitoring process have to be proportionate to the financial commitment made.[380] Thus, the bigger a financial commitment the more extensive parliamentary intervention possibilities have to be.

On the substantive side, the Court's jurisprudence remains abstract and broad, given that it only conducts a limited constitutional review of the inherently political decisions taken. The Court established that only an 'evident overstepping of the inner boundaries' of the principle of democracy would qualify as a violation of *overall budgetary responsibility* under Article 79 (3) Basic Law.[381] It seems that the limited review reflects the constitutionally enshrined political discretion that the German Parliament enjoys when evaluating the impact of financial commitments,[382] including possible financial risk attached to them.

When applying this limited constitutional review, the Court so far has refrained from defining any fixed sum of money or a specific percentage of the overall budget as an absolute limit for supranational financial commit-

376 Ibid para 111; *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 116-117.

377 *ESM-Treaty and Fiscal Compact (interim relief)* paras 108, 130.

378 Which the Court termed 'blanket empowerments', cf. *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297.

379 Inherent in *integration responsibility* that applies to the German Parliament, cf. Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23.

380 *ESM-Treaty and Fiscal Compact (interim relief)* para 110; Cf. as well: Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 21.

381 *Participation of Members of German Parliament in the EFSF* para 131; *ESM-Treaty and Fiscal Compact (interim relief)* para 112; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 188-189.

382 As established in Article 110 Basic Law, cf. Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295-296; Moeser, *Die Beteiligung des Bundestages an der staatlichen Haushaltsgewalt* 114-116.

ments.[383] Instead, it conducted the substantive assessment of the parliamentary decision based on broad guiding principles. From this jurisprudence, it can be deduced in the first place, that the Court accepted that a conferral of budgetary competences to or the engagement in financial commitments at the EU-level, as well as in relation to its Member States, can be reconciled with the German Constitution. This is illustrated by the fact that the different Eurocrisis-measures were all ultimately deemed compatible with the German Constitution.[384] This conclusion is also not altered by the recent decision on the ECB's PSP-Program. Although, the program was declared *ultra vires*, the constitutional concerns related to a procedural error in the ECB's proportionality assessment.[385] The German Court allowed for a three-month transitional period during which the ECB could remedy this error.[386] Awarding this transitional period implies that the Court considered that the ECB had the general competence to conduct such program and thus, no direct substantive incompatibility between the program and the German Constitution was established. However, within these decisions, the Court established that the *Bundestag* may not surrender to:

- either financial obligations as well as liabilities that would factually suspend German budgetary autonomy for a considerable time;[387]
- or a permanent transfer of essential budgetary powers to the EU-level, which would enable the EU to determine the type and level of German spending to a considerable degree.[388]

In case one of these two substantive conditions is violated, the German Court would likely conclude that the German Parliament would lose its ability to modify the budgetary planning and make independent fiscal decisions. By imposing these two substantive limits, the Court intends to ensure that the German Parliament remains autonomous in essential budgetary decisions.

383 *Financial Support for Greece and EFSF* paras 131-135; Cf. Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 416.

384 *Final OMT-Judgment* paras 218-219; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 260-261; Armin Steinbach, 'All's Well That Ends Well? Crisis Policy After the German Constitutional Court's Ruling in Gauweiler' (2017) 24 Maastricht Journal of European and Comparative Law 140, 142.

385 *Quantitative Easing (PSPP) Reference* para 232.

386 Ibid para 235.

387 *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; In particular no automatic liability for political decisions made by other actors, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213.

388 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 210-213; *ESM-Treaty and Fiscal Compact* para 163; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

Ultimately, the German Court saw this requirement sufficiently reflected in the EU-Treaties. Namely, the no-bail-out clause in Article 125 TFEU as well as the various requirements imposed for sustainable national budgeting and the prohibition of monetary financing presuppose that national parliaments remain responsible for their own national state budgets.[389]

4.2.2.3 Application of these requirements by the Bundesverfassungsgericht

In the concrete application of these procedural and substantive characteristics, the Constitutional Court engaged in a detailed assessment albeit mainly focusing on the procedural elements. Notably, when assessing the different Eurocrisis-related measures, the Court determined whether the supranational financial commitments were limited in volume, sufficiently specific and whether the German Parliament was able to take a free, informed decision.

In its first comprehensive Eurocrisis-related decision, the Court considered volume, purpose, objective and the specific rules attached to the first Greek loan package as well as the EFSF, in order to determine whether the German commitments complied with the outlined constitutional requirements.[390] In its assessment, the Court distinguished between the Greek loan package, which it considered sufficiently detailed and specific, and the EFSF, which only provided for a general framework for financial stabilization measures. The Court insisted that every specific program initiated under the EFSF required constitutive approval of the German Parliament. The Court noted that the German act of approval merely stated that the German Government should aim at reaching a common position on specific EFSF-programs with the German Parliament, which was deemed insufficient to warrant parliamentary budgetary prerogatives.[391] Therefore, it interpreted the act of approval as prescribing the constitutive parliamentary approval, except for emergency situations in which case the government has to seek parliamentary approval immediately after taking

389 *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 56; *OMT-reference* para 28; *ESM-Treaty and Fiscal Compact (interim relief)* para 110; In his assessment, Nettesheim identifies five core components of the principle of *overall budgetary responsibility*, which correspond in main parts with the previous outline. Namely the concept requires according to his analysis: (1) no external determination of budgetary commitments; (2) the precise determination of any fiscal commitment by the German Parliament; (3) the limitation of any such commitment with predictable consequences; (4) the preservation of continuous influence of as well as the reversibility by German actors; and finally (5) the proportionality of the overall amount of the commitments, cf. Nettesheim, ''Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 773-776.

390 *Financial Support for Greece and EFSF* paras 131, 139.

391 Ibid para 128; Cf. as well: Thomas Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing Limited 2017) 274; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 308; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

a decision.[392] Thus, the Court strengthened the position of the German Parliament in the EFSF framework and indicated that approving a general scheme, even if including a maximum volume, general conditions and objectives, was not sufficient to comply with *overall budgetary responsibility*. Instead, the German Parliament was required to approve all specific programs, assess possible financial risks and conduct an overall financial assessment. The Court further clarified that these central decisions could not be delegated to a parliamentary committee but instead, given the right of parliamentarians to equally participate in important parliamentary decisions, these decisions had to be taken in the plenary.[393]

A similar approach was followed in the examination of the ESM-Treaty, where the Court investigated in detail whether the German financial commitment of up to € 190 billion could be increased without the *Bundestag*'s approval.[394] The Court concluded that in case the ESM-Treaty would be read as to allowing the increase of the overall German liability without German parliamentary approval, such reading would violate *overall budgetary responsibility*.[395] It can be deduced from this approach that the German Parliament cannot approve an unspecific entitlement clause, according to which the EU could determine German financial commitments. The requirement that the German legislator has to take all central budgetary decision itself, which prevents it from divesting unspecified and unlimited fiscal competences to the EU-level, constitutes a specific case of *Kompetenz-Kompetenz*,[396] and was translated into the prohibition to issue a supranational blanket empowerment ('*carte blanche*').[397]

When assessing the substantive components of *overall budgetary responsibility*, the Court restricts its assessment to a highly limited 'obviousness' review of the taken measures. Namely, only a manifest and evident overstepping of German democracy is scrutinized. In relation to the EFSF and the first Greek

392 *Financial Support for Greece and EFSF* para 141.

393 *Participation of Members of German Parliament in the EFSF* paras 131, 136; Cf. as well: Christian Bumke and Andreas Voßkuhle, *German Constitutional Law – Introduction, Cases, and Principles* (Oxford University Press 2019) paras 1634-1636.

394 Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

395 Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005; Instead, the German Parliament has to approve all bigger financial supports, cf. Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' 274; Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 928; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 267.

396 *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* paras 130-131; *ESM-Treaty and Fiscal Compact (interim relief)* para 105.

397 *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297.

loan package, the Court concluded that the combined commitment of up to € 170 billion did not pre-empt the budgetary autonomy of the German Parliament for a considerable time, even though this amount was considerably bigger than half of the then enacted annual federal budget.[398] In relation to the ESM-Treaty, the German Court applied a similarly limited review. It found that the ESM commitment amounting to € 190 billion constituted a predictable financial risk compared to the hardly predictable financial consequences for future parliaments in case no supranational steps were taken.[399]

A similar reasoning was employed by the Court in its constitutional appraisal of the German debt break, which was introduced into Article 109 (3) GG in 2009. Notably, the Court highlighted that the immediate limitation of budgetary autonomy through constitutionally enshrined debt limits was required to preserve the ability of future parliaments to take autonomous budgetary decisions.[400] This implies that not establishing such a debt limit could negatively affect the political space for budgetary decisions. Overall, this highlights that the Court conducts a limited material review of the decisions and tends to follow the assessment made by the competent German institution.

In its more recent jurisprudence, the Constitutional Court established that *overall budgetary responsibility* might also be at risk through commitments made by the European Central Bank and the Eurosystem.[401] The Court identified two particularly contentious constitutional matters. First, the distinction between monetary and economic policies, which according to the Court ultimately relates to the compliance of EU institutions with the principle of conferral.[402] And second, the possible implications of ECB monetary programs

398 The annual federal budget was about €307 billion for the year 2012, cf. German Federal Ministry of Finance, 'Haushaltsrechnung des Bundes für das Haushaltsjahr 2012' (*German Government*, 2013) <https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Oeffentliche_Finanzen/Bundeshaushalt/Haushalts_und_Vermoegensrechnungen_des_Bundes/2013-06-13-haushaltsrechnung-des-bundes-2012.pdf?__blob=publicationFile&v=1> accessed 20 December 2020 2.

399 *ESM-Treaty and Fiscal Compact (interim relief)* para 167.

400 *Financial Support for Greece and EFSF* para 131; *ESM-Treaty and Fiscal Compact (interim relief)* para 120.

401 Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 430-431; Particularly, compared with the original reference, where the Constitutional Court suggested that the ECB exceeded its competences, cf. *OMT-reference* paras 87-94; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 927.

402 *Quantitative Easing (PSPP) Final Judgment* paras 138, 159-160; *Final OMT-Judgment* paras 144-145; Cf. as well: Steinbach, 'All's Well That Ends Well? Crisis Policy After the German Constitutional Court's Ruling in Gauweiler' 142.

for the German state budget – and thus parliamentary *overall budgetary responsibility*.[403]

Regarding the distinction between monetary and economic policies, which triggered considerable academic debate,[404] suffice it here to point to the possible repercussions of an unclear, unspecific conferral of competences to the EU-level. Following the German Court, the competence distinction between monetary and economic policies is crucial, given that Member States attached different (procedural) modalities to these competence areas.[405] Thus, the Court invoked the principle of conferral and highlighted that the allocation of competences established in the EU-Treaties had to be respected by EU institutions. Otherwise, the national principles of democracy and sovereignty could be undermined.[406] The *OMT*- and the *PSPP*-proceedings clearly illustrate the importance of a workable and judicially controllable conferral of powers. Given that EU fiscal integration will necessarily affect important national competences, a legally clear-cut, unambiguous conferral seems a fundamental first step to reduce the potential risk of *ultra vires* proceedings before the *Bundesverfassungsgericht*.

In relation to the possible budgetary implications of the ECB's programs, the German Court argued that due to the participation of the German Central Bank in the implementation of the ECB's monetary policies, the German federal budget might potentially be affected. As the Court highlighted, the German Parliament might be constitutionally obliged to refinance the German Central Bank in case of losses which could result from such ECB programs, given that Article 88 Basic Law presupposes the credibility and functioning of the *Bundesbank*.[407] In such a situation a risk for the budgetary autonomy of the German Parliament could materialize, specifically in light of the volume of the PSP-Program. The Court emphasized that such a program could under no circumstances be employed to 'redistribute sovereign debt' of other Member States and thereby create an automatic liability for budgetary decisions of third parties.[408] It however accepted that the '[...] scheme for the allocation of risk

403 *Quantitative Easing (PSPP) Final Judgment* paras 222, 227; *Quantitative Easing (PSPP) Reference* para 126; *Final OMT-Judgment* paras 216-217; Cf. as well: Takis Tridimas and Napoleon Xanthoulis, 'A Legal Analysis of the Gauweiler Case – Between Monetary Policy and Constitutional Conflict' (2016) 23 Maastricht Journal of European and Comparative Law 17, 20.

404 Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 410; Tridimas and Xanthoulis, 'A Legal Analysis of the Gauweiler Case – Between Monetary Policy and Constitutional Conflict' 23-26; Thomas Beukers, 'The Bundesverfasungsgericht Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?"' (2014) 15 German Law Journal 343, 345-354.

405 *Quantitative Easing (PSPP) Final Judgment* para 142; *Final OMT-Judgment* paras 193-196.

406 *Quantitative Easing (PSPP) Final Judgment* paras 138, 159-160.

407 Ibid paras 222, 227; *Quantitative Easing (PSPP) Reference* para 126; *Final OMT-Judgment* paras 216-217.

408 *Quantitative Easing (PSPP) Final Judgment* paras 222, 227; *Final OMT-Judgment* paras 213-214.

between the national central banks provided for in Art. 6 (3) of Decision 2015/774 [...]' constituted a sufficient safeguard for *overall budgetary responsibility*.[409] On the one hand, this emphasizes the importance of the constitutive, informed approval of the German Parliament regarding budgetary commitments. On the other hand, it indicates that the Court is willing to accept safeguards implemented at EU-level to preserve German budgetary autonomy. And finally, the German Court established through its decisions on the *OMT*- and the *PSP*-Program, that such programs can be validly initiated on the basis of the ECB's monetary policy prerogative without conflicting with German *overall budgetary responsibility*.

4.2.2.4 Conclusion on overall budgetary responsibility

Taken together, *overall budgetary responsibility* appears to be a strict substantive limit which could reduce the constitutional space available for EU fiscal integration. Yet, in the concrete application of this limit, the German Constitutional Court confirmed the broad political discretion of the German Parliament when deciding on supranational financial commitments. Notably, as to substantive limits, the Court only conducts a limited review restricted to 'manifest oversteppings'.[410]

Furthermore, *overall budgetary responsibility* requires that the German Parliament can take central budgetary decisions autonomously from supranational obligations. Therefore, the parliamentary approval for supranational financial commitments or liabilities has to be constitutive.[411] It also entails that financial commitments remain limited in volume and specific in their objectives. In short, the German Parliament has to remain the central institution that decides on whether and how to commit. This can occur by either attaching strict conditions, as the case with the first Greek loan package,[412] or by requiring additional subsequent parliamentary approvals when deciding on the use of the committed funds, as visible in relation to the ESM.[413] Given these requirements, the Constitutional Court continuously emphasized that Germany cannot automatically assume liability for political decisions made by other Member States. Such automatism would neither be specific and unlimited, nor would it presuppose parliamentary approval. This suggests for EU fiscal integration steps that national parliaments must retain a central role in the administration of fiscal powers and be able to effectively oppose decisions, to guarantee that the democratic self-determination of the national people is warranted.

409 *Quantitative Easing (PSPP) Final Judgment* para 222.

410 As highlighted by the Court in the OMT- and the Quantitative Easing-cases, it tries to avoid interfering in the political decision-making process, cf. *Quantitative Easing (PSPP) Reference* paras 53, 58; *Final OMT-Judgment* paras 155-156; It was however question whether the Court achieved this, cf. *OMT-reference* dissenting opinion Lübbe-Wolff para 2.

411 *Quantitative Easing (PSPP) Final Judgment* paras 222, 227; *Final OMT-Judgment* paras 213-214.

412 *Financial Support for Greece and EFSF* para 139.

413 *ESM-Treaty and Fiscal Compact (interim relief)* paras 168-171.

4.2.2.5 Possible double standard in conception of overall budgetary responsibility
When comparing the internal and the EU-related constitutional assessment of budgetary decisions or fiscal commitments a variable benchmark for the appraisal can again be identified. As with the previous double standard in the interpretation of the standing requirements and the *eternity clause*, the exclusive application of *overall budgetary responsibility* to EU matters can be questioned, given that the concept's underlying intention to preserve parliamentary budgetary prerogatives as well as its constitutional basis in Articles 20 (1) and (2) GG in conjunction with Article 79 (3) GG equally apply internally.[414]

– *Constitutional scrutiny of the German budget*
The German Constitution contains a specific section on public finances in Articles 104a to 115 GG. Of particular importance are Article 109 GG, which establishes general principles of public budgeting including the constitutional debt break, Article 110 GG, which establishes the requirements for the annual budgetary planning, as well as Article 115 GG on the conditions for public borrowing. Despite the interconnection between budgetary and fiscal matters with the principle of democracy, the Constitutional Court refrained from connecting the *eternity clause* to this internal financial constitutional framework. Instead, it relied on the specific constitutional financial framework when assessing *internal* budgetary or fiscal commitments. In addition, the Court emphasized the discretion of the constitution-amending legislator when modifying the constitutional financial framework,[415] without indicating that this discretion could possibly be limited by the *eternity clause*. Given that internal financial and budgetary commitments are only assessed on the basis of this specific framework, the Court therefore refrained from identifying potentially absolute constitutional limits to such commitments and focused on procedural constitutional requirements.

Notably, internally the German Constitutional Court established that the principles of completeness and punctuality of the annual German federal state budget are fundamental features of the parliamentarian budgetary rights.[416] First, this entails that all federal expenditure and revenue is included in the annual budget to enable parliament to undertake an accurate budgetary

414 Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 13-14.

415 2 BvF 1/04 *Statute on the Federal Supplementary Budget* [2007] (German Federal Constitutional Court) paras 132-133; 2 BvF 1/82 *Public Debt Level* [1989] (German Federal Constitutional Court) paras 75, 88.

416 *Statute on the Federal Supplementary Budget* para 75; determined in Article 115 (1) (1) GG, cf. Ekkehart Reimer, 'Art. 110 GG – Haushaltsplan des Bundes' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 24-25; Kube, 'Art. 110 GG' paras 91-95.

planning.[417] In essence, the *Bundestag* has to be fully informed by the government on all fiscal and budgetary commitments before approving the annual budgetary planning.[418] Second, parliament has to be informed on planned spending in advance.[419] Here, a temporal dimension is added to the principle of completeness enabling the *Bundestag* in return to predict the development of the German state budget. This ensures the accuracy of the fiscal planning and it is crucial for the democratic process. In EU-related cases, similar procedural guarantees apply. Before engaging in any supranational financial commitment, parliament has to be fully informed and debate the implications of such commitment.[420] Furthermore, *overall budgetary responsibility* establishes that parliament is 'master of its decisions', which requires that EU fiscal and budgetary commitments are limited and that parliament retains a continuous influence on the decision-making process.[421] Contrasting the internal and the external approach, it is striking that both require parliament to be fully informed, which cements the institutional position of the German Parliament as guardian of the state budget externally and internally. Yet, as the Court relies internally on Article 110 GG and externally on Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG,[422] different constitutional conditions apply. Whereas Article 110 GG may be modified,[423] the external approach is protected against constitutional changes through the *eternity clause*.

Furthermore, public borrowing appears relevant given its implications for future parliaments which is a core element of *overall budgetary responsibility*. In relation to the *internally* applicable Article 115 (1) GG, the Constitutional Court highlighted that the rules on borrowing relate to the principle of democracy[424] as they guarantee that future parliaments can decide independently on revenue and expenditure.[425] Therefore, any current decision should take the fiscal choices of future parliaments into due account. Obviously, the Court adds a negative obligation to the parliamentary budgetary rights within its internal jurisprudence. This negative obligation is reflected externally in *overall budgetary responsibility*. Here, the Court established that a pre-emption of fiscal

417 *Statute on the Federal Supplementary Budget* para 75; Including possible risks, cf. 2 BvL 1, 4, 6, 16, 18/99, 2 BvL 1/01 *Obligatory Information Concerning Extra Public Charge* [2003] (German Federal Constitutional Court) para 121; 2 BvL 12, 13/88, 2 BvR 1436/87 *Constitutionality of Establishing a Marketing Fund* [1990] (German Federal Constitutional Court) para 83; Cf. as well Kube, 'Art. 110 GG' paras 91-92.

418 *Statute on the Federal Supplementary Budget* paras 132-133; *Public Debt Level* paras 75, 88.

419 *Statute on the Federal Supplementary Budget* para 79.

420 *ESM-Treaty and Fiscal Compact (interim relief)* para 111.

421 Ibid para 170; *Financial Support for Greece and EFSF* para 120.

422 *Financial Support for Greece and EFSF* para 127.

423 As it is not explicitly covered by the *eternity clause*, cf. for example Herdegen, 'Art. 79 GG' para 14.

424 *Statute on the Federal Supplementary Budget* para 211; *Public Debt Level* para 90.

425 *Statute on the Federal Supplementary Budget* para 211; *Public Debt Level* para 90.

competences is not compatible with the German Constitution.[426] In both cases, the principle of democracy contains an obligation to refrain from excessively diminishing future budgetary abilities, either by engaging in too high debts or by transferring too far-reaching fiscal competences to the EU. Therefore, fiscal competences have to be utilized whilst respecting the rights of future parliaments. However, it should be emphasized that neither the Constitutional Court nor the constitution-amending legislator have so far been able to effectively limit an increasing debt burden and to guarantee decision-making space for future parliaments. As will be illustrated subsequently, most of the German state budget is predetermined by long-term political decisions.[427] Yet, this factual 'reduction' of direct budgetary decision-making abilities is not characterized as unconstitutional internally, although a comparable loss of budgetary autonomy through EU commitments would be likely interpreted as a violation of the *eternity clause* externally.[428] Again, this varying constitutional conclusion appears to be affected by the constitutional framework that the German Constitutional Court considers applicable. Whereas the Court seemingly relies *internally* on the (mainly procedural) framework provided by the German Constitution which awards great discretion to the parliament in its fiscal decisions, the German Court employs *overall budgetary responsibility* to define absolute limitations to the European integration process. The Court, thus, appears to formulate fewer substantive limitations *internally* compared to its EU-related approach.

Albeit this divagating appraisal might stem from the different nature of the inherent risk of the financial commitment for the German constitutional order, it raises concerns regarding the continuous application of the *eternity clause*. As shown, the *eternity clause* aims to protect democracy regardless of the state level that is affected. However, in its assessment of budgetary and fiscal matters, the Constitutional Court appears to differentiate between *internal* and *EU-related* situations. Notably, in EU-related cases the Court relies on the *eternity clause* to determine the compatibility of fiscal and budgetary decisions with the German Constitution. Internally the Court relies on the specific framework provided for in Articles 104a to 115 GG. And although the Constitutional Court connected this financial framework to democracy and federalism,[429] both protected by the *eternity clause*, it refrained from pronouncing similarly strict limits for *internal* decisions. Following the Court's conclusion that budgetary matters are central for the democratic process,[430] it would

426 *ESM-Treaty and Fiscal Compact* para 169.

427 Kube, 'Art. 110 GG' para 41; Wolfgang Streeck and Daniel Mertens, 'An Index of Fiscal Democracy (2010)' MPIfG Working Paper <https://www.mpifg.de/pu/workpap/wp10-3.pdf> accessed 20 December 2020 9-12.

428 *Financial Support for Greece and EFSF* paras 121, 135.

429 Herdegen, 'Art. 79 GG' paras 140-144, 162; Dietlein, 'Art. 79 GG – Änderungen des Grundgesetzes' paras 33-49, 52.

430 *Lisbon-judgment* paras 244, 250.

appear imperative to similarly relate the internal financial framework directly to the *eternity clause*.

– *Reduced budgetary space*

The factual development of the German budget is equally illustrative of an apparent double standard in the conception of budgetary decision-making. Research shows that the German Parliament is increasingly constrained in budgetary decisions. These constraints mainly result from long-term political decisions, which were taken in the past but continue to have considerable impact on the current budgeting. Although parliament has to approve the entire budget for a budgetary year, these long-term decisions continue to affect the discretion of the budgetary legislator.[431] The research conducted by *Streeck* and *Mertens* suggests that the share of so-called discretionary spending decreased from about 40% in 1970 to less than 20% in 2010.[432] Accordingly, the German Parliament had only some form of discretion in relation to 20% of the annual German federal state budget in 2010. The other 80% were predetermined by decisions taken by former parliaments.[433] The share of discretionary spending is even lower when including social security contribution into this calculation. If included, the share of discretionary spending reduces to about 8% in 2008. This corresponds to the findings of *Kube* which indicate that the German budgetary legislator has less than 10% of the annual budget at its discretionary disposition.[434] It also reflects a global trend,[435] for example visible in the research conducted by *Steuerle* on the US,[436] where the share of discretionary revenue available to US budgetary legislator decreased from about 60% in 1970 to no discretion for the collected revenue in 2009.[437] The figures indicate that in 2009 all revenue was absorbed by long-term policy decisions taken by previous legislators. Given these long-term

431 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8; Cf. as well: Lobna Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' (2019) 43 Public Sector Economics 49, 53.

432 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 7-8.

433 Ibid 10-11.

434 Kube, 'Art. 110 GG' para 41.

435 Other examples include, for example, the Czech Republic, where the share of discretionary spending dropped from about 28% in 1995 to about 8% in 2009, cf. Vojtěch Roženský, 'Mandatory Expenditure and the Flexibility of Fiscal Policy in the Czech Republic (in Czech: Mandatorní Výdaje A Flexibilita Fiskální Politiky V Čr)' (2012) 60 Politická ekonomie 40, 47, 57; Similar trends were also observed in the Middle East, cf. Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 53-54, 71.

436 C. Eugene Steuerle, 'America's Related Fiscal Problems' (2010) 29 Journal of Policy Analysis and Management 876, 878; Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 6-8; Cf. as well: Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 52-53.

437 Steuerle, 'America's Related Fiscal Problems' 877; Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 7.

policy decisions, all revenue was factually spent before the budgetary legislator even started debating the budget for 2009.[438]

Considering the research on Germany, the general trend suggests that the German Parliament is increasingly constraint in its budgetary decisions.[439] Although it could be submitted that the German Parliament remains formally in charge, as it has to approve the annual budget,[440] the factual development suggests that this approval does not equal a free decision on budgetary commitments. An illustrative example is German social expenditure, which increased from a share of 24,1% of the annual federal budget in 1970 to a peak of 53,9% in 2010 – as illustrated in *Figure 9*. The current trend suggests that social expenditure stabilized at around 50% to 52% of the annual federal expenditure. One explanation for this increase is the rise in the median age in Germany to 45,9 years in 2017,[441] which puts considerable pressure on the welfare system. The increased median age results for example in higher costs for health care and lower contributions, given the decreasing number of working taxpayers that sustain the system.[442] Also, changing governments have seemingly inflated social expenditure by establishing additional social benefits, as *Thiele* points out.[443]

Figure 9 depicts an almost steady increase in social expenditure which arguably contributes to the reduced parliamentary discretion when adopting the German federal state budget. Social expenditure is a policy area which relies on long-term policy decisions given that legal entitlements derive from social policy commitments. These commitments can be characterized as short-term mandatory expenditure,[444] as a newly elected parliament is bound by these commitments. And although over half of the German budget is committed to long-term social welfare policy, no constitutional violation of the parliamentary budgetary prerogatives was established by the German Constitutional Court as these commitments remain formally reversible.

438 Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 52.

439 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8-11.

440 Kube, 'Art. 110 GG' para 54; Reimer, 'Art. 110 GG – Haushaltsplan des Bundes' paras 7-8.

441 Together with Italy, Germany had the highest median age in 2017, cf. Eurostat Online Publications, 'Population Structure and Ageing' (*Eurostat*, 2019) <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1271.pdf> accessed 20 December 2020 3-4.

442 Ibid 5.

443 Alexander Thiele, 'The 'German Way' of Curbing Public Debt: The Constitutional Debt Brake and the Fiscal Compact – Why Germany Has to Work on Its Language Skills' (2015) 11 European Constitutional Law Review 30, 30-31.

444 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 11.

Fiscal Year[445]	Total fed. expenditure (in Mio. EURO)	Social expenditure in Mio. EURO)	Social Expenditure in relation to total fed. expenditure (in %)
1970	44.985	10.861	24,1
1980	110.291	27.291	24,7
1990	194.381	40.676	20,9
2000	244.405	94.802	38,8
2005	259.849	129.064	49,7
2010	303.700	163.612	53,9
2015	311.400	153.571	49,3
2016	317.100	159.964	50,4
2017	330.700	167.707	50,7
2018	343.600	172.137	50,1
2019	356.400	179.537	50,4
2020	363.200	183.065	50,4
2021	369.300	189.927	51,4
2022	375.500	194.160	51,7

Figure 9: Total German Federal Expenditure and Social Expenditure 1970-2022

Consequently, a core premise underlying the proclaimed *overall budgetary responsibility* can be challenged, notably that the German Parliament directly controls all central budgetary decisions. As became apparent from the previous assessment, major parts of the budget are predetermined by long-term policy decisions, which reduces parliamentary possibilities. Two points of reflection should be raised here. First, the German Parliament seems factually not to control all central budgetary decisions. Instead, it approves annually financial commitments that largely stem from previous parliamentary decisions.[446]

445 The author would like to thank W. Streeck and D. Mertens for providing their data set on the German Fiscal Democracy Index, which served as a basis for the calculations; Furthermore, the budgetary planning 2011-2015, 2016-2020, 2017-2021 and 2018-2022 of the German Ministry of Finance was consulted for the additional fiscal years from 2010-2022; social expenditure corresponds to the budgetary position 'Soziale Sicherung' in the budgetary planning; Cf. for the document: German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2018 bis 2022 (Drucksache 19/3401)* (German Government 2018); German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2017 bis 2021 (Drucksache 18/13001)* (German Government 2017); German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2016 bis 2020 (Drucksache 18/9201)* (German Government 2016); German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2011 bis 2015* (German Government 2011).

446 Kube, 'Art. 110 GG' para 41; Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 10-11.

This observation challenges the very conception of *overall budgetary responsibility*, which presupposes that the German Parliament is taking all central budgetary decisions itself. Second, the internal experience indicates that it might be necessary to make long-term policy decisions, which then necessarily impact budgetary discretion of future parliaments. One example is pension policy, where long-term commitments are essential to provide individuals with long-term stability. It can be argued that the same logic applies to EU commitments, which require a dedicated (budgetary) commitment to create long-term social, economic and political stability at the supranational level.

– *Interim conclusion: Relaxed approach towards overall budgetary responsibility?*

Overall, both observations support the hypothesis that the German Constitutional Court conducts a partially inconsistent assessment of budgetary and fiscal commitments. As highlighted, *internally* the Court is reluctant to scrutinize parliamentary budgetary decisions and thereby tends to respect the underpinning political choices. Although the Court emphasized that the applicable budgetary constitutional framework is closely related to the principle of democracy, it refrained from employing the *eternity clause*. This could be explained by the more specialized constitutional framework that the Court has at its disposition in order to adjudicate on budgetary and fiscal matters *internally*. Namely, Articles 104a to 115 GG provide a comprehensive framework for internal budgeting. In contrast, in EU matters the Court has no comparable constitutional framework, which could explain the fallback to Article 79 (3) GG.

Moreover, the assessment illustrates that the Court awards a wide discretion in fiscal and budgetary matters *internally* which is apparent in the decreasing discretionary share of the annual German federal state budget.[447] Facing the factual impact of these long-term decisions on the German state budget, the Constitutional Court emphasized that these decisions did not legally limit the discretion of parliament and were therefore permissible.[448] Yet, the factual limitations challenges the underlying claim of *overall budgetary responsibility*, namely that the German Parliament has to remain in charge of all central budgetary decisions. The previous assessment highlights that, although one might claim that parliament is formally taking all these decisions, the political decision-making space is clearly reduced. Possibly, the application of a similar approach in EU affairs could result in a more relaxed constitutional approach to additional fiscal EU commitments.

447 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 10-11; Cf. as well: Kube, 'Art. 110 GG' para 41.

448 *Statute on the Federal Supplementary Budget* para 144.

4.2.3 German sovereignty

The assessment of democracy and *overall budgetary responsibility* indicates that the Court seems to construe these principles together with sovereignty. This is apparent from the concept of *popular sovereignty* and in the Court's emphasis that fiscal decision-making powers constitute core sovereign competences. However, German sovereignty constitutes a historically disputed constitutional concept. When enacting the *Grundgesetz* in 1949, the Federal Republic of Germany was still formally occupied by the Allied Forces.[449] Only the 'Bonn-Paris Conventions' ended the occupation status and recognized Germany's general rights as a sovereign state. Therefore, the concept of sovereignty was not included in the original text of the *Grundgesetz* and is until today not explicitly mentioned.[450] Not introducing an explicit provision on sovereignty appears to have been a deliberate choice of the constitution-giving committee.[451] Yet, certain constitutional principles imply the existence of sovereignty. For example, the preamble identifies the German people as constituting power which presupposes that the German people can constitute sovereign power in the first place. The same logic applies to the *eternity clause*, which distinguishes between the constituting and the constituted powers, as well as Article 20 (2) (1) GG which states that all state power derives from the people.[452] In these examples, sovereignty is an underlying component or prerequisite for the constitutional claim.

A similar understanding can be observed in the constitutional jurisprudence. In a first step, the Court clarified that the *Grundgesetz*'s conception of sovereignty differed significantly from 'a self-serving and self-glorifying concept of sovereign statehood'.[453] Instead, it subscribed to an open conception of statehood that allowed for supranational and international cooperation, which it derived from the preamble as well as Articles 23 and 24 GG.[454]

449 Groß, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' 393-394; Klaus Kröger, 'Die Entstehung des Grundgesetzes' (1989) 42 Neue Juristische Wochenschrift (NJW) 1318, 1319.

450 Groß, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' 392, 397; Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 761; Terhechte, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 728; Which is also visible in the terms employed by the Court, when referring to 'sovereignty', cf. Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 148, 153-154.

451 Given that other states, including France and Italy, explicitly referred to sovereignty, cf. Groß, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' 392-393.

452 Paul Konertz, 'Historische und philosophische Grundlagen der Rechtsordnung im Überblick – Am Beispiel von BGB, GG und StGB' (2019) 59 Juristische Schulung (JuS) 201, 203

453 *Lisbon-judgment* para 223.

454 Also referred to as 'cooperatives understanding of sovereignty', cf. Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 560.

Based on this conception, the Court underscored that the conferral of sovereign competences to the EU was permissible under the German Constitution. Yet, the creation of a European state, and with it the renouncement of German democracy and state sovereignty, would require a constitutive vote of the German people following the prescribed procedure in Article 146 GG.[455]

As becomes obvious from its case law, the German Court conceptualizes sovereignty in conjunction with the principle of democracy when considering supranational cooperation.[456] This interrelation was accentuated by the Court in its *Lisbon*-judgment, where it characterizes sovereignty as 'a right of the people to take constitutive decisions concerning fundamental questions' regarding their own identity.[457] This shows the close interrelation of democracy and sovereignty, which is further emphasized by the Court when it speaks of the 'safeguarding of sovereignty, demanded by the principle of democracy'.[458] Resulting from the Court's jurisprudence are two fundamental requirements for EU cooperation. Firstly, the EU has to remain a derived legal order and its Member States the Masters of the Treaty.[459] Secondly, the German legislator cannot confer *Kompetenz-Kompetenz* to the EU.[460] Ultimately, both structural requirements for EU cooperation resonate with the conditions established in relation to the principle of democracy and under *overall budgetary responsibility*.

Consequently, it appears that *sovereignty* does not emerge as independent constitutional limit towards EU fiscal integration proposals. Instead, sovereignty can be characterized as an underlying component of German democracy, *overall budgetary responsibility* and the German constitutional order more generally. In addition, as sovereignty is not explicitly mentioned as *eternally protected principle* under Article 79 (3) GG, the Court will, most likely, continue to construe sovereignty in conjunction with the enumerated principles under the *eternity clause*.

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455 *Lisbon-judgment* 232; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-145; Vinx, 'The Incoherence of Strong Popular Sovereignty' 115; Cremer, 'Lissabon-Vertrag und Grundgesetz' 299; Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 561.

456 Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 445-446.

457 *Lisbon-judgment* para 340.

458 Ibid para 248; Although it is debatable whether sovereignty or statehood are a precondition for democracy, cf. Erik Oddvar Eriksen and John Erik Fossum, 'Bringing European Democracy Back in – or How to Read the German Constitutional Court's Libson Treaty Ruling' (2011) 17 European Law Journal 153, 166.

459 *Lisbon-judgment* para 231; Cf. as well: Cremer, 'Lissabon-Vertrag und Grundgesetz' 302-303; Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 561.

460 *Lisbon-judgment* para 231; Cf. as well: Cremer, 'Lissabon-Vertrag und Grundgesetz' 303; Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 561.

5 Resulting German constitutional space for EU fiscal integration steps

Overall, the assessment above illustrates that the German Constitution contains an explicit framework for EU cooperation. This framework establishes the constitutional requirements for the conferral of competences as well as a procedural framework for the engagement of German institutions in the exercise of conferred competences at EU-level. Following Article 23 (1) (2) GG, the German legislator can decide to confer budgetary and fiscal competences on the EU. Depending on the impact of such conferral on the German Constitution, a qualified majority might be required. During the Eurocrisis, the various measures with significant budgetary and financial implications were considered to require such a two-thirds majority.[461] For the envisaged EU fiscal integration steps, this suggests that the qualified majority requirement will likely apply.

In addition, EU integration has to comply with the *eternity clause*,[462] which seemingly constitutes the most significant limitation to EU fiscal integration steps in Germany.[463] Of particular relevance are German democracy and *overall budgetary responsibility*.[464] These require that all central decisions on revenue and expenditure are made by the German Parliament as demo-

461 As established in relation to the Fiscal Compact and the ESM-Treaty, cf. FDP, *Drucksache 17/9046 – Gesetzentwurf der Fraktionen der CDU/CSU und FDP: Entwurf eines Gesetzes zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion*; Cf. as well: Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 359.

462 Gärditz, 'Glaubwürdigkeitsprobleme im Unionsverfassungsrecht' 505; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150; Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' 27.

463 Given the *eternity clause*'s conception as absolute limit, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

464 The conceptual foundation of this concept was developed in the *Lisbon*-judgment, cf. *Lisbon-judgment* paras 252, 256; And most recently reiterated: *Quantitative Easing (PSPP) Final Judgment* paras 103-104; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

cratically elected representation of the German people.[465] This presupposes that all budgetary and fiscal commitments at the EU-level are approved and administered by the *Bundestag*.[466] During the Eurocrisis, the Constitutional Court, however, accepted that even major financial commitments equaling more than half of the annual German federal budget were compatible with German democracy and did not question parliament's position as the main decider on the German budget.[467] However, supranational budgetary and fiscal commitments may not put into question the overall budgetary autonomy of parliament. Finally, given that the Court connected this material limit with the *eternity clause*, the outlined limit imposes an absolute restriction to the constitutional space available to parliament when considering EU fiscal integration.[468] At the same time, the concrete application of the limit reveals judicial reluctance to scrutinize highly political decisions and an apparent focus on the procedural components of *overall budgetary responsibility*. For EU fiscal integration proposals this implies that the German Parliament has to be integrated as central decision-maker into the supranational institutional architecture. Furthermore, the recent *PSPP*-judgment illustrates the importance of an unambiguous conferral of competences, in order to pre-empt national constitutional challenges under the *ultra vires* review.[469] Ultimately, in case the Constitutional Court declares such fiscal integration steps incompatible with Article 79 (3) GG, the German legislator is prevented from participating in them.[470]

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465 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; cf. as well: Herdegen, 'Art. 79 GG' para 182; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 807-808.

466 *Participation of Members of German Parliament in the EFSF* para 112; Cf. as well: Herdegen, 'Art. 79 GG' para 183; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

467 Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 19.

468 *OMT-reference* para 29; *Lisbon-judgment* para 216; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 286; Preuss, 'The Implications of 'Eternity Clauses': the German Experience' 440.

469 *Quantitative Easing (PSPP) Final Judgment* paras 138, 159-160; *Final OMT-Judgment* paras 144-145; Cf. as well: Steinbach, 'All's Well That Ends Well? Crisis Policy After the German Constitutional Court's Ruling in Gauweiler' 142.

470 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 902; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-146; Wendel, 'Lisbon Before the

However, the assessment also demonstrated that the approach taken in EU matters and the interpretation of constitutional provisions – including first, the constitutionally enshrined standing requirements to initiate constitutional review, second, the *eternity clause* itself and third, the concept of *overall budgetary responsibility* developed under German democracy – result in an apparent constitutional double standard. It seems that the constitutional requirements for EU integration steps are stricter, compared to the internally adopted requirements. For example, it is more likely that constitutional proceedings against EU-related measures will be admissible compared to internal proceedings. Also, the Constitutional Court only developed a competence-based understanding of the *eternity clause* when considering EU integration steps, which it did not apply to similar internal decisions. Taken together, this indicates that additional *constitutional flexibility* for EU fiscal integration can be located and activated by applying a consistent constitutional assessment both *internally* and in EU-related situations, as will be proposed in the following.

6 Additional constitutional space by applying consistent constitutional standard

As indicated, the constitutional jurisprudence appears to entail multiple constitutional double standards at the disadvantage of EU cooperation. The German Constitutional Court seems to distinguish EU-related disputes from internal disputes, which the research detected in three different instances.

First, the assessment illustrated that it is easier to initiate constitutional proceedings against EU matters, compared to *internal* proceedings. Arguably, this resulted in the introduction of a specific EU *actio popularis* for individuals and in *intra*-institutional proceedings for institutional actors when challenging EU integration. Given that the Constitutional Court relies on the same procedural framework for both *internal* and *external* cases, the varying interpretation of this constitutional framework raises consistency concerns.

Second, considering the application of the *eternity clause*, it was argued that this constitutional mechanism is designed as *ultima ratio*, shielding the German constitutional order against fundamental structural changes.[471] In light of its historic origin, the intentional design as ultimate constitutional protection suggests the restrictive application of Article 79 (3) GG, which can

Courts: Comparative Perspectives' 125.

471 Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 763; Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 263; Pointing out that the Court itself seems to contradict this ultima ratio status in its EU-related jurisprudence, cf. Möllers and Redcay, 'Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union?' 425-426.

be observed in the *internal* case law of the Constitutional Court. However, in EU-related constitutional challenges the Court consistently applies Article 79 (3) GG mainly through its *constitutional identity* review. When considering for example the Eurocrisis-related case law, the proceedings involved Article 79 (3) GG, without, however, ultimately finding any EU measure in breach of the *eternity clause*.[472] One consequence of this approach is, arguably, that the clause's function as ultimate constitutional shield is weakened and it might even project the impression that the constitutional mechanism is ineffective. After all, German institutions might not perceive the *eternity clause* as a real constitutional obstacle, given that ultimately all EU integration steps taken were ultimately declared compatible with the German Constitution. A potential risk is that the *eternity clause* is watered down through this continuous application. As highlighted, the *eternity clause* is intended to apply when other constitutional protection mechanisms failed.[473] It seems that the Constitutional Court is not implementing the same range of constitutional mechanisms when confronted with EU integration matters. Applying a modified constitutional approach towards the EU would also emphasize the additional benefit that EU integration offers, namely, to shield the structural requirements included in Article 79 (3) GG through supranational cooperation. This diversification of the protection could help to stabilize the German constitutional core beyond the German Constitution.

Finally, the constitutional benchmark applied for the judicial assessment of budgetary and fiscal commitment differs. As indicated, the Court relies *internally* on the financial constitutional framework. In contrast, it relies on the principle of democracy – in conjunction with the *eternity clause* – in EU-related cases. This generates an inconsistent constitutional appraisal of such commitments. As was illustrated, the reluctant and flexible approach *internally* appears to have contributed to a factual erosion of parliamentary budgetary prerogatives. Today, the German Parliament is only taking active political decisions in relation to less than 10% of the annual federal budget.[474] Two separate conclusions were drawn on the basis of this development. First, the development of the German state budget suggests that central parts of the German budget are shaped by commitments made by previous parliaments. In its *internal* jurisprudence, the Constitutional Court relied on the fact that

472 For example, in relation to the *OMT*-reference, cf. Markus Ludwigs, 'Die Krisenpolitik der EZB zwischen Verfassungs- und Unionsrecht' (2017) 70 Neue Juristische Wochenschrift (NJW) 3563, 3563; Captured again in the metaphor of the barking dog, cf. Weiler, 'The 'Lisbon Urteil' and the Fast Food Culture' 505.

473 Underscored by the *ultima ratio* character, cf. Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 763; Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 263.

474 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 7-8; Cf. as well: Kube, 'Art. 110 GG' para 41.

parliament was at least theoretically able to modify such commitments. If this reasoning is accepted, one could equally indicate that EU fiscal commitments remain changeable, as the German Parliament can always withdraw from EU cooperation. Second, the *internal* developments challenge the underlying conceptual claim of *overall budgetary responsibility*. In case one accepts, indeed, that factually the German Parliament is not controlling central parts of the German state budget because of the outlined long-term decisions taken by previous parliaments, the question emerges whether the German Parliament can actually violate its budgetary responsibility through EU budgetary commitments. Thus, in case the German Parliament is factually not controlling all central budgetary commitments *internally* it is questionable whether EU fiscal commitments can actually challenge parliamentary prerogatives in the first place.

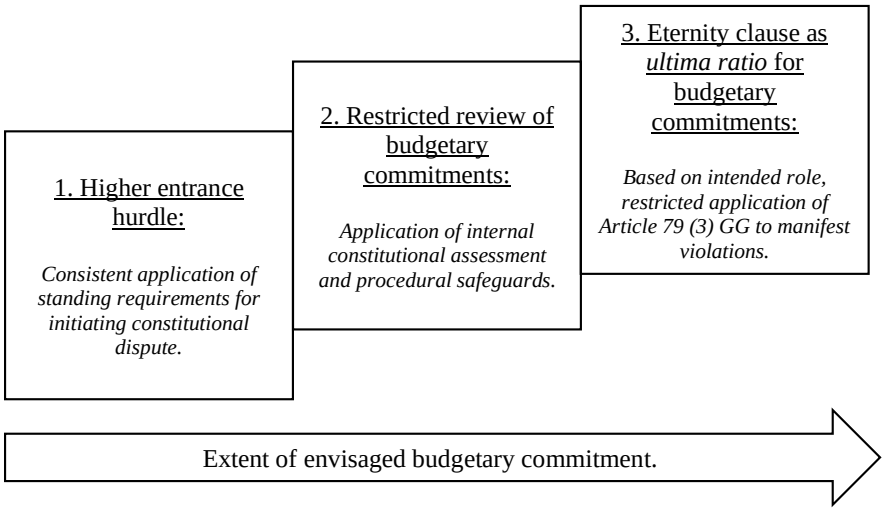

Figure 10: Roadmap to locate flexible constitutional space in Germany

The assessment has identified double standards in relation to these three points. These double standards suggest that the Constitutional Court has additional constitutional space when adjudicating on EU (integration) measures. This additional space is generated through a consistent application of the applicable constitutional framework. Concretely, a three-stepped *roadmap* is proposed to address the emerging inconsistency, which is visualized in *Figure 10.*

In the first place, the Constitutional Court could apply the constitutional standing requirements consistently. This would entail that individuals had to demonstrate how the challenged EU-related act is affecting them in their subjective constitutional rights. Clearly, the application of this requirement cannot result in a situation where every German individual that enjoys the

right to vote following Article 38 (1) GG is entitled to initiate a constitutional complaint. Instead, the Court would have to require that a specific subjective risk emerges for the applicant. Furthermore, it implies that the adversarial nature of inter-institutional proceedings is required by the Court in EU matters. In both situations, the consistent application of the constitutional standing requirements would reduce the number of admissible proceedings. Ultimately, the Constitutional Court could avoid addressing complex political questions, which the constitution-amending legislator did not intend the Court to rule on, as reflected in the constitutionally enshrined standing requirements.

Second, the Court could carefully extend the internally applicable financial constitutional framework to EU budgetary and fiscal commitments. This framework mainly relies on procedural safeguards that secure parliament's position as central budgeting authority. Relying on these procedural safeguards provides the Constitutional Court with a comprehensive constitutional framework. It would ensure compliance with the applicable procedural rules that secure parliamentary prerogatives and parliament's general political discretion. Ultimately, this would enable the Constitutional Court to reserve the application of the *eternity clause* to extreme cases, which would preserve the protective force of this important constitutional mechanism. Moreover, the limited application of Article 79 (3) GG would avoid an impossible conflict between law and politics as well as strengthen parliament in the exercise of its democratic mandate. Taken together, addressing the identified inconsistencies could ultimately generate additional constitutional space for EU fiscal integration steps by yet respecting core features of the German constitutional system and allowing for a more flexible and effective defense of German democracy than the current rigid but abstract substantive limits.

IV Comparative conclusions on Finland and Germany

1 Comparing Finland and Germany

The detailed assessment of the Finnish and the German constitutional approaches to EU integration revealed that EU fiscal integration steps appear generally possible in both systems. This finding is supported by judicial developments during the Eurocrisis, as neither the Finnish Constitutional Law Committee nor the German Federal Constitutional Court identified an unsurmountable constitutional conflict. Yet, the established jurisprudence of both authorities suggests that EU fiscal integration steps are limited by procedural and substantive requirements.

The following concluding assessment will compare both national approaches and their implications for EMU reform plans focusing on the national framework for constitutional review (2.), the procedural framework for engaging in and administering EU commitments (3.) and finally the substantive benchmarks formulated by the respective authorities (4.).

2 Comparing national constitutional review

The domestic framework for conducting constitutional review differs in both systems. In Finland, constitutional review is conducted by the Constitutional Law Committee.[1] Given that the Committee is part of the Finnish Parliament, its review is integrated in the parliamentary process. Consequently, it only conducts *ex ante* constitutional review which can be requested by either the

1 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361-362; Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 219; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 172 para 32; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 324; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 26; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 453; Ojanen, 'Constitutional Amendment in Finland' 96; Ojanen, 'The EU at the Finnish Constitutional Arena' 252; Lavapuro, 'Constitutional Review in Finland' 132; Lavapuro, Ojanen and Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' 510.

parliamentary plenary or specialized committees.[2] Therefore, the Constitutional Law Committee's opinions can be directly addressed by the Finnish Parliament before a constitutional conflict actually manifests. In contrast, the German Constitutional Court is established as judicial authority and is institutionally independent from other German institutions.[3] It conducts *ex post* constitutional review upon application by either institutional or private applicants.[4] Interestingly, the German legislator amended the German Constitution and erased the option to ask for advisory opinions of the Constitutional Court.[5] Thus, the German constitutional review is separate from the parliamentary process and it can only be initiated once acts are formally adopted.

The different institutional roles are reflected in the institutions' composition and the legal status of their verdicts. The Finnish Constitutional Law Committee is composed of seventeen parliamentarians. The members of the Committee are not required to have legal qualifications, which is why they are assisted by constitutional law experts.[6] The Committee's final statements or opinions

2 Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 226; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 29; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459-460; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 532.

3 Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 42-45; Hailbronner and Martini, 'The German Federal Constitutional Court' 365-366; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 670.

4 With the only exception of international agreements, which can be challenged prior to the promulgation of such an agreement following Article 59 (1) (1) GG, but after the approval of the legislator following Article 59 (2) (1) GG, cf. 1 BvF 1/52 *Germany Agreement* [1952] (German Federal Constitutional Court) paras 61-62; Cf. as well: Hans G. Rupp, 'Judicial Review of International Agreements: Federal Republic of Germany' (1977) 25 The American Journal of Comparative Law 286, 291.

5 Initially, § 97 BVerfGG provided either the legislator jointly with the government or the federal president with the opportunity to request for an advisory opinion, which was deleted in 1956, cf. Christian von Coelln, '§ 97 BVerfGG' in Theodor Maunz and others (eds), *Kommentar zum Bundesverfassungsgerichtsgesetz* (60th edn, C.H. Beck 2020) para 1; Wolfgang Heyde, '§ 97 BVerfGG – Gutachten-Verfahren' in Dieter C. Umbach, Thomas Clemens and Franz-Wilhelm Dollinger (eds), *Bundesverfassungsgerichtsgesetz – Mitarbeiterkommentar und Handbuch* (2nd edn, C.F. Müller 2005) 1340 paras 1-4.

6 On Finland, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361-362; Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 226; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 29; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459-460; Ojanen, 'The Impact of EU Membership

are not legally binding, yet, they are traditionally adhered to in the parliamentary process.[7] In contrast, the sixteen judges on the German Constitutional Court have to be qualified lawyers and six seats are filled with judges that worked previously on one of the other German high courts.[8] The German Constitutional Court's final decisions are legally binding on all other institutions.[9] When comparing the composition and the effect of the final verdicts it becomes obvious that the Finnish and the German constitutional system follow different models. Arguably, these design differences of national constitutional review impact the resulting jurisprudence. The Finnish Committee is required to anticipate constitutional conflicts. Through its opinions it impacts the parliamentary work that leads to the potential adoption of the act in question. For example, the Committee found that the adoption of a prior version of the ESM-Treaty would have required the support of a two-thirds parliamentary majority, which led the Finnish Government to renegotiate the Treaty.[10] Hence, the Finnish legislator can react to the Committee's views and alter the reviewed act. One result appears to be that the Constitutional Law Committee focusses mostly on procedural conditions that have to be met instead of imposing strict, substantive limitations. One reason for focusing on procedural requirements is that the Finnish Parliament is still able to comply with these requirements, given that all acts considered by the Finnish Constitutional Law Committee are not yet adopted legislation. Therefore, the Committee exercises both an advisory and supervisory mandate.

This is fundamentally different to the German Federal Constitutional Court, which only considers adopted acts. It thereby scrutinizes the work of the German legislator, instead of instructing it on the applicable procedural requirements. Obviously, this entails that the German Court cannot directly influence the decision-making process that leads to the adoption of a reviewed

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on Finnish Constitutional Law' 532; On Germany, cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 41.

7 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361-362;; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 27-28; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459-460; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 205.

8 Cf. Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 41.

9 As stipulated in § 31 BVerfGG, cf. Ibid paras 495-496; Aust and Meinel, 'Entscheidungsmöglichkeiten des BVerfG – Tenor, Systematik und Wirkungen' 26.

10 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 174-175 para 39; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

act. Rather, the Court's jurisprudence has a signaling function for future decisions of the legislator, which could explain the emergence of substantive and material constitutional benchmarks. As the Constitutional Court cannot advise the legislator prior to taking a decision, its *ex post* jurisprudence has a guiding function for future parliamentary decisions.

Overall, this suggests that the moment of constitutional review impacts the resulting jurisprudence. The Finnish Constitutional Law Committee considers acts *ex ante*, which is why its decisions have an advisory function, which is reflected by the fact that only the Finnish Parliament can trigger the review and that decisions are not intended to solve constitutional disputes. In contrast, the German Constitutional Court considers and adjudicates on concrete constitutional disputes that are initiated by a wide range of entitled applicants. Therefore, the German constitutional jurisprudence does not merely focus on procedural requirements but equally includes substantive constitutional norms into its appraisal, as apparent in relation to EU integration.

3 Comparing the national procedural framework for EU fiscal integration

When comparing the procedural and institutional constitutional framework, it should be pointed out that both the Finnish Constitution in Section 94 as well as the German Constitution in Article 23 (1) GG contain a constitutional basis for the conferral of competences to the EU. In Finland, the conferral of competences has to meet the general framework for supranational cooperation established in Section 1 (3) Finnish Constitution. Once it is established that EU integration steps contribute to the listed constitutional aims, the transfer of competences can be adopted by a simple parliamentary majority, unless the envisaged conferral affects the national borders, the constitutional text or the principle of sovereignty. In such case a qualified two-thirds majority requirement is applicable. This suggests that even far-reaching EU integration steps, which conflict with the constitutional text or principles such as Finnish sovereignty, can be adopted by the Finnish Parliament. The determination of the applicable majority requirement is conducted by the Constitutional Law Committee. The Committee clarified that budgetary competences are important parliamentary prerogatives,[11] therefore it is likely that EU fiscal integration steps, which impact national budgetary decisions, will require the support of a qualified parliamentary majority.

11 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

Similarly, the German Constitution formulates structural requirements for EU cooperation laid down in Article 23 (1) (1) GG. Once these are met, the German Constitution imposes different majority requirements depending on the extent of the envisaged conferral. Notably, Article 23 (1) (3) GG clarifies that the internally applicable procedural framework for constitutional amendments applies to EU cooperation, including the German *eternity clause*, which constitutes an absolute constitutional limit.[12] Hence, EU fiscal integration proposals that alter the German Constitution, for example, by transferring budgetary competences to the EU-level, will likely require the support of a qualified two-thirds majority,[13] provided that the conferral complies with the mentioned *eternity clause*, which evolved into the central constitutional concern for EU fiscal integration.[14]

When comparing the framework for competence conferrals, it appears that in both countries integration steps that impact parliament's fiscal and budgetary prerogatives have to be adopted by a two-thirds majority, given the importance of these prerogatives for parliament, the democratic process and sovereignty. Hence, both constitutional systems consider budgetary and fiscal competences as highly important constitutional prerogatives of the national parliament and therefore impose a qualified majority threshold for the conferral of such powers. Hence, although the ultimate constitutional conclusions differ, the underpinning constitutional consideration, notably that budgetary and fiscal decisions are important for parliament and the democratic process, is similar.

However, one major difference appears to be that the German Court defined the content of the *eternity clause* in its jurisprudence thereby restricting the substantive scope for EU integration, whereas the Finnish Constitutional Law Committee refrained from employing the mentioned Finnish *eternity-clause-like* provision in Section 94 (3) Finnish Constitution. One explanation for this difference may lie in the national constitutional conception of parliamentary prerogatives. The Finnish constitutional system appears to establish the Finnish Parliament as strong institutional actor, which is able to overcome constitutional conflicts by amending the constitutional text. The primary focus rests on the procedural involvement of parliament, which is then competent

12 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 902; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-146; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 125.

13 Cf. in general on Article 23 GG: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 24-27; Scholz, 'Art. 23 GG' para 118; Jarass, 'Art. 23 GG – Europäische Union'.

14 Through its identity review, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 138; *ESM-Treaty and Fiscal Compact* paras 107-109; *Lisbon-judgment* para 240; Cf. as well: Herdegen, 'Art. 79 GG' paras 60, 167-169; Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' 27; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 177.

to engage in any commitment, provided the required parliamentary majority is attained.[15] In contrast, the drafters of the German Constitution deliberately decided to limit the powers of the constituted institutions based on historical experiences. This restriction is laid down in the *eternity clause*, which exempts core constitutional principles from any change. The constitutional text thus distinguishes between the constituting power which only provided a limited mandate to the constituted institutions.[16] This limited mandate extends to EU cooperation and therefore limits the constitutional space for EU integration steps,[17] and it is actively defended by the German Constitutional Court.

Once competences are conferred to the EU, both constitutional systems ensure parliamentary participation in the national preparation of EU secondary acts. Notably, in Finland, this involvement is regulated in detail in the constitutional text itself. According to this framework, the parliamentary opinion is prepared by various parliamentary committees including, if necessary, the Constitutional Law Committee, and normally issued by the Grand Committee. Therein, it can formulate a political mandate to the Finnish Government for EU negotiations.[18] Consequently, parliament is actively involved in the national preparation of EU decisions, which is firmly secured by the Finnish Constitution. Similarly, the German Constitution translates the internal framework for the legislator's involvement to the domestic preparation of EU law. Depending on which state level is constitutionally competent, either the German Parliament or the Federal Council can issue a position to the government, which is required to carefully consider the communicated views. However, many details of the concrete institutional interaction between German institutions are laid down in secondary provisions, which contrasts with the approach in Finland. Obviously, this more comprehensive constitutional basis available under the Finnish Constitution strengthens the position of the Finnish Parliament. As highlighted in the previous assessment, this comprehensive constitutional basis and, more importantly, the political culture surrounding the inclusion of the Finnish Parliament into the EU decision-making process could

15 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 373, 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458-459; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

16 Herdegen, 'Art. 79 GG' paras 60-61; Grawert, 'Homogenität, Identität, Souveränität – Positionen jurisdiktioneller Begriffsdogmatik' 197; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 715, 724.

17 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 902; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 685; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-146.

18 Ojanen, 'The Europeanization of Finnish Law' 170; Raunio and Tiilikainen, *Finland in the European Union* 86.

serve as *best practice* example that could potentially relax the German constitutional concerns apparent under the procedural dimension of *overall budgetary responsibility.*

Specifically, the exemplary Finnish system allows for the issuing of parliamentary positions through a parliamentary Committee, traditionally the Grand Committee.[19] This delegation of responsibilities ensures a quicker engagement of specialized parliamentarians and it can thereby ensure a thorough involvement of the Finnish Parliament in EU decision-making prior to reaching an agreement on the matter amongst governmental representatives at the EU-level. Here, the German Constitutional Court could relax the outlined reservations[20] and re-consider the possibility to delegate limited decision-making powers to the German EU Committee following Article 45 (2) GG in conjunction with § 93b (2) GO-BT,[21] which could ensure quicker parliamentary decisions and ultimately guarantee that the German Parliament is not merely approving already taken EU decisions but that it could instead impact the content of such decisions.

Overall, the national constitutional framework suggests that the conferral of budgetary and fiscal competences is generally permissible both in Finland and in Germany. This was illustrated during the Eurocrisis, where EU-related measures such as the Fiscal Compact or the ESM were held to be compatible with national constitutional law. However, in both Member States budgetary and fiscal competences are considered particularly important prerogatives of the national parliament. In Finland, this was underscored by the Constitutional Law Committee when considering a draft version of the ESM-Treaty. Following the Committee, in case the financial commitment of Finland could be increased against the will of the Finnish Parliament, this would have required the support of a constitution-amending majority.[22] Similarly, the German Constitutional

19 Miller, 'Finnish Judges and the European Union: An American Perspective' 503; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 555; Although the plenary of the Finnish Parliament was often consulted during the Eurocrisis, the final decisions are issued by the Grand Committee – which illustrates an additional layer of flexibility as the plenary can be involved if deemed required; Overall, cf. Auel and Raunio, 'Debating the State of the Union? Comparing Parliamentary Debates on EU Issues in Finland, France, Germany and the United Kingdom' 19.

20 *Participation of Members of German Parliament in the EFSF* paras 131, 136; Cf. as well: Bumke and Voßkuhle, *German Constitutional Law – Introduction, Cases, and Principles* paras 1634-1636.

21 Against the original intention of the constitution-amending legislator that aimed to incentivise delegation of decision-making competences under Article 23 GG to the Committee for EU affairs, cf. Heintschel von Heinegg and Frau, 'Art. 45 GG – Ausschuss für Angelegenheiten der EU' para 1; Scholz, 'Art. 45 GG' para 3.

22 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 174-175 para 39; Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU

Court has constantly underscored the importance of budgetary competences for the German Parliament and with it German democracy through its *overall budgetary responsibility* doctrine.[23] Hence, EU fiscal integration proposals will likely require the support of a qualified parliamentary majority in both Finland and Germany, given the potential implications for parliamentary budgetary prerogatives. This qualified parliamentary majority might be challenging to attain in Finland, given an increasing Euroskepticism which impacts parliamentary work.[24] As a result, EU fiscal integration proposals might be constitutionally attainable in Finland, but they are confronted with an uncertain political context which could ultimately limit them. In contrast, in Germany too far-reaching fiscal integration proposals might conflict with the *eternity clause*, which prescribes that the German Parliament remains in charge of all central budgetary decisions. A detailed assessment of these requirements and their potential implications for EU fiscal integration ambitions is conducted in PART II below.

4 COMPARING THE NATIONAL SUBSTANTIVE BENCHMARK FOR EU FISCAL INTEGRATION

The analysis revealed that the German Constitutional Court increasingly relies on substantive limitations when confronted with EU integration proposals. In its jurisprudence, the Court identified particularly important competences under German democracy. Following its *Lisbon*-judgment, these protected competences include *inter alia* decisions on revenue and expenditure, which are characterized as core powers of the German Parliament essential for the democratic process.[25] A conferral of these competences to the EU-level could

Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247; Jokela, 'Finland: Towards a More Cautious Europeanization' 49.

23 *Quantitative Easing (PSPP) Final Judgment* paras 103-104; *Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

24 Iso-Markku, 'Finland – Pro-European Arguments Prevail Despite the Rise of Euroscepticism' 65, 73; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 455; Jokela, 'Finland: Towards a More Cautious Europeanization' 49; Husa, *The Constitution of Finland – A Contextual Analysis* 36.

25 *Lisbon-judgment* paras 252, 256; Cf. as well: Christian Calliess, 'Bausteine einer erneuerten Europäischen Union – Auf der Suche nach dem europäischen Weg: Überlegungen im Lichte des Weißbuchs der Europäischen Kommission zur Zukunft Europas' (2018) 37 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1, 3; Ludwigs, 'Die Krisenpolitik der EZB zwischen Verfassungs- und Unionsrecht' 3565; Kottmann and Wohlfahrt, 'Der gespaltene Wächter?

significantly alter German democracy, which is built on an accountability and legitimacy relation between parliament and the people.[26] As emphasized by the Court, in case the German Parliament is stripped of its core competences, the people legitimize a parliament without the ability to take political decisions.[27] Given that budgetary and fiscal powers are considered particularly important domestic competences, the Constitutional Court raised serious constitutional concerns regarding the compatibility of increasing budgetary constraints with the principle of democracy and *overall budgetary responsibility*.[28]

Notably, the Court introduced *overall budgetary responsibility* as a specific constitutional concept to address an increasing supranationalization of budgetary and fiscal competences. In a comparable way, the Finnish Constitutional Law Committee is concerned that EU budgetary and fiscal integration could undermine constitutional concepts such as Finnish sovereignty or parliamentary prerogatives in budgetary matters.[29] However, until now, these concerns only translated into procedural requirements, notably the adoption by qualified parliamentary majority. This confirms the previous finding that the initial constitutional concerns are similar in both Member States, however, the resulting constitutional approach or strategy differs significantly.

Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 460.

26 *Quantitative Easing (PSPP) Final Judgment* paras 99-101; *Final OMT-Judgment* paras 126, 129; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 233, 264; Cf. as well: De Sadeleer, 'The New Architecture of European Economic Governance' 36.

27 *Quantitative Easing (PSPP) Reference* para 56; *Final OMT-Judgment* paras 124, 135-138; *Lisbon-judgment* para 250; Also critically discussed in the academic debate, cf.: Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 516, 527; Cremer, 'Lissabon-Vertrag und Grundgesetz' 299-300; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 447-448; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

28 *Quantitative Easing (PSPP) Final Judgment* para 104; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 285; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 682-683; Ungern-Sternberg, 'Parliaments – Fig Leaf or Heartbeat of Democracy? German Constitutional Court – Judgment of 7 September 2011 – Euro Rescue Package' 314-315; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

29 *Adoption of the EU Six-Pack Legislation* 4-5; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

When considering the German constitutional opposition to budgetary and fiscal integration in greater detail, it should be emphasized that the relevant concept of *overall budgetary responsibility* has a procedural dimension and a substantive dimension. It suggests that the German Parliament can engage in budgetary and fiscal commitments at the EU-level, as long as these commitments remain reversible and as long as the central and major part of budgetary decisions is taken by the German Parliament itself. At the same time, national budgets are increasingly constrained by long-term political decisions, such as pension schemes, social policy or public health policy decisions, which limit the discretion of future parliaments.[30] Nevertheless, the jurisprudence implies that EU fiscal integration is restricted both in procedural terms, meaning how powers are conferred and what role the national parliament plays, as well as in substantive terms. Although the Constitutional Court did not yet define a specific percentage of the German federal state budget that has to remain under the control of the domestic level, the recent PSPP-judgment illustrates that the Court is carefully monitoring fiscal integration steps.[31] In contrast, the Finnish Constitutional Law Committee focused on the procedural safeguards for parliamentary involvement in budgetary decisions.

According to the German Constitutional Court, the substantive dimension of *overall budgetary responsibility* protects the unamendable constitutional core of the *Grundgesetz* protected by Article 79 (3) GG.[32] Therefore, *overall budgetary responsibility* constitutes an absolute limitation for EU fiscal integration steps which cannot be overcome by the German constitution-amending legislator. As highlighted, these material or substantive reservations are framed as *national constitutional identity* concern by the German Constitutional Court.[33] Given the absolute nature of these substantive identity concerns, they constitute a direct and serious limitation to the prospect of EU fiscal integration. Overall, such *national constitutional identity* concerns that protect budgetary and fiscal prerogatives constitute the most immediate and serious restrictions for such EU proposals. Yet, as the term *identity concern* already suggests, these are specific

30 As discussed previously, overall fiscal discretion for national parliaments is increasingly limited by such long-term policy decisions, cf. Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 53; Kube, 'Art. 110 GG' para 41; Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8.

31 *Quantitative Easing (PSPP) Final Judgment* paras 103-104; Cf. as well: Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 902.

32 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

33 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 902; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294.

to the national constitutional order and vary in their design from Member State to Member State. Therefore, the subsequent Section assesses different national *constitutional identity* concerns raised in the context of EU cooperation to identify conceptual overlap and determine their potential limiting impact on EU fiscal integration ambitions.

In addition, in both Member States the principle of sovereignty is invoked when evaluating supranational budgetary and fiscal commitments. In Finland, the principle of sovereignty occupies a historically important position and is enshrined in Section 1 (1) Finnish Constitution.[34] As outlined, the initial absolute conception of Finnish sovereignty was altered by the constitution-amending legislator.[35] Therefore, not every conferral of powers to the EU is construed as a conflict with Finnish sovereignty. In Germany, the Constitutional Court employs the principle of sovereignty in conjunction with democracy. Given its historic origin, the German Constitution does not mention sovereignty explicitly but instead implies it.[36]

Taken together, this illustrates that both national authorities employ national sovereignty when considering EU integration steps. The German Court seemingly addressed these concerns by emphasizing the derived status of the EU as well as by underscoring that *Kompetenz-Kompetenz* cannot be conferred to the EU-level. Similarly, the Finnish Constitutional Law Committee was concerned when evaluating the draft ESM-Treaty that the Finnish financial commitment could be increased without prior Finnish parliamentary approval, which would have equipped the EU with the power to overrule the Finnish Parliament and which would have resulted in some sort of EU *Kompetenz-*

34 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 331-332; Ojanen, 'The EU at the Finnish Constitutional Arena' 254; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 100; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 216; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 537.

35 Notably, Finnish sovereignty has to be balanced against the principle of internationality, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 335; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 100.

36 Cf. the German Court speaks of the sovereignty of the people, cf. Konertz, 'Historische und philosophische Grundlagen der Rechtsordnung im Überblick – Am Beispiel von BGB, GG und StGB' 203; Vinx, 'The Incoherence of Strong Popular Sovereignty' 114-115; Sennekamp, 'Alle Staatsgewalt geht vom Volke aus! – Demokratieprinzip und Selbstverwaltung der Justiz'; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 130-133; Weber-Fas, *Das Grundgesetz* 52-53; Cf. as well: Huster and Rux, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' paras 62-66; Grzeszick, 'Art. 20 GG' para 61.

Kompetenz.[37] Furthermore, the Finnish Constitutional Law Committee started to equally consider the factual benefits that stem from EU cooperation for national sovereignty. According to the Committee, EU commitments are not primarily limiting Finnish sovereignty, but instead increasing the Finnish impact in a globalized world. For example, negotiating a trade agreement as a Union of almost 450 million inhabitants enhances the final agreement for Finland – as less populated Member State – too.[38] Therefore, the Committee argues that EU cooperation can in fact increase sovereign powers, which is factored into the constitutional assessment and illustrates a flexible conception of substantive constitutional principles to EU integration steps.

5 Overall comparative conclusion

Overall, EU fiscal integration steps seem possible in Finland and in Germany. However, given that budgetary and fiscal competences are considered particularly important prerogatives for national parliaments, additional procedural and substantive requirements apply to future EU fiscal integration steps. In addition, the German *constitutional identity limit*, specifically *overall budgetary responsibility*, restricts the available constitutional space for such integration. Notably, EU fiscal integration steps cannot restrict the German Parliament's ability to take all central budgetary decisions itself. In contrast, the Finnish Constitutional Law Committee did not develop such substantive limitations, but instead relied on effective parliamentary involvement and underscored the overall discretion of the Finnish Parliament when deciding on EU integration. Therefore, the Finnish constitutional system appears more flexible towards EU integration compared to the German constitutional order. Given that Finland has no domestic constitutional court, which could scrutinize *ex post* parliamentary work and given the traditionally wide discretion that the Finnish Parliament enjoys, no substantive limitation to EU (fiscal) integration emerged. In contrast, the German constitutional order can be characterized as more rigid in light of its constitutional features, the institutional framework and the analyzed resulting constitutional jurisprudence.

Despite all these major differences, the comparison revealed that the Finnish Constitutional Law Committee and the German Federal Constitutional Court base their constitutional assessment on comparable principles, notably national sovereignty and democracy, and that their appraisal is framed by the domestic

37 Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

38 *Adoption of the Lisbon Treaty*; Cf. as well: Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334.

enabling clause. Therefore, considerable conceptual overlap exists, and the constitutional departure point appears similar. However, in light of the identified differences in the overall constitutional and institutional design of both systems, both authorities reach different final conclusions on the relationship between the respective national constitution and the EU legal order.

Yet, given the identified conceptual overlap, it can be submitted that the comparative exchange of constitutional interpretation and arguments is general possible as the constitutional concerns overlap. Although, of course, the respective domestic interpretation of, for example, democracy is a prerogative of the national authority, the conceptual overlap may be employed as input to reconsider the national interpretation of certain principles. For example, the Finnish Constitutional Law Committee includes the factual benefits of EU cooperation into its evaluation of Finnish sovereignty. Similarly, one could consider the factual benefits stemming from EU budgetary and fiscal integration when constitutionally assessing the impact of such integration steps on the principle of democracy in Germany. An additional means to achieving this *constitutional flexibility* is the application of a consistent constitutional standard and thus not distinguish between internal cases and cases with an EU-dimension, as currently apparent in the German constitutional practice. Hence, even the rigid German constitutional order appears to offer additional constitutional space for EU integration steps in budgetary and fiscal matters, which is further explored in PART II.

SECTION II

Micro-Comparative Assessment of Selected National Material Limits to EU Fiscal Integration

INTRODUCING THE *MICRO-COMPARATIVE* ASSESSMENT

The *macro-comparison* revealed that the feasibility of EU fiscal integration steps can be significantly constrained in rigid constitutional systems. These constraints stem from the substantive limits that rigid systems typically formulate against increasing EU cooperation. Obviously, these substantive limits restrict the constitutional space for EU integration.[1] This tendency is particularly pronounced in the German constitutional order. As substantiated in the previous analysis, the German *constitutional identity limit* does set an absolute restriction to possible EU integration ambitions.[2] Not even the constitution-amending legislator is competent to overcome this absolute restriction.[3] Obviously, such absolute restriction reduces the German Parliament's discretion for engaging in EU fiscal integration steps. In case EU fiscal integration measures are found to be incompatible with the German *constitutional identity limit* they are not achievable under the current German Constitution.[4] Therefore, the

1 Claes, 'National Idenity: Trump Card or Up for Negotiation?' 116; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 131.

2 Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 161-162; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 286; Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' 27; Preuss, 'The Implications of 'Eternity Clauses': the German Experience' 440; Grawert, 'Homogenität, Identität, Souveränität – Positionen jurisdiktioneller Begriffsdogmatik' 197.

3 1 BvR 1170, 1174 and 1175/90 *Real Estate Reform I* [1991] (German Federal Constitutional Court) para 130-131; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 715.

4 In light of Article 79 (3) Basic Law, cf. *Quantitative Easing (PSPP) Final Judgment* para 101; *OMT-reference* para 29; *Lisbon-judgment* para 216; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 156-157; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 430.

German example illustrates that EU fiscal integration does not only depend on national political-parliamentary support but equally on the compatibility with domestic constitutional limits and more specifically national *constitutional identity limits*.[5]

Furthermore, national *constitutional identity limits* appear to be the most likely constitutional obstacles when considering EU fiscal integration steps. Notably, as already demonstrated within the *macro-comparison* in relation to Finland and Germany, the proposed EU fiscal integration steps affect national fiscal and budgetary powers, which are traditionally perceived as core state competences and particularly important parliamentary prerogatives.[6] EU fiscal integration could require the transfer of these important budgetary prerogatives to create fiscal capacities at the supranational level, further limitations on national fiscal policies, for example regarding social policy decisions, or possibly even the introduction of joint guarantees of all Eurozone Member States through Euro- or Corona-bonds. However, the integration steps this would require might be difficult to attain as budgetary and fiscal competences are characterized as essential for the national democratic-political process and as they are therefore generally covered by national *constitutional identity limits*.[7] These *constitutional identity limits* appear to formulate uncompromising constitutional requirements, as apparent from the assessed German example.[8]

In light of the apparent severity of these constitutional limits, this Section focuses on *constitutional identity limits* which will likely apply to EU fiscal integration steps. Based on political and geographical relevance as well as overall constitutional importance, this assessment will focus on a sample of four *constitutional identity limits*, namely the German, French, Spanish and Polish limits. The assessment will determine in a comparative manner the constitutional implications of these four national *constitutional identity limits* for EU fiscal integration proposals. In order to allow for this comparison, the Section follows the previously established two-fold research design. In a first step, the four national *constitutional identity limits* will be analyzed separately (Chapter V). In a second step, the research findings on the four *constitutional identity limits* will be compared and contrasted (Chapter VI).

5 Saiz Arnaiz and Alcoberro Llivina, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' 14-15.

6 Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

7 Schyff, 'Exploring Member State and European Union Constitutional Identity' 228.

8 Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123.

V Micro-Comparative Assessment of French, German, Polish and Spanish Limit to EU Fiscal Integration

1 Introduction

This Chapter evaluates each national *constitutional identity limits* separately. To structure the assessment and to facilitate the following comparison across Member States, the assessment is structures based on the developed and previously introduced *Constitutional Identity Classification Board*, which is displayed in *Figure 11*.

The following assessment first considers the French *constitutional identity limit* (2.), before then considering the Spanish (3.) and the Polish one (4.). Subsequently, the previously established main findings on the German *constitutional identity limit* will be reiterated (5.).

	Components of the Constitutional Identity Classification Board
1	Which institutional actor enforces the constitutional limit?
2	How can the *constitutional identity limit* be triggered?
3	What is the constitutional basis of the *constitutional identity limit*?
4	What constitutional principles and substantive content are covered?
5	How – if at all – can the *constitutional identity limit* be overcome (longevity/ absoluteness of the limit)?

Figure 11: Design of the Constitutional Identity Classification Board

2 The French constitutional approach to EU fiscal integration

The comparative assessment departs from the French material constitutional limits to EU fiscal integration. The inclusion of France in this *micro-comparison* is vital given the influential position the country occupies within the Eurozone. Politically, France can be characterized as the crucial driving force next to Germany behind the integration dynamics within the Eurozone.[1] Economically,

1 Amandine Crespy and Vivien Schmidt, 'The clash of Titans: France, Germany and the discursive double game of EMU reform' (2014) 21 Journal of European Public Policy 1085, 1085-1086; Michele Chang, 'Reforming the Stability and Growth Pact: Size and Influence in EMU Policymaking' (2006) 28 Journal of European Integration 107, 115; Although both

France is the second biggest Eurozone-economy, after Germany, which translates, for example, into the ESM-funding guarantee that France represents.[2] Jointly, France and Germany represent almost 50% of the ESM funding guarantees.[3] This illustrates the economic, political and relative power of France both individually and jointly with Germany. Arguably any EMU-reform will require the support of the French-German axis. However, the political ideas in both Member States about Eurozone-reforms diverge considerably,[4] as French President Macron continuously advocated an ambitious fiscally more integrated single currency.[5] Yet, these far-reaching political ambitions must be separated from possible legal obstacles that might be imposed by the French Constitution towards EU fiscal integration.

In fact, when considering the French constitutional approach to EU integration, certain features of a rigid constitutional system become apparent. In the first place, the French constitutional approach is shaped by an influential constitutional authority, the *Conseil Constitutionnel*.[6] The *Conseil* has the prerogative to conduct *ex ante* constitutional review – including the review of

countries have different priorities concerning EMU-reform, both are politically influential, cf. Thomas Lehner and Fabio Wasserfallen, 'Political Conflict in the Reform of the Eurozone' (2019) 20 European Union Politics 45, 47, 61.

2 Which equals more than 20%, cf. Annex I of the ESM-Treaty; Carri Ginter and Raul Narits, 'The Perspective of a Small Member State to the Democratic Deficiency of the ESM' (2013) 38 Review of Central and East European Law 54, 65; Which gives France a *de facto* veto for qualified majority decisions, cf. Fabian Amtenbrink, 'New Economic Governance in the European Union: Another Constitutional Battleground?' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation* (Springer 2014) 223.

3 Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016) Chapter 2.3.B (Difference in Power); Ginter and Narits, 'The Perspective of a Small Member State to the Democratic Deficiency of the ESM' 65.

4 Lehner and Wasserfallen, 'Political Conflict in the Reform of the Eurozone' 47; Joachim Schild, 'Leadership in Hard Times – Germany, France, and the Management of the Eurozone Crisis' (2013) 31 German Politics and Society 24, 30.

5 Tony Barber, 'Eurozone Reform Deadlock Reflects Deep Malaise Over Integration – The Fiscal Stalemate Derives in Part From the Frictions in Franco-German Relations' *Financial Times* (London 26 December 2019) <https://www.ft.com/content/8ffa04c6-1815-11ea-8d73-6303645ac406> accessed 20 December 2020; Yet, the reform plans of Macron triggered German opposition, cf. Jim Brunsden, Anne-Sylvaine Chassany and Guy Chazan, 'France and Germany to Press on With Eurozone Reform' *Financial Times* (London 20 May 2018) <https://www.ft.com/content/fdde302c-5c1c-11e8-ad91-e01af256df68> accessed 20 December 2020; Anne-Sylvaine Chassany, Guy Chazan and Mehreen Khan, 'Impatient Macron Pushes Merkel Hard on Eurozone Reform' *Financial Times* (London 16 March 2018) <https://www.ft.com/content/8c521504-2904-11e8-b27e-cc62a39d57a0> accessed 20 December 2020; The FT View, 'Macron's Worthy Goals for Eurozone Reform – The new French President's Ideas are very Ambitious but Largely Right' *Financial Times* (London 9 May 2017) <https://www.ft.com/content/7ea08a52-34b9-11e7-99bd-13beb0903fa3> accessed 20 December 2020.

6 In English: Constitutional Council.

new EU commitments.[7] Thus, the compatibility of EU commitments with the French Constitution is determined prior to their ratification.[8] In addition, the *Conseil* conducts a limited review of the national implementation of EU-related obligations.[9] All its decisions are legally binding[10] and overall the *Conseil* can be described as central adjudicator for constitutional questions in France.[11] Considering its institutional prerogatives and the effect of its decisions, the *Conseil* can thus be compared to traditional constitutional courts such as the German *Bundesverfassungsgericht*.

At the same time, the *Conseil* is mainly composed of (former) politicians, including former French Presidents, instead of jurists.[12] Its composition thus more resembles a constitutional advisory body, comparable to the Finnish Constitutional Law Committee. Hence, the *sui generis* institutional nature of

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7 As enshrined in Articles 54 and 61 French Constitution, cf. Steiner, *French Law – A Comparative Approach* 7; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 769-770; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 871; David Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' (1988) 23 Irish Jurist 2, 13.

8 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 102; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 769-770; Federico Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' (2014) 32 Berkeley Journal of International Law 101, 119; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 529.

9 Chloé Charpy, 'Droit constitutionnel et droit communautaire – Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'État' (2009) 80 Revue Française de Droit Constitutionnel 795, 801-802; Philippe Blachèr and Guillaume Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' (2007) 69 Revue francaise de Droit constitutionnel 123, 140; Thomas M. Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 469, 475.

10 As established in Article 62 French Constitution, cf. Steiner, *French Law – A Comparative Approach* 68; Arthur Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' in Monica Claes and others (eds), *Constitutional Conversations in Europe* (Intersentia 2012) 319; Franz C. Mayer, Edgar Lenski and Mattias Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' (2008) 43 Europarecht (EuR) 63,, 68.

11 Marie-Luce Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' in John Bell and Marie-Luce Paris (eds), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing Limited 2016) 328-329; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 312.

12 Steiner, *French Law – A Comparative Approach* 68; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 302-303; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 319.

the *Conseil Constitutionnel*, which reflects both flexible and rigid constitutional features, appears to offer an interesting additional case study to complement the findings of the *macro-comparison*. And second, the French Constitution formulates different limits toward EU cooperation. Prominently, Article 89 (5) French Constitution excludes constitutional amendments that alter the republican status of France, which could possibly restrict EU fiscal integration.[13] In addition, the *Conseil Constitutionnel* has established a French sovereignty limit[14] and an explicit *constitutional identity limit*[15] which both might constrain the constitutional space available for EU fiscal integration steps under the French Constitution.

The economic-political as well as the comparative legal-constitutional relevance of the French constitutional limits to EU fiscal integration justify its inclusion in the conducted *micro-comparison*. The subsequent analysis is structured in four parts. In a first step, the relevant constitutional framework for EU fiscal integration steps is identified and the ambiguity of the constitutional terminology in relation to '*constitutional identity*' discussed (2.1.). Second, the French sovereignty limit, as the most immediate constitutional restriction for the conferral of additional competences to the EU is evaluated (2.2.). Third, the particularities of the French *constitutional identity limit* are outlined (2.3.). Finally, the resulting French constitutional space for EU fiscal integration is determined (2.4.).

2.1 Identifying the relevant French constitutional limits

Three French *final* judicial authorities adjudicate on the interaction between French and EU law. These different judicial authorities adopted contrasting approaches to the compatibility of EU law with French law and its general effect based on their respective field of judicial responsibility.[16] Notably, the

13 Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 124; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388-389; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 270-271.

14 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540.

15 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 141-142; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386; Furthermore, Germany and France could be seen as driving actors to stimulate the discourse on *constitutional identity limits*, cf. Saiz Arnaiz and Alcoberro Llivina, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' 7-8.

16 Steiner, *French Law – A Comparative Approach* 8; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France', 526; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid

Conseil Constitutionnel adjudicates on constitutional law questions, the *Conseil d'État* (Council of State) in last instance on administrative law, and the *Cour de Cassation* (Supreme Court) in last instance on civil as well as criminal law.[17] Obviously, given the wide range of matters regulated by EU law, all three high courts are confronted with EU law questions. The focus of the subsequent analysis rests, however, on constitutional law questions and in particular on substantive constitutional limits to EU fiscal integration steps. Therefore, the analysis will be limited to the jurisprudence of the *Conseil Constitutionnel*, given the *Conseil*'s central position as constitutional adjudicator.[18] This position was strengthened by the 2008 French constitutional reform, which introduced a referral system for constitutional law question emerging in front of lower courts in France.[19] By initiating a so-called *Question Prioritaire de Constitutionalité* (*QPC*), lower courts can refer questions on the constitutionality of a French legislative act to the *Conseil Constitutionnel*. This referral mechanism integrates the different branches of the judiciary and reinforces the position of the *Conseil Constitutionnel* as the most authoritative adjudicator on constitutional law questions in France.[20]

The *Conseil Constitutionnel* conducts constitutional review *inter alia* on the compatibility of EU law with the French Constitution. This review can either

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to Ask)' 313; With a general overview: John Bell, 'Court Institutions' in John Bell, Sophie Boyron and Simon Whittaker (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008) 37-43.

17 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 766-767; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 137; John Bell, *French Legal Culture* (Butterworths 2001) 29, 31, 33.

18 Arthur Dyevre, 'The French Constitutional Council' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 328; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 328-329; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 137; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 312.

19 Enshrined in Article 61-1 French Constitution and entered into force on 1. March 2010 following constitutional amendment, cf. Otto Pfersmann, 'Concrete Review As Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective' (2010) 6 European Constitutional Law Review 223,, 227; Constituting a major constitutional transformation, cf. Frangois-Xavier Millet and Nicoletta Perlo, 'The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law? ' (2015) 16 German Law Journal 1471, 1471; Resulting in increased caseload of the *Conseil Constitutionnel*, cf. Susan Wright, 'The French Conseil Constitutionnel Since Early 2010: Its Growing Caseload and Its First Contact With the Court of Justice of the European Union' (2014) 20 European Public Law 23,, 23-25.

20 Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 328-329; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 312.

be initiated against the conferral of additional powers to the EU[21] or against the national implementation of EU secondary law into French law.[22] The intensity of the review and the employed constitutional concepts, both depend on the challenged act. Notably, when assessing new EU primary commitments, the *Conseil* will conduct a full *ex ante* constitutional review,[23] traditionally following Article 54 French Constitution.[24] In contrast, when confronted with EU secondary law, the Conseil only conducts a limited review, as the secondary act benefits from the special presumption of constitutionality of ratified international agreements.[25] This is now specifically acknowledged for EU law obligations in Article 88-1 (2) French Constitution which states: '[France] shall participate in the European Union in the conditions provided for by the Treaty of Lisbon [...]'.[26] This obviously applies to the implementation of EU law into the national legal order. And furthermore, the *Conseil*'s jurisdiction is limited to French law, which restricts the review of EU secondary law to the French

21 Following Article 54 French Constitution, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 140-141; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126-127; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540.

22 Following Article 61 (2) French Constitution, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126-127; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386.

23 Any conferral of competences to the EU has to be compatible with the French Constitution, which potentially requires constitutional amendment prior to it, cf. *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; Decision 97-394 DC *Revision of Amsterdam Treaty* [1997] (French Conseil Constitutionnel) para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541.

24 Triggering Article 54 French Constitution prior to the adoption of new EU obligations constitutes a 'political routine' in France, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539.

25 As established by the *Conseil Constitutionnel*, cf. *Fiscal Compact* para 18; *Review of Maastricht Treaty (Maastricht I)* para 7; Cf. as well: Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 121; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478-479.

26 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 533; Jan-Herman Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' (2005) 1 European Constitutional Law Review 302, 303.

implementation act.[27] One consequence is that no direct conflict between secondary EU law and French constitutional law can emerge in front of the Conseil, which is an expression of the Conseil's respect for the prerogatives of the CJEU.[28] Despite both aspects, the *Conseil Constitutionnel* did however develop a specific limit that applies to the French implementation of EU secondary law, namely the *constitutional identity limit*.[29]

2.1.1 Relevant constitutional limits for EU primary law

When adjudicating on the compatibility of an anticipated conferral of competences to the EU, for example by ratifying a new EU Treaty, an amendment of the Treaty or by creating new EU obligations,[30] the Conseil applies a threefold constitutional scrutiny.[31] This scrutiny consists of both formal and material elements that restrict the constitutional space and that might require constitutional amendments prior to the ratification of an envisaged conferral. The *Conseil* established:

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27 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 140-141; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 775-776; Chloé Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' (2007) 3 European Constitutional Law Review 436, 442; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 307; Jacqueline Dutheil de la Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' (2005) 42 Common Market Law Review 859, 861.

28 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 142;

29 *Comprehensive Economic and Trade Agreement (CETA)* para 14; Decision 2010-605 DC *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* [2010] (French Conseil Constitutionnel) para 18; Decision 2008-564 DC *French Law on Genetically Modified Organisms* [2008] (French Conseil Constitutionnel) para 44; *Copyright and Related Rights in the Information Society* para 19; Cf. as well Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 141; Joris Larik, 'Prêt-à-Ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017' (2017) 13 European Constitutional Law Review 759, 764; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Édouard Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' (2010) 83 Revue française de Droit constitutionnel 451, 452.

30 This applied to the Fiscal Compact, which was considered as a potentially new, EU-related obligation, cf. *Fiscal Compact*; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119-120.

31 *Lisbon Treaty* para 9; *Fiscal Compact* para 10; Cf. as well: Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541.

> 'Considering however that where the commitments signed to this effect or which are closely related to this goal contain a clause which *is unconstitutional, call into question the rights and freedoms guaranteed by the Constitution or run contrary to the essential conditions for the exercise of national sovereignty* [emphasis added], [authorization] to ratify them may only be granted after the Constitution has been amended.'[32]

According to this constitutional benchmark, envisaged new EU obligations may not explicitly contradict the French Constitution, as this would result in a direct, formal conflict with French constitutional law. This formal requirement is complemented by substantive restrictions which exclude competence conferrals that either conflict with constitutional rights or with the French sovereignty doctrine.[33] Considering the first, the conferral may not challenge 'rights and freedoms guaranteed by the Constitution'.[34] This constitutes essentially a safeguard for the protection of fundamental rights and other subjective rights specifically recognized by the French Constitution.[35] Concerning the latter, the conferral may also not violate 'the essential conditions for the exercise of national sovereignty'. Whereas the prior substantive limit protects individual, subjective rights, this second substantive limit protects French sovereignty and with it the democratic decision-making process in France.[36]

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32 *Fiscal Compact* para 10; Which confirms the *Conseil*'s established jurisprudence, cf. *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; Prior to its judgment on the EU Constitutional Treaty, the Conseil did not explicitly mention the second limit on the protection of constitutional rights, cf. *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541.

33 Although one might actually identify three separate limits in this, the academic writing emphasized that a 'simple' textual/formal contradiction is not sufficient for identifying a conflict, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771-772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539.

34 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138.

35 For example, the collective rights established in Articles 1 to 3 French Constitution are covered by the EU Charter protection and therefore fall under the constitutional rights benchmark according to the *Conseil Constitutionnel*, cf. *Treaty Establishing a Constitution for Europe* para 16; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 542; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 498.

36 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539-541; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel'

In case the *Conseil Constitutionnel* identifies a conflict between an envisaged EU commitment and one of the two constitutional limits the French legislator can either modify the EU commitment in order to preempt the constitutional conflict or it can amend the French Constitution.[37] Since the Maastricht Treaty, the constitution-amending legislator opted for the second option and modified the French Constitution whenever the *Conseil Constitutionnel* identified an incompatibility. The result is therefore, that the French Constitution contains several explicit acknowledgements of competence transfers to the EU in its Title XV.[38]

When confronted with EU fiscal integration proposals, the sovereignty limit appears to be the most relevant obstacle within the French constitutional order.[39] This can be deduced from the Conseil's previous decisions, where it identified monetary, economic and fiscal matters as competence areas that are closely related to national sovereignty.[40] Therefore, it seems possible that EU fiscal integration proposals will conflict with the sovereignty limit.

2.1.2 *Relevant constitutional limits for EU secondary law*

In light of the outlined *internal* constitutional obligations that apply to ratified international and EU commitments,[41] the *Conseil Constitutionnel* applies a less comprehensive constitutional review *vis-à-vis* EU secondary acts. The previously outlined material limits are not applicable. Instead, the *Conseil Constitutionnel*

493-494; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884.

37 Following Article 89 French Constitution, as emphasized by the *Conseil*, cf. *Review of Maastricht Treaty (Maastricht I)* para 14; *Treaty Establishing a Constitution for Europe* para 7; *Lisbon Treaty* para 9; Cf. as well Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123.

38 Introduced with the Maastricht Treaty, cf. Peter Oliver, 'The French Constitution and the Treaty of Maastricht' (1994) 43 International & Comparative Law Quarterly 1, 16; Generally speaking, these limited acknowledgements result in a sort of constitutional 'patchwork', cf. Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 530.

39 See for example the constitutional assessment of EMU, which was deemed to affect essential sovereign competences, cf. *Review of Maastricht Treaty (Maastricht I)* para 43; Or the assessment of the Fiscal Compact under the sovereignty limit, cf. *Fiscal Compact* paras 16, 30; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265.

40 *Fiscal Compact* para 16.

41 Namely, the combined reading of the concept 'immunité des conventions ratifiées' and the principle of 'pacta sunt servanda' that apply to international commitments according to the *Conseil Constitutionnel*, cf. *Review of Maastricht Treaty (Maastricht I)* para 7; Cf. as well: Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478-479; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303.

developed the concept of French '*constitutional identity*'.[42] Namely, the *Conseil* established:

> 'Firstly, the transposition of a Directive cannot run counter to *a rule or principle inherent to the constitutional identity of France* [emphasis added], except when the constituting power consents thereto [...].'[43]

Based on this concept, the *Conseil* assesses whether the French implementation of obligations stemming from EU secondary law, in particular EU Directives, conflicts with core constitutional values inherent in the identity of the French Republic.[44] Subsequently, the Conseil extended the scope of this *constitutional identity* review to the implementation of obligations stemming from EU regulations[45] and to international agreements that are based on exclusive EU competences,[46] yet it did not extend it to EU primary law obligations.

Although the primary focus of the comparison rests on the available constitutional space for EU fiscal integration steps, and thus on the material limits that apply to the conferral of additional competences, the French *constitutional identity* doctrine will be equally assessed. One reason for this is that the French conception of *constitutional identity* differs from the conception in other Member States, which established *constitutional identity limits* as strict restrictions for the conferral of powers. Therefore, the French limit might constitute an interesting example for a different design of *national constitutional identity* concerns. It could function as a *best practice* inspiration. Another reason is that EU fiscal integration ambitions will likely require the enactment of EU secondary law, which would be confronted with the French *constitutional identity limit*.[47] Consequently, when drafting EU fiscal integration steps, considering this potential French limit to the effect of Eurozone secondary law might be equally taken into account.

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42 *Comprehensive Economic and Trade Agreement (CETA)* para 14; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 18; *French Law on Genetically Modified Organisms* para 44; *Copyright and Related Rights in the Information Society* para 19; Cf. as well Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 452; Characterized as a 'low-intensity review', cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 141.

43 *Copyright and Related Rights in the Information Society* para 19.

44 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 147-148; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Referring to constitutional principles that are specific to France, cf. Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 312; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388.

45 *National Law Related to the Protection of Personal Data Under the GDPR* paras 3, 26; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 143.

46 *Comprehensive Economic and Trade Agreement (CETA)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 145; Larik, 'Prêt-à-Ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017', 764.

47 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 148.

2.1.3 Ambiguity of the term 'constitutional identity' in the French context

When considering the prospect of EU fiscal integration in France, one might presume that the *constitutional identity limit* developed by the *Conseil Constitutionnel* is the most significant obstacle to EU fiscal integration proposals.[48] This conclusion seems convincing from a comparative perspective. In Germany, the *constitutional identity* lock is an absolute restriction to further EU integration step. Any conflict with this German identity is an impermissible violation of Article 79 (3) Basic Law.[49] Similarly, the subsequent assessment highlights that the constitutional tribunals in Spain[50] and Poland[51] equally employ *constitutional identity* as a strict limit to the conferral of competences to the EU. Hence, the French constitutional terminology might be characterized as 'misleading' from a comparative perspective.[52]

As previously highlighted, the French *constitutional identity limit* is restricted in its scope of application to derived EU law and does not apply to the initial conferral of competences.[53] Furthermore, the concept is a judicial concept

48 *National Law Related to the Protection of Personal Data Under the GDPR* para 3; *Comprehensive Economic and Trade Agreement (CETA)* para 14; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 18; *French Law on Genetically Modified Organisms* para 44; *Copyright and Related Rights in the Information Society* para 19; Cf. as well Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues'; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?'.

49 The German *constitutional identity lock* is based on Article 79 (3) German Constitution, cf. Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem', 293-294; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388.

50 *Treaty Establishing a Constitution for Europe* Section II. 2. and 3.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 269-270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

51 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 501; Władysław Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' (2011) 12 ERA Forum 197, 201.

52 Importantly, constitutional actors employ their own terminology, cf. Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 878.

53 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 147; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478-479; Reestman, 'France –

without an explicit constitutional basis.[54] In fact, the constitution-amending legislator even refused to introduce an explicit *constitutional identity* provision into the French Constitution.[55] Instead, the concept was developed by the *Conseil Constitutionnel*, which drew inspiration from EU law itself.[56] Through this limit, the *Conseil* assesses whether the EU offers an equivalent protection for the protected *constitutional identity* concerns under review[57] by equally acknowledging the ability of the legislator to overcome any resulting conflict.[58] Therefore, the French *constitutional identity limit* is, on the one hand, only of indirect importance for EU fiscal integration proposals. On the other hand, it is obvious that the French *constitutional identity* concept differs from the mentioned strict *constitutional identity limits* apparent in other Member States. Thus, the characteristics and function of the different limits are of primary relevance to allow for an insightful comparison – and not the constitutional terminology.[59]

Therefore, the following assessment focusses on the highlighted material limits applied to the conferral of competences, which seem comparable to the *constitutional identity* limits in other Member States, as they restrict the available scope for EU integration steps (2.2.).[60] And only subsequently, the analysis

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Conseil Constitutionnel on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303.

54 In contrast to, for example, the German *constitutional identity lock* which is based on Article 79 (3) Basic Law, cf. Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem', 293-294.

55 Notably, when debating the constitutional amendments following the Maastricht Treaty, cf. Saiz Arnaiz and Alcoberro Llivina, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' 7.

56 Notably, the identity provision in the proposed EU Constitutional Treaty, now enshrined in Article 4 (2) TEU, cf. Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 387-388; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*', 445.

57 Comparable to the German *Solange*-approach, cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 547; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 454; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 389.

58 As explicitly highlighted by the *Conseil*, cf. *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Denis Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' (2011) 41 Israel Law Review 389, 402-403.

59 Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 878.

60 As seen in the past, where the *Conseil Constitutionnel* declared several EU-Treaties in conflict with the national sovereignty doctrine and required constitutional amendments, cf. *Lisbon Treaty* para 34; *Treaty Establishing a Constitution for Europe* para 43; *Revision of Amsterdam Treaty* para 32; *Review of Maastricht Treaty (Maastricht I)* para 52; Cf. as well: Millet, 'Constitu-

considers the design of and the protection offered by the French *constitutional identity limit* in order to potentially identify a national *best practice* (2.3.).

2.2 Essential conditions for the exercise of national sovereignty

Based on the jurisprudence of the *Conseil Constitutionnel*, the *essential conditions for the exercising of national sovereignty ('conditions essentielles d'exercice de la souveraineté nationale')*[61] constitute the most immediate constitutional obstacle to EU fiscal integration proposals in France.[62] Based on this concept, the *Conseil Constitutionnel* determines whether an envisaged transfer of competences (limitation of sovereignty due to substantive changes) or whether a modification of the conditions for the exercise of already conferred competences to the EU (limitation of sovereignty due to procedural changes) affect French sovereignty.[63]

2.2.1 Institutional actor enforcing the limit

The French sovereignty limit was developed by the *Conseil Constitutionnel*, an institution that was established by the 1958 French Constitution.[64] The constitutional drafters envisaged the *Conseil* as an independent stabilizer for and supervisor of the new French separation of power.[65] Thus, the *Conseil* was

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tional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772.

61 Consistently employed by the *Conseil Constitutionnel* in relation to EU commitments since the Maastricht Treaty, cf. *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14.

62 Confirmed by its application to the Fiscal Compact, cf. *Fiscal Compact* para 10; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 122-123; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491.

63 *Lisbon Treaty* para 20; *Revision of Amsterdam Treaty* paras 27-28; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 526.

64 Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Sophie Boyron, 'Constitutional Law' in John Bell, Sophie Boyron and Simon Whittaker (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008) 156.

65 Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 305-306; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 7; Albeit originally, designed as a 'secondary institution', cf. Sylvain Brouard,

created to monitor the political process and the new division of competences between the executive and the legislative powers in a mixed parliamentary and presidential constitutional system introduced by the 1958 Constitution.[66] The established institution resembled in its structure, organization as well as its initial tasks a constitutional advisory body,[67] which is also reflected in its name: a 'constitutional *council*' rather than a 'constitutional *court*'.[68]

Notably, the conception as 'advisory body' is reflected in its composition and the appointment of its members.[69] The 9 members of the *Conseil Constitutionnel* are appointed in equal parts by the French President, the President of the *Assemblée Nationale* and the President of the *Sénat* for a term of 9 years. The appointed members are not required to have a legal professional qualification.[70] Furthermore, former French Presidents have the constitutional right to sit on the *Conseil Constitutionnel* as *member by law*.[71] Hence, the *Conseil*'s members are not trained lawyers and have clear political affiliations. These affiliations seem to impact its final verdict. As research by *Brouard* shows, in case a majority of the members shares the same political affiliation as the government, the *Conseil* is more likely to rule in favor of the government.[72] This suggests that political considerations which motivate the appointment of a new member to the *Conseil Constitutionnel* partly permeate into the final constitutional judgments.[73] From the initial design as 'advisory body', the *Conseil Constitutionnel* developed into an institution that increasingly resembles

'The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition' (2009) 32 West European Politics 384, 385.

66 Susan Wright, 'The French *Conseil Constitutionnel* Under an Evolving Constitution' (2017) 23 European Public Law 245,, 251; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Boyron, 'Constitutional Law' 156; Bell, *French Legal Culture* 33; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?', 6-7.

67 Reflecting the historic rejection of 'judge-made law' in France, cf. Steiner, *French Law – A Comparative Approach* 64; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 308; Boyron, 'Sources of Law' 15; Axel Spies, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' (1990) 9 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1040, 1041.

68 Bell, 'Court Institutions', 42; Bell, *French Legal Culture* 33; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 7.

69 Boyron, 'Constitutional Law' 156; Bell, *French Legal Culture* 42; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 7.

70 Bell, 'Court Institutions' 42.

71 As established in Article 56 French Constitution, cf. Boyron, 'Constitutional Law' 156; Spies, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' 1042;

72 Brouard, 'The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition' 394.

73 Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 302; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 7.

a judicial constitutional court. It conducts constitutional review[74] and its decisions are final and binding on all French state authorities.[75]

Clearly, the highlighted new referral mechanism for constitutional questions (*QPC*) integrates the *Conseil Constitutionnel* into the judicial branch of state power and thereby supports this on-going transformation.[76] Thereby, the mechanism requires the *Conseil Constitutionnel* to address concrete private disputes and adjudicate on subjective constitutional rights, which constitutes a core task of constitutional courts.[77] It thereby equally requires the *Conseil* to increasingly interact with the CJEU on EU law-related questions.[78]

Overall, the *Conseil Constitutionnel* adjudicates centrally on the constitutionality of EU primary law. In case the *Conseil* identifies a conflict between the sovereignty limit and a conferral of competences such conferral requires a prior amendment of the constitutional text.[79] Through its review, the *Conseil* traditionally functions – as *Ziller* fittingly puts it – as a constitutional '*points-*

74 Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 302-303; Pfersmann, 'Concrete Review As Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective', 223.

75 Cf. Article 62 French Constitution, Steiner, *French Law – A Comparative Approach* 68; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 319; Note as well the systematic-hierarchical importance of constitutional decisions, as the French Constitution sits 'at the summit of the domestic legal order', *Lisbon Treaty* para 8; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539.

76 Dyevre, 'The French Constitutional Council' 328; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 328-329; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 137; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 312.

77 Wright, 'The French *Conseil Constitutionnel* Under an Evolving Constitution', 250-251; Core intention of the constitutional reform that introduced the QPC, cf. De Visser, *Constitutional Review in Europe – A Comparative Analysis* 136.

78 Note, the first references by the *Conseil*: C-168/13 PPU *Jeremy F* [2013] (CJEU); Cf. as well: Millet and Perlo, 'The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law? ' 1475.

79 Steiner, *French Law – A Comparative Approach* 7; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Wendel, 'Lisbon Before the Courts: Comparative Perspectives', 103; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)', 69; Bell, *French Legal Culture* 200.

man'[80] that identifies constitutional conflicts, which can then be overcome by the French legislator.[81]

2.2.2 *Procedural framework – or how to trigger the limit*

The *Conseil Constitutionnel* applies the sovereignty limit in its abstract *ex ante* constitutional review of envisaged conferral of competences to the EU, which can be initiated based on Article 54 and Article 61 (2) French Constitution. Article 54 French Constitution empowers the French President, the French Prime Minister, the President of the *Assemblée Nationale*, the President of the *Senat*, 60 members of the *Assemblée Nationale* or 60 senators, to initiate an abstract *ex ante* review of the EU agreement itself. Hence, this constitutional review occurs prior to the ratification of the supranational obligations and although triggering Article 54 French Constitution is not compulsory, all EU-Treaties since Maastricht were reviewed following Article 54 French Constitution, with the exception of the Nice Treaty.[82] It seems convincing to argue that the same would apply to future EU Treaty reforms, including possible conferrals required to accommodate the more far-reaching EU fiscal integration steps. In case the new EU commitment is not directly challenged, the conferral of powers can also be indirectly disputed by proceeding *ex ante* against the French legislative act that ratifies the EU Treaty following Article 61 (2) French Constitution.[83]

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80 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 270; Spies, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' 1041; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 6-7.

81 As the *Conseil* consistently emphasized in relation to the sovereignty limit, cf. *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Equally emphasized in relation to the *constitutional identity limit*, cf. *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403.

82 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 871.

83 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France', 529; Christine Maugüé, 'Le Conseil Constitutionnel et le droit supranational' (2003) 2 Le Seuil 53, 53.

Furthermore, it might be possible that a *concrete ex post* review is initiated following the *QPC*-mechanism.[84] Based on this procedure, private applicants can challenge the validity of a French statue claiming that their constitutionally guaranteed rights and freedoms are violated. The matter is then submitted to either *Conseil d'État* or the *Cour de Cassation*, which filter the references based on constitutional importance.[85] Only important and new constitutional questions will be referred to the *Conseil Constitutionnel*. Considering the potential implications of this mechanism for challenges against EU primary law, three observations can be submitted. First, the *Conseil Constitutionnel* has refused to review statutes against international agreements, including EU law, given that Article 55 French Constitution assigns a special status to duly ratified international law.[86] Second, an evaluation of the EU-Treaties or a Treaty-provision through the *QPC*-mechanism is conceptually excluded as the *Conseil Constitutionnel* is not re-considering matters it already ruled on before.[87] Given that all EU-related conferrals of powers were in the past challenged following Article 54 French Constitution, an additional consideration of the constitutionality of EU-Treaties through Article 61-1 French Constitution appears preempted.[88] And finally, it is questionable whether EU fiscal integration steps would directly violate subjective constitutional rights, which constitute the basis of this *concrete constitutional review*.

Consequently, it seems that EU fiscal integration measures will likely only be challengeable *ex ante* by privileged applicants following Articles 54 or 61 (2) French Constitution. These procedures impose tight deadlines as the Conseil is required to deliver its ruling within one month after receiving the application. The government may even request an expedited procedure, which requires the Conseil to rule within eight days.[89] Considering the Conseil's most

84 Pfersmann, 'Concrete Review As Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective' 231-232.

85 Ibid 238-239.

86 *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* paras 11, 16; Decision 2010-4/17 QPC *Mr Alain C. an others* [2010] (French Conseil Constitutionnel) para 11; Cf. as well: Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 778-779; Alina Berger, *Anwendungsvorrang und nationale Verfassungsgericht*, vol 113 (Jus Internationale et Europaeum, Mohr Siebeck 2015) 230.

87 As determined by Section 23 (2) no. 2, a re-examination is only possible in case of changed circumstances, cf. Decision 2010-14/22 QPC *Mr Daniel W and Others* [2010] (French Conseil Constitutionnel) paras 12-13; *Revision of Amsterdam Treaty* para 27.

88 As outlined, it is a political convention to challenge EU-Treaties *ex ante*, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Subsequently, principle of res judicata prevents *Conseil* to reconsider the matter, cf. *Mr Daniel W and Others* paras 12-13; *Revision of Amsterdam Treaty* para 27.

89 As stipulated in Article 61 (3) French Constitution, which applies equally to the ex ante review of international agreements according to Article 19 Ordinance 58-1067 on the *Conseil Constitutionnel*, cf. Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 530-531.

recent decisions on EU integration matters, it delivered its decision on the EU Constitutional Treaty within 22 days,[90] its decision on the Lisbon Treaty within only eight days,[91] and its decision on the Fiscal Compact within 28 days.[92] Particularly in light of the complexity of EU-Treaties, these deadlines seem very tight. Yet, they ensure that the ratification of international commitments is not delayed in France because of constitutional proceedings. Taken together, the conducted *ex ante* review underscores the *Conseil Constitutionnel*'s function as '*pointsman*'[93], given that the *Conseil* identifies constitutional conflicts before they actually materialize.

2.2.3 *Constitutional basis of the employed limit*

The French '*essential conditions for the exercising of national sovereignty*'[94] limit was established by the *Conseil Constitutionnel* and, as the name suggests, it is based on the French sovereignty doctrine. The *Conseil Constitutionnel* derived this constitutional limit from a combined reading of several provisions of the French *bloc de constitutionnalité*, namely Article 3 *Declaration* of 1789, Articles 3 and 53 French Constitution (of 1958), as well as § 15 Preamble of French Constitution of 1946.[95] Since its decision on the EU Constitutional Treaty, the

90 *Treaty Establishing a Constitution for Europe*, where the French President referred the matter on 29.10.2004 and the *Conseil Constitutionnel* delivered its decision on 19.11.2004.

91 *Lisbon Treaty*, where the French President referred the matter on 13.12.2007 and the *Conseil Constitutionnel* delivered its decision on 20.12.2007.

92 *Fiscal Compact*, where the French President referred the matter on 13.07.2012 and the *Conseil Constitutionnel* delivered its decision on 9.08.2012.

93 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 270; Spies, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' 1041; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 6-7.

94 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 493-494; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884.

95 *Lisbon Treaty* paras 3-5; *Fiscal Compact* paras 4-6; For historic reasons, the 1958 French Constitution incorporates parts of previous French constitutional documents, which together form the so-called *'bloc de constitutionnalité'*, cf. Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 773; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 538; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491.

Conseil also refers to the EU enabling clause in Article 88-1 French Constitution.[96] Hence, the French sovereignty doctrine is enshrined in different constitutional provisions, which jointly constitute the textual and conceptual basis for the sovereignty limit.

The enumerated provisions serve different constitutional functions. It appears that Article 3 *Declaration* of 1789 and Article 3 French Constitution (1958) are primarily concerned with establishing the principle of sovereignty as such and its general conceptual design. To that end, Article 3 *Declaration* of 1789 establishes that sovereignty lies in the Nation, whereas Article 3 French Constitution (1958) establishes that sovereignty is vested in the people. One may identify here a combination of conceptual elements relating to national sovereignty and elements of popular sovereignty, as *Ziller* observes.[97] In addition, Article 3 French Constitution (1958) establishes the principle of democracy, including the right to vote and the electoral principles. Thus, the provision specifies the form of exercising French sovereignty.[98] Subsequently, the other enumerated provisions establish the specific framework for international and in particular EU cooperation.[99] Article 53 French Constitution (1958) determines that the conclusion of international agreements requires parliamentary approval. § 15 Preamble of the French Constitution of 1946 clarifies that French sovereignty can be limited for the sake of international cooperation, however requiring that such limitation of sovereignty is based on reciprocity.[100] And finally, Article 88-1 French Constitution (1958) reiterates these conditions for EU cooperation, thereby clarifying that it entails a common exercise of the conferred powers, and importantly not the conferral of sovereignty as such.[101]

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96 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 538; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 492-493.

97 Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 267; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520.

98 Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520.

99 Notably Title XV of the French Constitution, cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 533; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 861; Oliver, 'The French Constitution and the Treaty of Maastricht' 16.

100 Andrea Hamann, 'Sur un 'sentiment' de souveraineté' (2018) 20-21 Jus Politicum – Revue de droit politique 187, 188; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 538; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520; Oliver, 'The French Constitution and the Treaty of Maastricht' 12.

101 Thereby reflecting the *Conseil Constitutionnel*'s conception of French sovereignty, cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 532; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 861-862; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884.

A combined reading of these five constitutional provisions reveals that they cover the conceptual origin of French sovereignty as well as conditions and requirements for the exercise of sovereign powers. This underlying intention is equally reflected in the name of the constitutional limit '*essential conditions for the exercising of national sovereignty*', which suggests that the limit is focused on the use or the exercise of sovereign powers, rather than merely preserving sovereignty as such. In addition, given the reference to Article 88-1 French Constitution, the conception of the sovereignty limit is specific to the conferral of competences to the EU.[102]

2.2.4 *Substantive core protected by the limit*

The resulting French sovereignty limit is primarily a judicial creation of the *Conseil Constitutionnel*, which is defined on a case-to-case basis.[103] The subsequent analysis will determine the substantive content of this constitutional limit *vis-à-vis* EU fiscal integration by departing from the underpinning French sovereignty doctrine (2.2.4.1.) and subsequently turning to the concretization of the identified abstract elements of French sovereignty (2.2.4.2.).[104]

2.2.4.1 The conception of the French sovereignty doctrine

The principle of sovereignty serves as an underlying basis for limiting the conferral of competences to the EU. Obviously, this constitutional principle predates the EU integration process. The principle of sovereignty is of historical importance, as can be deduced from the Conseil's reference to Article 3 *Declaration* of 1789, and it has been subject to intense academic and political debate.[105] An important element of this historically rooted debate is, for

102 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 533-535; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 861-862.

103 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539-540; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 526; As the *Conseil* limits its assessment to what is strictly required to deliver a decision on the referred matter, cf. Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 773.

104 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771-771; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 875; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 525; Oliver, 'The French Constitution and the Treaty of Maastricht' 12.

105 Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 264; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 519-520.

example, the conception of sovereignty as sovereignty of the nation or as sovereignty of the people.[106] Despite the historic importance of sovereignty in the French constitutional culture, it should be emphasized that the references to Article 3 *Declaration* of 1789 and to § 15 Preamble of French Constitution of 1946 are a judicial creation of the *Conseil Constitutionnel*.[107] The Preamble of the current French Constitution merely acknowledges an 'attachment' of the French people to the principle of sovereignty as established in *Declaration* of 1789 and complemented by Preamble of French Constitution of 1946.[108] This historic origin of the French principle of sovereignty impacts the jurisprudence of the *Conseil Constitutionnel*, as for example visible in the evaluation of competence transfer of traditionally important competences which are deemed generally incompatible with French sovereignty.[109]

In addition, the constitutional significance of the principle of sovereignty can be deduced from the systematic position of the principle within the French Constitution. As already mentioned, the Preamble refers to the principle of sovereignty in its first phrase, together with fundamental rights and the protection of the environment, as protected in specifically mentioned constitutional documents. Furthermore, the first title of the French Constitution, which covers Articles 2 to 4, is entitled 'On Sovereignty'.[110] The principle is further specified in Articles 3 (1) and 4 (1) (3) French Constitution, which link sovereignty to the people and the principle of democracy. Given the prominent position within the constitutional text, one can deduce that sovereignty is a core constitutional principle[111] and, moreover, that it is conceptually closely interrelated with the principle of democracy.[112] Based on this constitutional framework, the *Conseil Constitutionnel* draws several conclusions which are summarized in its sovereignty limit.[113]

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106 Olivier Beaud, 'Le Conseil constitutionnel sur la souveraineté et ses approximations' (2018) 20-21 Jus Politicum – Revue de droit politique 143, 147; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 264-268; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520.

107 Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491-492; Oliver, 'The French Constitution and the Treaty of Maastricht' 2.

108 Reflecting the highlighted 'bloc de constitutionnalité', cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 527; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 518; Oliver, 'The French Constitution and the Treaty of Maastricht' 2.

109 Hamann, 'Sur un 'sentiment' de souveraineté' 188; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520.

110 Hamann, 'Sur un 'sentiment' de souveraineté' 187.

111 Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491-493.

112 Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520-521.

113 Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19

First, the *Conseil Constitutionnel* infers from the conception of sovereignty in the French Constitution, that the French legislator may limit sovereignty by participating at the international or EU-level. Here, the *Conseil Constitutionnel* refers to Articles 53 and 88-1 French Constitution to point out that the constitutional text allows explicitly for a limitation of national sovereignty.[114] As a result, not every transfer of competences to the EU conflicts in an unconstitutional manner with the principle of sovereignty, but rather transfers of competences which affect the *essential conditions of the exercising of national sovereignty*.[115]

Second, the *Conseil Constitutionnel* changed its rhetoric in the course of EU integration. Originally, it argued that the French Constitution allowed for a limitation but not a transfer of sovereignty to the supranational level. In its first EU-related decision on the direct election of the European Parliament, the Conseil established:

> 'Considering that, while the preamble to the French Constitution of 1946, confirmed by that of the Constitution of 1958, provides that, subject to reciprocity, France may consent to such limitations of sovereignty that are necessary for the establishment and preservation of peace, *no provision of the French Constitution authorizes transfers of the entire or parts of national sovereignty* [emphasis added] to any international organization whatsoever;'[116]

Hence, initially the *Conseil* apparently distinguished between the limitation of sovereignty, which was permissible under the French Constitution, and the impermissible transfer of sovereignty.[117] This constitutional benchmark proved difficult to apply, given that a limitation of sovereignty conceptually entails the partial shared exercise of sovereign decision-making abilities together with

November 2004, on the Treaty establishing a Constitution for Europe' 873; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520.

114 *Lisbon Treaty* para 7; *Fiscal Compact* para 8; Cf. as well: Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 132; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 873.

115 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138-139; Sophie Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' (1999) 6 Maastricht Journal of European and Comparative Law 169, 175-176.

116 Decision 76-71 DC *Direct Election of the European Parliament* [1976] (French Conseil Constitutionnel) para 2 (own translation).

117 Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 274-275; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 521; Jörg Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung*, vol 42 (Schriften zum Europäischen Recht, Duncker & Humblot 1997) 115-116; Oliver, 'The French Constitution and the Treaty of Maastricht' 7-8.

the supranational level.[118] Subsequently, the *Conseil* departed from this distinction and established in its decision on the Maastricht Treaty:

> 'It follows from these various institutional provisions that respect for national sovereignty does not preclude France, acting in accordance with the Preamble to the 1946 Constitution, from concluding international agreements relating to participation in the establishment or development of a permanent international [organization] enjoying legal personality and decision-making powers on the basis of *transfers of powers decided on by the Member States* [emphasis added], subject to reciprocity.'[119]

Thus, the *Conseil Constitutionnel* clarified that the French sovereignty doctrine allowed for a transfer of (sovereign) powers.[120] The previously established prohibition of a transfer of sovereignty was consequently scrapped by the *Conseil*, as becomes also obvious from the subsequent decisions.[121] According to the new conception, powers and competences can be conferred to the European level, which is in fact the exercise of national sovereignty by the legislator, without putting French sovereignty directly into question. This indicates an evolution of the principle of sovereignty from an absolute, indivisible construct to a more open conception, which defines sovereignty based on the competences of the state, which can be partly conferred to the supranational level without eroding French sovereignty.[122] The apparent openness of French sovereignty towards the conferral of competences to the EU-level is, however, confined by the *essential conditions limit*.[123]

Finally, the altered conception of the French sovereignty doctrine indicates that the judicial review of sovereignty conducted by the *Conseil Constitutionnel*

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118 Hamann, 'Sur un 'sentiment' de souveraineté' 188; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 522; Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 119; Oliver, 'The French Constitution and the Treaty of Maastricht' 8.

119 *Review of Maastricht Treaty (Maastricht I)* para 13.

120 Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 523; Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 132-134;

121 *Fiscal Compact* para 9 (although speaking of 'transfer of competences' in this decision); *Lisbon Treaty* para 8; *Treaty Establishing a Constitution for Europe* para 6; *Revision of Amsterdam Treaty* para 6; Cf. as well: Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 523

122 Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 492; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 524.

123 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138-139; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 883; Oliver, 'The French Constitution and the Treaty of Maastricht' 12.

focuses on the transfer of powers and competences to the EU. The emerging question becomes whether the EU commitment under consideration entails a shift of powers to the EU which is relevant for the exercise of national sovereignty.[124] Based on this conception, it seems likely that EU fiscal integration steps could conflict with French sovereignty as these integration steps would entail the conferral of important national competences, which is substantiated in the following.

2.2.4.2 Sovereignty as limit to EU integration: A competence-based approach

The established case law provides for an indication of which competence conferrals fall within essential areas and might therefore conflict with the sovereignty limit. In that regard, the conferral of competences in relation to Union citizenship, cooperation in AFSJ matters and the free movement of persons as well as second, the transfer of powers required to establish the EMU and the single currency were considered particularly contentious under the French sovereignty limit.

– *Union citizenship, AFJS and free movement*

In its Maastricht-judgment, the *Conseil Constitutionnel* identified two envisaged competence transfers in this area as constitutionally problematic. The first one concerned the right for EU citizens to vote and stand as candidate in French municipal elections.[125] In its appraisal, the *Conseil* pointed out that these proposed rights conflicted with the French Constitution, given that Article 3 French Constitution limited the right to vote and stand in French municipal elections to French citizens.[126] In contrast, the right to vote and stand in the French elections to the European Parliament for EU citizens was deemed unproblematic, for two reasons. First, according to the Conseil, Article 3 French Constitution only applied to elections provided by the French Constitution and the European Parliament is an institution based on the EU-Treaties.[127]

124 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 526-529.

125 *Review of Maastricht Treaty (Maastricht I)* paras 26-27; Cf. as well: Gerald L. Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' (2012) 45 Cornell International Law Journal 257, 297; Oliver, 'The French Constitution and the Treaty of Maastricht' 13.

126 *Review of Maastricht Treaty (Maastricht I)* paras 26-27; Cf. as well: Oliver, 'The French Constitution and the Treaty of Maastricht' 13.

127 *Review of Maastricht Treaty (Maastricht I)* paras 32-35; Cf. as well: Oliver, 'The French Constitution and the Treaty of Maastricht' 13.

Second, the *Conseil* emphasized that the European Parliament was not 'a sovereign assembly with general lawmaking power.'[128] In a legislative follow-up, the constitution-amending legislator addressed these concerns and introduced Article 88-3 French Constitution.

The second concern related to the common EU visa system. Initially, all decisions were to be taken unanimously by the EU Council. The *Conseil Constitutionnel* clarified that under these procedural rules, no conflict with the French sovereignty limit arose.[129] However, given that the procedural rules would change to a qualified majority vote by 1. January 1996, the *Conseil* identified a constitutional conflict with the French Constitution.[130] In the subsequent proceedings on the Amsterdam Treaty, the *Conseil Constitutionnel* was again confronted with the common EU visa system. In its decision, the *Conseil* clarified that it would not consider the general conferral of competences, as the 'status of res judicata of the Constitutional Council's decision preclude[d]'[131] to re-consider this conferral. However, it highlighted that the procedural conditions for the exercise of the conferred powers changed, given that following the proposed rule the co-decision procedure would apply after five years.[132] Hence, the changes to the procedural framework required an additional amendment of the French Constitution. Taken together, this confirms that visa policy is seen as a competence area that is essential to the exercise of French sovereignty.

In its subsequent case law, the *Conseil* identified a sovereignty conflict between the new competences under the title 'Asylum, immigration and crossing of internal borders', which was introduced by the Amsterdam Treaty. Interestingly, coordinating the decision-making process at the EU-level was not deemed problematic under the sovereignty limit, as long as decisions were taken in the Council by unanimity.[133] However, the Treaty provisions allowed for a modification of the procedural requirements from a unanimous vote in

128 *Review of Maastricht Treaty (Maastricht I)* para 34.

129 Ibid para 49; Cf. as well: Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

130 *Review of Maastricht Treaty (Maastricht I)* para 49; Cf. as well: Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

131 *Revision of Amsterdam Treaty* para 27; As the Conseil confirmed the original conferral, cf. Decision 92-312 DC *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* [1992] (French Conseil Constitutionnel) paras 37-40.

132 *Revision of Amsterdam Treaty* para 28.

133 Ibid para 23; Specifically, the *institutional choices* under the conferral were important for the assessment, cf. Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 177.

the EU Council to the co-decision procedure after five years.[134] The *Conseil* pointed out that such a change of the procedural requirement would not require national ratification[135] and therefore a constitutional amendment was required.[136] It becomes obvious that not only the nature of the conferred competences is closely reviewed by the *Conseil*, but also the conditions attached to the exercise of this competence – and therefore the remaining control of national parliaments over decision taken – at the supranational level. Hence, the *essential conditions* limit has both a substantive as well as a procedural or *institutional* dimension to it.[137] From the previous outline, it appears that common decision-making at the EU-level in important sovereign matters are permissible, as long as decisions are taken by unanimity. In case decisions on these matters are taken by qualified majority vote, a conflict with the French sovereignty limit will likely emerge. Therefore, it seems that both the substantive dimension, namely, to identify an essential sovereign competence, and the procedural dimension, namely, to consider the procedural modalities attached to them, are cumulative.[138]

This finding is confirmed by the *Conseil*'s Lisbon-judgment. In this judgment, the *Conseil* identified additional conflicting competence transfers in relation to AFSJ-matters enshrined in Title V of the TFEU.[139] Regarding these transfers, the Conseil paid particular attention to the attached procedural framework. The *Conseil* noted:

> 'The provisions of the Treaty of Lisbon which transfer to the European Union under the *'ordinary legislative procedure'* [emphasis added] powers inherent in the exercising of national sovereignty require a revision of the Constitution.'[140]

134 Andoni Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' (2009) 75-76 Revista de Derecho Político 409, 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 177.

135 *Revision of Amsterdam Treaty* para 24.

136 Ibid paras 25-26; Cf. as well: Marie-Luce Paris, 'Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law' (2010) 29 Yearbook of European Law 21, 28; Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 177; Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 Common Market Law Review 703, 717.

137 Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884-885; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

138 Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

139 Notably, Articles 75, 77, 79 (2) lit. d, 81, 82, 83, and 86 TFEU, cf. *Lisbon Treaty* paras 18, 19; Cf. as well: Paris, 'Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law' 56.

140 *Lisbon Treaty* para 18.

Hence, the modalities attached to the conferral are as important for the *Conseil*'s assessment as the competence area as such. Overall, the outline reveals that citizenship rights, the control of national borders, including immigration and asylum, cooperation in security matters, for example by police forces, and judicial cooperation are competence areas that are 'inherent to the exercising of national sovereignty'.[141] However, the assessment of the previous case law also shows that not only the competence area as such is decisive, but also the (procedural) modalities attached to it. As previously outlined, limiting sovereign powers to exercise them jointly at the EU-level is perceived as an exercise of French sovereignty and is therefore, as such, not incompatible with the French Constitution. Yet, in case the legislator transfers these important competences to the supranational level without retaining a constitutive say, a conflict with the sovereignty limit might emerge.

– *EMU and single currency*

The *Conseil Constitutionnel* also identified decision-making powers on EMU policies as important for the exercising of national sovereignty. In the Maastricht-decision, the *Conseil* found the Treaty provisions on the creation of the Economic and Monetary Union, and more specifically the creation of the Euro, to be in conflict with national sovereignty. It established:

> 'The effect of the provisions applicable from the beginning of the third stage of economic and monetary union is that such an objective will result in the conduct of *single monetary and exchange-rate policies* according to arrangements which deprive the Member States of their own powers in a matter which is *vital to the exercise of national sovereignty*.'[142]

Thus, the Conseil characterized monetary policy, including specifically exchange-rate policy, as a central or core competence area of the sovereign state.[143] Consequently, the French constitution-amending legislator was required to amend the French Constitution, and introduced Article 88-2 (1), which

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141 Ibid para 20; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

142 *Review of Maastricht Treaty (Maastricht I)* para 43; Cf. as well: Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

143 *Review of Maastricht Treaty (Maastricht I)* para 45; cf. as well Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527; Oliver, 'The French Constitution and the Treaty of Maastricht' 13, 15; This conflict was anticipated in light of the *Conseil Constitutionnel*'s decision on the IMF, cf. Decision 78-93 DC *Law Authorizing an Increase in France's Share in the International Monetary Fund (IMF)* [1978] (French Conseil Constitutionnel) para 5; As pointed out by Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 133.

enshrined French participation in the EMU into the constitutional text.[144] The *Conseil* confirmed this constitutional assessment in relation to the Fiscal Compact during the Eurocrisis, where it determined that economic and fiscal policies are competences that are closely related to the core of national sovereignty.[145] Following the *Conseil*'s reasoning, economic and fiscal decisions are crucial elements of the annual budgetary planning which is conducted by the French Parliament and which relates to the individual's right to democracy.[146] Specifically, the *Conseil* recalls that the democratic parliamentary control of the budget stems from Article 14 *Declaration* of 1789.[147] As outlined in the decision, the importance of democratic parliamentary control of the budget translates into parliamentary prerogatives constitutionally enshrined in Articles 24, 34, 47 and 47-1 French Constitution.[148]

When assessing the Fiscal Compact, the *Conseil* concluded that it did not establish any new constraints on national sovereignty, as it was merely reiterating the already existing EU balanced budget rules.[149] The *Conseil* conducted a more nuanced assessment of the requirement to implement the balanced budget rule into constitutional – or similarly binding national – law. Following the Conseil's assessment, two different readings of this obligation may be adopted: Either, a directly binding rule would have to be enacted which would alter parliamentary and governmental budgetary prerogatives, enshrined in Articles 34 and 47 French Constitution.[150] Such a binding rule would then require a constitutional amendment.[151] Or, in the alternative, if only an institutional act – which sits in the hierarchy of norms below the constitution and which could determine multiannual guidelines for public finances – would have to be adopted, no such constitutional amendment would be required.[152] Such an institutional act would only establish a (temporary) framework for the exercise of these prerogatives, which would furthermore be reviewed by

144 *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 35; Interestingly, Article 88-2 French Constitution is formulated in a very open manner without specifying what competences are transferred, cf. Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 302.

145 *Fiscal Compact* para 16.

146 Ibid para 13.

147 Ibid para 13.

148 Ibid para 13.

149 Ibid paras 14, 16; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119.

150 *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265.

151 *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 120.

152 *Fiscal Compact* paras 23-24; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265;

the *Conseil Constitutionnel* according to Article 61 (1) French Constitution.[153] The *Conseil* left the decision concerning the applicable interpretation to the legislator.[154] The French legislator opted for the second interpretation and did not amend the French Constitution, which appears paradoxical, as it undermines specifically the purpose of the Fiscal Compact to ensure that a permanent national implementation of the balanced budget rule is ensured.[155] At the same time, one can again see the *Conseil*'s institutional role as '*pointsman*' from the assessment conducted, which merely signaled possible constitutional conflicts to the legislator.

Based on this jurisprudence, it can be concluded that economic and fiscal policies are considered as essential for the exercising of national sovereignty. This equally covers the process of determining the national budget, without being legally restricted by international or EU commitments. Any such binding commitment would conflict with the parliamentary and governmental budgetary prerogatives enshrined in Articles 34, 47 French Constitution. Both provisions constitutionally secure the democratic control of the people over budgetary decisions covered as an important element by the French sovereignty limit,[156] which has major implications for EU fiscal integration proposals.

2.2.4.3 Interim conclusion – a substantive limit to EU fiscal integration?

Overall, the assessment reveals that the sovereignty limit is mainly construed as a competence-based restriction to EU integration. In its jurisprudence, the *Conseil* identified two broad competence areas that are important for the exercise of national sovereignty.[157] These are, first, citizenship rights, the control of national borders, the judiciary and security matters, as well as second, budgetary, economic, financial, fiscal and monetary policies. For EU fiscal integration the second competence area is highly relevant. In particular, the parliamentary and governmental fiscal, budgetary prerogatives enshrined in Articles 24, 34, 47 and 47-1 French Constitution as well as the individual's right to democratically control fiscal decisions, enshrined in Article 14 *Declaration* of 1789, might conflict with EU fiscal integration proposals.[158]

The assessment further revealed that the modalities attached to the conferred competences significantly affect the constitutional appraisal. Hence, a

153 *Fiscal Compact* para 27; Cf. as well: Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 122.

154 *Fiscal Compact* para 28; Which illustrates a reluctance of the *Conseil* to address *political* questions, cf. Pietro Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) 42 Brooklyn Journal of International Law 491, 508.

155 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 266.

156 *Fiscal Compact* para 13.

157 Corresponding to the outlined 'regalian' competences, cf. Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

158 *Fiscal Compact* para 13.

mere coordination of decisions appears less problematic, even in important competence areas. However, in case France is no longer able to take its own decisions or to veto decisions at the EU-level, the exercising of national sovereignty is affected. Therefore, the procedural framework attached to EU fiscal integration steps will be important to determine whether a conflict with the French sovereignty limit exists.

2.2.5 *Longevity and absoluteness of the constitutional limit*

The subsequent question is whether a possible conflict between EU fiscal integration and the French sovereignty limit could be overcome. Considering its constitutional mandate, it can be established that *Conseil Constitutionnel* is not competent to review constitutional amendments. Through its decisions, the *Conseil Constitutionnel* identifies conflicts,[159] which can then be overcome by amending the constitution following Article 89 French Constitution, which is common practice in EU integration matters.[160] Subsequently, however, these constitutional amendments cannot be reviewed by the *Conseil Constitutionnel*. Put differently, in case the French legislator amends the constitution, which requires broad political[161] or popular support,[162] the Conseil cannot scrutinize such amendments.[163] Therefore, the constitution-amending legislator can overcome a constitutional conflict with the sovereignty limit by amending the French Constitution, even though the amendment may not fully cover or address the obstacles identified by the *Conseil*.

159 Which corresponds to the *Conseil*'s role as '*pointsman*', cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 150-151; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 413.

160 *Review of Maastricht Treaty (Maastricht I)* paras 36-44; Cf. as well: Steiner, *French Law – A Comparative Approach* 7; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 535.

161 As outlined in Article 89 (3) French Constitution, requiring a 3/5-majority of the votes casted in Congress (the joined assembly of the Assemblée Nationale and the Sénat), cf. Maria Cahill, 'Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power' (2016) 75 Cambridge Law Journal 245, 266-267; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 770.

162 As established in Article 89 (2) in conjunction with Article 11 French Constitution; For example, employed in relation to the Maastricht Treaty and the Constitutional Treaty, cf. Cahill, 'Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power' 266-267; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 770-771; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 392, 421; Thomas König and Simon Hug, 'Ratifying Maastricht: Parliamentary Votes on International Treaties and Theoretical Solution Concepts' (2000) 1 European Union Politics 93, 99-100.

163 Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 413.

Second, the French Constitution does not contain 'supra-constitutional' principles.[164] Although Article 89 (5) French Constitution stipulates a limit to the powers of the constitution-amending legislator, this provision seemingly only has a symbolic function as *Dubout* concludes.[165] This is confirmed by *Baranger* who points out that the drafters of the 1958 French Constitution did not intend to establish an absolute material limit to the powers of the constitution-amending legislator.[166] Furthermore, the previous outline indicates that the *Conseil Constitutionnel* as 'pointsman' would not be in an institutional position to enforce such supra-constitutional provision against the democratically legitimized legislator.[167] The result is that the constitution-amending legislator is competent to modify the constitutional text as it sees fit to accommodate EU integration, as explicitly confirmed by the *Conseil Constitutionnel*.[168]

Therefore, the *essential conditions of the exercising of national sovereignty* limit does not impose absolute restrictions to EU fiscal integration proposals. A potential conflict between such integration proposals and the French Constitution can be overcome by amending the constitutional text, which is common practice in France. This ultimately transforms substantive limits into procedural limits – as the main legal hurdle is to attain the required constitution-amending majority.

2.3 Particularity of the French constitutional identity limit

As previously indicated, the *Conseil Constitutionnel* developed an explicit *constitutional identity limit* ('*identité constitutionnel de la France*').[169] The sub-

164 *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272.

165 Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 458; The predecessor of this provision was established to prevent the re-emergence of a monarchy in France, cf. Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

166 Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

167 For now, the French Constitution does not contain any mechanism to constitutionally enforce Article 89 (5) French Constitution, cf. Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

168 *Lisbon Treaty* paras 9, 34; *Revision of Amsterdam Treaty* paras 7, 32; *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272.

169 As established by the *Conseil Constitutionnel*, cf. *National Law Related to the Protection of Personal Data Under the GDPR* paras 2-3; *Comprehensive Economic and Trade Agreement (CETA)*

sequent assessment will focus on the scope of application (2.3.1.) and the substantive content of the French *constitutional identity limit* (2.3.2.) in order to allow for a comparison with the other national *constitutional identity limits*.

2.3.1 Scope of application of the constitutional identity limit

Generally speaking, the *Conseil Constitutionnel* does not review EU secondary law,[170] as Article 55 French Constitution stipulates that duly ratified international law prevails over acts of parliament.[171] In addition, Article 88-1 French Constitution formulates the commitment to participate in the EU and to commonly exercise the conferred competences, which entails the constitutional obligation to implement EU law.[172] As a result, EU law has a special status under French constitutional law and is generally not reviewed by the *Conseil*.[173]

Nevertheless, the *Conseil Constitutionnel* started to review French legislative acts, which implement EU law obligations, under Article 61 (2) French Constitu-

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paras 13-14; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 18; *French Law on Genetically Modified Organisms* para 44; Decision 2006-543 DC *French Act Pertaining to the Energy Sector* [2006] (French Conseil Constitutionnel) para 6; *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 546-547; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386-387; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 445.

170 Based on the 'pacta sunt servanda'-principle, cf. *Fiscal Compact* para 18; *Review of Maastricht Treaty (Maastricht I)* para 7; Decision 77-90 DC *Final Supplementary Budgetary Law for the Year 1977* [1977] (French Conseil Constitutionnel) para 4; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 247; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 126; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 443; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303; Furthermore, the *Conseil* identified the implementation of Directives as a constitutional obligation under Article 88-1 French Constitution, cf. *National Law Related to the Protection of Personal Data Under the GDPR* para 2; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 17.

171 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 531.

172 *National Law Related to the Protection of Personal Data Under the GDPR* para 2; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 17; Cf. as well: Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 305-307.

173 Previously, the *Conseil Constitutionnel* seemed to accord constitutional immunity to EU secondary law based on Article 55 French Constitution, cf. *Final Supplementary Budgetary Law for the Year 1977* para 4; Cf. as well: Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 126; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 443; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303.

tion. This results in an indirect review of EU secondary law.[174] Initially, the *Conseil* established that the constitutional obligation of the French legislator to implement EU law could not violate an 'express contrary provision of the [French] Constitution'.[175] The concept of *explicit contrary provision* was criticized as unspecific,[176] and subsequently replayed by the concept of '*identité constitutionnel de la France*'.[177] Following this new concept, the implementation of EU Directives may not conflict with 'a rule or principle inherent to the *constitutional identity* of France, except when the constituting power consents thereto'.[178] The *Conseil* requires, however, that the French implementation is manifestly incompatible with the respective EU Directive, before declaring a conflict with the French *constitutional identity* doctrine.

On the one hand, this pays tribute to the outlined special status of EU law. On the other hand, given that the *Conseil Constitutionnel* operates under strict procedural deadlines, it is normally not in a position to refer preliminary

174 The *Conseil Constitutionnel* now indirectly assesses the EU Directives: *National Law Related to the Protection of Personal Data Under the GDPR* paras 2-3; *Copyright and Related Rights in the Information Society* para 19; Decision 2004-496 DC *Digital Economy* [2004] (French Conseil Constitutionnel) para 7; Cf. as well: Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 442-443; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 860-861.

175 *Digital Economy* para 7; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 533; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 452; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 126; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 862.

176 Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 485-486; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 444; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 306-307.

177 In English: '*constitutional identity* of France'; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 546-547; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386-387; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 445.

178 *Copyright and Related Rights in the Information Society* para 19; *French Act Pertaining to the Energy Sector* para 6; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 547-548; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' 71.

questions to the CJEU.[179] The reluctant application of the *constitutional identity limit* acknowledges this procedural constraint.

Finally, the *Conseil Constitutionnel* expanded the scope of application in its subsequent jurisprudence to the transposition of obligations stemming from EU Regulations[180] as well as the review of international (trade) agreements that are based on exclusive EU competences.[181]

The *constitutional identity limit* can be triggered by privileged applicants based on Article 61 (2) French Constitution. The *Conseil* will then assess whether the French implementing law conflicts with French *constitutional identity* and whether the French implementation manifestly conflicts with the EU secondary law, or whether the French legislator enjoyed discretion when implementing it.[182] In contrast, individuals are generally barred from challenging French implementing acts based on the *constitutional identity limit*, as the identity limit is based on Article 88-1 French Constitution and concerns the constitutional duty to implement EU law.[183] This constitutional duty is, however, no subjective right or freedom in the sense of Article 61-1 French Constitution

179 *Copyright and Related Rights in the Information Society* para 20; *French Act Pertaining to the Energy Sector* para 7; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Charpy, 'Droit constitutionnel et droit communautaire – Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'État' 799; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' 71; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 450-451.

180 Which was clarified in relation to the French implementation of the EU GDPR, cf. *National Law Related to the Protection of Personal Data Under the GDPR* paras 2-3; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 143.

181 The power to conclude such agreements in areas of exclusive competences was explicitly conferred upon the EU, which is why the *Conseil Constitutionnel* does not see itself competent to conduct a full constitutional review, cf. *Comprehensive Economic and Trade Agreement (CETA)* paras 13-14; Cf. as well: Xavier Magnon, 'Commentaire de Décisions: Décision n° 2017-749 DC du 31 juillet 2017, Accord économique et commercial global entre le Canada, d'une part, et l'Union européenne et ses États membres, d'autre part' (2018) 113 Revue française de droit constitutionnel 173, 176-177; Larik, 'Prêt-à-Ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017' 764.

182 *Copyright and Related Rights in the Information Society* paras 19-20; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 141-142; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 776; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548.

183 *Copyright and Related Rights in the Information Society* para 17; Decision 2004-498 DC *Bioethics-Act* [2004] (French Conseil Constitutionnel) para 4; *Digital Economy* para 7; Cf. as well: Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 312; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 546; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' 70-71.

and it can therefore not serve as a basis for concrete constitution review following the *QPC*-mechanism.[184]

Overall, the limited procedural means to enforce the *constitutional identity limit* correspond with the importance that the French constitutional system assigns to adhering to EU law obligations and the special status that EU law enjoys under the French Constitution.[185]

2.3.2 *Substantive content covered by the French constitutional identity limit*

The concept of *constitutional identity* is based on the case law of the *Conseil Constitutionnel* and it is defined on a case-to-case basis. Regarding the protected substantive content, several conclusions can be drawn from the case law of the *Conseil* so far. In the first place, the *Conseil* appears to aim at protecting French constitutional particularities, including for example the principle of secularism ('laïcité'), the principle of equality and the indivisibility of the nation,[186] the 'French' separation of powers enshrined *inter alia* in Articles 34, 37 French Constitution and the republican status enshrined in Article 89 (5) French Constitution.[187] It seems that the *Conseil Constitutionnel* mainly conducts an equivalence assessment to determine whether the EU legal order protects the respective French constitutional principle at stake to an equivalent level.[188] In case such protection is warranted or in case the constitution-amending legislator consented to a limitation of the French constitutional

184 Decision 2010-79 QPC *Mr Kamel D.* [2010] (French Conseil Constitutionnel) para 3; Which could amount to an indirect review that is excluded by Article 55 French Constitution, cf. Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 321.

185 Namely, the outlined concept of 'immunité des conventions ratifiées', cf. Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478-479; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 137, 142.

186 As laid down in Article 1 French Constitution; Cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 148; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388.

187 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 148; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 474-475; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 135.

188 Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 454; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity'387-388; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 132-133.

particularity,[189] the *Conseil Constitutionnel* will not find a conflict with the French *constitutional identity limit*. Obviously, this implies that the *Conseil* accepts that the EU legal order is capable of protecting core French constitutional values and a conceptual overlap to the *Solange*-jurisprudence can be identified, as the French *constitutional identity limit* is only applied in case the EU is not offering an equivalent level of protection.[190]

Furthermore, the *Conseil Constitutionnel* employs an evolutionary conception of French *constitutional identity*. Namely, as the *Conseil* emphasized both in relation to EU primary law but also EU secondary law obligations, the constitution-amending legislator is able to modify the constitutional text and thereby overcome constitutional conflicts[191] – even conflicts with the French *constitutional identity*.[192] Given that such amendments are common practice in France as a precondition for the ratification of new EU-Treaties, the constitutional framework regularly changes.[193]

For EU fiscal integration proposals, it seems that the division of powers between French institutions as enshrined in Articles 34 and 37 French Constitution, the indivisibility of the nation as well as the republican status are particularly relevant. All three aspects are concerned with the state and institutional structure of France. In case EU fiscal integration proposals interfere with these areas through discretionary EU secondary law obligations, which are then implemented into French law, the French *constitutional identity* would possibly be triggered. In addition, the French *constitutional identity limit* is not absolute

189 Faraguna, 'Taking Constitutional Identities Away from the Courts' 508; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 133; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 387-389.

190 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 547; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 454; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 389.

191 *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272.

192 As the *Conseil Constitutionnel* continuously stressed, it is verifying whether the constitution-amending legislator actually consented to this limitation of French *constitutional identity*, cf. *National Law Related to the Protection of Personal Data Under the GDPR* para 3; *Copyright and Related Rights in the Information Society* para 19; *French Act Pertaining to the Energy Sector* para 6.

193 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 871; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 530.

in nature but can be overcome by the French constitution-amending legislator.[194] As already outlined, the *Conseil Constitutionnel* is neither empowered to conduct constitutional review of constitutional amendments,[195] nor is it in an institutional position to limit the choices made by the constitution-amending legislator.[196]

2.3.3 Interim conclusion: No immediate limit for EU fiscal integration

Overall, the *Conseil Constitutionnel* applies the concept of French *constitutional identity* in a very restrictive manner. In the first place, the application is limited to the French implementation of EU secondary law and of international trade agreements concluded by the EU on the basis of exclusive competences. Second, the *Conseil Constitutionnel* will only declare a French implementing law invalid based on this limit, in case the implementing law manifestly conflicts with the EU act it aims to implement. The Conseil emphasized that it is not able to refer preliminary questions to the CJEU due to the strict time constraints,[197] which is why it refused to strike down French implementing acts which are

194 *National Law Related to the Protection of Personal Data Under the GDPR* para 3; *French Act Pertaining to the Energy Sector* para 6; *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388.

195 Decision 2003-469 DC *Constitutional Revision of French Decentralisation Law* [2003] (French Conseil Constitutionnel) para 2; Decision 92-313 DC *Revision of the Act of Approval to Ratify EU Treaty (Maastricht III)* [1992] (French Conseil Constitutionnel) paras 2, 5; Decision 62-20 DC *Law on the General Election of French President* [1962] (French Conseil Constitutionnel) paras 2, 5; Cf. as well: Steiner, *French Law – A Comparative Approach* 7; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 303-304; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 396-397; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388-389; Bell, *French Legal Culture* 204.

196 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 270; Spies, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' 1041; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 6-7.

197 The *Conseil Constitutionnel* has to deliver its decision within one month as stipulated in Article 61 (3) French Constitution, cf. *Copyright and Related Rights in the Information Society* para 20; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' 71; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 450-451.

merely transposing unconditional EU law obligations.[198] This indicates a friendliness towards the EU legal order.[199] Moreover, the substantive content of the *constitutional identity concept* only covers French particularities that are not protected at the EU-level in an equivalent manner and it is open to modification by the French constitution-amending legislator.

Consequently, the French *constitutional identity* seems to be only of indirect importance for EU fiscal integration proposals. Given the very narrow scope of application and the confined instances in which the *Conseil Constitutionnel* will strike down a French law based on the *constitutional identity limit*, it seems unlikely that this will have an immediate limiting effect on EU fiscal integration proposals. One may add that the *Conseil Constitutionnel* seems to have trust in the political process[200] – and therefore possibly refrains from establishing absolute constitutional limits towards EU secondary law commitments.

2.4 Conclusion on the French constitutional identity limit

Overall, the assessment revealed that EU fiscal integration proposals will very likely trigger a conflict with the French sovereignty limit. When assessing the compatibility of new EU fiscal integration steps, a full constitutional assessment will be conducted by the *Conseil Constitutionnel*. As part of this scrutiny, the Conseil assesses whether the new EU commitments entails a transfer of competences that could affect the *essential conditions of the exercising of national sovereignty*.[201] The *Conseil* developed a two-stepped approach under its sovereignty limit. It first assesses whether the conferral occurs in an important competence area. In its jurisprudence, the Conseil identified economic, financial, fiscal and monetary policies as such particularly important competence

198 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 776; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548.

199 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 776; A tendency that can be observed within the jurisprudence of the *Conseil* more generally, cf. Larik, 'Prêt-à-Ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017' 774-777.

200 Faraguna, 'Taking Constitutional Identities Away from the Courts' 508; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 133; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 390.

201 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771-772; Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540-542; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491-492.

areas.[202] In a second step, the *Conseil* reviews the modalities that are attached to the conferral of such important competences to the EU. Based on the previous case law, it seems that a conflict with the sovereignty limit will arise if the conferred important competences are to be exercised under the ordinary legislative procedure, by qualified majority vote or if France loses its ability to initiate legislation.[203] The *Conseil Constitutionnel* applies this limit to new EU commitments prior to their adoption, following the procedure established in Article 54 French Constitution. In case the *Conseil* identifies a constitutional conflict, the constitution-amending legislator can modify the French Constitution to explicitly accommodate the conflicting EU obligations.[204]

Once EU law obligations are ratified by the French legislator, the *Conseil Constitutionnel* is not empowered to review them. EU law, including EU secondary law, benefits from the special status the French constitutional order awards to ratified international law more generally.[205] Nevertheless, the *Conseil* developed a French *constitutional identity limit*, which it applies to the French implementation of EU-law related obligations.[206] However, the *Conseil Constitutionnel* only applies the *constitutional identity limit* in case the French legislator enjoyed discretion in the implementation of EU law.[207] Therefore, also the *constitutional*

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202 *Fiscal Compact* para 16; *Review of Maastricht Treaty (Maastricht I)* para 45; *Law Authorizing an Increase in France's Share in the International Monetary Fund (IMF)* para 5; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527; Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 133; Oliver, 'The French Constitution and the Treaty of Maastricht' 13, 15.

203 Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

204 *Lisbon Treaty* paras 9, 34; *Revision of Amsterdam Treaty* paras 7, 32; *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272.

205 Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 247; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 126; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 443; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303.

206 With potentially indirect consequences for EU law, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 142-143; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 132-133; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 452.

207 *Copyright and Related Rights in the Information Society* para 20; *French Act Pertaining to the Energy Sector* para 7; Cf. as well: Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 776; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548.

identity limit embraces the assumption that EU law is in accordance with the French Constitution.[208]

In addition, the *Conseil Constitutionnel* consistently held that the EU legal order is a derived legal order and is thus based on the French Constitution, which is, for example, apparent in the two outlined constitutional limits requiring that EU law is consistent with the French Constitution.[209] Yet, the French Constitution provides a high degree of flexibility in this regard, as the constitution-amending legislator can alter the constitutional text in order to accommodate EU law obligations and as the *Conseil Constitutionnel* operates as constitutional 'pointsman' that identifies constitutional conflicts, without however restricting the powers of the constitution-amending legislator.[210] It seems therefore that EU fiscal integration proposals are mainly confronted with procedural-political obstacles in France, given that the anticipated conflict with the French sovereignty limit seems to require a constitutional amendment.

208 *National Law Related to the Protection of Personal Data Under the GDPR* para 3; *Comprehensive Economic and Trade Agreement (CETA)* paras 13-14; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 18; *French Law on Genetically Modified Organisms* para 44; *French Act Pertaining to the Energy Sector* para 6; *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388.

209 *Lisbon Treaty* para 8; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 877; The derived legal status is also visible in the fact that the implementation of EU Directives is seen as a constitutional duty stemming from Article 88-1 French Constitution, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 140; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 306.

210 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Copyright and Related Rights in the Information Society* para 19; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403.

Constitutional Identity Classification Board for France
1 ***Which institutional actor enforces the constitutional limit?***   The *Conseil Constitutionnel* applies the *national sovereignty*. The *Conseil* issues binding decisions on the compatibility of acts – including EU law – with the French Constitution. Its institutional role may best be described as 'pointsman' that identifies constitutional conflicts.
2 ***How can the constitutional identity limit be triggered?***   The *national sovereignty limit* is employed by the *Conseil Constitutionnel* in the *ex ante* constitutional review of EU primary law commitments following Article 54 or Article 61 (2) French Constitution. The review can only be initiated by privileged actors.
3 ***What is the constitutional basis of the constitutional identity limit?***   The concept of 'fundamental conditions of the exercising of national sovereignty', is based on a combined reading of Articles 3, 53, 88-1 French Constitution of 1958, Article 3 Declaration of 1789 and § 15 Preamble of French Constitution of 1946, which protect national sovereignty and which allow at the same time for international cooperation.
4 ***What constitutional principles and substantive content are covered?***   The limit is based on the principle of French sovereignty. It is conceptualized by the *Conseil* as a competence-based limit. Hence, it verifies whether the envisaged conferral concerns an important sovereign area as well as the final modalities attached to the exercise of the considered conferral of competences at the EU-level. The *Conseil* identified budgetary, economic, fiscal and monetary matters as particularly important competences, which suggests that EU fiscal integration proposals will likely conflict with French sovereignty.
5 ***How – if at all – can the constitutional identity limit be overcome (longevity/ absoluteness of the limit)?***   The national sovereignty limit may be overcome by the French constitution-amending legislator by modifying the French Constitution. Subsequently, the *Conseil Constitutionnel* has no jurisdiction to review such constitutional amendments. Hence, French sovereignty does not impose absolute limits to EU fiscal integration proposals.

Figure 12: Constitutional Identity Classification Board for France

3 THE SPANISH CONSTITUTIONAL PERSPECTIVE – AN EMERGING *CONSTITUTIONAL IDENTITY*?

An emerging constitutional opposition to EU (fiscal) integration can also be observed in Spain. The Spanish Constitutional Tribunal has established a material constitutional limit that restricts the available constitutional space

for the conferral of competences to the EU.[211] This Spanish *constitutional identity limit* was first established in the Tribunal's opinion on the EU Constitutional Treaty.[212] Since then, however, the Tribunal only referred once to this limit in its well-known *Melloni*-judgment on the European Arrest Warrant.[213]

The highly restricted judicial use of the *identity limit* might be surprising in light of the major impact that the Eurocrisis had on Spain. Spain was amongst the Eurozone Member States worst hit by the Eurocrisis. In fact, it also had to request a bailout program for its banks,[214] with considerable (internal) political and legal implications. Just as in the situation of other Eurozone Member States that requested financial assistance, the EU financial support for the Spanish banking sector was tied to strict and maybe even *invasive* bailout conditions.[215] Given this invasive nature and given the constitutional debate triggered elsewhere in light of all the Eurocrisis-related measures,[216] it seems remarkable that the Spanish Constitutional Tribunal did not employ, or at least test, the *constitutional identity limit* against these measures. Based on the apparent absence of judicial references to the *constitutional identity limit* in Spain, the subsequent assessment will analyze whether the *identity limit* has the potential to develop into a constitutional obstacle for EU fiscal integration proposals – or whether it can be seen as an example for a more *flexible* application of the *constitutional identity limit*.

211 *Treaty Establishing a Constitution for Europe* Section II. 2. and 3.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 269-270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

212 *Treaty Establishing a Constitution for Europe* Section II. 2. and 3.; Cf. in particular: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

213 *Constitutional Complaint Melloni* Section II.3.; Cf. the initial Spanish reference to the CJEU, *Preliminary Reference Concerning EAW (Melloni)*; Cf. as well: Torres Pérez, 'Constitutional Dialogue on the European Arrest Warrent: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011'.

214 Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 122.

215 Royo and Steinberg, 'Using a Sectoral Bailout to Make Wide Reforms: the Case of Spain' 164-166; Meiers, *Germany's Role in the Euro Crisis – Berlin's Quest for a More Perfect Monetary Union* 91, 116-117; On the internal receptiveness for the protection awarded by the EU legal order, cf. Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 359.

216 As for example the case in Germany, where the Constitutional Court developed *overall budgetary responsibility* in light of the different measures enacted during the Eurocrisis, cf. Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12.

As mentioned, the *constitutional identity limit* was established by the Spanish Constitutional Tribunal,[217] which functions as strong and independent institutional guardian of the constitutional order. Its institutional design was modelled on the German Constitutional Court.[218] Thus, the institutional competences and prerogatives as well as the procedural framework for the work of the Spanish Constitutional Tribunal all bear similarity with its German counterpart. Given the similarity in the conception of the German and the Spanish constitutional review, the assessment of the Spanish *constitutional identity limit* might offer an alternative perspective on how a similarly authoritative constitutional actor can devise its constitutional role in a less confrontational manner towards the EU.

One unique Spanish aspect of potential constitutional turmoil is the relationship between the regional level (Autonomous Communities) and the federal level, which created continuous constitutional conflicts. Despite the primarily internal tension, particularly regarding Spanish unity and indivisibility in the sense of Article 2 Spanish Constitution,[219] these conflicts have an obvious EU dimension. In fact, considering the constitutional challenges initiated during the Eurocrisis, it becomes clear that most challenges against EU-related decisions were initiated as a constitutional review of the internal allocation of competences between Autonomous Communities and the Spanish Federation.[220] And although the Constitutional Tribunal did not review national laws against EU law, given that the Tribunal can generally only review Spanish

217 In Spanish: *Tribunal Constitucional de España.*

218 Joan Solanes Mullor and Aida Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Asser Press 2019) 544; Marian Ahumada Ruiz, 'The Spanish Constitutional Court' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 606; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 68; Joaquín Verela Suanzes-Carpegna, 'El constitucionalismo español en su contexto comparado' (2010) 19 Giornale di Storia Costituzionale 93, 106-107; Victor Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' (2008) 3 Journal of Comparative Law 22, 23; James Casey, 'The Spanish Constitutional Court' (1990) 25 Irish Jurist 26, 28.

219 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282; Enric Martínez-Herrera and Thomas Jeffrey Miley, 'The Constitution and the Politics of National Identity in Spain' (2010) 16 Nations and Nationalism 6, 17.

220 Cristina Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' EUI Working Papers (Max Weber Programme) <https://cadmus.eui.eu/bitstream/handle/1814/33859/MWP_WP_2014_25.pdf?sequence=1&isAllowed=y> accessed 20 December 2020 36; On the historic constitutional dimension of this conflict, cf. Martínez-Herrera and Miley, 'The Constitution and the Politics of National Identity in Spain' 9-10; Casey, 'The Spanish Constitutional Court' 27.

legislation against constitutional law,[221] a possible judgment of unconstitutionality of an EU-related Spanish measure could have had major consequences for the underlying EU law, too. Therefore, the internal conflict on regional autonomy and independence will be reflected in the subsequent analysis.

All four points, namely the existence of a *constitutional identity limit*, the practical experiences during the Eurocrisis, the centralized constitutional review with a strong constitutional authority as well as the federal tensions, are compelling reasons for including Spain into this comparative exercise. The subsequent assessment will first provide a brief outline of the Spanish constitutional approach to EU cooperation (3.1.), before subsequently analyzing the *constitutional identity limit* in detail (3.2.).

3.1 Identifying the core constitutional limit to EU fiscal integration in Spain

Spanish EU membership coincided with a domestic constitutional transformation, which was successfully initiated with the adoption of the new Spanish Constitution in 1978, and it equally falls into the period of returning to a democratic state structure after the end of the *Franco*-dictatorship.[222] In light of the (constitutional) experiences during the dictatorship, the drafters of the 1978 Spanish Constitution awarded special protection to fundamental rights and the basic democratic structure of Spain.[223] Furthermore, the drafters anticipated Spanish accession to the European Communities and included Article 93 into the new constitutional text, which allowed for the conferral of competences to the international and supranational level.[224] The broad political support for EU cooperation resulted in Spanish EU accession in 1986[225] and subsequently in Spanish participation in the Eurozone.[226]

221 Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 567-568; Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' 36; Benito Alaez Corral and Abel Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' (2009) 15 European Public Law 597, 604.

222 Juan Luis Requejo Pagés, 'The Spanish Constitutional Tribunal' in Armin von Bogdandy, Peter Michael Huber and Christoph Grabenwarter (eds), *Constitutional Adjudication: Institutions*, vol III (The Max Planck Handbook in European Public Law, Oxford University Press 2020) 723-724; Casey, 'The Spanish Constitutional Court' 26-27.

223 Obvious from the extremely high threshold for amending these parts of the Spanish Constitution, as enshrined in Article 168 Spanish Constitution, cf. Ascensión Elvira, 'Spain' in Carlo Fusaro and Dawn Oliver (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing 2011) 282-283.

224 Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 354.

225 Craig and de Búrca, *EU Law Text, Cases, and Materials* 6; David Ramiro Troitino, *European Integration : Building Europe* (Nova Publishers 2013) 76; Juan Díez-Nicolás, 'Spaniards' Long March Towards Europe' in Sebastián Royo and Paul Christopher Manuel (eds), *Spain and*

The current Spanish constitutional approach to EU integration is coined by a political and a legal-constitutional dimension. Amongst Spanish political institutions support for EU integration is traditionally high. It is, for example, visible in the design of the Spanish EU enabling clause in Article 93 Spanish Constitution, which allows for the conferral of competences to the EU by absolute majority after the constitutional legislator explicitly rejected the introduction of a qualified majority requirement.[227] Hence, the political openness is reflected in the initial design of the constitutional framework for EU cooperation. It is subsequently reflected in the broad support across political parties for Spanish membership in the European Communities.[228] And it can be deduced from the fact that the only two constitutional amendments successfully enacted in Spain related to EU integration steps. The first amendment in 1992 introduced the right for EU citizens to vote and stand as candidate in municipal elections now enshrined in Article 13 (2) Spanish Constitution.[229] The second amendment was adopted in 2011 and implemented the EU balanced budget rule into Article 135 Spanish Constitution, in order to comply with the obligations stemming from the Euro-Plus-Pact and the Fiscal Compact.[230] This wide political support is further mirrored amongst the Spanish people.[231]

Portugal in the European Union?: The First Fifteen Years (Frank Cass and Company Limited 2003) 100.

226 Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 72; Charles Powell, 'Spanish Membership of the European Union Revisited' in Sebastián Royo and Paul Christopher Manuel (eds), *Spain and Portugal in the European Union?: The First Fifteen Years* (Frank Cass and Company Limited 2003) 125.

227 Antonio Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' (1999) 5 European Public Law 269, 273; Without imposing any scope limitation in the provision, cf. Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 548.

228 Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 273-274.

229 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 270; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 27; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 354.

230 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 270; Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 545-548; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 85-86.

231 Broad support for Spanish accession to the European Communities, cf. Suanzes-Carpegna, 'El constitucionalismo español en su contexto comparado' 106; Díez-Nicolás, 'Spaniards' Long March Towards Europe' 100; Powell, 'Spanish Membership of the European Union Revisited' 124; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 269-270; Michael T. Newton and Peter J. Donaghy, *Institutions of Modern Spain – A Political and Economic Guide* (Cambridge University Press 1997) 306.

For example, almost 77% voted in favor of the EU Constitutional Treaty in a national referendum.[232] In addition, in the July 2020 Eurobarometer (Standard Eurobarometer 93), 79% of the interviewed people in Spain indicated that they identify as EU citizens.[233] Thus, the EU continues to enjoy broad popular support, despite the challenging experiences during the Eurocrisis as well as the migration crisis.

The legal-constitutional dimension is shaped by the Spanish Constitutional Tribunal, which was partly described as 'hostile' by *Estella de Noriega*[234] or 'unreceptive' by *Requejo Pagés*[235] regarding EU law. One example is the Tribunal's refusal to adjudicate on conflicts between EU law and Spanish law, as the Tribunal characterized EU law as 'infra-constitutional'.[236] Although this initial resistance arguably changed more recently,[237] the Tribunal formulated constitutional reservations that reduce the available constitutional space for EU integration and that limit the effect of EU law in Spain. The initial Spanish constitutional reservation to EU law, the so-called Spanish constitutional nucleus, covered Spanish sovereignty and the protection of fundamental rights.[238] Subsequently, this constitutional nucleus transformed into the *national constitutional identity limit*, a substantive limit that the legislator has to respect when conferring powers to the EU.[239] Although this *constitutional identity*

232 Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 356; Although the turnout of the referendum was low at around 42%, cf. Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1169.

233 European Commission, *Standard Eurobarometer 93 Summer 2019 – 'Public Opinion in the European Union, First Results'* (Directorate-General for Communication 2020) 14; Slightly decreased from 86% in the previous Eurobarometer, cf. European Commission, *Standard Eurobarometer 92 Autumn 2019 – 'Public Opinion in the European Union, First Results'* (Directorate-General for Communication 2019) 14.

234 Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 275.

235 Requejo Pagés, 'The Spanish Constitutional Tribunal' 773-774.

236 Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 277.

237 The Tribunal initiated, for example, its first preliminary reference, cf. *Preliminary Reference Concerning EAW (Melloni)*; Cf. as well: Torres Pérez, 'Constitutional Dialogue on the European Arrest Warrent: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011'.

238 Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 276.

239 Introduced with Declaration 1/2004, cf. *Treaty Establishing a Constitution for Europe* Section II. 3.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Pierre Bon, 'La Identidad Nacional o Constitucional, una Nueva Noción Jurídica' (2014) 100 Revista Española de Derecho Constitucional 167, 172-173; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law'

remains abstract and vague in the constitutional jurisprudence until today,[240] it seems likely that the Tribunal will continue to refine this limit possibly in relation to EU fiscal integration steps. In that regard, the Tribunal might also draw further inspiration from the constitutional developments in other Member State, given the particular importance of comparative reasoning in the Spanish constitutional jurisprudence.[241]

Bringing both dimensions together, a nuanced picture emerges. On the one hand, Spain is politically receptive to EU integration, which was recently illustrated through the constitutional amendment that introduced the balanced budget rule into Article 135 of the Spanish Constitution. On the other hand, the Spanish Constitutional Tribunal appears to adopt a more reluctant approach towards EU law and developed substantive limits to further EU integration steps,[242] with possible implications for EU fiscal integration steps.

3.2 Spanish constitutional identity limit

The Tribunal established the Spanish *constitutional identity limit* in its Declaration 1/2004,[243] where it suggested that EU integration is confronted with

270; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 361; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

240 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282-283; Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 549; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271.

241 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 269; Given that national *constitutional identity* is a 'dialectic concept', which is defined in relation to the EU legal order, cf. Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 263; Furthermore, the Constitutional Tribunal employs comparative constitutional reasoning, which might explain the emergence of the *constitutional identity* discourse in Spain, cf. Ahumada Ruiz, 'The Spanish Constitutional Court' 629.

242 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

243 *Treaty Establishing a Constitution for Europe* Section II. 3.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bon, 'La Identidad Nacional o Constitucional, una Nueva Noción Jurídica' 172-173; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 361; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

a material limit deriving from Article 93 Spanish Constitution. The subsequent assessment will further investigate into the substantive content of this identity limit and its overall constitutional setting.

3.2.1 *Institutional actor enforcing the limit*

The Tribunal is a judicial institution, separate from the other judicial branches in the Spanish legal system. It is in charge of supervising that Spanish state institutions comply in their actions with the obligations and rights laid down in Spanish Constitution.[244] To that extent, the Tribunal has the monopoly to conduct constitutional review.[245] In its constitutional assessment, the Constitutional Tribunal is bound by the constitutional questions raised by the applicants.[246] All its judgments are final, binding decisions with *erga omnes* effect.[247] Thus, the Tribunal is an authoritative institutional actor that can restrict the political room to maneuver based on the Spanish Constitution.[248]

The Tribunal consists of twelve constitutional judges that are appointed by different institutions. Four judges are elected by the Spanish Congress of Deputies and an additional four by the Spanish Senate – confirmed respectively by a three-fifths majority. Two judges are nominated by the Spanish Govern-

244 Requejo Pagés, 'The Spanish Constitutional Tribunal' 728-729; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 68; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 23; Newton and Donaghy, *Institutions of Modern Spain – A Political and Economic Guide* 26.

245 Either in abstracto ex ante as laid down in Article 161 (1) lit. a Spanish Constitution ('recurso de inconstitucionalidad'), in concreto ex ante as established in Article 163 Spanish Constitution ('cuestión de inconstitucionalidad'), when considering international agreements, in abstracto ex ante as enshrined in Article 95 (2) Spanish Constitution, when adjudicating on competence conflicts between the different institutional actors as well as between the Autonomous Communities and the federal level, as established in Article 161 (1) lit. c Spanish Constitution ('conflictos de competencia') or finally when deciding individual constitutional complaints as enshrined in Articles 161 (1) lit. b, 53 (2) Spanish Constitution ('recursos de amparo'), cf. Nuno Garoupa, Fernando Gomez-Pomar and Veronica Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' (2011) 29 The Journal of Law, Economics, and Organization 513, 517; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 598; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 25, 28; Casey, 'The Spanish Constitutional Court' 52.

246 The Constitutional Tribunal is not competent to investigate a matter 'ex officio', cf. Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

247 According to Article 164 (1) Spanish Constitution as well as Articles 38 and 39 Constitutional Court Act (Organic Law 2/1979), Cf. Ahumada Ruiz, 'The Spanish Constitutional Court' 611; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 599; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 26; Casey, 'The Spanish Constitutional Court' 41.

248 Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 27.

ment and an additional two by the Council for the Judiciary.[249] The Spanish Constitution requires that the appointed candidates are qualified jurists with a working experience in their field of at least 15 years.[250] Constitutional judges are appointed for a not directly renewable mandate of nine years with an alternated replacement every three years.[251] Overall, this makes the Tribunal less vulnerable to political interferences. First, the appointed judges have to be trained jurist with considerable working experience, which ensures that candidates are professionally fit for the office. Second, constitutional judges that are elected by Spanish Congress or the Senate require support by a broad three-fifths majority, which ensures that the nominated candidates are respected across political parties.[252] Third, the replacement of judges on the bench of the Constitutional Tribunal is not aligned with the legislative term.[253]

Taken together, this illustrates that the Spanish Constitutional Tribunal is the central, independent (judicial) institution in charge of constitutional review in Spain. Its decisions are binding on all Spanish state institutions and can therefore limit the scope for political action.[254] Consequently, the constitutional jurisprudence may equally restrict the available constitutional space for EU fiscal integration steps.

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249 As established in Article 159 (1) Spanish Constitution, cf. Ahumada Ruiz, 'The Spanish Constitutional Court' 616; Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 517; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 599; Newton and Donaghy, *Institutions of Modern Spain – A Political and Economic Guide* 26; Casey, 'The Spanish Constitutional Court' 33.

250 According to Article 159 (2) Spanish Constitution, cf. Requejo Pagés, 'The Spanish Constitutional Tribunal' 729; Ahumada Ruiz, 'The Spanish Constitutional Court' 616; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 599.

251 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 219-220; Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 517; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 24; Casey, 'The Spanish Constitutional Court' 33.

252 Which requires governing majority and opposition to work together, cf. Nuno Garoupa, Joan Solanes Mullor and Teresa Violante, 'Constitutional Courts and National Parliaments in Spain and Portugal' in Jorge M. Fernandes and Cristina Leston-Bandeira (eds), *The Iberian Legislatures in Comparative Perspective* (Routledge 2019) 242; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 209.

253 Both, the Spanish Congress and the Senate are elected for a four-year term, as established in Articles 68 (4) and 69 (6) Spanish Constitution, which implies that not during every legislative term constitutional judges are appointed by Congress or Senate, cf. Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 517;

254 Requejo Pagés, 'The Spanish Constitutional Tribunal' 776-777; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 33.

3.2.2 *Procedural framework – or how to trigger the limit*

The Spanish *constitutional identity limit* can be triggered through different constitutional procedures.[255] Prior to the ratification of new EU commitments, the Spanish Government, the Congress, or the Senate may initiate an abstract *ex ante* constitutional review based on Article 95 (2) Spanish Constitution. Following this procedure, privileged applicants can request the Tribunal to assess whether an envisaged international or EU agreement conflicts with the Spanish Constitution. Subsequently, the Constitutional Tribunal issues a binding 'declaration', which determines the compatibility of this envisaged commitment with the Spanish Constitution. Similarly, to the situation in Finland and France, this *ex ante* review enables the legislator to tackle potential constitutional conflicts prior to the enactment of the EU agreement. Until today, the procedure has been employed twice, in relation to the Maastricht Treaty and the EU Constitutional Treaty.[256]

However, the possibility to initiate an *ex ante* review does not preclude an *ex post* constitutional review of such commitment.[257] After ratification of EU commitments, the Prime Minister, 50 deputies from the Congress, 50 Senators, the Ombudsperson, the government of any Autonomous Community or their legislative assemblies are able to initiate an abstract *ex post* constitutional review based on Article 162 (1) lit. a Spanish Constitution.[258] It seems that this provides an important procedural tool for political minorities and opposition parties to challenge legislative decisions.[259] In addition, regional governments and legislative assemblies employ the proceedings in order to

255 Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 600, 603; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 27; Casey, 'The Spanish Constitutional Court' 35.

256 Declaration 1/1992 *Constitutional Review of the Maastricht Treaty* [1992] (Spanish Constitutional Tribunal); *Treaty Establishing a Constitution for Europe*; Cf. as well: Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 546; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 106; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 27.

257 *Constitutional Review of the Maastricht Treaty*; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 27; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 294.

258 Ahumada Ruiz, 'The Spanish Constitutional Court' 612; Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 517; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 601-602; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 26; Casey, 'The Spanish Constitutional Court' 35; As the Spanish Constitution does not entitle individuals to initiate abstract constitutional review, cf. Ahumada Ruiz, 'The Spanish Constitutional Court' 612-613.

259 Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 601; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 34.

defend their respective regional prerogatives against the federal level.[260] Particularly, the interpretation of Articles 147-150 Spanish Constitution on the federal division of competences triggers judicial challenges, which could be equally observed during the Eurocrisis. Notably, Autonomous Communities proceeded to defend their own budgetary and fiscal prerogatives against federal intervention – which was required by the imposed EU conditions for financial assistance – before the Constitutional Tribunal.[261]

In addition, the Spanish Constitution allows for concrete constitutional review, which can be initiated by a reference from an ordinary court.[262] However, it seems less likely that EU fiscal integration measures will be challenged following this procedure. Ordinary courts are required to interpret the challenged law in conformity with the Spanish Constitution,[263] and they have to establish that the law in question is crucial for deciding the case,[264] prior to referring the matter to the Tribunal. Furthermore, the Constitutional Tribunal only considers the compatibility of the challenged act with the Spanish Constitution.[265] Various challenges were brought by Spanish trade unions against EU-related measures based on the outlined procedure, which was however found not to affect the underlying EU law obligation itself.[266]

Finally, the Constitutional Tribunal also hears individual constitutional complaints against alleged fundamental rights violations.[267] Such individual complaints are, however, restricted to violations of fundamental rights enshrined in Chapter II Section 1 (Articles 15-29) of the Spanish Constitution, the non-discrimination principle in Article 14 Spanish Constitution, or the

260 As laid down in Article 32 (2) Constitutional Court Act, cf. Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 518; The relationship between the federal and the regional level is traditionally contentious, cf. Martínez-Herrera and Miley, 'The Constitution and the Politics of National Identity in Spain' 9; Casey, 'The Spanish Constitutional Court' 31.

261 Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' 36.

262 As laid down in Article 163 Spanish Constitution and Article 35 Constitutional Court Act, cf. Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 607.

263 Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 26-27.

264 Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 607; Casey, 'The Spanish Constitutional Court' 40.

265 Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 567-568; Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' 36; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 604.

266 María Luz Rodríguez, 'Labour Rights in Crisis in the Eurozone: The Spanish Case' in Claire Kilpatrick and Bruno De Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, vol 2014/05 (EUI Working Paper LAW, EUI 2014) 106.

267 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 146-147; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 28.

objection against military duties enshrined in Article 30 (2) Spanish Constitution.[268] Furthermore, the complaint can only be brought against an administrative or judicial decision, and not against legislative acts.[269] Given both restrictions, it is unlikely that individuals would be able to challenge EU fiscal integration measures. This conclusion corresponds with observations made during the Eurocrisis.[270]

Taken together, the Spanish procedural framework entrusts privileged applicants to initiate a constitutional review either in an abstract *ex ante* manner following Article 95 (2) Spanish Constitution, or in an abstract *ex post* manner according to Article 162 (1) lit. a Spanish Constitution. The judicial experiences during the Eurocrisis reveal that most constitutional challenges were initiated by Autonomous Communities and concerned the compliance with the internal competence allocation between Autonomous Communities and the Spanish Federal Government.[271] Despite the fact that these challenges centered around a primarily internal constitutional conflict, the constitutional decisions issued on these matters might ultimately have consequences for the related EU law as well.

3.2.3 Constitutional basis of the employed limit

The *Constitutional Tribunal* developed its *constitutional identity limit* on the basis of Article 93 Spanish Constitution,[272] which states:

268 Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 28; Casey, 'The Spanish Constitutional Court' 28-29.

269 Ahumada Ruiz, 'The Spanish Constitutional Court' 613; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 146-147; Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)'8; Maribel González Pascual, 'Welfare Rights and Euro Crisis – The Spanish Case' in Claire Kilpatrick and Bruno De Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, vol 2014/05 (EUI Working Paper LAW, EUI 2014) 98; Rodríguez, 'Labour Rights in Crisis in the Eurozone: The Spanish Case' 106; In case the underlying legislative act is also violating constitutionally enshrined fundamental rights, the Constitutional Tribunal has to hear the case as a full court, cf. Garoupa, Solanes Mullor and Violante, 'Constitutional Courts and National Parliaments in Spain and Portugal' 244; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 29.

270 Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)'8; González Pascual, 'Welfare Rights and Euro Crisis – The Spanish Case' 98.

271 Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' 36.

272 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175-1176.

> 'Authorization may be granted by an organic act for concluding treaties by which powers derived from the Constitution shall be transferred to an international organization or institution.'

Based on the wording, the Tribunal traditionally conceptualized Article 93 Spanish Constitution as a mere procedural provision that proclaimed the constitutional requirements for empowering an international or EU institution to exercise a specific competence.[273] However, since its findings in Declaration 1/2004,[274] the Constitutional Tribunal recognizes that Article 93 Spanish Constitution also contains a material or substantive dimension, which shields core constitutional matters from being conferred to the international or EU-level.[275] Notably, the Tribunal stipulated in this decision:

> 'Therefore, the constitutional transfer which is made possible by Article 93 Spanish Constitution *has material limits, which apply to the transfer of powers itself* [emphasis added]. These material limits, which are not expressly set out in the constitutional text, but which are implicitly derived from the Spanish Constitution and its essential meaning, translate into respect for the sovereignty of the Spanish state, for our basic constitutional structures and for the system of values and principles enshrined in our Constitution, in which fundamental rights acquire their own substantive effect (Article 10.1 EC) [...].'[276]

As noted by the Constitutional Tribunal, the material content covered by Article 93 Spanish Constitution is not linked to specific constitutional provisions but rather to general constitutional concepts, including sovereignty, the structural organization of the state including democracy and the protection of fundamental rights. This rather general framing might result from the broad questions referred to the Tribunal within these proceedings by the Spanish

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273 Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1182-1183; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 295.

274 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 269-270.

275 The Spanish Constitutional Tribunal confirmed this jurisprudence in: *Constitutional Complaint Melloni* Section II. 3.; Cf. as well: Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 361; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176.

276 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176.

Government.[277] Overall, this suggests, however, that the *constitutional identity limit* derives essentially from the jurisprudence of the Spanish Constitutional Tribunal. Notably, it was the Tribunal that proclaimed that Article 93 Spanish Constitution entailed a material core – the Spanish *constitutional identity limit* – which protects a set of constitutional principles and restricts Spanish participation in the EU integration process.

3.2.4 Substantive core protected by the limit

Based on the Tribunal's Declaration 1/2004, three substantive constitutional aspects that fall under the material dimension of Article 93 (1) Spanish Constitution can be identified: First, Spanish sovereignty; second, the constitutional structure of the state; and third, the protection of fundamental rights, which are seen as an expression of Spanish constitutional values.[278] Together, these three aspects form the implicit material core that the Spanish legislator has to respect when conferring competences to the international or the supranational level. Yet, the Tribunal formulates these aspects in an abstract, general manner, without further defining the specific material conditions attached to them – as pointed out by *Martín Y Pérez de Nanclares*.[279] Given this vagueness, the subsequent analysis considers the Spanish *constitutional identity limit* from three different dimensions, namely the Tribunal's explicit intention to protect Spanish sovereignty and with it Spanish statehood (3.2.4.1.), the underlying intention to shield the Spanish Constitution as such (3.2.4.2.), and finally the

277 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 356-357.

278 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Victor Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' in Carlos Closa Montero (ed), *Constitución Española y Constitución Europea – Análisis de la Declaración del Tribunal Constitucional (DTC 1/2004, de 13 de Diciembre)* (Centro de Estudios Políticos y Constitucionales 2015) 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; José M. De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' (2005) 73 Revista Española de Derecho Constitucional 365, 370-371.

279 The Tribunal employed the *constitutional identity limit* only twice: *Constitutional Complaint Melloni* Section II.3.; *Treaty Establishing a Constitution for Europe* Section II. 2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279.

Tribunal's concrete application of this vague constitutional benchmark so far (3.2.4.3.).[280]

3.2.4.1 Protecting Spanish sovereignty and its statehood

The constitutionally most authoritative substantive element that the Tribunal enumerates under its *constitutional identity limit* is the principle of Spanish sovereignty and with it the status of the Member States as final decision-makers. Sovereignty was previously already employed by the Constitutional Tribunal as a constitutional benchmark for the assessment of EU integration steps.[281] Therefore, this prior jurisprudence can be taken into account when determining the protective scope of Spanish sovereignty. Although, it appears that the Tribunal did not (yet) provide a conclusive definition of sovereignty,[282] its case law reveals several characteristics that seem particularly important in the interpretation of this constitutional principle.

First, the Spanish Constitution establishes in Article 1 (2) that 'National sovereignty is vested in the Spanish people, from whom emanate the powers of the State.' Hence, the constitutional text identifies the Spanish people as origin of sovereign power, which establishes a close link between sovereignty and democracy.[283] Article 1 (3) Spanish Constitution clarifies that this sovereign power is framed in a parliamentary monarchy. Hence, the people confer the sovereign power to representative state institutions, which creates a crucial bond between the Spanish people and these institutions as recognized by the Constitutional Tribunal. Notably, when asked whether extending the right to vote in Spanish municipal elections to EU citizens interfered with Spanish sovereignty the Tribunal concluded:

> 'Without entering into other considerations, it is sufficient to note [...] that the attribution to non-nationals of the right to vote in elections to representative bodies could only be constitutionally contentious [...] if such bodies were those that hold powers directly attributed by the Constitution and the Statutes of Autonomy and therefore linked to the ownership of sovereignty by the Spanish people.'[284]

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280 Partly inspired by the distinction made by former constitutional judge Pablo Pérez Tremps, cf. Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270-271; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1183.

281 *Constitutional Review of the Maastricht Treaty* Section II.3.C.; Namely, under the theory of the constitutional nucleus, cf. Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 276, 297.

282 Luis I. Gordillo, *Interlocking Constitutions – Towards an Interordinal Theory of National, European and UN Law* (Hart Publishing 2012) 37 para 30.

283 *Treaty Establishing a Constitution for Europe* Section II.4.; *Constitutional Review of the Maastricht Treaty* Section II.3.C.

284 *Constitutional Review of the Maastricht Treaty* Section II.3.C.

The Tribunal found that this was not the case for municipal institutions, which do not hold powers that are directly attributed to them by the Constitution. Consequently, entitling EU foreigners to vote in municipal elections was not in contradiction with Spanish democracy or sovereignty.[285] Based on this decision, it can be deduced that the Tribunal conceptualizes the principle of sovereignty based on the Spanish people. It further indicates that the Tribunal is mainly concerned about the exercise of constitutionally assigned powers (or competences) by state institutions, which are in turn representing the Spanish people. Hence, the Spanish Tribunal seems to construe sovereignty as a competence-based limitation for the EU integration process. The consequence is that a set of core competences has to remain at the national level under the control of Spanish institutions.[286]

Moreover, the Tribunal emphasized that the introduction of Article 93 Spanish Constitution constituted 'an unmistakable act of exercise of the sovereignty of Spain'.[287] One consequence is, that the conferral of powers by the Spanish legislator according to Article 93 Spanish Constitution is perceived as an exercise of sovereign powers.[288] At the same time, the Tribunal underscored that Article 93 Spanish Constitution did not automatically entail a constitutional amendment, but instead, in case of conflicts between Spanish constitutional law and supranational cooperation, the constitutional text would have to be amended following the framework established in Articles 167 and 168 Spanish Constitution.[289] Therefore, compliance with the principle of sovereignty requires that the constitutional procedures are adhered to.

In addition, Article 93 Spanish Constitution does not transfer the actual competence to the supranational level, but merely mandates the exercise of this competence at the EU-level. The sovereign competence remains at the national level, following the conception of the Constitutional Tribunal.[290] This

285 Ibid Section II.3.C.; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185.

286 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1183-1184.

287 *Treaty Establishing a Constitution for Europe* Section II.2.

288 Ibid Section II.2.; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175.

289 *Constitutional Review of the Maastricht Treaty* Section II.3.C.; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 283-284; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 272; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 354; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 292.

290 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 286; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1182.

implies, in the first place, that the EU legal order is derived from and dependent on the Spanish Constitution. It furthermore suggests that the sovereign powers remain at the national level, and supranational cooperation constitutes only a shared exercise of certain powers. This shared exercise is, in itself, expression of Spanish sovereignty, given that the Spanish legislator decided to enable supranational cooperation through Article 93 Spanish Constitution and subsequently to transfer certain powers by adopting the EU-Treaties.[291] An additional indication for the preservation of Spanish sovereignty is, according to the Tribunal, the explicit possibility to withdraw from EU cooperation following Article 50 TEU.[292] The Tribunal concluded on this point:

> 'Therefore, the primacy operates with regard to the competences transferred to the Union by the sovereign will of the State and also sovereignly recoverable by means of the procedure of 'voluntary withdrawal' as set forth in Article I-60 of the Treaty.'[293]

Finally, the Tribunal connected the principle of sovereignty with the overall constitutional framework, which is an expression of the sovereign decision of how to organize the functioning of the state. The Tribunal ruled:

> '[...] [T]he transfer of the exercise of competences to the European Union and the consequent integration of Community legislation into our own [legislation] impose[s] *unavoidable limits to the sovereign faculties of the State* [emphasis added], acceptable only when European legislation is compatible with *the fundamental principles of the social and democratic State of Law* [emphasis added] established by the national Constitution.'[294]

This confirms the observation that the Tribunal is seemingly not merely shielding the principle of sovereignty in isolation. Instead, it relates sovereignty to the ability of the state to take core structural and organizational (value) decisions, which clearly connects sovereignty with the principle of (representative) democracy. At the same time, the Tribunal seems to strengthen the hierarchical position of the Spanish Constitution in the quoted section. Notably, the Tribunal requires that supranational cooperation complies with the core constitutional principles protected by the Spanish Constitution. This suggests in the first place that the Spanish legislator can only transfer powers to the extent

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291 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175.

292 *Treaty Establishing a Constitution for Europe* Section II.4.; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 286-287; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1187.

293 *Treaty Establishing a Constitution for Europe* Section II.3.

294 Ibid Section II.2.

that this is compatible with the Spanish Constitution – or it would have to otherwise modify the constitutional text. But it also reinforces the position of the Spanish Constitution as most authoritative legal document in the hierarchy of legal norms in Spain. At the same time, one could also see in this passage a request of the Constitutional Tribunal to the Spanish constitution-legislator to establish clear structural requirements for the EU,[295] as for example the case in Germany.[296]

3.2.4.2 Protecting the hierarchical position of the Spanish Constitution

The analyzed jurisprudence suggests that the Spanish Constitutional Tribunal not only protects the principle of sovereignty in isolation, but instead it protects sovereignty together with the constitutional framework. Notably, the Spanish Constitution is understood as formal expression of sovereignty.[297] As expressed through Article 93, the Spanish Constitution forms the basis for the Spanish EU membership, as competences have to be conferred following the requirements established by the Spanish constitutional text.[298] Therefore, the Tribunal emphasized in its assessment that the Spanish Constitution had to remain the basis for Spanish participation in EU cooperation, and with it the constitutionally prescribed procedure in Article 93 Spanish Constitution, which in the reading of the Tribunal includes the mentioned material *constitutional identity* dimension.[299] As noted by the Tribunal:

> 'By virtue of Article 93, the Cortes Generales can [...] attribute the exercise of "powers derived from the Constitution", but not disposing of the Constitution itself [...].'[300]

This implies that the Spanish Constitution forms the basis for and sits hierarchically on top of EU law. Therefore, EU law may not challenge the integrity of Spanish constitutional law. Any direct (textual) conflict between the Spanish

295 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution'.

296 Notably the structural requirements established in Article 23 (1) (1) German Basic Law, cf. Scholz, 'Art. 23 GG' paras 70-71; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686.

297 Sentencia 28/1991 *Spanish Rules on the Elections to the European Parliament* [1991] (Spanish Constitutional Tribunal) Section II.4.; Cf. as well: Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

298 *Spanish Rules on the Elections to the European Parliament* Section II.4.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 273; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271.

299 As pointed out by the Spanish Constitutional Tribunal in its earlier case-law, cf. *Spanish Rules on the Elections to the European Parliament* Section II. 4.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 273.

300 *Constitutional Review of the Maastricht Treaty* Section II.4 (own translation).

Constitution and EU law has to be resolved in favor of the constitution. The Tribunal established a reserve competence to give preference to the Spanish Constitution in case of conflict between the Spanish Constitution and EU law in case the EU itself did not resolve the Spanish concerns against the EU legal provision in question. The underpinning logic is, obviously, that the Spanish legislator cannot confer powers to the EU which contradict the Spanish Constitution. Hence, in case such a conflict would be identified a sort of EU *ultra vires* act would be given, which the Tribunal considers unconstitutional in Spain.[301] However, this review is very unlikely to occur and the Tribunal itself considers it only a hypothetical option at this point.[302] In addition, the Tribunal would allow the EU to address the matter in the first place, in case such a situation emerges. This corresponds with the Tribunal's conception of the EU and Spanish legal order as separate systems, that have their respective tools and mechanisms to address legal questions.[303] Finally, the Tribunal appears rather reluctant in its scrutiny of EU law, which suggests that an open conflict between EU and Spanish law is unlikely to emerge.[304]

Furthermore, the three aspects that the Tribunal identified as material dimension of Article 93 Spanish Constitution, namely sovereignty, the state structure, and constitutional rights are covered by Article 168 Spanish Constitution.[305] This provision imposes additional procedural requirements for constitutional amendments that concern particularly important constitutional matters, notably amendments to the Preliminary Part (Articles 1 to 9 Spanish Constitution),[306] Part 1 Chapter II Division 1 (Articles 15 to 29 Spanish Constitution),[307] as well as Part II (Articles 56 to 65 Spanish Constitution).[308] Therefore, it seems that the Constitutional Tribunal expands the special constitutional protection awarded to particularly important provision of the Spanish Constitution – which can only be amended under the strict amendment-procedure laid down in Article 168 Spanish Constitution – to the process of EU integration.

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301 *Treaty Establishing a Constitution for Europe* Section II.4.; Cf. as well: Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1195; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 292.

302 *Treaty Establishing a Constitution for Europe* Section II.4.

303 Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 36; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 293.

304 In contrast to the German Constitutional Court, which frequently employed the *ultra vires* review as a means to adjudicate on German and EU law questions, cf. *Quantitative Easing (PSPP) Final Judgment*.

305 Bon, 'La Identidad Nacional o Constitucional, una Nueva Noción Jurídica' 183.

306 Covering basic constitutional principles, such as sovereignty, democracy, state structure, and the status of the Spanish Constitution.

307 Covering core fundamental rights, including the freedom of speech, freedom of religion, and other civil liberties.

308 Special constitutional arrangements on the Spanish monarchy.

3.2.4.3 The Tribunal's concrete assessment

When considering the concrete application of the *constitutional identity limit*, it can be observed that the Tribunal frames the Spanish limit in its jurisprudence in vague and broad terms.[309] One consequence from this abstract wording is that no actual, concrete conflict with the constitutional text was identified until now. This might suggest that the Tribunal does not have the intention to impose strict constitutional limits to EU integration steps. Instead, it could be argued that the Tribunal might aim to recall core constitutional principles and values *vis-à-vis* the Spanish legislator, which is in charge of EU integration steps. Put differently, through the *constitutional identity limit* the Tribunal might illustrate the transformative constitutional impact that EU integration has and thereby require the legislator to consider this specific impact when debating EU integration steps. In fact, the Tribunal's limit might counterbalance the open wording of Article 93 Spanish Constitution.[310] One might even see in this proclaimed material limit, as *Martín Y Pérez de Nanclares* formulates it, an indirect judicial request to amend the constitutional framework for the conferral of powers to the EU-level.[311] At the same time, the Constitutional Tribunal clarified its own role in the constitutional appraisal of EU integration steps. Although the Tribunal remains largely in the background, it confirmed its competence – and readiness – to adjudicate on conflicts between Spanish constitutional law and EU law if required.[312]

In the concrete application of the *constitutional identity limit* against the EU Constitutional Treaty, the Tribunal found that the EU commitments replicated the Spanish material constitutional concerns. Namely, the proposed Treaty included the protection of national constitutional identities, the protection of core constitutional values, and the protection of EU fundamental rights.[313] This

309 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279.

310 Ibid 277.

311 Ibid 280; Antonio López Castillo, 'La Unión Europea 'en constitución' y la Constitución estatal en (espera de) reformas – A propósito de la DTC 1/2004 de 13 de diciembre' in Carlos Closa Montero (ed), *Constitución Española y Constitución Europea – Análisis de la Declaración del Tribunal Constitucional (DTC 1/2004, de 13 de Diciembre)* (Centro de Estudios Políticos y Constitucionales 2015) 49.

312 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 368; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1195.

313 Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 83; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 359; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1192-1193.

seems to suggest that the Constitutional Tribunal is receptive to accept an EU-law-based protection of material constitutional concerns.[314]

Finally, once EU-Treaties are adopted, EU law is seen as 'infra-constitutional', which implies that it lacks constitutional status.[315] Therefore, the Constitutional Tribunal refused to review national law against EU law, which it considered instead a matter for the other Spanish courts.[316] During the Eurocrisis, one could observe the consequences stemming from this approach. Notably, in constitutional challenges brought by the Spanish Autonomous Community of Catalonia against the federal balanced budget rules, which translated EU requirements into Spanish law. In its decision, the Tribunal confirmed that the Spanish law was closely interrelated with EU law, however, it subsequently assessed whether the federal law was compatible with the Spanish Constitution. Ultimately, it found that the Spanish Government was competent to enact the federal laws in question.[317]

3.2.4.4 Interim conclusion on the Spanish substantive core

Taken together, the substantive core of the Spanish *constitutional identity limit* remains vague and abstract. The vagueness stems from the open constitutional framework for conferring competences to the EU enshrined in Article 93 Spanish Constitution. The absence of further detail might indicate the Tribunal's intention to compensate for a lacking material constitutional guidance for this conferral,[318] it might equally indicate that the Tribunal intended to trigger the legislator without setting strict material limits, or it might simply

314 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 263; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 359.

315 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 263; Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 292; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 277.

316 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 263; Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 292.

317 Sentencia 134/2011 *EMU-Related Challenge* [2011] (Spanish Constitutional Tribunal) Sections II.6. and II.7.; Cf. as well: Giacomo Delledonne, 'A Legalization of Financial Constitutions in the EU? Reflections on the German, Spanish, Italian and French Experiences' in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 188.

318 A constitutional reform was discussed at the time when Declaration 1/2004 was issued, cf. Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 280; López Castillo, 'La Unión Europea 'en constitución' y la Constitución estatal en (espera de) reformas – A propósito de la DTC 1/2004 de 13 de diciembre' 49; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 377.

stem from the fact that the Tribunal was never explicitly asked to clarify the protected content.[319]

The Constitutional Tribunal identified Spanish sovereignty, basic constitutional principles, and the protection of fundamental rights as the core material concerns that EU integration steps might be confronted with.[320] When considering EU fiscal integration proposals, the prior two are of immediate constitutional relevance. The Tribunal seems to construe Spanish sovereignty as a competence-based constitutional limit which secures that core powers remain under the democratic control of the Spanish people. Despite the fact that the Tribunal did not yet specify which powers fall into this category, it seems very likely that fiscal, budgetary and financial matters could be conceived as such important powers. First, the competences are traditionally characterized as particularly important powers of a sovereign state.[321] And second, the Constitutional Tribunal incorporates comparative constitutional considerations into its constitutional jurisprudence. It seems that particularly the German, and the French constitutional debates are influential in that regard.[322] Given that both constitutional systems identified fiscal, budgetary and financial powers as especially relevant under the principles of sovereignty and democracy,[323]

319 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 356-357.

320 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

321 Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?', 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

322 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ahumada Ruiz, 'The Spanish Constitutional Court' 629; López Castillo, 'La Unión Europea 'en constitución' y la Constitución estatal en (espera de) reformas – A propósito de la DTC 1/2004 de 13 de diciembre' 48-49; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

323 *For Germany: Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Calliess, 'The Future of the Eurozone and the Role of the

it seems possible that the Spanish Constitutional Tribunal draws inspiration from these constitutional debates.

Moreover, the *constitutional identity limit* aims at securing the hierarchical position of the Spanish Constitution. As pointed out, the Tribunal determined that Article 93 Spanish Constitution formed the basis for EU cooperation in Spain, that the legislator was not entitled to confer constitution-amending powers to the EU-level, and that Spain retained the possibility to withdraw from the supranational cooperation.[324] By conceptualizing the EU legal order as derived from the Spanish Constitution, the Tribunal clearly limits the available constitutional space for EU (fiscal) integration steps.[325] Consequently, EU fiscal integration steps could possibly conflict with the Spanish *constitutional identity limit* in light of a possible comparative exchange of constitutional reasoning as well as in case such integration steps modify the outlined derived nature of EU cooperation. Although the Tribunal indicated readiness to accept possible EU safeguards as well as showed reluctance in the concrete application of this limit, it might ultimately use its competences in the future to formulate more detailed substantive requirements for EU cooperation.[326] At the same time, the Tribunal refrained from further fleshing out the *constitutional identity limit* when partly confronted with Eurocrisis-measures, which could possibly indicate a general reluctance to apply the limit to (EU) budgetary and fiscal policy decisions.

3.2.5 Longevity and absoluteness of the constitutional limit

Finally, the question is whether this *constitutional identity limit* constitutes an absolute limit to EU fiscal integration proposals. When considering the constitutional framework, it is first apparent that Articles 167 and 168 Spanish Constitution do not contain any restriction for the scope of constitutional amendments.[327] Conversely, this implies that the Spanish Constitution can be amended

German Federal Constitutional Court' 407; *And for the French debate: Fiscal Compact* para 13; *Review of Maastricht Treaty (Maastricht I)* para 43; Cf. as well Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

324 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 373-374.

325 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279.

326 Ibid 271, 283; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1186.

327 Article 169 Spanish Constitution only formulates a prohibition for constitutional amendments in times of war or during state of emergency, cf. José M. V. Santos, 'La Reforma del Procedimiento de Reforma Constitucional en España' (2016) 96 Revista de Derecho

in all parts.[328] Therefore, one may conclude that possible conflicts between EU fiscal integration proposals and the *constitutional identity limit* can be overcome by amending the Spanish Constitution.[329]

Furthermore, it seems that the Tribunal has no competence to review constitutional amendments. According to Article 161 (1) lit. a Spanish Constitution and Article 27 Constitutional Court Act, which together define the Tribunal's jurisdictional competences, the Tribunal can review the constitutionality of 'laws and regulations having the force of law.'[330] However, a constitutional amendment is neither a law nor a regulation having the force of law, as becomes obvious from the wording in Articles 167 and 168 Spanish Constitution. This suggests that Article 161 (1) lit a Spanish Constitution confers upon the Tribunal 'merely' the power to review parliamentary and governmental acts, but not constitutional law as such.[331] Thus, the constitution-amending legislator could overcome the *constitutional identity limit* by amending the Spanish Constitution in order to accommodate conflicting EU fiscal integration steps.

As a result, EU fiscal integration proposals might be confronted with the procedural requirements enshrined in Article 167 Spanish Constitution, in case an ordinary revision is required, or with the stricter requirements enshrined in Article 168 Spanish Constitution, in case constitutional amendments concern particularly important areas.[332] Following the ordinary procedure, the constitutional amendment can be adopted by a three-fifths majority in Congress and Senate.[333] According to Article 168 Spanish Constitution, stricter procedural

Político 13, 23-24.

328 Sentencia 259/2015 *Catalan Independence Declaration* [2016] (Spanish Constitutional Tribunal) Section II. 7.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 281; Ahumada Ruiz, 'The Spanish Constitutional Court' 636; Leonardo Álvarez, 'Die spanische Dogmatik der Verfassungstreue – Geschichte einer fehlgeschlagenen Rezeption des deutschen Verfassungsdenkens' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 433, 442; Francisco Santaolalla Gadea and Santiago Martinez Lage, 'Spanish Accession to the European Communities: Legal and Constitutional Implications' (1986) 23 Common Market Law Review 11, 13-14.

329 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 272.

330 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 119.

331 Alaez Corral and Arias Casta–o, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 603.

332 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282.

333 If this initial 3/5-majority cannot be reached a joint committee will be set up, which proposes a new wording of the amendment and which then requires an absolute majority in the Senate and a 2/3-majority in the Congress, as laid down in Article 167 (2) Spanish Constitution, cf. Elvira, 'Spain' 282.

requirements apply to any constitutional reform which affects (fully or in parts)[334] the Preliminary Part (Articles 1 to 9 Spanish Constitution), Part 1 Chapter II Division 1 (Articles 15 to 29 Spanish Constitution), or Part II (Articles 56 to 65 Spanish Constitution) of the Spanish Constitution. Under the strict constitutional amendment procedure Congress and Senate have to be dissolved by the approval of a two-thirds majority as a first step. Subsequently, the newly elected assemblies have to confirm the constitutional amendments with a two-thirds majority. Finally, the approved constitutional amendment will have to be confirmed by public referendum.[335]

When applying this framework to EU fiscal integration steps, it seems likely that the stricter amendment procedure is applicable in case such integration steps conflict with the *constitutional identity limit* and thus core constitutional principles established in the preliminary part of the Spanish Constitution. Nevertheless, the Tribunal continuously emphasized that the Spanish Constitution is open for a full revision,[336] which suggests that the *constitutional identity limit* constitutes ultimately a high procedural hurdle for the constitution-amending legislator.

3.3 Conclusion

The assessment revealed that the Spanish *constitutional identity limit* was established by the Constitutional Tribunal in order to protect a material constitutional core of the Spanish Constitution against continuous EU integration. The limit was first pronounced in the constitutional opinion of the Tribunal on the EU Constitutional Treaty[337] and it protects Spanish sovereignty, the basic constitutional structure as well as fundamental rights against constitutional

334 Given the broad wording, any textual change of the covered constitutional provision has to comply with the strict procedural requirements, cf. Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 192; Victor Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* (Hart Publishing 2013) 57.

335 Elvira, 'Spain' 282-283.

336 *Catalan Independence Declaration* Secion II. 7.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 167-168; Ahumada Ruiz, 'The Spanish Constitutional Court' 636; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 272.

337 The EU Constitutional Treaty included specific safeguards for national (constitutional) identities, which might explain the emergence of the Spanish limit in this decision, and also other Member States established similar limits, cf. Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 269; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 263.

erosion.[338] It was pointed out that the precise substantive content of the *constitutional identity limit* remains vague, given its sporadic mentioning by the Tribunal. Yet, by taking previous decisions into account, it was shown that the Tribunal's main intention appears to be the protection of Spanish statehood as well as sovereign and democratic decision-making.[339] The latter seems to imply that core competences have to remain at the national level under the democratic control of the Spanish Congress, as democratic representation of the Spanish people.

These core competences could include budgetary, financial and fiscal decisions, which then might impact the proposed EU fiscal integration ambitions. However, the Tribunal did not yet provide more specific guidance on the competence areas covered by the *constitutional identity limit*. At the same time, the Tribunal accepted in its appraisal that the EU legal order might offer adequate protection for the outlined constitutional concerns.[340] When applying this abstract constitutional benchmark to EU fiscal integration proposals, it seems that these proposals could affect important sovereign competences which might require confirmation under the strict constitutional amendment procedure.[341]

Overall, this suggests that the Tribunal has no intention to employ the *constitutional identity limit* as an absolute constitutional restriction to EU fiscal integration proposals. Over the past decades, the Spanish Constitutional Tribunal was critical towards EU integration, more so than the Spanish political institutions and the Spanish people.[342] Yet, the Tribunal remained constructive

338 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bon, 'La Identidad Nacional o Constitucional, una Nueva Noción Jurídica' 172-173; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

339 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270-271; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1183.

340 Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 359; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1192-1193.

341 As Article 168 Spanish Constitution allows for a 'total revision', cf. *Catalan Independence Declaration* Section II. 7.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 281.

342 Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 275.

and open towards EU law and further integration steps. One example in that regard is the refusal of the Constitutional Tribunal to generally review EU law but instead restrict itself to matters that are close to the Spanish constitutional core.[343] Obviously, this approach reduces the risk that situations of direct conflict between Spanish (constitutional) law and EU law, as well as in institutional terms between the Spanish Constitutional Tribunal and the CJEU, emerge. As it stands, the Spanish *constitutional identity limit* is an abstract constitutional warning towards the political institutions of Spain to preserve Spanish statehood, the basic constitutional structures, and the protection of fundamental rights.[344] The Tribunal might specify the limit's content in future decisions, and thereby restrict the constitutional space for the political decision-making process decisively.

Constitutional Identity Classification Board for Spain
1 ***Which institutional actor enforces the constitutional limit?***   The Spanish *constitutional identity limit* was developed by the Spanish Constitutional Tribunal, which is in charge of constitutional review. Its decisions are final and binding.
2 ***How can the constitutional identity limit be triggered?***   Most commonly, EU (integration) measures are challenged through abstract ex ante (Article 95 (2) Spanish Constitution) or ex post review (Article 161 (1) lit. a Spanish Constitution). The Eurocrisis-measures triggered internal conflicts on the allocation of competences.[345]
3 ***What is the constitutional basis of the constitutional identity limit?***   Article 93 Spanish Constitution is the basis on which the Constitutional Tribunal grounds its *constitutional identity limit*. In Declaration 1/2004, it identified that this provision has a material dimension which shields core constitutional principles and values.

343 Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1200.

344 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176.

345 Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' 36.

Constitutional Identity Classification Board for Spain
4 ***What constitutional principles and substantive content are covered?*** The material core identified by the Constitutional Tribunal covers: Spanish sovereignty; basic constitutional structures; the system of constitutional values and principles; as well as fundamental rights.[346] However, the jurisprudence on the *constitutional identity limit* is brief[347] and its content remains abstract and vague. In light of EU fiscal integration proposals, the Tribunal seems mainly concerned about preserving core decision-making abilities in central sovereign competence areas within the Spanish constitutional order
5 ***How – if at all – can the constitutional identity limit be overcome (longevity/absoluteness of the limit)?*** The Spanish Constitution does not restrict the scope for constitutional amendments. Given that EU fiscal integration steps might impact core constitutional principles, the strict constitutional amendment procedure in Article 168 Spanish Constitution appears to apply.

Figure 13: Constitutional Identity Classification Board for Spain

4 The Polish perspective on EU fiscal integration

Finally, the comparison will consider the material limits that the Polish constitutional order formulates against EU fiscal integration proposals. In light of the comparative setting of this research, Poland provides for an interesting addition to the comparison for at least four related reasons.

First, Poland is not (yet) a member of the Eurozone, which distinguishes it from the previously analyzed Member States. However, the EU's *acquis communautaire*, to which Poland subscribed in 2004, establishes a legal obligation for the country to accede to the single currency once it meets the prescribed convergence criteria.[348] Therefore, Poland currently has the perspective

346 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

347 Only confirmed once by the Constitutional Tribunal, cf. *Constitutional Complaint Melloni* Section II. 3.

348 Czuczai, 'Accession to the EU, But to Which EU? The Legal Impact of the Constantly Evolving EMU Acquis on the EU Enlargement Process' 595; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 72-73; Rinaldi-Larribe, 'Is Economic Convergence in New Member States Sufficient for an Adoption of the Euro?' 269-270; Louis, 'The Economic and Monetary Union: Law and Institutions' 605; For a detailed overview on the different convergence criteria cf.: Frédéric Allemand, 'The Impact of the EU Enlargement on Economic and Monetary Union: What Lessons Can Be Learnt From the Differentiated Integration Mechanisms in an Enlarged Europe?' (2005) 11 European Law Journal 586, 589-591; It should also be noted that Poland was ambitious to join the Eurozone prior to its accession to the EU, cf. Zbigniew Polański, 'Poland and the Euro Zone

of a Euro-candidate country and not that of a Eurozone member. Nevertheless, the currently debated EU fiscal integration steps are equally relevant for Euro-candidate countries, as they might render Eurozone membership harder to achieve constitutionally in the future, leading to a clash between the EU obligation to join and possible constitutional obstacles to the level of fiscal integration required for joining. This may particularly happen as several constitutional limits have already been established by the Polish Constitutional Tribunal[349] against too far-reaching competence conferrals to the EU.[350] A more integrated Eurozone could trigger these limits and render Polish accession to the Euro constitutionally impossible. Therefore, it seems crucial to include the constitutional perspective of Euro-candidate Member States into the assessment in order to balance the required reform steps with, on the hand, political ambitions of the current 19 Eurozone countries, and, on the other hand, the ambition to extend the Eurozone. Hence, EU fiscal integration should take the available constitutional space in Euro-candidate countries into account in order to keep full Eurozone-membership constitutionally attainable for these countries.[351]

Second, Poland is historically shaped by its communist past under the influence of the Soviet Union. The Polish Constitution of 1997 was drafted in light of these experiences and it entails a strong fundamental rights protection as well as constitutional safeguards against the (institutional) abuse of public power.[352] These constitutional characteristics equally developed in other Central and Eastern European states, given their comparable historical experiences.[353] The Polish constitutional order can therefore be seen as a

Enlargement: Monetary Policy, ERM II, and Other Issues' (2004) 32 Atlantic Economic Journal 280, 285-286.

349 In Polish: *Trybunał Konstytucyjny.*

350 *Poland's EU Membership* Point 18.7; Cf. as well: Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 161; Anneli Albi, '"Europe" Articles in the Constitutions of Central and Eastern European Countries' (2005) 42 Common Market Law Review 399, 408.

351 Jan Barcz, 'Polish Policy in the Context of the Euro Area Reform' (2013) 16 Yearbook of Polish European Studies 69, 71.

352 Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 31; Cezary Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 393-397.

353 Anneli Albi and Samo Bardutzky, 'Revisiting the Role and Future of National Constitutions in European and Global Governance: Introduction to the Research Project' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 14; Stanislaw Biernat and Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 748.

sufficiently representative example of a wider group of Member States that joined the European Union since 2004. Consequently, the conclusions drawn on the Polish material limits to EU fiscal integration proposals might be equally relevant for other constitutional systems in Central and Eastern European Member States that have a similar constitutional design to Poland.

Third, as already indicated, the Polish constitutional approach to EU integration is mainly shaped by an authoritative constitutional court, namely the Polish Constitutional Tribunal. The Tribunal established for example the Polish *constitutional identity limit*, through which it protects core constitutional principles against EU integration.[354] Hence, the institutional design and the existence of substantive constitutional limits characterize the Polish constitutional order as relatively rigid towards EU integration, which squarely fits within the employed comparative framework. In addition, the Polish Constitutional Tribunal itself draws inspiration from the constitutional jurisprudence of other EU constitutional courts.[355] This comparative approach is especially noticeable in relation to the *constitutional identity limit*, which was strongly influenced by German jurisprudence.[356] At the same time, both the substantive content and the absolute nature of the limits differ, as will be elaborated.

Lastly, the Polish constitutional system is undergoing a process of constitutional decay, which is scrutinized at the supranational level with limited success.[357] This decay concerns in particular the rule of law and erupted after

354 Introduced with the *Lisbon*-judgment into Polish constitutional logic, *Treaty of Lisbon* Section III.2.1; subsequently confirmed in relation to the ESM, cf. *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 243; Marcin Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' in Bruno de Witte and others (eds), *Judicial Review and Cooperation series, National Courts and EU Law: New Issues, Theories and Method* (Edward Elgar Publishing Limited 2016) 129; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 31-32; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 128-129.

355 The *Lisbon*-judgment contains an entire section dedicated to a comparative overview of constitutional developments in other EU Member States, cf. *Treaty of Lisbon* Section III 3.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 243; Magdalena Bainczyk, 'Die erste Vorabentscheidungsfrage des polnischen Verfassungsgerichtshofs an den EuGH' (2017) 52 Europarecht (EuR) 121, 123.

356 *Treaty of Lisbon* Section III.3.3.; Cf. as well: Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 130-131.

357 Rech, 'Some Remarks on the EU's Action on the Erosion of the Rule of Law in Poland and Hungary' 335-336, 343; Tomasz Tadeusz Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 Review of Central and East European Law 116, 134-136; Also given the rejection of this process from the Polish side, which could result in a lasting credibility damage for the EU, cf. Armin von Bogdandy, 'Tyrannei der Werte? Herausforderungen und Grundlagen einer europäischen Dogmatik systemischer Defizite' (2019) 79 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 503, 511; Note that the PiS-party is traditionally

the election of the PiS[358]-party into governmental power in 2015. The contested measures taken by the government were *inter alia* target against the Polish Constitutional Tribunal.[359] Naturally, these developments put constitutional precedent and the Tribunal's established approach in EU matters into question.[360] This constitutes a challenge for the subsequent analysis, as the future Polish constitutional jurisprudence might be more difficult to predict due to the on-going constitutional transformation. Assuming that the current political interferences remain temporary, the relevant constitutional jurisprudence established prior to 2015 will likely regain significance – or otherwise serve as basis for an even more protectionist and nationalist constitutional approach. Consequently, the focus on the established approach seems justified. In addition, analyzing the Polish case also offers the possibility to reflect on the potential stabilizing function of national constitutional values through supranational cooperation. Furthermore, it will allow for a reflection on the importance of the rule of law – possibly even a necessary precondition – for the stability of the Euro.

The following assessment will first outline the applicable constitutional framework (4.1.), before subsequently evaluating the *constitutional identity limit* (4.2.) as well as substantiating the rule of law concerns and its implications for EU fiscal integration proposals (4.3.).

4.1 Identifying the core constitutional limits to EU fiscal integration in Poland

Since Polish accession to the EU in 2004, the Constitutional Tribunal developed a detailed constitutional approach towards EU integration and towards the effect of EU law in Poland. This constitutional approach includes an *ultra vires limit* as well as a *constitutional identity limit*, which were both inspired by the German jurisprudence.[361] Both limits are rooted in the principle of Polish

skeptical of the EU, also in relation to the previous integration steps, cf. Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156-157.

358 Referring to Poland's Law and Justice political party (in Polish: *Prawo i Sprawiedliwoúæ*).

359 Wojciech Sadurski, 'Constitutional Crisis in Poland' in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 262; Sava Jankovic, 'Polish Democracy Under Threat? An Issue of Mere Politics or a Real Danger?' (2016) 9 Baltic Journal of Law & Politics 49, 51.

360 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 264; Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' 547, 572-573; Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2019) 11 Hague Journal on the Rule of Law 63, 77; Obviously, constitutional courts are of core interest for illiberal governments, given the courts' powers, cf. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 49.

361 *Treaty of Lisbon* Section III 3.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 243; For

sovereignty – which entails that core decisions have to be taken by Polish institutions and which protects the supreme status of the Polish Constitution.[362] Through its *ultra vires* review, the Tribunal scrutinizes competence excesses of EU institution not covered by the mandate awarded by the Polish legislator through the conferral of competences based on Article 90 Polish Constitution.[363] It is thus primarily applied to the exercise of conferred competences. In contrast, the *constitutional identity limit* restricts the available material constitutional scope for the conferral of competences.[364] Under the *identity limit* the Tribunal reviews whether EU integration steps sufficiently respect Polish democracy, the rule of law, fundamental rights, as well as Polish sovereignty and statehood.[365] When considering EU fiscal integration proposals, the *constitutional identity limit* seems particularly relevant, as it formulates restrictions to the material scope available for such integration steps under the Polish Constitution.

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example, the Polish *ultra vires* review was inspired by the German jurisprudence, cf. Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 130.

362 As enshrined in Article 8 (1) Polish Constitution, cf. Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 250; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 156; Krystyna Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' (2005) 6 German Law Journal 1355, 1365.

363 Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 130-131; Stanislaw Biernat, 'Offene Staatlichkeit: Polen' in Armin von Bogdandy, Pedro Cruz Villalón and Peter Michael Huber (eds), *Handbuch Ius Publicum Europaeum, Band II: Offene Staatlichkeit – Wissenschalft vom Verfassungsrecht* (C.F. Müller 2008) para 46; Sven Höbel, 'Polish and German Constitutional Jurisprudence on Matters of European Community Law: A Comparison of the Constitutional Courts' (2007) 3 Croation Yearbook of European Law and Policy 515, 525-526.

364 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 501; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201.

365 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499, 501; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

In addition to constitutional limits, the Polish Constitutional Tribunal also established more receptive approaches towards EU law. One example in this regard is its so-called *multi-centric* approach according to which legal norms enacted by different authorities can coexist in Poland.[366] The most prominent example is the coexistence of Polish and EU law. Corresponding to the idea of the EU as a pluralistic constitutional legal order, the Constitutional Tribunal aims at avoiding conflicts between legal instruments stemming from the different orders and thereby preserve both orders equally. This multi-centric approach also entails that the Tribunal adopts a *European-law-friendly* interpretation of the Polish Constitution[367] and that it presumes the constitutionality of newly enacted EU obligations.[368] Taken together, the multi-centric approach enables the Tribunal to reduce hierarchical disputes between Polish and EU law. Obviously, this would equally extend to EU fiscal integration measures. In the first place, such integration steps would benefit from the rebuttable presumption of constitutionality. And subsequently, once the measures are duly ratified, the Tribunal would likely adopt a European-law-friendly reading of the Polish Constitution in light of possible new obligations. Nevertheless, the Tribunal can rebut the presumption of constitutionality in light of the outlined *constitutional identity limit*. Therefore, the subsequent assessment will focus on the possible substantive restrictions of this limit for EU fiscal integration steps.

4.2 The Polish *constitutional identity* limit – protecting a *sovereign* Poland?

The Polish *constitutional identity limit* imposes substantive restrictions to the conferral of powers to the EU.[369] Comparable to the function of *constitutional*

366 Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multi-centric Vision or Creeping Hierarchical Practice' 132; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 251; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 156; Höbel, 'Polish and German Constitutional Jurisprudence on Matters of European Community Law: A Comparison of the Constitutional Courts' 522; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1363-1364.

367 Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multi-centric Vision or Creeping Hierarchical Practice' 132; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 251; Magdalena Bainczyk and Ulrich Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' (2006) 41 Europarecht (EuR) 236, 253; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1360.

368 Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multi-centric Vision or Creeping Hierarchical Practice' 130-131; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107.

369 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 129.

identity limits developed in other EU Member States, the Polish limit shields core constitutional principles against external intervention,[370] as will be assessed in the following analysis.

4.2.1 *Institutional actor enforcing the limit*

The Polish *constitutional identity limit* was established by the Polish Constitutional Tribunal. The Tribunal was initially created on a provisional basis under Communist rule in 1982 with only a limited set of responsibilities.[371] The apparent underlying aim of its creation was to convey the impression that Poland was a constitutional system under the supervision of an 'independent' *constitutional court*.[372] Its institutional position as guardian of the Polish Constitution was cemented under the new 1997 Polish Constitution, with widely extended competences.[373] It is established as independent judicial actor, as explicitly established in Article 173 Polish Constitution,[374] and entitled to conduct constitutional review of acts of parliaments, normative acts including governmental decrees as well as international agreements.[375] Furthermore, its judgments are binding for all Polish state institutions, including the Polish Government and the Polish Parliament (Sejm).[376] Decisions take binding effect

370 As pointed out by the Constitutional Tribunal itself, cf. *Treaty of Lisbon* Section III 2.1. and Section III.3.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

371 Including a mechanism according to which decisions by the Tribunal on the compatibility of legislative acts with the constitutional text were referred to the Polish Parliament, which could then confirm the constitutionality by overruling the constitutional decision, cf. De Visser, *Constitutional Review in Europe – A Comparative Analysis* 71-72; Csilla Kiss, *Constitutional Democracy in Eastern Europe: The Role of Constitutional Courts in Democratic Consolidation in Post-Communist Hungary and Poland* (ProQuest Dissertations Publishing 2005) 57-58; Ernst-Wolfgang Böckenförde, 'Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation' (1999) 52 Neue Juristische Wochenschrift (NJW) 9, 16; Mark F. Brzezinski and Leszek Garlicki, 'Judicial Review in PostCommunist Poland: The Emergence of a Rechtsstaat?' (1995) 31 Stanford Journal of International Law 13, 26.

372 Kiss, *Constitutional Democracy in Eastern Europe: The Role of Constitutional Courts in Democratic Consolidation in Post-Communist Hungary and Poland* 56;

373 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 72-73; Wioleta Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' (2009) 44 Europarecht (EuR) 131, 132.

374 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 212.

375 As established in Article 188 Polish Constitution, cf. *Treaty of Lisbon* Section III 1.1.1.; Cf. as well: De Visser, *Constitutional Review in Europe – A Comparative Analysis* 260; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1361.

376 Established in Article 190 (1) Polish Constitution.

after their official publication.[377] In its function as guardian of the Polish Constitution, it furthermore delivered crucial judgements on the relationship between Polish constitutional law and EU law.[378] Consequently, the Tribunal is a key player when considering additional EU integration steps, including fiscal integration.

The Constitutional Tribunal is composed of 15 constitutional judges, which are appointed for 9-year-terms by the Sejm.[379] The Sejm votes on proposals that are either submitted by the *Presidium of the Sejm* or by at least 50 members of the Sejm. A proposed candidate requires the support of a simple majority, with at least half of the parliamentarians participating in the vote.[380] Both the Tribunal's President and the Vice-President are appointed by the Polish President upon proposal of the Assembly of all 15 constitutional judges.[381] In order to be nominated as a constitutional judge, candidates need to be qualified to become a judge at either the Polish Supreme Court or the Highest Administrative Court, which requires *inter alia* at least 10 years of working experience in a legal profession.[382] As could be witnessed during the rule of law crisis in Poland, particularly the low majority requirement for the appointment of constitutional judges (simple majority in parliament) enabled the appointment of controversial, political candidates.

Hence, the Tribunal is an authoritative constitutional court with far-reaching review powers, which can, however, be influenced by political interests given the outlined appointment procedure of constitutional judges – as apparent from the recent crisis in Poland.

4.2.2 Procedural framework – or how to trigger the limit

The main procedure to trigger the *constitutional identity limit* is the initiation of constitutional review of an international or EU agreement following Article 188 No. 1 Polish Constitution.[383] This review can be either initiated *ex ante* by the Polish President following Article 133 (2) Polish Constitution[384] or *ex post*[385]

377 Enshrined in Article 190 (2) and (3) Polish Constitution.

378 For example, the judgment on Polish accession to the EU *Poland's EU Membership* and the *Lisbon*-judgment *Treaty of Lisbon*; Cf. as well: Adam Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' (2011) 48 Common Market Law Review 503, 504;

379 Established in Article 194 (1) Polish Constitution.

380 Established in Article 5 (4) Act on the Polish Constitutional Tribunal, cf. De Visser, *Constitutional Review in Europe – A Comparative Analysis* 207.

381 As laid down in Article 194 (2) Polish Constitution as well as Article 15 (1) and (2) Act on the Polish Constitutional Tribunal.

382 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 212;

383 Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1362.

384 Magdalena Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichts-

by various privileged applicants enumerated in Article 191 (1) No. 1 Polish Constitution. These privileged applicants are *inter alia* the Polish President, the Marshal of the Sejm and of the Senate, the Prime Minister, 50 members of the Sejm or 30 Senators.[386] Both the *ex ante* and the *ex post* constitutional review are conducted *in abstracto*. Interestingly, the Constitutional Tribunal requires that the applicable standing requirements are met throughout the entire proceedings. An application against the Fiscal Compact was declared inadmissible after two of the thirty senators that initiated the challenge in March 2013 transferred to the European Parliament in 2014.[387] Similarly, applications initiated by the Sejm have to be confirmed after general elections by the newly elected Sejm to determine whether the proceedings still enjoy parliamentary support.[388] Hence, the Constitutional Tribunal assesses the admissibility of the application throughout the entire proceedings, and not only at the moment of submission of the application.[389]

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hofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' (2017) 52 Europarecht (EuR) 306, 319; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 107; Nina Półtorak and Sławomir Dudzik, ''The Court of the Last Word.' Competences of the Polish Constitutional Tribunal in the Review of European Union Law' (2012) 15 Yearbook of Polish European Studies 225, 227; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005.' 154; Which constitutes an exclusive prerogative of the Polish President, cf. K 11/13 *Challenge Against the Fiscal Compact* [2013] (Polish Constitutional Tribunal); Cf. as well: Biernat and Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context' 785.

385 *Poland's EU Membership* Section 1.2.; Cf. as well: Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 151-152; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 154.

386 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 107, 118-119; Półtorak and Dudzik, ''The Court of the Last Word.' Competences of the Polish Constitutional Tribunal in the Review of European Union Law' 226-227; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107; Anna Wyrozumska, 'Poland' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011) 471; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 151-152; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 154;

387 Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 319.

388 *Challenge Against the Fiscal Compact*; Cf. as well: Biernat and Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context' 774; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 319; Alicia Hinarejos Parga, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015) 148.

389 Through which difficult political questions might be avoided by the Tribunal, cf. Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von

Moreover, the *constitutional identity limit* could also be triggered by individuals initiating a constitutional complaint.[390] However, the constitutional framework establishes that individuals may only challenge a 'statute or *another normative act*' that violates them in their constitutional rights.[391] The Constitutional Tribunal specified, in this regard, that the term 'normative act' covers EU law acts, both of primary and secondary law, as they have direct implications for the constitutional rights of individuals and therefore qualify as normative acts.[392] Yet, for a constitutional complaint to be admissible individuals have to substantiate that the protection of constitutional rights at the EU-level is considerably lower than the protection awarded by the Polish Constitution.[393] This suggests that the rebuttable presumption exists that the EU fundamental rights protection corresponds to the national protection. Overall, it shifts the burden of proof to the applicants who have to substantiate a lower fundamental rights protection at EU-level, which makes the admissibility of such complaints, particularly against EU fiscal integration steps, relatively unlikely.[394] It further suggests that individual constitutional complaints against future EU fiscal integration will likely be considered inadmissible by the Tribunal.

Overall, this indicates that constitutional review can be triggered by a range of both privileged and non-privileged applicants at different stages. The review can take the form of an abstract *ex ante* or *ex post* constitutional review as well as a concrete *ex post* review. In relation to EU law, and more specifically EU primary law, constitutional review is most commonly initiated by the named privileged applicants in an abstract *ex post* manner.[395] Although the Polish

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Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 320.

390 Based on Article 79 (1) and Article 188 No. 5 Polish Constitution.

391 Cf. wording in Article 79 (1) Polish Constitution; Cf. as well De Visser, *Constitutional Review in Europe – A Comparative Analysis* 151.

392 In general: Półtorak and Dudzik, ''The Court of the Last Word.' Competences of the Polish Constitutional Tribunal in the Review of European Union Law' 246; Cf. in relation to EU primary law: SK 54/05 *Constitutional Complaint Against Protocol No. 4 to the European Agreement* [2007] (Polish Constitutional Tribunal); Cf. as well: Wyrozumska, 'Poland' 471; And in relation to EU secondary law: SK 45/09 *Constitutional Complaint Against Brussels I Regulation* [2011] (Polish Constitutional Tribunal); Cf. as well: Katarzyna Granat, 'Kontrolle des EU-Sekundärrechts durch den polnischen Verfassungsgerichtshof – Anmerkung zum Beschluss des polnischen Verfassungsgerichtshofs vom 16. November 2011, SK 45/09' (2013) 48 Europarecht (EuR) 205, 208.

393 *Constitutional Complaint Against Brussels I Regulation* Section III.8.2. and III.8.5.; Cf. as well Granat, 'Kontrolle des EU-Sekundärrechts durch den polnischen Verfassungsgerichtshof – Anmerkung zum Beschluss des polnischen Verfassungsgerichtshofs vom 16. November 2011, SK 45/09' 213.

394 Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 310;

395 Particularly, because of the political disagreement across Polish political parties, cf. Ibid 310.

Constitution also provides for an *ex ante* assessment, the Polish President did not yet employ this prerogatives in relation to EU integration steps.[396] In all cases, the Tribunal is bound by the application brought before it and may not extend the scope of review *ex officio*.[397]

4.2.3 Constitutional basis of the employed limit

The Polish *constitutional identity limit* is a judicial concept established by the Polish Constitutional Tribunal. Its conceptual basis is the Polish sovereignty doctrine[398] and the Tribunal established that the concept of *constitutional identity* corresponds to the normative, substantive manifestation of sovereignty, which is specified in different provisions of the Polish Constitution.[399] Namely, it covers particularly important sovereign competences that have to remain under the control of Polish institutions laid down in the Preamble as well as Articles 2, 4, 5, 8, 90, 104 (2), 126 (1) Polish Constitution.[400] These provisions protect core constitutional principles, such as sovereignty, (representative) democracy, the rule of law, Polish statehood, the supreme status of the Polish Constitution, the protection of fundamental rights, and national security, as well as the constitutional basis for the conferral of competences to the EU.

Article 90 Polish Constitution can be identified as the main constitutional vehicle for the operationalization of the *constitutional identity limit*. The provision states:

> 'The Republic of 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.'

Thus, the provision generally entitles the Polish legislator to confer powers to the EU as long as the conferral remains limited 'to certain matters'. The Tribunal interpreted this restriction as a direct acknowledgement of the Polish *constitutional identity* doctrine, as it only allows for a conferral of a limited set

396 The Polish President did, for example, not use the presidential prerogatives in Article 133 (2) Polish Constitution to challenge the *Lisbon Treaty*, cf. Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107;

397 *Treaty of Lisbon* Section III 1.2.1.; Cf. as well: Magdalena Bainczyk, 'Die praktische Anwendung des Unionsrechts in Polen – Anmerkung zum Urteil des EuGH v. 7.3.2017, Rs. C-390/15 (RPO), und zum Beschluss des polnischen Verfassungsgerichtshofes v. 17.5.2017, Akz. K 61/13' (2017) 52 Europarecht (EuR) 725, 740-741.

398 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 248; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 129.

399 *Treaty of Lisbon* Section III. 2.1.

400 Ibid Section III 2.1.; Cf. as well: Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 525.

of competences.[401] In the reading of the Constitutional Tribunal, this implies, on the one hand, that the conferral to the EU has to be specific and limited in scope,[402] and, on the other hand, that the conferral of powers may not occur in competence areas that are covered by Polish *constitutional identity*, as these are not included in the term 'certain matters'.[403] Put differently, according to the Tribunal the wording 'certain matters' indicates that the Polish constitutional legislator wanted to exclude competence areas from the possibility of conferral. Finally, it should be added that although Article 90 (1) Polish Constitution limits the scope for EU cooperation, the provision has to be distinguished from the German *eternity clause*, which entails a scope restriction for constitutional amendments in general.[404]

4.2.4 Substantive core protected by the limit

As concluded, the *constitutional identity limit* imposes substantive restrictions for the conferral of competences. Conceptually, the Constitutional Tribunal derives the limit from the material manifestation of Polish sovereignty, which it bases on Article 90 Polish Constitution.[405] These substantive restrictions are defined in the Tribunal's jurisprudence on a case-to-case basis and mainly depend on the questions raised by the applicants.[406]

Here, the fact that Poland is not yet a member of the Eurozone becomes relevant. Up to this point, the Tribunal did not conduct an elaborate assessment

401 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252.

402 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 250; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 313; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1364.

403 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 525;

404 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 246; Bainczyk, 'Die praktische Anwendung des Unionsrechts in Polen – Anmerkung zum Urteil des EuGH v. 7.3.2017, Rs. C-390/15 (RPO), und zum Beschluss des polnischen Verfassungsgerichtshofes v. 17.5.2017, Akz. K 61/13' 742;

405 *Treaty of Lisbon* Section 2.1.; *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510-511.

406 As highlighted, the Tribunal is bound by the applications brought before it, cf. *Treaty of Lisbon* Section III 1.2.1.; Cf. as well: Bainczyk, 'Die praktische Anwendung des Unionsrechts in Polen – Anmerkung zum Urteil des EuGH v. 7.3.2017, Rs. C-390/15 (RPO), und zum Beschluss des polnischen Verfassungsgerichtshofes v. 17.5.2017, Akz. K 61/13' 740-741.

of the constitutional implications of Polish Eurozone-membership or of the Eurocrisis-measures taken by the Eurozone. It considered these questions as hypothetical and thus inadmissible. As established in Article 90 (1) Polish Constitution, the Polish legislator has to *confer the competence* to enact legally binding measures.[407] However, given that Poland is currently only a Euro-candidate country, no legally binding obligations can directly derive for Poland. The Tribunal emphasized in this regard that Poland is currently merely bound by the EU convergence rules.[408] The Tribunal only noted that accession to the Euro might require a constitutional amendment of Article 227 Polish Constitution.[409]

Despite the absence of specific Euro-related jurisprudence, the Tribunal identified a set of constitutional principles that are particularly important for the functioning of the political system in Poland. These principles are covered by the *constitutional identity limit* (4.2.4.1.) and they are subsequently evaluated in light of EU fiscal integration proposals (4.2.4.2.).

4.2.4.1 Constitutional identity limit: general characteristics

In its *Lisbon*-judgment the Constitutional Tribunal established that Polish *constitutional identity* covers the inalienable institutional prerogatives which are the 'normative manifestation'[410] of the principle of sovereignty. Although the Tribunal explicitly highlighted that it was difficult to provide a detailed list of these inalienable competences, it provided a non-exhaustive overview of 'matters' that fall under a 'complete prohibition of conferral' under Article 90 Polish Constitution.[411] According to the Tribunal, these matters are:

> '[...] decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, *in particular* [emphasis added], the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring

407 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 249; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

408 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.6.1.

409 *Poland's EU Membership* Point 33; Cf. as well: Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 509; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 161.

410 *Treaty of Lisbon* Section III 2.1.

411 Ibid Section III 2.1.; The non-exhaustive character stems from the Tribunal's wording 'in particular', cf. Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201.

> better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences [...].'[412]

Considering this list, one can identify four broad constitutional areas covered, namely the protection of fundamental rights, the preservation of the Polish state, the protection of the state structure as well as retaining *Kompetenz-Kompetenz*.[413] Obviously, this list is formulated in an abstract manner and only covers broad constitutional principles or values, without identifying more specific underlying constitutional provisions or competences connected to them. Moreover, some of the identified matters are already affected by EU law. For example, the protection of fundamental rights is largely regulated at EU-level based on the Charter of Fundamental Rights[414] and General Principles of EU law. The Polish Tribunal explicitly acknowledged the equivalent degree of fundamental rights protection awarded by both legal orders.[415] Therefore, the enlisted constitutional areas are apparently not entirely banned from supranational cooperation, which is why the Tribunal's wording referring to a 'complete prohibition' is misleading. Instead, the Tribunal seems to suggest that the ultimate control or the 'heart of the matter'[416] remains at the Polish constitutional level. This can be observed in relation to fundamental rights protection, where the Tribunal employs the rebuttable presumption that the EU protection corresponds to the Polish Constitution.[417] This is equally visible in relation to the *constitutional identity* doctrine, where the Tribunal identified the EU protection of national (constitutional) identities, enshrined in Article 4

412 *Treaty of Lisbon* Section III 2.1.

413 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

414 To which Poland negotiated Protocol 30, however, the CJEU clarified that the Protocol did not alter the obligation of Poland to comply with the Charter, cf. Joined Cases C-411/10 and C-493/10 *N.S. and M.E. et al. v. Minister for Justice, Equality and Law Reform* [2011] (CJEU) para 120; Cf. as well: Craig and de Búrca, *EU Law Text, Cases, and Materials* 395.

415 As, for example, apparent from the outlined admissibility assessment of individual constitutional complaints on EU-related matters, cf. *Constitutional Complaint Against Brussels I Regulation* Section III.8.5.; Cf. as well: Granat, 'Kontrolle des EU-Sekundärrechts durch den polnischen Verfassungsgerichtshof – Anmerkung zum Beschluss des polnischen Verfassungsgerichtshofs vom 16. November 2011, SK 45/09' 213.

416 *Treaty of Lisbon* Section III 2.1.

417 *Constitutional Complaint Against Brussels I Regulation* Section III.2.2.; *Poland's EU Membership* Point 23; Cf. as well: Granat, 'Kontrolle des EU-Sekundärrechts durch den polnischen Verfassungsgerichtshof – Anmerkung zum Beschluss des polnischen Verfassungsgerichtshofs vom 16. November 2011, SK 45/09' 213.

(2) TEU, as an 'equivalent' concept.[418] Similarly to its findings on fundamental rights, the Tribunal concluded that the protection enshrined in Article 4 (2) TEU corresponds to the constitutional concerns of the Member States, which is why this EU provision constitutes a safeguard for Polish *constitutional identity*.[419] Nevertheless, both concepts remain independent from each other and the Constitutional Tribunal retains the ability to employ the *constitutional identity limit* in case the EU protection is no longer deemed equivalent.[420]

Furthermore, when considering the matters covered by the *constitutional identity limit* it can be observed that the major concern seems to relate to the preservation of the Polish state, including its sovereign decision-making abilities based on a democratic structure and guided by the protection of subjective constitutional rights.[421] This corresponds to the Tribunal's conclusions on the Polish EU membership where it established that Article 90 (1) Polish Constitution did '[...] not [authorize] the delegation of competences to such an extent that it would signify the inability of the Republic of Poland *to continue functioning as a sovereign and democratic state* [emphasis added].'[422] Hence, the Tribunal clarified that the existing constitutional framework in Article 90 Polish Constitution, which forms the basis for the *constitutional identity limit*, restricts the scope of EU integration. Notably, the EU may not develop into an own state, thereby transforming Poland into a (federal) state entity and depriving it of its statehood.[423]

Taken together, this suggests that the Tribunal mainly shields Polish statehood from EU integration through the *constitutional identity limit*. To that end, it identified a list of core competences that may not be transferred to the EU. The Tribunal infers this restriction from the wording in Article 90 Polish

418 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 254; Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 170; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 253, 258; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 501.

419 *Treaty of Lisbon* Section III 2.2.

420 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 254-255.

421 *Treaty of Lisbon* Section 2.5.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251-253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252-253.

422 *Poland's EU Membership* Point 8.

423 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251-253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252-253.

Constitution, which limits the conferral to 'certain matters'.[424] However, the specific constitutional matters that the Tribunal includes in its *constitutional identity limit* remain abstract and they entail only limited guidance for EU fiscal integration proposals. The subsequent analysis therefore focuses on the principle of sovereignty, which forms the conceptual-normative basis of the Polish *constitutional identity limit*.

4.2.4.2 Polish sovereignty

The assessment of the Polish sovereignty doctrine is divided into a general outline of the principle and a following assessment of the material competences covered by it.

– *General conception of Polish sovereignty*

The concept of sovereignty is of particular historic importance for the Polish constitutional order. Specifically, during the Communist time, the influence of the Soviet Union reduced the Polish political decision-making abilities considerably. Poland was only able to claim political autonomy and sovereignty over its own national decisions in the aftermath of the Communist past and after the breakdown of the Iron Curtain.[425] This historic consideration might explain the restrictive framework for the conferral of powers to the supranational level laid down in Article 90 Polish Constitution. As highlighted, Article 90 Polish Constitution is restricted to 'certain matters'[426] and the procedural requirements for the conferral of competences under Article 90 (1) Polish Constitution are stricter than for constitutional amendments.[427] At

424 *Treaty of Lisbon* Section III.2.5.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510.

425 Christoph Grabenwarter, 'National Constitutional Law Relating to the European Union' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2. edn, Hart Publishing and C. H. Beck 2009) 98; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 393.

426 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

427 As laid down in Article 235 Polish Constitution, cf. Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 249-250; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 312; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107.

the same time, Article 90 Polish Constitution is an expression of the sovereign decision to open the Polish Constitution and to allow for supranational cooperation.[428] Both, the historic importance of sovereignty in the Polish constitutional order and the constitutional decision to allow for supranational cooperation, albeit under strict conditions, are reflected in the jurisprudence of the Polish Constitutional Tribunal.

Notably, the Tribunal concluded that the conferral of competences to the EU-level following Article 90 Polish Constitution constituted in itself an exercise of sovereign powers.[429] It furthermore stressed that the conferral of competences did not entail a transfer of sovereignty, but that it rather constituted a revocable and democratically-made restriction of Poland's ability to take unilateral decisions on the conferred matters.[430] Hence, the conferral only entails a substantive limitation of national sovereign competences to allow for joint action at the supranational level. It, however, does not constitute a loss of these competences to the EU or a challenge to the supreme status of the Polish Constitution, which is further clarified in Article 8 (1) Polish Constitution.[431] Therefore, the principle of sovereignty imposes at least two requirements for EU integration steps.

First, the Polish legislator's decision is constitutive for the conferral, as enshrined in Article 90 (1) Polish Constitution. Hence, the EU can only exercise competences that were attributed to it by the Polish legislator. Obviously, the EU's principle of conferral mirrors this Polish constitutional requirement accordingly.[432] As a conceptual opposite, the Tribunal further requires that

428 Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241.

429 Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 27; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 33; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510-511; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157; Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

430 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 250; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32, 34; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498-499; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 511.

431 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 250-251; As the Tribunal already pointed out in its judgment on Polish EU accession, cf. Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 509.

432 *Treaty of Lisbon* Section III.2.2.; Cf. as well: Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 500.

Poland can terminate the supranational cooperation, which is enshrined in Article 50 TEU.[433] This implies that Poland retains the final say over the extent of EU commitments.

Second, the conferral only entails the exercise of the conferred sovereign competences and not the loss of the competence itself. Therefore, the conferral is only a restriction on the exercise of sovereign powers by Polish institution for the benefit of joint EU action. Conceptually, this can be secured by characterizing the EU as a derived legal order, which is based on the Polish Constitution.[434] For EU fiscal integration proposals, this implies that the approval of the Polish legislator for the conferral of powers following Article 90 (1) Polish Constitution is constitutive. Furthermore, the derived status of the EU legal order and the Member States' status as 'Masters of the Treaties' may not be altered by such integration steps. Thus, the sovereign decision-making space available to the Polish legislator has to be preserved and respected by EU fiscal integration proposals.

At the same time, the Constitutional Tribunal established in its jurisprudence the dynamic and evolutionary character of the principle of sovereignty.[435] This evolutionary potential can be triggered by EU cooperation, which is introduced into the Polish constitutional order by a sovereign Polish decision.[436] Obviously, if the Polish Constitution allows for an opening of the Polish constitutional order the principle of sovereignty is required to evolve, for example by accepting the exercise of sovereign competence at the supranational level.[437] The Tribunal even highlighted that the 'modern' interpretation of the principle of sovereignty requires international cooperation in order to achieve constitutional commitments laid down in the Polish Consti-

433 *Treaty of Lisbon* Section III.2.1.; Cf. as well: Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156; Article 90 Polish Constitution is seemingly based on the assumption that the conferral is revocable, cf. Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

434 *Treaty of Lisbon* Section III.2.1.

435 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; Cf. as well: *Treaty of Lisbon* Section III.2.1.; Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

436 Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241.

437 Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 34; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498-499.

tution.[438] Here, once again the protection of fundamental rights is a good example, which in a globalized world requires, according to the Tribunal, the opening of the domestic order to EU and international commitments in order effectively protect fundamental rights.[439] Given the evolutionary potential of Polish sovereignty, and given that sovereignty constitutes the basis of Polish *constitutional identity*, it seems convincing to argue that the *constitutional identity limit* is – just as the underlying principle of sovereignty – open to evolve. From that perspective, the Polish *constitutional identity limit* is not a fixed, inflexible substantive core of constitutional principles, but it is rather a concept that is open to future development.

Furthermore, the Tribunal explicitly recognized that a 'modern' interpretation of sovereignty requires international and supranational cooperation in order to comply with national constitutional duties. One might apply the same logic to *national constitutional identity* and submit that a protection of core constitutional values is no longer only a domestic matter but instead requires supranational cooperation. The potential stabilizing benefits of EU safeguard for national constitutional values can be seen with regard to the current rule-of-law-crisis in Poland. Here the EU carefully monitors and tries to prevent the deterioration of this core constitutional value, which is equally included in the Polish *constitutional identity limit*.

Overall, this indicates that the principle of sovereignty is a historically important constitutional concept, which is reflected in the constitutional basis for supranational cooperation in Article 90 Polish Constitution. This provision allows for a limited transfer of the exercise of sovereign power. According to the Constitutional Tribunal, the fact that supranational cooperation is based on the sovereign Polish decision to transfer competences and given that Poland retains the possibility to withdraw suggest that Poland retains full sovereignty. At the same time, the Tribunal recognized that the understanding of sovereignty has to evolve, which suggests that also the Polish *constitutional identity limit* is receptive to such evolution.

438 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; Cf. as well: Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

439 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 271-272.

– *Specific material dimension of sovereignty covered by constitutional identity limit*

In fact, the Constitutional Tribunal equally developed a material dimension of the principle of sovereignty. This material dimension is mainly a competence-based conception of Polish sovereignty.[440] In its *Lisbon*-judgment the Tribunal established the subsequent list of particularly important domestic competences, that are accordingly covered by this material dimension. Following this judgment, these competences are:

> '[...] having the exclusive power of jurisdiction as regards the territory of a given state and its citizens, conducting foreign policy, deciding about war and peace, freedom as to [recognizing] other states and governments, maintaining diplomatic relations, deciding about military alliances and membership in international political [organizations], conducting an independent financial, budget and fiscal policies [...].'[441]

Thus, the Constitutional Tribunal identified a wide field of important competences of Polish institutions that are the expression of Polish sovereignty and that constitute the Polish *constitutional identity*.[442] As previously already submitted in relation to the matters listed under the *constitutional identity limit*,[443] this material dimension of sovereignty can hardly be seen as completely off-limit. Clearly, EU integration already triggered constitutional transformation in these areas, without putting Polish sovereignty and *constitutional identity* into question. This is equally recognized by the Tribunal, which subsequently referred to the previously outlined evolution of sovereignty that moved away from absolute and strict sovereignty claims to a modern or

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440 Which can be deduced from the competence-catalogue that the Tribunal established, cf. *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499.

441 *Treaty of Lisbon* Section III 2.1.

442 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; The similarity with the German catalogue may be pointed out here, cf. *Lisbon-judgment* para 252.

443 Cf. *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

contemporary understanding of this constitutional doctrine.[444] Therefore, not every conferral of competences, which affects these competence areas, is seen as a violation of Polish sovereignty. One may conclude that the areas enumerated by the Tribunal may serve as guidance, together with the previously outlined core constitutional matters, when ruling on the constitutionality of competence conferrals to the EU-level.[445]

Considering the prospect of EU fiscal integration proposals, the mentioned 'conducting an independent financial, budget and fiscal policies'[446] as protected competence area seems particularly relevant. A more integrated Eurozone would most likely require a conferral of competences in these areas. However, the Tribunal identified all three areas as particularly important competences under the Polish sovereignty doctrine.[447] Based on this finding, one may conclude that EU fiscal integration proposals could potentially conflict with the competence-based material conception of Polish sovereignty. Yet, given the evolutionary nature of the sovereignty doctrine, and given that supranational cooperation in the identified three areas might be deemed necessary, the Tribunal could consider the conferral of these competences to be less problematic by invoking the modern interpretation of national sovereignty.[448] Furthermore, the Tribunal already indicated that Polish Eurozone-membership might require internal constitutional amendments,[449] which implies that the

444 As recognized by the Tribunal: *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; And as highlighted in the academic writing, cf. Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

445 As noted by the Tribunal in relation to the effective protection of fundamental rights, cf. *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 271-272.

446 Cf. wording of the Tribunal: *Treaty of Lisbon* Section III 2.1.

447 Ibid Section III 2.1.; The Constitutional Tribunal was confronted with the question whether the Fiscal Compact eroded fiscal and economic competences in a manner incompatible with the Polish Constitution, which was clearly inspired by this benchmark, however, the Tribunal did not have to answer the question due to the inadmissibility of the action, cf. *Challenge Against the Fiscal Compact*; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314-315.

448 Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

449 Specifically, the amendment of Article 227 Polish Constitution on the National Central Bank, cf. *Poland's EU Membership* Point 33; Cf. as well: Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 509; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish

conferral required for such membership is generally attainable under the Polish sovereignty doctrine.

When considering the overall Polish constitutional framework, the Tribunal's concern for financial, budget and fiscal policies seems to correspond with the institutional prerogatives enshrined in Articles 146 and 219 Polish Constitution, as highlighted by *Bainczyk*.[450] Article 146 Polish Constitution establishes, *inter alia*, the competence of the Polish Ministerial Council to implement the domestic economic policy. Article 219 Polish Constitution establishes the prerogative of the Sejm to adopt the annual budget as well as the different budgetary commitments under this state budget. In proceedings against the ESM-Treaty and the amendment of Article 136 (3) TFEU, the applicants submitted that European Council Decision 2011/199/EU violated these two constitutional provisions. However, the Tribunal did not rule on the substance of these claims, given that the applicants did not further elaborate on the possible constitutional conflict that could arise.[451] Nevertheless, it seems that these institutional prerogatives could be seen as specific constitutional concretizations and thus fall under the essential competences covered by Polish sovereignty.

At the same time this remains indicative. For now, the Polish Constitutional Tribunal did not mention these two provisions when enumerating the constitutional core protected by the *constitutional identity limit* – which might stem from the fact that Poland is not yet a Eurozone member and therefore the Tribunal never had to consider the implications of a transfer of competences in financial, fiscal, and budgetary matters in detail. In all cases, it seems likely that a conferral in these areas will undergo close constitutional scrutiny by the Polish Constitutional Tribunal.

4.2.4.3 Interim conclusion

Overall, the *constitutional identity limit* shields core national competences, that are crucial for the sovereign Polish political democratic process, against the transfer to the EU-level. To that end, the Tribunal identified four core constitutional matters, which are described as inalienable institutional competences. These matters cover the protection of fundamental rights, the preservation of Polish statehood, the defending of the constitutional structure of the state

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Contitution. Decision of 11 May 2005.' 161.

450 Which were raised in constitutional proceedings on the ESM, cf. *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

451 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

as well as the continuous existence of the Polish Constitution itself.[452] However, the Tribunal did not point out specific constitutional or institutional features that had to be preserved in the process of conferring competences to the EU.

Further guidance on the substantive content of the *constitutional identity limit* may be derived from the sovereignty doctrine, which constitutes the conceptual basis of this limit.[453] Here, the assessment revealed that the doctrine protects the initial decision to confer competences to the EU and the conception of the EU as derived legal order. Furthermore, the Tribunal adopted a modern interpretation of sovereignty, which allowed for the evolution of the doctrine from an absolute, strict reading to a more open, EU-friendly understanding.[454] Given the intrinsic interconnection between sovereignty and *constitutional identity*, this evolutionary potential will likely apply to the *constitutional identity limit*.

Finally, it was illustrated that budgetary, financial, and fiscal competences are characterized by the Tribunal as traditionally important sovereign competence areas,[455] which is of particular relevance for EU fiscal integration steps. Yet, the Tribunal did not specify any institutional prerogatives that fall under the *constitutional identity limit*. Until now, the Tribunal has refused to engage with the compatibility of Eurozone-obligations with the Polish constitutional order, given their now only hypothetical nature. Therefore, no detailed constitutional jurisprudence on this matter exists in Poland.

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452 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158;

453 *Treaty of Lisbon* Section III.2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 503; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 501; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 128; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510-511.

454 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; Cf. as well: Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

455 *Treaty of Lisbon* Section III.2.1.; Cf. as well: Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499.

4.2.5 Longevity and absoluteness of the constitutional limit

Ultimately, the question emerges whether the substantive content protected by the Polish *constitutional identity limit* can be amended. Considering the constitutional framework itself, Article 90 (1) Polish Constitution explicitly limits competence conferrals to 'certain matters'.[456] Furthermore, the Polish Constitution treats the conferral of competences to the international or the EU-level as a particularly important and yet highly restricted matter.[457] This is visible from the procedural requirements that Article 90 Polish Constitution establishes for this conferral. Conferring competences to the EU requires the support of a two-thirds majority in both the Polish Sejm and the Polish Senate or the approval by referendum. These are the highest procedural thresholds that the Polish Constitution imposes. Even the requirements for amending the Polish Constitution itself are less strict.[458] At the same time, and although the procedural requirements for the conferral of competences are stricter than the requirements for constitutional amendments, a conferral of powers may not violate the constitutional text itself. Thus, competence conferrals might require a prior constitutional amendment.[459] The emerging question is therefore whether Article 90 (1) Polish Constitution, and specifically the mentioning of 'certain matters' may be amended by the constitution-amending legislator to possibly overcome the *constitutional identity limit*.

Until now, the Polish Constitutional Tribunal did not explicitly have to rule on this question.[460] Nonetheless, certain conclusions may be drawn from the Tribunal's established constitutional jurisprudence. In the first place, the Constitutional Tribunal underscored that the constitution-amending legislator had three alternatives when confronted with a conflict between national constitutional law and new EU primary law obligations. First, the legislator

456 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510.

457 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 249-250.

458 Cf. the framework for constitutional amendments in Article 235 Polish Constitution, Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107; Given these strict procedural requirements, treaties ratified following Article 90 Polish Constitution have a high degree of legitimacy, cf. Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 148.

459 Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 155.

460 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244.

could change the Polish Constitution. Second, the legislator could aim at changing the EU commitment. Or third, the legislator could decide to withdraw from the EU altogether following Article 50 TEU.[461] In fact, underscoring these three possibilities emphasizes the sovereign abilities of the Polish legislator.[462] Put differently, excluding certain competence areas from the constitution-amending legislator's powers might result in a limitation of the sovereign decision-making process in Poland. Therefore, it seems convincing to argue that the Polish constitution-amending legislator can overcome the *constitutional identity limit* by changing the Polish Constitution. Such changes might entail a modification of the Polish sovereignty doctrine, the framework for conferring powers and most notably Article 90 Polish Constitution. The Constitutional Tribunal already indicated that a future Eurozone membership might require a constitutional amendment to Article 227 Polish Constitution,[463] which suggests that this constitutional amendment is constitutionally feasible. Otherwise, the Polish Constitutional Tribunal would have pronounced the absoluteness of the *constitutional identity limit*, as for example occurred in Germany.[464]

The absence of such explicit mentioning suggests that the Polish limit is not absolute and may in fact be overcome following the prescribed framework, which would entail a constitutional amendment as well as the conferral under Article 90 Polish Constitution. Particularly in light of the political divide in the Polish party system[465] such support might be hard to achieve. Furthermore, constitutional amendments are very rare in Poland. Between 1997 and 2019 only two constitutional amendments were enacted on less far-reaching matters.[466] Therefore, although the constitution-amending legislator is seem-

461 Ibid 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157.

462 Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 33; Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241; also expressed in Article 90 Polish Constitution, which indicates that conferring powers to an international or supranational level is not diminishing Polish sovereignty, cf. Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

463 *Poland's EU Membership* Point 33; Cf. as well: Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 161.

464 As outlined by the German Constitutional Court, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* paras 230, 240; Cf. as well: Herdegen, 'Art. 79 GG' para 60; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 177.

465 Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 310.

466 Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 42.

ingly competent to overcome the *constitutional identity limit*, the required constitutional amendment might be politically difficult to achieve.

4.3 The rule of law at risk in Poland: The independence of the Constitutional Tribunal

After having analyzed the established Polish constitutional approach to possible EU fiscal integration steps, the subsequent outline constitutes a conceptual caveat. Namely, the Polish rule-of-law-crisis erupted in the aftermath of the parliamentary elections in late 2015 during which the Polish PiS-party gained an absolute majority in the Sejm (235 out of 460 seats) and the Polish Senate (61 out of 100 seats).[467] Since 2016, this process is critically monitored by the EU as well as by the Venice Commission of the Council of Europe.[468] The political crisis also received great academic attention.[469] The following analysis does not claim to be comprehensive but will instead focus on the impact of this crisis on the Polish Constitutional Tribunal. In particular, three significant actions taken by the Polish Parliament and the Polish Government will be outlined to assess the potential impact of the ongoing transformation on the discussed Polish constitutional approach towards the EU.[470]

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467 Jankovic, 'Polish Democracy Under Threat? An Issue of Mere Politics or a Real Danger?' 60; Tomasz Tadeusz Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' (2016) 53 Common Market Law Review 1753, 1754; Although, the PiS-party was apparently only elected by 1/5 of the eligible voters during the 2015 elections (in light of the overall turnout and the spread of the vote), cf. Radoslaw Markowski, 'Creating Authoritarian Clientelism: Poland After 2015' (2019) 11 Hague Journal on the Rule of Law 111, 130.

468 At the EU-level, the monitoring started with the initiation of a dialogue with Poland under the Rule of Law framework, for an outline cf: European Commission, *Press Release: Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control* (European Commission 3 April 2019); Moreover, the Venice Commission issued six critical Opinions on Poland between 2016 and 2020, the first concerned the amendments made to the Constitutional Tribunal Act, cf. *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland* [2016] (Venice Commission); For a general overview, cf. Sadurski, 'Constitutional Crisis in Poland' 262; Jankovic, 'Polish Democracy Under Threat? An Issue of Mere Politics or a Real Danger?' 51.

469 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); Miroslaw Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' (2019) 11 Hague Journal on the Rule of Law 417; Marcin Matczak, 'Poland's Rule of Law Crisis: Some Thoughts' (2019) 11 Hague Journal on the Rule of Law 407; Mattias Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice After LM' (2019) 15 European Constitutional Law Review 17; Sadurski, 'Constitutional Crisis in Poland'.

470 Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 57-58; Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' 547-548; Hatje and Schwarze, 'Der Zusammenhalt der Europäischen Union' 179-181; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 5-6.

In the first instance, the appointment of several constitutional judges raises serious concerns. In 2015, the Sejm of the seventh legislative term elected five new constitutional judges, shortly before the 2015 parliamentary elections. However, at that moment only three constitutional seats were vacant, the two additional seats were only becoming vacant during the next legislative term after the 2015 parliamentary election. In response, the newly elected Sejm under control of a new political majorities annulled the nomination of all five constitutional judges, and elected instead five new judges. These newly elected five judges were subsequently appointed by the Polish President.[471] In a judgment delivered by the Constitutional Tribunal on the matter, the constitutional bench found that the original nomination of the three judges, who were filling the seats that became vacant during the seventh legislative term, was constitutional. However, the nomination of the two additional judges, whose seat only became vacant during the eighth legislative term, was considered unconstitutional.[472] Despite a clear verdict from the Constitutional Tribunal, the judgment was not followed by the government. Later, after the composition of the constitutional bench shifted in favor of the PiS-party, the Tribunal even reverted its initial judgment and confirmed the appointment of all five constitutional judges appointed by the Sejm of the eighth legislative term.[473] Regarding this second judgment, two points may be raised. First, the shift in the political affiliation of the constitutional judges obviously affected the final verdict. In its decision, the Constitutional Tribunal altered established, long-standing constitutional jurisprudence in relation to Article 194 (1) Polish Constitution,[474] which illustrates a severe risk, namely that constitutional jurisprudence may be disrupted

471 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 65-66; Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 57; Brauneck, 'Rettet die EU den Rechtsstaat in Polen?' 1424; Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' 1755-1757.

472 K 34/15 *Appointment of Constitutional Judges* [2015] (Polish Constitutional Tribunal); Cf. as well Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 66; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 6; Brauneck, 'Rettet die EU den Rechtsstaat in Polen?' 1424; Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' 1755.

473 Namely, in the decision K 1/17 *Constitutionality of Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal* [2017] (Polish Constitutional Tribunal); As pointed out by, Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 67; Cf. as well: Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 57; Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 264.

474 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 67.

by political actors which exercise significant influence on the composition of the Polish Constitutional Tribunal. Second, the latter case concerned *indirectly* the nomination of the controversial three constitutional judges from 2015. The judgment validated their appointment, however, two of these *controversial* judges were part of the deliberations and ruled therefore on their own case.[475] Overall, this instance demonstrates the risk that constitutional courts are confronted with, namely the political interference in their independent work through the composition of the constitutional bench.

The second instance concerns the appointment of Judge *Julia Przyłębska* as (current) President of the Constitutional Tribunal, which was equally controversial. Judge *Przyłębska* was appointed as President of the Constitutional Tribunal by the Polish President, without having been properly elected by the General Assembly of Constitutional Judges, as required by both Article 194 (2) Polish Constitution and Articles 15 (1) and 14 (1) No. 3 Act on the Polish Constitutional Tribunal.[476] Notably, the General Assembly of Constitutional Judges did not have a quorum to issue a formal nomination.[477] Nevertheless, the Polish President appointed *Przyłębska* as president, only one day after receiving a letter informing him about her apparent election which was criticized by constitutional scholars.[478] This instance illustrates again the emerging political interference in the constitutionally established work of the Constitutional Tribunal as well as the limited means to of the Tribunal to resist against such political influence. This illustrates how the Polish President and the Government deliberately cooperated in the disregarding of the applicable rules, which resulted in a favorable outcome for the PiS-governmental majority.[479]

The third instance concerns the refusal of the Polish Government to publish the judgements of the Constitutional Tribunal. The Polish Constitution prescribes that constitutional judgments have to be published in order to acquire binding legal effect, as enshrined in Article 190 (2) and (3) Polish Constitu-

475 Ibid 67; Sadurski, *Poland's Constitutional Breakdown* 63-64.

476 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 69; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 17.

477 Brauneck, 'Rettet die EU den Rechtsstaat in Polen?' 1424; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 17; Tina de Vries, 'Bedrohungen für die Unabhängigkeit der Justiz in Polen – Teil 1' (2018) 27 Wirtschaft und Recht in Osteuropa (WiRO) 105, 106.

478 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 69; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 17-18.

479 Namely, that the Tribunal seemingly rules increasingly in line with the governmental positions, cf. Sadurski, *Poland's Constitutional Breakdown* 84-86; Castillo-Ortiz, 'The Illiberal

tion.[480] The refusal to publish certain judgments in the official journal therefore implied that these judgments could not acquire binding force. Sufficient here to point out that the refusal to publish a selection of judgments indicates that the government appears to have conducted a political 'quality control' – thereby deciding which judgments should acquire binding legal effect. Obviously, this significantly hinders the work of the Constitutional Tribunal and entails a challenge to the constitutionally enshrined institutional balance of powers.[481] One result was that the Tribunal could no longer perform its core task, namely, to supervise the constitutionality of parliamentary and governmental actions.

These three instances illustrate clear political interference with the Polish Constitutional Tribunal. Given that the constitutional judges are appointed by the Sejm in Poland and given the absolute majority that the governing PiS-party commands in the Sejm, candidates with clearly political affiliations have been elected in the past years. These apparently politically motivated appointments affect the work of the Tribunal considerably, as, first of all, established constitutional jurisprudence is questioned and, in addition, the Constitutional Tribunal appears to side increasingly with the governing party, which, according to *Sadurski*, transformed the Tribunal into a 'government's ally'.[482] Obviously, this has implications for EU law. On the one hand, the current governing party has been critical towards the EU,[483] which might be increasingly reflected in the jurisprudence of the Tribunal, too. On the other hand, the established constitutional approach towards the EU might no longer be imperative, as the Tribunal could decide to alter its constitutional appraisal of EU integration steps significantly.

Considering the content covered by the *constitutional identity limit*, it could be argued that the current internal political interferences with the judiciary – which is established as independent institutional branch of the state accord-

Abuse of Constitutional Courts in Europe' 60; Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' 547.

480 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 74; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 13.

481 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 74; Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' 547; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 13.

482 Sadurski, *Poland's Constitutional Breakdown* 85; Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 264; Thereby, the Tribunal lost its core function as guardian of the Polish Constitution, cf. Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' 417; The Constitutional Tribunal is employed as a 'tool for constitutional mutation', cf. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 69.

483 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 246; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156-157.

ing to Articles 45 (1), 173, 178 (1), 195 (1) and 199 (3) Polish Constitution – undermine core constitutional principles, namely the rule of law, democracy and the separation of powers.[484] As indicated, the EU can offer an external safeguard and become a supplementary guarantor of such constitutional principles. These foundational principles are mainly enshrined in Article 2 TEU, and largely correspond with the principles covered by the Polish *constitutional identity limit*.[485] This illustrates that the EU legal order can have an additional protective value for core constitutional principles and thereby function as an external stabilizer for national *constitutional identity*.

Furthermore, considering the analysis of the Polish *constitutional identity limit* it seems that adverse constitutional developments within one Member States have not only internal consequences, but also impact the EU and its other Member States. Obviously, these negative external impacts are equally applicable to EU fiscal integration proposals. Given the dismantling of the Polish Constitutional Tribunal, it is hardly predictable what substantive limits EU fiscal integration proposals are confronted with in the future. Hence, these interferences reduce the reliability and predictability of the Polish constitutional system in EU matters. In addition, they put into question whether Poland can become a reliable member of the Eurozone, which is increasingly dependent on predictable (and enforceable) constitutional commitments.

4.4 Conclusion

The Polish *constitutional identity limit* was established by the Constitutional Tribunal. The limit is rooted in the Polish basis for the conferral of competences to the EU as well as the Polish sovereignty doctrine. More specifically, the Tribunal established in its *Lisbon*-judgment that the *constitutional identity limit* covers the inalienable institutional competences that constitute the 'normative manifestation' of the principle of sovereignty.[486] Thus, *constitutional identity* and the principle of sovereignty are closely interconnected in the Polish constitutional jurisprudence. Furthermore, the Tribunal identified budgetary, financial and fiscal policy decisions as particularly important sovereign competences.[487] It however equally indicated that the interpretation of sovereignty

484 Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' 418.

485 As also stressed by the Polish Constitutional Tribunal itself, cf. *Treaty of Lisbon* Section III 2.2.; Cf. as well Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255-256.

486 *Treaty of Lisbon* Section III 2.1.

487 Ibid Section III 2.1.; *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1. Treaty of Lisbon Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253;

evolves, particularly in light of increasing international and supranational cooperation in a globalizing world.[488] This might indicate an openness towards more integrated forms of supranational cooperation.

When applying this *constitutional identity limit* to EU fiscal integration proposals, the conclusions are only indicative, as Poland is not yet a member of the Eurozone.[489] First, EU fiscal integration proposals affect competence areas that are particularly important under the principle of sovereignty.[490] Second, the conception of the EU as a derived legal order, the required constitutive approval of the Polish Parliament for the conferral of powers to the EU-level, the preservation of *Kompetenz-Kompetenz* in Poland and the ability of Poland to withdraw from EU cooperation jointly guarantee according to the Tribunal that Poland retains its statehood and that EU cooperation is not challenging the Member States as sovereign entities.[491] Given that the material content of sovereignty is currently evolving, it is possible that the required conferral of competences in budgetary, financial and fiscal matters is finally deemed permissible under the *constitutional identity doctrine*.[492] This illustrates that the *constitutional identity limit* is flexible, and the protected content crucially depends on the precise constitutional findings of the Constitutional Tribunal.

Regardless of whether the Tribunal identifies a conflict between EU fiscal integration steps and the *constitutional identity limit*, it is to be expected that

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Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252.

488 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; Cf. as well: Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

489 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 249; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

490 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201.

491 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 250-251; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 509.

492 *Treaty of Lisbon* Section III 2.1.; *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland - Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252.

the Tribunal will find a conflict between such EU integration and the text of the Polish Constitution which would require a constitutional amendment. In particular, Article 146, 219 and 227 Polish Constitution were previously identified as constitutional provisions that might conflict with membership in the Eurozone.[493] It was already emphasized that such constitutional amendments are practically rare[494] and the conferral of powers will depend on both the procedural requirements in Article 90 and 235 Polish Constitution. At the same time, given that the procedural hurdles for the conferral of powers in Article 90 Polish Constitution compared to the procedural requirements in Article 235 Polish Constitution, it seems likely that a constitutional amendment can be adopted in case the conferral of power is supported by the required majority.

Therefore, it was concluded that even a conflict of the Polish *constitutional identity limit* with EU fiscal integration proposals might be overcome by amending the Polish Constitution, for example Article 90 (1) Polish Constitution.[495] This corresponds in the first place with the Tribunal's established jurisprudence.[496] What is more, the combined effort of amending the Polish Constitution following Article 235 and subsequently the conferral of competences following Article 90 Polish Constitution would require compliance with high constitutional procedural hurdles and therefore vest this undertaking with a high level of democratic legitimacy.[497] Thus, it seems that the *constitutional identity limit* does not impose absolute limits for Polish participation in EU fiscal integration steps.[498] Instead, such integration steps mainly face a political-procedural hurdle, as attaining the required majorities might prove challenging. All these conclusions ultimately depend on the future course of the Constitutional Tribunal, which is interfered with in its work by other Polish institutions driven by political power games. This highlights a risk when

493 *Poland's EU Membership* Point 33; *Challenge Against the Fiscal Compact* Section 7.7.; Cf. as well: Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 161.

494 Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 42.

495 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1364.

496 *Poland's EU Membership* Point 13; Cf. as well: Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1364.

497 Particularly, Article 90 (2) Polish Constitution presupposes broad political support, cf. Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 150.

498 Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 253.

relying on strong (independent) constitutional courts for determining the constitutional feasibility of EU fiscal integration.

Constitutional Identity Classification Board for Poland
1 ***Which institutional actor enforces the constitutional limit?*** The Polish Constitutional Tribunal established the *constitutional identity limit* in Poland. The Tribunal takes binding decisions on the compatibility of international agreements with the Polish Constitution (Articles 188 (1) and 190 (1) Polish Constitution).
2 ***How can the constitutional identity limit be triggered?*** The *constitutional identity limit* can be triggered either *ex ante* by the Polish President, or *ex post* by a set of privileged applicants enlisted in Article 190 (1) Polish Constitution, including Members of the Sejm or the Senate.
3 ***What is the constitutional basis of the constitutional identity limit?*** The Polish Constitutional Tribunal developed the *constitutional identity limit* on the basis of the normative manifestation of the Polish sovereignty doctrine, which are specified in the Preamble as well as Articles 2, 4, 5, 8, 90, 104 (2), 126 (1) of the Polish Constitution. Besides, the Tribunal employs Article 90 (1) Polish Constitution as constitutional basis for the limit.
4 ***What constitutional principles and substantive content are covered?*** The Polish *constitutional identity limit* protects *inter alia* Polish statehood, the state structure, the status of the constitution and fundamental rights. This protection mainly translates into formal safeguards, including the principle of conferral, the preservation of *Kompetenz-Kompetenz*, the derived status of the EU and the withdrawal possibility. In addition, the Tribunal emphasized the evolutionary potential of the principle of sovereignty.
5 ***How – if at all – can the constitutional identity limit be overcome (longevity/ absoluteness of the limit)?*** As it stands, the Polish Constitutional Tribunal did not establish the absoluteness of the *constitutional identity limit* which suggests that the constitution-amending legislator is able to overcome any conflict with EU fiscal integration proposals.

Figure 14: Constitutional Identity Classification Board for Poland

5 Research findings on German constitutional identity limit

The German *constitutional identity limit* is based on the German *eternity clause* enshrined in Article 79 (3) Basic Law, which equally applies to EU integration steps according to Article 23 (1) (3) Basic Law. From this, the German Constitutional Court, as most authoritative interpreter of the German constitutional text, developed an absolute substantive limit for EU integration. When considering EU fiscal integration proposals, the most apparent conflict could arise with

overall budgetary responsibility, which the Court developed during the Eurocrisis on the basis of the principle of democracy.[499]

This limit can be triggered by both private individuals and privileged institutional applicants. The assessment revealed that the constitutional standing requirements are, however, applied differently when deciding on EU-related matters. It was outlined that the Court is inclined to find EU-related proceedings more readily admissible.[500] The result is that a wide range of institutional and private actors could proceed against EU fiscal integration proposals and thereby trigger the *constitutional identity limit*.[501]

Overall budgetary responsibility shields central fiscal and budgetary decisions against too far-reaching supranationalization in order to preserve the democratic decision-making process on these highly political matters within Germany. The underlying aim of this judicial concept is to ensure that the German Parliament, as the directly democratically legitimized institution, retains the necessary space to make politically important decisions, which include fiscal and budgetary matters. Therefore, the Court required that supranational fiscal and budgetary commitments remain sufficiently limited in volume, connected to strict conditions as well as clear objectives, and finally, no automatic liability – without prior authorization of the German Parliament – may arise.[502] Put differently, the German Parliament has to remain the central institution that evaluates fiscal and budgetary commitments that impact the German state budget.

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499 Established by the Court's decision on the first Greek loan package and the EFSF, cf. *Financial Support for Greece and EFSF* para 120; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 285; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 682-683; Ungern-Sternberg, 'Parliaments – Fig Leaf or Heartbeat of Democracy? German Constitutional Court – Judgment of 7 September 2011 – Euro Rescue Package' 314-315.

500 Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 172; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 634; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 279-280; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 535.

501 Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 641-642; Ruffert, 'Europarecht: Vorlagebeschluss des BVerfG zum OMT-Programm – Die Europarechtswidrigkeit des Kaufs von Staatsanleihen durch die EZB im Rahmen des OMT-Programms ist vom EuGH zu prüfen.' 374.

502 *ESM-Treaty and Fiscal Compact (interim relief)* para 124; Cf. as well: Nettesheim, '"Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 772.

Finally, given that the German Constitutional Court connected this material limit to the *eternity clause*, the limit imposes an absolute restriction to the constitutional space available to the German legislator when considering EU fiscal integration proposals.[503] At the same time, the concrete application of the limit reveals a degree of judicial reluctance. Consequently, one could conclude that the Court seemingly focusses on the procedural requirements of *overall budgetary responsibility*, which ensure that the key political decisions are taken by the German Parliament, within predictable, reasonable limits. For EU fiscal integration proposals this implies that the German Parliament has to be integrated as central decision-maker into the supranational institutional architecture. In addition, the recent *PSPP*-judgment illustrates the importance of an unambiguous conferral of competences, in order to pre-empt national constitutional challenges under the *ultra vires* review.[504]

503 *OMT-reference* para 29; *Lisbon-judgment* para 216; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 286; Preuss, 'The Implications of 'Eternity Clauses': the German Experience' 440.

504 *Quantitative Easing (PSPP) Final Judgment* paras 138, 159-160; *Final OMT-Judgment* paras 144-145; Cf. as well: Steinbach, 'All's Well That Ends Well? Crisis Policy After the German Constitutional Court's Ruling in Gauweiler' 142.

Constitutional Identity Classification Board for Germany
1 ***Which institutional actor enforces the constitutional limit?***   The German *constitutional identity limit* is developed by the German Constitutional Court. The Court takes authoritative and binding decisions on the compatibility of the German Constitution with EU integration steps.
2 ***How can the constitutional identity limit be triggered?***   The experiences during the Eurocrisis show that individual constitutional complaints (Article 93 (1) no. (4a) Basic Law) and institutional proceedings (Article 93 (1) no. (1) Basic Law) are the most relevant proceedings to challenge Euro-related measures.
3 ***What is the constitutional basis of the constitutional identity limit?***   Article 79 (3) Basic Law is the constitutional basis for the German *constitutional identity limit*, which shields core constitutional values against constitutional amendments, and against EU integration, as specified in Article 23 (1) (3) Basic Law. The content includes the principle of democracy, which is the conceptual basis for *overall budgetary responsibility*.
4 ***What constitutional principles and substantive content are covered?***   When considering EU fiscal integration, the concept of *overall budgetary responsibility*[505] seems most relevant. According to this concept, core budgetary decisions have to remain at the domestic level. This requires that fiscal commitments remain limited in volume, restricted to specific objectives, attached to clear conditions, and that the German parliamentary approval has to remain constitutive for any German participation. Furthermore, the Court established an abstract material benchmark, according to which the budgetary decision-making ability of the German Parliament may not be suspended for a considerable time.
5 ***How – if at all – can the constitutional identity limit be overcome (longevity/absoluteness of the limit)?***   Article 79 (3) Basic Law formulates an absolute limit to the powers of the constitution-amending legislator, which can only be overcome by adopting a new constitution.[506]

Figure 15: Constitutional Identity Classification Board for Germany

505 Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12.

506 Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 157; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33.

VI Comparing the different national *constitutional identity limits* and their implications for EU fiscal integration proposals

1 Introducing the comparative evaluation

The observations made in the previous Chapter in relation to the German, the French, the Spanish and the Polish *constitutional identity limits* indicate a degree of conceptual, substantive and institutional convergence, despite the limits' intention to protect core national constitution particularities as can be deduced from the combined national *constitutional identity* classification board in *Figure 16* below.

The subsequent comparison of these limits first considers the substantive dimension, which includes the determination of the constitutional space for EU fiscal integration (2.). Then the institutional and procedural side of the analyzed limits are compared in order to evaluate the likelihood of constitutional challenges against EU fiscal integration steps that might conflict with national *constitutional identity limits* (3.) before concluding on the combined limiting effect that the assessed *constitutional identity limits* have on the proposed EU fiscal integration ambitions (4.).

2 What national constitutional space for EU fiscal integration?

Although national constitutional systems and their constitutional actors employ their own distinctive terminology and constitutional mechanisms,[1] the assessment of the four *national constitutional identity limits* uncovered clear similarities in their underlying objectives, their constitutional basis and the protected core principles and material content. It especially seems key to all of them to protect sufficient space for national democratic decision-making, whether this is seen as part of the right to vote, democracy more generally, or more abstract notions such as sovereignty or statehood. The significant substantive overlap is further demonstrated by the fact that all the compared systems identify very similar

1 Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 878.

Components of the Constitutional Identity Classification Board		*Germany*	*France*	*Spain*	*Poland*
1	Which institutional actor enforces the constitutional limit?	Constitutional Court (judicial)	Constitutional Council (judicial-like, advisory body)	Constitutional Court (judicial)	Constitutional Court (judicial)
2	How is the *constitutional identity limit* triggered?	Ex post Privileged and non-privileged applicants	Ex ante Privileged applicants	Ex ante + ex post Privileged applicants	Ex ante + ex post Privileged and non-privileged applicants
3	What is the basis of the *constitutional identity limit*?	EU enabling clause + *eternity clause*	EU enabling clause + core constitutional provisions	EU enabling clause	EU enabling clause + core constitutional provisions
4	What constitutional principles and substantive content are covered?	Democracy (competence-centric, including budgetary and fiscal competences)	Sovereignty (competence-centric, including budgetary, fiscal and monetary matters)	Sovereignty + democratic decision-making	Sovereignty (competence-centric, financial, budget and fiscal policy)
5	How – if at all – can the *constitutional identity limit* be overcome (longevity/absoluteness of the limit)?	Absolute limitations (replacement by new constitution)	Amendable (normal constitutional amendment procedure)	Amendable (strict constitutional amendment procedure)	Amendable (strict constitutional amendment procedure)

Figure 16: Combined Constitutional Identity Classification Board

substantive domains as the most contentious and threatening aspects of EU (fiscal) integration.

Such overlap is visible with regard to the constitutional basis of the *constitutional identity limits*. The Spanish Constitutional Tribunal, the Polish Constitutional Tribunal and the French *Conseil Constitutionnel* all base their limits, at least partly, on the domestic clause that regulates the conferral of competences to the EU. The Spanish Constitutional Tribunal derives its *constitutional identity limit* from Article 93 Spanish Constitution, which allows for the conferral of powers to the supranational or international level.[2] The Polish Constitutional

2 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 270; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law'

Tribunal employs Article 90 Polish Constitution as legal basis for its limit, which allows for the transfer of 'certain powers' to an international organization.[3] Finally, the French *Conseil Constitutionnel* lists Article 88 French Constitution as one of the constitutional bases for its essential conditions limit.[4] One can equally argue that even the *Bundesverfassungsgericht* bases its identity review (partly) on the German EU clause. Although the underpinning constitutional mechanism in Article 79 (3) and the protected constitutional principles in Articles 20 (2) and (3) Basic Law[5] are not specific EU-related provisions, the German Court mentioned Article 23 (1) (3) Basic Law in its EU-related review – which refers back to the *eternity clause*.[6]

Thus, all four *constitutional identity limits* are at least partly based on the national provisions that allow for the participation in EU and international cooperation. The resulting constitutional review is consequently rooted in constitutional provisions that are specifically designed for EU cooperation – and which depart from the perspective that the national constitution is the basis – and thus also limit – for any EU collaboration. These provisions traditionally aim to balance the possibility to conclude international agreements

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270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176.

3 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 313; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1364.

4 In addition to other provisions of the *'bloc de constitutionnalité'*, cf. *Lisbon Treaty* paras 3-5; *Fiscal Compact* paras 4-6; Cf. as well: Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 773; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 538; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491.

5 The *eternity clause* equally covers other principles established in Articles 1 and 20 Basic Law, yet, democracy is the basis of *overall budgetary responsibility*, which is the focus of this comparison, cf. *Quantitative Easing (PSPP) Final Judgment* paras 103-104; *Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

6 Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 763; Schönberger, 'Die Europäische Union zwischen 'Demokratiedefizit' und Bundesstaatsverbot – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 553; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 177.

and participate in EU integration with the preservation of national constitutional principles and decision-making capacity. Notably, EU cooperation requires a modified constitutional approach in the national constitutional systems. An illustrative example is the protection of fundamental rights, which constitutes a pivotal part of the national constitutional order and which is thus covered by all four *constitutional identity limits*.[7] Given that fundamental rights are extensively protected at the EU-level, the German Constitutional Court developed its *Solange*-approach,[8] which was followed by other constitutional courts.[9] The Polish Constitutional Tribunal even established that an effective protection of fundamental rights, as warranted under the Polish Constitution, seems to

7 *Germany: Solange II-Decision* para 132; *Solange I-Decision* para 56; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 690; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292; *France: Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; *Spain: Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176.; *Poland: Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

8 *Solange II-Decision* para 132; Cf. as well: Craig and de Búrca, *EU Law Text, Cases, and Materials* 280-281.

9 Spanish Constitutional Tribunal only scrutinizes Spanish implementing acts that violate the core of a fundamental right, which was particularly relevant in relation to the EAW, cf. Torres Pérez, 'Constitutional Dialogue on the European Arrest Warrent: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011' 108; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1197; The *Conseil Constitutionnel* conducts an equivalence assessment under its *constitutional identity limit*, cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 547; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 454; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 389.

require international cooperation.[10] This indicates that national constitutional systems are able to consider and take into account the constitutional value of supranational cooperation when determining the overall balance between integration and protecting the national constitution and space for domestic (political) decision-making.

When now considering the relevant substantive issues protected under the *constitutional identity limits* clear conceptual similarities can be identified, too. Notably, the four assessed *limits* protect – to a varying degree – national sovereignty, the democratic decision-making process, and the hierarchical position of the respective national constitution.

Regarding the principle of sovereignty, all four national constitutional actors refer directly to this concept. The German Constitutional Court established that EU integration had to respect the sovereignty of the German people to take autonomous decisions in a list of core competence areas.[11] Similarly, the French *Conseil Constitutionnel* found that a transfer of competences may not affect the essential conditions for the exercise of national sovereignty.[12] The Spanish Constitutional Tribunal concluded that certain constitutional competences were closely linked to Spanish sovereignty as well as the Spanish people as sovereign.[13] Finally, the Polish Tribunal held that supranational cooperation cannot alter the substantive manifestation of Polish sovereignty.[14] Hence, all four *constitutional identity limits* identify sovereignty as a core principle, which they aim to protect or preserve through their review. Put differently, one of the core functions of the four *constitutional identity limits* is to shield national sovereignty against EU integration steps. In parts, this relates to the protection

10 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 271-272; One motivation for Central and Eastern European Member States to join the EU was the stabilization of core constitutional values, cf. Craig and de Búrca, *EU Law Text, Cases, and Materials* 304.

11 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Klein, 'Art. 38 GG' paras 145-146b; Herdegen, 'Art. 79 GG' paras 177-179; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 807-808.

12 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138-139; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 175-176.

13 *Constitutional Review of the Maastricht Treaty* Section II.3.C.; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185.

14 *Treaty of Lisbon* Section III 2.1.

of statehood in a process of ever closer supranational cooperation.[15] At the same time, the assessment revealed that sovereignty is mostly construed in conjunction with or to preserve the underlying principle of national democracy. Therefore, a major aim of the analyzed limits seems to be to prevent the creation of too integrated forms of EU cooperation – that could otherwise replace national constitutional systems – in order to guarantee democratic decision-making in the Member States, whilst the protection of statehood appears to mostly function as a conceptual means to attain this objective.

In addition, national constitutional actors characterize EU integration as a reversible transfer of competences. Here, the derived legal status of the EU legal order can be identified as the core similarity across all systems, which entails that the national constitution remains the highest legal benchmark.[16] Also, the reversibility of the transfer of competences was emphasized as an important conceptual element, which is now explicitly enshrined in Article 50 TEU. In the context of Brexit, the CJEU explicitly acknowledged that triggering Article 50 TEU constituted a sovereign decision of the Member State.[17] In the national constitutional conception, the possibility to withdraw is, on the one hand, an expression of the derived status of EU cooperation – which implies

15 For example, the perception in Poland, cf. Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251-253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252-253.

16 *Germany: Quantitative Easing (PSPP) Final Judgment* para 102; *OMT-reference* para 37; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 929; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274; *France: Lisbon Treaty* para 8; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 877; The derived legal status is arguably also visible in the fact that the implementation of EU Directives into French law is seen as a constitutional duty stemming from Article 88-1 French Constitution, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 140; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 306; *Spain: Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175; *Poland: Treaty of Lisbon* Sections III.2.2. and III.2.3.; Cf. as well: Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 500.

17 C-621/18 *Wightman* [2018] (CJEU) para 50.

that the EU is not replacing the national constitutional system.[18] On the other hand, it indicates that Member States can take the decision to terminate the limitation to their sovereign powers and exercise them independently from EU coordination, after withdrawal.[19] Obviously, allocating highest legal importance to the national constitution equally safeguards the position of the constitutional authorities that established the national *constitutional identity limits*.

Regarding the substantive dimension of national sovereignty and democracy, all four constitutional actors operationalized the principle of sovereignty by identifying a core of substantive competence areas – which arguably relates back to the principle of democracy. The most detailed 'competence-catalogue' was developed by the German Constitutional Court, which established that revenue and expenditure had to remain under (sovereign) national democratic control of the German Parliament following the *overall budgetary responsibility* limit.[20] This limit excludes that parliamentary budgetary prerogatives are transferred to such an extent that the German Parliament can no longer determine revenue and spending autonomously to a sufficiently significant degree.[21] The French *Conseil Constitutionnel* identified monetary, economic,

18 As apparent in Spain: *Treaty Establishing a Constitution for Europe* Section II.4.; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 286-287; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1187; Or Poland: *Treaty of Lisbon* Section III.2.1.; Cf. as well: Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156; Article 90 Polish Constitution is based on the assumption that the conferral is revocable, cf. Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

19 As established by the Spanish Constitutional Tribunal, cf. *Treaty Establishing a Constitution for Europe* Section II.4.; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 286-287.

20 *Quantitative Easing (PSPP) Final Judgment* paras 102-104; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 250-252; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 285; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 682-683; Ungern-Sternberg, 'Parliaments – Fig Leaf or Heartbeat of Democracy? German Constitutional Court – Judgment of 7 September 2011 – Euro Rescue Package' 314-315; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

21 Summarized under the concept 'budgetary autonomy', cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Financial Support for Greece and EFSF* para 127; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 70; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 13; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 411.

fiscal and budgetary policies as 'vital for the exercise of national sovereignty'.[22] Therefore, the introduction of the Euro was found to conflict with the French sovereignty doctrine, and the adoption of the Maastricht Treaty required thus a constitutional amendment in France.[23] The Spanish Constitutional Tribunal appears to adopt a similar competence-based conception of Spanish sovereignty when assessing EU integration steps, albeit being less detailed.[24] And finally, the Polish Constitutional Tribunal also established a list of core competences that have to remain at the national level, which seem to include financial, budget and fiscal policy decisions.[25]

Consequently, all four national constitutional limits protect core sovereign competences against EU integration steps. In Germany, France and Poland, the constitutional authorities explicitly identified budgetary-related competences, including economic, financial and fiscal competences as particularly important national competences, that enjoy the protection of the national *constitutional identity limits*. Although the Spanish Constitutional Tribunal did not yet identify these competence areas explicitly under the *constitutional identity limit*, it seems likely that it would consider these matters as particularly important, too.[26] Considering the concrete application of these limits, it was observed that Eurozone-membership required an amendment of the French Constitution, given that it was found incompatible with the French sovereignty doctrine.[27] The Polish Constitutional Tribunal indicated that Eurozone-member-

22 *Fiscal Compact* para 16; *Review of Maastricht Treaty (Maastricht I)* para 43; Cf. as well Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

23 *Review of Maastricht Treaty (Maastricht I)* para 35; Cf. as well Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 302.

24 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1183-1184.

25 For the competences, cf. *Treaty of Lisbon* Section III 2.1.; For the general conception, cf. Ibid Section III.2.5.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510.

26 Particularly, given that comparative constitutional reasoning is employed by the Spanish Constitutional Tribunal, cf. Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ahumada Ruiz, 'The Spanish Constitutional Court' 629; López Castillo, 'La Unión Europea 'en constitución' y la Constitución estatal en (espera de) reformas – A propósito de la DTC 1/2004 de 13 de diciembre' 48-49; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

27 *Fiscal Compact* para 16; *Review of Maastricht Treaty (Maastricht I)* para 43; Cf. as well Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

ship will likely trigger constitutional conflicts.[28] In Spain and in Germany, such constitutional conflicts between Euro-related integration steps and the principle of sovereignty (in conjunction with democracy) did not yet materialize. Regarding the German approach, it can be noted that the German Constitutional Court has so far appeared rather reluctant, as it has merely defined certain procedural safeguards, given that any conflict between *overall budgetary responsibility* and EU integration steps could be overcome.[29] Based on the constitutional precedent in all four Member States, it can be argued that future EU fiscal integration steps will be considered a contentious constitutional conferral. This corresponds with the traditional characterization of budgetary and fiscal competences as core, sovereign state powers.[30] Hence, a conferral of decision-making powers in these competence areas seems to open a sort of 'material scope of application' attached to the national *constitutional identity limits*.

However, it appears that even if this *material scope of application* is triggered no immediate outright prohibition is resulting. Instead, the assessment revealed that the German Constitutional Court and the French *Conseil Constitutionnel* equally consider the modalities attached to the conferral of these important competences. Notably, the German Court emphasized the importance of German parliamentary approval for budgetary commitments and underscored that any conferral of such competences to the supranational level had to be specific as well as limited.[31] According to the German case law, these safeguards are intended to ensure that the '[...] the type and level of public spending are [not], to a significant extent, determined at the supranational level, [which would otherwise deprive] the Bundestag of its decision-making pre-

28 Notably Article 227 Polish Constitution, cf. *Poland's EU Membership* Point 33; Cf. as well: Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 509; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 161.

29 Given the highlighted connection with the *eternity clause*, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Real Estate Reform I* para 130-131; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 715.

30 Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?', 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

31 As highlighted, no 'blanket empowerment' can be given to the EU, cf. *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297.

rogative [...].'[32] One could therefore argue that the German Constitutional Court not only developed a substantive dimension but that it equally includes a procedural dimension into its *constitutional identity* review.

Notably, the German Constitutional Court assesses the procedural arrangements connected to the conferral of competences to determine the institutional and general impact on the national constitutional framework. A similar observation was made in relation to the French approach, where the *Conseil Constitutionnel* established that the modalities attached to the conferred competences were equally important to the competence area affected. Namely, the principle of sovereignty would only be violated in case the exercise of the conferred competences is supranationalized and France is prevented from acting autonomously.[33] It appears that the Spanish and the Polish Constitutional Tribunal do not employ a separate assessment of these procedural modalities, however, it seems that the degree of supranational influence when exercising the competence is equally important for their constitutional assessment. Consequently, the procedural requirements attached to the conferral of fiscal competences to the EU are highly relevant. In particular, the nature of the competence (i.e. exclusive, shared, or coordinating competence), the legislative procedure attached to it (i.e. ordinary or special legislative procedure), the veto possibilities, the degree of harmonization, and the extent of the competence (i.e. fixed volume, temporary financial framework, conditions for increase), all have to be taken into consideration in order to determine their compatibility with the national *constitutional identity limits*. In other words, when designing EU fiscal integration, the question is not only how far the EU can go substantively, but also how all these national procedural requirements, including especially the required sufficient influence of national parliaments, can be met, without making the resulting system unworkable as a whole.

In addition, the assessment reveals that national systems are not concerned about the principle of sovereignty in isolation, but rather about the principle in conjunction with other constitutional principles, including in particular the principle of democracy. In Germany, the Constitutional Court established the importance of budgetary and fiscal decisions for the democratic process and the self-determination of the German people.[34] In France, the *Conseil Constitutionnel* reviews whether the essential conditions for the exercising of sover-

32 *Quantitative Easing (PSPP) Final Judgment* para 104.

33 *Lisbon Treaty* para 18; Cf. as well: Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

34 *Quantitative Easing (PSPP) Final Judgment* paras 99-101; *Final OMT-Judgment* paras 126, 129; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 233, 264; Cf. as well: De Sadeleer, 'The New Architecture of European Economic Governance' 36.

eignty are affected,[35] which clearly focusses on the ability and process of employing national sovereignty. Similarly, the Spanish Constitutional Tribunal connects the preservation of sovereignty with structural, organizational characteristics of the state, including democracy,[36] just as the Polish Constitutional Tribunal.[37] Consequently, one may submit that the protection of sovereignty occurs jointly with the protection of national democracy, as the four analyzed national constitutional actors are concerned about the exercise of the important sovereign competences by the democratically legitimized domestic state institutions. Obviously, this interconnection between sovereignty and democracy is equally reflected in the detailed assessment of the modalities attached to the conferred competences – including the remaining influence of national parliaments – that national constitutional actors conduct. Thus, the crucial question is not only at what level a competence is located (i.e. national or supranational level) but also who is essentially controlling this competence and how this control is framed.

Finally, the comparison revealed that only the German Constitutional Court established the *constitutional identity limit* as an absolute limit to the powers of the constitution-amending legislator. Based on Article 79 (3) Basic Law, the German Court concluded that the *constitutional identity limit* can only be

35 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771-771; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 875; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 525; Oliver, 'The French Constitution and the Treaty of Maastricht' 12.

36 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

37 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

overcome by replacing the German Constitution altogether.[38] The power to amend the German Constitution on matters covered by Article 79 (3) Basic Law is not vested in the German legislator. Hence, any conflict between EU fiscal integration proposals and the German *constitutional identity limit* could only be overcome in following the radical replacement of the German Constitution. In contrast, the constitutional authorities in France, Spain and Poland have highlighted the possibility to amend the constitutional framework in order to accommodate EU integration steps.[39] None of the three national constitutions seems to contain a restriction for constitutional amendments comparable to the German *eternity clause*, and hence the respective domestic *constitutional identity limits* appear not to set absolute restrictions to the process of EU (fiscal) integration in these Member States. Even though the respective national constitutional authorities emphasize the significance of a constitutional conflict by framing it through the *constitutional identity review*, the constitution-amending legislator may overcome these constitutional concerns by following the prescribed procedure. Consequently, EU fiscal integration proposals could be overcome in France, Spain and Poland by amending the constitutional text, which requires, however, compliance with the strict procedural requirements that appear particularly difficult to attain in Spain and Poland. As highlighted, it seems likely that Article 168 Spanish Constitution would apply to constitutionally accommodate EU fiscal integration reforms in Spain, which requires the dissolution of Congress and Senate, supported by two-thirds majorities, the confirmation of the constitutional amendment within the newly elected Congress and Senate, again supported by two-thirds majorities, and finally

38 *Quantitative Easing (PSPP) Final Judgment* paras 103-104; *Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

39 *France: Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272; *Spain: Catalan Independence Declaration* Section II. 7.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 281; Ahumada Ruiz, 'The Spanish Constitutional Court' 636; Álvarez, 'Die spanische Dogmatik der Verfassungstreue – Geschichte einer fehlgeschlagenen Rezeption des deutschen Verfassungsdenkens' 442; Santaolalla Gadea and Martinez Lage, 'Spanish Accession to the European Communities: Legal and Constitutional Implications' 13-14; *And Poland:* Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157.

approval by public referendum.[40] Although in Poland the procedural requirements for a constitutional amendment under Article 235 Polish Constitution are 'lighter' compared with the requirements that apply to the conferral of competences to the EU-level,[41] constitutional practice illustrates that constitutional amendments are only rarely considered a (political) possibility.[42]

Taken together, it should be pointed out that none of the examined constitutional limits has so far proven to be an insurmountable legal barrier to further EU integration. All identified constitutional obstacles in relation to the Treaty of Maastricht in France and Spain as well as in relation to the EU Constitutional Treaty in France were overcome by amending the constitutional text. The same holds true for the German constitutional order, which imposes seemingly the strictest limit to EU integration steps.[43] Although the *eternity clause* could theoretically result in an unsolvable constitutional conflict, the German Constitutional Court did (until now) conclude that all EU integration steps were compatible with the German Constitution.

What is more, the emergence of the *constitutional identity limit* discourse is arguably only re-framing previously articulated national constitutional concerns. When considering EU fiscal integration steps, the most relevant constitutional concerns are national sovereignty and democratic decision-making. In order to render such EU fiscal integration steps constitutionally attainable, it therefore seems required to design EMU-reforms in light of the identified constitutional concerns. A particular focus thereby rests on the procedural and institutional framework envisaged for EU fiscal competences. As highlighted, the weaker the role of the democratically legitimized national parliaments in the exercise of supranationally coordinated EU fiscal competences, the more likely a conflict with national sovereignty and national democracy. Ultimately, such a conflict can result in the unattainability of EU fiscal integration, either because of absolute constitutional hurdles, as the case in Germany, or because of the parliamentary majorities required to first amend the constitutional text and subsequently confer the powers to the EU, as the case in France, Spain and Poland.

40 Elvira, 'Spain' 282-283.

41 Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107.

42 Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 42.

43 As highlighted, this finding is not affected by the recent PSPP-judgment, despite the fact that the German Court identified *ultra vires* acts, the general possibility of the ECB to run this program was not questioned, cf. *Quantitative Easing (PSPP) Final Judgment* para 235.

3 INSTITUTIONAL AND PROCEDURAL FRAMEWORK OF NATIONAL *CONSTITUTIONAL IDENTITY* LIMITS

As with the substantive limits, the institutional and procedural framework that surrounds the four assessed *constitutional identity limits* entails clear overlap. To start with, in all four Member States the *constitutional identity limit* is established by an independent constitutional court – or quasi-court in the case of France.[44] Importantly, the respective national constitutional framework guarantees their institutional independence and entitles them to conduct constitutional review.[45] The judgments of all four constitutional actors are binding on the state institutions and can therefore limit the constitutional space available for political action.[46] One could argue that the competence of the German Constitutional Court is even more far-reaching, given that its findings based on Article 79 (3) Basic Law are outside the reach of the constitution-amending legislator.

This institutional independence is reflected in the composition of the German Court and the Spanish Tribunal, which consist of qualified lawyers appointed by different institutional actors. In Germany constitutional judges are appointed to equal parts by *Bundestag* and *Bundesrat* by a two-thirds

44 Cf. on the specific institutional design and the position of the *Conseil Constitutionnel*, which transformed from an advisory body to a body with clear judicial resemblance, Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 267; Bell, *French Legal Culture* 32-33.

45 *Germany:* Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 475-500; Florian Meinel, 'The Constitutional Miracle on the Rhine: Towards a History of West German Constitutionalism and the Federal Constitutional Court' (2016) 14 International Journal Of Constitutional Law 277, 283; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 63-65; Limbach. Jutta, *Das Bundesverfassungsgericht* (2nd edn, C.H. Beck 2010) 56-57; Ewald Wiederin, 'Die Gesetzeskraft der Entscheidungen des Bundesverfassungsgerichts' in Michael Brenner, Peter M. Huber and Markus Möstl (eds), *Der Staat des Grundgesetzes – Kontinuität und Wandel: Festschrift für Peter Badura zum siebzigsten Geburtstag* (Mohr Siebeck 2004) 605-608; *France:* Steiner, *French Law – A Comparative Approach* 68; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 319; *Spain:* Ahumada Ruiz, 'The Spanish Constitutional Court' 611; Alaez Corral and Arias Casta–o, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 599; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 26; Casey, 'The Spanish Constitutional Court' 41; *And Poland:* De Visser, *Constitutional Review in Europe – A Comparative Analysis* 260; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1361; Although the current Polish rule-of-law-crisis puts the independence of the Tribunal into question, cf. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 57-58; Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' 547-548; Hatje and Schwarze, 'Der Zusammenhalt der Europäischen Union' 179-181; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 5-6.

46 Claes, 'National Idenity: Trump Card or Up for Negotiation?' 116; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 131.

majority.[47] Given the qualified majority threshold, constitutional judges have to enjoy cross-party support, which renders political appointments less likely.[48] A similar constitutional decision in favor of a more 'unpolitical' constitutional bench can be observed in Spain, where respectively 4 judges are appointed by the Spanish Congress and the Senate by a three-fifths majority and respectively an additional 2 judges are appointed by the government and the Council for the Judiciary.[49] Hence, the Spanish nomination procedure combines high majority thresholds with diversification across different institutional actors. The French Constitution institutionally diversifies the appointment prerogatives regarding the *Conseil Constitutionnel*. In equal parts the French President, the President of the Parliament and the President of the French Senate appoint the 9 members of the Conseil.[50] However, judges do not have to be qualified lawyers, which reflects the institutions original more advisory role.[51] Finally, Polish constitutional judges are elected by a simple majority in the Polish Sejm and subsequently appointed by the Polish President.[52] The judges have to be legally qualified with a considerable working experience in a legal profession.[53] The lower majority requirement as well as the lacking institutional diversification therefore concentrate the prerogative to nominate constitutional judges in the parliamentary governing majority. Although the strong role of the Sejm in the appointment of constitutional judges is counterbalanced by the mentioned qualification requirement, the Polish developments since 2015 illustrate the central importance of institutional diversification, higher majority thresholds, but also a cross-party dialogue on the nomination of constitutional judges. Otherwise, constitutional courts risk to be captured between opposing political interests, as visible in Poland.[54]

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47 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 214; Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* (5th edn, C.H. Beck 2001) para 39.

48 Hailbronner and Martini, 'The German Federal Constitutional Court' 366; Schlaich and Korioth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 43.

49 Ahumada Ruiz, 'The Spanish Constitutional Court' 616; Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 517; Alaez Corral and Arias Casta–o, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 599; Newton and Donaghy, *Institutions of Modern Spain – A Political and Economic Guide* 26; Casey, 'The Spanish Constitutional Court' 33.

50 Bell, 'Court Institutions' 42.

51 Ibid 42.

52 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 207.

53 Ibid 212;

54 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 65-66; Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 57; Brauneck, 'Rettet die EU den Rechtsstaat in Polen?' 1424; Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' 1755-1757.

Clearly, these internal constitutional problems in Poland have implications for the EU as well. On the one hand, the jurisprudence of constitutional judges impacts EU law and EU integration. Through their jurisprudence, national constitutional courts ensure that EU law enjoys constitutional authority, which complements the political authority that national parliaments vest in EU law by ratifying the EU-Treaties. In case national constitutional courts cannot exercise their constitutional review independently, EU law can arguably not acquire full constitutional authority. On the other hand, the interferences with the composition of the national constitutional court might reflect a broader rule-of-law-problem. However, EU law in general and Eurozone cooperation in particular are based on *legal* safeguards. This is apparent for example in the EU balanced budget rules, as the Fiscal Compact specifically requires Member States to implement them into constitutional law – or a source equally effective – in order to create legal safeguards against the violation of Eurozone rules.[55] Consequently, such a potential rule-of-law-crisis in a Eurozone Member State could cast doubts regarding the credibility of the Eurozone and negatively affect all other Member States.

Considering the constitutional review of EU law, it was outlined that such national constitutional review will be, most likely, initiated by privileged applicants and will either take the form of an abstract *ex ante* review (mostly the case in France and Spain) or an abstract *ex post* review (mostly the case in Germany and Poland). Suffice it here to point out that the advantages of an *ex ante* review are most visible in France – and as apparent under the flexible Finnish constitutional system – where the constitution-amending legislator overcame the incompatibility between envisaged EU commitments and the French Constitution by modifying the constitutional text, so that a conflict would not materialize in the first place.[56] The possible problems that could emerge from an *ex post* unconstitutional verdict against EU law are well visible in Germany, where such a decision from the Court in Karlsruhe could risk the stability of the Euro.[57] In addition, the criticized apparent double standard employed by the German Constitutional Court in EU matters renders

55 On the importance of the rule-of-law in EMU-cooperation, cf. Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 241-243.

56 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 871.

57 Stemming from the German *ultra vires* finding on the ECB's PSP-program, cf. *Quantitative Easing (PSPP) Final Judgment*; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 936.

proceedings against EU law more likely admissible.[58] For EU fiscal integration measures, this entails that the constitutional status and the ability to challenge such measure depend on the national system. The previous analysis illustrates this diversity. Such challenges are particularly likely in Germany, where Article 38 (1) Basic Law enables every German citizen that is entitled to vote to proceed against EU law.

4 IMPLICATIONS OF THE COMPARATIVE FINDINGS FOR EU FISCAL INTEGRATION

The comparison in this Section demonstrates that EU fiscal integration steps are not per definition unconstitutional. It appears that all four national constitutional actors identified fiscal competences as important domestic sovereign powers, which require a high degree of democratic control. Therefore, the modalities and specific design of EU fiscal integration steps are crucial for the constitutional assessment. Particularly the German and the French jurisprudence place great importance on sufficient national parliamentary (or presidential) control of fiscal decisions, which suggests that conferring upon the EU an exclusive competence in fiscal competence areas would likely be declared incompatible with the national constitution. As highlighted at different occasions, this would prevent German participation in such far-reaching fiscal integration steps, in light of the *eternity clause*. Instead, a coordination of this policy field seems more realistically achievable, whereby particular attention has to be paid to preserve the *right kind* and *right amount* of national decision-making capacity without rendering the coordination and collaboration ineffective. As long as national consent remains constitutive for any additional financial commitment, for example, and as long as the German Parliament is not liable for budgetary decisions taken by other EU Member States, such a supranational cooperation seems also achievable under the more rigid German Basic Law.

Given the importance of the concrete design of EU fiscal integration measures in order to determine their compatibility with the available national constitutional space, the subsequent PART II uses the framework developed so far and in particular the *charted* national constitutional space to assess several concrete proposals for deeper EU fiscal integration. Through this application the outlined comparative conclusions are further sharpened and the limiting potential of the respective national *constitutional identity limit* – but

58 Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 172; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305; Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 641-642.

also more generally of more flexible and more rigid constitutional systems – in relation to EU fiscal integration steps is determined in broader detail.

PART II

Testing the charted national constitutional space

Introduction

The Constitutional Feasibility of EU Fiscal Integration Proposals

The Eurocrisis painfully exposed the structural shortcomings in the design of the Euro. Although the precise root-causes of this crisis remain disputed,[1] it is widely acknowledged that fundamental reforms are required in order to stabilize the Euro in the long-run.[2] To that end, many proposals have already been submitted at EU, national, academic and civil-societal level. These proposal suggest a variety of EU reform steps,[3] including further completing the Banking Union,[4] the establishment of a Capitals Market Union,[5] the initiation of a

1 Notably, focusing on the banking sector, the close relationship between public finances and the banking sector, cf. Lionello, The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration 162; Or, when focusing on the EU legal framework, the lacking fiscal discipline and the weakened EU rules in that regard, cf. Craig and Markakis, 'EMU Reform' 1401; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 162; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 36; Or, when focusing on the economic dimension, for example the three economic trends identified as cause of the Eurocrisis, cf. Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 61; Or finally, the asymmetric Treaty design of the EMU with exclusive monetary competences at the EU-level and only a coordination of economic policies, cf. Fabbrini, 'Fiscal Capacity' 107; As well as the lack in EMU fiscal (stabilization) capacities, cf. Benedicta Marzinotto, André Sapir and Guntram B. Wolff, 'What Kind of Fiscal Union? (2011)' Bruegel Policy Brief <https://www.bruegel.org/2011/11/what-kind-of-fiscal-union/> accessed 20 December 2020 2.

2 Craig and Markakis, 'EMU Reform' 1404; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 34; Dawson, Enderlein and Joerges, 'Introduction: The Governance of the Transformation of Europe's Economic, Political, and Constitutional Constellation Since the Euro-Crisis ' 3.

3 Cf. on the made proposals, for example: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 163-165; Craig and Markakis, 'EMU Reform' 1400, 1446-1447; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 45-47; Fabbrini, 'Fiscal Capacity' 114-124.

4 Cf. the official documents of the EU institutions on the creation of the Banking Union: Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 19-20; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 4; European Commission, *Communication from the Commission to the European Parliament and the Council – A Roadmap Towards a Banking Union (COM (2012) 510)* (European Commission 2012).

5 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 20-21; Cf. as well: Craig and Markakis, 'EMU Reform' 1434.

European Monetary Fund,[6] or even the creation of Political Union.[7] As substantiated in the Introductory Chapter, another widely discussed reform ambition is further EU fiscal integration.[8] Although these EU fiscal integration steps appear to be a vital reform component to build a stable, resilient single currency, their design and the required degree of integration remain politically contested across the Member States.[9]

The apparent political controversy around EU fiscal integration coincides with an extensive legal-constitutional opposition that is formulated by national constitutional authorities. As revealed in PART I, national constitutional authorities appear to increasingly scrutinize EU measures that are linked to budgetary or fiscal policies,[10] which could seriously restrict the constitutional

6 The initial proposals of the Commission: Commission Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Monetary Fund (COM (2017) 827); Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 28; Cf. as well: Craig and Markakis, 'EMU Reform' 1407; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 176-178; Editorial Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' (2018) 55 Common Market Law Review 1, 3-4.

7 As proposed by the Five Presidents' Report, cf. Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 4, 17; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 226-227.

8 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 23-26; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 14-15; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 201-202; Fabbrini, 'Fiscal Capacity' 114-115, 125; Van den Bogaert and Cuyvers, 'Of Carrots and Sticks – What Direction to Take for Economic and Monetary Union?' 133; Scharpf, 'The Costs of Non-Disintegration: The Case of the European Monetary Union' 37-39; Tortola, 'Coming Full Circle: The Euro Crisis, Integration Theory, and the Future of the EU' 131; Pisani-Ferry, 'Rebalancing the Governance of the Euro Area' 62; Maduro, 'Foreword: Fiscal Capacity and Constitutional Reform in the EMU' vi; Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 255-256; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 123-124; Hinarejos, 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration ' 14.

9 Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 65; Schoeller, 'Preventing the Eurozone Budget: Issue Replacement and Small State Influence in EMU' 11-12.

10 As established, most visible in the national *constitutional identity limits*, cf. Saiz Arnaiz and Alcoberro Llivina, 'Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' 3; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 110; Jacobsohn, 'The Formation of Constitutional Idenities' 130; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 125-128; This contestation is particularly strong in Germany, where the Constitutional Court developed the concept of *overall budgetary responsibility* to address EU fiscal integration, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; *Financial Support for Greece and EFSF* para 120; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688.

feasibility of the proposed fiscal integration reform proposals. It appears to result in the dilemma fleshed out in the Introductory Chapter which constitutes the starting point of the research: EU fiscal integration is necessary to stabilize the Euro and yet constitutionally impossible to attain. In light of this apparent dilemma, the following assessment determines the compatibility of a broad selection of EU fiscal integration proposals with the previously charted national constitutional space.[11]

To facilitate this compatibility assessment, the subsequent section first maps the most authoritative and representative fiscal integration proposals, which will provide a nuanced outline of possible design options for such integration steps. The research defines the 'authority' of the proposals based on the actor that submitted them as well as their reception within the political and academic debate. In light of this litmus test, the analysis firstly includes the various proposals submitted by the European Commission. This covers the 2015 EU Five Presidents' Report, the follow-up in the White Paper on the future of Europe as well as the Reflection Paper on the deepening of the EMU both published in 2017, the Budgetary Instrument for Convergence and Competitiveness (BICC) circulated in 2019,[12] the recently approved recovery fund Next Generation EU,[13] as well as an early proposal on Eurobonds from 2011.[14] It should be emphasized once again that Next Generation EU does not

11 Cf. the assessment in PART I.

12 See the original proposal by the Commission: Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354); Which was encouraged and supported by Council and European Council, cf. Eurogroup, *Term Sheet on the Budgetary Instrument for Convergence and Competitiveness* (Eurogroup 2019); Euro Summit, *Statement of the Euro Summit, 14 December 2018 (EURO 503/18)* (General Secretariat of the Council 2018); Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 185-186; Schoeller, 'Preventing the Eurozone Budget: Issue Replacement and Small State Influence in EMU' 9-11; Paul Dermine, 'The Commission's December Package 18 Months Later' (2019) Maastricht Law – Faculty of Law Working Paper series 7, 11-12.

13 As concluded by the European Council, cf. Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20*; And as initially proposed by the European Commission, cf. Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committe and the Committee of the Regions – Europe's moment: Repair and Prepare for the Next Generation (COM (2020) 456)*.

14 The idea was proposed by the European Commission, cf. European Commission, *Green Paper on the Feasibility of Introducing Stability Bonds (COM (2011) 818)* (European Commission 2011); Subsequently considered in several publications, cf. Hans-Bernd Schäfer and Jochen Bigus, 'Consequences of Different Eurobonds Proposals' (2016) 12 Review of Law & Economics 523, 553; Alexandra Hild, Bernhard Herz and Christian Bauer, 'Structured Eurobonds: Limiting Liability and Distributing Profits' (2014) 52 Journal of Common Market Studies 250, 251; Franz C. Mayer and Christian Heidfeld, 'Eurobonds, Schuldentilgungsfonds und Projektbonds – Eine dunkle Bedrohung?' (2012) 45 Zeitschrift für Rechtspolitik 129, 129; Franz C. Mayer and Christian Heidfeld, 'Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds' (2012) 65 Neue Juristische Wochenschrift (NJW) 422, 422.

qualify as a reform of the single currency as such. Nevertheless, the design choices made in this proposal illustrate how a feasible Eurozone financial capacity might be devised. Taken together, these proposals constitute the most comprehensive and authoritative reform package for EU fiscal integration steps.

In addition to these Commission proposals, the assessment covers the Franco-German proposal on establishing a Eurozone-budget,[15] as well as the proposal of France and Germany that led to the adoption of Next Generation EU.[16] Moreover, various proposals on Eurobonds, the proposal on establishing an 'automatic' investment budget for the Euroarea[17] and an early *Bruegel* proposal on the creation of a full-fledged Fiscal Union are included in the assessment.[18] Finally, several academic publications that evaluate these proposals and introduce own ideas are incorporated to complement the assessment.[19] Combined, the various proposals, displayed in chronological order in *Figure 17*, offer a comprehensive overview of authoritative and innovative design options currently available for potential deeper EU fiscal integration.

Given that a separate compatibility assessment of each proposal with the charted national constitutional space is not feasible, the research follows an expedient two-fold functional approach. In a first step, all proposals are dismantled and organized into four substantive *reform elements* or *components* building on a distinction introduced by *Ruffert*.[20] Notably, these four elements are the creation of a Eurozone fiscal capacity,[21] the financing options of po-

15 Meeting, *Erklärung von Meseberg – Das Versprechen Europas für Sicherheit und Wohlstand erneuern*; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 164; Fabbrini, 'Fiscal Capacity' 122.

16 Bundeskanzlerin, *Press Release 173/20: A French-German Initiative for the European Recovery from the Coronavirus Crisis*.

17 Bibow, 'Making the Euro Viable: The Euro Treasury Plan' 2-4.

18 Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)'.

19 For example, the following publications on EMU reforms and specifically EU fiscal integration steps: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration*; Craig and Markakis, 'EMU Reform'; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law'; Fabbrini, 'Fiscal Capacity'; Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis*.

20 As similarly identified in academic writing: Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 48.

21 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 25-26; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 180-182; Craig and Markakis, 'EMU Reform' 1420, 1422-1423; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 48-49; Fabbrini, 'Fiscal Capacity' 125; Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 254.

tential additional EU expenditure,[22] the establishment of institutional capacities, most prominently a Eurozone Minister of Finance,[23] and finally the strengthened EU supervision of national budgeting.[24]

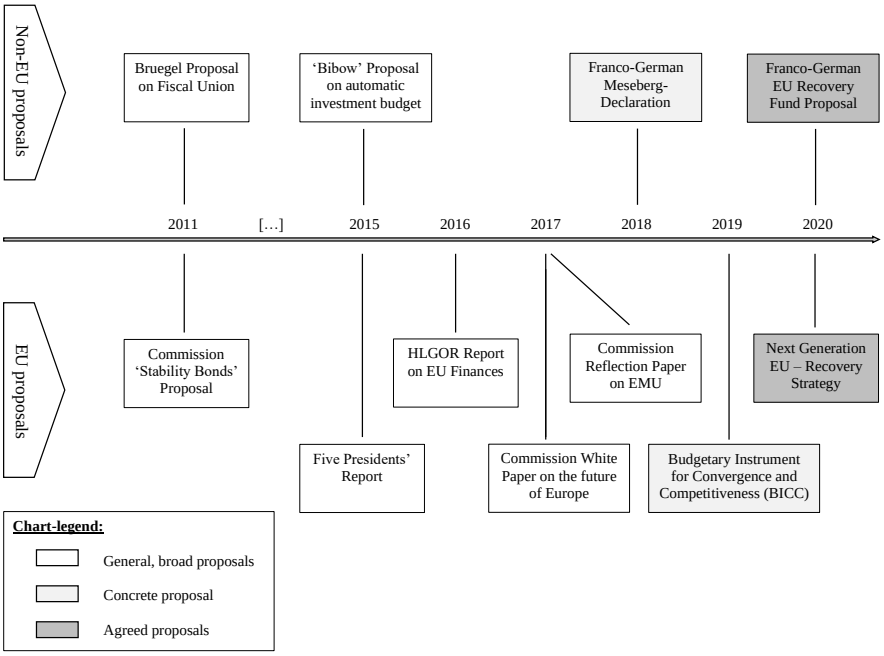

Figure 17: Chronological overview of assessed EU fiscal integration proposal

22 To generate up to 3% of national GDP in EU revenue, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 182; Craig and Markakis, 'EMU Reform' 1423; Yves-Emmanuel Bara and others, 'A contribution to the work on the strengthening of the euro area' (2017) Trésor-Economics, 8; Also pointed out by the European Commission, cf. European Commission, *Commission Staff Working Document – Impact Assessment – Accompanying the Document for Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a European Investment Stabilisation Function (COM (2018) 297)* (European Commission 2018) 52.

23 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 23-26; European Commission, *Completing Europe's Economic and Monetary Union – A European Minister of Economy and Finance* (European Commission 2017); Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 18; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188-190; Craig and Markakis, 'EMU Reform' 1441-1442; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 61; Fabbrini, 'Fiscal Capacity' 131; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 8-9.

24 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 23-26; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 9; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 169-170.

In a second step, the deconstructed proposals are subsequently differentiated based on the degree of *EU influence* or the intensity of *EU integration* that they envisage. The apparent differences in the proposed intensity of supranational cooperation reflect the academic distinction between 'decentralized' and 'centralized' approaches to EMU reforms. Following the strictest 'decentralized approach' as conceptualized by *Lionello*[25] or the '*surveillance model*' as initially labelled by *Hinarejos*,[26] Member States retain control over fiscal decisions, no additional competences are conferred to the EU-level and the supranational level only has indirect influence by coordinating policy decisions. Relying on these academic concepts, the research labels proposals that aim to retain responsibility for budgetary and fiscal decisions at the national level, and thereby to preserve the current distribution of competences within the EMU, as *coordination approaches*. In contrast, proposals that follow a strict 'centralized approach'[27] or the '*classic fiscal federalism model*'[28] aim to assign core budgetary and fiscal competences to the EU-level. This also implies greater administrative powers for EU institutions. The research labels these proposals, which entail the conferral of considerable extent of competences to the EU, as *integration approaches*.

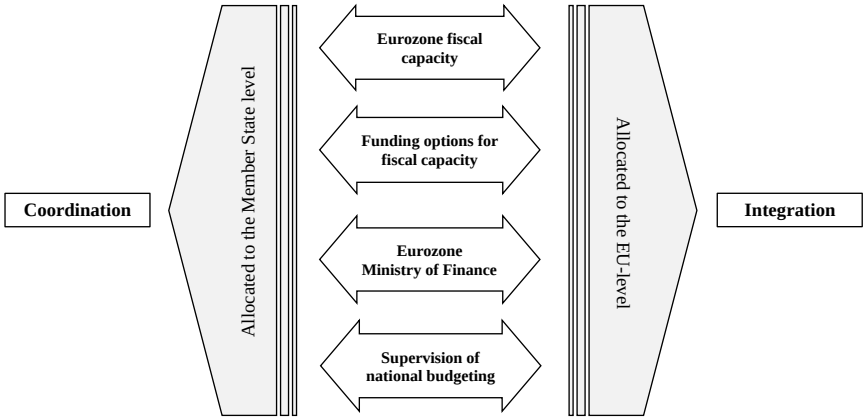

Figure 18: Visualization of two-fold functional approach employed to organize proposals

25 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 164.

26 Alicia Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU ' (2013) 50 Common Market Law Review 1621, 1634-1635; Cf. as well: Armin Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' (2017) 27 Swiss Review of International and European Law 19, 20.

27 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 164.

28 Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 20; Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU ' 1635-1636.

The outlined two-fold functional approach deconstructs the identified EU fiscal integration proposals into the four core substantive elements that fiscal integration reform might entail as well as based on the degree of cooperation that they envision, distinguishing between a *coordination* and an *integration approach* (Chapter VII), as visualized in *Figure 18*. The adopted distinction allows to subsequently determine *what form* of EU fiscal integration is achievable within the charted national constitutional space – even beyond the directly assessed proposals (Chapter VIII).

The resulting overview of EU fiscal integration proposals established in Chapter VII provides a nuanced basis for the subsequent compatibility assessment of the possible integration steps in Chapter VIII in light of the previously charted national constitutional space. Within Chapter VIII, the assessment also explores whether the developed concept of *constitutional flexibility* could create additional constitutional space for EU fiscal integration in some of the analyzed Member States as well as whether fiscal integration proposals could be reconceptualized to better fit the national constitutional concerns. The concluding section of Chapter VIII then unites all made observations and projects *what form* and *what degree* of EU fiscal integration is achievable within the existing national constitutional space, either with or without the use of potential mechanisms of flexibilization.

VII Deconstructing EU fiscal integration proposals

1 Introduction

Following the outlined functional approach, the subsequent section organizes the identified EU fiscal integration proposals into the four core substantive elements of EU fiscal integration developed by this research, which will subsequently serve as framework to structure and to conduct the detailed comparative compatibility assessment.[1] As established, these are the creation of a Eurozone budgetary capacity (2.), the introduction of new EU revenue sources to finance increased financial needs at the EU-level (3.), the establishment of an 'EU Ministry of Finance' – or more generally additional administrative or executive capacities at EU-level (4.) – as well as finally the enhanced EU supervision over national budgeting and fiscal decision-making (5.).

Within each substantive element, the proposed concrete ideas will be tentatively organized based on the envisaged extent of EU fiscal integration following the established linear distinction between 'cooperation'[2] and 'integration'[3] approaches.

2 Creating a Eurozone fiscal capacity

The creation of a Eurozone fiscal capacity – which covers a range of design options varying from the creation of new EU fiscal emergency funds to the initiation of a full-fledged EMU budget to conduct fiscal and economic policy[4] – appears to constitute the most comprehensively discussed reform component

1 For this organization into substantive elements, cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 48.

2 For the original concept, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 164; Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 20; Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU ' 1635-1636.

3 For the original concept, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 164; Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 20; Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU ' 1634-1635.

4 Cf. for example: Alessandro D'Alfonso and Andrej Stuchlik, *A fiscal capacity for the euro area?* (European Parliament 2016) 9-10.

of EU fiscal integration. The centrality of this component in the assessed proposals can be explained by two interrelated considerations. First, it appears that the design of the fiscal capacity necessarily determines the overall nature of EMU cooperation. Notably, the more fiscal powers Member States decide to attribute to the EU, the more the EU is replacing national fiscal decisions by supranational political decision-making. Thus, additional Eurozone fiscal capacities could equip the EU with the power to determine fiscal policy decisions, thereby directing national policy decisions in this area. Given the close link between the budget and national democracy as well as policy-making, the allocation of such fiscal capacities would shift the current power balance between both levels towards greater EU influence and in doing so modify the nature of EMU cooperation – and even EU integration as a whole. And second, the design of the fiscal capacity impacts all other substantive elements, too – including the required amount of revenue to finance it or the necessary EU institutional framework to administer it. Taken together, this suggests that the design of the fiscal capacity is not only a reform question of structural importance, but it is also of central interest to the political and the national constitutional discourse given its possible implications for the future of EU cooperation altogether.

As to the specific design of a possible Eurozone fiscal capacity, the various proposals distinguish between two general options. The first option is to equip the Eurozone with an additional – possibly large – budget that could operate as preventive tool to strive for economic cohesion across the Euroarea (2.1.).[5] In the alternative – or in addition – Member States could decide to establish additional emergency instruments in order to better support Member States impacted by asymmetric economic shocks (2.2.).[6]

2.1 Eurozone-budget

Following the highlighted *integration approach* various reform proposals envisage the creation of a genuine Eurozone-budget.[7] Such a budget would

5 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 172.

6 Craig and Markakis, 'EMU Reform' 1420; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 165.

7 As envisaged by the EU Five Presidents' Report, the Meseberg Declaration, and the BICC, cf. Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Meeting, *Erklärung von Meseberg – Das Versprechen Europas für Sicherheit und Wohlstand erneuern*; Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354); Eurogroup, *Term Sheet on the Budgetary Instrument for Convergence and Competitiveness*; Summit, *Statement of the Euro Summit, 14 December 2018 (EURO 503/18)*; As well as the Bruegel-proposal, cf. Marzinotto,

operate on a continuous basis in parallel with or even integrated into[8] the regular EU budget. According to most proposals, this budget would function as a preventive tool, geared towards stabilizing the Euro by fostering the economic convergence and competitiveness across the Member States.[9] This function corresponds to the fundamental requirements for optimum currency areas under Mundell's economic theory.[10] The main objectives of the budget is to foster the economic and structural development of the Eurozone as well as social cohesion.

The Commission's BICC would, for example, fund 'reforms in product and labor markets, education, tax reforms, the development of capital markets, reforms to improve the business environment as well as investment in human capital and public administration reforms.'[11] According to the Commission's evaluation, these national reforms are likely to foster economic convergence by equally targeting broader EU objectives.[12] Similarly, the European Parliament advocated that a fiscal capacity should 'support growth and social cohesion addressing imbalances, structural divergences and financial emergencies which

Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5, 7; Although it is interesting to note that the initial proposition in the Four Presidents Report spoke about a 'fiscal capacity' whereas the Five Presidents' Report speaks of a 'fiscal function', which might hint at the difficulty of introducing a full budget, i.e. fiscal capacity, given national opposition, cf. on the proposals and the wording: Fabbrini, 'Fiscal Capacity' 114-115.

8 As proposed by the BICC, cf. Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354); Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 185-186; Schoeller, 'Preventing the Eurozone Budget: Issue Replacement and Small State Influence in EMU' 9-11; Dermine, 'The Commission's December Package 18 Months Later' 11-12; Fabbrini, 'Fiscal Capacity' 122-124.

9 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 184-185; As emphasized as well by the BICC, cf. Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354) Recitals 1 and 2; Cf. as well: Fabbrini, 'Fiscal Capacity' 122-124.

10 Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 77; Jager and Hafner, 'The Optimum Currency Area Theory and the EMU – An Assessment in the Context of the Eurozone Crisis' 316; Eichengreen, *European Monetary Unification : Theory, Practice, and Analysis* 51-52.

11 European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A Modern Budget for a Union That Protects, Empowers and Defends The Multi-annual Financial Framework for 2021-2027 (COM (2018) 321)* (European Commission 2018) 10.

12 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 180-181.

are directly connected to the monetary union.'[13] Thus, the envisaged Eurozone-budget would pursue both economic as well as social objectives by allocating funds across the Member States guided by the general objective to achieve convergence within the Eurozone.[14]

The Commission substantiated that such a Eurozone-budget would target in particular national reforms that increase the competitiveness of the national economy and that equally have a positive 'spill-over effect' for other Eurozone economies.[15] When considering the required size of the Eurozone-budget, the different proposals suggest a minimum budget of around 1-3% of the Eurozone-GDP to be fully effective.[16] In light of this considerable financial volume and the potentially wide discretion enjoyed by the EU when allocating the available funds, various proposals equally envision enhanced democratic legitimacy at the supranational level by, for example, including national parliaments in the decision-making process.[17]

Finally, the proposals consider different legal bases to establish the budget. Based on previous instruments, a Eurozone-budget intended to fund structural reforms could possibly be based on Article 175 (3) TFEU.[18] Other proposals suggest the possible use of Article 136 (1) TFEU,[19] the initiation of a budgetary

13 European Parliament Resolution of 20 November 2012 with Recommendations to the Commission on the Report of the Presidents of the European Council, the European Commission, the European Central Bank and the Eurogroup 'Towards a Genuine Economic and Monetary Union' (2012/2151(INI)) (2012) para 11; Cf. as well: Fabbrini, 'Fiscal Capacity' 119.

14 Craig and Markakis, 'EMU Reform' 1415, 1418; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 182.

15 Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A Modern Budget for a Union That Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027 (COM (2018) 321)* 10.

16 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 182; Craig and Markakis, 'EMU Reform' 1423; Bara and others, 'A contribution to the work on the strengthening of the euro area' 8; Also pointed out by the Commission, cf. Commission, *Commission Staff Working Document – Impact Assessment – Accompanying the Document for Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a European Investment Stabilisation Function (COM (2018) 297)* 52.

17 Especially in light of the importance of budgetary decisions for the democratic process, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 222; Fabbrini, 'Fiscal Capacity' 131; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

18 As highlighted, this constitutes the legal basis for Regulation 2015/1072, under which *inter alia* strategic investments are financed.

19 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 205-206.

capacity following enhanced cooperation[20] or even an intergovernmental solution. In addition, Treaty-based solutions would likely be tied to the EU's own resources decision in the sense of Article 311 TFEU to generate the required revenue. In the alternative, Member States could equally decide to allocate additional competences to the EU-level and establish a specific framework including the creation of new legal bases for the envisaged Eurozone-budget, which would, however, require Treaty amendment.

2.2 Emergency budgetary instruments

An additional idea to complement – or instead of – a permanent, preventive Eurozone budgetary capacity advocated by some proposals is the introduction of a temporary budgetary instrument connected to a specific purpose, such as to stabilize public investments in times of asymmetric shocks[21] or to support Member States in the payment of unemployment benefits in economic downturns to free fiscal space for investments.[22] The latter could replace the recently enacted Support to mitigate Unemployment Risks in an Emergency (SURE) scheme, under which the EU issues on a temporary basis loans to the Member States.[23] These temporary instruments are envisaged as emergency mechanisms and follow a more *coordination approach*, given that EU intervention remains only secondary to the primary competence of the Member States.[24]

The underlying idea of such emergency instruments is that Member States tend to cut public investment in case of economic shocks, which renders the domestic recovery process lengthy and which has adverse consequences for the entire Eurozone. Hence, financing public investments at a fixed level in case of economic downturn could break the vicious circle and speed up

20 Ibid 205; Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* 169.

21 Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Cf. as well: Craig and Markakis, 'EMU Reform' 1426; Fabbrini, 'Fiscal Capacity' 115; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6.

22 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 26; Cf. as well: Craig and Markakis, 'EMU Reform' 1426.

23 Cf. the final regulation: Commission, 'SURE – Supporting Member States to Help Protect People in Work and Jobs'; And the initial proposal: Proposal for a Council Regulation on the Establishment of a European Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency (SURE) Following the COVID-19 Outbreak – COM(2020) 139 final – 2020/0057(NLE); Cf. as well: László Andor, 'SURE – EU Capacity for Stabilising Employment and Incomes in the Pandemic' (2020) 55 Intereconomics – Review of European Economic Policy 139, 139.

24 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 164; Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU ' 1634-1635.

national – and EU – recovery efforts.[25] Similarly, exploding unemployment costs during economic shocks puts pressure on public finances. Through temporary support in the financing of unemployment costs important national fiscal space could be freed to guarantee that public investments are maintained despite the economic downturn.[26] Hence, both proposed instruments would operate on a demand-basis and they are mainly intended to smoothen the consequences of an economic shock, thereby preventing economic distress in the Eurozone. Contrary to the proposed Eurozone-budget, such emergency instruments would neither have the intention nor the ability to finance national structural reforms. Instead, they support a speedier recovery after asymmetric shocks within the Eurozone and tame potential contagious effects within the Euroarea.

According to the considered proposals, the possible legal bases for establishing temporary budgetary instruments are Article 175 (3) TFEU, which is employed for the proposed Recovery and Resilience Facility under Next Generation EU.[27] Similarly, more limited budgetary instruments, such as the proposed Investment Stabilization Fund, could be based on Article 175 (3) TFEU,[28] or as well on Article 122 (2) TFEU.[29] In both cases, the precise modalities, the funding eligibility and the procedural steps would be established within a secondary act, which has to be adopted following the ordinary legislative procedure.

An additional, intermediate proposal that combines the idea of a Eurozone-budget and of emergency instruments was submitted by Jörg Bibow. Bibow proposed the introduction of an automatic investment budget to stabilize Eurozone investments in the long run. According to this proposal, Member States would initially agree on the annual volume of Eurozone investments and a desired growth rate. Subsequently, the investment budget runs 'automatically' without being subject to political discussions.[30] The required budget would be funded by common debt, which are intended to be invested in a shared EU future. The fund would thus operate on a permanent basis and require the pre-determination of major political decisions by national parliaments to guarantee the 'automatic' functioning of the budget

25 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 25; Cf. as well: Craig and Markakis, 'EMU Reform' 1426; Fabbrini, 'Fiscal Capacity' 118.

26 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 25; Cf. as well: Craig and Markakis, 'EMU Reform' 1426.

27 Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility (COM (2020) 408).

28 Which was, for example, also employed as legal basis to adopt Regulation 2015/1072 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013, cf. Fabbrini, 'Fiscal Capacity' 126-127.

29 Which constitutes the legal basis for the EFSM, cf. Council Regulation 407/2010 establishing a European Financial Stabilisation Mechanism.

30 Bibow, 'Making the Euro Viable: The Euro Treasury Plan' 4.

subsequently as well as the commitment of considerable funds to finance Member States' public investment through such EU-based scheme.[31] Obviously, this would result in greater supranational powers albeit in a very limited framework, as the proposal would deliberately not involve the conferral of political discretion on spending to the EU-level. Instead, Member States would set the investment rate at a fixed level and it would subsequently operate in an automatic fashion.[32] Bibow pointed out that such an automatized investment stabilization budget would ensure that structural investments are secured over time, which could enhance economic performance and convergence. Automatized investments would similarly escape the debate on democratic legitimacy, as such a budget would run on 'auto-pilot'.[33] Yet, it can be submitted that this 'auto-pilot' would ultimately not render its function less democratically contentious, as national parliaments would effectively be stripped of their prerogatives to determine how national funds are allocated.

2.3 Interim conclusion on increased fiscal capacity

When comparing the different proposals, two core design options can be distinguished that are located at opposite ends of the conceptual scale between *integration* and *coordination approaches* to EU fiscal integration.

Accordingly, Member States could either agree to create a full-fledged Eurozone-budget which could stimulate economic convergence by financing structural reforms on a permanent basis. It would operate as preventive instrument aiming to make the Eurozone more robust and economic shocks less likely. In its most comprehensive form, such budget would entail the conferral of budgetary discretion to the EU-level, including a degree of political discretion on how the available funding is spent.

Or, Member States could follow a *coordination approach* and introduce emergency instruments that could stabilize public investments to ensure a speedy recovery from economic shocks. These proposals would follow the existing Treaty-logic and complement the current framework, most notably the ESM. Between these two extreme points, intermediate proposals can emerge that combine various elements of both approaches. Examples of such intermediate solutions are the BICC proposal, which is highly limited in volume and scope, as well as the Bibow proposal, which aims at automatic investment rates.

Taken together, this suggests that Member States are able to allocate different functions or objectives to the proposed fiscal capacity, which provides

31 Ibid 4.
32 Ibid 4.
33 Ibid 4.

a degree of flexibility when confronted with the various national constitutional concerns, which will be reflected in the subsequent compatibility assessment.

3 Funding options for fiscal integration

As indicated, the design of any EU fiscal capacity ultimately determines the EU's financial needs. Notably, a permanent Eurozone-budget through which the EU allocates grants would require a stable, reliable revenue stream. In contrast, the proposed emergency instruments would depend to a lesser extent on continuous revenue and could operate under, for example, the ESM financing structure which combines a small amount of paid-in capital with a larger amount of callable capital.[34]

Hence, in order to determine possible funding sources (3.2.), it appears essential to tentatively establish in a preliminary step the financing need of a Eurozone-budget or an emergency instrument (3.1.).

3.1 The required funding

It was already pointed out that the proposals aiming at creating a permanent Eurozone-budget envisage a minimum size of 1-3% of the Eurozone-GDP to be fully effective.[35] Based on data from 2019, this commitment would translate into an annual Eurozone budget of around € 115 to € 343 billion.[36] This would constitute a significant increase of the EU's fiscal capacities as can be seen in comparison to the EU's regular budget. Notably, the MFF for the period of 2021 to 2027 has a volume of € 1.074 billion[37] whereas the envisaged Eurozone-budget would amount to an additional € 805 billion to up to € 2.401 billion in the same timeframe. Comparing these absolute numbers, it suggests a major increase in the EU's financial capacity would be required and it remains questionable whether Member States would agree to allocate these additional financial means to the EU. This reluctance was reflected in the BICC which was

34 On the ESM financing structure, cf. Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 95; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 104.

35 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 182; Craig and Markakis, 'EMU Reform' 1423; Bara and others, 'A contribution to the work on the strengthening of the euro area' 8.

36 According to World Bank, the Euroarea GDP was around €11.430 billion, cf. The World Bank, 'GDP (current US$) – Euro area' (*The World Bank*, 2020) <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2019&locations=XC&start=2006&view=chart> accessed 20 December 2020; Other proposals envisaged an annual budget of €90 billion based on data from 2011, cf. Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 7.

37 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 7.

projected to have a size of only € 25 billion for the period of 2021 to 2027.[38] Obviously, this constitutes only a fraction of the seemingly required financial firepower and indicates the limited political willingness across the Eurozone to establish a significant EU budget. Although one could submit that establishing such a budget in the first place, even with limited financial means, could be a stepping stone towards a more substantial Eurozone-budget as argued by *Lionello*,[39] it remains questionable whether the apparent political deadlock towards establishing more substantial financial EU means can be overcome.[40]

Different to a permanently operating Eurozone-budget, the proposed specialized temporary budgetary instruments would only be triggered in case of asymmetric economic shocks.[41] Therefore, their financing needs and funding structures are different to the ones of a permanent budget. Concretely, the Commission proposed that the envisaged European Investment Stabilization Function could operate through back-to-back loans guaranteed by the EU budget.[42] According to the Commission, such European Investment Stabilization Function could provide loans of up to € 30 billion between 2021 and 2027.[43] Given that these € 30 billion would be guaranteed through the existing EU budget no direct additional financial commitments would arise for the Member States. However, it seems questionable whether the Function is equipped to support larger Member States. The German share of public investments in the federal budget in 2019, for example, by itself already amounted

38 Cf. the European Commission's proposal on the MFF: Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A Modern Budget for a Union That Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027 (COM (2018) 321)* 10; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 217; Fabbrini, 'Fiscal Capacity' 118.

39 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 182.

40 Cf. for example: Schoeller, 'Preventing the Eurozone Budget: Issue Replacement and Small State Influence in EMU' 11-12; Although the divide is seemingly not so much across Member States, but rather across political groupings, cf. Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 46.

41 Craig and Markakis, 'EMU Reform' 1426; Fabbrini, 'Fiscal Capacity' 115; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6.

42 Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A Modern Budget for a Union That Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027 (COM (2018) 321)* 11; Cf. as well: Craig and Markakis, 'EMU Reform' 1426.

43 Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A Modern Budget for a Union That Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027 (COM (2018) 321)* 11; Cf. as well: Craig and Markakis, 'EMU Reform' 1427; Fabbrini, 'Fiscal Capacity' 118.

to almost € 39 billion in a single year,[44] which would clearly overburden the envisaged scheme. Therefore, it has to be questioned whether the proposed funding is sufficient to stabilize the Euro.[45] In addition, the Commission also proposed to support Member States through an interest rate subsidy in order to free fiscal space in the national budget, which could be financed by contributions of all Eurozone Member States.[46]

Taken together, this illustrates that the initiation of a Eurozone-budget would require a considerable financial commitment from the Member States. A budget of up to 3% GDP for the Eurozone alone triples the budgetary capacities available at EU-level and presupposes a stable revenue stream. In contrast, the proposed emergency tools would largely operate on a loan-basis, which implies, or presupposes, that the EU financial commitment is paid back by the recipient Member State. The other Member States would then mostly guarantee the loans, for example, by increased own resources ceilings, and therefore carry the risk of default.

3.2 Funding sources

If a budgetary capacity is created, the next question of course is how it could be concretely funded. To that end several options are currently discussed, which include the establishment of new, genuine EU own resources, the possibility of introducing genuine EU taxation, increased contributions by the Member States, the allocation of additional funds by the Member States as externally assigned revenues, as well as EU debts or joint liabilities.[47] These options will be considered below both as to their legal design and their potential maximum financing ability.

The outline differentiates between Treaty-based solutions (3.2.1.) and options beyond the existing Treaty-framework (3.2.2.).

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44 German Federal Ministry of Finance, *Bundeshaushalt 2019* (German Government 2019) 18.

45 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 217.

46 Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A Modern Budget for a Union That Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027 (COM (2018) 321)* 11; Cf. as well: Craig and Markakis, 'EMU Reform' 1426.

47 For a comprehensive overview, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 183-184; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 49-51.

3.2.1 Treaty-based funding sources

According to various proposals, a first possibility is to increase the EU's own resources in order to finance a budgetary capacity for the Eurozone. This could be achieved by increasing the own-resources ceilings established by the Council Decision on the system of own resources[48] established under Article 311 (3) TFEU as well as a specific outline of the use of the additional funding in Council Regulation 1311/2013 laying down the multiannual financial framework[49] based on Article 312 (2) TFEU. In light of the current composition of the EU's own resources, such an increase would presumably lead to higher contributions of the Member States in order to 'top up' the difference between the own resource ceiling and the resources generated from other sources, including the traditional own resources and the VAT-based component as established in Article 2 (1) Council Regulation 2014/335.[50] This suggests that, based on the existing EU budgetary framework, any additional EU means would likely have to be financed through higher contribution of the Member States.

When negotiating a new Council Decision on the system of the EU's own resources, the higher national contributions could be limited to Eurozone Member States by either setting two sets of own resource ceilings distinguishing between Eurozone and non-Eurozone Member States, or by otherwise allocating specific rebates to the non-Eurozone Member States in order to secure the required unanimous support.[51] Yet, such higher national contributions would reinforce the political debate on 'just return' for the Member States.[52] In the alternative, Member States could establish a new source of traditional own resources, for example, by introducing a financial transaction

48 Cf. Council Decision 2014/335; Cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 51; European Union, *European Union Public Finance* (Publications Office of the European Union 2014) 130-132.

49 Cf. Council Regulation 1311/2013 which establishes the MFF from 2014-2020 and lays down the general budgetary planning of the EU; Cf. as well: Richard Crowe, 'The European Budgetary Galaxy' (2017) 13 European Constitutional Law Review 428, 437; Union, *European Union Public Finance* 132.

50 Union, *European Union Public Finance* 132; Identified as less favorable option given the political tensions that might arise, as national contributions are seen as a 'zero-sum game', cf. Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68.

51 As prescribed by Article 311 (3) TFEU; Also, the currently existing rebate-system indicates that Member States are generally able to agree on a reduction of the financial commitment for some Member States, cf. Articles 2 (4) (2) and 4 Council Decision 2014/335.

52 Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 50; Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203; Fabbrini, 'Fiscal Capacity' 129; Crowe, 'The European Budgetary Galaxy' 433; Cf. as well: Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68.

tax and allocating the revenue to the scheme of own resources.[53] Hence, the Member States would establish the tax at the national level, levy it and then attribute it to the EU based on Article 311 TFEU. Following the model of the traditional own resources, such revenue is not introduced into the national budgetary process but instead transferred to the EU, which limits the involvement of national parliaments.[54]

An alternative, which would also be based on the current framework, could be to agree on additional national contributions that are not directly injected into the EU's budget as own resources but rather as targeted externally assigned revenue in the sense of Article 21 Financial Regulation (No. 966/2012).[55] Such externally assigned revenues are independent from the EU budget adopted according to Article 314 TFEU and rather constitute a commitment of the Member State to fund a specific EU activity.[56] Given their voluntary character, Member States could commit in an intergovernmental agreement to the payment of externally assigned revenue and thereby render the inflow of financial resources more predictable.[57]

Further options are EU borrowing and EU debts as recently exemplified by Next Generation EU. Following the European Council's conclusions, the Commission would borrow money on the financial markets and issue EU debts on behalf of the EU, which are subsequently serviced by either the re-payment of the loans by the recipient Member States, possible interest rate gains or, as a final option, through increased contributions by the Member States under the own resources system guaranteed by higher national ceilings.[58] However, the EU's borrowing power is strictly confined by the mandate spelled out in both the European Council Conclusions and subsequently in the amended Own Resources Decision, which both require a unanimous support and even national approval.[59] This implies that the EU cannot engage autonomously in

53 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 205; Which would nevertheless only offer limited additional resources of an estimated €10 to €15 billion, cf. Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68.

54 Crowe, 'The European Budgetary Galaxy' 431; Based on Article 311 TFEU, Member States can assign revenue generated from EU levies to the EU as, for example, the case with the sugar levy, cf. on the system: Siegfried Magiera, 'Art. 311 AEUV – Eigenmittel der EU' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union – Kommentar* (70th edn, C.H. Beck 2020) paras 16-17.

55 Crowe, 'The European Budgetary Galaxy' 441; Cf. as well: Fabbrini, 'Fiscal Capacity' 127-128.

56 Crowe, 'The European Budgetary Galaxy' 441.

57 Ibid 441; Cf. as well: Fabbrini, 'Fiscal Capacity' 127-128.

58 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 2-3.

59 Cf. for the adoption of the European Council conclusions unanimity applies as established in Article 16 (4) TEU and for the adoption of the EU own resources decision Article 311 (3) TFEU prescribes unanimity in the Council; Cf. as well: Lionello, *The Pursuit of Stability*

such borrowing activities, as the principle of equilibrium of budgeting requires that any possible EU liability is guaranteed, for example, by the mentioned increased own resources ceiling.[60]

All three funding options have in common that they crucially and continuously depend on national (parliamentary) approval. Notably, the own resources decision is traditionally amended with the MFF-Regulation every seven years.[61] Hence, Member States can alter their financial commitments, which renders the revenue inflow uncertain in the longer run. This is particularly the case in case the budgetary capacity requires direct contributions of Member States, as these are financed through the general budget of the Member States. At the same time, given the flexible character of these Treaty-based funding options, their funding potential is relatively big as long as Member States reach a (political) agreement on committing a sizeable amount of money.

3.2.2 Extending the current Treaty-framework

In addition, the proposals also suggest the creation of more autonomous revenue streams for the EU which would extend the currently available Treaty-framework. One suggestion is to equip the EU directly with a (limited) taxation competence.[62] Accordingly, the EU would be able to determine the level of taxation in a specific area, possibly in relation to the activities of the EU. Different to proposals building on the existing own resources framework, as for example put forward by the Monti-Report following which Member States would be in charge of enacting a tax and would then transfer the revenue generated from that tax to the EU-level,[63] equipping the EU with a genuine taxation power would entail that the tax and the modalities attached to it are determined by the EU autonomously. In the first place this would, however, require EU Treaty-change, as the current Treaties do not grant the EU the power to tax and it would subsequently trigger serious democratic concerns, as the power to tax traditionally presupposes a high degree of democratic legit-

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of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration 205; Union, *European Union Public Finance* 131-132.

60 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 2-3; Union, *European Union Public Finance* 159-160, 282.

61 Union, *European Union Public Finance* 131-132.

62 Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5; Which would however require a shift of fiscal sovereignty, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 183-184.

63 Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68.

imacy.[64] As long as the EU lacks the required democratic capacity, allocating a genuine taxation power to the EU-level might trigger considerable national constitutional concerns, as will be assessed subsequently.[65] Yet, practically speaking, a genuine EU taxation power would make the revenue of the EU less dependent on the Member States – although the EU would certainly continue to depend on the national level to execute any EU taxation decision.

In addition, some proposals submit that the fiscal capacity could be financed through shared liabilities or EU debts, possibly in the shape of Eurobonds.[66] The underpinning idea is that the Member States would either directly or through the EU issue EU bonds which could partially finance the EU financial deficit. Given the beneficial credit rating of the EU, Member States would likely have to reserve less money for servicing the debts thereby freeing up fiscal space. This would entail that Member States jointly guarantee the entire or at least parts of the national debt, which arguably involves a liability risk for national budgets. Hence, Eurobonds would primarily facilitate the access to the financial markets for the Member States, without however generating direct revenue for the EU itself. Yet, the EU could also be empowered to issue Eurobonds to finance an EU budgetary capacity, ultimately resulting in EU debts. Regarding the issuing of EU debts, the current Treaties establish the principle of equilibrium or the principle of balance of payments in Article 310 (1) (3) TFEU, which requires that revenue and expenditure of the EU are balanced.[67] Although this suggests the potential incompatibility of EU debts with EU law, the EU developed a system under which the Commission can borrow money on the financial markets and subsequently lend it to other countries in order to achieve wider Union objectives. Examples are the Balance of Payments Facility, which grants financial assistance to Member States outside the Eurozone that experience difficulties in the balance of their current payments,[68] the European Financial Stabilization Mechanism (EFSM), which grants loans under strict conditions to Member States that are affected by extraordinary

64 Jussi Jaakkola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' (2019) 20 German Law Journal 660, 663; Fabbrini, 'Fiscal Capacity' 131; Under the current Treaties, the EU has no 'fiscal rights', cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 202-203; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5.

65 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 204.

66 Commission, *Green Paper on the Feasibility of Introducing Stability Bonds (COM (2011) 818)*; Cf. as well: Hild, Herz and Bauer, 'Structured Eurobonds: Limiting Liability and Distributing Profits' 252; Mayer and Heidfeld, 'Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds' 422-423; Hanno Beck and Dirk Wentzel, 'Eurobonds – Wunderwaffe oder Sprengsatz für die Europäische Union?' (2011) 91 Wirtschaftsdienst – Zeitschrift für Wirtschaftspolitik 717, 720-721.

67 Union, *European Union Public Finance* 159-160, 282.

68 Ibid 292-293.

circumstances in order to enhance their fiscal position,[69] or by providing budgetary guarantees to the European Investment Bank.[70] Hence, it illustrates that the EU is generally able to borrow money in order to loan it to different actors, including Member States of the Eurozone. However, the current Treaty-framework requires that the EU finances remain balanced in the long run, which suggests that EU debts would have to be adequately secured by corresponding guarantees.

3.2.3 Interim conclusion on possible funding sources

Comparing the different funding options, the most far-reaching proposals envisage a genuine EU taxation competence independent from direct Member States control, which would require Treaty-change and trigger major democratic concerns. On the other end of the spectrum, the proposed emergency instruments could operate based on EU borrowing which is guaranteed by the Member States, following the existing ESM-example. Given that these emergency instruments work on a loan-basis, the resulting debts would generally be re-paid by the beneficiary Member States. The collective of all Member States would, however, be liable in case of default, which involves financial risks for the domestic state budgets. Other financing proposals are designed based on the existing EU framework surrounding the EU's own resources system.

Taken together, the proposals identify a range of different financing schemes and funding options that could underpin the envisaged budgetary capacity or instruments. These raise a variety of constitutional concerns and face domestic legal hurdles as will be analyzed in broader detail in the following compatibility assessment.

3.3 Interim conclusion on funding options

Overall, the assessment reveals that the size of the budgetary instrument has to be designed in conjunction with the funding scheme. According to the evaluated proposals, a full-fledged Eurozone-budget would require a permanent revenue source at the EU-level whereas an emergency budgetary instrument could rely to a larger extent on national guarantees. Thereby, it appears likely that creating a more permanent budgetary structure with a permanent inflow of revenue will trigger greater constitutional concerns, as Member States will be required to wave their control over the respective financial means once

69 Ibid 293-294.
70 Ibid 285.

they are assigned to the EU-level.[71] At the same time, it appears possible to create greater EU financial capacities within the existing framework of own resources by either establishing new traditional own resources or by increasing the national own resources ceilings.

4 EU Ministry of Finance: Creating administrative-executive capacity

The third substantive idea is the creation of an EU Minister of Finance or EU Treasury to better coordinate the existing powers in a single institution.[72] The core idea is an alteration of the current institutional framework in order to establish a central EU authority in charge of fiscal decision-making. Despite the fact that the envisaged institutional modifications could increase the EU-impact in these areas as a result of centralizing them in a single actor, these reform plans are comparably less controversial as they focus on institutional reforms and a re-shuffling of already conferred responsibilities without necessarily requiring the transfer of additional substantive competences. Nevertheless, the proposed introduction of such EU Treasury and the required institutional alterations are likely to trigger national constitutional concerns albeit depending on the precise institutional role assigned to it.

Considering the concrete proposals, the EU Five Presidents' Report encouraged the creation of a Euroarea Treasury which is projected to facilitate joint fiscal decision-making amongst Eurozone Member States, without however altering the existing division of competences between the national and the EU-level.[73] This suggests that the Treasury would mainly perform a coordinating function. The initial proposal was further fleshed out in the Commission's Reflection Paper on the EMU, which confirmed the idea to bundle the existing EU budgetary, economic and fiscal competences within the pro-

71 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 208-209.

72 Commission, *Completing Europe's Economic and Monetary Union – A European Minister of Economy and Finance*; Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 27; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 14, 18; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-61; Fabbrini, 'Fiscal Capacity' 131.

73 Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 14, 18; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-61; As equally pointed out by the *Monti*-Report, cf. Fabbrini, 'Fiscal Capacity' 116.

posed Euroarea- Treasury.[74] In a subsequent Communication,[75] the Commission specified that an EU Minister of Finance could be appointed as Vice-President of the Commission, as President of the Eurogroup and as chair of the envisaged European Monetary Fund.[76] According to the Commission, such a Minister could enhance the economic policy coordination, more effectively supervise the compliance with budgetary and fiscal benchmarks, overview the implementation of EU funding,[77] ensure global representation, as well as draft future fiscal policies for the Euroarea given the envisaged triple hatted institutional position.[78]

The Bruegel-proposal on reforming the EMU envisages an even stronger position for the EU Ministry of Finance, which should be elected by the European Parliament and the Council in Eurogroup formation.[79] To that end it was even proposed to create a Eurozone Assembly, which could, for example, consist for four-fifths of national parliamentarians of Eurozone Member States and for one-fifths of members of the European Parliament,[80] and which would continuously monitor EMU decision-making. The Bruegel-proposal furthermore envisaged that the Ministry could operate as a lender of last resort to illiquid but otherwise solvent Member States.[81] This presupposes a high degree of

74 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 28; Cf. as well: Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 8; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 638.

75 Commission, *Completing Europe's Economic and Monetary Union – A European Minister of Economy and Finance*.

76 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 27; Cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 61; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 189-190; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 8.

77 Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 638.

78 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 27; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 189-190; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 8-9; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 638.

79 Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 7; Echoed by other proposals that intend to enhance legitimacy of the final decisions, cf. Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-60; Manifesto for the Democratization of Europe, *Draft Treaty on the Democratization of the Governance of the Euro Area ('T-Dem')* (2020) Article 4 (1).

80 Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-60; Europe, *Draft Treaty on the Democratization of the Governance of the Euro Area ('T-Dem')* Article 4 (1); Which might, however, require Treaty-change, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 226.

81 Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5.

political authority and adequate fiscal abilities, which could be generated by the Ministry itself through an independent revenue power.[82] The authors submit that the Ministry would need an emergency taxing competences of about 2% GDP to cover potential losses resulting from loans granted to illiquid Eurozone Member States.[83] The proposal further advocates for a permanent, annual revenue of about 1% Eurozone-GDP, which could be employed to create a sufficient borrowing capacities at EU-level to assist bigger Eurozone Member States.[84] And finally, the Ministry would be granted the power to veto national budget plans that are in conflict with EU fiscal rules and that therefore endanger the stability of the Euroarea.[85]

Nevertheless, the submitted ideas on creating a Eurozone Ministry of Finance remain relatively vague, which could stem from the highlighted central importance of the fiscal capacity's design, which will determine the required institutional capacities as well. From that perspective, the design and the institutional role of the Ministry inherently depend on the characteristics of the fiscal capacity. Nevertheless, two central design elements for the EU Ministry are discussed in the various proposals. Notably, the institutional position the Ministry would occupy within the EU institutional framework and the institutional powers that could be assigned to it, which both trigger questions of EU law.

First, re-shuffling and re-organizing the existing institutional responsibilities to pool them in a central institutional actor arguably challenges the existing institutional balance established by the EU-Treaties. The envisaged EU Ministry could be entitled to exercise economic policies, supervise national budgeting, undertake fiscal decisions, chair decisions on financial assistance in the ESM[86] and potentially even administer an own budgetary capacity.[87] This illustrates that the EU Ministry would be a highly powerful institutional actor, which triggers legal concerns. In the first place, the current EU-Treaties do not establish a central institution such as the EU Ministry in charge of the Eurozone's EMU policies. Quite the contrary: even the existing, less far-reaching powers

82 Ibid 5.
83 Ibid 7.
84 Ibid 7.
85 Ibid 6.
86 See proposal of the Commission: Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 28; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188-189; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 8; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 638.
87 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 189; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 638; Possibly even with taxation powers: Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 7.

are distributed across different actors.[88] A re-shuffling of the existing allocation of responsibilities would inevitably affect the institutional balance established by the EU-Treaties, which could only be altered by explicit Treaty-change. This conclusion is confirmed by a systematic reading of the Treaties, as the office of High Representative, which also wears a 'double hat' and has various institutional responsibilities and loyalties, is explicitly established.[89] When now creating a comparable double- or even triple-hatted position in EMU matters[90] it seems convincing to require an explicit recognition of the particular institutional position that the Minister would occupy.[91] Consequently, even the creation of the institutional position itself will likely already require Treaty amendments.

And then second, the question of whether additional competences would be assigned to the envisaged Minister or the Ministry of Finance. It has been proposed to transfer additional competences, for example regarding the administration of the previously outlined budgetary capacity to the Minister, which could improve accountability and transparency, in light of the currently existing overlapping and unclear responsibilities.[92] The Minister could be, for example, accountable to either the European Parliament or a special chamber consisting of national and EU parliamentarians,[93] which would, however, equally require explicit Treaty recognition. If no such Treaty-change is initiated, a possible EU Minister of Finance would mainly facilitate the existing processes without however being conferred real decision-making powers. This would essentially continue the status quo, without, however, altering the ultimate institutional responsibilities.

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88 Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 641.

89 Cf. Article 18 TEU; Cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 61.

90 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 27; Commission, *Completing Europe's Economic and Monetary Union – A European Minister of Economy and Finance*; Cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 61; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 189-190; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 8; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 638.

91 Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 9.

92 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 190; Craig and Markakis, 'EMU Reform' 1441; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 3.

93 Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 61, 64; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 200; Or to both, the European Parliament and the Council, cf. Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5.

Overall, in case the Minister would be accorded additional (discretionary) competences, additional means of (national) control and supervision might be required. For example, by establishing a link with a parliamentary body, which could be either the European Parliament, a newly created chamber of national and EU parliamentarians, or directly with the national parliaments. Obviously, this would impact the entire institutional design of the EU and would therefore require a comprehensive Treaty-reform.[94] In addition, given that the Ministry would be located between the institutions, questions regarding the Minister's loyalty regarding other EU institutions as well as towards the Member States might be triggered, which should be explicitly clarified within the EU-Treaties.[95] Taken together this illustrates that the creation of this new institutional actor is of major relevance for the national constitutional debate, given that the Ministry might ultimately be empowered to take centralized fiscal decisions that impact national budgets, at least under the more ambitious integration proposals.

5 Enhanced supervision of national budgeting

Finally, various proposals envisage enhanced supervision of national budgeting to improve compliance with the existing EU fiscal rules, an area that became particularly relevant in the course of the Eurocrisis which triggered the enactment of various measures. The introduced measures include the European Semester, which streamlines budgetary processes across the Eurozone,[96] the Macroeconomic Imbalance Procedure, which functions as an early-warning system for emerging economic problems,[97] as well as the Fiscal Compact, which requires Member States to implement the balanced budget rule into their constitutional order.[98] The main goal of this tightened fiscal supervision was to restore fiscal discipline across the Member States, as the previous approach based on market control and ineffective political supervision under the Stability

94 Craig and Markakis, 'EMU Reform' 1441; Possibly in conjunction with a broadly consulting intergovernmental conference, cf. Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 2, 7.

95 Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 9.

96 Fabbrini, 'Fiscal Capacity' 111; Craig and de Búrca, *EU Law Text, Cases, and Materials* 737; Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 108; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 121-122.

97 Fabbrini, 'Fiscal Capacity' 111; Craig and de Búrca, *EU Law Text, Cases, and Materials* 737; Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 106-107; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 3.

98 Fabbrini, 'Fiscal Capacity' 111; Craig and de Búrca, *EU Law Text, Cases, and Materials* 737; Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 109-110; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 124.

and Growth Pact could not prevent excessive national public debts.[99] Consequently, the EU increased its supervision to complement the insufficient control exercised by the financial markets. As these measures were adopted at the height of the Eurocrisis, many rules create overlapping responsibilities and duties.[100] Therefore, various reform proposals advanced ideas on how to make the existing framework more coherent and how to enhance effective EU supervision over national budgeting.

To that end, the Five Presidents' Report proposed an enhanced supervision of national budgeting in order to render the European Semester more effective and to guarantee fiscal discipline in the Euroarea.[101] Concretely, the Report envisaged the creation of domestic 'Competitiveness Authorities' that evaluate the national economic development, which is then incorporated in the Commission's assessment in the framework of the European Semester.[102] In addition, the Report called for a more vigorous Macroeconomic Imbalance Procedure to target adverse national developments that could endanger the stability of the Euroarea at an early stage as well as for a stronger focus on the domestic labor market and social performance across the Member States.[103] More specifically, building upon the already existing enhanced supervision of national budgeting in the European Semester, the Report proposed the creation of an advisory European Fiscal Board which could stimulate a wider public debate and improve the coordination of budgeting across the Member States.[104]

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99 Put differently, stronger incentives for fiscal discipline are required, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 162-163.

100 Craig and Markakis, 'EMU Reform' 1441; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 190; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 3.

101 Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 8; And reiterated, cf. Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 24; Cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 55; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 165-166.

102 Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 8; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 169-170.

103 Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 8.

104 Ibid 14; The European Fiscal Board was created in 2015 by a decision of the European Commission, cf. Commission Decision on Establishing an Independent Advisory European Fiscal Board (COM 2015/1937); Cf. as well: Frédéric Allemand, 'European Economic Constitution: From Soft to Hard Policy Coordination?' in Herwig C. H. Hofmann, Katerina Pantazatou and Giovanni Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar Publishing Limited 2019) 100; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 638.

An additional idea introduced by the Commission was that available EU funds should be increasingly linked with the country-specific recommendations of the European Semester,[105] an approach that was already partially adopted in the MFF 2014-2020. Hence, in order to maximize the benefits of EU supervision over national budgeting, a more integrated approach towards EU funding and the European Semester could be followed. This suggests that the Commission aims to make the existing framework more coherent and ensure that national parliaments have clear incentives to comply with the existing EU fiscal rules.

The previously mentioned Bruegel-proposal even went one step further and proposed to give the EU a genuine veto power against unsustainable budgetary planning in the Member States and against budgets that are in conflict with the commonly agreed fiscal rules.[106] At the same time it was submitted that the combination of market pressure exercised through the no-bailout clause and the requirements for national budgeting established in the Stability and Growth Pact should be paired with greater national responsibility to create ownership for the decisions within the Member States, following the approach of the Fiscal Compact.[107]

Taken together, the most far-reaching *integration* proposal envisages the allocation of a real EU blocking power to oppose national budgeting – as proposed by the Bruegel-proposal.[108] This would alter the existing framework and is different to initiating, for example, an Excessive Deficit Procedure, as the EU could effectively block national fiscal decisions.[109] Obviously, this has implications for national budgetary prerogatives, which are vested in the national parliaments, and would certainly require EU Treaty amendment. On a general level, it should be emphasized that increasing EU supervision over national budgeting, even without a veto power, limits national constitutional principles such as parliamentary responsibility for the state budget or democratic control over fiscal policy decisions.[110] Here, proposals that aim to

105 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 24-25; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6.

106 Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 170.

107 Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 55; Craig and Markakis, 'EMU Reform' 1410.

108 Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 169; Which raises however legal-constitutional concerns, cf. Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 255.

109 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 170; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6.

110 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 200.

increase national ownership of the EU fiscal rules and thereby internalize the applicable framework into the national constitutional thinking, appear less invasive. These proposals follow a *coordination approach*, which aims to preserve national decision-making power by emphasizing the national commitment to EU fiscal rules and including these rules better into the national political process.

6 Conclusion: The envisaged EU fiscal integration

These four aspects constitute the core substantive points of discussion when it comes to EU fiscal integration proposals. As becomes obvious, particularly the introduction of a new fiscal capacity is widely and controversially debated. Overall, the proposed ideas for designing a budgetary tool, its funding sources, but also on the introduction of a Ministry of Finance and the enhanced supervision of national budgeting can be distinguished regarding the envisaged intensity of EU integration steps as well as the proposed degree of EU influence. These variations in the design of the substantive elements of EU fiscal integration steps can be evaluated based on a linear division between *integration* and *coordination approaches*.[111]

The previous assessment deconstructed various proposals regarding the mentioned four elements and organized them according to this linear distinction. This process revealed, in the first place, that a variety of different ideas are circulated, which provide a diverse framework for drafting EU fiscal integration steps in light of national constitutional concerns. It revealed at the same time that many of the proposals might not only trigger national constitutional concerns but equally EU law challenges, as EU Treaty amendments appear to be required particularly for the implementation of ideas that can be associated with *integration approaches* to EU fiscal integration steps.

In the following Chapter VIII, the compatibility of the deconstructed EU fiscal integration proposals with the charted national constitutional space is investigated following the previously adopted structure focusing on the four core substantive elements of EU fiscal integration. The overall research ambition is to identify an EU fiscal integration reform agenda that contributes to the stability of the Euro and that is yet compatible with the identified national constitutional framework.

111 Ibid 164; Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 20; Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU ' 1634-1636.

VIII The compatibility of EU fiscal integration proposals with national constitutional concerns

1 INTRODUCTION

The previous comparative assessment of the different national constitutional frameworks applicable to EU fiscal integration illustrates how similarly and differently constitutional systems address, regulate and conceptualize EU integration. In that regard, the macro-comparative assessment distinguished between more flexible approaches,[1] as for example apparent in Finland, and more rigid approaches,[2] as for example the case in Germany. These varying approaches result from differences in the domestic design of the institutional framework, the constitutional text itself and the overall constitutional framework. The *macro-comparative* assessment revealed that both constitutional systems mainly impose procedural requirements towards EU fiscal integration steps. In addition, the German Constitution contains the highlighted *eternity clause* which sets absolute limits to the process of EU integration. In Finland, a comparable substantive limitation to EU cooperation does currently not exist. It was thus concluded that specifically rigid constitutional systems formulate the most relevant *substantive* opposition to EU fiscal integration proposals.

The subsequent *micro-comparative* assessment of a selection of strict national *constitutional identity limits* revealed that the constitutional concerns formulated against EU fiscal integration are rooted in similar constitutional principles across the analyzed Member States. Yet, despite protecting similar constitutional principles, the national constitutional systems compared, and in particular their national constitutional courts, employ different approaches to defend them. The resulting overview of different *constitutional identity limits* provides an insight into the variety of substantive constitutional concerns that might be formulated against EU fiscal integration steps and the ways in which they may be policed or operationalized.

In the following compatibility assessment, the charted constitutional space will be applied to the previously deconstructed elements of EU fiscal integra-

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1 Heringa, *Constitutions Compared – An Introduction to Comparative Constitutional Law* 9; Grewe, 'Methods of Identification of National Constitutional Identity' 43; Dixon, 'Constitutional Amendment Rules: a Comparative Perspective' 102.

2 Heringa, *Constitutions Compared – An Introduction to Comparative Constitutional Law* 7-8; Dixon, 'Constitutional Amendment Rules: a Comparative Perspective' 102; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123.

tion. Based on the previous research findings, it appears that fiscal integration proposals are confronted with four general types of constitutional hurdles ranging from simple procedural requirements as the 'lightest obstacle' to absolute limitations, as depicted in *Figure 19*. The color-coding that is introduced in the figure below is subsequently used to illustrate the results of the compatibility assessment in a graphic overview per substantive element of EU fiscal integration proposals.

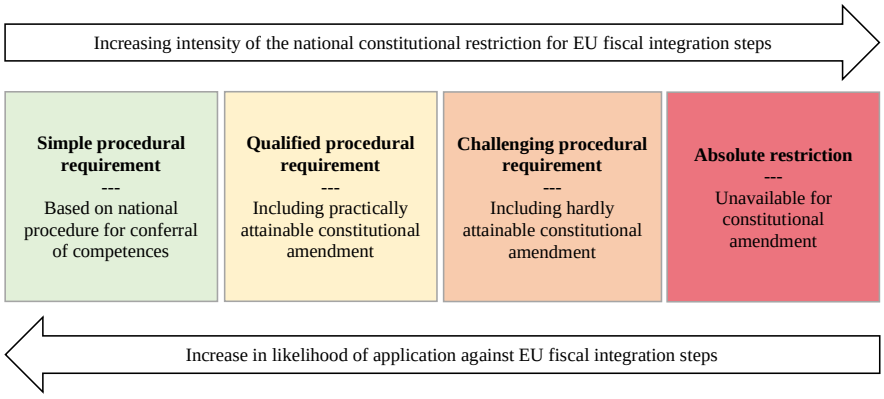

Figure 19: Categorization of national constitutional hurdles to EU fiscal integration

Overall, the conducted compatibility assessment determines which EU fiscal integration ideas are achievable within the existing national constitutional framework and which proposals might be confronted with severe national constitutional obstacles (2.). In a separate sub-section (3.), the compatibility assessment subsequently employs the research findings concerning the possibility to induce additional *constitutional flexibility* in the seemingly strict conception of certain constitutional limits, which would be located at the right end of *Figure 19*. In short, this assesses if more EU fiscal integration becomes legally feasible if one applies the different flexibility tools when applying national constitutional limits. Moreover, this assessment allows us to determine to what extent national constitutional concerns can be accommodated by EU fiscal integration steps in order to soften the apparent opposition emerging in some Member States.

2 Compatibility of fiscal integration with current national constitutional space

The compatibility assessment of the four proposed elements of EU fiscal integration – and, hence, of the outlined EMU reform proposals – with the charted

national constitutional space focuses in the following section on the currently available space within the Member States.

2.1 Compatibility of an EU fiscal capacity with national constitutional space

When considering the general compatibility of an EU budgetary capacity or instrument with the charted national constitutional requirements, two separate legal situations can be distinguished. A first set of ideas appears to be achievable within the existing EU Treaty-framework (2.1.1.), without requiring the conferral of additional competences from the national to the EU-level, as is the case, for example, with Next Generation EU, BICC or the European Investment Protection Schemes. A second set of ideas requires amendments to the EU Treaty-framework (2.1.2.).

2.1.1 A fiscal capacity or instrument based on the existing Treaty-framework

The proposed Eurozone-budget could be devised under the EU-Treaties as a limited support fund that is financed through the MFF. For example, Articles 175 (3) and 197 (2) TFEU served as the legal bases to establish Regulation 2017/825, which created the Structural Reform Support Programme for the period of 2017 to 2020 with a total volume of € 142,8 million in funding to support structural reforms in the Member States.[3] This combined legal basis was equally envisaged for the Reform Support Programme Regulation, the underpinning regulation for the BICC.[4] In contrast, the Recovery and Resilience Facility under Next Generation EU was based on Article 122 (2) TFEU, which allows for support in case of *asymmetric* economic shocks and which thus raises legal concerns considering the apparent symmetric nature of the economic shock.[5]

3 Cf. Article 4 Regulation 2017/825; Which was subsequently increased by €80 million by Regulation 2018/1671; Cf. as well: Menelaos Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford Studies in European Law, Oxford University Press 2020) 310-311.

4 Jointly with the proposed Regulation (COM (2019) 354) for the governing framework of the BICC, which was based on Articles 136 (1) (b) and 121 (6) TFEU.

5 As Article 122 (2) TFEU allows for financial support for a specific Member State, instead of establishing a full scheme of financial support for all Member States, cf. Rüdiger Bandilla, 'Art. 122 AEUV – Maßnahmen bei gravierenden Schwierigkeiten' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union – Kommentar* (70th edn, C.H. Beck 2020) para 6; Ulrich Häde, 'Art. 122 AEUV – Maßnahmen bei gravierenden Schwierigkeiten' in Christian Calliess and Matthias Ruffert (eds), *Kommentar zum EUV/AEUV – Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (5th edn, C.H. Beck 2016) paras 8-9.

The proposed more limited emergency instruments, including the proposed European Investment Protection Scheme[6] as well as the European Unemployment Reinsurance Fund,[7] would operate as so-called insurance-type mechanisms.[8] These schemes might possibly be adopted based on Article 122 (2) TFEU, too, if indeed established as emergency instruments that only operate in times of economic downturn.[9] Taken together, this suggests that the EU-Treaties contain various legal bases to accommodate a Eurozone budgetary capacity as a matter of secondary law. This triggers the question whether national constitutional law imposes any requirements or conditions for the initiation of a budgetary capacity based on EU secondary law.

2.1.1.1 Compatibility with the charted macro-comparative constitutional space

In Finland, the creation of a Treaty-based fiscal capacity could either require parliamentary approval following Section 94 Finnish Constitution in case Finnish financial commitments are increased by such capacity[10] or, in the alternative, the internal monitoring system for the exercise of already conferred competences enshrined in Section 96 Finnish Constitution could be triggered.[11] The proposed establishment of a Eurozone-budget or the envisaged emergency instruments would establish financial obligations for the Member States. It thus concerns the allocation of financial resources and has implications for the EU's financial planning itself, which in return affects the Member State's own domestic finances. According to Section 3 (1) Finnish Constitution, the Finnish Parliament determines the State Finances, which covers the adoption of the state budget, according to Section 83 (1) Finnish Constitution, including

6 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 26; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Cf. as well: Craig and Markakis, 'EMU Reform' 1426; Fabbrini, 'Fiscal Capacity' 115; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6.

7 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 26; Cf. as well: Craig and Markakis, 'EMU Reform' 1426; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6; Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 22.

8 Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6-7; Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 22.

9 As the case for the agreed SURE-scheme, cf. Commission, 'SURE – Supporting Member States to Help Protect People in Work and Jobs' Recitals 1-2; For a general analysis on the legal bases for such schemes, cf. Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 24-29.

10 Cf. for example: *Amendment to the EFSF (Increase in State Guarantee)* 3; *First Assessment Draft ESM-Treaty (I.)*; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452; Husa, *The Constitution of Finland – A Contextual Analysis* 47; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556.

11 *Adoption of the EU Six-Pack Legislation* 4-5; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

all revenue and expenditure, as established in Section 84 (1) Finnish Constitution.[12]

In light of these constitutional considerations, and building upon the experiences during the Eurocrisis, it appears that the Finnish constitutional appraisal differs for the different Eurozone-budget and the emergency instruments proposed. Regarding the allocation of funds under the proposed *Eurozone-budget* based on the current EU Treaty-framework, the monitoring procedure in Section 96 Finnish Constitution seems to apply, given that the envisaged secondary law-based budget concerns fiscal decisions, which are assigned to the Finnish Parliament. Therefore, the Finnish Parliament must engage in an *ex ante* assessment upon referral, which involves all relevant specialized parliamentary committees, including the Constitutional Law Committee. Finally, the Grand Committee will have to communicate the final parliamentary position to the Finnish representative in the EU Council of Ministers. Although the position is not legally binding,[13] it has high political authority given the strong institutional position of the Finnish Parliament within the Finnish constitutional system as well as the governmental dependence on continuous parliamentary support.[14] It is therefore likely that the parliamentary position will be followed by the Finnish representative, which secures an authoritative involvement of the Finnish Parliament in the adoption of any EU secondary act that would underpin an EU budgetary capacity.

Furthermore, any underlying core financial commitment to fund the Eurozone-budget – which would certainly increase Finnish financial responsibilities towards the EU – would likely be based on Article 311 TFEU and would thus require Finnish parliamentary approval under Section 94 Finnish Constitution as will be established subsequently in more detail.[15] Suffice it here to highlight that the allocation of additional financial capacities to the EU-level requires parliamentary authorization following Section 94 Finnish Constitution, given that the exercise of (financial) powers is conferred from the national to the EU-level.[16] In contrast, the subsequent use of these additional financial powers, based on the highlighted legal bases included in the EU-Treaties, would only have to be monitored by the Finnish Parliament following Section 96 Finnish Constitution.

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12 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 457.

13 As highlighted previously, Section 96 (2) Finnish Constitution does not specify the status of the statement, cf. Ojanen, 'The Europeanization of Finnish Law' 170; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556.

14 Ojanen, 'The Europeanization of Finnish Law' 170; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556; Raunio and Tiilikainen, *Finland in the European Union* 86.

15 Cf. the assessment within this Chapter in Section 2.2.1.

16 *Commission's Draft EU Recovery Plan and MFF Planning* 10; Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

Considering the adoption of an *emergency instrument*, similar constitutional considerations appear to apply. Notably, as such an EU instrument would depend on additional national contributions and liabilities, which would increase the current Finnish financial EU commitment, parliamentary approval following Section 94 Finnish Constitutional seems required, as already established by the Constitutional Law Committee in its appraisal of the EFSF- and the ESM-Treaty.[17] Depending on the precise modalities of the emergency instrument, the Finnish Parliament will likely have to approve these additional financial commitments by simple majority, unless the EU would be empowered to increase the Finnish commitment or liability autonomously without parliamentary approval which would require the support of a two-thirds parliamentary majority, as exemplified in relation to the draft ESM-Treaty.[18]

Taken together, this suggests that the Finnish constitutional appraisal focuses on whether the proposed fiscal integration steps actually increase the national financial commitment. If this is the case, the procedure in Section 94 Finnish Constitutional seems applicable. Otherwise, the Finnish Parliament is empowered to mandate the Finnish representative at EU-level to vote for the adoption of secondary law solutions, as laid down in Section 96 Finnish Constitution.

Similarly, under the more rigid German constitutional system, the provision for the conferral of competences enshrined in Article 23 (1) (2) GG seems not applicable to the allocation of the funds available under the proposed *Eurozone-budget*. This is because no additional competences are allocated to the EU-level but rather the existing EU Treaty-framework is employed.[19] Instead, the German

17 *First Assessment Draft ESM-Treaty (I.)*; *Second Assessment Draft ESM-Treaty (II.)*; *Final Assessment Draft ESM-Treaty (III.)*; Cf. as well: Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

18 *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

19 *Lisbon-judgment* para 243; Which is conceptualized in conjunction with German integration responsibility, cf. Armin von Bogdandy, 'Prinzipien der Rechtsfortbildung im europäischen Rechtsraum – Überlegungen zum Lissabon-Urteil des BVerfG' (2010) 63 Neue Juristische Wochenschrift (NJW) 1, 3; Also implied in the conception of *ultra vires* review, which scrutinizes EU secondary law that exceed the EU-Treaties, cf. for example: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 929; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274.

Government would have to inform the German Parliament about the intention to adopt an EU budgetary capacity or instrument as required by Article 23 (2) GG. Given that the allocation of the Eurozone-budget would likely be established as an EU legislative act, and given that the identified possible legal bases in Article 122 (2), 175 (3), 197 (2) TFEU prescribe the adoption of an act following a legislative procedure, the German Parliament would be required to issue a parliamentary position following Article 23 (3) GG, which the German Government then has to take into due account for the negotiations at the EU-level.[20] Therefore, comparable to the Finnish Parliament, the *Bundestag* is centrally involved in the domestic *ex ante* assessment of the relevant EU secondary act.

Furthermore, the allocation of additional funds for this Eurozone-budget, which could be financed through the own resources system under the current EU-Treaties, would require German parliamentary approval under Article 23 (1) (2) GG.[21] Hence, the applicable constitutional procedures in Germany bear obvious similarity with those in Finland. Notably, the allocation of additional financial means to the EU level requires constitutive approval by the German Parliament given that the EU powers are extended – and hence Article 23 (1) (2) GG applies. In contrast, the allocation of the available funds is a matter of EU law and can be implemented based on the EU-Treaties. Given that the Treaty-framework itself was already ratified by national parliaments, the allocation of EU funds as a matter of EU secondary law is only supervised by the national parliament, notably under Article 23 (3) GG in Germany.

Considering now the adoption of the proposed *emergency instruments*, it appears that such instrument would likely require parliamentary approval following Article 23 (1) (3) in conjunction with Article 79 (2) GG – as displayed in relation to the adoption of the ESM-Treaty – given the likely considerable impact on German parliamentary budgetary prerogatives.[22] As highlighted in relation to the Eurozone-budget, the fact that additional financial means seem to be required to establish such EU instruments indicates that a conferral of (financial) competences from the national to the EU level is necessary. This conferral can only be adopted through constitutive approval by the German Parliament.

In addition to the national *ex ante* parliamentary involvement in the preparation of the adoption of such a Eurozone-budget and the parliamentary

20 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 37-39; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 181.

21 Cf. as well the conducted assessment within this Chapter in Section 2.2.1.

22 Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' 1779; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 359; FDP, *Drucksache 17/9046 – Gesetzentwurf der Fraktionen der CDU/CSU und FDP: Entwurf eines Gesetzes zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion*.

approval of the proposed emergency instruments, it seems, moreover, almost certain that constitutional review will be initiated against the envisaged measures. In contrast to the Finnish constitutional system, which limits the constitutional assessment to the *ex ante* involvement of the Constitutional Law Committee in the parliamentary process, an *ex post* constitutional review seems highly likely in Germany in light of the identified lowered standing requirements in EU-related proceeding.[23]

Notably, it is conceivable that individuals would challenge such EU secondary law in the framework of a constitutional complaint claiming that the legislative act exceeds the competences conferred upon the EU or that the resulting fiscal capacity violates German *constitutional identity* contained in Article 79 (3) GG.[24] Similar concerns could be raised by, for example, a political fraction in possible inter-institutional proceedings.[25] The German Constitutional Court would then assess whether the German Parliament, the German Federal Council or the German Government violated their integration responsibility, which imposes a constitutional obligation to continuously review that the EU stays within its mandate, that EU action does not infringe the German *constitutional identity* and that, if they do, German institutions take appropriate steps to remedy such a violation.[26] In light of established jurisprudence of the Court, it is highly likely that such a constitutional complaint or the inter-institutional proceedings would be deemed admissible.

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23 Cf. the assessment in Chapter III Section 3.1.3.; Which for example resulted in an *actio popularis* in EU matters, cf. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 641-642.

24 Based on the individual's right to vote, cf. *Quantitative Easing (PSPP) Final Judgment* para 113; *OMT-reference* para 19; *Maastricht-Judgment* paras 61-62; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 294-295; Thiele, 'Friendly or Unfriendly Act? The 'Historic' Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' 251-253; Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 189; Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 108-109; Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' 266.

25 *Lisbon-judgment* paras 204-206; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305-306; Geis and Meier, 'Grundfälle zum Organstreitverfahren, Art. 93 I Nr. 1 GG, §§ 13 Nr. 5, 63ff. BVerfGG' 703; Mayer, 'Der Vertrag von Lissabon im Überblick' 194.

26 As recently illustrated in the PSPP-judgment of the Constitutional Court, cf. *Quantitative Easing (PSPP) Final Judgment* paras 106-107; *OMT-reference* paras 160 ff.; Cf. as well: Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1047; Engels, 'Die Integrationsverantwortung des Deutschen Bundestags' 212-213

The subsequent question is whether such applications are also likely to succeed. Regarding the assessment under the *ultra vires* review, the German Constitutional Court requires in a first step that the EU act in question constitutes a manifest overstepping of the conferred powers which results in a structurally significant shift of powers to the disadvantage of the Member State.[27] A major determining factor for this assessment will be the actual size, the remaining control of the *Bundestag* as well as the source of funding for such a fiscal capacity, which will be addressed in the subsequent section.

When considering the substantive question of conferral, focusing on the broad idea of initiating a Eurozone-budget to support structural reforms, this appears generally compatible with the legal bases in Articles 175 (3) and 197 (2) TFEU, as already illustrated by Regulations 2017/825 and 2018/1671.[28] These established the Structural Reform Support Programme between 2017 and 2020 and did not trigger German constitutional concerns. Article 175 (3) TFEU empowers the European Parliament and the Council to adopt 'specific actions' to complement the Structural Funds established under Article 175 (1) TFEU in order to attain the objective of an economically, socially and territorially more cohesive EU.[29] Arguably, a Eurozone-budget could complement the general scheme of Structural Funds by specifically targeting economic and social cohesion in the Euroarea, as also explicitly envisaged by the European Commission.[30] Hence, it seems convincing to argue that a Eurozone-budget could be generally based on Articles 175 (3) and 197 (2) TFEU in case it is geared towards economic as well as social cohesion and in case it remains limited in size, given the only supplementary function that Article 175 (3) TFEU seems to have. In the alternative, Article 136 (1) (b) in conjunction with Article 121 (6) TFEU could constitute a possible legal basis as suggested by the Commis-

27 As for example established by the Constitutional Court in: *Quantitative Easing (PSPP) Final Judgment* para 110; *OMT-reference* para 37; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 927; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 297; Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 538.

28 Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* 310-311.

29 As determined by Article 174 (1) TFEU; Cf. as well: Bastian Kern and Christoph Eggers, 'Art. 174 AEUV – Ziele, Regionen und benachteiligte Gebiete' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union – Kommentar* (70th edn, C.H. Beck 2020) paras 22-26; Adelheid Puttler, 'Art. 174 AEUV – Ziele der Strukturpolitik; benachteiligte Gebiete' in Christian Calliess and Matthias Ruffert (eds), *Kommentar zum EUV/AEUV* (5th edn, C.H. Beck 2016) paras 8-9.

30 Notably in relation to the proposed European Investment Stabilization Function, cf. Commission, *Commission Staff Working Document – Impact Assessment – Accompanying the Document for Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a European Investment Stabilisation Function (COM (2018) 297)*; Cf. as well: Fabbrini, 'Fiscal Capacity' 127.

sion in its BICC-proposal.[31] However, these legal bases only enable the EU to establish a framework for the governance of economic policy coordination, whereas the financial capacity seemingly would have to be established on a different legal basis. Regarding these different legal bases, the German Constitutional Court is not likely to find an excess of the conferred mandate, which ultimately depends, however, on the precise design of the actual EU legislative acts.

Similarly, the creation of the proposed emergency instruments based on Article 122 (2) TFEU appears generally compatible with the EU-Treaties, as long as they remain indeed emergency tools that only operate in economic crises.[32] Therefore, the general establishment of such instruments would likely not be considered an *ultra vires* act by the German Constitutional Court, presupposing that the respective schemes remain limited in scope and size.

A subsequent question in the constitutional evaluation will then be whether a Eurozone-budget or an EU emergency instrument would be compatible with German *overall budgetary responsibility* as protected by Article 79 (3) GG.[33] As previously established, the concept of *overall budgetary responsibility* has a procedural and a substantive dimension.[34] At a procedural level, *overall budgetary responsibility* requires that German parliamentary approval is constitutive for any budgetary commitment with impact on the German budget, that parliament is fully informed about the commitment as well as potential financial risks and that the commitment remains limited.[35] Applying this benchmark

31 Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354); Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 185-186.

32 Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 24-29.

33 As for example established by the Constitutional Court in: *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' paras 177-179; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 807-808.

34 Cf. the assessment in Chapter III Section 4.2.2.2.

35 As established in Chapter III Section 4.2.2.2.; And as pointed out by the Constitutional Court: *Quantitative Easing (PSPP) Reference* para 48; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in

to the envisaged Eurozone-budget, the German Parliament was and will be involved at several stages of the adoption process. In the first place, the budget proposed here would be based on the EU-Treaties, which were ratified by the German Parliament. Thus, the parliament explicitly approved the legal bases in Articles 175 (3) and 197 (2) TFEU or Article 136 (1) (b) in conjunction Article 121 (6) TFEU. In addition, the previously outlined institutional *ex ante* involvement of the German Parliament secures parliamentary participation in the drafting of the secondary law details. Although this involvement does not include a constitutive approval of the German Parliament, given that the German Government is not legally mandated by the parliamentary position and given that the vote in the Council is taken by qualified majority if the act is adopted based on the mentioned provisions, the German Parliament can nevertheless impact the EU decision.

Moreover, the envisaged BICC as an example of a secondary-law-based budgetary capacity, would be financed through the MFF, which in return is funded through the EU's own resources that are approved by the Member States according to national constitutional requirements as established in Article 311 (3) TFEU. In Germany, this national adoption includes approval by the German Parliament. Hence, even in case the general scheme for a Eurozone-budget is based on Articles 175 (3) and 197 (2) TFEU or governed by Article 136 (1) (b) and 121 (6) TFEU, the budget itself would be financed through the general EU budget which is funded by the EU's resources determined based on Article 311 (3) TFEU and thus secures the constitutive German parliamentary approval. Overall, the outlined framework comprehensively involves the German Parliament, secures the constitutive approval for additional financial commitments and specifies the use of the attributed financial means through the EU Treaty-framework. Therefore, it seems that the procedural requirements of *overall budgetary responsibility* would be complied with.

Regarding the establishment of an emergency instrument under Article 122 (2) TFEU the constitutional conclusions drawn by the German Constitutional Court in relation to the ESM-Treaty appear applicable. Concerning the ESM, the Court established that the German Parliament could adopt the general scheme but it required that the concrete financial assistance programs receive prior approval by the German Parliament in order to provide parliament with the possibility to evaluate the inherent risk of the granted assistance.[36] Thus, considering the proposed emergency instruments which target asymmetric economic shocks, a similar design to the ESM could be implemented under

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der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 7.

36 *Participation of Members of German Parliament in the EFSF* para 112; Cf. as well: Herdegen, 'Art. 79 GG' para 183; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

which Member States would retain an impact on the financial assistance offered to the respective Member State. This would ensure the constitutive German parliamentary approval of financial commitments required under *overall budgetary responsibility* as established by the German Constitutional Court. Taken together, this suggests that the envisaged emergency instruments could be drafted in conformity with the procedural requirements under *overall budgetary responsibility* – which was displayed by the EFSF- and ESM-Treaty that both could be adopted in conformity with the German Constitution.

Regarding the substantive requirements of German *overall budgetary responsibility*, the Court established that the German Parliament could neither surrender budgetary autonomy for a considerable time nor transfer essential budgetary powers to the EU-level which would enable EU institutions to independently determine German spending.[37] Moreover, it was established that the German Constitutional Court seems reluctant in the application of this substantive benchmark, which seems to acknowledge the wide discretion that the German Parliament enjoys and equally showcases the inherent difficulty of defining and enforcing any substantive reference value.[38]

When applying this broad substantive framework to the proposed Eurozone-budget it seems that the financial impact of such a budget would be limited given its apparently insignificant size. For example, the reform program initiated under Articles 175 (3) and 197 (2) TFEU for the timeframe between 2017 and 2020 included financial commitments of € 222,8 million.[39] The proposed BICC was envisaged to 'only' have a financial volume of € 25 to € 55 billion for the timeframe between 2021 to 2027.[40] Given that the financing under the scheme was or will be guaranteed through the EU budget, Germany would only partially contribute to such a Eurozone-budget. Therefore, the financial and budgetary impact of the suggested Eurozone-budget remains limited and is not likely to suspend German budgetary autonomy for a considerable time. This conclusion seems particularly convincing when considering German commitments during the Eurocrisis that entailed significantly higher commit-

37 On the importance of budgetary autonomy and the exclusion of automatic liabilities for political decisions of third parties, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; On the exclusion of conferring essential budgetary powers to the EU, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 210-213; *ESM-Treaty and Fiscal Compact* para 163; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

38 Cf. the assessment and the conclusions drawn in Chapter III Section 4.2.2.3.

39 Cf. amendments to Article 10 (1) Regulation 2017/825 introduced by Regulation 2018/1671; Cf. as well: Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* 310-311.

40 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 217.

ments. The ESM, for example, amounted to total potential commitments of up to € 190 billion for Germany yet was deemed compatible with *overall budgetary responsibility*.[41] It appears, therefore, that a similar conclusion can be drawn in relation to any emergency instruments, which will provide financial assistance to Member States in strictly limited circumstances and which will likely be limited in size, too. Once again building on the findings in relation to the ESM-Treaty, larger financial commitments are generally compatible with the German Constitution as long as the previously outlined procedural safeguards are respected.[42]

Overall, this suggests that both an additional EU budgetary capacity as well as possible emergency instruments can be designed in compliance with the German concept of *overall budgetary responsibility*. However, this presupposes that any financial commitment in relation to the proposed secondary law mechanisms remains limited in scope, that it would be strictly confined in its overall size and that it remains under the final control of the German Parliament. Furthermore, it requires that the maximum financial liability for Germany under any of the schemes is strictly determined to avoid that German budgetary autonomy is suspended for considerable time. Given that most proposals remain vague on the specific details, which are however relevant for the legal-constitutional appraisal, it is only possible to indicate the general compatibility of such proposals with the German Constitution.

2.1.1.2 Compatibility with the charted micro-comparative constitutional space

How would the domestic constitutional authorities of the other Member States compared apply their respective national *constitutional identity limit* to a potential Eurozone-budget or an emergency instrument based on EU secondary law? Building on the findings in Chapter V and Chapter VI, which considered the French, Spanish and Polish *constitutional identity* concerns, several projections can be made.

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41 *ESM-Treaty and Fiscal Compact (interim relief)* para 167; Requiring, however, that the specific assistance program would be approved by the German Parliament, cf. Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' 274; Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 928; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 267.

42 *ESM-Treaty and Fiscal Compact (interim relief)* para 167; Cf. as well: Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' 274; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 928; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 267.

When considering the compatibility of such a Eurozone-budget with the French *constitutional identity limit*, it seems that the '*essential conditions for the exercise of national sovereignty*'-limit is not applicable, as this only applies to new EU primary law commitments.[43] Instead, the specific *constitutional identity limit* which the *Conseil Constitutionnel* applies to the French implementation of EU secondary law obligations appears relevant.[44] Following this limit, an EU secondary law obligation may not violate a 'principle inherent to the *constitutional identity* of France'[45], in particular the institutional balance enshrined in the French Constitution, the indivisibility of the French nation and France's republican status, without explicit confirmation of the constitution-amending legislator.[46] However, it seems that this constitutional benchmark is not applicable to the envisaged design of the Eurozone-budget or the emergency instruments, as these constitute EU secondary acts that do not require implementation into French law as they are based on the EU-Treaties. Given that the Conseil does not generally review EU secondary law but merely the implementation thereof into French law, no direct limit seems to emerge from the French Constitution.

When considering the Spanish *constitutional identity limit*, it was established that the Constitutional Tribunal developed this limit specifically in the context of conferring additional powers to the EU-level by ratifying a new EU Treaty or amending the existing Treaty-framework. This is for example visible from the limit's underpinning constitutional basis in Article 93 Spanish Constitution, which refers to the conclusion of supranational treaties through which domestic

43 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 122-123; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491.

44 *Comprehensive Economic and Trade Agreement (CETA)* para 14; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 18; *French Law on Genetically Modified Organisms* para 44; *Copyright and Related Rights in the Information Society* para 19; Cf. as well Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 452; Characterized as a 'low-intensity review', cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 141.

45 As established by the Conseil, cf. *Copyright and Related Rights in the Information Society* para 19; *French Act Pertaining to the Energy Sector* para 6; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 547-548; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' 71.

46 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 148; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 474-475; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 135-135.

powers are conferred upon the supranational level.[47] In addition, the Tribunal emphasized that EU secondary law is based on ratified primary law and that it would generally not scrutinize such secondary law, as the EU-Treaties provide procedures to remedy excessive EU legislation and given that EU primary law must comply with the Spanish *constitutional identity limit* in order to be validly adopted.[48] Consequently, given that the type of Eurozone-budget envisaged here would be adopted based on EU primary law, the Spanish *constitutional identity limit* would only be applied by the Constitutional Tribunal in case of manifest violations by the EU act in question and an apparent impossibility of the EU-level to address this violation.[49] Given that establishing the Eurozone-budget as well as the emergency instruments in the proposed way appears generally compatible with the EU Treaty-framework, it is unlikely that a conflict between the Spanish *constitutional identity limit* and the respective EU secondary legislation arises. Furthermore, it seems particularly important for the Spanish Constitutional Tribunal that EU cooperation retains its derived status and that the Spanish legislator retains control within the process of EU cooperation.[50] This control is given in relation to the own resources decision, which would likely constitute the underlying funding mechanism for the proposed Eurozone-budget.[51] In the alternative, and in particular in relation to the proposed emergency instruments, the Member States' financial commitments might be determined by an intergovernmental agreement comparable to, for example, the ESM-Treaty, which equally requires national parliamentary approval. Consequently, the Spanish Parliament retains a fundamental role

47 *Constitutional Complaint Melloni* Section II.3.; *Treaty Establishing a Constitution for Europe* Section II. 2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175-1176.

48 *Constitutional Complaint Melloni* Section II.3.; Which indicates that this limit primarily applies to the process of EU integration, rather than the subsequent application of the resulting EU secondary law, cf. for example: Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 269-270.

49 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 263; Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 292; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 277.

50 Thereby equally shielding the hierarchical position of the Spanish Constitution, cf. *Treaty Establishing a Constitution for Europe* Section II.4.; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 358.: Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 373-374.

51 Cf. the wording of the Treaties in Article 311 (3) TFEU; Margit Schratzenstaller and Alexander Krenek, 'Tax-Based Own Resources to Finance the EU Budget' (2019) 54 Intereconomics – Review of European Economic Policy 171, 174.

when determining its financial commitment in relation to any of the proposed mechanism based on the existing EU Treaty-framework, as will be further elaborated subsequently.[52]

And finally, when evaluating the compatibility of a possible secondary-law-based Eurozone-budget or emergency instruments with the Polish *constitutional identity limit*, it seems that no major constitutional conflict would emerge either. In the first place, Poland is not yet a Member State of the Eurozone,[53] therefore, any Eurozone-specific measure has only potential future implications and consequently a constitutional conflict remains hypothetical at this point. Yet, these reform steps could impact the Polish ability to join the Eurozone in case EU fiscal integration would be subsequently deemed incompatible with the Polish constitutional order. Furthermore, given that specifically the envisaged Eurozone-budget could potentially be financed by the EU's own resources, Polish approval is required according to Article 311 (3) TFEU. Given that Article 311 (3) TFEU prescribes unanimity in the Council as well as national approval, Poland could potentially block the adoption of the own resources decision, as was recently illustrated in relation to Next Generation EU and the MFF 2021-2027, which would make the attainability of the Eurozone-budget more difficult and could even expose the Eurozone to demands for concessions from non-Euro Member States in return for their vote.

Considering the Polish *constitutional identity limit*, which could be invoked against a Eurozone-budget or an emergency instrument after Polish accession to the Eurozone, no immediate conflict appears to emerge either. Notably, the Polish *constitutional identity limit* protects Polish statehood, the structure of the state with its institutions, the hierarchical position of the Polish Constitution as well as fundamental rights.[54] An additional budgetary capacity or instrument based on EU secondary law requires a primary law basis, which must have been ratified by the Polish legislator according to Article 90 Polish Consti-

52 Cf. the assessment within this Chapter in Section 2.2.1.

53 Czuczai, 'Accession to the EU, But to Which EU? The Legal Impact of the Constantly Evolving EMU Acquis on the EU Enlargement Process' 595; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 72-73; Rinaldi-Larribe, 'Is Economic Convergence in New Member States Sufficient for an Adoption of the Euro?' 269-270; Louis, 'The Economic and Monetary Union: Law and Institutions' 605.

54 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

tution.[55] Therefore, in case any budgetary solution is validly enacted based on EU secondary law, it presupposes prior Polish approval of the general commitment. Consequently, in case an EU budgetary capacity can be based on the existing EU primary law, it seems unlikely that the Polish Constitutional Tribunal identifies a constitutional conflict. At the same time, given the current developments in Poland, new constitutional concerns or limits might emerge in the future.[56]

2.1.1.3 Interim conclusion

Overall, this suggests that the initiation of a Eurozone-budget and a limited emergency instruments based on EU secondary law is generally compatible with the national *constitutional identity limits* apparent in Germany, France, Spain and Poland as well as with the overarching constitutional framework in Finland and Germany. The overall assessment indicates that a secondary law solution is confronted with only limited constitutional concerns in the Member States, as even in more rigid systems the assumption prevails that the underpinning EU primary law basis was validly ratified by national parliaments. The assessment revealed that according to national constitutional logic the adoption of the general scheme – which allocates EU funds – has to be distinguished from the prior allocation of additional funds to the EU-level. The latter triggers additional constitutional concerns given that the EU would be equipped with additional (financial) competences.

When considering the EU secondary law solution in isolation, momentarily dis-regarding the legal details concerning possible funding, national constitutional courts appear to only adopt a subsidiary constitutional control, which mainly targets transgressions of powers in relation to secondary law. What is more, given that the most likely options concerning the funding of any of the proposed fiscal integration steps would either be integrated into the EU budget, and thus based on the own resources decision which has to be adopted by national parliaments, or on an intergovernmental solution, which equally requires national parliamentary approval, the respective national parliaments retain a major say on how extensive the domestic financial commitment would be. Arguably, this secures national control over the own national state budget and it thereby confines the discretion on the side of the EU.

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55 *Treaty of Lisbon* Section 2.5.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251-253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252-253.

56 Sadurski, *Poland's Constitutional Breakdown* 85; Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 69.

2.1.2 *A budgetary capacity or instrument introduced by EU Treaty amendment*

Instead of using existing legal bases, a future Eurozone-budget or the different emergency instruments could also be established by amending the EU-Treaties. Accordingly, a new legal basis and a new general legal framework for EU budgeting could be introduced into the EU-Treaties, which would then enable the enactment of a specific Eurozone budget or the initiation of emergency instruments. Arguably, this might be difficult to achieve in the current political context, but it could equally provide a specific, detailed legal framework for the envisaged Eurozone-budget or the potential emergency instruments. Member States could amend the EU-Treaties following either the simplified amendment procedure in Article 48 (6) TEU, which allows for limited amendments that do not confer additional substantive competences to the EU, or through a regular Treaty amendment based on Article 48 (1) (1) TEU. The appropriate basis for such amendment depends on the extent of the envisaged changes to the Treaties.

A clarification of the Treaty-framework, comparable to the amendment of Article 136 TFEU, could be attainable under Article 48 (6) TEU by simple parliamentary majority in Finland and Germany.[57] However, more fundamental changes to the EMU structure as envisaged by the proposed fiscal capacity would likely require a comprehensive Treaty amendment.

2.1.2.1 *Compatibility with the charted macro-comparative constitutional space*

When applying the charted *macro-comparative* constitutional framework to the envisaged creation of budgetary tools through EU Treaty amendment, it appears that particularly those proposals that aim to alter core constitutional features of the EMU-framework, including national responsibility for economic and fiscal policies as well as the no-bailout commitment, could transform the general nature of EU and EMU-cooperation. More specifically, the proposed changes could empower the EU to establish financial commitments that impact or reduce national budgetary prerogatives thereby challenging the core position of national parliaments in budgetary and fiscal matters. As a result, a qualified parliamentary majority might be necessary to ratify the proposed Treaty-

57 Cf. the respective national decisions on the amendment of Article 136 TFEU, *on Finland: Amendment of Article 136 (3) TFEU*; Cf. as well: Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* V.2; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 469.; *And on Germany: ESM-Treaty and Fiscal Compact (interim relief)* paras 128-129; German Parliamentary Fractions of CDU/CSU and FDP, *Entwurf eines Gesetzes zu dem Beschluss des Europäischen Rates vom 25. März 2011 zur Änderung des Artikels 136 des Vertrags über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist (Drucksache 17/9047)* (German Parliament 2012) 4; Cf. as well: Birgit Daiber, 'Das Integrationsverantwortungsgesetz in der Praxis des Deutschen Bundestages' (2012) 43 Zeitschrift für Parlamentsfragen 293, 296-298.

changes in Finland[58] as well as in Germany,[59] as will be analyzed in broader detail in the subsequent section on possible funding sources.

In addition, it is questionable whether the initiation of a far-reaching Eurozone-budget or the creation of additional emergency instruments, which presuppose amendments to the EU-Treaties, is compatible with German *overall budgetary responsibility*. Given the lowered standing requirements in EU-related proceedings, the initiation of admissible constitutional proceedings challenging the required conferral of competences is almost certain.[60] As determined, *overall budgetary responsibility* imposes procedural and substantive requirements, which are violated in case core budgetary competences are conferred to the EU-level outside German parliamentary control.[61] Specifically, the idea to create a Eurozone-budget of up to 3% Eurozone GDP[62] appears problematic as it would entail a permanent re-allocation of national revenue through the EU and would require the EU to conduct fiscal policy decisions on the distribution of the additional financial means. In the alternative, the envisaged emergency mechanisms[63] could result in large financial risks for all Eurozone Member States in case provided loans are defaulting. In both situations, the German

58 As highlighted by the Finnish Constitutional Law Committee in relation to Next Generation EU *Commission's Draft EU Recovery Plan and MFF Planning* 17-18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 457-458.

59 As highlighted by the Legal Service of the German Parliament, cf. Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5; Cf. as well: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 25; Lorz and Sauer, 'Verfassungsändernde Mehrheiten für die Stabilisierung des Euro? – Mehrheitserfordernisse bei der Zustimmung zum Fiskalpakt, zum ESM-Vertrag und zur Änderung des AEUV' 685.

60 Cf. the assessment in Chapter III Section 3.4.3.; Which resulted in an *actio popularis* in EU matters, cf. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 641-642.

61 *Quantitative Easing (PSPP) Final Judgment* para 104; *Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

62 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 182; Craig and Markakis, 'EMU Reform' 1423; Bara and others, 'A contribution to the work on the strengthening of the euro area' 8.

63 Craig and Markakis, 'EMU Reform' 1426; Fabbrini, 'Fiscal Capacity' 115; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6.

budget is impacted either directly by transferring revenue to the EU-level[64] or indirectly by guaranteeing financial risks. In light of the potential wide transformative impact on national budgetary and fiscal decision-making, it is imperative that the established requirements under *overall budgetary responsibility* are respected when devising such Treaty amendments to escape a conflict with the German *eternity clause*.

On the procedural level, the requirements prescribe that major financial commitments with implications for the German budget have to be confirmed by the *Bundestag* and that these commitments remain limited in size and scope.[65] This indicates that the German Parliament has to retain a central role in the approval and the administration of larger financial commitments. The constitutional jurisprudence suggests that for larger commitments with uncertain financial risks parliamentary approval is required at various stages.[66] For the adoption of the ESM-Treaty this implied that each country-specific assistance program had to be approved by the German Parliament.[67] It seems that a core constitutional element apparent in this jurisprudence is the concept of financial risk. Notably, the ESM provides financial assistance to Member States through conditional loans.[68] The entirety of participating Member States guarantees the operations of the ESM through paid-in and callable capital based

64 Note that even in case new taxes or levies are introduced to fund the additional EU budgetary capacity, these revenue sources are no longer available for the German Parliament and the budgetary space is thus curtate, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 208.

65 On the requirement that these commitments are confirmed by the German Parliament, cf. *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 107; *Participation of Members of German Parliament in the EFSF* paras 109-111; *Financial Support for Greece and EFSF* para 124; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; On the requirement that commitments are specific, cf. *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297.

66 *Participation of Members of German Parliament in the EFSF* para 112; Cf. as well: Herdegen, 'Art. 79 GG' para 183; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

67 *ESM-Treaty and Fiscal Compact (interim relief)* para 167; Requiring, however, that the specific assistance program would be approved by the German Parliament, cf. Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' 274; Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 928; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 267.

68 Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 96-97; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 105.

on a scheme that is proportionate to the population and economic power of the participating Member States.[69]

In the case of Germany, the maximum guarantees amount to € 190 billion, which is however only activated in case of defaulting loans.[70] Obviously, the probability of defaulting loans granted through the ESM's financial assistance programs depends on the specific Member State in question and the agreed conditions for receiving such assistance are crucial to determine the long-term impact that the financial support can have. These are essential considerations in the determination of the financial risk that is inherent in the commitment that the German Parliament has to approve. In case the decision on financial assistance would be exclusively exercised at ESM- or EU-level, the German Parliament would be unable to assess the projected concrete financial risk which would undermine parliamentary responsibility for national budgeting as protected by Article 79 (3) GG and more specifically the principle of democracy. For the envisaged EU budgetary capacity or instrument this suggests that the German financial commitments require that parliament is able to project the inherent financial risks. Hence, in case the EU Treaty amendment would introduce a legal basis to establish a Eurozone-budget or an emergency instrument, it seems constitutionally required to enable national parliaments to continuously evaluate the financial risks attached to the national financial commitment – and it would thus correspond to wider domestic constitutional calls for comprehensive involvement of national parliaments in budgetary and fiscal decisions.[71]

Next to the solution in the ESM-Treaty, which guarantees national parliamentary control over the administration of the available financial guarantees, Article 311 (3) TFEU illustrates how national parliamentary confirmation of financial commitments at EU-level can be implemented. Notably, Article 311 (3) TFEU requires the approval of the EU's own resources decision, which determines the EU's revenue and the Member States' maximum financial commitment to finance this revenue, in accordance with the national constitutional requirements applicable in the Member States.[72] This enables national parliaments to continuously assess the financial risk attached to the national financial commitment. Subsequently, these resources are broadly allocated

69 Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 95; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 104.

70 *ESM-Treaty and Fiscal Compact (interim relief)* para 167; Cf. as well: Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' 274; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 267.

71 Inherent in the concept of *overall budgetary responsibility* and the identified *integration responsibility* of the German Parliament in that regard, cf. Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23.

72 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 205; Union, *European Union Public Finance* 131-132.

to the different EU policy fields in the MFF-Regulation which requires unanimous approval by the Council according to Article 312 (2) (2) TFEU,[73] and which thus again involves national parliaments through the outlined procedures applicable to the domestic *ex ante* control over EU decision-making.[74] Put differently, national parliaments have constitutive control over the maximum domestic commitments to the EU as well as decisive control over the allocation of funds according to policy fields under the current Treaty-framework.

In practice, the MFF-ceilings are agreed by the European Council in an unanimous decision as established by Article 15 (4) TEU, which was recently illustrated in relation to the 2021-2027 MFF-framework.[75] Under the German constitutional system, the German Chancellor, which is accountable to the German Parliament, represents Germany in the European Council.[76] Institutionally speaking, this guarantees a limited degree of parliamentary control also in relation to the initial European Council decision on the allocation of the EU's own resources. Finally, the current framework consisting of the EU's own resources decision as well as the MFF-Regulation is limited in time,[77] which ensures that the German financial obligations towards the EU are regularly re-negotiated. The outlined framework appears exemplary regarding national parliamentary involvement which is comprehensive, compulsory regarding maximum financial liabilities, as well as temporary and thereby it appears to comply with the procedural requirements formulated under *overall budgetary responsibility*. When designing EU Treaty amendments to introduce either a comprehensive Eurozone-budget or an emergency instrument to tackle asymmetric economic shocks, the submitted observations have to be taken into consideration.

On the substantive level, *overall budgetary responsibility* requires that Germany is not establishing automatic liabilities for political decisions taken by

73 Crowe, 'The European Budgetary Galaxy' 437; Union, *European Union Public Finance* 132.

74 Cf. the evaluated framework in Finland enshrined in Section 96 Finnish Constitution, Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452; Husa, *The Constitution of Finland – A Contextual Analysis* 47; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556; As well as the framework in Germany enshrined in Article 23 (3)-(6) GG, *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 127-131; Cf. as well: Scholz, 'Art. 23 GG' para 154.

75 Notably, the conclusions of the European Council contain a detailed outline of the MFF-ceilings per policy field, cf. Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 17-65.

76 As established in Article 67 (1) GG, the German Parliament can withdraw its confidence in the government, cf. as well: Roman Herzog, 'Art. 67 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) para 2; Jens Kersten, 'Parlamentarismus und Populismus' (2018) 58 Juristische Schulung (JuS) 929, 930.

77 Article 312 (1) (2) TFEU introduces a temporal dimension; More generally on the temporal dimension, cf. Crowe, 'The European Budgetary Galaxy' 437.

third parties, in order to preserve budgetary autonomy, and that essential budgetary competences remain at the national level.[78] It was established that the German Constitutional Court adopts a reluctant stance when applying these substantive requirements and that until now all EU-related financial commitments were deemed compatible with *overall budgetary responsibility*. However, this conclusion might be different in case of larger, permanent contributions to the EU budget as would be required by some of the more far-reaching proposals that advocate an annual Eurozone-budget of up to 3% Eurozone GDP,[79] which would amount to € 343 billion annually based on the available 2019 data.[80] In case the financing structure for the proposed Eurozone budget would follow a comparable approach to the current one, the annual German contribution could amount to around 27%[81] which would translate into up to € 92,6 billion annually. In absolute numbers and percentages, the German financial commitment to the EU could then be classified as substantial as under the current calculation about 25% of the German federal budget[82] would be effectively transferred to the EU-level. In light of the current conception of *overall budgetary responsibility*, it seems likely that the German Court would consider such commitment as too extensive as the German Parliament would be prevented from exercising its budgetary prerogatives in relation to over a quarter of the annual German budget.

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78 On the importance of budgetary autonomy and the exclusion of automatic liabilities for political decisions of third parties, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; On the exclusion of conferring essential budgetary powers to the EU, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* paras 210-213; *ESM-Treaty and Fiscal Compact* para 163; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

79 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 182; Craig and Markakis, 'EMU Reform' 1423; Bara and others, 'A contribution to the work on the strengthening of the euro area' 8; Also pointed out by the Commission, cf. Commission, *Commission Staff Working Document – Impact Assessment – Accompanying the Document for Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a European Investment Stabilisation Function (COM (2018) 297)* 52.

80 As determined previously, the Euroarea GDP amounted to around €11.430 billion according to the World Bank, cf. Bank, 'GDP (current US$) – Euro area'.

81 Based on EU data considering overall revenue from national contributions amongst Eurozone Member States (amounting to €94.245,5 million in 2019; €93.445,4 million in 2018; €72.720 million in 2017) and the German share of national contributions (amounting to €25.820 million in 2019; €25.266,7 million in 2018; €19.587 million in 2017) the share was 27,4% in 2019, 27% in 2018 and 26,9% in 2017, cf. the data: European Commission, *EU expenditure and revenue 2014-2020 (dataset)* (DG Budget data 2020).

82 Based on the previous calculation and data; €72 billion constitute 20,2% of the 2019 federal budget which amounted to €356 billion in 2019.

Overall, the presented arguments suggest that the German Constitutional Court could consider the creation of the proposed most far-reaching Eurozone-budget in conflict with *overall budgetary responsibility* given that it limits direct German parliamentary control over a significant part of the German budget. Obviously, such a constitutional verdict would have serious implications for the entire EU, as Germany would be constitutionally barred under Article 79 (3) GG to participate in the concrete integration step. Therefore, the research will evaluate in a separate section within this chapter (3.) whether the charted *constitutional flexibility* in the German constitutional approach could ease the apparent constitutional conflict and thereby prevent the emergence of an unsurmountable conflict with the *eternity clause*.

2.1.2.2 Compatibility with the charted micro-comparative constitutional space

As previously established, the different national constitutional limits protect similar constitutional principles in their jurisprudence, in particular national sovereignty, democracy and parliamentary control over budgeting. In light of this material overlap and given the previously established potential conflicts with German democracy, it appears likely that the French, Spanish and Polish *constitutional identity limits* conflict with the prospect of introducing a sizeable Eurozone-budget or an emergency instrument. Yet, given that constitutional systems equally adopt specific strategies on how to address conflicts with these core national principles, it has to be determined whether the respective *constitutional identity limit* imposes limitations towards the attainment of these integration steps.

In France, the *Conseil Constitutionnel* could be requested to rule on the compatibility of such a Treaty amendment with the French Constitution.[83] As established, the required conferral of competences to the EU can be challenged by a set of privileged applicants based on Article 54 or Article 61 (2) French Constitution.[84] In light of the previous constitutional practice,[85] it

83 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539-541; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 493-494; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884.

84 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 529.; Maugüé, 'Le Conseil Constitutionnel et le droit supranational' 53.

85 As highlighted, since the Maastricht Treaty all EU Treaty amendments were referred to the *Conseil Constitutionnel* with the exception of the Nice Treaty, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Azoulai

seems highly likely that such a review will be initiated in light of the constitutional importance of the matter.[86] The *Conseil* would then mainly determine whether the envisaged conferral of power is compatible with the French sovereignty doctrine. As established, the Conseil determines whether the envisaged conferral of competences from the national to the EU-level affects the French sovereignty.[87] In that regard, the *Conseil* established that not every conferral of competences to the EU-level is automatically in conflict with French sovereignty but only such conferrals that affect the 'essential conditions for the exercise of national sovereignty'.[88]

It appears that the *Conseil* construed these *essential conditions* mainly on a competence-centric basis. For example, the initiation of EMU and the required conferral of monetary competences to the EU required a constitutional amendment given that monetary competence were deemed an important competence area under French sovereignty and given that these competences were shifted to the EU-level.[89] In contrast, in its evaluation of the Fiscal Compact the *Conseil Constitutionnel* established that the intergovernmental instrument largely reiterated already conferred competences, which did not require anew confirmation through explicit constitutional amendment.[90] Only Article 3 (2) Fiscal Compact, which introduced the balanced budget rule, triggered constitutional concerns, as it was seen to potentially reduce the parliamentary budgetary

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and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 871.

86 Notably, the *Conseil Constitutionnel* has identified EMU-related policies as important under the French conception of sovereignty, cf. *Review of Maastricht Treaty (Maastricht I)* para 43; Cf. as well Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

87 As established by the *Conseil Constitutionnel*: *Lisbon Treaty* para 20; *Revision of Amsterdam Treaty* paras 27-28; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 526.

88 Conception introduced by the *Conseil Constitutionnel* itself, cf. for example: *Fiscal Compact* para 9; *Lisbon Treaty* para 8; *Treaty Establishing a Constitution for Europe* para 6; *Revision of Amsterdam Treaty* para 6; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138-139; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 883; Oliver, 'The French Constitution and the Treaty of Maastricht' 12.

89 Cf. the findings of the *Conseil Constitutionnel*: *Review of Maastricht Treaty (Maastricht I)* para 45; Cf. as well Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527; Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 133; Oliver, 'The French Constitution and the Treaty of Maastricht' 13, 15.

90 *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 120.

prerogatives contained in Article 34 and 47 French Constitution, in case the rule would have had to be implemented into French constitutional law.[91]

Therefore, the central point of the *Conseil*'s scrutiny when assessing the fiscal integration steps appears to be whether the proposed EU Treaty amendment would alter the original EMU commitment introduced by the Maastricht Treaty and whether in that regard additional competences are conferred to the EU-level. The constitutional assessment will depend on the concrete design of the Treaty amendment and the envisaged conferral of national powers. However, it seems that particularly the introduction of a bigger Eurozone-budget could potentially impact French fiscal competences in the view of the *Conseil Constitutionnel*. At the same time, the Conseil was until now very reluctant to identify a conflict with the sovereignty limit in relation to EMU integration steps taken during the Eurocrisis,[92] which were, however, largely introduced as EU secondary law measures. Overall, it appears at least possible that the *Conseil* would find a proposed establishment of a bigger Eurozone-budget or the introduction of emergency instruments accompanied by EU Treaty amendment to be in conflict with the French sovereignty limit. Especially more far-reaching proposals which could result in a 'transfer union'[93] would significantly alter the original conception of EMU-cooperation and therefore exceed the initial conferral.

In case the *Conseil Constitutionnel* would conclude that the proposed Treaty amendment conflicts with French sovereignty, a constitutional amendment would be required in France to ratify the new EU obligations.[94] Such constitutional amendments can be enacted following Article 89 French Constitution,

91 *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119-120.

92 Actually, the only conflict in that regard was the creation of the EMU introduced through the Maastricht Treaty, which conferred exclusive monetary competences to the EU, cf. the wording of the Conseil *Review of Maastricht Treaty (Maastricht I)* paras 43, 45; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

93 As previously introduced, cf. for the concept: Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 823; Eriksen, *Contesting Political Differentiation – European Division and the Problem of Dominance* 249-250; Oeter, 'Bundesstaat, Föderation, Staatenverbund – Trennlinien und Gemeinsamkeiten föderaler Systeme' 750; Weber, 'Die Reform der Wirtschafts- und Währungsunion in der Finanzkrise' 938.

94 Given that the French Constitution does not limit the scope for constitutional amendments, cf. Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

which requires the support of a three-fifth majority in Congress.[95] Thereby, it should be equally emphasized that such constitutional amendments are common in France prior to the ratification of new EU-Treaties and that the *Conseil* will not check if the adopted amendments themselves violate French *constitutional identity*.[96] Overall, the *Conseil Constitutionnel* occupies in this process its institutional role as 'pointsman' that identifies constitutional conflicts with EU integration steps but that refrains from imposing absolute limitations to the powers of the constitution-amending legislator.[97]

Similarly, in Spain the Constitutional Tribunal established that EU cooperation is limited by the Spanish *constitutional identity* doctrine. The *constitutional identity* doctrine protects *inter alia* Spanish sovereignty in conjunction with democracy as well as the fundamental constitutional structure established by the Spanish Constitution.[98] It was already established that the Constitutional Tribunal seems to adopt a rather reluctant approach when defining the content of the *constitutional identity limit*. From its jurisprudence, it can be deduced that the Tribunal construes Spanish sovereignty as an exercise of constitutional powers[99] and thus as a competence-based restriction to EU integration.[100] Furthermore, the Tribunal emphasized the constitutional importance of preserv-

95 Cahill, 'Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power' 266-267; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 770.

96 Steiner, *French Law – A Comparative Approach* 7; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 535.

97 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 150-151; Moreover, the French Constitution does not contain supra-constitutional provisions, cf. *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272.

98 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

99 As emphasized by the Tribunal in relation to the right of EU citizens to vote in municipal elections, cf. *Constitutional Review of the Maastricht Treaty* Section II.3.C.; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185.

100 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1183-1184.

ing *Kompetenz-Kompetenz* and, more generally, the hierarchical position of the Spanish Constitution.[101] Based on this broad conceptual framework, it appears that budgetary and fiscal prerogatives are likely covered by the Spanish *constitutional identity limit*. Notably, the Spanish Constitution assigns the constitutional responsibility for the state budget in Article 66 (2) to the *Cortes Generales* – the joint assembly of Spanish Parliament and Spanish Senate.[102] In addition, Article 75 (3) Spanish Constitution clarifies that these budgetary prerogatives cannot be delegated to a standing legislative committee, but that these have to be exercised by the plenary. The constitutional consideration apparent in this constitutional provision suggests that the decision-making on the Spanish state budget is of high democratic importance which requires approval of the entire *Cortes Generales*. Finally, Article 134 Spanish Constitution establishes further details for the budget process, including the requirement that the adopted state budget has to contain all expenditure and revenue.

Any EU Treaty amendments, which would introduce a genuine Eurozone-budget or an emergency instrument to tackle asymmetric economic shocks, would likely alter these central constitutional prerogatives of the Spanish *Cortes Generales*, and thus affect Spanish democracy and sovereignty. Through such EU Treaty amendment, the EU could be entitled to take its own, independent budgetary and fiscal decisions as well as potentially generate its own revenue, which could interfere with the constitutional task to control the state budget assigned to the *Cortes Generales*. Notably, the possible additional national expenditure or potential financial liabilities could affect the principle of the completeness of budgetary planning and the currently required parliamentary approval for budgetary, financial as well as fiscal decisions and thereby interfere with the exercise of the constitutionally-assigned responsibilities of the *Cortes Generales*. As a result, a constitutional amendment might likely be required to prepare the conferral of the required budgetary and fiscal competences from the national to the EU-level.

Such constitutional amendments are governed by Articles 167 and 168 Spanish Constitution, which impose different constitutional requirements depending on which section of the Spanish Constitution is affected by the

101 *Constitutional Review of the Maastricht Treaty* Section II.4.; Cf. as well: Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 373-374; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1193-1194.

102 Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

envisaged amendment.[103] The previously mentioned constitutional provisions in Articles 66 (2), 75 (3), 134 Spanish Constitution, are not situated within the sections of the constitution enumerated in Article 168 Spanish Constitution. Amendments to these provisions would therefore not be considered as 'essential reforms' of the constitutional text and the stricter procedural framework is not applicable.[104] Hence, amendments to these provisions can be approved by a three-fifths majority in the Spanish Parliament and Senate.[105] Yet, the identified possible conflict with the Spanish *constitutional identity limit*, and more specifically with the principle of democracy and sovereignty alters this conclusion. Notably, budgetary and fiscal competences are not merely parliamentary prerogatives protected by the Spanish Constitution, but they have a particular constitutional link to these two principles and can be therefore identified as important state competences. Consequently, the envisaged EU Treaty-changes might not only alter the specifically identified constitutional provisions but these amendments appear to equally affect core constitutional principles enlisted in the Preliminary Part of the Spanish Constitution which compromises Articles 1 to 9. Concretely, Articles 1 (1) and 1 (2) Spanish Constitution establish the principle of democracy and sovereignty respectively. Consequently, the envisaged EU Treaty amendments could be characterized as amendments to these principles, which would result in an 'essential reform' in the sense of Article 168 Spanish Constitution.[106] Such essential reform has to be approved by a two-thirds majority of the Spanish Parliament and Senate. Both houses then have to be immediately dissolved and after new elections are concluded, the newly elected houses have to confirm the reform again by a two-thirds majority followed by a public referendum.[107] This constitutes a high constitutional hurdle that was never taken until now.

Taken together, this indicates that the Constitutional Tribunal might identify a conflict between the proposed EU Treaty amendments and the Spanish *constitutional identity limit*. The precise evaluation remains anticipatory, as the Tribunal did only define its *constitutional identity limit* at two occasions in a

103 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282; As previously illustrated, the Spanish Constitution does not restrict the scope for constitutional amendments, which was confirmed by the Constitutional Tribunal, cf. *Catalan Independence Declaration* Section II. 7.; Cf. as well: Ahumada Ruiz, 'The Spanish Constitutional Court' 636; Álvarez, 'Die spanische Dogmatik der Verfassungstreue – Geschichte einer fehlgeschlagenen Rezeption des deutschen Verfassungsdenkens' 442; Santaolalla Gadea and Martinez Lage, 'Spanish Accession to the European Communities: Legal and Constitutional Implications' 13-14.

104 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

105 Elvira, 'Spain' 282.

106 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

107 Elvira, 'Spain' 282-283.

very abstract manner. However, given the projected major impact on core Spanish constitutional responsibilities and the general receptiveness to comparative reasoning,[108] the emergence of such conflict is possible in light of the projected constitutional conflicts in other Member States. However, in case this conflict emerges, the Spanish constitution-amending legislator is empowered to overcome it by amending the constitutional text under the strict revision procedure following Article 168 Spanish Constitution. Given that the Spanish Constitutional Tribunal is not competent to review constitutional amendments, such amendments could not be challenged themselves.[109] Yet, the strict constitutional amendment procedure and the highly exceptional status of constitutional amendments in Spain[110] both ultimately render its attainability challenging.

Finally, the application of the Polish *constitutional identity limit* to the proposed EU Treaty amendment appears to result in comparable constitutional concerns, albeit this conflict remains hypothetical for now as Poland is not yet a member of the Eurozone.[111] As established in the *micro-comparative* assessment, the Polish Constitutional Tribunal identified the ability to design financial, budgetary and fiscal policies as a central component of Polish sovereignty.[112] Article 219 Polish Constitution assigns the prerogative to adopt the state budget to the Sejm and the constitutional text empowers the Polish Council of Ministers to draft internal policies, including economic and fiscal policies, as stipulated in Article 146 Polish Constitution.[113] Obviously, the

108 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 269; Particularly applicable to the *constitutional identity* discourse which possibly triggered the emergence of this limit in Spain, cf. Ahumada Ruiz, 'The Spanish Constitutional Court' 629.

109 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 119; Alaez Corral and Arias Casta–o, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 603.

110 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 270; Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 545-548; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 85-86.

111 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 249; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

112 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314-315.

113 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von

envisaged amendments to the EU-Treaties could result in partial shifts of responsibilities in economic and fiscal matters to the EU-level. These modifications would then challenge the outlined constitutional responsibilities and prerogatives in financial, budgetary as well as fiscal competences of the Polish Parliament and the Polish Council of Ministers, which were identified as core components of Polish sovereignty. Therefore, it seems that the Polish Constitutional Tribunal will likely conclude that any proposed Treaty-changes on these matters alter constitutional provisions in Poland and will thus require explicit confirmation by the Polish legislator following Article 90 (1) and (2) Polish Constitution.[114]

The subsequent question is, whether the proposed EU Treaty amendment and the identified constitutional challenges would also be found to impact the material core of the Polish Constitution as protected by the *constitutional identity limit*. It should be recalled that, although the Polish Constitutional Tribunal identified fiscal competences as particularly important under Polish sovereignty, the Tribunal equally acknowledged the evolutionary potential of Polish sovereignty.[115] The evolutionary conception of sovereignty might ultimately even allow for the conferral of competences to the EU which were traditionally perceived as core powers of the sovereign state.[116] Furthermore, the Tribunal construed EU cooperation as an exercise of sovereign powers and argued that the respective competences remained at the national level, merely

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Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

114 As stipulated, the confirmation of the conferral of competences is construed as exercise of Polish sovereignty, cf. Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 27; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 33; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510-511; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157; Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

115 Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

116 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; As equally established in academic writing, cf. Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

their exercise is transferred to the supranational level.[117] In addition, the conception of EU cooperation as a shared exercise of competences that remain attached to the national level is reflected in the derived status of the EU and the prohibition to confer *Kompetenz-Kompetenz* to the EU-level.[118] To that end, the Tribunal underscored that the conferral of competences is restricted to 'certain matters', which requires that the Polish legislator clearly outlines the extent of the conferred competences.[119]

When applying this constitutional benchmark to the envisaged EU Treaty amendment it is conceivable that the Polish Constitutional Tribunal would identify a major conflict with Polish *constitutional identity*, given that financial, budgetary and fiscal competences are construed as core powers under Polish sovereignty. In case major parts of these competences are conferred to the EU-level, the Tribunal might find a violation of the constitutional framework for the conferral of competences established in Article 90 Polish Constitution and in particular the requirement that the transfer of competences has to be limited to 'certain matters'.

Yet, in case the outlined EU fiscal integration steps would be deemed incompatible with Polish *constitutional identity* and the EU enabling clause in Article 90 Polish Constitution it appears that the Polish constitution-amending legislator is competent to overcome the resulting constitutional conflict. Although the Polish Constitutional Tribunal did never explicitly affirm this,[120] it continuously indicated that the Polish legislator could overcome a conflict between the Polish Constitution and envisaged EU commitments by either amending the constitutional text, by modifying the EU commitment, or by withdrawing from the EU following Article 50 TEU.[121] This can be seen as

117 *Treaty of Lisbon* Section III.2.1.; Cf. as well: Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

118 Directly deriving from Article 90 Polish Constitution, which restricts the conferral to 'certain matters', cf. *Treaty of Lisbon* Section III.2.5.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510.

119 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252.

120 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244.

121 Ibid 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157.

a confirmation of the wide discretion of the Polish legislator.[122] Moreover, it can be submitted that a possible absolute character of the Polish *constitutional identity limit* would have already been emphasized by the Polish Constitutional Tribunal. Therefore, the Polish constitution-amending legislator would likely be able to overcome a conflict between the Polish *constitutional identity limit*, specifically Polish sovereignty, and the envisaged EU Treaty amendment. However, the possibly required modifications in relation to core constitutional principles included in Chapter I of the Polish Constitution – in particular the conception of Polish sovereignty enshrined in Article 4 Polish Constitution – would have to be confirmed by public referendum as established in Article 235 (6) Polish Constitution. Hence, the seemingly required constitutional amendment to accommodate the outlined fiscal integration steps seems to entail major procedural hurdles.

2.1.2.3 Interim conclusion

The creation of an EU budgetary capacity or the introduction of emergency instruments through comprehensive EU Treaty amendment is generally possible in Finland, France, Spain and Poland. Only the German *constitutional identity limit* appears to impose an absolute restriction to its attainment. However, it was established that attaining the required two-thirds majority threshold in Finland could be politically challenging[123] and similarly the feasibility of constitutional amendments in Spain remains questionable in light of the high procedural threshold as well as the generally rare use of the amendment procedure. The latter corresponds to the situation in Poland where possible constitutional conflicts can be overcome, however, the attainability of the required majority to enact both a constitutional amendment including possibly a public referendum and subsequently to approve the conferral of competences under Article 90 Polish Constitution seems highly questionable, particularly in light of the current political situation.

Hence, the most far-reaching integration proposals concerning the creation of an additional EU fiscal capacity are confronted with significant national constitutional opposition that ranges from requiring support by qualified majority in Finland, requiring constitutional amendments in France, Spain and Poland to being seemingly incompatible with the German *eternity clause*. Thus, the most central question when designing the envisaged fiscal capacity appears to be to what extent the resulting budgetary tools are specific, limited in size and scope, what sort of control national parliaments can exercise as well as

122 Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 33; Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

123 Jokela, 'Finland: Towards a More Cautious Europeanization' 49; Ojanen, 'Constitutional Amendment in Finland' 95.

how they are financed. In case the introduction of the envisaged tools follows the existing framework of EU budgeting, it appears that no incompatible constitutional conflicts emerge, given that the central position of national parliaments in the control of fiscal and budgetary decisions would be warranted. In case, however, the Treaty amendment would confer discretionary decision-making in relation to these instruments for example regarding their size, national parliamentary prerogatives would be clearly impacted and the outlined constitutional concerns would be triggered.

2.1.3 Conclusion on feasibility of EU budgetary capacity or instrument

The assessment reveals that the envisaged EU Treaty amendment to introduce a budgetary capacity for the Euroarea or an emergency instrument to address asymmetric economic shocks affects important constitutional principles within the Member States. These constitutional principles are national democracy in combination with national sovereignty as well as the institutional prerogatives of the national parliaments. Given the importance of these principles for the respective national constitutional systems, the constitutional text as well as the constitutional authorities appear to impose additional hurdles to confirm the required conferral of competences to engage in the suggested EU Treaty amendments. However, in Finland, France, Poland and Spain it appears that constitutional concerns can be addressed by the constitution-amending legislator by explicitly confirming the conferral of competences through constitutional amendment – with partly high procedural hurdles. Only in Germany the constitutional concerns might partly not be overcome by amending the constitutional text itself. Overall, the assessment thus reveals that the emerging constitutional concerns are rooted in a similar conception of national democracy and national sovereignty, according to which budgetary and fiscal competences are essential powers of the national parliaments protected by both mentioned principles.

Furthermore, the compatibility assessment revealed that the German *overall budgetary responsibility* limit provides a kind of constitutional litmus test for the drafting of EU fiscal integration steps more generally, as it covers most constitutional concerns identified in other Member States given its comprehensive and far-reaching conception. As highlighted, the limit distinguishes between procedural and substantive requirements.[124] On the procedural level, the

124 Cf. the assessment in Chapter III Section 4.2.2.2.; As highlighted, on the requirement that these commitments are confirmed by the German Parliament, cf. *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 107; *Participation of Members of German Parliament in the EFSF* paras 109-111; *Financial Support for Greece and EFSF* para 124; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; On the requirement that commitments are specific, cf. *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im euro-*

German Constitutional Court requires that financial commitments remain limited in scope as well as overall size and that the German Parliament retains a central position in the approval as well as administration of EU fiscal decision-making.[125] For the design of the EU Treaty amendments, several design requirements appear to emerge. These design requirements include a compulsory involvement of the German Parliament in all major budgetary and fiscal decision at EU-level. For a Eurozone-budget, this would imply to develop a structure comparable to the current EU budgetary framework, which makes national parliamentary approval obligatory for determining EU revenue according to Article 311 (3) TFEU and which subsequently allows national parliaments to advice their respective national Council and European Council representatives according to the internally applicable procedures. In that regard, given that the fiscal decision-making space would be significantly increased under the envisaged scheme, additional national parliamentary involvement could be envisaged to tackle possible further constitutional concerns. In addition, the conferral of powers has to be limited in size and scope, which requires that national parliaments clearly define their financial commitments and that this commitment cannot be increased against the will of the respective national parliament.

Through these procedural requirements, the German Court aims to preserve the constitutionally enshrined control of the German Parliament over budgetary and fiscal decisions, which are essential competence areas under German democracy.[126] The result of these procedural requirements is ultimately that fiscal integration steps seemingly have to take a hybrid character, which allows for EU decision-making under strict German parliamentary control. The resulting hybrid character of fiscal decision-making in the specific areas identified is neither exclusively confined to the national level nor is it independently administered by the EU. Instead, the institutional requirements appear to balance decisive control of national parliaments with allocating fiscal decision-making space to the EU-level. The existing model under Article 311 (3) TFEU might serve as an example in that regard, although increased fiscal decision-

päischen Integrationsprozess 297; And on the substantive dimension, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

125 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23.

126 As initially concluded by the Constitutional Court in its *Lisbon*-decision, cf. *Lisbon-judgment* para 252; Cf. as well Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005.

making space in case of a larger Eurozone-budget appears to require an even more comprehensive involvement of national parliaments.

Adhering to the German procedural requirements under *overall budgetary responsibility* and pursuing a hybrid model for fiscal integration appears to not merely address the constitutional concerns of the German Constitutional Court. It appears to equally address potential constitutional concerns in the other evaluated Member States in relation to their national *constitutional identity limits*. Arguably, the central involvement of national parliaments in the fiscal decision-making of a more integrated EU might more generally address sovereignty or democracy concerns. Notably, in France and Spain the constitutional authorities appear to restrict the conferral of particularly important competences to the EU-level, but they seem not to necessarily oppose the shared exercise of core sovereign competences.[127] It can be submitted that respecting the German procedural requirements under *overall budgetary responsibility* ensures that democratically relevant constitutional budgetary and fiscal powers are not fully conferred to the EU-level but are instead only jointly exercised. The result might be that no constitutional amendment would be required in these Member States as the constitutional prerogatives are ultimately preserved. If this proved correct, the German procedural requirements under *overall budgetary responsibility* could function as indicatory constitutional benchmark for EU fiscal integration proposals in other EU Member States.

In addition, the resulting overview indicates that only the German *constitutional identity limit* imposes an irreconcilable limitation to the conferral of powers to the EU-level. Notably, in case the envisaged EU Treaty amendment conflicts with the substantive dimension of *overall budgetary responsibility* and therefore violates the core of German democracy, the German legislator may

127 On the Finnish conception of sovereignty, which allows to filter in the factual benefits that stem from supranational cooperation, cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334; On the conception of French sovereignty, cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 532; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 861-862; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884; On the conception of Spanish sovereignty, cf. *Treaty Establishing a Constitution for Europe* Section II.2.; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175; As well as on the Polish conception of sovereignty, which emphasizes the only temporary limitation of sovereignty through EU cooperation, cf. *Treaty of Lisbon* Section III.2.1.; cf. as well: Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156.

Member State	Emergency instrument (ESM-design)	Discretionary emergency instrument (Treaty-change)	Budgetary capacity based on Article 311 TFEU	Discretionary budgetary capacity (Treaty-change)
Finland	Parl. approval by simple majority (Sect. 94 (2) (1) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).	*Ex ante* parl. monitoring (Sect. 96 FC). Own resources decision by qualified parl. majority (Sect. 94 (2) (2) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).
Germany (including *constitutional identity limit)*	Parl. approval by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG).	Apparent conflict with the German *eternity clause* (size of commitment and suspension of nat. parliamentary control). Partly flexibilization of conflict possible through: - EU benefits. - Net. calculation. - Consistent standard.	*Ex ante* parl. involvement (Art. 23 (3) GG). Parl. approval of own resources decision by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG).	Apparent conflict with the German *eternity clause* (size of commitment and suspension of nat. parliamentary control). Partly flexibilization of conflict possible through: - EU benefits. - Net. calculation. - Consistent standard.
French *sovereignty limit*	No apparent conflict with the *sovereignty limit*.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.	Not applicable to EU secondary law.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.
Polish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit*.	Possible conflict which might require const. amendment (Art. 236 PC), including possibly referendum. Apparent conflict, can be possibly overcome through "modern" interpretation of Polish sovereignty.	Not applicable to EU secondary law.	Possible conflict which might require const. amendment (Art. 236 PC), including possibly referendum. Apparent conflict, can be possibly overcome through "modern" interpretation of Polish sovereignty.
Spanish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit*.	Apparent conflict, can be overcome by const. amendment (Art. 168 SC) which imposes high threshold and is practically difficult to attain.	Generally not applicable to EU secondary law.	Apparent conflict, can be overcome by const. amendment (Art. 168 SC) which imposes high threshold and is practically difficult to attain.

Figure 20: Compatibility of charted constitutional space with proposals on fiscal capacity

not ratify the required conferral of powers.[128] Consequently, *overall budgetary responsibility* can be identified as the strictest constitutional hurdle for introducing the envisaged EU Treaty amendment to establish a discretionary Eurozone-budget and the proposed large financial instruments envisaged against asymmetric shocks in order to stabilize the Euro both in a preventive manner as well as in emergency situations. In contrast to the assessed *constitutional identity limits* in France, Poland and Spain, which could all be overcome by the constitution-amending legislator, the German Constitution does not allow constitutional modifications that affect the *eternity clause* in Article 79 (3) GG. Changes to this provision require the enactment of a new constitutional text following Article 146 GG confirmed by the constituting power in Germany.[129] It was already highlighted that such thorough constitutional reform process is currently unlikely in Germany, which is why EU fiscal integration has to address the German constitutional demands. Yet, it was submitted that different constitutional arguments could be included in order to deconstruct the substantive dimension of *overall budgetary responsibility* and thereby generate additional constitutional flexibility, as will be further elaborated below (3.). As it stands, the most ambitious EU fiscal integration steps will be likely considered incompatible with the German *constitutional identity limit*. The overall research findings on the creation of a Eurozone fiscal capacity are summarized in *Figure 20* above.

2.2 Compatibility of funding options with national constitutional space

The previous compatibility assessment illustrated that, although the more ambitious integration reforms would certainly trigger constitutional conflicts if implemented in the proposed way, the creation of some form of Eurozone-budget or emergency instruments is generally attainable under the charted national constitutional space. This triggers the subsequent question how to equip the EU with the required financial means.

The current EU-Treaties enable Member States to fund shared projects, ambitions or objectives, without putting the national constitutional order in question. As was previously established, the current budgeting practice at the EU-level relies heavily on the Member States and their approval for any EU

128 In light of the absolute conception of Article 79 (3) GG, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

129 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

funding. Notably, and in addition to the fact that the EU budget is adopted following the special legislative procedure according to Article 314 (1) TFEU and requires approval of both the European Parliament and the Council,[130] the budget's underpinning funding has to be approved by the Member States as laid down in Article 311 (3) TFEU.[131] Therefore, Member States retain final control over their budgetary commitments under the existing Treaty structure, which seems to warrant domestic parliamentary control over financial involvement at EU-level, which was for example deemed a core procedural component of *overall budgetary responsibility* by the German Constitutional Court.[132]

At the same time, different ideas were advanced by the analyzed proposals to make EU revenue less dependent on the national budget. These proposals include, following the current Treaty-framework, the introduction of new EU own resource possibly generated through jointly introduced taxes (2.2.1.), or more far-reaching proposals suggesting the introduction of a genuine EU taxation power (2.2.2.) or the initiation of EU debts and shared liabilities (2.2.3.). All three ideas will be subsequently assessed concerning their compatibility with the charted national constitutional space.

2.2.1 Introducing new tax-based own resources for the EU

One possibility to generate additional EU revenue to finance the proposed modifications is to reform the existing EU own resources system. As mentioned before, currently almost three-quarters of the EU's own resources are financed through the direct contributions of the Member States.[133] These funds are thus expenditure for the Member States, which triggers particular domestic interests regarding the use of these funds, also referred to as 'just return' discussion.[134] To overcome this rhetoric, the *Monti*-Report proposed the introduction of new sources of genuine EU own resources, which could be

130 Cf. for example: Crowe, 'The European Budgetary Galaxy' 440-441.

131 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 205; Union, *European Union Public Finance* 131-132.

132 *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 107; *Participation of Members of German Parliament in the EFSF* paras 109-111; *Financial Support for Greece and EFSF* para 124; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259.

133 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 203; Fabbrini, 'Fiscal Capacity' 128-129.

134 Cf. the point made by the *Monti*-Report: Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68; Cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 50; Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203; Fabbrini, 'Fiscal Capacity' 129; Crowe, 'The European Budgetary Galaxy' 433.

based on a levy or tax imposed upon EU-related improvements or achievements.[135] The idea of introducing new genuine own resources, which would be levied by the Member States but directly transferred to the EU without entering the national budgetary process,[136] was equally submitted in European Council conclusions on Next Generation EU.[137]

These new own resources would be largely tax-based and could include, for example a carbon-emission tax on flight tickets, a general carbon tax, a nuclear power tax, a national surcharge on fuel tax, a financial transaction tax, or even a wealth tax.[138] Such tax-based own resources could be established based on the tax approximation clauses in Articles 113, 115 TFEU or designed as fiscal measures to pursue the environmental and energy-related objectives established in the Treaties based on Articles 192, 194 TFEU.[139] Subsequently, Member States would have to agree to purpose the revenues from these harmonized or environmental taxes as own resources of the EU under Article 311 TFEU.[140] Hence, such tax-based EU own resources framework could be established under the EU-Treaties.

When applying the national constitutional framework to the adoption of such EU secondary law, it appears that national parliaments would retain considerable influence given the unanimity requirement for the Council voting in case national constitutions prescribe parliamentary *ex ante* participation comparable to the outlined Finnish or the German system.[141] In addition,

135 Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68, 41-56; Subsequently also put forward by the Commission, cf. European Commission, *Reflection Paper on the Future of EU Finances* (European Commission 2017) 27-28; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 183; Thereby changing the narrative of the debate to a re-allocation of jointly acquired 'Union wealth', cf. Fabbrini, 'Fiscal Capacity' 129.

136 Crowe, 'The European Budgetary Galaxy' 431; Similar to the current system according to which genuine own resources do not enter the budgetary process in the Member States, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 203.

137 Which include, for example, a revenue generated from non-recycled plastic waste, a carbon border adjustment mechanism, a digital levy, cf. Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 8 (A 29).

138 Cf. for example the various proposals submitted by the *Monti*-Report, Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 41-56; For a full overview, cf. Schratzenstaller and Krenek, 'Tax-Based Own Resources to Finance the EU Budget' 173-174; Margit Schratzenstaller, 'The EU Own Resources System – Reform Needs and Options' (2013) 48 Intereconomics – Review of European Economic Policy 303, 311-312.

139 Schratzenstaller and Krenek, 'Tax-Based Own Resources to Finance the EU Budget' 174-175.

140 Ibid 175.

141 Notably, Section 96 (1) and (2) Finnish Constitution, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452; Husa, *The Constitution of Finland – A Contextual Analysis* 47; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556; As well as

Article 311 (3) TFEU prescribes the adoption following the special legislative procedure by unanimous vote in the Council after consultation of the European Parliament as well as the subsequent approval by all EU Member States according to their respective constitutional procedures.[142]

In Finland, for example, this national implementation would require parliamentary approval according to Section 94 Finnish Constitution, as budgetary powers of the Finnish Parliament are affected by the envisaged commitment.[143] The required parliamentary majority to approve these financial commitments depends on the impact of the envisaged own resources decision on the Finnish Constitution. The Constitutional Law Committee has pointed out that a Council Decision based on Article 311 (3) TFEU can be generally approved by simple majority and that it is compatible with the Finnish sovereignty doctrine, as long as the general nature of EU cooperation is not altered by it.[144] Following the Committee, this requires in particular that the upper limits of the Finnish liabilities are determined in order to secure Finnish parliamentary budgetary sovereignty.[145] In that regard, it appears that the proposed tax-based own revenues would be clearly limited within the EU own resources decision both in relation to the taxes that are covered (scope restriction) as well as the maximum Finnish liabilities (size restriction).

Article 23 (3) GG, cf. *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* para 127; Cf. as well: Scholz, 'Art. 23 GG' para 154.

142 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 205; Union, *European Union Public Finance* 131-132; This even elevates the resulting decision to EU primary law *sui generis*, cf. Magiera, 'Art. 311 AEUV – Eigenmittel der EU' para 10; Henning Tappe and Rainer Wernsmann, *Öffentliches Finanzrecht* (2nd edn, C.F. Müller 2019) 196 (Recital 810); Michael Schweitzer, *Staatsrecht III* (10th edn, C.F. Müller 2010) 26 (Recital 63).

143 As for example visible in relation to Council Decision 2014/355, which required approval under Section 94 (1) Finnish Constitution, cf. Finnish Parliament, 'HE 248/2014 on the Government Proposal to Parliament on the Adoption of the Council Decision on the System of the European Union's Own Resources (2014/335 / EU, Euratom)' (*Finnish Parliament*, 2014) <https://www.finlex.fi/fi/esitykset/he/2014/20140248#idp446520544> accessed 20 December 2020 point 7.1.; Also pointed out by the Finnish Constitutional Law Committee in relation to Next Generation EU, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 10; Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

144 *Commission's Draft EU Recovery Plan and MFF Planning* 17.

145 As established in relation to the draft proposal on Next Generation EU, cf. Ibid 10; Also apparent in relation to the ESM and the possible increase of liabilities by unanimity, which was considered to require the support of a qualified majority under Section 94 (2) (2) Finnish Constitution, cf. *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

Under the German constitutional framework, the Council Decision on the EU's own resources system has to be adopted by the German legislator following Article 23 (1) (3) GG, as it supplements the EU-Treaties.[146] Accordingly, Article 23 (1) (3) in conjunction with Article 79 (2) and (3) GG applies the adoption of the envisaged decision, which suggests that it would have to be adopted by constitution-amending majority in case it alters the German Constitution.[147] Considering that the allocation of tax-based revenues has considerable consequences for the national budgetary prerogatives, notably the German Parliament could not freely decide on the future use of the transferred revenue, it appears likely that a constitution-amending two-thirds majority would be deemed applicable. This conclusion is supported by the outlined German constitutional jurisprudence, which during the Eurocrisis continuously emphasized the importance of (free) parliamentary control over revenue and expenditure decisions – as summarized within *overall budgetary responsibility*.

Taken together, this suggests that in both EU Member States the proposed tax-based own resources could be adopted based on the domestic EU clause, possibly by qualified parliamentary majority. The national approval is constitutive for the adoption of the EU own resources decision, as specified in Article 311 (3) TFEU. Furthermore, national parliaments can influence the subsequent allocation of the new EU revenue through the analyzed domestic *ex ante* preparatory procedures applicable to EU secondary law. Finally, the scheme is negotiated for a limited period of time which ensures continuous parliamentary involvement. This comprehensive involvement of national parliaments appears to satisfy the German constitutional requirements under *overall budgetary responsibility*.[148]

Furthermore, given that the proposed tax-based own resources would be entirely based on existing EU law and would be implemented based on EU secondary law, Member States retain the possibility to alter their financial commitments. Notably, the own resources decision is traditionally re-drafted jointly with the EU's MFF every seven years.[149] Therefore, the national commitment appears more easily reversible compared to, for example, an explicit primary law commitment. If indeed enshrined in EU secondary law and if the

146 As established by the German Constitutional Court, cf. *Lisbon-judgment* paras 313-314; Cf. as well: Tappe and Wernsmann, *Öffentliches Finanzrecht* 196 (Recitals 809-810); Schweitzer, *Staatsrecht III* 26 (Recital 63).

147 As possibly required in relation to Next Generation EU, cf. Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 4-5, 10; Cf. more generally: Schweitzer, *Staatsrecht III* 26 (Recital 63).

148 Besides requiring that parliamentary approval remains constitutive for financial commitments and that these commitments remain limited, it also requires that the made commitments are reversible, cf. *ESM-Treaty and Fiscal Compact* para 244; *Financial Support for Greece and EFSF* para 136; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 188-189.

149 Cf. for example: Union, *European Union Public Finance* 130-132.

outlined procedure continues to apply, national parliaments would therefore have the possibility to regularly alter the financial commitments enshrined within the EU own resources decision. In addition, as a secondary law solution, the proposed additional tax-based own resources would not alter the EU and EMU constitutional framework, including core pillars such as economic policy coordination (Article 121 (1) TFEU) and the no-bailout clause (Article 125 (1) TFEU).[150]

Therefore, the constitutional impact of the proposed tax-based own resources appears limited. It further suggests that no constitutional conflict with the charted national constitutional limit is likely to emerge. As illustrated, neither the French nor the Spanish constitutional authority engages in a thorough assessment of EU secondary law with national constitutional law.[151] Although one could consider the EU own resources decision as a legal act that resembles EU primary law given its procedural requirements,[152] the adopted own resources decision is nevertheless embedded in the EU-Treaties, which were previously ratified. The adoption of this decision can therefore be seen as an exercise of the adopted Treaty-framework rather than as a substantial alteration of the EU-Treaties which warrants anew constitutional review in these Member States. In Poland, despite the apparent hypothetical nature of the conflict,[153] it appears questionable whether the *constitutional identity limit* applies, given the multi-centric conception of EU membership according to which both the Polish and the EU legal order co-exist[154] as well as the focus

150 Craig and de Búrca, *EU Law Text, Cases, and Materials* 738; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 91, 98.

151 As the core commitment inherent in the EU-Treaties was already reviewed by the *Conseil Constitutionnel* and anew review is generally preempted, cf. *Mr Daniel W and Others* paras 12-13; *Revision of Amsterdam Treaty* para 27; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; And in Spain, the Spanish Constitutional Tribunal considered EU law to be 'infra-constitutional', cf. De Visser, *Constitutional Review in Europe – A Comparative Analysis* 263; Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 292; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 277.

152 As previously indicated, cf. Magiera, 'Art. 311 AEUV – Eigenmittel der EU' para 10; Tappe and Wernsmann, *Öffentliches Finanzrecht* 196 (Recital 810); Schweitzer, *Staatsrecht III* 26 (Recital 63).

153 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 249; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

154 Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multi-centric Vision or Creeping Hierarchical Practice' 132; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 251; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 156; Höbel, 'Polish and German Constitutional Jurisprudence on Matters of European Community Law:

of the limit on scrutinizing the intended conferral of additional powers.[155] In the present case, the initial conferral is already confirmed by the Polish Constitutional Tribunal and introducing tax-based own resources appears not to alter this initial conferral.

Taken together, this suggests that the introduction of the proposed EU tax-based own resources would amend but not fundamentally change the existing own resources system. Member States have established constitutional approaches to confirm their maximum financial commitments to the EU, as required by Article 311 (3) TFEU. It was illustrated that in Finland and Germany additional procedures secure the *ex ante* involvement of national parliaments in the designing of the EU's budget. Both instances of national parliamentary involvement secure the decisive control of the national parliaments over the national budgetary and fiscal decision-making space that is partly constrained by the EU decision. Through this involvement, parliaments specify their commitments for a limited amount of time in terms of size as well as scope, which appears to meet German procedural requirements under *overall budgetary responsibility*. Furthermore, given that the proposed reform is based on the existing EU Treaty-framework and given the decisive role national parliaments retain, no conflict with the analyzed national *constitutional identity limits* appears to emerge.

2.2.2 *Genuine EU taxation competence*

A different, more far-reaching possibility is to confer upon the EU a genuine taxation competence, which would empower it to levy taxes in a pre-defined area.[156] As a result, the EU would no longer depend on the Member States' decision regarding the EU's funding, but instead it could unilaterally determine its own revenues.[157] This would obviously require an amendment to the EU-

A Comparison of the Constitutional Courts' 522; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1363-1364.

155 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 501; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201.

156 As for example advanced by: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 183-184; Fabio Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' (2014) 52 Journal of Common Market Studies 420, 424-425;

157 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 183-184; In contrast to the current process of EU budgeting, which is dominated by the Member States and intergovernmental decision-making, cf. Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' 424.

Treaties and the explicit conferral of such taxation power to the EU-level, as the current Treaty-framework does not enable the EU to exercise genuine taxation competences itself.[158] At the same time, such taxation powers would alter the mode of cooperation in the funding of the EU, which is currently determined by the Member States through the system of own resources. In contrast, an EU taxation competence would allocate additional discretion in fiscal matters to the EU,[159] it would further limit the national control over national taxation, which is already indirectly affected by EU policies and taxation approximation,[160] and ultimately challenge core national constitutional values, such as democracy as well as (budgetary) sovereignty.

2.2.2.1 Compatibility with the charted macro-comparative constitutional space

When applying the charted constitutional space to this far-reaching integration idea, a major difference to the previously analyzed tax-based own resources proposal is that an explicit EU Treaty amendment would be required to award such taxation power directly to the EU. As established, Section 94 Finnish Constitution regulates the conferral of additional powers to the EU in Finland. The provision prescribes different parliamentary majority requirements depending on the intensity and extent of the envisaged conferral.[161] The Constitutional Law Committee identified budgetary and fiscal competence as core parliamentary prerogatives, which are essential for Finnish sovereignty and the related principle of democracy.[162] The proposed EU taxation power would limit national budgetary sovereignty, as the EU would be empowered to determine its tax revenue independent from the Finnish Parliament, which would ultimately limit parliamentary authority over taxation.[163] Although the Constitutional Law Committee adopted a highly flexible understanding

158 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 202-203; Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' 424; Walter Deffaa, 'New Impetus for EU Taxation Policy' (2011) 46 Intereconomics – Review of European Economic Policy 287, 287.

159 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 184.

160 Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' 425.

161 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

162 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

163 As emphasized by the Constitutional Law Committe, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 12; *On the Establishment of a European Monetary Fund* 3-4; *Second Assessment Draft ESM-Treaty (II.)* 2.

of Finnish sovereignty, it underscored that fundamental changes to the functioning of the EU with relevance for the Finnish Constitution had to be approved by constitution-amending parliamentary majority.[164] This approach was developed during the Eurocrisis, where the Committee established that an increase of the maximum Finnish financial liabilities under the draft ESM-Treaty without explicit confirmation of the Finnish Parliament constituted a serious interference with Finnish budgetary sovereignty and therefore had to be approved by constitution-amending majority according to Section 94 (2) (2) Finnish Constitution.[165]

When applying this jurisprudence to the introduction of an EU taxation competence, it can be first established that such a competence alters the current mode of EU cooperation given that the EU would be able to determine its own revenue independent from national control and thereby different to the current model established by Article 311 (3) TFEU.[166] Second, the proposed EU taxation competence would impact parliament's authority over budgeting and more specifically its own prerogative to determine taxation in Finland, as proclaimed in Sections 3 (1) and 81 (1) Finnish Constitution.[167] Both observations indicate that any Treaty amendment to introduce an EU taxation competence would require the support of a qualified two-thirds majority, given its implications for Finnish sovereignty and parliamentary budgetary prerogatives. Despite potentially serious political difficulties to attain this majority,[168] the introduction of EU taxation powers is, however, constitutionally possible in Finland.

In Germany, the envisaged conferral equally requires parliamentary approval under Article 23 (1) GG, most likely by qualified majority in the sense of Article 23 (1) (3) GG in conjunction with Article 79 (2) GG. Notably, Article

164 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

165 As established by the Constitutional Law Committee, cf. *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

166 As pointed out, such a taxation competence is not included in the current Treaty, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 202-203; Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' 424; Deffaa, 'New Impetus for EU Taxation Policy' 287; Moreover, the Finnish Constitutional Law Committee indicated that EU debts could undermine budgetary sovereignty, as decisions with budgetary implications can be taken by the EU, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 17-18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

167 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 457-458.

168 Jokela, 'Finland: Towards a More Cautious Europeanization' 49; Ojanen, 'Constitutional Amendment in Finland' 95.

23 (1) (3) GG specifies that EU Treaty-changes which amend the material content of the German Constitution have to be approved by a constitution-amending two-thirds majority according to Article 79 (2) GG.[169] Article 105 GG grants the power to introduce taxation to the federal as well as the regional German state level, depending on the area of taxation.[170] Allocating a genuine taxation power, which is defined as the power to introduce a financial contribution that is not attached to a direct return service and that is imposed by the state or public authority to generate revenue,[171] to a different organizational level would alter this German constitutional framework. Consequently, and in light of the general importance of democratic control over taxation,[172] it seems that the conferral of taxation competences to the EU-level has to be approved by constitution-amending two-thirds majority. Even this, of course, is only possible as long as the conferral of budgetary and fiscal competences is compatible with *overall budgetary responsibility*.[173]

As indicated, the Constitutional Court requires under *overall budgetary responsibility* that the German Parliament has to retain full control over all central budgetary and fiscal decisions.[174] On a procedural level, the Court

169 As highlighted by the Legal Service of the German Parliament, cf. Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5; Cf. as well: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 25; Lorz and Sauer, 'Verfassungsändernde Mehrheiten für die Stabilisierung des Euro? – Mehrheitserfordernisse bei der Zustimmung zum Fiskalpakt, zum ESM-Vertrag und zur Änderung des AEUV' 685.

170 Hanno Kube, 'Art. 105 GG – Steuergesetzgebungskompetenz' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 1-2; Christian Seiler, 'Art. 105 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 41-42; As highlighted by the Constitutional Court, Article 105 GG intends to equip the state with the power to generate the financial revenue necessary, cf. 1 BvL 16/69 *Law Introducing an Additional Charge* [1972] (German Federal Constitutional Court) para 19.

171 See for the definition of 'taxation' in the sense of Article 105 GG: Kube, 'Art. 105 GG – Steuergesetzgebungskompetenz' paras 3-4; Seiler, 'Art. 105 GG' para 36.

172 Kube, 'Art. 105 GG – Steuergesetzgebungskompetenz' para 1; Fabbrini, 'Fiscal Capacity' 131; And given the general interconnection of the budgetary process with democracy, as highlighted previously, cf.: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 222; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

173 As continuously emphasized by the Constitutional Court: *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

174 *Quantitative Easing (PSPP) Final Judgment* para 104; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts'

requires that parliamentary approval remains constitutive for financial commitments and that these commitments remain limited as well as specific.[175] On a substantive level, the Court demands that German budgetary autonomy is not suspended for a considerable period of time and that central competences remain at the national level, including explicitly the competence to determine type, level and size of German revenue and expenditure.[176] When applying this constitutional benchmark to the proposed EU taxation competences, which would necessarily confer a degree of political discretion to the EU-level, two major constitutional concerns emerge.

In the first place, taxation is intrinsically linked with the principle of democracy.[177] As highlighted before, the decision of how, at what level and whom to tax constitutes an essential political prerogative at the core of the decision-making space that democratically legitimized institutions dispose of, and which is controlled by the voters through regular elections.[178] In case these core political decisions are conferred to the EU-level, the people would only have an indirect impact on the content of the taken decisions. This is democratically problematic in light of the highlighted centrality of revenue decisions for political decision-making. From that perspective, the power to tax concerns a competence associated with the nucleus of German democracy.[179]

259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12.

175 As established in Chapter III Section 4.2.2.2.; And as pointed out by the Constitutional Court: *Quantitative Easing (PSPP) Reference* para 48; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 7.

176 *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

177 Cf. for example: Jaakkola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' 662; Fabbrini, 'Fiscal Capacity' 131.

178 On the German conception of democracy, cf. Chapter III Section 4.2.1.; On the importance of preserving the political space for democracy, cf. *Quantitative Easing (PSPP) Reference* para 56; *Final OMT-Judgment* paras 124, 135-138; Cf. as well: Cremer, 'Lissabon-Vertrag und Grundgesetz' 299-300; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 447-448.

179 Particularly in light of the apparent lacking democratic safeguards at the EU-level; On the democratic deficit of the EU, cf. Craig and de Búrca, *EU Law Text, Cases, and Materials* 151-159; Specifically, on an apparent substantive democratic deficit, cf. Marija Bartl, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit' (2015) 21 European Law Journal 23, 24.

Second, the conferral of tax powers might deprive the German Parliament of one source of public revenue. Notably, empowering the EU to tax in a specific field deprives the Member State from generating the same revenue.[180] Therefore, it appears that German budgetary autonomy would be impacted for a considerable time due to a restriction of potential revenue sources and ultimately a possible decrease in national state revenue. This could expose the German state budget to the political decisions taken by a third party, notably the EU, including hardly predictable financial risks, which was deemed incompatible with *overall budgetary responsibility* by the German Constitutional Court.[181] The specific assessment in this regard depends, however, on the scope and size of the EU taxation power – including possible limitations that could be attached to the conferral of such competences to the EU-level.

Nevertheless, as it stands, any proposed EU taxation competence would trigger serious constitutional concerns in both Finland and Germany given its discretionary character and its inherent political nature which involve hardly predictable financial risks for the national state budget. This appears to translate into a conflict with the German concept of *overall budgetary responsibility* which could result in the constitutional unattainability of such reform ambitions under the current German Constitution. Precisely the independent, discretionary character of the proposed EU taxation competence, which could secure an autonomous means to generate EU revenue, conflicts with the outlined national constitutional framework.

2.2.2.2 Compatibility with the charted micro-comparative constitutional space

When evaluating the compatibility of the outlined EU taxation power with the assessed national *constitutional identity limits*, it appears that the constitutional concerns are largely comparable to the German concerns. Notably, in France the sovereignty limit would be applicable to any conferral of tax powers to the EU, which would be governed by Article 88-1 French Constitution.[182] The *Conseil Constitutionnel* would have to determine, upon referral of a privileged institutional applicant, whether the introduction of EU taxation competences entails a significant shift of powers in domestic budgetary and fiscal prerogatives as laid down in Articles 34 and 47 French Constitution.[183] Notably,

180 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 208.

181 As established by the German Constitutional Court, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213.

182 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 538; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 492-493.

183 *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119-120.

Article 34 French Constitution stipulates that taxation has to be based on a statute, which according to Article 24 (1) French Constitution can only be adopted by the French Parliament. Consequently, the French Constitution assigns the power to tax exclusively to the French Parliament.[184] Hence, awarding this prerogative to the EU, even partially, would alter the current constitutional *status quo*. Furthermore, given the constitutionally enshrined importance of taxation powers to the French Parliament, a conferral of such competences to the EU-level would likely be seen as a significant interference with the French sovereignty limit. The resulting anticipated constitutional conflict could be overcome by the French constitution-amending legislator following Article 89 French Constitution, which prescribes the adoption by a three-fifths majority in the *Congrès*.[185] Given that the *Conseil Constitutionnel* is not empowered to review constitutional amendments,[186] these amendments would subsequently not be scrutinized. Moreover, enacting such constitutional reforms to accommodate EU integration steps is a common practice in France.[187] Consequently, the proposed EU taxation power will likely trigger a conflict with the French sovereignty limit, which can be overcome by the French legislator.

In Spain, the conferral of competences to the EU-level requires parliamentary approval following Article 93 Spanish Constitution. This conferral, however, has to respect the Spanish *constitutional identity limit*. As previously established, the Spanish constitutional order stresses the particular bond between the parliament and budgetary as well as fiscal decision-making, as apparent in Articles 66 (2), 75 (3) and 134 Spanish Constitution. It is furthermore reflected in the fact that the general power to tax is assigned to the Spanish legislator according to Article 133 (1) Spanish Constitution. Although the Constitutional Tribunal did not yet conclude that taxation prerogatives are covered by the Spanish *constitutional identity limit*, it established that sovereignty, democracy

184 *Fiscal Compact* paras 13, 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265.

185 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 770; Cahill, 'Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power' 266-267.

186 As emphasized by the *Conseil Constitutionnel*, cf. *Lisbon Treaty* paras 9, 34; *Revision of Amsterdam Treaty* paras 7, 32; *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 150-151; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 413; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

187 Steiner, *French Law – A Comparative Approach* 7; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 535.

and the overall constitutional structure are covered by this limit.[188] Given the crucial link between the power to tax and the principle of democracy,[189] which is recognized in other Member States too,[190] and given that the Spanish Constitution explicitly recognizes this important relationship in Article 133 (1) Spanish Constitution, it seems likely that taxation prerogatives are covered by the Spanish *constitutional identity limit*. Therefore, the proposed discretionary EU taxation competence would indeed conflict with the Spanish *constitutional identity* given its implications for budgetary sovereignty as well as the parliamentary, democratically legitimized control over taxation. Yet, even in case such a conflict with the Spanish *constitutional identity limit* is found by the Spanish Constitutional Tribunal, the constitution-amending legislator can overcome the resulting conflict by altering the constitutional text.[191] Given the outlined link of a possible EU taxation competence with Spanish sovereignty, democracy and the general state structure, it seems that the reform would be considered essential and thus Article 168 (1) Spanish Constitution is applicable, which imposes the previously mentioned strict procedural requirements.[192] Furthermore, the exceptional nature of constitutional amendments in Spain should be recalled. Therefore, although allocating the proposed

188 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

189 On the traditional relationship between taxation and democracy, cf. Jaakkola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' 662; Fabbrini, 'Fiscal Capacity' 131; As well as on the traditional link of fiscal powers with democracy and sovereignty, cf. Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

190 As for example established in Article 34 (4) French Constitution, cf. *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Or as established in Article 105 GG for Germany, cf. Kube, 'Art. 105 GG – Steuergesetzgebungskompetenz' paras 1-2; Seiler, 'Art. 105 GG' paras 41-42.

191 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 272.

192 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282; Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

taxation power to the EU would be theoretically attainable – as the constitution assigns a clear procedural avenue to implement the seemingly required constitutional changes – the practical feasibility remains questionable.

And finally, in Poland the conferral of the required competences to introduce an EU taxation power will likely require parliamentary confirmation following Article 90 Polish Constitution. The core constitutional question is whether EU taxation powers are compatible with the Polish *constitutional identity limit*. It was already established that the Constitutional Tribunal would consider constitutional challenges against Eurozone-measures as being merely hypothetical at this point.[193] Nevertheless, given the Polish obligation to accede to the Eurozone,[194] an anticipatory analysis of the compatibility of an EU taxation competence with the Polish Constitution seems possible. As established, the Polish *constitutional identity limit* protects the power to conduct financial, budgetary and fiscal policies.[195] This power includes the power of the Polish Sejm to adopt the budget as established in Article 219 (1) Polish Constitution, that the Polish Council of Ministers devises economic internal policies as established in Article 146 (1) Polish Constitution, but also that taxes can only be introduced by means of statute by the Polish legislator, as established in Article 217 in conjunction with Articles 95 (1), 120, 121 Polish Constitution.[196] Conferring the power to tax to the EU would alter the outlined constitutional prerogatives, which are equally covered by the competence-centric conception of Polish sovereignty. Therefore, it appears likely that a constitutional amendment would be required, either to overcome the explicit conflict with the Polish Constitution or to address the anticipated conflict with

193 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 249; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

194 Czuczai, 'Accession to the EU, But to Which EU? The Legal Impact of the Constantly Evolving EMU Acquis on the EU Enlargement Process' 595; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 72-73; Rinaldi-Larribe, 'Is Economic Convergence in New Member States Sufficient for an Adoption of the Euro?' 269-270; Louis, 'The Economic and Monetary Union: Law and Institutions' 605.

195 *Treaty of Lisbon* Section III 2.1.; *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

196 Cf. the assessment of the ESM-Treaty by the Polish Constitutional Tribunal: *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

the Polish *constitutional identity limit*, as prescribed by Article 235 Polish Constitution. Yet, the attainability of such constitutional amendment remains questionable given the high procedural hurdles attached to amending the Polish Constitution and given the current political circumstances.

2.2.2.3 Interim conclusion

Taken together, major national constitutional concerns appear to exist against the prospect of conferring a discretionary taxation competence to the EU-level. In all charted Member States, taxation is a constitutionally assigned parliamentary prerogative which is deeply rooted in the national conception of democracy and protected by *constitutional identity limits*.[197] This suggests that the emerging constitutional conflict between national democracy in combination with national (budgetary) sovereignty can only be overcome by constitutional amendment.

The assessment equally revealed that the German *constitutional identity limit* appears to fully exclude the conferral of far-reaching tax competences to the EU-level as this might be classified as violation of a core component of German democracy as well as a permanent interference with budgetary autonomy.

2.2.3 EU debts and shared liabilities

A final possibility to fund an EU budget or an emergency instrument is issuing either EU debt, as for example envisaged by Next Generation EU,[198] or shared liabilities, as for example suggested by various Eurobond-proposals.[199] To that end, the most recently proposed Next Generation EU sparked considerable national constitutional discussion. Notably, the national reactions to the envisaged EU recovery strategy revealed a general concern as to whether the extent of EU debts proposed to fund the Recovery Facility is incompatible with EU primary law, most notably Article 310 (1) (3) TFEU according to which revenue and expenditure of the EU have to be balanced.[200]

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197 Notably the highlighted traditionally important link between taxation and democracy, cf. Jaakkola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' 662; Fabbrini, 'Fiscal Capacity' 131.

198 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 3; Cf. as well: Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203.

199 As envisaged by the Commission, cf. Commission, *Green Paper on the Feasibility of Introducing Stability Bonds (COM (2011) 818)*; Cf. as well: Schäfer and Bigus, 'Consequences of Different Eurobonds Proposals' 553; Hild, Herz and Bauer, 'Structured Eurobonds: Limiting Liability and Distributing Profits' 251; Mayer and Heidfeld, 'Eurobonds, Schuldentilgungsfonds und Projektbonds – Eine dunkle Bedrohung?' 129; Mayer and Heidfeld, 'Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds' 422.

200 Concerns were for example raised by the Finnish Constitutional Law Committee, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 15; As well as the legal service of the German Parliament, cf. Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlus-*

These concerns correspond with wider constitutional concerns already apparent in the Eurocrisis-jurisprudence of the various national constitutional actors, which suggest that the impact of an EU financial commitment on the national budgetary space has to be limited in scope and size as well as that the national parliament has to retain ultimate control over fiscal decision-making that impacts the respective state budget.

2.2.3.1 Compatibility with the charted macro-comparative constitutional space

These requirements are, for example, apparent in the jurisprudence of the Finnish Constitutional Law Committee. The Committee established that significant changes to the working of the EU would be considered a major encroachment of Finnish sovereignty which could only be approved by a two-thirds parliamentary majority.[201] One example of significant change is the increase of Finnish financial commitments at the ESM-level without constitutive approval of the Finnish Parliament, which was seen as a significant alteration of Finnish budgetary sovereignty.[202] Building on this conclusion, the Finnish Constitutional Law Committee submitted in relation to Next Generation EU that the proposed financing structure through EU debts could significantly alter the mode of EU cooperation, as under the current Treaty-framework the EU finances its expenditure through own resources assigned by the Member States in order to achieve a balanced budget in accordance with Article 310 TFEU.[203] Furthermore, the proposed scheme appears to increase Finnish liabilities to a not yet predictable degree and the Finnish Parliament retains only very limited control over the subsequent spending of the newly available EU funds, which is considered by the Committee as a major interference with Finnish budgetary sovereignty.[204] Additionally, Section 82 (2) Finnish Constitution requires parliamentary approval for the issuing of state guarantees, which might be

ses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20) 6-7.

201 *Commission's Draft EU Recovery Plan and MFF Planning* 18; *Adoption of the Lisbon Treaty* 5; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

202 As established by the Constitutional Law Committee in its second appraisal of the draft ESM Treaty, cf. *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

203 Note that the Constitutional Law Committee's assessment concerns the proposal of the European Commission, for the Committee's opinion cf. *Commission's Draft EU Recovery Plan and MFF Planning* 17-18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

204 *Commission's Draft EU Recovery Plan and MFF Planning* 13.

relevant to secure the proposed EU borrowing.[205] In light of these considerations, the Constitutional Law Committee concluded that the proposal had a significant impact on Finnish sovereignty and that the required adoption of the EU own resources decision might therefore require the support of a qualified two-thirds majority following Section 94 (2) (2) Finnish Constitution.[206]

When applying the outlined Finnish constitutional benchmark to the suggested EU debt through Eurobonds, it seems that the Constitutional Law Committee would equally consider Eurobonds as a considerable modification of the current EU-Treaties as well. More specifically, the Committee emphasized that Article 125 TFEU allowed for financial assistance amongst Member States as long as the Member States remained liable for their own obligations.[207] Arguably, Eurobonds would introduce shared liabilities and thereby alter the current conception of the EMU. Furthermore, given the possible overall size of the issued Eurobonds, it can be argued that considerable liabilities might arise and that these entail hardly predictable financial risks for the national budget. Notably, in case a Member State experiences difficulties and is unable to service its debts, the other Member States might be required to guarantee the financial obligations. This could have significant implications for Finnish budgetary sovereignty and affect the ability of Finnish state authorities to comply with their constitutional obligations.[208] Therefore, it seems that the Constitutional Law Committee would likely require a two-thirds majority in the sense of Section 94 (2) (2) Finnish Constitution to confer any competences to the EU-level to issue Eurobonds. In addition, subsequent parliamentary approval might be required to approve any connected Finnish state guarantees in the sense of Section 82 (2) Finnish Constitution in order to provide a sound constitutional basis for the joint liabilities under the resulting Eurobonds.

Comparable constitutional concerns arise under the German Constitution. Considering the national adoption of Next Generation EU and the issuing of EU debts which would be introduced by the proposed own resources decision, German parliamentary approval in the sense of Article 23 (1) GG is required to adopt the EU decision in compliance with Article 311 (3) TFEU.[209] Given the extent of the proposed program and the considerable increase in national financial commitments, it has to be determined whether the qualified majority

205 Ibid 12; *EIB Proposal for EU Covid-19 Guarantee Fund* 5; Cf. as well the Committee's view on the ESM, *First Assessment Draft ESM-Treaty (I.)*; As well as on the EFSF, *Amendment to the EFSF (Increase in State Guarantee)* 3.

206 *Commission's Draft EU Recovery Plan and MFF Planning* 17; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

207 *Commission's Draft EU Recovery Plan and MFF Planning* 13; PeVP 34/2020 vp *Protocol Concerning Possible EU COVID-19 Rescue Measures* [2020] (Finnish Constitutional Law Committee) 3.

208 *Commission's Draft EU Recovery Plan and MFF Planning* 13; *EIB Proposal for EU Covid-19 Guarantee Fund* 4.

209 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 4-5; Magiera, 'Art. 311 AEUV – Eigenmittel der EU' para 10.

threshold applies in the sense of Article 23 (1) (3) in conjunction with Article 79 (2) GG or whether the German legislator might be barred to approve the proposed recovery scheme due to a potential conflict with the *eternity clause*.

Article 23 (1) (3) GG is applicable in case an amendment to EU primary law or a comparable measure alters the substantive content of the German Constitution.[210] The own resources decision is characterized as measure comparable to an EU Treaty amendment, given the unanimity requirement and the national constitutional confirmation prescribed by Article 311 (3) TFEU.[211] The resulting question is whether this decision and Next Generation EU result in an amendment to the content of the German Constitution. This is the case if competences are conferred, which would enable the EU to deviate from the German Constitution or in case a comparable domestic act would have required a constitutional amendment.[212] Considering the German constitutional framework, it appears that the German Constitution prescribes the approval of state borrowing through an act of parliament that determines the actual size of the intended borrowing according to Article 115 (1) GG.[213] However, the envisaged borrowing to finance Next Generation EU is not financed through borrowing on behalf of the Member States but through borrowing on behalf of the EU, which is why Article 115 GG cannot be directly applicable.[214] Notably, Next Generation EU does not entitle the EU to borrow money on the financial markets in the name of the respective Member States.

Yet, the proposed increase of the own resources ceiling to finance the envisaged EU debts could be considered a material amendment of the constitution. Here, the concept of *overall budgetary responsibility* appears particularly relevant. Following the jurisprudence of the German Constitutional Court, the German Parliament has to remain in charge of all central budgetary decisions and must retain budgetary autonomy. Any suspension of *overall budget-*

210 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5; Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3089.

211 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5; As also highlighted by the German Constitutional Court, cf. *Lisbon-judgment* paras 313-314.

212 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5-6; Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 25, 27.

213 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 6; Kube, 'Art. 115 GG' para 2; Reimer, 'Art. 115 GG – Kreditbeschaffung' paras 27, 30.

214 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 7; Partly also seen differently, cf. Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3090.

ary responsibility is incompatible with the *eternity clause* and therefore constitutionally unachievable in Germany.[215] To that end, strictly limited budgetary commitments can be adopted by a simple parliamentary majority following Article 23 (1) (2) GG.[216] Financial commitments that are significant given their overall size as well as the attached modalities, but that do not suspend *overall budgetary responsibility* for a considerable time, have to be adopted by a constitution-amending majority, as they alter the constitutionally enshrined parliamentary responsibility for budgetary decisions.[217]

Considering the own resources decision, the envisaged maximum commitment under the Next Generation EU would amount to a maximum annual financial commitment of up to 1,4% of the Gross National Income (GNI) plus an additional 0,6% of the GNI until 2058 to fund the emergency schemes to tackle the economic impact of COVID-19.[218] This would entail an increase of the national commitment from previously 1,23% to now up to 2% of the GNI.[219] In absolute numbers, this would translate into annual financial commitments of up to € 70,7 billion based on the GNI of 2019.[220] This in itself constitutes a considerable amount in comparison to the overall German federal

215 Following the conception of the Constitutional Court, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Lisbon-judgment* paras 252, 256; Cf. as well: Herdegen, 'Art. 79 GG' paras 182, 185; Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Mayer, 'Rebels Without a Cause? Zur OMT-Vorlage des Bundesverfassungsgerichts' 497; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

216 Own resources require parliamentary approval according to Article 23 (1) (2) GG in conjunction with § 3 Integrationsverantwortungsgesetz, cf. Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3089.

217 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 7.

218 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 3 (point A9); Cf. as well: Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 7; Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3087.

219 Cf. the scheme established for the period from 2014 and 2020 by Article 3 (1) Council Decision 2014/335/EU on the system of own resources of the European Union; As well as the new own resources ceiling: Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 3 (point A9); Cf. as well: Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3087.

220 Commission, *EU expenditure and revenue 2014-2020 (dataset)*.

expenditure for 2019 which amounted to € 356,4 billion.[221]

At the same time, the factual development of German contributions to the EU budget reveals that the own resources ceiling is traditionally not fully exhausted. For example, in 2019 the overall German contributions to the EU's own resources amounted to 0,846%, in 2018 to 0,847% and in 2017 to 0,713% of GNI.[222] This underscores that the own resources decision merely prescribes an upper limit of German commitments. Furthermore, although the supplementary increase of up to 0,6% of GNI applies until 2058, the core commitment of up to 1,4% of GNI is linked to the MFF which applies from 2021 to 2027.[223]

Moreover, the supplementary increase may only be triggered in case other means to service the EU debts are exhausted, as clarified by the European Council.[224] And in addition, this supplementary charge is designated to fund Next Generation EU, which although amounting to € 750 billion has to be further distinguished into grants, which amount to € 390 billion, and into favorable loans, which amount to € 360 billion, that have to be paid back by the Member States benefiting from them. Consequently, the supplementary own resources are mainly designated to finance the share of grants under Next Generation EU.

When projecting the possible financial implications for the German budget based on the calculations of the 2019 EU budget, where Germany contributed € 29,91 billion to the overall EU own resources of € 163,92 billion which equals 18,2%, the German commitment could amount to around € 71,2 billion until 2058. This would amount to around € 2 billion projected over a 36-year framework, which in comparison to the overall German budget is an arguably limited commitment. Given the long-term implications of the additional commitment and the considerable increase in the own resources ceiling from 1,23% of GNI to 2% of GNI, it seems that a qualified majority in the sense of Article 23 (1) (3) in conjunction with Article 79 (2) GG is applicable.[225] However, given that the financial commitments remain comparably limited, it seems that German *overall budgetary responsibility* and budgetary autonomy are sufficiently safeguarded.

The previous assessment suggests that more far-reaching forms of EU debts or shared liabilities are only constitutionally feasible in Germany under strict conditions. As apparent in relation to Next Generation EU, which limits the

221 For the research assessment on German expenditure, cf. Chapter III Section 4.2.2.5.; For the employed data, cf. Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2018 bis 2022 (Drucksache 19/3401)*.

222 Based on data from Commission, *EU expenditure and revenue 2014-2020 (dataset)*.

223 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 8 (point A28).

224 Ibid 4 (point A10).

225 Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' 1779; Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3089.

maximum national financial liabilities, and as equally apparent in relation to the ESM, which similarly determines a maximum commitment, any such scheme has to be capped to prevent unpredictable financial risks for the national budget. This was continuously emphasized by the German Constitutional Court under its *overall budgetary responsibility* doctrine.[226] Hence, any form of EU debts or shared liabilities would have to be limited in their overall size, for example through the maximum ceilings established by the EU own resources decision. Otherwise, an essential procedural requirement under *overall budgetary responsibility* would be violated which would suggest its incompatibility with the German *eternity clause*. Hence, under the current German Constitution, the EU could not be empowered to autonomously engage in own borrowing or to established shared liabilities without acquiring prior confirmation of the German Parliament – for each batch – regarding the required German financial commitment. When subsequently considering the substantive dimension of the German *overall budgetary responsibility* doctrine it is hard to anticipate when this abstractly defined benchmark established by the Constitutional Court is violated. In all cases, far-reaching proposals that envisage a wide-scale supra-nationalization of national debts through shared guarantees, as for example apparent in the blue-and red-bond proposal,[227] seem incompatible with *overall budgetary responsibility* given the hardly predictable financial impact on the German state budget.

Hence, EU debts, borrowing or shared liabilities appear to be compatible with the German Constitution in case they are based on a limited financial commitment confirmed by the German Parliament that does not challenge the central parliamentary control over budgetary and fiscal decision-making. An apparent example that complies with these requirements is Next Generation EU. In contrast, under the current German constitutional jurisprudence proposals such as the envisaged blue and red-bonds would likely be considered to entail unpredictable financial commitments that could undermine *overall budgetary responsibility* and would therefore likely be incompatible with the German *eternity clause*.

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226 *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297; Otherwise requiring successive parliamentary involvement, cf. *Participation of Members of German Parliament in the EFSF* para 112; Cf. as well: Herdegen, 'Art. 79 GG' para 185; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

227 Commission, *Green Paper on the Feasibility of Introducing Stability Bonds (COM (2011) 818)* 14; Jacques Delpla and Jakob von Weizsäcker, 'The Blue Bond Proposal (2010)' Bruegel Policy Brief <https://www.bruegel.org/wp-content/uploads/imported/publications/1005-PB-Blue_Bonds.pdf> accessed 20 December 2020 1-3; Cf. as well: Mayer and Heidfeld, 'Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds' 422; Beck and Wentzel, 'Eurobonds – Wunderwaffe oder Sprengsatz für die Europäische Union?' 717-718.

2.2.3.2 Compatibility with the charted micro-comparative constitutional space
When considering the compatibility of EU debts, shared liabilities and in particular Next Generation EU with the different national *constitutional identity limits*, certain similarities with the assessment of the proposed EU taxation power can be identified. Despite differences in the legal design, both the power to tax as well as the ability to engage in public borrowing have considerable implications for budgetary prerogatives of national parliaments. In both situations the domestic fiscal discretionary decision-making space is limited, either due to reduced tax revenue or given that the respective debt might have to be serviced. Therefore, the previously drawn constitutional conclusions and the identified possible constitutional concerns regarding the creation of a genuine EU taxation power seem largely applicable.

For France, this entails that the proposed Next Generation EU including the intended financing through debts outlined in the own resources decision will have to be approved by the French legislator according to Article 53 (1) French Constitution, given the decision's impact on the finances of the French state.[228] Yet, as the decision is based on an existing EU Treaty provision, notably Article 311 TFEU, it does not entail the conferral of additional competences in the sense of Article 88-1 French Constitution and consequently the sovereignty limit appears not to be applicable.[229] This conclusion is in conformity with early decisions of the *Conseil Constitutionnel* concerning the EU's own resources system, where the Conseil highlighted that the decision was based on ratified international obligations that enjoyed primacy according to Article 55 French Constitution and that the decision had to be approved

228 Cf. the evaluation of the *Conseil des Ministres* submitted to the French legislator in the so-called 'Jaune Budgétaire', French Conseil des Ministres, 'Annex au Project de Loi de Finances pour 2021 (Jaune Budgétaire) – Relations Financières avec l'Union Européenne' (*French Conseil des Ministres,* 2020) <https://www.budget.gouv.fr/documentation/file-download/6871> accessed 20 December 2020 15; Cf. as well in relation to the previous own resources decision the assessment of the French Senate: French Senate, 'Report of the Commission of Finances Issued for the French Senate Concerning the Decision 2014/335 (no. 685/2015) – Rapport fait au nom de la commission des finances (1) sur le projet de loi autorisant l'approbation de la décision du Conseil du 26 mai 2014 relative au système des ressources propres de l'Union européenne' (*Commission of Finances,* 2015) <http://www.senat.fr/rap/l14-685/l14-6850.html> accessed 20 December 2020; As also pointed out by the *Conseil Constitutionnel*, cf. Decision 70-39 DC *Introduction of the EU's System of Own Resources* [1970] (French Conseil Constitutionnel) para 6.

229 Ministres, 'Annex au Project de Loi de Finances pour 2021 (Jaune Budgétaire) – Relations Financières avec l'Union Européenne' 15; Notably, the French sovereignty limit only applies to the conferral of new competences to the EU, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138-139; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 883; Oliver, 'The French Constitution and the Treaty of Maastricht' 12.

by the French legislator according to Article 53 French Constitution.[230] Therefore, the sovereignty limit is not applicable.[231]

Instead, the *Conseil Constitutionnel* would evaluate whether the proposed own resources decision as EU secondary law violates the French *constitutional identity limit* that applies to EU secondary acts.[232] It protects in particular the division of competences as established in Articles 34, 37 French Constitution, including parliamentary responsibility to determine state revenue and expenditure in a Finance Act.[233] It appears that this constitutional benchmark is largely respected by the own resources decision, which prescribes national approval and which complies with Article 53 (1) French Constitution. In that regard, it seems that Article 53 (1) French Constitution extends the internally applicable responsibility for budgetary decisions enshrined in Article 34 (4) French Constitution to supranational cooperation. Given that EU law allows for this national framework to apply, it can be submitted that the final own resources decision does not alter the established constitutional division of powers. This conclusion is also not put into question by the fact that Next Generation EU is largely financed through EU debts, as the underpinning funding mechanism established by the own resources system remains unchanged in its core function. Member States guarantee funds up to the own resources ceilings, which are then allocated through the EU budget and the proposed recovery fund. As a result, it seems that no constitutional conflict arises between the own resources decision or the proposed EU debts and the French Constitution as long as the French Parliament approves the decision following Article 53 (1) French Constitution by an act of parliament.

However, the previous assessment would differ in case additional competences are conferred to the EU, for example, in order to introduce an independent EU power to engage in public borrowing or to establish shared liabil-

230 *Introduction of the EU's System of Own Resources* paras 5-6; Cf. as well the subsequent findings of the *Conseil Constitutionnel*: Decision 77-90 DC *Concerning the Introduction of an Isoglucose Levy* [1977] (French Conseil Constitutionnel) para 4.

231 *Introduction of the EU's System of Own Resources* para 9.

232 *Comprehensive Economic and Trade Agreement (CETA)* para 14; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 18; *French Law on Genetically Modified Organisms* para 44; *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 141; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 452.

233 Cf. the constitutional benchmark that the *Conseil Constitutionnel* established in relation to the Fiscal Compact: *Fiscal Compact* paras 13, 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 120.

ities. In such cases, the French sovereignty limit becomes applicable.[234] As highlighted, budgetary and fiscal prerogatives are constitutionally assigned to the French legislator, as laid down in Article 34 (4) French Constitution.[235] In case the EU would be entitled to engage in larger borrowing following a mechanism that differs from the own resources framework or by establishing shared liabilities following the Eurobond proposals, new challenges to these parliamentary prerogatives would emerge. Notably, Member States might be required to guarantee for financial commitments made through the EU, which alters the current framework that builds on national parliamentary approval for the determination of maximum financial commitments. Member States would guarantee larger borrowing jointly, with hardly predictable financial risks that could negatively impact national budgetary sovereignty as well as the parliamentary prerogatives to establish the state budget. The resulting interference with French sovereignty, democracy and parliamentary prerogatives[236] would likely be deemed incompatible with the French sovereignty limit. Therefore, it appears likely that a constitutional amendment would be required to adopt the proposed EU borrowing competence or the envisaged Eurobonds.[237] As previously emphasized, enacting constitutional amendments constitutes a common practice and a prerogative of the legislature, which is not scrutinized by the *Conseil Constitutionnel*.[238]

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234 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; Cf. as well: Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123-124; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 490-491.

235 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 120; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540.

236 Cf. the core components of French *constitutional identity*, as established by the *Conseil Constitutionnel*: *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 526-529.

237 Cf. for example: *Review of Maastricht Treaty (Maastricht I)* paras 36-44; Cf. as well: Steiner, *French Law – A Comparative Approach* 7; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 535.

238 As emphasized by the *Conseil Constitutionnel*, cf. *Lisbon Treaty* paras 9, 34; *Revision of Amsterdam Treaty* paras 7, 32; *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 150-151; Ziller, 'European Union Law

In Spain, Next Generation EU, and more specifically the underpinning own resources decision, requires national approval following Article 94 (1) (d) as an international agreement 'which [implies] financial liabilities for the Public Treasury [...]'.[239] As the own resources decision is based on the existing EU Treaty-framework, it seems that no constitutional amendment is required to approve this decision in Spain. Arguably, the general system underpinning the EU's own resources was already ratified by the Spanish legislator when adopting the Lisbon Treaty, and therefore the own resources decision can be seen as a concretization of this initial commitment. What is more, given that the Spanish Constitutional Tribunal is generally not assessing the compatibility of EU secondary law with the Spanish Constitution,[240] it seems that a possible constitutional assessment of Next Generation EU would be limited to the Spanish approval of the financial commitments enacted following Article 94 (1) (d) Spanish Constitution.

Regarding the more far-reaching proposals concerning EU borrowing competences or the introduction of shared liabilities, the Spanish *constitutional identity limit* seems applicable. As clarified, the Spanish *constitutional identity limit* remains abstract and the Constitutional Tribunal did not yet explicitly define budgetary and fiscal competences as part of this limit. However, given that Spanish sovereignty and democracy are covered by it,[241] given that budgetary decisions have a particular importance for the electorate,[242] and

in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 413; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

239 As for example pointed out by the Spanish Parliament in its assessment of Council Decision 2014/335, cf. Spanish Congreso de los Diputados, *Dictamen de la Comisión de Asuntos Exteriores (110/000176) – Decisión del Consejo de 26 de mayo de 2014 sobre el sistema de recursos propios de la Unión Europea (2014/335/UE, EURATOM), adoptada en Bruselas el 26 de mayo de 2014.* (Boletín Oficial de las Cortes Generales 2015).

240 Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 277.

241 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

242 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 222; Fabbrini, 'Fiscal Capacity' 131; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency:

given that the Spanish Constitution protects, in several places, the parliamentary control over state budgeting,[243] it appears convincing to argue that budgetary and fiscal prerogatives are covered by the Spanish *constitutional identity limit*.[244] As an extension of this parliamentary responsibility for the state budget, Article 135 (3) Spanish Constitution moreover prescribes a legislative act to approve public borrowing.

When applying this constitutional benchmark to a possible wider EU borrowing competence or shared liabilities through Eurobonds, several constitutional concerns arise. Notably, these new competences could result in considerable, hardly predictable financial risks for the Spanish state budget. Specifically, in case the borrowing or the shared liabilities are guaranteed by the Member States, given that the EU currently has no major revenue stream that is independent from the Member States, the factual decisions on Spanish revenue and expenditure might be taken at EU-level. Such a system would challenge the currently established constitutional design which allocates budgetary and fiscal decision-making to the Spanish legislator. The apparently resulting conflict with the Spanish *constitutional identity limit* would require a constitutional amendment following Article 168 Spanish Constitution,[245] which might be practically difficult to attain.

Parliaments Against Governments?' 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

243 For example, visible in Articles 66 (2), 75 (3), 133 (1) and 134 Spanish Constitution.

244 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1183-1184; This conclusion can also be substantiated from a comparative perspective, for example visible from the German *overall budgetary responsibility* concept, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407; Or from the French jurisprudence, cf. *Review of Maastricht Treaty (Maastricht I)* para 45; Cf. as well Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

245 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282; Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

And finally, the compatibility of the various proposals with the Polish *constitutional identity limit* is considered.[246] Regarding Next Generation EU and the underlying EU own resources decision, national approval following Article 89 (1) (4) Polish Constitution is required,[247] which prescribes that the Polish Parliament confirms agreements with 'considerable financial responsibilities imposed on the State'. Different to the conferral of competences according to Article 90 (1) Polish Constitution, which has to be approved by a two-thirds majority in the Polish Sejm,[248] Article 89 Polish Constitution does not impose a qualified majority requirement. However, Article 311 TFEU was ratified as part of the Lisbon Treaty by the Sejm based on Article 90 Polish Constitution. Given the resulting dual parliamentary confirmation and the general constitutional respect for EU law obligations,[249] the own resources decision seems to be vested with high democratic legitimacy and the proposed financing through EU borrowing does not seem to alter that conclusion, as the mechanism in Article 311 TFEU allows for a continuous modification of the national financial commitment towards the EU.[250]

Regarding the more far-reaching proposal concerning EU borrowing competences or the introduction of shared liabilities, the Polish *constitutional identity limit* appears applicable. As established, the Polish Constitutional Tribunal identified the competence to conduct independent budgetary, financial and

246 Recalling that possible conflicts remain hypothetical until Polish accession to the Euro, cf. Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 249; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

247 Cf. the parliamentary assessment: Polish Parliament, 'Parliamentary Report on Adoption of Decision 2014/335/EU – Druk nr 3198: o ratyfikacji decyzji Rady z dnia 26 maja 2014 r. w sprawie systemu zasobów własnych Unii Europejskiej (2014/335/UE, Euratom)' (*Polish Parliament*, 2015) <http://orka.sejm.gov.pl/Druki7ka.nsf/0/E6E5C6BEE40F88B9C1257DFD004A8C82/%24File/3198.pdf> accessed 20 December 2020 4.

248 Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 148.

249 Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 130-131; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107; Also visible from the general friendliness of the Polish Constitution towards EU law, cf. Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 251; Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 253; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1360.

250 Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 148; Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241.

fiscal policies as particularly important powers under the Polish principle of sovereignty.[251] This includes the parliamentary responsibility for adopting the state budget enshrined in Article 219 Polish Constitution and the Sejm's responsibility to determine the conditions for state borrowing according to Article 216 (4) Polish Constitution.[252] The proposed conferral of competences to the EU would increase Polish liabilities and alter the current constitutional conception according to which state borrowing and state guarantees have to be approved by the Sejm, as apparent from the mentioned constitutional provisions. In addition, the budgetary discretion available to parliament would be reduced in case financial risks manifest at the EU-level, which could then impact national budgeting. As a result, the Constitutional Tribunal might consider the envisaged EU cooperation in conflict with the Polish *constitutional identity limit*. Such conflict can be, however, overcome by amending the constitutional text as previously established.[253] Although such constitutional amendment might be practically difficult to achieve, the *constitutional identity limit* does not impose an absolute limitation to the constitution-amending legislator.[254]

2.2.3.3 Interim conclusion

Overall, the compatibility assessment revealed that Next Generation EU is largely compatible with the national constitutional frameworks, even if financed through EU borrowing. It was highlighted that the Finnish Constitutional Law Committee raised concerns, as it characterized the proposed scheme as a departure from the current practice of EU budgeting under the EU-Treaties,

251 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499.

252 Cf. the constitutional arguments submitted in the inadmissible ESM-proceedings: *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

253 Notably, Article 235 (6) Polish Constitution requires the confirmation of constitutional amendments that affect Chapters I, II, XII of the Polish Constitution by public referendum, thereby imposing a higher constitutional threshold for such amendments without excluding them in the first place, cf. Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

254 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157.

which, following the Committee's view, does not include large scale EU borrowing.[255] Therefore, the Committee suggested that a two-thirds parliamentary majority might be required to adopt Next Generation EU. Similarly, the underpinning own resources decision might require the support of a constitution-amending majority in Germany given the increased financial implications for the state budget.

However, no additional substantive constitutional concerns appear to emerge under the national *constitutional identity limits* across the assessed Member States. This appears to result from the fact that Next Generation EU is built on the existing EU Treaty-framework, which was already ratified by national legislators. The fact that the EU finances parts of its activities through borrowing appears not to alter the general financing structure of the EU's budget and it in fact appears to be caused by the aim to kick-start the EU recovery strategy in the aftermath of the COVID-19, which requires a major financial impulse in a short period of time. The envisaged financing structure through EU borrowing guaranteed by the Member States based on the EU own resources ceilings ensures that national budgets are not immediately overwhelmed by the required large financial investments. Given its design based on the existing EU budgeting framework and given that Member States retain a constitutive say under Article 311 (3) TFEU, Next Generation EU appears not to limit parliamentary budgetary prerogatives in an unconstitutional manner – and can thus be seen as a *constructive* example of how to devise EU fiscal integration steps in a legal-constitutionally sound manner.

Regarding a wider EU borrowing competence or the introduction of shared EU liabilities through Eurobonds, serious constitutional concerns appear to emerge. These concerns relate, on the one hand, to the potential impact of such EU discretionary competences on the national state budget and, on the other hand, to the difficulty of determining the potential financial risk inherent in the required national financial commitment. Here, a conceptual similarity with the constitutional concerns against a possible EU taxation competence can be identified. In fact, the discretionary competences to tax and issue debts appear to constitute the metaphorical two-sides of the same coin. Notably, by conferring taxation competences to the EU, Member States reduce their own prerogatives on generating state revenue which limits their fiscal decision-making space. Similarly, EU debts and liabilities could trigger financial obligations for the Member States, which restricts future domestic fiscal discretion.[256] Conse-

255 *Commission's Draft EU Recovery Plan and MFF Planning* 17; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

256 In general, it should be pointed out that debts will have to be paid in the future through, for example, tax money, cf. Violeta Ruiz Almendral, 'The European Fiscal Consolidation Legal Framework: Its Impact on National Fiscal Constitutions and Parliamentary Democracy' in Thomas Beukers, Bruno De Witte and Claire Kilpatrick (eds), *Constitutional Change Through Euro Crisis Law* (Cambridge University Press 2017) 29.

quently, both types of proposals trigger comparable national constitutional concerns.

As it stands, the constitutional concerns in Finland as well as the possible *constitutional identity* conflicts in France, Poland and Spain can be overcome based on the support of a qualified parliamentary majority that either confirms the EU commitment or that first enacts the required national constitutional amendments to then approves the conferral of powers to the EU-level. Yet, the practical-political feasibility of the required majority requirements seems questionable. Furthermore, only in Germany an absolute obstacle seems to exist, given the identified procedural and substantive conflicts with *overall budgetary responsibility*. Thereby, some of these concerns might be smoothened by deconstructing the conception of *overall budgetary responsibility*, addressing the apparent constitutional double standard and including the direct as well as indirect benefits from EU financial commitments into the constitutional appraisal, which is assessed in in further detail below (3.). Taken together, the German concept of *overall budgetary responsibility* appears to entail the most serious constitutional challenge to the prospect of the proposed additional EU competences.

2.2.4 Conclusion – Altering constitutional appraisal of Eurozone budgetary tool

The constitutional compatibility assessment of the possible funding options for the Eurozone revealed that the current EU Treaty-framework provides space to generate additional EU revenue in compliance with national constitutional law. Under the existing framework in Article 311 TFEU, national parliaments retain a final vote on the maximum financial commitments as well as influence on the administration of the conferred funds. Given that Article 311 TFEU is not limited in scope, Member States are able to assign new revenues to the EU-level. They can do so either by raising the national own resources ceiling and thereby increasing the direct national contributions, or, in the alternative, by introducing new tax-based EU resources that are collected at the national level and then assigned to the EU through the own resources decision, comparable to other traditional own resources.[257] The second option appears particularly interesting, given that it provides the EU with a more stable source of revenue different to the resources generated through national cooperation that continue to spark the outlined political debates on 'just return'.[258] Moreover, Member States and in particular national parliaments retain ultimate

257 Such as sugar levies, for example, cf. Magiera, 'Art. 311 AEUV – Eigenmittel der EU' paras 16-17; Crowe, 'The European Budgetary Galaxy' 431.

258 As previously highlighted, cf. Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 50; Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203; Fabbrini, 'Fiscal Capacity' 129; Crowe, 'The European Budgetary Galaxy' 433.

Member State	New own resources	Discretionary EU taxation competence	EU debts / borrowing	Next Generation EU
Finland	Parl. approval by simple majority (Sect. 94 (2) (1) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC) for the adoption of own resources decision.
Germany (including *constitutional identity limit)*	Parl. approval by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG).	Apparent conflict with the German *eternity clause* (given the discretionary nature, hardly predictable financial risks and the close link of taxation power with political decision-making which requires democratic control in Germany).	If design corresponds to Next Generation EU: Parl. approval by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG). If unlimited shared liability or discretionary EU competence to engage in borrowing without prior nat. approval of financial commitment: Apparent conflict with the German *eternity clause*.	Parl. approval by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG) for the adoption of the underlying own resources decision.
French sovereignty limit	Limit not applicable to EU secondary law.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.	Limit not applicable to EU secondary law. Parl. approval of own resources decision (Art. 53 (1) FC).
Polish constitutional identity limit	Limit not applicable to EU secondary law.	Apparent conflict which might require const. amendment (Art. 236 PC), including possibly referendum.	Apparent conflict which might require const. amendment (Art. 236 PC), including possibly referendum.	Limit not applicable to EU secondary law. Parl. approval of own resources decision (Art. 89 (1) (4) PC).
Spanish constitutional identity limit	Limit not applicable to EU secondary law.	Apparent conflict which might require const. amendment (Art. 168 SC).	Apparent conflict which might require const. amendment (Art.168 SC).	Limit not applicable to EU secondary law. Parl. approval of own resources decision (Art. 94 (1) (d) SC).

Figure 21: Compatibility of charted constitutional space with proposed EU funding options

control over the content of the own resources decision, which enables them to re-direct the proposed new traditional revenues if desired.

In contrast, allocating a discretionary power in order to either introduce taxation or engage in larger EU borrowing appears to interfere with national constitutional law. Inherent in such discretionary power is a degree of political decision-making power and flexibility which sits uneasily with national democratic concerns as well as (sovereign) budgetary planning, which involves the evaluation of financial risks. Therefore, the introduction of discretionary funding option seems constitutionally contested in Finland, France, Poland and Spain as well as prevented by the absolute German *constitutional identity limit*, which can only be overcome by repealing and replacing the entire constitutional text, following Article 146 GG.[259] Hence, these funding options seem hardly attainable within the currently available national constitutional space. The overall compatibility findings on the various EU funding options are summarized in *Figure 21* above.

2.3 Compatibility of an EU Ministry of Finance with national constitutional space

The previous constitutional compatibility assessment already identified major constitutional obstacles that EU fiscal integration ideas are confronted with. These constitutional obstacles or concerns equally apply to the creation of an EU Ministry or Minister of Finance to complement the institutional framework of the EMU. The following assessment draws on previous conclusions and focuses on identifying the most immediate constitutional limitations that might emerge considering this institutional reform ambition.

Considering the various proposals on creating a Eurozone Ministry of Finance, it was established in the previous Chapter that two particularly relevant elements for the national constitutional appraisal can be distinguished. In the first place, a structural-institutional dimension, which includes the general idea to pool existing EMU-related competences in one central EU institution[260] as well as the proposal to establish a Euroarea parliamentary assembly

259 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

260 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 28; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 14, 18; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-61; Fabbrini, 'Fiscal Capacity' 116; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 8; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der

to supervise the Ministry (2.3.1.).[261] Second, a more substantive-institutional dimension which includes reform ideas to allocate new competences, such as a discretionary taxation competence or an EU veto power for national budgets, to this Eurozone Ministry (2.3.2.).[262]

2.3.1 Structural-institutional dimension of the proposed Eurozone Ministry

The different proposals advance two major institutional reform ambitions that are relevant for the constitutional compatibility assessment. Notably, these are the proposed creation of the Eurozone Ministry of Finance in charge of the pooled existing EMU-powers as such[263] and the envisaged establishment of a Eurozone parliamentary assembly that could supervise and administer the actions of this Ministry.[264]

2.3.1.1 Compatibility with the charted macro-comparative constitutional space

When assessing the compatibility of these institutional reform steps with the charted *macro-comparative* space, constitutional concerns arise in Finland concerning the implementation of the structural-institutional reforms at the EU-level as well as the potentially required conferral of additional competences to attain the proposed structural-institutional modifications. Notably, the Finnish Constitutional Law Committee established in its jurisprudence that changes to the EU institutional framework could constitute a modification of

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Wirtschaftsunion' 638.

261 Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-60; Europe, *Draft Treaty on the Democratization of the Governance of the Euro Area ('T-Dem')* Article 4 (1); Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 226; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 7.

262 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 170; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6-7.

263 Commission, *Completing Europe's Economic and Monetary Union – A European Minister of Economy and Finance*; Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 27; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 14, 18; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-61; Fabbrini, 'Fiscal Capacity' 131.

264 Cf. for example: Craig and Markakis, 'EMU Reform' 1441; The proposed Ministry could at least render the decision-making more transparent, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188-189.

the initial parliamentary approval given to ratify the EU-Treaties.[265] Furthermore, the Committee established that budgetary and fiscal competences are considered particularly important competences of the Finnish Parliament according to Section 3 (1) and Chapter 7 Finnish Constitution.[266] Therefore, any institutional modification on the administration and modalities of EMU-related competences may be seen as particularly relevant to the Finnish Parliament and more specifically the Finnish sovereignty doctrine.[267] Finally, the Committee established that fundamental changes to the *modus operandi* of EU cooperation could constitute a significant interference with Finnish sovereignty and that they thus required approval by a qualified two-thirds majority following Section 94 (2) (2) Finnish Constitution.[268]

In light of this constitutional benchmark, it appears that the creation of a new institutional actor in charge of the coordination of EMU-related competences would require parliamentary approval following Section 94 (1) Finnish Constitution, as the initial parliamentary EU commitment is amended. Notably, the current EU-Treaties did not envisage the creation of a Ministry of Finance and the introduction of such a new institution, even if based on EU secondary law, would likely be seen as an amendment to the institutional balance currently enshrined in the EU-Treaties. Therefore, approval under Section 94 (1) Finnish Constitution appears to be required.

Furthermore, the proposed institutional reform step could alter Finnish parliamentary control over EMU decision-making. Notably, the Finnish Parliament participates in the national *ex ante* preparation of EMU decisions that are

265 The Constitutional Law Committee raised concerns regarding the reverse qualified majority vote, which was seen as an alteration to the institutional balance, cf. *Adoption of the EU Six-Pack Legislation*; Or in relation to Comitology, cf. PeVL 49/1998 vp *Comotology Procedure* [1998] (Finnish Constitutional Law Committee); Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 472.

266 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

267 As emphasized by the Constitutional Law Committe: *Second Assessment Draft ESM-Treaty (II.)* 2; *Adoption of the EU Six-Pack Legislation*; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

268 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

of parliamentary relevance.[269] Thereby the Finnish mandating practice only extends to the Finnish representative in the Council and European Council. Moreover, the parliamentary right to be informed about EU developments only obliges the Finnish Government following Section 97 Finnish Constitution.[270] Any changes to the existing EU institutional framework could also impact this constitutionally secured parliamentary oversight, as decisions might be centrally prepared by an EU Ministry – instead of the Council. What is more, relevant information might be accumulated outside the direct reach of the Finnish Government, and hence the Finnish Parliament. Consequently, the envisaged creation of an EU Ministry of Finance would not only alter the initial parliamentary approval of the EU-Treaties but it could equally have significant implications for the national parliamentary knowledge of and involvement in the EU decision-making process. These constitutional concerns are reinforced since the competence areas involved are particularly important parliamentary prerogatives protected by the Finnish sovereignty.

To a similar extent, the initiation of a Eurozone assembly would alter the initial parliamentary approval and with it the institutional framework, as such chamber would unite democratic structures of the national and the EU-level. These combined parliamentary structures are not anticipated by the current EU-Treaties and would thus alter the Finnish parliamentary EU-mandate. A new approval under Section 94 (1) Finnish Constitution therefore appears required to confirm these institutional modifications.

Moreover, the subsequent question is whether real decision-making responsibilities would be assigned to such assembly. In case such powers would be indeed allocated to the Eurozone assembly, this would constitute a shift of responsibilities from the exclusively national constitutional level to a combined national-EU decision-making space, which clearly impacts the outlined important budgetary prerogatives constitutionally protected in Section 3 (1) and Chapter 7 Finnish Constitution. Although the new Eurozone assembly would include Finnish parliamentarians, it would operate in a constitutional *in-between* space between the EU and the national level, in which neither of the established parliamentary tools appears to apply. In addition, the current functioning of the EU does not include such *sui generis* Eurozone parliamentary assembly, which may be thus classified as a major institutional transformation that alters the current *modus operandi* of the EU.

Taken together, this suggests that both institutional reform steps could have a major impact on the exercise of budgetary prerogatives, which are

269 As established in Section 96 Finnish Constitution; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452; Husa, *The Constitution of Finland – A Contextual Analysis* 47; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556.

270 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459.

particularly important Finnish parliamentary competences. As a result, it seems that the required Treaty recognition and institutional transformation would likely necessitate confirmation by a qualified two-thirds parliamentary majority, as established in Section 94 (2) (2) Finnish Parliament.

When now considering the German constitutional framework, the established constitutional jurisprudence – similarly to the Finnish one – underscores the importance of explicitly recognizing institutional alterations such as the proposed structural-institutional modifications through Treaty amendment. Otherwise, the Constitutional Court could be potentially inclined to consider such modifications enacted on the basis of EU secondary law as *ultra vires* acts.[271] As illustrated, the fact that constitutional proceedings are highly likely given the lowered standing requirements[272] might incentivize the German legislator to be more diligent in its supervision of EU action in light of obligations stemming from the outlined *integration responsibility* doctrine.[273] Considering that the EU-Treaties do neither establish an EU Ministry of Finance nor a Eurozone assembly to supervise such Ministry and in light of the considerable authority that the different proposals aim to delegate and pool within this envisaged institutional actor, it seems likely that a Treaty amendment would be deemed necessary from a German constitutional perspective. This conferral might then require approval by a qualified majority under Article 23 (1) (3) in conjunction with Article 79 (2) GG.

As previously clarified, Article 23 (1) (3) GG prescribes a constitution-amending two-thirds majority for EU integration steps that amend the material content of the German Constitution.[274] This qualified majority was for

271 Particularly in light of the recent *ultra vires* finding, which could suggest a more active approach of the Constitutional Court, cf. for the decision: *Quantitative Easing (PSPP) Final Judgment* paras 163, 234; Cf. as well: Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 818; Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 898; Kirchhof, 'Die Rechtsarchitektur der Europäischen Union' 2057.

272 Cf. the assessment in Chapter III Section 3.4.3.; For example, the Constitutional Court seemingly introduced an *actio popularis* in EU matters, cf. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 641-642.

273 *Quantitative Easing (PSPP) Final Judgment* paras 106-107; Cf. as well: Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1047; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 178-179.

274 As highlighted by the Legal Service of the German Parliament, cf. Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5; Cf. as well: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 25, 27; Lorz and Sauer, 'Verfassungsändernde Mehrheiten für die Stabilisierung des Euro? – Mehrheitserfordernisse bei der Zustimmung zum Fiskalpakt, zum ESM-Vertrag und zur Änderung des AEUV' 685.

example required to adopt the ESM-Treaty as well as the Fiscal Compact,[275] given the instruments' implications for parliament's budgetary prerogatives.[276] Considering the reform proposals, it appears that the establishment of a Eurozone Ministry of Finance and a Eurozone assembly controlling EMU-related decisions would alter the currently applicable institutional framework, including the German constitutional framework that guarantees parliamentary involvement in the preparation of EU decisions with parliamentary relevance. Comparable to the framework in Finland, the German Constitution establishes the parliamentary obligation to issue a statement to the German Government on EU secondary law decisions that concern its constitutional prerogatives according to Article 23 (3) GG.[277]

In addition, given that budgetary and fiscal prerogatives are assigned to the German Parliament and protected under *overall budgetary responsibility*[278] as well as re-calling that the German Constitutional Court clarified that central budgetary decisions may not be delegated to a parliamentary committee but have to be taken by the entire *Bundestag*,[279] it seems incompatible with the German Constitution to confer the parliamentary responsibilities to the proposed Eurozone assembly. Instead, all central decisions have to be determined by the German Parliament, as for example the case under Article 311 (3) TFEU.

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275 Although both instruments are intergovernmental agreements, and thus, strictly speaking, not EU law, the German Federal Constitutional Court clarified that in case such agreements have a close connection to EU law, for example by complementing it, they are considered EU matters under German constitutional law and Article 23 GG is applicable, cf. *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 135-137; Cf. as well: Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 359.

276 Richter, *Funktionswandel im Mehrebenensystem? Die Rolle der nationalen Parlamente in der Europäischen Union am Beispiel des Deutschen Bundestags* 176; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 6, 277; Calliess, 'Finanzkrise als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' 160.

277 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 39; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 181.

278 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' para 182; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 807-808.

279 *Participation of Members of German Parliament in the EFSF* paras 131, 136; Cf. as well: Bumke and Voßkuhle, *German Constitutional Law – Introduction, Cases, and Principles* paras 1634-1636.

The proposed Eurozone assembly cannot replace the confirmation of financial commitments by the democratically elected German Parliament.

Furthermore, establishing a state-like institutional structure consisting of an EU Ministry and the corresponding parliamentary assembly might have a centralizing effect, which could result in a situation where the EU gains increasing control over budgetary and fiscal decisions in the long run. Given the possible implications for these competences, which are particularly protected under Articles 104a to 115 GG, as well as a potential decrease in German parliamentary oversight over EU decision-making as Article 23 (3) GG does not cover decisions by the EU Minister or the proposed Eurozone assembly, it seems likely that a constitution-amending majority in the sense of Article 23 (1) (3) in conjunction with Article 79 (2) GG will be deemed necessary to confirm the proposed institutional reform steps.

These institutional reforms remain restricted by *overall budgetary responsibility* and thus the German *eternity clause*. It was established that *overall budgetary responsibility* was defined to have both a procedural as well as a substantive dimension.[280] Regarding these constitutional requirements, it appears that the institutional reform steps themselves do not contain an incompatible conferral of competences, given that the proposals only create an institutional framework or infrastructure for the administration of existing EMU competences. Notably, these competences are already conferred to the EU-level without resulting in a conflict with the German *eternity clause* and the proposed modifications do not seem to alter the current ultimate control over budgetary decisions, which rests with the German Parliament. Consequently, the proposed institutional modifications appear not to result in an incompatible conflict with German *overall budgetary responsibility*.

2.3.1.2 Compatibility with the charted micro-comparative constitutional space

However, it is possible that substantive constitutional concerns emerge under the other charted national *constitutional identity limits*. In France, the proposed

280 On the procedural requirements, cf. *Quantitative Easing (PSPP) Reference* para 48; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 7; On the substantive requirements, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

institutional reform steps could trigger a conflict with the sovereignty limit[281] which protects budgetary and fiscal competences.[282] Therefore, the central question is whether the envisaged EU integration steps would confer additional competences to the EU-level, and would thus require an explicit constitutional amendment.[283] As previously highlighted, the proposed institutional reform steps appear to re-allocate existing EU responsibilities. The proposed reform steps therefore do not appear to entail an additional conferral of competences from the national to the EU-level but rather a re-shuffling of already conferred powers. Consequently, national budgetary and fiscal prerogatives appear not to be modified by these structural-institutional steps. Rather, the steps intend to render EU decision-making in these areas more transparent and more effective, which appears beneficial for the functioning of the single currency. At the same time, the *Conseil* continuously underscored in its constitutional decisions that the modalities attached to the conferred competences are similarly important for the conducted review.[284] However, it appears that the proposed initiation of the Ministry of Finance does not alter the final decision-making modalities itself but it would rather impact the preparation of such decisions. This seems not to conflict with the French sovereignty limit. Taken together, it appears that the *Conseil Constitutionnel* is unlikely to detect a conflict with the sovereignty limit given that the existing division of competences between the EU and the Member States appears not to be impacted by the proposed institutional modifications.

In Spain, the Constitutional Tribunal similarly established that EU integration steps have to respect Spanish *constitutional identity*, which protects sovereignty, democracy and the constitutional structure.[285] From the Tribunal's

281 As established by the *Conseil Constitutionnel*: *Lisbon Treaty* para 20; *Revision of Amsterdam Treaty* paras 27-28; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540.

282 Cf. the findings of the *Conseil Constitutionnel*: *Fiscal Compact* para 21; *Review of Maastricht Treaty (Maastricht I)* para 45; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119-120; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527; Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 133; Oliver, 'The French Constitution and the Treaty of Maastricht' 13, 15.

283 *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 120.

284 Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

285 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert,

jurisprudence it can be deduced that the concept is conceptualized as a competence-based limitation to the process of EU integration.[286] Consequently, the Tribunal is mainly concerned with the conferral of competences to the EU-level, which could alter the Spanish constitutional order in a manner that is incompatible with the identity of the Spanish Constitution for example by conferring *Kompetenz-Kompetenz* to the EU-level.[287] As illustrated, the structural-institutional reform steps appear to focus on modifications to the EU's institutional framework, which has implications for the mandate that the Member States conferred upon the EU. Notably, the modalities and conditions attached to the exercise of transferred competences are equally important for the constitutional conferral. However, given that the envisaged institutional reform steps do not entail an additional change of competences from the national to the EU-level or alter the final decision-making responsibility these modifications seem not contentious under the Spanish *constitutional identity limit*.

When now considering the Polish *constitutional identity limit*, it appears questionable whether a conflict would be triggered by the proposed institutional modifications. As highlighted, the Polish Constitutional Tribunal established that the conferral of powers to the EU is limited by the principle of sovereignty, which requires that important competence areas remain at the national level, including economic, financial and fiscal competences.[288] As established in relation to France, Germany, and Spain, the here envisaged institutional modifications do not concern the conferral of competences, but rather an alteration of the modalities of already conferred competences. These modifications do, however, not change the final decision-making authority. Therefore, it appears that the equally competence-centric *constitutional identity* concerns do not apply to the proposed reform steps, as the division of compet-

'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

286 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1183-1184.

287 *Constitutional Review of the Maastricht Treaty* Section II.4.; Cf. as well: Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 373-374; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1193-1194.

288 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314-315.

ences between the EU and the Member States as well as the ultimate responsibility for the decisions taken on these competences would remain unchanged by these proposals.

Taken together, this suggests that no substantive constitutional conflict with the French, Polish or Spanish *constitutional identity limit* would emerge. As these limits primarily focus on conferral of competences, EU institutional amendments appear not to create any conflicts as long as no additional competences are conferred to the EU-level and given that the ultimate decision-making remains unaffected by the proposed reform steps.

2.3.1.3 Interim conclusion

Overall, it seems that the introduction of an EU Minister or Ministry of Finance – and thus an institution into which the existing EMU competences could be integrated – might require additional national constitutional approval in Finland and Germany. Notably, the creation of such an institutional actor would alter the currently existing EU institutional balance as enshrined in the EU-Treaties and approved by the national parliaments. Furthermore, the envisaged alterations to the EU institutional framework could impact on national procedures that ensure parliamentary participation in EU decision-making. The result could be that national parliaments would not be as comprehensively involved in the adoption of EMU-policies, which modifies the initial conferral of competences as well as the modalities attached to it. Therefore, these alterations could require a new confirmation by national parliaments – possibly even by a qualified parliamentary majority in case these institutional changes are deemed to modify the current mode of cooperation within the EMU.

In addition, the compatibility assessment illustrated that no conflict under the French, German, Polish or Spanish *constitutional identity limit* seems to emerge, given that the proposed institutional reform steps mainly concern the modalities attached to the exercise of already conferred competences and given that the ultimate decision-making responsibility appears not to be altered by these structural proposals. Therefore, these institutional modifications do not directly confer additional competences to the EU-level, which appears to be the most relevant requirement for triggering the national *constitutional identity limits*. This constitutional evaluation would change, however, in case the envisaged new institutional actors would be assigned additional competences beyond the currently conferred competences or in case the Ministry would be empowered to take decisions independently, as will be elaborated in the following section.

2.3.2 Conferring new competences to the Eurozone Ministry

A second set of ideas relates to the allocation of additional competences to the proposed EU Ministry of Finance. These competences include, for example,

a discretionary taxation competence to empower the EU to autonomously raise revenue if required[289] or the power to veto national budgeting.[290] Obviously, allocating these competences to the EU-level would require Treaty-recognition, as the envisaged powers go beyond the current EU Treaty-framework. Yet, the required Treaty amendments might conflict with national constitutional concerns, as will be evaluated subsequently.

2.3.2.1 Compatibility with the charted macro-comparative constitutional space

When considering the charted constitutional space in Finland, it seems that through the conferral of additional, far-reaching institutional responsibilities to this Ministry of Finance a conflict with Finnish sovereignty could emerge, which would require approval by a qualified parliamentary majority following Section 94 (2) (2) Finnish Constitution. Notably, as previously established in relation to the introduction of a discretionary EU taxation competence, the Constitutional Law Committee considers budgetary and fiscal competences particularly important parliamentary prerogatives.[291] Following its decisions, these prerogatives cover the introduction of new taxation following Sections 3 (1) and 81 (1) Finnish Constitution the general adoption of the state budget, as clarified in Section 83 (1) Finnish Constitution, including all revenue and expenditure as well as finally the issuing of state guarantees, as clarified in Section 82 (3) Finnish Constitution.[292]

In light of this constitutional benchmark, it appears that a discretionary taxation competence for the envisaged Eurozone Ministry of Finance would challenge precisely these parliamentary prerogatives established under Section

289 Cf. the Bruegel-proposal: Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 7.

290 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 169; Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 255; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6.

291 Cf. decisions by Constitutional Law Committee: *Second Assessment Draft ESM-Treaty (II.)* 2; *Adoption of the EU Six-Pack Legislation*; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

292 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 457-458; On the prerogatives in relation to issuing a state guarantee, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 12; *EIB Proposal for EU Covid-19 Guarantee Fund* 5; Cf. as well the Committee's view on the ESM, *First Assessment Draft ESM-Treaty (I.)*; As well as on the EFSF, *Amendment to the EFSF (Increase in State Guarantee)* 3.

3 (1) Finnish Constitution. In addition, a veto possibility regarding the national budget after the approval of the Finnish Parliament alters the constitutional framework for national budgeting established under Section 83 (1) Finnish Constitution. Given that budgetary and fiscal prerogatives are essential competences under the sovereignty doctrine, and given that the EU influence would be considerable, it appears that the envisaged powers could only be conferred by a qualified parliamentary majority in the sense of Section 94 (2) (2) Finnish Parliament. This conclusion is further supported by the fact that the proposed reform steps would likely alter the general mode of EU cooperation in conflict with Finnish sovereignty. Notably, core decision-making abilities would be shifted from the national to the EU level thereby equally reducing the available decision-making space for the Finnish Parliament.[293] Hence, it seems likely that a qualified two-thirds majority would be required in Finland in order to equip the proposed EU Ministry of Finance with the envisaged substantive competences.

In Germany, the allocation of a discretionary taxation competence and an EU veto power regarding the national state budget to the proposed Eurozone Ministry of Finance will likely result in a major constitutional conflict. In the first place, it appears that both envisaged competences alter the German Constitution. As outlined, Article 105 GG allocates the power to tax to the federal as well as the regional German state level, depending on the specific area of taxation.[294] In addition, Article 110 GG assigns the independent responsibility to establish the German federal budget to the German Parliament.[295] Both constitutionally determined parliamentary prerogatives would be modified by the proposed substantive reform steps und would therefore require approval by a constitution-amending two-thirds parliamentary majority following Article 23 (1) (3) in conjunction with Article 79 (2) GG.

However, these reform steps could also conflict with *overall budgetary responsibility* given their impact on budgetary and fiscal parliamentary prerogatives. As stated, the German Constitutional Court requires that budgetary and financial commitments remain specific, limited and under the control of the

293 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

294 Kube, 'Art. 105 GG – Steuergesetzgebungskompetenz' paras 1-2; Seiler, 'Art. 105 GG' paras 41-42; As highlighted by the German Constitutional Court, Article 105 GG intends to equip the state with the power to generate the financial revenue necessary, cf. *Law Introducing an Additional Charge* para 19.

295 As established in Article 110 (2) Basic Law, the annual budget, which consists of all revenue and expenditure, has to be approved by parliament through a legislative act; Cf. as well: Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295-296; Moeser, *Die Beteiligung des Bundestages an der staatlichen Haushaltsgewalt* 114-116.

German Parliament[296] as well as that German budgetary autonomy is not suspended.[297] When applying this benchmark to the prospect of a discretionary taxation competence for the EU Ministry of Finance, the previously established conclusions in relation to the allocation of discretionary revenue powers to the EU apply. Notably, a discretionary EU taxation competence reduces the national fiscal decision-making space in Germany and it would shift political decision-making outside the reach of democratic control through the German people.[298]

Furthermore, the proposed EU veto power for national budgets would establish the EU as the final authorizer of national budgeting and thereby alter the current conception, which establishes national parliaments as highest budgetary authority. Such veto power would significantly alter the current framework, according to which Member States have to comply with the established fiscal rules as they could be otherwise sanctioned. Yet, this gives national parliaments a genuine political choice to either modify the national budgetary planning or to risk EU sanctions. This genuine political choice would be challenged in case an EU institution could simply block the adoption of a domestic state budget.

Therefore, it appears that the proposed increase in EU powers for the envisaged EU Ministry of Finance would be declared incompatible with *overall budgetary responsibility* by the German Constitutional Court. As a result, the proposed substantive reform steps appear constitutionally impossible in Germany in light of the current jurisprudence of the Constitutional Court and particularly its interpretation of Article 79 (3) GG.[299]

296 *Quantitative Easing (PSPP) Reference* para 48; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 7.

297 *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

298 As established, political decision-making space is an essential component under the German principle of democracy, cf. Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 516, 527; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

299 *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

2.3.2.2 Compatibility with the charted micro-comparative constitutional space

The outlined apparent conflict between the proposed discretionary decision-making abilities and the German *constitutional identity limit* indicates that these reform ambitions might be more generally constitutionally contentious for other Member States with a *constitutional identity limit* as well. The outlined German constitutional concerns appear to be echoed in France, where the *Conseil Constitutionnel* focuses within its sovereignty limit particularly on protecting domestic budgetary and fiscal prerogatives as laid down in Articles 34 and 47 French Constitution.[300] Both provisions establish the French legislator's responsibility to determine the broader budgeting framework, the sources of revenue and planned expenditure as well as the requirement that the French state budget has to be adopted by a legislative act. Clearly, the introduction of a discretionary taxation competence administered by the proposed EU Ministry of Finance would limit the constitutionally secured parliamentary taxation prerogatives of the French legislator. And the proposed EU veto power over national budgeting would challenge the parliamentary responsibility for establishing the state budget. Notably, the current French Constitution does not provide for the possibility that an EU institution can effectively block the adoption of the French state budget. As a result, the French legislator would be significantly restricted in its constitutionally assigned budgetary and fiscal prerogatives. Therefore, the proposed discretionary powers appear to require a constitutional amendment in France prior to confirming the required conferral of competences to the EU-level. As highlighted, such conferral is possible in all parts of the constitutional text and in fact common practice in France prior to the ratification of competence conferrals to the EU-level but equally requires political support.[301]

In Spain, the *constitutional identity limit* protects national sovereignty and democracy,[302] which seemingly includes the parliamentary prerogative to

300 *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119-120.

301 Steiner, *French Law – A Comparative Approach* 7; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 535.

302 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

enact taxation[303] as well as to establish the state budget.[304] The proposed discretionary EU taxation competences would challenge this taxation authority of the Spanish legislator. It could furthermore impact national budgeting more generally, in case the resources generated by the EU are no longer available for the national budgetary process. In addition, Article 134 (1) Spanish Constitution establishes, in an exhaustive manner, that the *Cortes Generales* is responsible for examining, amending and approving the Spanish state budget. The provision does not qualify this prerogative by, for example, a veto option for the EU. Hence, a veto possibility for the proposed Eurozone Ministry of Finance would clearly alter these exclusive Spanish parliamentary prerogatives with potential implications for Spanish democracy more generally. Notably, the Spanish legislator would no longer be the final arbiter in the adoption process of the state budget. Given these major implications, the proposed substantive reform steps appear to require confirmation through constitutional amendment following Article 168 Spanish Constitution.[305] This suggests that the conferral of the required competences is generally constitutionally possible, but might prove highly challenging to attain.

In Poland, following an anticipatory constitutional analysis,[306] it appears that similar constitutional conflicts with the Polish *constitutional identity limit* could emerge. Notably, the Polish Constitutional Tribunal established that economic, financial and fiscal decision-making competences were particularly important under the Polish sovereignty concept.[307] This is explicitly confirmed by the Polish Constitution itself, which assigns these competences to the Polish Council of Ministers as well as the Polish Parliament as established in Articles 146 and 219 Polish Constitution.[308] Any discretionary decision-making powers on taxation at EU-level or the EU ability to veto national budgeting would challenge the established constitutional framework for budgeting in Poland. It is likely that the Tribunal would see in this a serious limit to the ability of

303 Established in Article 133 (1) Spanish Constitution.

304 Established in Article 134 (1) Spanish Constitution.

305 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

306 Given that these reform steps will likely be considered as hypothetical at the moment, cf. Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 249; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

307 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314-315.

308 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

the legislator to independently design budgetary and fiscal decisions, which was characterized as an essential component under Polish sovereignty. Therefore, the proposed substantive reform steps and the required conferral of competences to the EU-level appear to result in a conflict with the Polish *constitutional identity limit*. However, the resulting conflict could be accommodated by amending the constitutional text following Article 235 Polish Constitution.[309] The political feasibility of such constitutional reform remains however questionable.

2.3.2.3 Interim conclusion

Overall, this suggests that the proposed substantive reform steps, which are intended to equip the envisaged EU Ministry of Finance as well as the composed Eurozone assembly with discretionary decision-making possibilities, appear to be confronted with serious constitutional concerns. Both in Finland and Germany, these concerns would likely trigger the qualified majority threshold for confirming the conferral of powers to the EU-level.

In addition, multiple serious constitutional concerns could potentially result in a major conflict with German *overall budgetary responsibility*. Arguably, awarding discretionary taxation powers or a veto over national budgeting to the EU challenges German budgetary autonomy and amends the responsibility of the German Parliament for the German state budget. Comparable constitutional concerns can be identified in France, Poland and Spain, where the proposed substantive reform steps appear to result in conflicts with the respective national *constitutional identity limit*. However, only the German *constitutional identity limit* imposes an absolute limitation to the process of EU integration, which might consequently translate into an irreconcilable conflict with the German *eternity clause* in Article 79 (3) GG.

2.3.3 Conclusion on the creation of an EU Ministry of Finance

National constitutional concerns primarily emerge in relation to the proposed conferral of substantive decision-making competences to the EU-level and to a lesser extent in relation to the mere modification of the existing EU structural-institutional framework. This observation appears to confirm that national *constitutional identity limits* are mainly construed in light of competence areas

309 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157.

Member State	Institutional dimension of establishing Eurozone Ministry	Substantive dimension of establishing Eurozone Ministry
Finland	Qualified parl. approval (Sect. 94 (2) (2) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).
Germany (including *constitutional identity limit)*	Parl. approval by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG).	Apparent conflict with the German *eternity clause* (size of commitment and suspension of nat. parliamentary control).
		Partly flexibilization of absolute conflict possible through: - EU benefits. - Consistent standard.
French *sovereignty limit*	No apparent conflict with the sovereignty limit.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.
Polish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit.*	Possible conflict which might require const. amendment (Art. 236 PC), including possibly referendum.
		Apparent conflict, can be possibly overcome through "modern" interpretation of Polish sovereignty.
Spanish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit.*	Apparent conflict, can be overcome under strict const. amendments procedure in Art. 168 SC which imposes high threshold and is practically difficult to attain.

Figure 22: Compatibility of charted constitutional space with proposed Eurozone Ministry of Finance

and competence conferrals. As illustrated within the *macro-* and *micro-comparative* constitutional assessment, national constitutional authorities seem to conceptualize national sovereignty or national democracy, which constitute central principles under the various national *constitutional identity limits*, by identifying particularly important national competence areas and powers within the protected scope under these limits. Based on this competence-centric conception of national *constitutional identity limits*, the required conferral of competences to allocate the outlined substantive powers to the EU-level would

likely trigger the outlined major conflicts with national sovereignty and democracy.

In contrast, the envisaged structural-institutional modifications – that would result in the creation of the envisaged EU Ministry of Finance – seem to trigger fewer constitutional concerns under the national *constitutional identity limits*. However, these reform ambitions appear to require additional parliamentary support in Finland and Germany given that they alter the currently existing institutional framework. Depending on the resulting impact on the constitutionally secured involvement of national parliaments in EU decision-making as well as the potential implications for the *modus operandi* of the EMU – notably, by moving away from a mere coordination of fiscal decision-making towards taking these decisions at the EU-level – it is even conceivable that these structural-institutional reform ambitions would require qualified parliamentary support.

The overall compatibility findings on the establishment of a Eurozone Ministry are summarized in *Figure 22* above.

2.4 Compatibility of tightened EU supervision with national constitutional space

A final set of ideas relates to the enhanced EU supervision over national budgeting. To that end, it was established that the proposals mainly aim at better integrating the existing supervisory tools into the national and the EU budgetary process.[310] The Commission proposed the establishment of independent domestic 'Competitiveness Authorities' that evaluate the national economic development as part of a reformed European Semester[311] as well as the comprehensive use of the national recommendations issued under the European Semester for the allocation of EU funds.[312] The most far-reaching proposal even suggested the allocation of the previously discussed veto power over national budgeting to the EU.[313]

Obviously, the increased EU supervision of national budgetary and fiscal decisions would have implications for the Member States as these rules limit

310 To address the apparent overlap and in-transparency of the existing EU rules, cf. Craig and Markakis, 'EMU Reform' 1441; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 190; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 3.

311 Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 8; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 169-170.

312 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 24-25; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6.

313 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 170; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6.

the available national space to take decisions independently.[314] At the same time, EU fiscal rules were consistently identified as important tool to ensure that national budgeting complies with its responsibility towards the Eurozone and thereby to avoid moral hazards.[315]

Bearing these constitutional concerns in mind, the following compatibility assessment of the identified core ideas, including the proposed reform of the European Semester, a possible EU veto power over national budgets and the advocated strive to achieve greater national ownership, draws from the previous extensive conclusions and identifies major constitutional obstacles that the charted national constitutional space entails for their attainment.

2.4.1 Compatibility with the charted macro-comparative constitutional space

As indicated, the proposed increased EU supervision would limit the fiscal possibilities of the national parliaments and therefore impact on national budgetary prerogatives. Notably in relation to Finland, it was established that these budgetary prerogatives are considered central sovereign competences that enjoy enhanced constitutional protection.[316] Furthermore, given its flexible conception, EU integration steps are generally compatible with the Finnish sovereignty limit unless they impact essential features of parliamentary budgetary prerogatives[317] or in case the general *modus operandi* of EU cooperation is altered through such steps.[318]

In light of these constitutional concerns, it seems that the proposed more integrated European Semester and the establishment of the national 'Competitiveness Authority' do not entail a significant shift of powers to the EU-level. Rather, they build on the currently existing framework established for EU fiscal supervision. To that end, the Constitutional Law Committee even emphasized the benefits that stem from a stable Euro for Finland,[319] which may be attained through the envisaged increased fiscal supervision. Consequently, a better integrated European Semester with data provided by an inde-

314 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 200.

315 Ibid 218; Craig and Markakis, 'EMU Reform' 1421; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 55.

316 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

317 *Commission's Draft EU Recovery Plan and MFF Planning* 13; *EIB Proposal for EU Covid-19 Guarantee Fund* 4; Cf. as well: Tuori and Raitio, 'Finland' 328.

318 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

319 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

pendent domestic authority and a possible connection of EU funds to the recommendations established within the European Semester jointly appear to strengthen the effectiveness of the existing framework. Therefore, these ideas can be likely confirmed by simple parliamentary majority.

The assessment would, however, differ in case the EU obtained a veto power over national parliaments, as previously outlined. Taken together, this suggests that additional EU supervision and EU-based incentives to comply with EU recommendations would generally be compatible with the Finnish Constitution as long as they remain *voluntary*. As soon as the EU can modify or block a national decision, the general mode of EMU-cooperation is altered and such reform steps would likely have to be confirmed by qualified majority under Section 94 (2) (2) Finnish Constitution.

In Germany, a similar constitutional appraisal appears to apply. Notably, the proposed enhanced enforcement of the existing framework as well as the creation of a new domestic authority appears not to entail additional challenges for *overall budgetary responsibility* or parliamentary prerogatives.[320] Hence, the proposed alterations would largely preserve the decision-making responsibility within the Member States – and the EU would thus mainly incentivize national parliaments in their political decisions. This implies that Member States would retain the final decision-making power which suggest that compliance could not be forced upon them and that such compliance would thus remain *voluntary*. As a result, the proposed improvements of the European Semester and the increased incentives to comply with the EU rules appear generally compatible with the German Constitution, as no additional powers or competences are conferred to the EU-level.

In contrast, awarding the EU-level with a genuine veto power over national budgeting would seriously interfere with the national constitutional framework. As previously established, it would challenge the German Parliament's position as final arbiter in budgetary matters.[321] Hence, similarly to the Finnish approach, the German constitutional framework appears to allow for the conferral of additional supervisory competence to the EU as long as Member States retain the autonomous decision-making power to comply or disregard the recommended EU action. In case, however, the EU can overrule a national

320 Richter, *Funktionswandel im Mehrebenensystem? Die Rolle der nationalen Parlamente in der Europäischen Union am Beispiel des Deutschen Bundestags* 176; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 6, 277; Calliess, 'Finanzkrise als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' 160.

321 As inherent in *overall budgetary responsibility* which requires that essential budgetary competences are preserved at the national level, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

decision or take decisions on behalf of the Member State a conflict with German *overall budgetary responsibility* could arise.[322]

2.4.2 *Compatibility with the charted micro-comparative constitutional space*

The reform proposals might equally trigger *constitutional identity* concerns. As previously highlighted, the French, Polish and Spanish *constitutional identity limits* protect budgetary and fiscal decision-making prerogatives based on national sovereignty as well as democracy considerations.

In France, the *constitutional identity limit* covers *inter alia* the parliamentary competence to establish the budgetary planning and adopt the state budget, as established in Article 34 French Constitution.[323] This corresponds to the parliamentary budgeting powers established in 134 (1) Article Spanish Constitution[324] as well as in Article 219 Polish Constitution.[325] In light of these prerogatives, and considering the current framework according to which Member States are incentivized to comply with various EU fiscal rules as well as increased EU monitoring, EU restrictions for national budgeting seem generally compatible with national *constitutional identity limits*.

Importantly, however, the existing rules entail in the first place a political dimension, which is for example visible under the Excessive Deficit Procedure that has to be confirmed by a vote in the Council of Ministers according to Article 126 (6) TFEU.[326] And second, these procedures can only *strongly incentivize* Member States to comply with the agreed EU fiscal rules, with the possible imposition of penalties following Article 126 (11) TFEU. Conceptually,

322 Given the absolute nature of the German *constitutional identity limit*, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

323 *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119-120.

324 On the Spanish *constitutional identity limit* more generally: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

325 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

326 Craig and de Búrca, *EU Law Text, Cases, and Materials* 736; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 109-110.

the EU rules build on the *voluntary compliance* of the Member States, with the possibility to fine any violation. Yet, Member States and more specifically national parliaments retain the possibility to make an autonomous decision, which preserves political discretion at the national level. The proposed enhanced operation of the European Semester and possible amendments to fiscal supervision in the Member States both appear not to alter this cornerstone of the EMU-architecture. Therefore, it appears that no conflict with the charted national *constitutional identity limits* arises in relation to these reform ambitions.

In contrast, the introduction of discretionary fiscal instruments, such as the veto power for national budgets, appears to conflict with the fundamental underlying notion namely that compliance with EU fiscal rules is incentivized but ultimately remains a political responsibility of the Member States' parliaments. Therefore, the introduction of such *mandatory* or *non-discretionary* elements appears to conflict with these *constitutional identity limits* in all three Member States, as previously established, and the adoption of such steps would thus require constitutional amendments.

2.4.3 Conclusion on tightened EU fiscal supervision

Overall, this suggests that the tightened EU supervision over budgetary and fiscal decisions in the Member States is generally compatible with the national constitutional framework, as long as those decisions follow the current mode of cooperation which allocates the final decision-making power to the Member State. As highlighted, the current system identifies unsustainable national budgeting, confronts Member States with the EU concerns and might finally result in a penalty. The system builds thus on the *voluntary* cooperation of the Member States, without awarding the EU with an autonomous decision-making power over domestic decision-making. Hence, the Commission can identify unsustainable fiscal policies, it might engage with Member States on the matter and even suggest financial penalties, it can, however, not change itself the contested domestic policy decision. Therefore, the political responsibility for budgetary and fiscal decisions is preserved at the national level.

It was substantiated that the allocation of an enforcement power for common fiscal rules to the EU-level, for example the power to veto national budgeting, would challenge this traditional conception and results in substantive conflicts with the charted national *constitutional identity limits*. Notably, national parliaments would no longer be able to adopt autonomously their respective state budget but instead the EU could block their adoption. Ultimately, this would undermine the position of national parliaments as final arbiters of budgetary decision-making which appears to conflict with the national conception of sovereignty and democracy in Finland, France, Germany, Poland and Spain. Therefore, the level of political discretion in budgetary and fiscal decision-making allocated to the EU-level is a crucial reference point for the

constitutional appraisal. It seems to suggest that the bigger EU discretion in budgetary and fiscal matters is, the more limited the national decision-making powers are respectively – which is constitutionally contentious. The findings of the compatibility assessment concerning an enhanced EU supervision of national budgeting are summarized in *Figure 23*.

Member State	Enhanced EU supervision based on voluntary tools	Enhanced EU supervision based on compulsory tools
Finland	Parl. approval by simple majority (Sect. 94 (2) (1) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).
Germany (including *constitutional identity limit)*	Parl. approval by simple majority (Art. 23 (1) (2) GG).	Apparent conflict with the German *eternity clause* (suspension of nat. parliamentary control).
		Partly flexibilization of absolute conflict possible through: - EU benefits.
French *sovereignty limit*	No apparent conflict with the sovereignty limit.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.
Polish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit.*	Possible conflict which might require const. amendment (Art. 236 PC), including possibly referendum.
		Apparent conflict, can be possibly overcome through "modern" interpretation of Polish sovereignty.
Spanish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit.*	Apparent conflict, can be overcome under strict const. amendments procedure in Art. 168 SC which imposes high threshold and is practically difficult to attain.

Figure 23: Compatibility of charted constitutional space with enhanced EU supervision

Finally, EU fiscal rules provide an important source for stability in the Eurozone as they discipline national fiscal decision-making and thereby confine the possible emergence of moral hazards.[327] From that perspective, these *soft*

327 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 218; Craig and Markakis, 'EMU Reform' 1421; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 55.

EU fiscal limits to national budgeting provide a major stabilization advantage for the Eurozone as a whole. Therefore, enhancing the operation of the European Semester, a better inter-connection of EU funding with EU fiscal rules as well as more effective supervisory instruments appear constitutionally beneficial, as for example pointed out in the Finnish constitutional debate on the introduction of the ESM.[328] Therefore, it might be required to start an additional reflection on how to increase EU incentives for national compliance with this set of rules beyond the imposition of financial penalties but without restricting the final national political authority over fiscal and budgetary decisions.

2.5 Interim conclusion: Fiscal integration within the current constitutional space?

The compatibility assessment demonstrated that while EU fiscal integration steps devised on the current EU Treaty-logic appear largely feasible, more far-reaching integration proposals that envisage the conferral of discretionary, political competences to the EU-level seem incompatible with core national constitutional principles. In particular, the establishment of a discretionary budgetary capacity, the discretion to engage in EU borrowing, a discretionary tax competence, a veto power for the envisaged Ministry of Finance as well as the enhanced supervision conferring direct enforcement powers for the EU-level appear to conflict with national democracy, national sovereignty and the parliamentary prerogatives in fiscal matters.

It was shown that the implementation of these proposals would therefore likely require confirmation of the competence conferral by a qualified parliamentary majority and, regarding national *constitutional identity limits*, most likely constitutional amendments in order to overcome the emerging conflicts. Notably, in Finland and Germany the required conferral of competences would likely have to be adopted by a qualified two-thirds majority following Section 94 (2) (2) Finnish Constitution or Article 23 (1) (3) in conjunction with Article 79 (2) GG respectively – and in France, Poland as well as Spain the apparent conflict with the respective *constitutional identity limit* could only be overcome by enacting a constitutional amendment. Although such constitutional amendments are common practice in France, their attainability remains questionable in Poland in light of the political circumstances and it appears challenging in Spain given the high majority requirements as well as the factual scarcity of constitutional amendments. Finally, the apparent conflict with German democracy and specifically *overall budgetary responsibility* seems to amount to an unsurmountable hurdle in light of the absolute design of the German

328 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

eternity clause.[329] Taken together, these constitutional obstacles appear to seriously impact the feasibility of more far-reaching EU fiscal integration proposals, as they challenge the traditional budgetary and fiscal responsibilities that national parliaments exercise under the comprehensive protection of national constitutions.

Comparing the resulting constitutional conflicts per assessed Member State, it is apparent that while being confronted with strict procedural requirements in Finland, France, Poland and Spain, only the German Constitution imposes absolute limitations to the prospect of EU fiscal integration. In anticipation of this conflict with the German *red-lines*, the research employed the concept of *constitutional flexibility* in the previous *micro-comparative* assessment. It thereby revealed that the seemingly rigid German constitutional limitations entail constitutional flexibility that could ultimately ease the seeming deadlock between EU fiscal integration steps and the German *constitutional identity limit*, which is explored subsequently.

3 Compatibility through constitutional flexibility

Through the following assessment, the research explores whether the different methods employed to locate *constitutional flexibility* in the German constitutional approach could be applied to the constitutional appraisal of the highlighted challenging EU fiscal integration proposals to solve the apparent deadlock.

Therefore, the first part of the assessment focuses on the application of the previous conclusions on the apparent German constitutional double standard (3.1.) as well as the application of *best practice* examples to the strict German constitutional limit (3.2.), which has obvious implications for the other restrictive national constitutional approaches as well. In a second part, the research considers the possibility to re-conceptualize the competence-centric national *constitutional identity limits* more generally in order to better reflect the constitutional advantages stemming from EU cooperation within the national evaluation of EU (fiscal) integration steps (3.3.).

3.1 Consistent constitutional standard in Germany

A first method to locate and activate additional *constitutional flexibility* in the seemingly rigid German constitutional approach is the application of a constitutional consistency assessment. As previously substantiated, constitutional

329 *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

provisions and principles have to be interpreted consistently.[330] Yet, the conducted evaluation of the German constitutional jurisprudence revealed that the Constitutional Court appears to apply a constitutional double standard in the interpretation of constitutional concepts and provisions to the disadvantage of EU cooperation. The research therefore proposed the application of a consistent interpretation, which could have the net effect of flexibilizing some of the currently more rigid constitutional limits to EU integration more generally, thereby potentially creating additional constitutional space for the adoption of the outlined contested EU fiscal integration proposals, without substantively undermining the effective protection of the German constitutional core.

Following the conclusions in Chapter III, this consistent application would first entail a stricter application of the constitutionally enshrined standing requirements for the initiation of constitutional proceedings – as practiced by the Constitutional Court in relation to *internal* constitutional proceedings. The result could be fewer admissible constitutional proceedings. In turn, this corresponds to the German constitutional framework which excludes procedures in the general interest and which restricts access to the Court for privileged applicants as well. The Court would thereby simply apply its established *internal* jurisprudence on the admissibility of constitutional proceedings towards EU-related applications, too. Although this would certainly reduce the likelihood of admissible constitutional proceedings against the identified EU integration steps, the underlying substantive constitutional question remains in place and in fact other traditional privileged applicants might be inclined to challenge these EU fiscal integration steps given their apparent impact on core German constitutional principles.

Second, as previously established, the consistent application of the constitutional framework would entail a more reluctant application of the substantive dimension of constitutional principles as well as the *eternity clause*, as apparent in the internal case law. Notably, the Court seems very cautious in the scrutiny of internal budgetary and fiscal decisions in order to respect the political discretion that the German Parliament enjoys under the German constitutional framework. Furthermore, it was substantiated that the underlying assumption of *overall budgetary responsibility*, which suggests that the German Parliament controls all central budgetary and fiscal decisions, can be challenged, as the national budgetary decision-making space is increasingly limited by *internal* long-term policy decisions.[331]

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330 Under rule of law and legal certainty considerations, cf. Kischel, 'Artikel 3 GG – Gleichheit vor dem Gesetz' para 83; Which is secured by employing accepted interpretation methods, cf. Schäfers, 'Einführung in die Methodik der Gesetzesauslegung' 886.

331 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8; Cf. as well: Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 53.

And finally, the Court refrained from applying the *eternity clause* to internal budgetary commitments, which contrasts with its EU-related approach where the *eternity clause* is continuously applied with the ultimate consequence that constitutional conflicts cannot be overcome by the German legislator.[332]

The latter two points demonstrate that the Constitutional Court adopts a more reluctant stance towards *internal* budgetary commitments of the German Parliament, which could potentially be extended to EU fiscal integration steps. The following evaluation explores four opportunities or considerations that could be employed by the German Court to conceptualize and apply *overall budgetary responsibility* – together with the *eternity clause* – in a more flexible, consistent and yet even more effective way. Notably, additional German flexibility towards EU fiscal integration could be, for example, achieved by carefully assessing the actual financial commitment at the EU-level (3.1.1.), by focusing on the operating budgetary balance (3.1.2.), by including wider EU advantages as well as the German economic dependency on a functioning Eurozone into the constitutional appraisal (3.1.3.) and finally by focusing on the procedural dimension of *overall budgetary responsibility* (3.1.4.). All four considerations will be presented as brief constitutional arguments that could be adopted by the German Constitutional Court when applying *overall budgetary responsibility*.

3.1.1 Actual German contributions to the EU budget

A first consideration that could be incorporated into the German constitutional assessment of parliamentary decisions with budgetary or fiscal implications is the actual German contribution to the EU budget, which differs from the agreed maximum contribution established by the own resources ceilings. Notably, under the 2014 EU Own Resources Decision (Council Decision 2014/335/EU) the own resources ceilings are determined at 1,23% of GNI. These own resources ceilings establish the upper limit for national contributions. The actual national contributions are, however, calculated by the Commission based on the EU's financial needs. For Germany, these actual contributions amounted in 2019 to 0,846% of GNI, in 2018 to 0,847% of GNI and in 2017 to 0,713% of GNI.[333] Hence, the actual German contributions were significantly lower than the maximum target values determined by the 2014 EU Own Resources Decision.

This suggests that the own resources ceilings are generally not fully exhausted by the EU. Instead, these ceilings can be conceptualized as maximum,

332 *Financial Support for Greece and EFSF* para 127; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

333 Based on data from Commission, *EU expenditure and revenue 2014-2020 (dataset)*.

upper national financial commitments. These upper commitments are not fully employed by the Commission as apparent from the outlined actual German contributions between 2017 and 2019 – which amounted to around two-thirds of the maximum target value determined by the own resources ceiling. Hence, when constitutionally assessing new national financial commitments towards the EU-level the discrepancy between maximum and anticipated actual national contribution could be more thoroughly examined and taken into account in order to determine the national contributions that can be realistically expected.

3.1.2 Net contribution of Germany

A subsequent consideration is the direct, immediate financial 'return' from the German contribution to the EU budget through the allocation of EU funds to Germany. To conceptualize this 'return', the Commission determines the so-called operating budgetary balance, which indicates the balance between the EU funds allocated to the respective Member State minus the Member State's actual contribution to the EU budget.[334] The underlying argument is that the national contribution of funds to the EU-level is not a one-directional effort for the Member State, but it in fact entails direct financial benefits for the respective Member State – thereby making it a two-directional transaction; i.e. Germany does not only pay money, but it also receives money from the EU, which should be taken into account.

For Germany, the operating budgetary balance amounted to € -14.323 billion or -0,41% of GNI in 2019. This suggests that the German contributions were in fact higher than the immediate financial 'return' allocated to Germany through the various EU policies.[335] Nevertheless, by contrasting the EU funds allocated to Germany, which amounted to € 12.214 billion in 2019, with the total German own resources contribution, which amounted to € 25.820 billion in the same year, it becomes obvious that almost half of the German contribution directly returned to Germany through, for example, agricultural subsidies or cohesion funds.

Thus, the German contributions to the EU budget result in direct financial 'returns' that could be incorporated into the constitutional appraisal of any new German financial commitments to the EU. Although these 'returning' funds are of course administered by the EU – and not the German Parliament – the operating budgetary balance illustrates that national financial contributions are in fact two-directional and result in direct financial benefits in the Member States, besides, of course, generating wider domestic benefits such as access to the internal market.

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334 For an explanation of the concept, cf. Zsolt Darvas, 'A New Look at Net Balances in the European Union's Next Multiannual Budget' (2019) Bruegel Working Paper 3.

335 For the data, cf. Commission, *EU expenditure and revenue 2014-2020 (dataset)*.

3.1.3 Wider EU advantages and German interest in a functioning Euro

In addition to these direct 'returns', reforming the Eurozone in order to stabilize the Euro could also result in broader economic advantages for Germany. For example, German exports to the Eurozone accounted for 37,5% of all German exports in 2018.[336] The German economy is thus closely intertwined with the Eurozone economy and it has a genuine economic interest in the overall well-being of the Euroarea.

Moreover, studies estimate that the German GDP-growth could be at least 0,5% lower without German membership within the single currency.[337] Therefore, German Eurozone-membership translates into a higher GDP and additional economic prosperity, which underscores the German interest in a functioning single currency.

Furthermore, the discussed fiscal integration reforms could render the EMU more potent in the long run, particularly in case an increased budgetary capacity is created or in case new, bigger emergency instruments against macro-economic shocks are initiated. Two immediate benefits appear to emerge from these reforms for Germany. In the first place, increasing particularly the firepower of the emergency instruments could guarantee that the Eurozone is equipped to financially assist Germany in the future as well if needed. Hence, the envisaged reforms could provide a supranational safety net in case Germany experiences economic hardship. And second, the proposed comprehensive reforms of the Euro intend to make the single currency crisis-resistant for the future, which would make *ad-hoc* crisis-solutions – as were required during the Eurocrisis or as apparent now in relation to COVID-19 – with high immediate costs less likely.

These considerations illustrate that the envisaged EU fiscal integration steps are in fact in the genuine interest of Germany, given the economic interconnection with the Eurozone, the possible safety net stemming from the envisaged EU instruments as well as to prevent an anew crisis-situation. The constitutional appraisal of possible EU fiscal integration steps could thus more thoroughly rely on the added benefits that stem from such integration measures for the German constitutional order, thereby relaxing the outlined constitutional resistance expressed through *overall budgetary responsibility*.

336 Federal Ministry for Economic Affairs and Energy (BMWi), *Facts About German Foreign Trade* (German Government 2019) 1.

337 Thieß Petersen, Michael Böhmer and Henning vom Stein, 'How Germany Benefits from the Euro in Economic Terms (Policy Brief # 2013/01)' (*Bertelsmann Stiftung*, 2013) <https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Presse/imported/downloads/xcms_bst_dms_37730_37731_2.pdf> accessed 20 December 2020 6.

3.1.4 Focus on procedural dimension of overall budgetary responsibility

A final example for a more consistent and thus more flexible German constitutional approach towards the proposed EU fiscal integration steps is to re-evaluate the creation of the substantive requirement formulated by the Constitutional Court under *overall budgetary responsibility* which appears to constitute a major hurdle for more far-reaching integration proposals.

Notably, the basic assumption underlying this substantive requirement is that the German Parliament actually controls all central budgetary decisions. However, the research established[338] that in reality the German Parliament has only limited discretion in budgetary and fiscal decisions *internally* given the impact of long-term political commitments on the state budget for example through social welfare and pension policy decisions.[339] Yet, in case parliament is not actively determining the majority of budgetary and fiscal decisions given that these are pre-determined by previous parliaments, it is questionable whether EU fiscal integration steps can undermine an internally apparently non-existent fully independent fiscal decision-making space of the German Parliament.

Therefore, the research submitted that instead of introducing an upper limit of financial commitments as substantive requirement under *overall budgetary responsibility*, which can be challenged in light of the apparent reduction in discretionary fiscal decision-making space, the concept could be limited to the procedural requirements. These procedural requirements ensure that the German Parliament retains final control over budgetary commitments – at least as long Article 50 TEU allows for the unilateral withdrawal from EU cooperation. Arguably, this provision allows to retrieve any transferred fiscal competences – and hence a newly elected German Parliament could ultimately reverse EU budgetary commitments if desired.

Thus, it can be argued that the German Parliament retains ultimate control over fiscal decisions as long as it can reverse such commitment. This reversibility opens a political decision-making space that a newly elected parliament can explore if so desired. It furthermore underscores the final decision-making responsibility of the German Parliament and protects cornerstones of the German constitutional approach to EU cooperation, namely the derived status

338 Cf. Chapter III Section 4.2.2.5.

339 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8-11; Seemingly, German Governments tend to introduce new social benefits after being elected, cf. Thiele, 'The 'German Way' of Curbing Public Debt: The Constitutional Debt Brake and the Fiscal Compact – Why Germany Has to Work on Its Language Skills' 30-31; Overall, the trend of decreasing fiscal democracy or decision-making space can be observed in other states, too, cf. Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 53-54, 71; Roženský, 'Mandatory Expenditure and the Flexibility of Fiscal Policy in the Czech Republic (in Czech: Mandatorní Výdaje A Flexibilita Fiskální Politiky V Ċr)' 47, 57; Steuerle, 'America's Related Fiscal Problems' 878.

of the EU as well as *Kompetenz-Kompetenz*. The research furthermore substantiated that the availability of only future, medium-term reversibility corresponds to the *internal* budgetary and fiscal planning process which is increasingly dominated by long-term political decisions, and which appears to comply with constitutional requirements under German democracy.[340]

Adopting the suggested approach – apparent in the *internal* constitutional appraisal of fiscal decisions – to EU-related proceedings would offer additional flexibility for German participation in the proposed EU fiscal integration steps. Within this assessment, the focus would then rest on procedural involvement of the German Parliament and the underscored cornerstones of the German perspective on EU cooperation. These requirements correspond with the procedural requirements formulated under *overall budgetary responsibility*.

3.1.5 Interim conclusion on the German constitutional approach

Jointly, these considerations could be employed to devise the German constitutional assessment of EU fiscal integration steps and in particular the concept of *overall budgetary responsibility* in a more flexible manner.

As established, this additional *constitutional flexibility* could result from a stronger focus on the political discretion that the German Parliament enjoys when devising EU integration steps within the constitutional appraisal of the German Constitutional Court. Notably, it would enable the Court to be more receptive towards the outlined economic, political and societal advantages stemming from EU cooperation. Moreover, these advantages are also apparent on the constitutional level, as outlined throughout the research. Namely, the EU offers an additional supranational layer of protection for core constitutional principles such as democracy, the rule of law or the protection of fundamental rights. Other constitutional authorities even highlighted that the attainment of some of these principles required supranational cooperation.[341] Thus, the proposed more flexible conception of German constitutional limits can ultimately even contribute to a more effective protection of the underlying German constitutional principles.

But this constitutional flexibility can equally derive from a stronger focus on the procedural requirements under *overall budgetary responsibility*, an explicit acknowledgment that Article 50 TEU secures ultimate control of the German

340 Cf. the conclusions drawn within the assessment in Chapter III Section 4.2.2.5.

341 As previously established in relation to the Polish Constitutional Tribunal, cf. *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; Cf. as well: Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

Parliament over EU-centered budgetary prerogatives as well as from an abstention to enforce an abstract substantive dimension of *overall budgetary responsibility*. Ultimately, this modified constitutional approach would also be an acknowledgment of the apparent necessity for national parliaments to make long-term, major budgetary commitments which are binding upon successive parliaments as well – which is accepted within the *internal* jurisprudence of the German Constitutional Court.

Overall, this suggests that the German Constitutional Court could generate additional constitutional space for the outlined EU fiscal integration steps that appear to currently conflict with *overall budgetary responsibility*. In addition, the proposed more flexible approach to EU fiscal integration would enable the German Court to more effectively protect the core constitutional values that are at the center of its constitutional jurisprudence. However, the potential success of the proposed approach mainly depends on the receptiveness of the German Court which is confronted with the highly challenging task of balancing national constitutional considerations that are protected by the absolute *eternity clause* with the prospect of continuous EU integration.

3.2 Best practice examples

An additional method to generate *constitutional flexibility* identified by this research is the exchange of *best practices* across constitutional systems. Through a transnational exchange of constitutional reasoning and arguments[342] the seemingly strict national constitutional limitations might be redesigned. The exchange of constitutional reasoning is facilitated due to the detected overlap of constitutional principles protected throughout the various assessed constitutional systems – including democracy, sovereignty and parliamentary prerogatives – employed by the respective constitutional authority when reviewing the compatibility of EU fiscal integration proposals with the domestic constitution.

In particular, the conception of EU cooperation in both Finland and Poland appears to offer a constructive perspective on how to balance the principles of national sovereignty with EU integration ambitions. Notably, it was previously established that the Finnish Constitutional Law Committee emphasized in its decisions the wider benefits that EU cooperation entails for Finland.[343] Specifically, the Committee highlighted in its interpretation of Finnish sover-

342 Ginsburg and Dixon, 'Introduction' 4.

343 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 328-332; Ojanen, 'The EU at the Finnish Constitutional Arena' 245; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 100.

eignty that EU cooperation constitutes an exercise of sovereign powers and that it increases the reach of national powers through the pooling of competences at the supranational level.[344] Similarly, the Polish Constitutional Tribunal highlighted that the 'modern' interpretation of Polish sovereignty presupposed international cooperation in order to achieve wider constitutional commitments established within the Polish Constitution.[345]

Both examples illustrate that the national constitutional authorities conceptualize EU integration not exclusively as a decrease in national, sovereign decision-making competences but instead as a potential increase in the reach or impact of sovereign powers. Hence, through EU cooperation Member States might be able to attain wider national constitutional objectives, for example the protection of fundamental rights, environmental objectives or the supranational stabilization of core national values, but also to compete in a globalized world, for example by negotiating trade agreements as Union of 27 Member States instead of negotiating as individual country.

Taken together, this suggests that traditional constitutional principles, such as national sovereignty, can be construed in a more EU-friendly and yet equally effective manner in case national constitutional authorities are willing to consider the resulting national benefits stemming from EU cooperation in their respective appraisal of EU integration steps. As highlighted, through an exchange of constitutional reasoning, other national constitutional authorities could implement a similar interpretation which could render the highlighted EU integration more attainable. At the same time, the compatibility assessment illustrated that even these flexible *best practices* could potentially reach a limit when confronted to more far-reaching budgetary and fiscal integration steps that would alter the general *modus operandi* of the EU.

Therefore, the potential constitutional flexibilization through these *best practices* remains ultimately limited. Yet, they could mark the starting point of a more receptive national constitutional approach towards EU fiscal integration steps and trigger a necessary engagement with the question how to adapt existing national and internal doctrines to an EU and global reality. When applying these *best practices* to the most rigid limits apparent in Germany, it seems that the previously outlined flexibilization of *overall budgetary responsibility* through consistent application could be supplemented by a 'modern' or

344 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334.

345 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; Cf. as well: Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

more receptive interpretation of German democracy, the underlying constitutional principle protected by *overall budgetary responsibility*. Notably, the German Constitutional Court could include the direct and indirect benefits of EU cooperation for national democracy – for example apparent in economic, legal and political advantages – into the constitutional appraisal. Ultimately, this could contribute to a more flexible interpretation of German democracy *vis-à-vis* EU fiscal integration steps.

3.3 Re-conception of national approach and EU benefits

A final proposition relates to the potential re-conception of the assessed national *constitutional identity limits*. Notably, the compatibility assessment revealed that these *constitutional identity limits* appear to be devised and designed as competence-centric limitations against EU integration steps. National constitutional authorities in all assessed Member States identified a list of national competences as particularly important for national sovereignty or democracy under their *constitutional identity* doctrines.[346]

According to this conception, the conferral of such important competences to the EU-level triggers the *constitutional identity limit* by default. This was illustrated within the previous compatibility assessment which demonstrated that the conferral of budgetary and fiscal competences, which qualify as particularly important competence areas under the national sovereignty and democracy throughout all assessed Member States, in itself is sufficient to trigger the respective *constitutional identity limit*.

346 *On France, cf. Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119-120; *On Germany, cf. Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' paras 127, 167; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; *On Poland, cf. Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314; *And on Spain, cf.* Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

For example, the German Constitutional Court focusses on the impact of an envisaged financial commitment on the German budget[347] to determine whether increased German EU contributions or additional liabilities reduce German budgetary autonomy.[348] Through this conception, the German Constitutional Court emphasizes the direct impact of EU financial commitments for the German state budget without, however, thoroughly considering the added benefit that might stem from the conferral of these competences to the EU-level. Hence, the apparent competence-centric conception of *constitutional identity limits* seems to render national constitutional systems partially un-receptive for benefits that might arise for national budgetary and fiscal prerogatives through supranational cooperation. A more flexible approach, which acknowledges the benefits that supranational cooperation might entail and which thereby is not only focused on preserving a set of core competences at the national level, could reduce the identified constitutional conflicts.

The proposed constructive conception of national *constitutional identity limits* could be further stimulated by EU fiscal integration proposals by connecting fiscal integration steps to actual EU achievements. For example, an EU taxation power or new EU levy could be devised in a substantive area that is a direct consequence from EU cooperation and thus a revenue stream that the national budgetary legislator would not have had at its disposition without such supranational cooperation.[349] The EU would then generate its revenue through its own activities or advantages directly generated from EU cooperation, which has to be conceptually differentiated from the traditional budgetary decision-

347 Cf. for example the wording of the Constitutional Court in the recent PSPP-decision *Quantitative Easing (PSPP) Final Judgment*: '(104) [...] It is for the German Bundestag, as the organ directly accountable to the people, to take all essential decisions on revenue and expenditure; this prerogative forms part of the core of Art. 20(1) and (2) GG, which is beyond the reach of constitutional amendment (cf. BVerfGE 70, 324 <355 and 356>; 79, 311 <329>; 129, 124 <177>; 142, 123 <195 para. 138>). It falls to the Bundestag to determine the overall financial burden imposed on citizens and to decide on essential expenditure of the state (cf. BVerfGE 123, 267 <361>). Thus, a transfer of sovereign powers violates the principle of democracy at least in cases where the type and level of public spending are, to a significant extent, determined at the supranational level, depriving the Bundestag of its decision-making prerogative [...].'; The requirements stemming from the concept seemingly do not include the potential benefits stemming from budgetary integration for Germany, cf. Nettesheim, '"Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 773-776.

348 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 210-213; *ESM-Treaty and Fiscal Compact* para 163; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

349 As proposed by the *Monti*-Report, cf. Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68, 41-56; And subsequently the European Commission, cf. Commission, *Reflection Paper on the Future of EU Finances* 27-28; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 183; Fabbrini, 'Fiscal Capacity' 129.

making potential available within a Member State under the control of the national legislator. Here, the proposed conception could be considered less contentious under the domestic principle of democracy as the budgetary powers traditionally enjoyed by national parliaments would not be curtailed. Conceptually, the EU would then only occupy budgetary space that it created itself, which should also render such integration steps less contentious under the competence-centric conception of national *constitutional identity limits*.

3.4 Interim conclusion: EU integration as two-way street

Taken together, this suggests that additional *constitutional flexibility* can be generated within the seemingly strict national constitutional limitations. This *flexibility* can be activated through the conducted constitutional consistency assessment, which albeit being limited to the German constitutional approach in this research can be applied to other Member States as well. Furthermore, national *best practices* can stimulate constitutional re-configurations across the EU. Here, the Finnish and Polish example illustrate how traditional national constitutional concepts can be interpreted in a 'modern', more receptive way. And finally, the research identified that *national constitutional identity limits* appear to be devised in a competence-centric manner through which national constitutional authorities consider conferrals of budgetary and fiscal decision-making powers to the EU as a *de facto* conflict with these limits. To that end, the research proposed a more comprehensive constitutional appraisal that allows to filter EU benefits into the constitutional assessment. Furthermore, considering these EU benefits, it was proposed to devise EU fiscal integration proposals based on EU achievements.

Overall, these steps could ease the partially detected national constitutional opposition against EU fiscal integration steps by at the same time offering national constitutional systems an apparently more efficient and effective manner to protect the underlying constitutional values in a changed, globalized world.

4 Final conclusions on the constitutional feasibility of EU fiscal integration

All these observations on the various components of EU fiscal integration proposals and their compatibility with the charted national constitutional space result in a complex, multilayered picture. Notably, core structural proposals such as the initiation of an additional Eurozone budget or an emergency instrument with an underlying funding structure that corresponds to the current Treaty-logic as well as the establishment of an EU Ministry of Finance and enhanced supervision of national fiscal decision-making appear feasible

within the existing constitutional framework, albeit partly requiring confirmation by a qualified parliamentary majority. However, the evaluation equally demonstrated that several core components of the various 'integration' reform proposals, most notably the allocation of discretionary powers to the EU-level, appear constitutionally contested in all assessed Member States.

Concretely, the comparative assessment suggests that the creation of a secondary-law-based emergency instrument – comparable to the ESM-design – to stabilize public investments or to support Member States in the payment of unemployment benefits during asymmetric shocks, as proposed by the European Commission,[350] is compatible with national constitutional law. Similarly, the creation of a (limited) Eurozone budget, as proposed by the EU Five Presidents' Report, the BICC, the Franco-German Meseberg Declaration and as agreed under Next Generation EU,[351] is attainable under national constitutional law if based on the existing EU Treaty-framework, and specifically Article 311 TFEU. It was established within the assessment that the required national budgetary commitments will likely require confirmation by a simple parliamentary majority in Finland and by a two-thirds majority in the German Parliament. As the proposed emergency instruments and the budget would be devised within the EU Treaties, the central and constitutive involvement of national parliaments in the creation of a Eurozone fiscal capacity appears to be secured which arguably pre-empts national constitutional democracy and sovereignty concerns. Furthermore, the assessment illustrated that the required additional funds to sustain the fiscal capacity could be devised under the existing EU Treaty framework, either by increasing the own resources ceilings, as the case with Next Generation EU or as put forward by the BICC-proposal,[352] or by introducing new own resources, as proposed by the HLGOR Report.[353] These funding options will likely require confirmation

350 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 26; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Cf. as well: Craig and Markakis, 'EMU Reform' 1426; Fabbrini, 'Fiscal Capacity' 115; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6.

351 In chronological order: Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Meeting, *Erklärung von Meseberg – Das Versprechen Europas für Sicherheit und Wohlstand erneuern*; Eurogroup, *Term Sheet on the Budgetary Instrument for Convergence and Competitiveness*; Summit, *Statement of the Euro Summit, 14 December 2018 (EURO 503/18)*; Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354); Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 2-3.

352 Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354); Eurogroup, *Term Sheet on the Budgetary Instrument for Convergence and Competitiveness*; Summit, *Statement of the Euro Summit, 14 December 2018 (EURO 503/18)*.

353 Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68.

by a simple majority in the Finnish Parliament – although the size of the funding potential is essential and might alter this assessment – and in Germany a two-thirds majority will likely be applicable. Again, the *constitutional identity limits* seem not to conflict with the proposed funding options, as they are devised under the current EU Treaties and thus preserve the central control of national parliaments. In addition, the comparative assessment revealed that pooling existing EMU competences in a 'Eurozone Ministry' – as proposed by the Five Presidents' Report – is generally attainable if the final decision-making modalities remain unchanged. Finally, the charted constitutional space would enable Member States to agree on additional EU supervision of national budgetary processes as long as these remain *voluntary* and Member States cannot be legally forced to modify their budgetary planning.

In contrast, the implementation of larger, long-term-oriented budgetary commitments, as for example proposed by *Bibow*,[354] or the allocation of discretionary fiscal powers to the Eurozone, which would empower the EU to take and implement independent fiscal decisions, as envisioned by the *Bruegel*-proposal,[355] appear more difficult to achieve within the charted national constitutional space. Notably, the comparative assessment revealed that a two-thirds majority would likely be required to adopt the necessary EU Treaty-changes in Finland. The probability of overcoming this procedural hurdle remains uncertain. In Germany, a conflict with *overall budgetary responsibility* appears to emerge as the central oversight of the German Parliament over budgetary and fiscal decision would be challenged by discretionary EU decisions on these matters. Comparable conflicts with the *constitutional identity limits* in France, Poland and Spain appear to emerge – as will be further explained below. Whilst overcoming the resulting constitutional conflict by constitutional amendment seems practically achievable in France, the high majority thresholds in Poland and Spain for confirming constitutional amendments put the feasibility of these more ambitious EU integration steps into question. These constitutional concerns equally apply to the proposed discretionary funding options, including the introduction of a genuine EU taxation power, as proposed by the Bruegel-proposal,[356] or the issuing of Eurobonds, as initially suggested by the European Commission.[357] Notably, the comparative assessment illustrated that any funding solution, which would offer the Eurozone discretionary funding powers independent from Member States' approval, would likely have to be adopted by a two-thirds majority in Finnish Parliament. In Germany, such discretionary funding powers could even be

354 Bibow, 'Making the Euro Viable: The Euro Treasury Plan' 4.

355 Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5, 7.

356 Ibid 5, 7.

357 Commission, *Green Paper on the Feasibility of Introducing Stability Bonds (COM (2011) 818)*; Cf. as well: Hild, Herz and Bauer, 'Structured Eurobonds: Limiting Liability and Distributing Profits' 252; Mayer and Heidfeld, 'Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds' 422-423.

characterized as a conflict with *overall budgetary responsibility* and therefore be constitutionally unattainable. Similar constitutional concerns appear to emerge in France, Poland and Spain, which suggests that constitutional amendments are required in order to overcome the apparent conflicts with national *constitutional identity limits*. Finally, these concerns equally apply to conferring the power to veto national budgeting to a Eurozone Ministry, as envisioned by the Bruegel-proposal.[358]

When considering the substance of the applicable national constitutional limits, the assessment revealed that the identified concerns against the most ambitious EU fiscal integration steps are based on national sovereignty, national democracy and the parliamentary prerogatives in fiscal competences or a combination of these. Therefore, even in the highly flexible Finnish constitutional system a qualified parliamentary majority appears mandatory to confirm the required conferral of competences to the EU-level. In France, Poland and Spain the anticipated conflict with the *constitutional identity limits* seems to require constitutional amendments and in Germany the reform ambitions appear to collide with the *eternity clause* which constitutes an almost unsurmountable hurdle for EU integration.[359] Therefore, while the constitutional conflicts in France,[360] Poland[361] and Spain,[362] could be overcome by amending the constitutional text with all related practical and procedural difficulties, the German Constitution appears to impose an absolute limitation to these EU fiscal integration ambitions.[363]

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358 Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 170.

359 *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

360 As established by the *Conseil Constitutionnel*, cf. *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 150-151; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272.

361 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157.

362 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

363 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

Although, this suggests that the German *overall budgetary responsibility* limit imposes the most rigid substantive hurdle for EU fiscal integration steps, the strict national procedural requirements apparent in the other Member States seem equally challenging. Therefore, the research identified the proposals which envisage the establishment of a discretionary budgetary capacity, the discretion to engage in EU borrowing, a discretionary tax competence, a veto power for the envisaged Ministry of Finance as well as the enhanced supervision conferring direct enforcement powers for the EU-level as hardly feasible under the current national constitutional space given the apparent conflict with national democracy, national sovereignty and the parliamentary prerogatives in fiscal matters.

Obviously, this conclusion significantly limits the fiscal reform possibilities for the EU, which is why the research employed the concept of *constitutional flexibility* in order to soften the rigid constitutional opposition in Germany, which proves to be the key bottle-neck. Furthermore, in order to ease the apparent constitutional deadlock between EU fiscal integration ambitions and national constitutional concerns more generally the research proposed modifications to the conception of national *constitutional identity limits* as well as the design of EU fiscal integration proposals.

Considering national *constitutional identity limits*, it was established that the assessed national constitutional authorities appear to mainly devise these essential restrictions as competence-centric limitation to EU integration ambitions. As established, the French, German, Polish and Spanish constitutional authority identified a set of core competences that are particularly important for national sovereignty or democracy and that are thus covered by the respective *constitutional identity limit*.[364] The result is that these limits are focused on a shift of competences or decision-making powers from the national to the

364 *On France, cf. Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119-120; *On Germany, cf. Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' paras 127, 167; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; *On Poland, cf. Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314; *And on Spain, cf.* Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

EU-level. This is particularly apparent in relation to budgetary and fiscal competences, which are traditionally important constitutional prerogatives of national parliaments.[365] Given that these competences are identified as particularly important sovereign and democratic powers which are protected by *constitutional identity limits*, EU fiscal integration steps are almost automatically considered as potential interference with these limits. Here, the research proposed an alternative design or conception of *constitutional identity limits* in order to allow for the holistic appraisal of added values and advantages that stem from EU cooperation in these competence areas, which was conceptualized within the *constitutional flexibility* assessment.

As pointed out within the national *best practices*, the consideration of factual benefits stemming from EU cooperation is already conducted by the Finnish Constitutional Law Committee[366] and it appears to offer the opportunity to include the constitutional advantages of EU integration steps into the constitutional appraisal. Ultimately, this could result in a flexibilization of national *constitutional identity* concerns apparent in the assessed Member States without compromising on the effective protection of the underlying constitutional core, which could allow for the implementation of more far-reaching EU fiscal integration steps.

Considering the general conception of EU fiscal integration, it was highlighted that current reform plans focus on the conferral of competences from the national to the EU-level, which sparks the outlined conflict with the competence-centric national *constitutional identity limits*. This focus on 'competence-shifts' appears problematic and the research therefore suggested to modify the conception of EU fiscal integration proposals which could alter the national constitutional appraisal. Notably, EU fiscal integration proposals could be designed based on advantages and benefits directly resulting from EU cooperation. The underlying argument is that EU integration creates or enables Member States to tap fiscal space that would otherwise not be available to the Member States. Hence, EU cooperation results in direct or indirect financial benefits – for example through access to the internal market – which Member States could not have created independently. By devising EU fiscal integration steps within this EU-generated fiscal space, the EU would arguably not undermine traditional national fiscal competences controlled by national parliaments which would remain unaffected. In addition, it could be submitted that as long as

365 Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' 567; Dawson and De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' 827; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

366 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334.

the financial benefits outweigh the financial costs and Member States are thus able to partially exploit the EU-generated fiscal space, supranational cooperation as well as possible EU fiscal integration steps can be characterized as beneficial for the budgetary, financial and fiscal decision-making powers of the Member States.

More generally, the identified potential to locate and activate *constitutional flexibility* within (rigid) national constitutional limits, but also the proposed reflection on how to best design EU fiscal integration in light of national constitutional concerns, both are relevant beyond the EMU. Arguably, national constitutional law and EU law concepts must understand and regulate our current (global) reality in which supranational cooperation entails benefits for national constitutional law, too. Notably, national policy objectives in environmental, health, digital, or defense matters – which are often reflected in constitutional guarantees such as environmental protection or social state principles – can often better and even sometimes only be achieved at the supranational level. The employed *constitutional flexibility* provides national constitutional actors with a tool to more comprehensively include the benefits that supranational cooperation entails for national constitutional objectives.

Overall, this indicates that more far-reaching EU fiscal integration steps could be possible in case the national constitutional space would more comprehensively incorporate EU benefits into the constitutional appraisal and in case fiscal integration proposals are conceptually modified. In the alternative, the compatibility assessment illustrated a variety of feasible reform steps that are compatible with the current national constitutional space. These attainable reform steps would be devised on the basis of the currently existing Treaty-framework, which guarantees the central involvement of national parliaments in the confirmation of any additional financial burden on the respective national state budget. The recent Next Generation EU recovery strategy forcefully illustrates that sufficient legal space – also at the national constitutional level – exists to equip the EU-level with additional financial means if the political actors reach an agreement. Given the identified constitutional hurdles that more far-reaching reform proposals are confronted with as well as the current political tensions within the EU – which mostly relate to the distribution of the envisaged EU fiscal capacities and which constitute a genuine political question that EU fiscal integration steps would have to answer[367] – it appears most realistic to employ this existing legal space to devise a more long-term

367 As pointed out in the Introductory Chapter; Cf. as well: Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 823; Eriksen, *Contesting Political Differentiation – European Division and the Problem of Dominance* 249-250; Oeter, 'Bundesstaat, Föderation, Staatenverbund – Trennlinien und Gemeinsamkeiten föderaler Systeme' 750; Weber, 'Die Reform der Wirtschafts- und Währungsunion in der Finanzkrise' 938; And thus, *re-distributive* policies, cf. on that notion: Sefton, 'Distributive and Redistributive Policy' 607.

framework in order to stabilize the Euro without potentially fueling a new fundamental conflict between the EU and national constitutional authorities.

IX Overall Conclusions and Outlook

1 Tackling the dilemma: Constitutional concerns and EU fiscal integration

The COVID-19-crisis has amplified the urgency of stabilizing the Euro – an imperative that has been widely acknowledged since the eruption of the Eurocrisis.[1] The currently unfolding serious economic disruption and the predicted uneven recovery process across EU Member States might trigger a new, existential challenge for the single currency.[2] Ultimately, this crisis could leave the Eurozone politically and economically more divided than ever – various national and EU interventions were submitted to preempt the feared additional fragilities within the Eurozone. Notably, in anticipation of this grim prospect, the EU agreed on a € 750 billion recovery strategy which has at its core the Next Generation EU recovery fund.[3] Its endorsement illustrates the political capability of committing additional substantial financial means to joint EU action – seemingly within the existing national constitutional framework.

While constituting a significant achievement, Next Generation EU only provides temporary relief and will require structural follow-up in order to lead to a lasting stabilization of the Eurozone. In addition, the negotiations that culminated in this recovery strategy forcefully displayed the inherent challenge in the current design of the EU finances, which awards final control exclusively to the Member States. Notably, the negotiations revealed that Member States were primarily driven by domestic political interests when debating the design of Next Generation EU instead of following a shared EU vision on how to most effectively remedy the unfolding economic disruption,[4]

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1 Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 33-34; Chalmers, Jachtenfuchs and Joerges, 'The Retransformation of Europe' 1; Ritterberger and Schimmelpfennig, 'Kontinuität und Divergenz. Die Eurokrise und die Entwicklung europäischer Integration in der Europaforschung' 389.

2 Partington, 'Inflation Collapses Around the World Amid Coronavirus Pandemic'; Posaner, 'Merkel Warns Against Trade Barriers in Face of Coronavirus Recession'.

3 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20*.

4 Most visible from the negotiations on the overall volume, possible rebates as well as the grant-loan-ratio, cf. Khan and Peel, ''Frugal Four' Fight to Protect EU Budget Rebates'; Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203.

which seems hardly surprising as the EU's recovery strategy is financed through national state budgets. The apparent shortcomings of the EU financing system, which incentivizes Member States to pursue domestic financial interests, has once again pushed the proposed EMU-reforms and fiscal integration steps into the limelight as a potential solution. The envisaged increase in EU supervision over national budgeting,[5] the creation of an additional fiscal capacity at EU-level[6] and the establishment of a Ministry of Finance[7] could fundamentally transform the current EU financing as well as fiscal system thereby potentially making Eurozone decision-making with all its financial implications politically less contentious across Member States.

However, the structural reforms required to achieve a (politically) more resilient Euro face intensifying national constitutional opposition.[8] The consequence appears to be the difficult dilemma from which this research departed and which suggests that EU fiscal integration is both indispensable to stabilize the Euro yet legally impossible to achieve in light of an increasing national constitutional resistance. The research dismantled this dilemma by investigating the legal-constitutional feasibility of EU fiscal integration steps.

Through a comparative evaluation of a sample of national constitutional concerns formulated against EU budgetary or fiscal integration proposals and the subsequent compatibility assessment of these proposals with the charted, de-constructed national constitutional space, this research could refute the absoluteness of this dilemma (2.). To that end, the research has demonstrated that the current legal framework allows for a certain level of fiscal integration

5 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 24; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 8; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6; Cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 55; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 170.

6 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 25-26; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Bibow, 'Making the Euro Viable: The Euro Treasury Plan' 4; Cf. as well: Craig and Markakis, 'EMU Reform' 1426; Fabbrini, 'Fiscal Capacity' 115; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6.

7 Commission, *Completing Europe's Economic and Monetary Union – A European Minister of Economy and Finance*; Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 27; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 14, 18; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-61.

8 Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure' 1334; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 100; Schorkopf, 'The European Union As an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' 1232.

that is, however, restricted by the requirement to preserve the central power of Member States in fiscal decision-making (3.).

Subsequently, the research introduced two transformative propositions that could create additional constitutional space in order to accommodate more far-reaching EU fiscal integration steps. According to the first proposition, national constitutional limits to EU fiscal integration proposals could be read to entail a degree of *constitutional flexibility*, which can be located and activated through specific methods and which can address the formulated constitutional concerns against a more fiscally integrated Eurozone in an effective manner (4.). According to the second proposition, EU fiscal integration proposals can defuse central national constitutional concerns by altering their narrative and by embracing national parliaments as central actors in the administration of the envisaged additional Eurozone fiscal capacities (5.). These propositions represent achievable transformative ideas that are rooted in the current legal-political discussion yet have the potential to contribute to reviving the seemingly deadlocked national constitutional debate on more far-reaching EU fiscal integration steps.

Finally, the resulting nuanced overview provides the opportunity to reflect more broadly on the future interaction between national constitutional law and EU integration in core state policy areas (6.).

2 CHARTED COMPARATIVE CONSTITUTIONAL SPACE FOR EU FISCAL INTEGRATION

Through a comprehensive comparative assessment, the research established that national constitutional concerns over EU budgetary and fiscal integration steps appear to surface in a range of constitutional systems regardless of their general approach to EU integration. Here, the research distinguished between more flexible[9] as well as more rigid constitutional systems[10] and subsequently assessed, based on two representative examples, the system's respective potential to accommodate EU fiscal integration. Interestingly, the core constitutional concerns under the more flexible Finnish and the more rigid German constitutional system seemingly coincided. Notably, the Finnish Constitutional Law Committee identified potential conflicts between the ambition to integrate budgetary or fiscal competences and Finnish sovereignty, parliamentary control

9 Heringa, *Constitutions Compared – An Introduction to Comparative Constitutional Law* 9; Grewe, 'Methods of Identification of National Constitutional Identity' 43; Dixon, 'Constitutional Amendment Rules: a Comparative Perspective' 102.

10 Heringa, *Constitutions Compared – An Introduction to Comparative Constitutional Law* 7-8; Dixon, 'Constitutional Amendment Rules: a Comparative Perspective' 102; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123.

over the state budget as well as Finnish democracy.[11] Similarly, the German Constitutional Court established its *overall budgetary responsibility* limit based on the principle of democracy and the need for central parliamentary control over budgetary decisions.[12] When comparing both constitutional approaches, it can thus be substantiated that the normative constitutional basis employed by the national constitutional authorities when addressing EU budgetary and fiscal integration steps overlaps. This comparative conclusion can be confirmed by the research findings on the French, Polish and Spanish *constitutional identity limits*, which similarly protect budgetary and fiscal competences based on national sovereignty, democracy or parliamentary-related institutional arguments. Despite this apparent overlap in the underlying core constitutional concerns, the subsequent constitutional consequences and the adopted constitutional strategies to address these concerns vary significantly across the Member States, and this can be related back to the initial distinction between flexible and rigid constitutional systems.

Notably, in Finland, the constitutional concerns against EU fiscal integration steps appear to mainly result in procedural obstacles. In light of the constitutional relevance of EU fiscal integration steps, the Finnish Constitutional Law Committee will likely require that the Finnish Parliament approves the necessary conferral of powers by a qualified two-thirds majority according to Section 94 (2) (2) Finnish Constitution.[13] In addition, the Committee will likely insist on comprehensive parliamentary involvement in the national preparation of EU secondary law based on Section 96 Finnish Constitution.[14] However, the

11 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458-459; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

12 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' 807-808.

13 *Commission's Draft EU Recovery Plan and MFF Planning* 12; *On the Establishment of a European Monetary Fund* 3-4; *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

14 Which corresponds to the Committee's approach during the Eurocrisis, cf. *Adoption of the EU Six-Pack Legislation*; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-

Committee refrained from imposing substantive limits to the parliamentary power to pursue EU integration steps in the past. The absence of substantive limitations to EU integration ambitions seems to derive from the Finnish model of constitutional review conducted by a parliamentary committee,[15] the constitutional history of Finland[16] as well as the strong focus on parliamentary sovereignty.[17] Although the qualified majority threshold could render EU fiscal integration politically challenging, it appears that the Finnish constitutional order does not impose substantive legal-constitutional obstacles to such integration ambitions.

In contrast, the German Constitutional Court established its *overall budgetary responsibility* doctrine as an absolute limitation to the powers of the German legislator by invoking the German *eternity clause*.[18] Based on this doctrine, the Court demands that central budgetary decisions remain permanently under the control of the German Parliament, which translates into procedural and substantive requirements for the conferral of fiscal competences to the EU-level. Procedurally, the Court insists that the conferral of fiscal powers is strictly limited in volume and is specific to the pursued objectives. For larger financial commitments, the Court requires that the German Parliament remains actively involved in its administration and that it retains the competence to determine how the available funding is distributed.[19] Notably, it requires that EU commitments do not undermine German budgetary autonomy, which sets an abstract constitutional limit on the prospect of fiscal integration. Different to the Finnish constitutional approach, which allows for constitutional concerns

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Making?' 452; Husa, *The Constitution of Finland – A Contextual Analysis* 47; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556.

15 Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 219; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 172 para 32; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 26; Lavapuro, 'Constitutional Review in Finland' 132.

16 As established, historically the Finnish constitutional system relied on *exceptive enactments* which enable parliament to overcome substantive constitutional conflicts without amending the Finnish Constitution, which illustrates the historically-rooted flexibility; On exceptive enactments, cf. Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 220; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 307-308.

17 Ojanen, 'The EU at the Finnish Constitutional Arena' 254; Lavapuro, Ojanen and Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' 509; Suksi, 'Finland' 88.

18 *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

19 *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 107; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297.

to be overcome by the legislator, the resulting German constitutional limit cannot be overcome by the legislator.[20]

Comparing both constitutional approaches, this suggests that substantive constitutional limits, which are formulated as *constitutional identity* concerns in Germany, constitute the strictest material obstacles to EU fiscal integration. Based on this observation, the research investigated whether the absolute conception of the German *constitutional identity* limit is a particularity of the German constitutional order or whether *constitutional identity* limits in other EU Member States have a comparable limiting effect on the proposed EU fiscal integration steps.

Through the subsequent *micro-comparison* of the French, the Polish and the Spanish *constitutional identity limits* the research further substantiated the observed overlap of protected constitutional principles. Notably, all three assessed limits identified budgetary and fiscal competences as particularly important parliamentary prerogatives protected by national sovereignty and democracy.[21] In addition, the research detected that the examined *constitutional identity limits* are mainly conceptualized as competence-centric limitations that exclude certain core state powers from the scope of supranational cooperation. The apparent underpinning assumption is that the conferral of budgetary and fiscal competences in itself can be sufficient to trigger *constitutional identity* concerns, given the traditional importance of these competences for national sovereignty and democracy.[22] National authorities seem similarly concerned that the conferral of these competences could alter national political decision-making through a modification of EU cooperation in case discretionary, political

20 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33.

21 *On France: Fiscal Compact* para 21; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119-120; *On Spain:* Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; *On Poland: Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

22 Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

powers are allocated to the EU.[23] However, despite these serious constitutional concerns, the research revealed that the French, Polish and Spanish *constitutional identity* limits can ultimately be overcome by the constitution-amending legislator,[24] this in contrast to the German *constitutional identity limit*. Nevertheless, the requirements imposed to enact constitutional amendments and the surrounding national practice reveal that the attainability of such a constitutional amendment is uncertain in Poland[25] and in Spain.[26] Hence, although the French, Polish and Spanish limits can be distinguished from the German *constitutional identity limit* based on their nature and general conception, the practical limiting effect of the Polish and Spanish *constitutional identity limit* is comparable to the German one given the seemingly low likelihood of successful constitutional amendments.

In addition, the evaluation of the national *constitutional identity limits* displayed the central position that national constitutional authorities occupy

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23 *Germany: Quantitative Easing (PSPP) Final Judgment* para 102; *ultra vires* review is based on the assumption that the EU has a limited mandate, cf. *OMT-reference* para 37; Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 929; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274; *France: Lisbon Treaty* para 8; Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 140; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 877; *Spain: Treaty Establishing a Constitution for Europe* Section II.2.; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175; *Poland: Treaty of Lisbon* Sections III.2.2. and III.2.3.; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 500.

24 *France: Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272; *Spain: Catalan Independence Declaration* Section II. 7.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 281; Ahumada Ruiz, 'The Spanish Constitutional Court' 636; Álvarez, 'Die spanische Dogmatik der Verfassungstreue – Geschichte einer fehlgeschlagenen Rezeption des deutschen Verfassungsdenkens' 442; *Poland:* Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139.

25 Cf. requirements in Article 235 (6) Polish Constitution; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

26 Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 545-548; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 85-86.

in determining the relationship between national constitutional law and EU integration steps. Strikingly, it is through the jurisprudence of the Constitutional Court that the German *eternity clause* could emerge as a strict limit to EU fiscal integration.[27] Similarly, the French, Polish and Spanish *constitutional identity limits* are primarily inventions of the national constitutional authorities.[28] This shows that EU integration is not only dependent on national parliaments and governments, but that in light of *national constitutional identity* reservations the attainability of EU integration increasingly depends on domestic constitutional authorities that adjudicate on the compatibility of EU integration with national constitutional law. Given the resulting pivotal position that national constitutional authorities occupy, the proper functioning of these authorities has to be of vital interest for the EU. Therefore, the highlighted adverse constitutional development in Poland, which affected the Polish Constitutional Tribunal,[29] triggers serious concerns regarding the continued reliability as well as the persistence of the established Polish jurisprudence – and with it concerns regarding the actual constitutional restrictions deriving from the Polish *constitutional identity limit* for EU fiscal integration steps. Aside from the Polish case, the important role of national constitutional authorities in determining the scope for EU integration steps appears to necessitate a high degree of attention at the EU-level to the national constitutional reasoning when devising EU integration.

3 Constitutionally attainable EU fiscal integration steps

In the second part of the research, the conducted compatibility assessment revealed that the charted national constitutional space allows for the implementation of several proposed EU fiscal integration steps, provided that these

27 *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

28 *On France: Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 150-151; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272; *On Spain: Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57; *And on Poland: Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139.

29 Sadurski, *Poland's Constitutional Breakdown* 2-3, 206-207; Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' 421; Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice After LM' 18.

are strictly limited in size, preserve the central control of national parliaments over budgetary and fiscal matters and ensure that core political decisions – that concern the collection and the distribution of money – remain at the national level. Based on these national constitutional requirements, it was concluded that the proposed allocation of new, tax-based 'own resources', the creation of an additional budgetary capacity under Article 311 TFEU, the establishment of further emergency instruments modeled on the ESM-structure, further supervisory tools with non-binding character and possibly even the creation of an EU Ministry of Finance are generally compatible with the charted national constitutional space and thus constitutionally attainable, albeit presumably requiring qualified parliamentary support in both Germany as well as Finland – and thus likely also in other EU Member States.

Overall, this suggests that decisive reform steps can be taken such as the initiation of a Eurozone-budget or the allocation of new revenue without triggering rigid constitutional opposition. Yet, it also appears that the resulting reform potential would be limited to the current EU-Treaties. In turn, this would not permit the type of long-term oriented innovations of the Eurozone which are deemed necessary by more far-reaching fiscal 'integration' proposals.[30] These more far-reaching fiscal integration proposals centrally aim at the conferral of discretionary competences to the EU-level to enable the Eurozone to take political decisions independently from continuous national parliamentary approval, which sits uneasily with the current conception of national democracy, national sovereignty and constitutionally secured national parliamentary prerogatives. Consequently, under a conventional *face-value* application of these national constitutional limits a fundamental alteration of the EMU remains highly precarious with possibly adverse implications for the viability of the Euro. Therefore, the research introduced two transformative propositions in order to ease the apparent conflict between ambitious EU fiscal integration reform needs and restricting national constitutional concerns.

4 TRANSFORMING NATIONAL CONSTITUTIONAL LIMITS THROUGH *CONSTITUTIONAL FLEXIBILITY*

The first transformative proposition relates to the increased flexibility of national constitutional concerns against far-reaching EU fiscal integration steps.

30 For example, the Five Presidents' Report, cf. Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Or the Bruegel-proposal, cf. Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5, 7; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 226-227; Craig and Markakis, 'EMU Reform' 1420, 1422-1423; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 48-49; Fabbrini, 'Fiscal Capacity' 125; Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 254.

The research established that seemingly rigid national constitutional approaches might, on closer inspection and with sufficient judicial goodwill, contain a degree of *constitutional flexibility*. It was substantiated that this *constitutional flexibility* could enable national authorities to construe national constitutional approaches to EU integration in a more open but still effective manner, thereby potentially facilitating additional EU-level fiscal integration steps. Given that the German *constitutional identity limit* emerged as the most rigid substantive restriction to EU fiscal integration, the research employed three different methods to identify such *constitutional flexibility* within the German constitutional approach.

These methods include the consistent application of the constitutional framework (4.1.), the identification and application of domestic *best practices* (4.2.), as well as the increased focus on the added benefit of EU (fiscal) integration for the national constitutional order (4.3.). Although the research applied these methods in an exemplifying fashion to the German *constitutional identity limit*, the employed methods can be equally extended to other national constitutional systems in order to similarly locate and activate sources of *constitutional flexibility*.

4.1 Consistent application of the national constitutional framework

A first method employed by the research to generate *constitutional flexibility* within the German constitutional approach is the proposed consistent application of the applicable constitutional framework. The *micro-comparison* demonstrated the existence of an apparent constitutional double standard in the jurisprudence of the German Constitutional Court at the disadvantage of EU integration measures.

Notably, this double standard can be detected in the application of the established constitutional standing requirements, which makes it comparably easier to proceed against EU measures before the Constitutional Court.[31] It can equally be detected in the application of the *eternity clause*, which is rarely employed *internally* and yet is a focal point in the constitutional assessment of EU-related matters. It was demonstrated that this practice undermines the *ultima ratio* function that the *eternity clause* traditionally has in the German constitutional order.[32] And it can equally be identified in the conception of

31 Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 190-197; Klein and Sennekamp, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' 949.

32 Möllers and Redcay, 'Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union?' 425-426; Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 763; Schorkopf, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' 263.

overall budgetary responsibility. Notably, the research established that the core premise of this important EU-related doctrine – namely that the German Parliament takes all central budgetary and fiscal decisions – can be challenged. The evaluation of the German state budget illustrated that most public spending is in fact determined by so-called long-term policy decisions.[33]

In light of these three instances, the research proposed a three-stepped *constitutional roadmap* which is illustrated in *Figure 24.* This *roadmap* outlines how the adherence to a consistent interpretation of the applicable national constitutional framework could possibly reduce future conflicts between German constitutional law and EU (fiscal) integration steps.

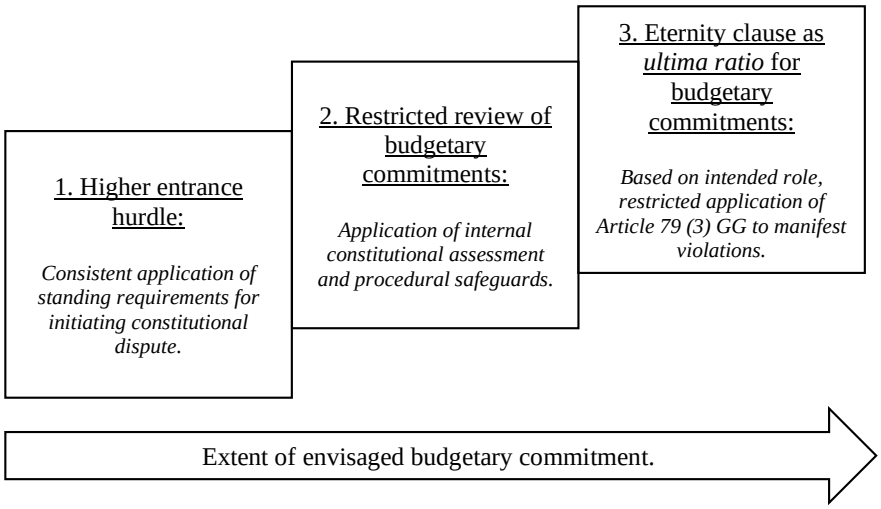

Figure 24: Roadmap to locate flexible constitutional space in Germany

The research explained that the proposed consistent application of the German constitutional framework comprises a constitutional imperative under the rule of law and legal certainty considerations,[34] and is also required in order to pay respect to the constitutionally enshrined division of powers and the constitutional duty to support European cooperation. And finally, the research pointed out that the consistent application of constitutional provisions appears

33 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8.

34 Kischel, 'Artikel 3 GG – Gleichheit vor dem Gesetz' para 83; Which is secured by employing accepted interpretation methods, cf. Schäfers, 'Einführung in die Methodik der Gesetzesauslegung' 886.

equally required under EU law itself as national authorities are required to engage in sincere cooperation with the EU and its institutions.[35]

4.2 Creating constitutional flexibility through domestic best practices

Second, building on the observation that constitutional concerns against EU fiscal integration steps derive from similar underpinning constitutional principles, the comparative research allowed the identification of constructive *best practices* amongst the various strategies national constitutional systems and actors adopt to protect these overlapping constitutional concerns.

The research illustrated that such *best practices* can be partially identified in the more flexible Finnish constitutional approach to EU integration. These *best practice* examples include the Finnish parliamentary mandating system according to which the Finnish Parliament participates in the *ex ante* preparation of EU decisions in a comprehensive and constitutionally secured fashion that is politically respected.[36] These examples also include the constitutional review conducted by the Finnish Constitutional Law Committee which incorporates factual benefits stemming from EU cooperation into the constitutional assessment thereby resulting in a constructive conception of Finnish sovereignty,[37] which is employed in a comparable manner by the Polish Constitutional Tribunal.[38] The research demonstrated how these *best practice* examples could address and partly dispel German constitutional concerns raised based on *overall budgetary responsibility*.[39]

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35 As enshrined in Article 4 (3) TEU; Cf. as well: Christian Calliess and Anita Schnettger, 'The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism' in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 361.

36 *Adoption of the EU Six-Pack Legislation* 4-5; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458; Ojanen, 'The Europeanization of Finnish Law' 169.

37 As highlighted, cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 328-332; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 100.

38 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; Cf. as well: Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32.

39 On these concerns, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at

The exemplary involvement of the Finnish Parliament in EU decision-making and the Constitutional Law Committee's recognition of this constitutionally secured parliamentary participation could equally address the German procedural requirements under *overall budgetary responsibility*. Considering the Finnish example in broader detail, it appears that given the interplay of constitutional rules and the institutional acceptance of parliamentary involvement in preparing EU decisions, the Finnish Parliament evolved into a central domestic authority that can influence Council and European Council decision-making. The Finnish example further illustrates that such effective participation does not necessarily require a legally binding parliamentary vote[40] but that political mandates can work as effectively in guaranteeing parliamentary control over such EU decisions. Hence, even once competences are conferred to the EU-level, the Finnish Parliament retains vital influence on supranational decisions secured through the constitutional framework.

In light of this example, the German Constitutional Court could similarly embrace the opportunities stemming from Article 23 (3) GG by considering parliamentary involvement in EU decisions and by more consistently relying on the provision to establish not only parliamentary control over governmental action at EU-level, but to employ it as a forceful constitutional basis to provide the German Parliament with its own genuine role in EU matters. Put differently, instead of being an accessory to the government, parliament could obtain stronger and independent political influence on EU decisions, as exemplified in Finland. Concretely, the application of the Finnish *best practice* example could ease German constitutional concerns in relation to the required comprehensive parliamentary involvement at EU-level, prominently expressed in relation to the EFSF- and the ESM-Treaty.[41] Instead of requiring specific procedural arrangements under the respective EU agreements, the Court could focus on the possibilities deriving from Article 23 (3) GG. For example, the required continuous parliamentary involvement under the ESM-Treaty to evaluate financial risks[42] could be safeguarded by the proposed *best practice* use of parliamentary mandating systems. Parliament could then forward its views to the German Government, which might consider these politically binding – with the option of parliament to proceed against any divergence from its position either politically or constitutionally in front of the German Constitutional Court. The result would be an enhanced standing of the German

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the Occasion of the *Gauweiler* Case' 927.

40 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 27-28; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459-460; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 205.

41 *ESM-Treaty and Fiscal Compact (interim relief)* para 107; *Participation of Members of German Parliament in the EFSF* paras 109-111.

42 Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23.

Parliament in EU matters and the consequential emerging of a political culture that protects this parliamentary involvement in EU matters, as apparent in Finland.

An additional advantage of the Finnish model is that the Grand Committee can communicate positions on behalf of parliament, after receiving the relevant views of other parliamentary committees.[43] If necessary, this allows for the speedy handling of EU affairs by the Finnish Parliament. This contrasts with the current German model, which prescribes that decisions with budgetary and fiscal implications have to be taken by the plenary given the overall importance of the affected competences as well as given the parliamentarians' right to equally participate in all relevant parliamentary affairs.[44] Yet, employing the available explicit constitutional option in Article 45 (2) GG to increasingly delegate EU matters to the responsibility of the European Committee could ensure the more efficient involvement of the German Parliament through faster decision-making. Such delegation is also democratically secured in two regards. First, the constitutional legislator included the possibility of delegating responsibilities in EU affairs to the European Committee. And second, the initial conferral of powers is ratified by the German Parliament. Therefore, an empowerment of the parliamentary committee seems less contentious and could secure speedy national parliamentary involvement in EU affairs. Overall, if the German Constitutional Court were to accept that the current system under Article 23 (3) GG could provide a workable route for parliamentary involvement in EU matters, this might also relax the substantive democracy concerns raised towards EU fiscal integration. It could allow for the emergence of a hybrid model of national parliamentary involvement in EU budgetary or fiscal decision-making through a specialized parliamentary committee.

An additional *best practice* element is the inclusion of factual benefits of supranational cooperation in the constitutional assessment of EU integration steps. According to the Finnish Constitutional Law Committee, EU integration steps do not only challenge Finnish sovereignty but they can factually increase sovereign competences through shared decision-making at EU-level.[45] Similarly, the Polish Constitutional Tribunal submitted that the 'modern' interpretation of national sovereignty warranted supranational cooperation in order to attain

43 Miller, 'Finnish Judges and the European Union: An American Perspective' 503; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 555.

44 *Participation of Members of German Parliament in the EFSF* paras 131, 136; Cf. as well: Bumke and Voßkuhle, *German Constitutional Law – Introduction, Cases, and Principles* paras 1634-1636.

45 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 328-332; Ojanen, 'The EU at the Finnish Constitutional Arena' 245; Cf. in that regard as well: Dieter Grimm, Tobias Reinbacher and Mattias Wendel, 'European Constitutionalism and the German Basic Law' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 289-290.

national constitutional objectives.[46] Building on these examples, the research illustrated how the German Constitutional Court could potentially create additional flexibility under its substantive requirements of *overall budgetary responsibility* notably by filtering various factual benefits into the constitutional appraisal. A general readiness to follow this approach – albeit with a slight variation – could be detected in the German constitutional assessment of the ESM-Treaty where the Court concluded that not establishing the ESM would have resulted in hardly predictable financial risks.[47] Following the Finnish and Polish *best practice* examples, the inclusion of factual benefits could be further extended, as will be substantiated in broader detail in relation to the third method below.

4.3 Immediate and indirect benefits of EU cooperation

A final tool employed to locate and activate *constitutional flexibility* – applied within this research in an exemplary fashion to the German constitutional approach – is to better incorporate immediate and indirect benefits of EU cooperation into the national constitutional assessment of EU integration steps. Building on the various EU integration theories,[48] it can be ascertained that Member States pursue specific objectives when acceding to the EU. These may vary from mainly trade and economic considerations[49] to broader political and societal goals that states aim to attain through supranational institutions[50] depending on the underpinning integration theory.

Regardless of the specific national reasons for EU accession, these theories suggest that EU membership offers a range of incentives that may outbalance

46 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; Cf. as well: Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

47 *ESM-Treaty and Fiscal Compact (interim relief)* para 167.

48 For an overview, cf. Liesbet Hooghe and Gary Marks, 'Grand Theories of European Integration in the Twenty-First Century' (2019) 26 Journal of European Public Policy 1113, 1114-1118; Sergio Fabbrini, 'The Euro Crisis Through Two Paradigms: Interpreting the Transformation of the European Economic Governance' (2017) 18 European Politics and Society 318, 322-324; Craig and de Búrca, *EU Law Text, Cases, and Materials*.

49 Particularly within intergovernmentalism, cf. Hooghe and Marks, 'Grand Theories of European Integration in the Twenty-First Century' 1114; Fabbrini, 'The Euro Crisis Through Two Paradigms: Interpreting the Transformation of the European Economic Governance' 322-323.

50 For example, in neo-functionalism, cf. Hooghe and Marks, 'Grand Theories of European Integration in the Twenty-First Century' 1114; Fabbrini, 'The Euro Crisis Through Two Paradigms: Interpreting the Transformation of the European Economic Governance' 323-324.

the inherent costs that supranational integration brings with it.[51] These incentives generally prevail after accession – for example, they are visible economically through permanent access to the internal market but are also apparent in the relative increase in national powers by pooling sovereign competences at the EU-level, thereby enhancing the national position in negotiating international trade agreements as the Union of 27 Member States.[52] This suggests that the domestic reasons for accession to the EU and the anticipated benefits do not merely vanish once membership is achieved, but these reasons actually transform into continuous grounds of justification for membership. Although national constitutional systems signal their ability to consider the benefits stemming from EU integration, which can be detected from the EU law friendliness doctrines apparent in some Member States,[53] a comprehensive assessment of possible EU benefits resulting from a specific conferral appears not to be conducted. To that end, the research outlined examples of immediate and indirect benefits that EU integration steps appear to entail which could counter-balance national constitutional concerns.

Notably, as substantiated in Chapter VIII, this could entail that the constitutional appraisal not only focusses on the volume of a proposed financial commitment, but that it equally considers direct financial benefits stemming from such commitment. Here, the Commission's concept of 'operating budgetary balance' could provide useful guidance.[54] Following the current EU financing rules, Germany contributed a substantial € 25,8 billion to the EU budget in 2019. However, when including the direct return through EU funds into the equation, the operating budgetary balance indicated 'only' a minus of

51 With a comprehensive overview on costs-benefits analyses for the 2004 Enlargement, cf. Susan Senior Nello, 'EU Enlargement and Theories of Economic Integration' in Amy Verdun and Alfred Tovias (eds), *Mapping European Economic Integration* (Palgrave Macmillan UK 2013) 178-183.

52 Dieter Grimm, 'The Role of National Constitutions in a United Europe' in Dieter Grimm (ed), *Constitutionalism – Past, Present, and Future* (Oxford University Press 2016) 289-292; Specifically on the international impact of pooling sovereign powers at EU-level, cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334.

53 *Germany: Lisbon-judgment* para 225; *Honeywell-judgment* para 111; Cf. as well: Mayer and Walter, 'Die Europarechtsfreundlichkeit des BVerfG nach dem Honeywell-Beschluss' 539; Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' 559; *France:* Larik, 'Prêt-à-Ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017' 774-777; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 776; *Poland:* Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 132; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 251; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1360

54 Darvas, 'A New Look at Net Balances in the European Union's Next Multiannual Budget' 3.

€ 14,3 billion, which is significantly lower.[55] It thus revealed that the Member States' financial commitments towards the EU are not one-directional but that direct financial returns stem from them. Thus, when considering EU fiscal integration proposals, the German constitutional assessment should not merely focus on the financial commitment that is required but it should equally pay attention to the 'return' that flows back into Germany. Furthermore, these EU benefits might also occur indirectly. The research highlighted that the German GDP would be at least 0,5% lower without the Euro[56] and that Eurozone-membership thus increased fiscal decision-making space in Germany in that manner.

Ultimately, this suggests that EU integration in fiscal matters is not only reducing national fiscal decision-making abilities but that through the resulting cooperation additional fiscal space might be tapped that would otherwise not have been available to the Member States. Overall, this highlights that the current focus of the constitutional review based on a reduction of own competences is not sufficient to adequately reflect the impact that supranational cooperation has on the national constitutional order. Incorporating the outlined EU benefits would render the national constitutional assessment more balanced, thereby equally connecting to the highlighted EU integration theories which conceptualize incentives for countries to join the EU in the first place but which can serve as continuous justification after accession.

5 Transforming the design of fiscal integration proposals

The second transformative proposition relates to the conception of EU fiscal integration. The compatibility assessment of the proposed EU fiscal integration steps with the charted national constitutional space revealed that limited reforms appear constitutionally feasible, albeit largely building upon the currently existing EU Treaty-framework. In light of a proposed more flexible conception of national constitutional limits and the resulting additional national constitutional space, even more ambitious EU fiscal integration proposals could possibly be attainable. However, the proposed transformation largely depends on the receptiveness of national constitutional authorities. Therefore, the research introduced a second transformative proposition in order to trigger a re-conceptualization of EU fiscal integration proposals as well.

This proposition departs from the idea of connecting EU fiscal integration and particularly EU revenues with achievements that can be directly attributed to EU cooperation instead of relying on Member States' national contributions.[57] This proposition thus connects to the previous point of more compre-

55 For the data, cf. Commission, *EU expenditure and revenue 2014-2020 (dataset)*.

56 Petersen, Böhmer and Stein, 'How Germany Benefits from the Euro in Economic Terms (Policy Brief # 2013/01)' 6.

57 Fabbrini, 'Fiscal Capacity' 129.

hensively incorporating EU benefits into the national constitutional appraisal of EU fiscal integration steps, thereby rendering such reform ambitions potentially less contentious. In essence, EU fiscal integration proposals are designed around the conferral of competences from the national to the EU-level. Notably, the creation of the proposed Eurozone budget is constructed as a limit of national competences for the sake of EU decision-making which requires the transfer of additional powers or funds from the Member States to the EU. In a comparable manner, the creation of an EU Ministry of Finance and increased budgetary supervision are construed as a limitation of national competences. Obviously, this design choice conflicts with the competence-centric conception of national *constitutional identity limits*, which aim to preserve core competences at the national level.

Therefore, the research proposed that EU fiscal integration steps could be devised from the perspective of the 'added benefit' that EU fiscal integration entails as well as the fiscal opportunities that might be created through EU fiscal cooperation. The underpinning idea is that the EU would be financed by or operate through revenue that it creates itself and subsequently employ this revenue to stabilize supranational cooperation in the long run. From a national constitutional perspective, such a design would address the concerns that the EU is limiting budgetary competences at the national level, as these competences would stem from the EU-level itself and would therefore not be under the direct control of the Member States in the first place. Consequently, it can be submitted that sourcing the financial advantages generated from the EU does not reduce the traditional budgetary competences enjoyed by national parliaments. In fact, these financial benefits are additional and complementary to the nationally generated financial benefits. It could even be added that as long as EU cooperation results in more fiscal benefits than it actually requires to sustain itself, EU fiscal integration steps could increase the available national fiscal decision-making space. From an EU perspective, the proposed design would provide the advantage that EU finances would be less dependent on national contributions.[58] Taken together, this second proposition would change the debate surrounding EU fiscal integration steps and steer the focus towards added benefits created by envisaged supranational integration, instead of centering around the reduction of national constitutional competences, which are protected by the outlined national *constitutional identity limits*.

However, determining these fiscal opportunities in a detailed manner – for example, in the case of Germany, the financial benefits resulting from low interest rate payments on state bonds or the advantages that result from the fact that the Euro developed into a stable and important global currency –

58 EU finances are dominated by 'just return' considerations, cf. Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 50; Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203; Crowe, 'The European Budgetary Galaxy' 433.

and translating them into EU fiscal integration steps would exceed the framework of this research. Given that EU cooperation traditionally entails the elimination of costs and a liberation of trade, these EU benefits might not yet constitute genuine sources of revenue for any administrative level. But, a comprehensive reflection on how actual EU achievements can be transformed into revenue sources could investigate this potential in detail and ultimately allow for a fresh perspective on EU fiscal integration proposals.

6 Outlook: EU cooperation as a national constitutional duty in the 21st century

The research comprehensively demonstrated how these two innovative transformative propositions could help escape the apparent dilemma between EU fiscal integration ambitions and national constitutional concerns. It was consequently illustrated how outright substantive constitutional opposition against EU fiscal integration could be overcome by essentially embracing EU membership and including the resulting supranational benefits into the domestic constitutional assessment. Nevertheless, the research equally highlighted that budgetary and fiscal competence are considered across all examined constitutional orders as central parliamentary prerogatives connected to national sovereignty and democracy.[59]

Therefore, EU fiscal integration triggers much wider constitutional questions of how national democracies and nation states can effectively function in an ever more integrated European Union which affects ever more core constitutional concerns. Thus, while the proposed transformative ideas might address the short-term need to create additional fiscal capacities at the EU-level in line with national constitutional requirements, a wider process of reflection is now required as to how such core national constitutional concerns can be accommodated in the design of EU integration in a constitutionally sound, effective and mutually-respectful way. Ultimately, this might require a paradigm shift in national constitutionalism, which would certainly exceed the limits of this brief concluding outlook. Yet, building on the observations made throughout the research, one conceptual and one institutional point of reflection will be submitted to contribute to such a wider constitutional reflection process.

On a conceptual level, it was shown how EU fiscal integration ambitions could trigger a broader re-conception process within national constitutional culture about the added benefits of EU cooperation for national constitutional values. It was illustrated that the EU legal order offers the supranational

59 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 222; Fabbrini, 'Fiscal Capacity' 131; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?' 567.

stabilization of constitutional principles, such as democracy and the rule of law. The immediate benefits can be witnessed in the EU interventions regarding Hungary and Poland.[60] Similarly, supranational cooperation enhances the protection of fundamental rights, boosts economic prosperity and contributes to objectives such as environmental protection or digitalization which are all of immediate national constitutional relevance. Therefore, EU cooperation is much more than an intrusion into the national constitutional space – it is in fact a means to accomplish constitutional goals and fulfil constitutional obligations in the globalized world of the 21st century where international priorities are no longer determined in Washington DC, Berlin, Paris or Rome but increasingly at tables in Beijing, New Delhi or Brasilia. In this new global setting, European cooperation can secure international influence that Member States alone could hardly exercise and it might enable Member States to defend national constitutional values at the global stage by integrating them into the supranational DNA, as apparent in Article 2 TEU. Against this background, it could be argued that EU cooperation no longer only signifies a constitutional opportunity for Member States but that it in fact transforms into a constitutional obligation in order to effectively protect constitutional principles in a globalized world. From that perspective EU cooperation can be seen as collective empowerment on the world stage and an opportunity for national constitutional orders to determine jointly how this cooperation can best protect shared national constitutional principles in a shifting global context.

On an institutional level, the research indicated that various national constitutional concerns relate to the conferral of politically important competences to the EU and the subsequent insufficient involvement of national parliaments in the administration of these competences. The research illustrated that the Finnish constitutional system of parliamentary involvement in EU matters and the surrounding institutional acceptance of this system might partly address these concerns. Yet, the debate on EU fiscal integration also offers the opportunity to re-think the institutional involvement of national parliaments in EU decision-making more generally, which was discussed in some proposals on fiscal integration that envisage the creation of a Eurozone assembly.[61] These institutional reform ideas connect to earlier proposals that suggested the establishment of a *European Senate*.[62] According to *van der Schyff*

60 Bojan Bugariè, 'The Populist Backlash Against Europe – Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe' in Francesca Bignami (ed), *EU Law in Populist Times – Crises and Prospects* (Cambridge University Press 2020) 488-491; Sadurski, *Poland's Constitutional Breakdown* 2-3.

61 Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-60.

62 Gerhard van der Schyff and Gert-Jan Leenknegt, 'The Case for a European Senate – A model for the representation of national parliaments in the European Union' (2007) 62 Zeitschrift für öffentliches Recht (ZöR) 237, 238; Or a *congress of parliaments*, cf. Philipp Kiiver, *The*

and *Leenknegt* such a *European Senate* could guarantee that national parliaments are better informed on EU policies, that they can subsequently play a more decisive role in policy-making at EU level and thereby equally better involve the citizens in EU decisions.[63] Building on these proposals, the research proposes the establishment of a *Eurozone Forum of National Parliamentary Delegates* as an initial institutional innovation for the Eurozone. This *Forum* would be exclusively composed of national parliamentary delegates and thus integrate the national parliamentary level better into EMU decision-making, which could address the identified concerns of national constitutional authorities regarding EU fiscal integration and the required degree of national parliamentary control over budgetary and fiscal decision-making. The *Forum* should tentatively consist of 5 *Delegates* per Member States, which are determined by the national parliaments themselves. The determined *Delegates* should equally be members of the national parliamentary EU Committees, in order to guarantee a high degree of EU expertise and to better integrate EU-level discussions into national parliamentary discussions – which are either prepared or even fully conducted by the respective national EU Committees. The specifics of how national *Delegates* are selected should be determined by national law – for example, within the *rules of procedures* of national parliaments. These *Eurozone Delegates* could come together in the proposed *Forum* to discuss the national parliamentary perspective on EU budgetary and fiscal matters in a supranational setting. Initially, this *Forum* could take an informal *ad hoc* format, following the example of the European Council which similarly only developed over time into a formal EU institution.[64]

To preempt legal concerns regarding a possible interference with the EU's institutional structure, the *Forum* would not be assigned decision-making powers but instead operate in a coordinating capacity. The regular joint debates of the *Forum* would be integrated into the national parliamentary work and occur before the national parliament reaches a final decision on the matter. The decisions taken by the *Eurozone Forum* would be declaratory and not preempt national decision-making or replace national constitutional requirements. National parliaments are merely invited to take the deliberations of the *Eurozone Forum* – as presented by the national *Delegates* – into due account. Despite only operating on an informal basis and taking declaratory decisions, the creation of a *Eurozone Forum* could counter-balance the criticized dominance of national executive actors at EU-level and offer a comprehensive institutional framework – beyond the current *informal* exchange of views at COSAC gather-

National Parliaments in the European Union: A Critical View on EU Constitution-Building, vol 50 (European Monographs, Kluwer Law International 2006) 133-134.

63 Schyff and Leenknegt, 'The Case for a European Senate – A model for the representation of national parliaments in the European Union' 238.

64 Luuk Van Middelaar, *The Passage to Europe – How a Continent Became a Union* (Yale University Press 2013) 179-180.

ings – to supranationally align national parliamentary priorities within the Eurozone. It would equally offer national parliaments the opportunity to more effectively use their prerogatives under the EU-Treaties – for example by coordinating the initiation of the yellow and orange card procedure. In the long run, the proposed *Eurozone Forum* could be formally integrated into the EU's institutional framework and it might be assigned genuine decision-making powers. Ultimately, this would make national parliaments less dependent on national governments in EU matters and firmly integrate them into the EU's institutional structure.

As it stands, EU integration is a process of continuous amendments, challenges and transformation. Increasingly, this process conflicts with traditional characteristics of the national constitutional space, which can explain the emergence of national *constitutional identity limits* as a new type of constitutional defense mechanism. Through these limits, national constitutional authorities attempt to contain EU integration and preserve national constitutional structures in light of an ever-deepening integration. Although it was illustrated that national constitutional systems can be receptive towards the various benefits that stem from supranational cooperation, this receptiveness is increasingly limited as EU integration advances towards the core of national systems: their *constitutional identity*. EU fiscal integration ambitions squarely fit into this general trend, as they propose a shift of core constitutional and political competences from the national to the supranational level. Naturally, this proposed shift is met with national constitutional resistance displayed in the various constitutional proceedings in the Member States assessed within this research. Overcoming these national constitutional challenges against EU fiscal integration – but also against EU cooperation in core state areas generally – might require to initiate a new chapter in national and supranational constitutionalism. After all, EU integration and national constitutional law are not opponents but can and should be mutually reinforcing allies in a globalized world.

Zusammenfassung (German summary)

Ein Europäisches Finanzministerium?

Die Kartierung und Prüfung der nationalen verfassungsrechtlichen Grenzen für EU-Fiskalintegration

Die Eurokrise hat die strukturellen Mängel der europäischen Gemeinschaftswährung offengelegt. Diese werden derzeit wieder durch die wirtschaftlichen Folgen der COVID-19-Pandemie ins Scheinwerferlicht gerückt. Es ist mittlerweile weithin anerkannt, dass eine Form von EU-Fiskalintegration erforderlich ist, um diese weiterhin bestehenden Schwachstellen adäquat zu beheben und einen stabilen Euro zu schaffen. Jedoch wird die Umsetzbarkeit der erforderlichen Integrationsschritte durch nationales Verfassungsrecht in Frage gestellt, insbesondere aufgrund der hohen Bedeutung von Steuer- und Haushaltsbefugnissen für nationale Souveränität, Demokratie und die parlamentarischen Entscheidungsspielräume. Daraus ergibt sich ein grundsätzliches Dilemma: Eine effektive fiskalische Integration der EU scheint einerseits notwendig, um den Euro zu stabilisieren, aber andererseits rechtlich unmöglich aufgrund der bestehenden verfassungsrechtlichen Hürden.

Mit Blick auf dieses Dilemma, untersucht die vorliegende Promotionsarbeit den bestehenden nationalen verfassungsrechtlichen Spielraum für EU-Fiskalintegration. In Teil I der Arbeit wird eine rechtsvergleichende Analyse ausgewählter nationaler verfassungsrechtlicher Beschränkungen für EU-Fiskalintegration vorgenommen, um festzustellen, wie ähnlich – oder unterschiedlich – die nationalen Verfassungssysteme der Mitgliedsstaaten mit demselben EU-Integrationsziel umgehen. Der gewählte rechtsvergleichende Rahmen erlaubt es, die nationalen Hindernisse, mit denen EU-Fiskalintegrationsvorhaben konfrontiert sind, zu bestimmen und zu kategorisieren sowie nationale verfassungsrechtliche '*Best Practices*' zu identifizieren, die angewandt werden können, um zusätzlichen verfassungsrechtlichen Spielraum zu schaffen. In Teil II werden sodann die einflussreichsten Reformvorschläge anhand des bestimmten nationalen verfassungsrechtlichen Spielraums analysiert, um die nationale verfassungsrechtliche Umsetzbarkeit dieser Vorschläge auszuwerten.

Die Arbeit zeigt auf, dass verfassungsrechtlicher Spielraum für EU-Fiskalintegration in den Mitgliedsstaaten gefunden werden kann und dass selbst starre, rigide nationale Verfassungsgrenzen eine zumindest eingeschränkte Form von EU-Fiskalintegration zulassen. Um das Dilemma zwischen EU-Fiskal-

integration und nationalem Verfassungsrecht weiter zu entkräften, formuliert die Arbeit zwei transformative Ansätze. Erstens schlägt die Arbeit vor, die expliziten und impliziten Vorteile, die sich aus EU-Fiskalintegrationsschritten ergeben, umfassend in die nationale verfassungsrechtliche Bewertung einzubeziehen und damit die vorherrschende staats- oder kompetenzzentrierte Interpretation von nationaler Souveränität und Demokratie abzulösen. Zweitens schlägt die Forschungsarbeit vor, das *Design* der EU-Fiskalintegrationsschritte zu verändern, um konstruktiv auf die nationalen verfassungsrechtlichen Bedenken einzugehen und somit die erforderlichen EU-Integrationsschritte im Tandem mit der nationalen verfassungsrechtlichen Debatte zu entwickeln. Letztlich könnten diese beiden transformativen Ansätze die Umsetzung der scheinbar erforderlichen EU-Fiskalintegration rechtlich ermöglichen und damit sowohl die Stabilisierung des Euros sicherstellen als auch die betroffenen nationalen verfassungsrechtlichen Prinzipien und Werte effektiv schützen.

Samenvatting (Dutch summary)

Een Europees Ministerie van Financiën?

Het in kaart brengen en testen van nationale constitutionele grenzen aan fiscale integratie in de EU

De eurocrisis heeft de structurele weeffouten in de euro pijnlijk blootgelegd. Deze tekortkomingen staan momenteel opnieuw in de schijnwerpers door de economische gevolgen van COVID-19. Inmiddels wordt daarom algemeen erkend dat enige vorm van fiscale integratie van de EU noodzakelijk is om deze structurele weeffouten te verhelpen en een stabiele euro tot stand te brengen. Fiscale integratie in de EU botst echter op tegen de grenzen van nationaal constitutioneel recht. Fiscale en budgettaire bevoegdheden zijn immers van essentieel belang voor nationale soevereiniteit, democratie en politiek. Nationaal constitutioneel recht stelt daarom, logischerwijs, harde grenzen aan het afstaan van fiscale, budgettaire of economische bevoegdheden aan de EU. Het resultaat is een gevaarlijke patstelling: enerzijds lijkt effectieve fiscale integratie in de EU noodzakelijk om de gemeenschappelijke munt te stabiliseren, en een nog veel kostbaardere crisis te voorkomen. Anderzijds lijkt fiscale integratie in de EU juridisch onmogelijk gezien de grenzen die nationale grondwettelijke stelsels opleggen, en de noodzaak om nationale democratie en soevereiniteit te respecteren.

Geconfronteerd met deze schijnbare patstelling brengt dit proefschrift de beschikbare nationale constitutionele ruimte voor fiscale integratie in de EU in kaart. Deel I vergelijkt een selectie van nationale constitutionele beperkingen die grenzen stellen aan fiscale integratie in de EU. Hiermee wordt onderzocht welke grenzen de constituties van verschillende lidstaten stellen aan fiscale integratie, en of zij dit op dezelfde manier of op verschillende manieren doen. Op basis van deze vergelijking worden vervolgens de belangrijkste constitutionele grenzen aan fiscale integratie in de EU geïdentificeerd. Daarnaast worden verschillende constitutionele "*best practices*" geïdentificeerd. Dit zijn juridische concepten en constructen die zijn gecreëerd om afdoende constitutionele ruimte voor EU-integratie te behouden, zonder het streven naar begrenzing op te geven. Vervolgens wordt gekeken of deze "*best practices*" ook vertaald kunnen worden naar andere constitutionele systemen in de EU. Deel I stelt daarmee vast wat de huidige juridische ruimte voor fiscale integratie in de EU is, en in welke mate meer ruimte gecreëerd kan worden door toepassing van consti-

tutionele "*best practises*", zonder de kern van nationale constituties te ondermijnen.

In deel II wordt vervolgens gekeken of de meest gezaghebbende hervormingsvoorstellen voor fiscale integratie in de EU haalbaar zijn binnen de beschikbare constitutionele ruimte. Met andere woorden, zijn de voorstellen die nu op tafel liggen juridisch haalbaar? En omgekeerd, welke vorm van fiscale integratie is maximaal haalbaar binnen de beschikbare nationale constitutionele ruimte?

Op basis van deze analyse toont dit proefschrift aan dat er belangrijke en vergaande nationale constitutionele beperkingen zijn aan fiscale integratie in de EU. Tegelijkertijd is er wel degelijk juridische ruimte en kan, zelfs in de meest rigide nationale constitutionele systemen, ruimte gevonden en gecreëerd worden voor een zekere mate van fiscale integratie, mits deze goed ontworpen wordt. Om de spanning tussen fiscale integratie en nationaal constitutioneel recht verder te reduceren, zonder daarbij nationale constitutionele kernwaarden op te geven, introduceert het proefschrift twee concrete voorstellen. Ten eerste wordt voorgesteld om de expliciete en impliciete voordelen die voortvloeien uit fiscale integratie te integreren in de nationale constitutionele beoordeling van integratie. Hiermee wordt de heersende staats- of bevoegdheden-centrische interpretatie van nationale soevereiniteit en democratie gemoderniseerd, zodat deze beter aansluit bij de daadwerkelijke belangen van lidstaten en hun burgers. Ten tweede stelt dit proefschrift voor om de huidige voorstellen voor EU fiscale integratie beter aan te passen aan de grenzen die inherent voortvloeien uit de aard en inhoud van de verschillende nationale constituties en de gegronde zorgen van verschillende constitutionele hoven die over deze constituties waken. Deze aanpassingen kunnen op een constructieve wijze rekening houden met deze nationale constitutionele beperkingen en fiscale integratie zo vormgeven dat ze meegaan met en ruimte laten aan het nationale constitutionele debat. Uiteindelijk kunnen deze twee voorstellen de schijnbare patstelling tussen de noodzaak van EU fiscale integratie en het respecteren van nationale grondwettelijke grenzen helpen doorbreken.

Bibliography

Case Law

Court of Justice

- *Sayn-Wittgenstein* C-208/09 (CJEU), ECLI:EU:C:2010:806.
- *N.S. and M.E. et al. v. Minister for Justice, Equality and Law Reform* Joined Cases C-411/10 and C-493/10 (CJEU), ECLI:EU:C:2011:865.
- *Pringle* C-370/12 (CJEU), ECLI:EU:C:2012:756.
- *Jeremy F* C-168/13 PPU (CJEU), ECLI:EU:C:2013:358.
- *Commission v. Poland* C-619/18 R (CJEU), ECLI:EU:C:2019:531.
- *Wightman* C-621/18 (CJEU), ECLI:EU:C:2018:999.

Opinion of the Venice Commission

- *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland* (Venice Commission).

Finnish Constitutional Law Committee

- *Comotology Procedure* PeVL 49/1998 vp (Finnish Constitutional Law Committee).
- *Adoption of the Lisbon Treaty* PeVL 13/2008 vp (Finnish Constitutional Law Committee).
- *Adoption of the EU Six-Pack Legislation* PeVL 49/2010 vp (Finnish Constitutional Law Committee).
- *Amendment of Article 136 (3) TFEU* PeVL 6/2011 vp (Finnish Constitutional Law Committee).
- *Amendment to the EFSF (Increase in State Guarantee)* PeVL 5/2011 vp (Finnish Constitutional Law Committee).
- *First Assessment Draft ESM-Treaty (I.)* PeVL 1/2011 vp (Finnish Constitutional Law Committee).
- *Protocol on the EFSF* PeVP 11/2011 vp (Finnish Constitutional Law Committee).
- *Second Assessment Draft ESM-Treaty (II.)* PeVL 22/2011 vp (Finnish Constitutional Law Committee).
- *Additional Amendment to the EFSF* PeVL 3/2012 vp (Finnish Constitutional Law Committee).
- *Final Assessment Draft ESM-Treaty (III.)* PeVL 13/2012 vp (Finnish Constitutional Law Committee).

- *Preliminary Assessment of Fiscal Compact (I.)* PeVL 24/2011 vp (Finnish Constitutional Law Committee).
- *Final Assessment of Fiscal Compact (II.)* PeVL 37/2012 vp (Finnish Constitutional Law Committee).
- *On the Establishment of a European Monetary Fund* PeVL 12/2018 vp (Finnish Constitutional Law Committee).
- *Proposal for Council Directive Laying Down Provisions for Strengthening Fiscal Responsibility and the Medium-Term Budgetary Orientation in the Member States (COM (2017) 824 final)* PeVL 13/2018 vp (Finnish Constitutional Law Committee).
- *Commission's Draft EU Recovery Plan and MFF Planning* PeVL 16/2020 vp (Finnish Constitutional Law Committee).
- *EIB Proposal for EU Covid-19 Guarantee Fund* PeVL 12/2020 vp (Finnish Constitutional Law Committee).
- *Protocol Concerning Possible EU COVID-19 Rescue Measures* PeVP 34/2020 vp (Finnish Constitutional Law Committee).

French Conseil Constitutionnel

- *Law on the General Election of French President* Decision 62-20 DC (French Conseil Constitutionnel).
- *Introduction of the EU's System of Own Resources* Decision 70-39 DC (French Conseil Constitutionnel).
- *Direct Election of the European Parliament* Decision 76-71 DC (French Conseil Constitutionnel).
- *Concerning the Introduction of an Isoglucose Levy* Decision 77-90 DC (French Conseil Constitutionnel).
- *Final Supplementary Budgetary Law for the Year 1977* Decision 77-90 DC (French Conseil Constitutionnel).
- *Law Authorizing an Increase in France's Share in the International Monetary Fund (IMF)* Decision 78-93 DC (French Conseil Constitutionnel).
- *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* Decision 92-312 DC (French Conseil Constitutionnel).
- *Review of Maastricht Treaty (Maastricht I)* Decision 92-308 DC (French Conseil Constitutionnel).
- *Revision of the Act of Approval to Ratify EU Treaty (Maastricht III)* Decision 92-313 DC (French Conseil Constitutionnel).
- *Revision of Amsterdam Treaty* Decision 97-394 DC (French Conseil Constitutionnel).
- *Constitutional Revision of French Decentralisation Law* Decision 2003-469 DC (French Conseil Constitutionnel).
- *Bioethics-Act* Decision 2004-498 DC (French Conseil Constitutionnel).
- *Digital Economy* Decision 2004-496 DC (French Conseil Constitutionnel).
- *Treaty Establishing a Constitution for Europe* Decision 2004-505 DC (French Conseil Constitutionnel).
- *Copyright and Related Rights in the Information Society* Decision 2006-540 DC (French Conseil Constitutionnel).
- *French Act Pertaining to the Energy Sector* Decision 2006-543 DC (French Conseil Constitutionnel).

- *Lisbon Treaty* Decision 2007-560 DC (French Conseil Constitutionnel).
- *French Law on Genetically Modified Organisms* Decision 2008-564 DC (French Conseil Constitutionnel).
- *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* Decision 2010-605 DC (French Conseil Constitutionnel).
- *Mr Alain C. an others* Decision 2010-4/17 QPC (French Conseil Constitutionnel).
- *Mr Daniel W and Others* Decision 2010-14/22 QPC (French Conseil Constitutionnel).
- *Mr Kamel D.* Decision 2010-79 QPC (French Conseil Constitutionnel).
- *Fiscal Compact* Decision 2012-653 DC (French Conseil Constitutionnel).
- *Comprehensive Economic and Trade Agreement (CETA)* Decision 2017-749 DC (French Conseil Constitutionnel).
- *National Law Related to the Protection of Personal Data Under the GDPR* Decision 2018-765 DC (French Conseil Constitutionnel).

German Federal Constitutional Court

- *Survivor's Pension I* 1 BvR 220/51 (German Federal Constitutional Court).
- *Germany Agreement* 1 BvF 1/52 (German Federal Constitutional Court).
- *Procedure to Prohibit the Political Party SRP* 1 BvB 1/51 (German Federal Constitutional Court).
- *Decision on the Consumer Mortgage Law* 1 BvR 102/51 (German Federal Constitutional Court).
- *Law on Direct (Financial) Support* 1 BvL 13/52, 1 BvL 21/53 (German Federal Constitutional Court).
- *Party-Financing I* 2 BvF 1/65 (German Federal Constitutional Court).
- *Wiretapping I* 2 BvF 1/69, 2 BvR 629/68 und 308/69 (German Federal Constitutional Court).
- *Law Introducing an Additional Charge* 1 BvL 16/69 (German Federal Constitutional Court).
- *Treaty concerning the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic* 2 BvF 1/73 (German Federal Constitutional Court).
- *Solange I-Decision* BvL 52/71 (German Federal Constitutional Court).
- *Driving Licence Regulation* 2 BvR 1018/74 (German Federal Constitutional Court).
- *Peaceful Use of Nuclear Energy in Germany* 2 BvL 8/77 (German Federal Constitutional Court).
- *Nuclear Plant Mülheim-Kärlich* 1 BvR 385/77 (German Federal Constitutional Court).
- *Non-Contributory Health Insurance* 1 BvR 602/78 (German Federal Constitutional Court).
- *Dissolution of the German Parliament* 2 BvQ 4/82 (German Federal Constitutional Court).
- *Committee of Enquiry in the Flick-Matter* 2 BvE 11, 15/83 (German Federal Constitutional Court).
- *Deployment of Atomatic Weapons* 2 BvE 13/83 (German Federal Constitutional Court).
- *Solange II-Decision* 2 BvR 197/83 (German Federal Constitutional Court).

- *Deployment of Chemical Weapons* 2 BvR 624, 1080, 2029/83 (German Federal Constitutional Court).
- *Public Debt Level* 2 BvF 1/82 (German Federal Constitutional Court).
- *Constitutionality of Establishing a Marketing Fund* 2 BvL 12, 13/88, 2 BvR 1436/87 (German Federal Constitutional Court).
- *Right to Vote for Foreigners I* 2 BvF 2, 6/89 (German Federal Constitutional Court).
- *Right to Vote for Foreigners II* 2 BvF 3/89 (German Federal Constitutional Court).
- *Real Estate Reform I* 1 BvR 1170, 1174 and 1175/90 (German Federal Constitutional Court).
- *Interest-Rate Adjustment for Mortgage Awarded by the GDR* 1 BvR 1509/91 (German Federal Constitutional Court).
- *Maastricht-Judgment* 2 BvR 2134/92 and 2159/92 (German Federal Constitutional Court).
- *German Participation in NATO Actions* 2 BvE 3/92, 5/93, 7/93, 8/93 (German Federal Constitutional Court).
- *Participation Law Schleswig-Holstein* 2 BvF 1/92 (German Federal Constitutional Court).
- *Conception of Safe Third Countries* 2 BvR 1938, 2315/93 (German Federal Constitutional Court).
- *Bavarian Municipal Elections* 2 BvR 1953/95 (German Federal Constitutional Court).
- *German Spelling Reform* 1 BvR 1640/97 (German Federal Constitutional Court).
- *Conditions for the Keeping of Laying Hens* 2 BvF 3/90 (German Federal Constitutional Court).
- *Casino-Regulation of the German Region of Baden-Württemberg* 1 BvR 539/96 (German Federal Constitutional Court).
- *NATO-Concept* 2 BvE 6/99 (German Federal Constitutional Court).
- *High Financial Authority* 2 BvF 4/98 (German Federal Constitutional Court).
- *Obligatory Information Concerning Extra Public Charge* 2 BvL 1, 4, 6, 16, 18/99, 2 BvL 1/01 (German Federal Constitutional Court).
- *Wiretapping II* 1 BvR 2378/98 and 1 BvR 1084/99 (German Federal Constitutional Court).
- *Statute on the Federal Supplementary Budget* 2 BvF 1/04 (German Federal Constitutional Court).
- *Copyright-Law Amendment I* 1 BvR 213/08 (German Federal Constitutional Court).
- *Lisbon-judgment* 2 BvE 2/08 (German Federal Constitutional Court).
- *Copyright-Law Amendment II* 1 BvR 2062/09 (German Federal Constitutional Court).
- *Honeywell-judgment* 2 BvR 2661/06 (German Federal Constitutional Court).
- *Constitutionality of the German Debt Break* 2 BvG 1/10 (German Federal Constitutional Court).
- *Financial Support for Greece and EFSF* 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 (German Federal Constitutional Court).
- *ESM-Treaty and Fiscal Compact (interim relief)* 2 BvR 1390, 1421, 1438, 1439, 1440/12, 2 BvE 6/12 (German Federal Constitutional Court).
- *New Allocation of Seats in the German Parliament* 2 BvF 3/11, 2 BvR 2670/11, 2 BvE 9/11 (German Federal Constitutional Court).
- *Participation of Members of German Parliament in the EFSF* 2 BvE 8/11 (German Federal Constitutional Court).

- *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* 2 BvE 4/11 (German Federal Constitutional Court).
- *Alleged Violation of Protective Duties by State Organs Towards Individuals in Nursing Homes* 1 BvR 131/14 (German Federal Constitutional Court).
- *ESM-Treaty and Fiscal Compact* 2 BvR 1390, 1421, 1438, 1439, 1440/12, 2 BvE 6/12 (German Federal Constitutional Court).
- *OMT-reference* 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (German Federal Constitutional Court).
- *Relation Between International Law and the German Legal Order* 2 BvL 1/12 (German Federal Constitutional Court).
- *Vereinten Dienstleistungsgewerkschaft (ver.di)* 2 BvR 2292/13 (German Federal Constitutional Court).
- *Final OMT-Judgment* 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (German Federal Constitutional Court).
- *Fundamental Rights for Residents of Nursing Homes* 1 BvR 2980/14 (German Federal Constitutional Court).
- *Interim Relief against Comprehensive Economic and Trade Agreement (CETA)* 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16 and 2 BvE 3/16 (German Federal Constitutional Court).
- *Opposition Rights in the German Parliament* 2 BvE 4/14 (German Federal Constitutional Court).
- *Transatlantic Trade and Investment Partnership (TTIP)* 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16 (German Federal Constitutional Court).
- *Procedure to Prohibit the Political Party NPD* 2 BvB 1/13 (German Federal Constitutional Court).
- *Quantitative Easing (PSPP) Reference* 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/15 (German Federal Constitutional Court).
- *Constitutional Challenge of German Migration Policy Initiated by the AfD* 2 BvE 1/18 (German Federal Constitutional Court).
- *Decision on the Unified Patent Court* 2 BvR 739/17 (German Federal Constitutional Court).
- *Quantitative Easing (PSPP) Final Judgment* 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/15 (German Federal Constitutional Court).

Italian Constitutional Court

- *Frontini* Judgment of 27. December 1973 – No. 183 (Italian Constitutional Court).
- *Granital* Judgment of 8. June 1984 (Italian Constitutional Court).

Spanish Constitutional Tribunal

- *Spanish Rules on the Elections to the European Parliament* Sentencia 28/1991 (Spanish Constitutional Tribunal).
- *Constitutional Review of the Maastricht Treaty* Declaration 1/1992 (Spanish Constitutional Tribunal).
- *EMU-Related Challenge* Sentencia 134/2011 (Spanish Constitutional Tribunal).

· *Preliminary Reference Concerning EAW (Melloni)* AUTO 86/2011 (Spanish Constitutional Tribunal).
· *Constitutional Complaint Melloni* Sentencia 26/2014 (Spanish Constitutional Tribunal).
· *Catalan Independence Declaration* Sentencia 259/2015 (Spanish Constitutional Tribunal).

Polish Constitutional Tribunal

· *Poland's EU Membership* K 18/04 (Polish Constitutional Tribunal).
· *Constitutional Complaint Against Protocol No. 4 to the European Agreement* SK 54/05 (Polish Constitutional Tribunal).
· *Treaty of Lisbon* K 32/09 (Polish Constitutional Tribunal).
· *Constitutional Complaint Against Brussels I Regulation* SK 45/09 (Polish Constitutional Tribunal).
· *Challenge Against the Fiscal Compact* K 11/13 (Polish Constitutional Tribunal).
· *Challenges Against Article 136 (3) TFEU and ESM-Treaty* K 33/12 (Polish Constitutional Tribunal).
· *Appointment of Constitutional Judges* K 34/15 (Polish Constitutional Tribunal).
· *Constitutionality of Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal* K 1/17 (Polish Constitutional Tribunal).

Books and Monographs

Bell J, *French Legal Culture* (Butterworths 2001).
Berger A, *Anwendungsvorrang und nationale Verfassungsgericht*, vol 113 (Jus Internationale et Europaeum, Mohr Siebeck 2015).
Bumke C and Voßkuhle A, *German Constitutional Law – Introduction, Cases, and Principles* (Oxford University Press 2019).
Caldwell PC, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* (Duke University Press 1997).
Cloots E, *National Identity in EU Law* (Oxford University Press 2015).
Craig P, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, vol Revisited (Oxfored University Press 2013).
Craig P and de Búrca G, *EU Law Text, Cases, and Materials* (6th edn, Oxford University Press 2015).
De Visser M, *Constitutional Review in Europe – A Comparative Analysis* (Hart Publishing 2015).
Eichengreen B, *European Monetary Unification : Theory, Practice, and Analysis* (MIT Press 1997).
Epping V, *Grundrechte* (6th edn, Springer Verlag 2015).
Eriksen EO, *Contesting Political Differentiation – European Division and the Problem of Dominance* (Palgrave Macmillan – Springer 2019).
Fabbrini F, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016).

Ferreres Comella V, *The Constitution of Spain – A Contextual Analysis* (Hart Publishing 2013).
Finer SE, Bogdanor V and Rudden B, *Comparing Constitutions* (Clarendon Press 1995).
Foster N and Sule S, *German Legal System and Laws* (4. edn, Oxford University Press 2010).
Fuller LL, *The Morality of Law* (Revised Edition edn, Yale University Press 1969).
Fürst W and Hellmuth G, *Grundgesetz – Das Verfassungsrecht der Bundesrepublik Deutschland in den Grundzügen* (Studienbücher Rechtswissenschaft, 3. edn, Verlag W. Kohlhammer 1982).
Gordillo LI, *Interlocking Constitutions – Towards an Interordinal Theory of National, European and UN Law* (Hart Publishing 2012).
Granat M and Granat K, *The Constitution of Poland – A Contextual Analysis* (Hart Publishing 2019).
Gundel J, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung*, vol 42 (Schriften zum Europäischen Recht, Duncker & Humblot 1997).
Häberle P, *Das Grundgesetz zwischen Verfassungsrecht und Verfassungspolitik* (Nomos 1996).
Heringa AW, *Constitutions Compared – An Introduction to Comparative Constitutional Law* (4th edn, Intersentia Ltd 2016).
Hesse K, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (C.F. Müller 1993).
Hinarejos Parga A, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015).
Husa J, *The Constitution of Finland – A Contextual Analysis* (Hart Publishing 2011).
Jokela J, *Europeanization and Foreign Policy* (Routledge 2011).
Jutta L, *Das Bundesverfassungsgericht* (2nd edn, C.H. Beck 2010).
Ketterer L, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* (Freiburger Rechtswissenschaftliche Abhandlungen, Mohr Siebeck 2016).
Kiiver P, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building*, vol 50 (European Monographs, Kluwer Law International 2006).
Kiss C, *Constitutional Democracy in Eastern Europe: The Role of Constitutional Courts in Democratic Consolidation in Post-Communist Hungary and Poland* (ProQuest Dissertations Publishing 2005).
Koemm M, *Eine Bremse für die Staatsverschuldung?* (Mohr Siebeck 2011).
Kröger K, *Grundrechtsentwicklung in Deutschland – von ihren Anfängen bis zur Gegenwart* (Mohr Siebeck 1998).
Lionello L, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* (Springer 2020).
Markakis M, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford Studies in European Law, Oxford University Press 2020).
Meiers F-J, *Germany's Role in the Euro Crisis – Berlin's Quest for a More Perfect Monetary Union* (Springer 2015).
Moeser E, *Die Beteiligung des Bundestages an der staatlichen Haushaltsgewalt* (Duncker & Humblot 1978).
Mutanen A, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* (Hansaprint Oy 2015).

Newton MT and Donaghy PJ, *Institutions of Modern Spain – A Political and Economic Guide* (Cambridge University Press 1997).
Raunio T and Tiilikainen T, *Finland in the European Union* (Frank Cass Publishers 2003).
Richter A, *Funktionswandel im Mehrebenensystem? Die Rolle der nationalen Parlamente in der Europäischen Union am Beispiel des Deutschen Bundestags* (Herbert Utz Verlag 2016).
Rompuy Hv, *Europe in the Storm – Promise and Prejudice* (Davidsfonds Uitgeverij nv 2014).
Sadurski W, *Poland's Constitutional Breakdown* (Oxford University Press 2019).
Schlaich K and Korioth S, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* (5th edn, C.H. Beck 2001).
Schlaich K and Korioth S, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* (11th edn, C.H. Beck 2018).
Schweitzer M, *Staatsrecht III* (10th edn, C.F. Müller 2010).
Simon S, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess*, vol 253 (Jus Publicum, Mohr Siebeck 2016).
Steiner E, *French Law – A Comparative Approach* (Oxford University Press 2018).
Tappe H and Wernsmann R, *Öffentliches Finanzrecht* (2nd edn, C.F. Müller 2019).
Tresselt W, *Die Vertreter der Länder im Rat der Europäischen Gemeinschaft* (Books on Demand (BoD) 2006).
Troitino DR, *European Integration : Building Europe* (Nova Publishers 2013).
Tuori K and Tuori K, *The Eurozone Crisis – A Constitutional Analysis* (Cambridge University Press 2014).
Union E, *European Union Public Finance* (Publications Office of the European Union 2014).
Van Middelaar L, *The Passage to Europe – How a Continent Became a Union* (Yale University Press 2013).
Vanberg G, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2005).
Weber-Fas R, *Das Grundgesetz* (Duncker & Humblot 1983).
Zippelius R, *Juristische Methodenlehre* (JuS Schriftreihe, 11th edn, C.H. Beck 2012).

Book Sections

Albert R, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019).
Ahumada Ruiz M, 'The Spanish Constitutional Court' in Jakab A, Dyevre A and Itzcovich G (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017).
Albi A and Bardutzky S, 'Revisiting the Role and Future of National Constitutions in European and Global Governance: Introduction to the Research Project' in Albi A and Bardutzky S (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019).
Allemand F, 'European Economic Constitution: From Soft to Hard Policy Coordination?' in Hofmann HCH, Pantazatou K and Zaccaroni G (eds), *The*

Metamorphosis of the European Economic Constitution (Edward Elgar Publishing Limited 2019).

Amtenbrink F, 'New Economic Governance in the European Union: Another Constitutional Battleground?' in Purnhagen K and Rott P (eds), *Varieties of European Economic Law and Regulation* (Springer 2014).

Bandilla R, 'Art. 122 AEUV – Maßnahmen bei gravierenden Schwierigkeiten' in Grabitz E, Hilf M and Nettesheim M (eds), *Das Recht der Europäischen Union – Kommentar* (70th edn, C.H. Beck 2020).

Baranger D, 'The Apparition of Sovereignty' in Kalmo H and Skinner Q (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press 2010).

Becker P, 'Haushaltspolitik' in Weidenfeld W and Wessels W (eds), *Jahrbuch der Europäischen Integration 2017* (Nomos 2017).

Becker P, 'Haushaltspolitik' in Weidenfeld W and Wessels W (eds), *Jahrbuch der Europäischen Integration 2019* (Nomos 2019).

Bell J, 'Court Institutions' in Bell J, Boyron S and Whittaker S (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008).

Bethge H, '§ 90 BVerfGG – Erhebung der Verfassungsbeschwerde' in Maunz T and others (eds), *Kommentar zum Bundesverfassungsgerichtsgesetz* (60th edn, C.H. Beck 2020).

Beukers T, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' in Koutrakos P and Snell J (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing Limited 2017).

Biernat S, 'Offene Staatlichkeit: Polen' in von Bogdandy A, Cruz Villalón P and Huber PM (eds), *Handbuch Ius Publicum Europaeum, Band II: Offene Staatlichkeit – Wissenschalft vom Verfassungsrecht* (C.F. Müller 2008).

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

Bignami F, 'Introduction – EU Law, Sovereignty, and Populism' in Bignami F (ed), *EU Law in Populist Times – Crises and Prospects* (Cambridge University Press 2020).

Boyron S, 'Constitutional Law' in Bell J, Boyron S and Whittaker S (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008).

Boyron S, 'Sources of Law' in Bell J, Boyron S and Whittaker S (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008).

Bugarić B, 'The Populist Backlash Against Europe – Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe' in Bignami F (ed), *EU Law in Populist Times – Crises and Prospects* (Cambridge University Press 2020).

Bustos Gisbert R, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' in Saiz Arnaiz A and Alcoberro Llivina C (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013).

Butzer H, 'Art. 38 GG – Wahl' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Calliess C, 'Finanzkrise als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' in Höfling W (ed), *Grundsatzfragen der Rechtsprechung und Rechtsfindung* (Walter de Gruyter 2012).

Calliess C, 'Constitutional Identity in Germany – One for Three or Three in One?' in Calliess C and Van der Schyff G (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

Calliess C, 'Art. 24 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, 2020).

Calliess C and Schnettger A, 'The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism' in Calliess C and Van der Schyff G (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

Chalmers D, Jachtenfuchs D and Joerges C, 'The Retransformation of Europe' in Chalmers D, Jachtenfuchs D and Joerges C (eds), *The End of the Eurocrats' Dream – Adjusting to European Diversity* (Cambridge University Press 2016).

Claes M, 'National Idenity: Trump Card or Up for Negotiation?' in Saiz Arnaiz A and Alcoberro Llivina C (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013).

Coelln Cv, '§ 97 BVerfGG' in Maunz T and others (eds), *Kommentar zum Bundesverfassungsgerichtsgesetz* (60th edn, C.H. Beck 2020).

Craig P, 'Development of the EU' in Barnard C and Peers S (eds), *European Union Law* (2nd edn, Oxford University Press 2017).

Craig P and Markakis M, 'EMU Reform' in Amtenbrink F and Herrmann C (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020).

Czuczai J, 'Accession to the EU, But to Which EU? The Legal Impact of the Constantly Evolving EMU Acquis on the EU Enlargement Process' in Adam S and others (eds), *The European Union in the World : Essays in Honour of Professor Marc Maresceau* (Martinus Nijhoff Publishers 2014).

Dannemann G, 'Comparative Law: Study of Similarities or Differences?' in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019).

Dawson M, Enderlein H and Joerges C, 'Introduction: The Governance of the Transformation of Europe's Economic, Political, and Constitutional Constellation Since the Euro-Crisis ' in Dawson M, Enderlein H and Joerges C (eds), *Beyond the Crisis – The Governance of Europe's Economic, Political, and Legal Transformation* (Oxford University Press 2015).

De Sadeleer N, 'The New Architecture of European Economic Governance' in Philipsen N and Xu G (eds), *The Role of Law and Regulation in Sustaining Financial Markets* (Routledge 2015).

Delledonne G, 'A Legalization of Financial Constitutions in the EU? Reflections on the German, Spanish, Italian and French Experiences' in Adams M, Fabbrini F and Larouche P (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014).

Dietlein J, 'Art. 79 GG – Änderungen des Grundgesetzes' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Díez-Nicolás J, 'Spaniards' Long March Towards Europe' in Royo Sn and Manuel PC (eds), *Spain and Portugal in the European Union?: The First Fifteen Years* (Frank Cass and Company Limited 2003).

Dixon R, 'Constitutional Amendment Rules: a Comparative Perspective' in Ginsburg T and Dixon R (eds), *Comparative Constitutional Law* (Edward Elgar Publishing Limited 2011).

Dyevre A, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' in Claes M and others (eds), *Constitutional Conversations in Europe* (Intersentia 2012).

Dyevre A, 'The French Constitutional Council' in Jakab A, Dyevre A and Itzcovich G (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017).

Elvira A, 'Spain' in Fusaro C and Oliver D (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing 2011).

Epping V, 'Art. 87a GG – Streitkräfte' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Fabbrini F, 'Fiscal Capacity' in Fabbrini F and Ventoruzzo M (eds), *Research Handbook on EU Economic Law* (Edward Elgar Publishing Limited 2019).

Ferreres Comella V, 'The Rise of Specialized Constitutional Courts' in Ginsburg T and Dixon R (eds), *Comparative Constitutional Law* (Edward Elgar Publishing Limited 2011).

Ferreres Comella V, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' in Closa Montero C (ed), *Constitución Española y Constitución Europea – Análisis de la Declaración del Tribunal Constitucional (DTC 1/2004, de 13 de Diciembre)* (Centro de Estudios Políticos y Constitucionales 2015).

Garoupa N, Solanes Mullor J and Violante T, 'Constitutional Courts and National Parliaments in Spain and Portugal' in Fernandes JM and Leston-Bandeira C (eds), *The Iberian Legislatures in Comparative Perspective* (Routledge 2019).

Ginsburg T and Dixon R, 'Introduction' in Ginsburg T and Dixon R (eds), *Comparative Constitutional Law* (Edward Elgar Publishing Limited 2011).

González Pascual M, 'Welfare Rights and Euro Crisis – The Spanish Case' in Kilpatrick C and De Witte B (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, vol 2014/05 (EUI Working Paper LAW, EUI 2014).

Górski M, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' in de Witte B and others (eds), *Judicial Review and Cooperation series, National Courts and EU Law: New Issues, Theories and Method* (Edward Elgar Publishing Limited 2016).

Grabenwarter C, 'National Constitutional Law Relating to the European Union' in von Bogdandy A and Bast J (eds), *Principles of European Constitutional Law* (2. edn, Hart Publishing and C. H. Beck 2009).

Grewe C, 'Methods of Identification of National Constitutional Identity' in Saiz Arnaiz A and Alcoberro Llivina C (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013).

Grimm D, 'The Role of National Constitutions in a United Europe' in Grimm D (ed), *Constitutionalism – Past, Present, and Future* (Oxford University Press 2016).

Grimm D, Reinbacher T and Wendel M, 'European Constitutionalism and the German Basic Law' in Albi A and Bardutzky S (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019).

Grzeszick B, 'Art. 20 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Häde U, 'Art. 122 AEUV – Maßnahmen bei gravierenden Schwierigkeiten' in Calliess C and Ruffert M (eds), *Kommentar zum EUV/AEUV – Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (5th edn, C.H. Beck 2016).

Hailbronner M and Martini S, 'The German Federal Constitutional Court' in Jakab A, Dyevre A and Itzcovich G (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017).

Heintschel von Heinegg W and Frau R, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Heintschel von Heinegg W and Frau R, 'Art. 45 GG – Ausschuss für Angelegenheiten der EU' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Hellermann J, 'Artikel 28 GG – Verfassung der Länder' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Herdegen M, 'Art. 79 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Herdegen M, 'Präambel des Grundgesetzes' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Herzog R, 'Art. 67 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Heyde W, '§ 97 BVerfGG – Gutachten-Verfahren' in Umbach DC, Clemens T and Dollinger F-W (eds), *Bundesverfassungsgerichtsgesetz – Mitarbeiterkommentar und Handbuch* (2nd edn, C.F. Müller 2005).

Hillgruber C, 'GG Präambel' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Hume M, 'Macroeconomic Imbalances in the Euro Area – Can They Be Managed?' in Campos NF, De Grauwe P and Ji Y (eds), *Economic Growth and Structural Reforms in Europe* (Cambridge University Press 2020).

Huster S and Rux J, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Iso-Markku T, 'Finland – Pro-European Arguments Prevail Despite the Rise of Euroscepticism' in Bukovskis K (ed), *Euroscepticism in Small EU Member States* (Zinātne 2016).

Jabko N, 'The Divided Sovereignty of the Eurozone' in Genschel P and Jachtenfuchs M (eds), *Beyond the Regulatory Polity?: The European Integration of Core State Powers* (Oxford University Press 2013).

Jacobsohn GJ, 'The Formation of Constitutional Idenities' in Ginsburg T and Dixon R (eds), *Comparative Constitutional Law* (Edward Elgar Publishing Limited 2011).

Jarass HD, 'Art. 23 GG – Europäische Union' in Jarass HD and Pieroth B (eds), *Grundgesetz für die Bundesrepublik Deutschland – Kommentar* (9th edn, C.H. Beck 2007).

Jokela J, 'Finland: Towards a More Cautious Europeanization' in Bretherton C and Mannin M (eds), *The Europeanization of European Politics* (Palgrave Macmillan 2013).

Kern B and Eggers C, 'Art. 174 AEUV – Ziele, Regionen und benachteiligte Gebiete' in Grabitz E, Hilf M and Nettesheim M (eds), *Das Recht der Europäischen Union – Kommentar* (70th edn, C.H. Beck 2020).

Kischel U, 'Artikel 3 GG – Gleichheit vor dem Gesetz' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Klein HH, 'Art. 21 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Klein HH, 'Art. 38 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Klein HH, 'Art. 145 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Kube H, 'Art. 105 GG – Steuergesetzgebungskompetenz' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Kube H, 'Art. 110 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Kube H, 'Art. 114 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Kube H, 'Art. 115 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (90th edn, C.H. Beck 2020).

Länsineva P, 'Fundamental Principles of the Constitution of Finland ' in Nuotio K, Sakari M and Huomo-Kettunen M (eds), *Introduction to Finnish Law and Legal Culture* (Univeristy of Helsinki 2012).

Lavapuro J, 'Constitutional Review in Finland' in Nuotio K, Sakari M and Huomo-Kettunen M (eds), *Introduction to Finnish Law and Legal Culture* (University of Helsinki 2012).

Lavapuro J, Ojanen T and Scheinin M, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' in Bell J and Paris M-L (eds), *Rights-Based Constitutional Review – Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing Limited 2016).

López Castillo A, 'La Unión Europea 'en constitución' y la Constitución estatal en (espera de) reformas – A propósito de la DTC 1/2004 de 13 de diciembre' in Closa Montero C (ed), *Constitución Española y Constitución Europea – Análisis de la Declaración del Tribunal Constitucional (DTC 1/2004, de 13 de Diciembre)* (Centro de Estudios Políticos y Constitucionales 2015).

Louis J-V, 'The Unexpected Revision of the Lisbon Treaty and the Establishment of a European Stability Mechanism' in Ashiagbor D, Countouris N and Lianos I (eds), *The European Union After the Treaty of Lisbon* (Cambridge University Press 2012).

Luif P, 'Grundlagen der Analyse' in Luif P (ed), *Österreich, Schweden, Finland – Zehn Jahre Mitgliedschaft in der Europäischen Union* (Böhlau Verlag 2007).

Maduro MP, 'Foreword: Fiscal Capacity and Constitutional Reform in the EMU' in Adams M, Fabbrini F and Larouche P (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014).

Magiera S, 'Art. 311 AEUV – Eigenmittel der EU' in Grabitz E, Hilf M and Nettesheim M (eds), *Das Recht der Europäischen Union – Kommentar* (70th edn, C.H. Beck 2020).

Martín Y Pérez de Nanclares J, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' in Calliess C and van der Schyff G (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

Mehde V, 'Art. 28 Abs. 1 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Michaels R, 'The Functional Method of Comparative Law' in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019).

Mik C, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' in Walker N (ed), *Sovereignty in Transition* (Hart Publishing 2003).

Millet F-X, 'Constitutional Identity in France – Vices and – Above All – Virtues' in Calliess C and Van der Schyff G (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

Morgenthaler G, 'Art. 93 GG – Bundesverfassungsgericht, Zuständigkeit' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Nettesheim M, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' in Brandt P (ed), *Verfassung und Krise*, vol 16 (Berliner Wissenschafts-Verlag (BWV) 2015).

Nettesheim M, 'Art. 1 AEUV – Regelungsbereich' in Grabitz E, Hilf M and Nettesheim M (eds), *Das Recht der Europäischen Union – Kommentar* (67th edn, C.H. Beck 2019).

Ojanen T, 'The Europeanization of Finnish Law' in Luif P (ed), *Österreich, Schweden, Finland – Zehn Jahre Mitgliedschaft in der Europäischen Union* (Böhlau Verlag 2007).

Ojanen T, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' in Nuotio K, Sakari M and Huomo-Kettunen M (eds), *Introduction to Finnish Law and Legal Culture* (University of Helsinki 2012).

Ojanen T, 'Constitutional Amendment in Finland' in Contiades X (ed), *Engineering Constitutional Change – A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013).

Ojanen T, '§ 296: Grundrechte in Finland' in Merten D and Papier H-J (eds), *Handbuch der Grundrechte in Deutschland und Europa – Band X (Grundrechte in West-, Nord- und Südeuropa)* (C.F. Müller 2018).

Ojanen T and Salminen J, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' in Albi A and Bardutzky S (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019).

Paris M-L, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' in Bell J and Paris M-L (eds), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing Limited 2016).

Pérez Tremps P, 'National Idenity in Spanish Constitutional Court Case-Law' in Saiz Arnaiz A and Alcoberro Llivina C (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013).

Pisani-Ferry J, 'Rebalancing the Governance of the Euro Area' in Dawson M, Enderlein H and Joerges C (eds), *Beyond the Crisis – The Governance of Europe's Economic, Political, and Legal Transformation* (Oxford University Press 2015).

Powell C, 'Spanish Membership of the European Union Revisited' in Royo Sn and Manuel PC (eds), *Spain and Portugal in the European Union?: The First Fifteen Years* (Frank Cass and Company Limited 2003).

Puttler A, 'Art. 174 AEUV – Ziele der Strukturpolitik; benachteiligte Gebiete' in Calliess C and Ruffert M (eds), *Kommentar zum EUV/AEUV* (5th edn, C.H. Beck 2016).

Raunio T, 'The Finnish Eduskunta and the European Union: The Strengths and Weaknesses of a Mandating System' in Hefftler C and others (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave Macmillan 2015).

Reestman J-H, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' in Beukers T, de Witte B and Kilpatrick C (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017).

Reimer E, 'Art. 110 GG – Haushaltsplan des Bundes' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Reimer E, 'Art. 115 GG – Kreditbeschaffung' in Epping V and Hillgruber C (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020).

Requejo Pagés JL, 'The Spanish Constitutional Tribunal' in von Bogdandy A, Huber PM and Grabenwarter C (eds), *Constitutional Adjudication: Institutions*, vol III (The Max Planck Handbook in European Public Law, Oxford University Press 2020).

Rideau J, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' in Saiz Arnaiz A and Alcoberro Llivina C (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013).

Rodríguez ML, 'Labour Rights in Crisis in the Eurozone: The Spanish Case' in Kilpatrick C and De Witte B (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, vol 2014/05 (EUI Working Paper LAW, EUI 2014).

Rossi LS, 'A New Revision of the EU Treaties After Lisbon?' in Rossi LS and Casolari F (eds), *EU after Lisbon: Amending or Coping with the Existing Treaties?* (Springer 2014).

Royo Sn and Steinberg F, 'Using a Sectoral Bailout to Make Wide Reforms: the Case of Spain' in Chang M, Steinberg F and Torres F (eds), *The Political Economy of Adjustment Throughout and Beyond the Eurozone Crisis – What Have We Learned?* (Routledge 2019).

Ruffert M, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' in Bignami F (ed), *EU Law in Populist Times – Crises and Prospects* (Cambridge University Press 2020).

Ruiz Almendral V, 'The European Fiscal Consolidation Legal Framework: Its Impact on National Fiscal Constitutions and Parliamentary Democracy' in Beukers T, De Witte B and Kilpatrick C (eds), *Constitutional Change Through Euro Crisis Law* (Cambridge University Press 2017).

Sadurski W, 'Constitutional Crisis in Poland' in Graber MA, Levinson S and Tushnet M (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

Saiz Arnaiz A and Alcoberro Llivina C, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' in Saiz Arnaiz A and Alcoberro Llivina C (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013).

Scharpf FW, 'The Costs of Non-Disintegration: The Case of the European Monetary Union' in Chalmers D, Jachtenfuchs D and Joerges C (eds), *The End of the Eurocrats' Dream – Adjusting to European Diversity* (Cambridge University Press 2016).

Schneider C, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' in Gatzer W and Schweisfurth T (eds), *Öffentliche Finanzwirtschaft in der Staatspraxis* (BWV – Berliner Wissenschafts-Verlag 2015).

Scholz R, 'Art. 23 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Scholz R, 'Art. 45 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Sefton T, 'Distributive and Redistributive Policy' in Goodin RE, Moran M and Rein M (eds), *The Oxford Handbook of Public Policy* (Oxford University Press 2008).

Seiler C, 'Art. 105 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Senior Nello S, 'EU Enlargement and Theories of Economic Integration' in Verdun A and Tovias A (eds), *Mapping European Economic Integration* (Palgrave Macmillan UK 2013).

Śledzińska-Simon A and Ziółkowski M, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' in Calliess C and Van der Schyff G (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

Solanes Mullor J and Torres Pérez A, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' in Albi A and Bardutzky S (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Asser Press 2019).

Suksi M, 'Finland' in Dawn O and Fusaro C (eds), *How Constitutions Change – A Comparative Study* (Hart Publishing 2011).

Tomuschat C, 'The Defence of National Identity by the German Constitutional Court' in Saiz Arnaiz A and Alcoberro Llivina C (eds), *National Constitutional Idenity and European Integration* (Intersentia Ltd 2013).

Tuori K, '§ 98: Verfassungsgerichtsbarkeit in Finnland' in von Bogdandy A, Grabenwarter C and Huber PM (eds), *Handbuch Ius Publicum Europaeum – Band VI (Verfassungsgerichtsbarkeit in Europa: Institutionen)* (C.F. Müller 2016).

Tuori K and Raitio J, 'Finland' in Neergaard; U, Jacqueson; C and Danielsen JH (eds), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU (The XXVI FIDE Congress in Copenhagen)*, vol 1 (DJØF Publishing Copenhagen 2014).

Van den Bogaert S and Cuyvers A, 'Of Carrots and Sticks – What Direction to Take for Economic and Monetary Union?' in Steunenberg B, Voermans W and Van den Bogaert S (eds), *Fit for the Future? Reflections From Leiden on the Functioning of the EU* (Eleven International Publishing 2016).

Van Middelaar L, 'Taking Decisions or Setting Norms? EU Presidencies Between Executive and Legislative Power in a Crisis-Driven Union' in Steunenberg B, Voermans W and Van den Bogaert S (eds), *Fit for the Future? Reflections From Leiden on the Functioning of the EU* (Eleven International Publishing 2016).

Walter C, 'Art. 93 GG' in Maunz T and Düring G (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020).

Wiederin E, 'Die Gesetzeskraft der Entscheidungen des Bundesverfassungsgerichts' in Brenner M, Huber PM and Möstl M (eds), *Der Staat des Grundgesetzes – Kontinuität und Wandel: Festschrift für Peter Badura zum siebzigsten Geburtstag* (Mohr Siebeck 2004).

Wyrozumska A, 'Poland' in Shelton D (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011).

Ziller J, 'Sovereignty in France: Getting Rid of the Mal de Bodin' in Walker N (ed), *Sovereignty in Transition* (Hart Publishing 2003).

Journal Articles

Abdellatif L and others, 'Transparency of law making and fiscal democracy in the Middle East' (2019) 43 Public Sector Economics 49.

Alaez Corral B and Arias Castaño A, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' (2009) 15 European Public Law 597.

Albi A, '"Europe" Articles in the Constitutions of Central and Eastern European Countries' (2005) 42 Common Market Law Review 399.

Alcidi C and Gros D, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' (2020) 55 Intereconomics – Review of European Economic Policy 202.

Allemand F, 'The Impact of the EU Enlargement on Economic and Monetary Union: What Lessons Can Be Learnt From the Differentiated Integration Mechanisms in an Enlarged Europe?' (2005) 11 European Law Journal 586.

Álvarez L, 'Die spanische Dogmatik der Verfassungstreue – Geschichte einer fehlgeschlagenen Rezeption des deutschen Verfassungsdenkens' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 433.

Andor L, 'SURE – EU Capacity for Stabilising Employment and Incomes in the Pandemic' (2020) 55 Intereconomics – Review of European Economic Policy 139.

Auel K and Raunio T, 'Debating the State of the Union? Comparing Parliamentary Debates on EU Issues in Finland, France, Germany and the United Kingdom' (2014) 20 The Journal of Legislative Studies 13.

Aust HP and Meinel F, 'Entscheidungsmöglichkeiten des BVerfG – Tenor, Systematik und Wirkungen' (2014) 54 Juristische Schulung (JuS) 25.

Azoulai L and Ronkes Agerbeek F, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' (2005) 42 Common Market Law Review 871.

Bainczyk M, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' (2009) 44 Europarecht (EuR) 145.

Bainczyk M, 'Die erste Vorabentscheidungsfrage des polnischen Verfassungsgerichtshofs an den EuGH' (2017) 52 Europarecht (EuR) 121.

Bainczyk M, 'Die praktische Anwendung des Unionsrechts in Polen – Anmerkung zum Urteil des EuGH v. 7.3.2017, Rs. C-390/15 (RPO), und zum Beschluss des polnischen Verfassungsgerichtshofes v. 17.5.2017, Akz. K 61/13' (2017) 52 Europarecht (EuR) 725.

Bainczyk M, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' (2017) 52 Europarecht (EuR) 306.

Bainczyk M and Ernst U, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' (2006) 41 Europarecht (EuR) 236.

Bara Y-E and others, 'A contribution to the work on the strengthening of the euro area' (2017) Trésor-Economics

Baranger D, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' (2011) 41 Israel Law Review 389.

Barcz J, 'Polish Policy in the Context of the Euro Area Reform' (2013) 16 Yearbook of Polish European Studies 69.

Bartl M, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit' (2015) 21 European Law Journal 23.

Beaud O, 'Le Conseil constitutionnel sur la souveraineté et ses approximations' (2018) 20-21 Jus Politicum – Revue de droit politique 143.

Beck H and Wentzel D, 'Eurobonds – Wunderwaffe oder Sprengsatz für die Europäische Union?' (2011) 91 Wirtschaftsdienst – Zeitschrift für Wirtschaftspolitik 717.

Beichelt T, 'Recovering space lost? The German Bundestag's new potential in European Politics' (2012) 21 German Politics 143.

Belavusau U, 'On age discrimination and beating dead dogs: *Commission v. Hungary*' (2013) 50 Common Market Law Review 1145.

Beukers T, 'The Bundesverfasungsgericht Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?"' (2014) 15 German Law Journal 343.

Bibow J, 'Making the Euro Viable: The Euro Treasury Plan' (2015) Levy Economics Institute Working Paper Collection

Blachèr P and Protière G, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' (2007) 69 Revue francaise de Droit constitutionnel 123.

Bobek M, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10 European Constitutional Law Review 54.

Böckenförde E-W, 'Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation' (1999) 52 Neue Juristische Wochenschrift (NJW) 9.

Bogdandy Av, 'Prinzipien der Rechtsfortbildung im europäischen Rechtsraum – Überlegungen zum Lissabon-Urteil des BVerfG' (2010) 63 Neue Juristische Wochenschrift (NJW) 1.

Bogdandy Av, 'Tyrannei der Werte? Herausforderungen und Grundlagen einer europäischen Dogmatik systemischer Defizite' (2019) 79 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 503.

Bogdandy Av and Schill S, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 701.

Bon P, 'La Identidad Nacional o Constitucional, una Nueva Noción Jurídica' (2014) 100 Revista Española de Derecho Constitucional 167.

Bonnie A, 'The Constitutionality of Transfers of Sovereignty: the French Approach' (1998) 4 European Public Law 517.

Borger V, 'The ESM and the European Court's Predicament in Pringle' (2013) 14 German Law Journal 113.

Boyron S, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' (1999) 6 Maastricht Journal of European and Comparative Law 169.

Brandt W, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' (2009) 44 Europarecht (EuR) 131.

Brauneck J, 'Rettet die EU den Rechtsstaat in Polen?' (2018) 37 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1423.

Breuer R, 'Die Sackgasse des neuen Europaartikels (Art. 23 GG)' (1994) 13 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 417.

Brok E and Selmayr M, 'Per Popularklage zurück nach Nizza? Zu den Verfassungsklagen gegen den Reformvertrag von Lissabon' (2008) 19 Europäische Zeitschrift für Wirtschaftsrecht 487.

Brouard S, 'The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition' (2009) 32 West European Politics 384.

Brzezinski MF and Garlicki L, 'Judicial Review in PostCommunist Poland: The Emergence of a Rechtsstaat?' (1995) 31 Stanford Journal of International Law 13.

Burchardt D, 'Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht – Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ('Solange III'/'Europäischer Haftbefehl II')' (2016) 76 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 527.

Burkiczak C, 'Die verfassungsrechtlichen Grundlagen der Wahl des Deutschen Bundestages' (2009) 49 Juristische Schulung (JuS) 805.

BVerfG, 'Kein Rechtsschutz des Bürgers gegen Auflösung des Bundestages' (1983) 36 Neue Juristische Wochenschrift (NJW) 383.

Cahill M, 'Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power' (2016) 75 Cambridge Law Journal 245.

Calliess C, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' (2012) 31 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1.

Calliess C, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' (2012) 31 Yearbook of European Law 402.

Calliess C, 'Bausteine einer erneuerten Europäischen Union – Auf der Suche nach dem europäischen Weg: Überlegungen im Lichte des Weißbuchs der Europäischen Kommission zur Zukunft Europas' (2018) 37 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1.

Calliess C, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' (2019) 38 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 684.

Calliess C, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' (2020) 39 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 897.

Casey J, 'The Spanish Constitutional Court' (1990) 25 Irish Jurist 26.

Castillo de la Torre F, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' (2005) 42 Common Market Law Review 1169.

Castillo-Ortiz P, 'The Illiberal Abuse of Constitutional Courts in Europe' (2019) 15 European Constitutional Law Review 48.

Chang M, 'Reforming the Stability and Growth Pact: Size and Influence in EMU Policymaking' (2006) 28 Journal of European Integration 107.

Charpy C, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' (2007) 3 European Constitutional Law Review 436.

Charpy C, 'Droit constitutionnel et droit communautaire – Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'État' (2009) 80 Revue Française de Droit Constitutionnel 795.

Claes M, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure' (2015) 16 German Law Journal 1331.

Claes M and Reestman J-H, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' (2015) 16 German Law Journal 917.

Classen CD, 'Europäische Rechtsgemeinschaft à l'allemande? Anmerkung zum Urteil des BVerfG vom 21.06.2016, 2 BvR 2728/13 u. a.' (2016) 51 Europarecht (EuR) 529.

Classen CD, 'Schwierigkeiten eines harmonischen Miteinanders von nationalem und europäischem Grundrechtsschutz' (2017) 52 Europarecht (EuR) 347.

Cloots E, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) 45 Netherlands Journal of the Legal Philosophy 82.

Comments E, 'Editorial Comments – Tinkering with Economic and Monetary Union' (2018) 55 Common Market Law Review 1.

Cooper I, 'A yellow card for the striker: national parliaments and the defeat of EU legislation on the right to strike' (2015) 22 Journal of European Public Policy 1406.

Cremer W, 'Lissabon-Vertrag und Grundgesetz' (2010) 32 JURA – Juristische Ausbildung 296.

Crespy A and Schmidt V, 'The clash of Titans: France, Germany and the discursive double game of EMU reform' (2014) 21 Journal of European Public Policy 1085.

Crowe R, 'The European Budgetary Galaxy' (2017) 13 European Constitutional Law Review 428.

Curti Gialdino C, 'Some Reflections on the *Aquis Communautaire*' (1995) 32 Common Market Law Review 1089.

Czapliński W, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' (2011) 12 ERA Forum 197.

Czaputowicz J, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' (2014) 17 Yearbook of Polish European Studies 15.

Czarny P, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' (2018) 64 Osteuropa Recht (OER) 5.

Daiber B, 'Das Integrationsverantwortungsgesetz in der Praxis des Deutschen Bundestages' (2012) 43 Zeitschrift für Parlamentsfragen 293.

Darvas Z, 'A New Look at Net Balances in the European Union's Next Multiannual Budget' (2019) Bruegel Working Paper

Dawson M and De Witte F, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 The Modern Law Review 817.

De Areilza Carvajal JM, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' (2005) 73 Revista Española de Derecho Constitucional 365.

de Vries T, 'Bedrohungen für die Unabhängigkeit der Justiz in Polen – Teil 1' (2018) 27 Wirtschaft und Recht in Osteuropa (WiRO) 105.

Deffaa W, 'New Impetus for EU Taxation Policy' (2011) 46 Intereconomics – Review of European Economic Policy 287.

Dermine P, 'The Commission's December Package 18 Months Later' (2019) Maastricht Law – Faculty of Law Working Paper series 7.

Dubout É, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' (2010) 83 Revue francaise de Droit constitutionnel 451.

Dyevre A, 'The German Federal Constitutional Court and European Judicial Politics' (2011) 34 West European Politics 346.

Eichengreen B, 'European Monetary Integration with Benefit of Hindsight' (2012) 50 Journal of Common Market Studies 123.

Emmert F and Petroviæ S, 'The Past, Present, and Future of EU Enlargement' (2014) 37 Fordham International Law Journal 1349.

Engels A, 'Die Integrationsverantwortung des Deutschen Bundestags' (2012) 52 Juristische Schulung (JuS) 210.

Eriksen EO and Fossum JE, 'Bringing European Democracy Back in – or How to Read the German Constitutional Court's Libson Treaty Ruling' (2011) 17 European Law Journal 153.

Estella de Noriega A, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' (1999) 5 European Public Law 269.

Everling U, 'Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte' (2010) 45 Europarecht (EuR) 91.

Fabbrini F, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' (2014) 32 Berkeley Journal of International Law 101.

Fabbrini F, 'Austerity, the European Council, and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council' (2015) 22 Indiana Journal of Global Legal Studies 269.

Fabbrini F and Granat K, ''Yellow Card, but no Foul': The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50 Common Market Law Review 115.

Fabbrini S, 'The Constitutional Conundrum of the European Union' (2016) 23 Journal of European Public Policy 84.

Fabbrini S, 'The Euro Crisis Through Two Paradigms: Interpreting the Transformation of the European Economic Governance' (2017) 18 European Politics and Society 318.

Falkner G, 'How Pervasive Are Euro-Politics? Effects of EU Membership on a New Member State' (2000) 38 Journal of Common Market Studies 223.

Faraguna P, 'Taking Constitutional Identities Away from the Courts' (2016) 42 Brooklyn Journal of International Law 491.

Ferreres Comella V, 'The Spanish Constitutional Court: Time for Reforms' (2008) 3 Journal of Comparative Law 22.

Fischer MG and Ladiges M, 'Evakuierungseinsätze der Bundeswehr künftig ohne Parlamentsvorbehalt' (2016) 35 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 32.

Franzius C, '70 Jahre Grundgesetz und Europa: Passt das zusammen?' (2019) 54 Europarecht (EuR) 365.

Galetta D-U, 'European Union Law in the Jurisprudence of Italian High Courts: Is the Counter-Limits Doctrine a Dog That Barks but Does Not Bite?' (2015) 21 European Public Law 747.

Gärditz KF, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' (2014) 15 German Law Journal 183.

Gärditz KF, 'Glaubwürdigkeitsprobleme im Unionsverfassungsrecht' (2020) 31 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 505.

Garoupa N, Gomez-Pomar F and Grembi V, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' (2011) 29 The Journal of Law, Economics, and Organization 513.

Geis M-E and Meier H, 'Grundfälle zum Organstreitverfahren, Art. 93 I Nr. 1 GG, §§ 13 Nr. 5, 63ff. BVerfGG' (2011) 51 Juristische Schulung (JuS) 699.

Ginter C and Narits R, 'The Perspective of a Small Member State to the Democratic Deficiency of the ESM' (2013) 38 Review of Central and East European Law 54.

Gött H, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' (2014) 49 Zeitschrift Europarecht (EuR) 514.

Granat K, 'Kontrolle des EU-Sekundärrechts durch den polnischen Verfassungsgerichtshof – Anmerkung zum Beschluss des polnischen Verfassungsgerichtshofs vom 16. November 2011, SK 45/09' (2013) 48 Europarecht (EuR) 205.

Grawert R, 'Homogenität, Identität, Souveränität – Positionen jurisdiktioneller Begriffsdogmatik' (2012) 51 Der Staat 189.

Groß T, 'Erlaubt das Grundgesetz einen Austritt aus der EU?' (2018) 53 Europarecht (EuR) 387.

Hahn J-U, 'Die Mitwirkungsrechte von Bundestag und Bundesrat in EU-Angelegenheiten nach dem neuen Integrationsverantwortungsgesetz' (2009) 20 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 758.

Haltern U, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' (2020) 39 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 817.

Hamann A, 'Sur un 'sentiment' de souveraineté' (2018) 20-21 Jus Politicum – Revue de droit politique 187.

Hatje A and Schwarze J, 'Der Zusammenhalt der Europäischen Union' (2019) 54 Europarecht (EuR) 153.

Hautamäki V-P, 'Novel Rules in the Finnish Constitution – The Question of Applicability' (2007) 52 Scandinavian Studies in Law 133.

Herbst T, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' (2012) 45 Zeitschrift für Rechtspolitik (ZRP) 33.

Herrmann C, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währverfassungsrechts' (2012) 23 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 805.

Hild A, Herz B and Bauer C, 'Structured Eurobonds: Limiting Liability and Distributing Profits' (2014) 52 Journal of Common Market Studies 250.

Hinarejos A, 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration ' (2012) 14 Cambridge Yearbook of European Legal Studies 243.

Hinarejos A, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU ' (2013) 50 Common Market Law Review 1621.

Höbel S, 'Polish and German Constitutional Jurisprudence on Matters of European Community Law: A Comparison of the Constitutional Courts' (2007) 3 Croation Yearbook of European Law and Policy 515.

Hoecke MV, 'Methodology of Comparative Legal Research' (2015) Law and Method 1.

Holste H, 'Demokratie wieder flott gemacht: Das neue Sitzzuteilungsverfahren im Bundeswahlgesetz sichert das gleiche Wahlrecht' (2013) 32 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 529.

Hönnige C and Gschwend T, 'Das Bundesverfassungsgericht im politischen System der BRD – ein unbekanntes Wesen?' (2010) 51 Politische Vierteljahresschrift 507.

Hooghe L and Marks G, 'Grand Theories of European Integration in the Twenty-First Century' (2019) 26 Journal of European Public Policy 1113.

Jaakkola J, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' (2019) 20 German Law Journal 660.

Jääskinen N, 'The Application of Community Law in Finland: 1995-1998' (1999) 36 Common Market Law Review 407.

Jager J and Hafner KA, 'The Optimum Currency Area Theory and the EMU – An Assessment in the Context of the Eurozone Crisis' (2013) 48 Intereconomics – Review of European Economic Policy 315.

Jaggi S, 'Revolutionary Constitutional Lawmaking in Germany – Rediscovering the German 1989 Revolution' (2016) 17 German Law Journal 579.

Jankovic S, 'Polish Democracy Under Threat? An Issue of Mere Politics or a Real Danger?' (2016) 9 Baltic Journal of Law & Politics 49.

Jestaedt M, 'Demokratische Legitimation – quo vadis?' (2004) 44 Juristische Schulung (JuS) 649.

Kainer F, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' (2020) 31 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 533.

Kaiser A-B, 'Verfassungsvergleichung durch das Bundesverfassungsgericht – Ein Kommentar' (2010) 18 Journal für Rechtspolitik 203.

Kersten J, 'Parlamentarismus und Populismus' (2018) 58 Juristische Schulung (JuS) 929.

Kirchhof P, 'Die Rechtsarchitektur der Europäischen Union' (2020) 73 Neue Juristische Wochenschrift (NJW) 2057.

Klein O and Sennekamp C, 'Aktuelle Zulässigkeitsprobleme der Verfassungsbeschwerde' (2007) 60 Neue Juristische Wochenschrift (NJW) 945.

Klotz C, 'Die Machtbalance zwischen Politik und verfassungsgerichtlicher Rechtsprechung' (2012) 45 Zeitschrift für Rechtspolitik (ZRP) 5.

Kochenov D and Pech L, 'Better Late Than Never? On the European Commission's Rule of Law Framework and its First Activation' (2016) 54 Journal of Common Market Studies 1062.

Komárek J, '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. ÚS 5/12, Slovak Pensions XVII' (2012) 8 European Constitutional Law Review 323.

Koncewicz TT, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' (2016) 53 Common Market Law Review 1753.

Koncewicz TT, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 Review of Central and East European Law 116.

Konertz P, 'Historische und philosophische Grundlagen der Rechtsordnung im Überblick – Am Beispiel von BGB, GG und StGB' (2019) 59 Juristische Schulung (JuS) 201.

König T and Hug S, 'Ratifying Maastricht: Parliamentary Votes on International Treaties and Theoretical Solution Concepts' (2000) 1 European Union Politics 93.

Kottmann M and Wohlfahrt C, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' (2009) 69 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 443.

Kowalik-Bańczyk K, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' (2005) 6 German Law Journal 1355.

Kröger K, 'Die Entstehung des Grundgesetzes' (1989) 42 Neue Juristische Wochenschrift (NJW) 1318.

Krygier M, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' (2019) 15 European Constitutional Law Review 544.

Kühling J, 'Die richtlinienkonforme und die verfassungskonforme Auslegung im Öffentlichen Recht' (2014) 54 Juristische Schulung (JuS) 481.

Kühn Z, 'Ultra Vires Review and the Demise of Constitutional Pluralism – The Czecho-Slovak Pension Saga, and the Dangers of State Court's Defiance of EU Law' (2016) 23 Maastricht Journal of European and Comparative Law 185.

Ladiges M, 'Grenzen des wehrverfassungsrechtlichen Parlamentsvorbehalts' (2010) 29 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1075.

Lang A, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' (2018) 55 Common Market Law Review 923.

Larik J, 'Prêt-à-Ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017' (2017) 13 European Constitutional Law Review 759.

Lastra RM and Louis J-V, 'European Economic and Monetary Union: History, Trends, and Prospects' (2013) 32 Yearbook of European Law 57.

Lavapuro J, Ojanen T and Scheinin M, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 International Journal of Constitutional Law 505.

Łazowski A, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' (2007) 3 European Constitutional Law Review 148.

Łazowski A, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' (2011) 48 Common Market Law Review 503.

Lehner T and Wasserfallen F, 'Political Conflict in the Reform of the Eurozone' (2019) 20 European Union Politics 45.

Leino P and Salminen J, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' (2013) 9 European Constitutional Law Review 451.

Lorz RA and Sauer H, 'Verfassungsändernde Mehrheiten für die Stabilisierung des Euro? – Mehrheitserfordernisse bei der Zustimmung zum Fiskalpakt, zum ESM-Vertrag und zur Änderung des AEUV' (2012) 47 Europarecht (EuR) 682.

Louis J-V, 'The Economic and Monetary Union: Law and Institutions' (2004) 41 Common Market Law Review 575.

Ludwigs M, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' (2015) 34 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 537.

Ludwigs M, 'Die Krisenpolitik der EZB zwischen Verfassungs- und Unionsrecht' (2017) 70 Neue Juristische Wochenschrift (NJW) 3563.

Madsen MR, Olsen HP and Sadl Uk, 'Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' (2017) 23 European Law Journal 140.

Magnon X, 'Commentaire de Décisions: Décision n◦ 2017-749 DC du 31 juillet 2017, Accord économique et commercial global entre le Canada, d'une part, et l'Union européenne et ses États membres, d'autre part' (2018) 113 Revue française de droit constitutionnel 173.

Markowski R, 'Creating Authoritarian Clientelism: Poland After 2015' (2019) 11 Hague Journal on the Rule of Law 111.

Martínez-Herrera E and Miley TJ, 'The Constitution and the Politics of National Identity in Spain' (2010) 16 Nations and Nationalism 6.

Matczak M, 'Poland's Rule of Law Crisis: Some Thoughts' (2019) 11 Hague Journal on the Rule of Law 407.

Maugüé C, 'Le Conseil Constitutionnel et le droit supranational' (2003) 2 Le Seuil 53.

Mayer FC, 'Der Vertrag von Lissabon im Überblick' (2010) 50 Juristische Schulung (JuS) 189.
Mayer FC, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' (2011) 9 International Journal of Constitutional Law 757.
Mayer FC, 'Rebels Without a Cause? Zur OMT-Vorlage des Bundesverfassungsgerichts' (2014) 49 Europarecht (EuR) 473.
Mayer FC and Heidfeld C, 'Eurobonds, Schuldentilgungsfonds und Projektbonds – Eine dunkle Bedrohung?' (2012) 45 Zeitschrift für Rechtspolitik 129.
Mayer FC and Heidfeld C, 'Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds' (2012) 65 Neue Juristische Wochenschrift (NJW) 422.
Mayer FC, Lenski E and Wendel M, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' (2008) 43 Europarecht (EuR) 63.
Mayer FC and Walter M, 'Die Europarechtsfreundlichkeit des BVerfG nach dem Honeywell-Beschluss' (2011) 33 Juristische Ausbildung (JURA) 532.
Meinel F, 'The Constitutional Miracle on the Rhine: Towards a History of West German Constitutionalism and the Federal Constitutional Court' (2016) 14 International Journal Of Constitutional Law 277.
Melin P, 'Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon' (2011) 46 Europarecht (EuR) 655.
Miller MC, 'Finnish Judges and the European Union: An American Perspective' (2016) 24 Michigan State International Law Journal 495.
Millet F-X and Perlo N, 'The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law?' (2015) 16 German Law Journal 1471.
Möllers TMJ and Redcay K, 'Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union?' (2013) 48 Europarecht (EuR) 409.
Morlok M, 'Kein Geld für verfassungsfeindliche Parteien?' (2017) 50 Zeitschrift für Rechtspolitik (ZRP) 66.
Morlok M and Kühr H, 'Wahlrechtliche Sperrklauseln und die Aufgaben einer Volksvertretung' (2012) 52 Juristische Schulung (JuS) 385.
Murkens J, 'Identity Trumps Integration – The Lisbon Treaty in the German Federal Constitutional Court' (2009) 48 Der Staat 517.
Nägele C, 'German Constitutional Law Cases 2012-2015' (2016) 22 European Public Law 439.
Neergaard U and S¿rense KE, 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case' (2017) 36 Yearbook of European Law 275.
Nettesheim M, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' (2010) 63 Neue Juristische Wochenschrift (NJW) 177.
Nettesheim M, '"Euro-Rettung" und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' (2011) 46 Europarecht (EuR) 765.
Nettesheim M, 'Verfassungsrecht und Politik in der Staatsschuldenkrise' (2012) 65 Neue Juristische Wochenschrift (NJW) 1409.
Nettesheim M, 'Wo 'endet' das Grundgesetz – Verfassungsgebung als grenzüberschreitender Prozess' (2012) 52 Der Staat 313.

Neuman GL, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' (2012) 45 Cornell International Law Journal 257.
Nicoll A, 'Fiscal Union by Force' (2011) 53 Survival 17.
Oeter S, 'Bundesstaat, Föderation, Staatenverbund – Trennlinien und Gemeinsamkeiten föderaler Systeme' (2015) 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 733.
Ohler C, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' (2015) 34 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1001.
Ojanen T, 'The Impact of EU Membership on Finnish Constitutional Law' (2004) 10 European Public Law 531.
Ojanen T, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' (2007) 52 Scandinavian Studies in Law 203.
Ojanen T, 'The EU at the Finnish Constitutional Arena' (2013) 4 Tijdschrift voor Constitutioneel Recht 242.
Oliver P, 'The French Constitution and the Treaty of Maastricht' (1994) 43 International & Comparative Law Quarterly 1.
Pache E, 'Das Ende der europäischen Integration? Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon, zur Zukunft Europas und der Demokratie' (2009) 36 Europäische Grundrechte-Zeitschrift (EuGRZ) 285.
Pagoulatos G, 'EMU and the Greek Crisis: Testing the Extreme Limits of an Asymmetric Union' (2020) 42 Journal of European Integration 363.
Paris M-L, 'Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law' (2010) 29 Yearbook of European Law 21.
Payandeh M, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' (2011) 48 Common Market Law Review 9.
Payandeh M, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' (2017) 13 European Constitutional Law Review 400.
Perez Ayala A, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' (2009) 75-76 Revista de Derecho Político 409.
Pernice I, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 Common Market Law Review 703.
Pfeiffer TM, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 469.
Pfersmann O, 'Concrete Review As Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective' (2010) 6 European Constitutional Law Review 223.
Pieroth B, 'Das Demokratieprinzip des Grundgesetzes' (2010) 50 Juristische Schulung (JuS) 473.
Pilz S, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' (2017) 28 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 637.
Pinelli C, 'The Discourses on Post-National Governance and the Democratic Deficit Absent an EU Government' (2013) 9 European Constitutional Law Review 177.

Plaza C, 'The Constitution for Europe and the Spanish Constitutional Court' (2006) 12 European Public Law 353.
Polański Z, 'Poland and the Euro Zone Enlargement: Monetary Policy, ERM II, and Other Issues' (2004) 32 Atlantic Economic Journal 280.
Pollard D, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' (1988) 23 Irish Jurist 2.
Półtorak N and Dudzik S, '"The Court of the Last Word." Competences of the Polish Constitutional Tribunal in the Review of European Union Law' (2012) 15 Yearbook of Polish European Studies 225.
Polzin M, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14 International Journal of Constitutional Law 411.
Preuss U, 'The Implications of 'Eternity Clauses': the German Experience' (2012) 44 Israel Law Review 429.
Puntscher Riekmann S and Wydra D, 'Representation in the European State of Emergency: Parliaments Against Governments?' (2013) 35 Journal of European Integration 565.
Rademacher T, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' (2018) 53 Europarecht (EuR) 140.
Raunio T, 'Refusing to Be Sidelined: The Engagement of the Finnish *Enduskunta* in Foreign Affairs' (2016) 39 Scandinavian Political Studies 312.
Rech W, 'Some Remarks on the EU's Action on the Erosion of the Rule of Law in Poland and Hungary' (2018) 26 Journal of Contemporary European Studies 334.
Reestman J-H, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' (2005) 1 European Constitutional Law Review 302.
Reestman J-H, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' (2009) 5 European Constitutional Law Review 374.
Reestman J-H and Besselink LFM, 'Editorial – On the Lissabon-Urteil: Democracy and a Democratic Paradox' (2009) 5 European Constitutional Law Review 341.
Reimer F, 'Vertrauensfrage und Bundestagsauflösung bei parlamentarischer Anscheinsgefahr' (2005) 45 Juristische Schulung (JuS) 680.
Rinaldi-Larribe M-J, 'Is Economic Convergence in New Member States Sufficient for an Adoption of the Euro?' (2008) 5 The European Journal of Comparative Economics 269.
Ritge K, 'Das Recht der kommunalen Selbstverwaltung in den Verfassungsräumen von Bund und Ländern' (2018) 37 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 114.
Ritterberger B and Schimmelpfennig F, 'Kontinuität und Divergenz. Die Eurokrise und die Entwicklung europäischer Integration in der Europaforschung' (2015) 56 Politische Vierteljahresschrift 389.
Rochère JDdl, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' (2005) 42 Common Market Law Review 859.
Rosas A, 'Finland – Finland's Accession to the European Union: Constitutional Aspects' (1995) 1 European Public Law 166.

Roženský V, 'Mandatory Expenditure and the Flexibility of Fiscal Policy in the Czech Republic (in Czech: Mandatorní Výdaje A Flexibilita Fiskální Politiky V Ċr)' (2012) 60 Politická ekonomie 40.

Ruffert M, 'The European Debt Crisis and European Union Law' (2011) 48 Common Market Law Review 1777.

Ruffert M, 'Europarecht: Vorlagebeschluss des BVerfG zum OMT-Programm – Die Europarechtswidrigkeit des Kaufs von Staatsanleihen durch die EZB im Rahmen des OMT-Programms ist vom EuGH zu prüfen.' (2014) 54 Juristische Schulung (JuS) 373.

Ruffert M, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' (2020) 39 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1777.

Ruffert M, Grischek F and Schramm M, 'Europarecht im Examen: Grundfragen und Organisationsstruktur' (2019) 59 Juristische Schulung (JuS) 974.

Rupp HG, 'Judicial Review of International Agreements: Federal Republic of Germany' (1977) 25 The American Journal of Comparative Law 286.

Rytel-Warzocha A, 'The Dispute over the Constitutional Tribunal in Poland and Its Impact on the Protection of Constitutional Rights and Freedoms' (2016) 3 International Comparative Jurisprudence 153.

Sadurski W, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2019) 11 Hague Journal on the Rule of Law 63.

Salo S and Rydgren J, 'Politicisation of the Eurozone Crisis in Finland: Adaptation Toward the Radical Right?' (2018) 34 Journal of International and Comparative Social policy 234.

Santaolalla Gadea F and Martinez Lage S, 'Spanish Accession to the European Communities: Legal and Constitutional Implications' (1986) 23 Common Market Law Review 11.

Santos JMV, 'La Reforma del Procedimiento de Reforma Constitucional en España' (2016) 96 Revista de Derecho Político 13.

Sauer H, 'Verfassungsvergleichung durch das Bundesverfassungsgericht – Zur Bedeutung der Verfassungsvergleichung für die Auslegung des Grundgesetzes' (2010) 18 Journal für Rechtspolitik 194.

Schäfer H-B and Bigus J, 'Consequences of Different Eurobonds Proposals' (2016) 12 Review of Law & Economics 523.

Schäfers D, 'Einführung in die Methodik der Gesetzesauslegung' (2015) 55 Juristische Schulung (JuS) 875.

Scheuer A and Schmitt H, 'Sources of EU Support: The Case of Germany' (2009) 18 German Politics 577.

Schild J, 'Leadership in Hard Times – Germany, France, and the Management of the Eurozone Crisis' (2013) 31 German Politics and Society 24.

Schladebach M, 'Staatszielbestimmungen im Verfassungsrecht' (2018) 58 Juristische Schulung (JuS) 118.

Schöbener B, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' (2011) 43 Juristische Arbeitsblätter (JA) 885.

Schoeller MG, 'Preventing the Eurozone Budget: Issue Replacement and Small State Influence in EMU' (2020) Journal of European Public Policy 1.

Schönberger C, 'Die Europäische Union zwischen 'Demokratiedefizit' und Bundesstaatsverbot – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48 Der Staat 535.

Schorkopf F, 'The European Union As an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10 German Law Journal 1219.

Schorkopf F, 'Case Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, and 2 BvR 182/09 – 123 BVerfGE 267 (2009)' (2010) 104 The American Journal of International Law 259.

Schorkopf F, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' (2020) 73 Neue Juristische Wochenschrift (NJW) 3085.

Schratzenstaller M, 'The EU Own Resources System – Reform Needs and Options' (2013) 48 Intereconomics – Review of European Economic Policy 303.

Schratzenstaller M and Krenek A, 'Tax-Based Own Resources to Finance the EU Budget' (2019) 54 Intereconomics – Review of European Economic Policy 171.

Schröder UJ, 'Das Demokratieprinzip des Grundgesetzes' (2017) 49 Juristische Arbeitsblätter (JA) 809.

Schwarze J, 'Die verordnete Demokratie – Zum Urteil des 2. Senats des BVerfG zum Lissabon-Vertrag' (2010) 45 Europarecht (EuR) 108.

Schwerdtfeger A, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' (2015) 50 Europarecht (EuR) 290.

Schyff GVd, 'Exploring Member State and European Union Constitutional Identity' (2016) 22 European Public Law 227.

Schyff Gvd and Leenknegt G-J, 'The Case for a European Senate – A model for the representation of national parliaments in the European Union' (2007) 62 Zeitschrift für öffentliches Recht (ZöR) 237.

Sennekamp C, 'Alle Staatsgewalt geht vom Volke aus! – Demokratieprinzip und Selbstverwaltung der Justiz' (2010) 29 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 213.

Sluis Mvd, 'A Euro Area Budget: Another Seedling? ' (2019) Maastricht Law – Faculty of Law Working Paper series 18.

Sokolov E, 'Wege zur Partizipation für Inländer – Volksbegriff und Einbürgerung im Lichte des Demokratieprinzips' (2016) 35 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 649.

Spieker LD, 'Breathing Life Into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182.

Spieker LD, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize *Modus Vivendi* Between the Court of Justice and Constitutional Courts' (2020) 57 Common Market Law Review 361.

Spies A, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' (1990) 9 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1040.

Steinbach A, 'All's Well That Ends Well? Crisis Policy After the German Constitutional Court's Ruling in Gauweiler' (2017) 24 Maastricht Journal of European and Comparative Law 140.

Steinbach A, 'Insurance-Type Cooperation Mechanisms Under EU Law' (2017) 27 Swiss Review of International and European Law 19.

Steuerle CE, 'America's Related Fiscal Problems' (2010) 29 Journal of Policy Analysis and Management 876.

Suanzes-Carpegna JV, 'El constitucionalismo español en su contexto comparado' (2010) 19 Giornale di Storia Costituzionale 93.

Terhechte JP, 'Souveränität, Dynamik und Integration – Making Up the Rules As We Go Along? – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 20 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 724.

Thiele A, 'Friendly or Unfriendly Act? The 'Historic' Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' (2014) 15 German Law Journal 241.

Thiele A, 'The 'German Way' of Curbing Public Debt: The Constitutional Debt Brake and the Fiscal Compact – Why Germany Has to Work on Its Language Skills' (2015) 11 European Constitutional Law Review 30.

Thiele A, 'Der Austritt aus der EU – Hintergründe und rechtliche Rahmenbedingungen eines 'Brexit'' (2016) 51 Europarecht (EuR) 281.

Thiele A, 'Die Integrationsidentität des Art. 23 Abs. 1 GG als (einzige) Grenze des Vorrangs des Europarechts' (2017) 52 Europarecht (EuR) 367.

Thym D, 'Europäische Integration im Schatten souveräner Staatlichkeit – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48 Der Staat 559.

Tiilikainen T, 'Finland – An EU Member State With a Small State Identity' (2006) 28 Journal of European Integration 73.

Tomuschat C, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 251.

Torres Pérez A, 'Constitutional Dialogue on the European Arrest Warrent: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011' (2012) 8 European Constitutional Law Review 105.

Tortola PD, 'Coming Full Circle: The Euro Crisis, Integration Theory, and the Future of the EU' (2015) 50 The International Spectator 125.

Tridimas T and Xanthoulis N, 'A Legal Analysis of the Gauweiler Case – Between Monetary Policy and Constitutional Conflict' (2016) 23 Maastricht Journal of European and Comparative Law 17.

Ungern-Sternberg Av, 'Parliaments – Fig Leaf or Heartbeat of Democracy? German Constitutional Court – Judgment of 7 September 2011 – Euro Rescue Package' (2012) 8 European Constitutional Law Review 304.

Urbaneck P, 'Die Zulässigkeitsprüfung im Verfassungsrecht' (2014) 54 Juristische Schulung (JuS) 896.

Van den Bogaert S and Borger V, 'Hoog spel in Karlsruhe – Het Duitse Constitutionele Hof over het Public Sector Purchase Programme van de ECB' (2020) Nederlands Juristenblad 2978.

Vinx L, 'The Incoherence of Strong Popular Sovereignty' (2013) 11 International Journal of Constitutional Law 101.

Volp D, 'Parteiverbot und wehrhafte Demokratie – Hat das Parteiverbotsverfahren noch eine Berechtigung?' (2016) 69 Neue Juristische Wochenschrift (NJW) 459.

Voßkuhle A, 'Grundwissen – Öffentliches Recht: Der Grundsatz des Vorbehalts des Gesetzes' (2007) 47 Juristische Schulung (JuS) 118.
Voßkuhle A, 'Verfassungsgerichtsbarkeit und europäische Integration' (2013) 32 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 27.
Voßkuhle A, 'Der Wandel der Verfassung und seine Grenzen' (2019) 59 Juristische Schulung (JuS) 417.
Voßkuhle A and Kaiser A-B, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' (2009) 49 Juristische Schulung (JuS) 803.
Vranes E, 'Constitutional Foundation of, and Limitations to, EU Integration in France' (2013) 19 European Public Law 525.
Vranes E, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' (2013) 14 German Law Journal 75.
Wahl R, 'Elemente der Verfassungsstaatlichkeit' (2001) 41 Juristische Schulung (JuS) 1041.
Wasserfallen F, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' (2014) 52 Journal of Common Market Studies 420.
Weber A, 'Die Reform der Wirtschafts- und Währungsunion in der Finanzkrise' (2011) 22 Europäische Zeitschrift für Wirtschaftsrecht 935.
Weiler JHH, 'The 'Lisbon Urteil' and the Fast Food Culture' (2009) 20 The European Journal of International Law 505.
Weiß W, 'Die Integrationsverantwortung der Verfassungsorgane' (2018) 58 Juristische Schulung (JuS) 1046.
Wendel M, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law Review 96.
Wendel M, 'Comparative Reasoning and the Making of a Common Constitutional Law: EU-Related Decisions of National Constitutional Courts in a Transnational Perspective' (2013) 11 International Journal of Constitutional Law 981.
Wendel M, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) 10 European Constitutional Law Review 263.
Wendel M, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' (2014) 74 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 615.
Wendel M, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice After LM' (2019) 15 European Constitutional Law Review 17.
Wohlfahrt C, 'The Lisbon Case: A Critical Summary' (2009) 10 German Law Journal 1277.
Wood S, 'Germany and the Eastern Enlargement of the EU: Political Elites, Public Opinion and Democratic Processes' (2002) 24 Journal of European Integration 23.
Wouters J, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 5 European Papers 255.
Wright S, 'The French Conseil Constitutionnel Since Early 2010: Its Growing Caseload and Its First Contact With the Court of Justice of the European Union' (2014) 20 European Public Law 23.

Wright S, 'The French *Conseil Constitutionnel* Under an Evolving Constitution' (2017) 23 European Public Law 245.
Wróbel A, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' (2013) 13 ERA Forum – Journal of the Academy of European Law 491.
Würtenberger T and Kunz E, 'Die Mitwirkung der Bundesländer in Angelegenheiten der Europäischen Union' (2010) 42 Juristische Arbeitsblätter (JA) 406.
Wyplosz C, 'The Six Flaws of the Eurozone' (2016) 31 Economic Policy 559.
Wyrzykowski M, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' (2019) 11 Hague Journal on the Rule of Law 417.
Ziller J, 'The German Constitutional Court's Friendliness Towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' (2010) 16 European Public Law 53.
Ziller J, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' (2015) 21 European Public Law 765.
Zwingmann B, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' (2012) 61 International & Comparative Law Quarterly (ICLQ) 665.

Newspaper Articles

Arnold M and Romei V, 'Eurozone Economy Shrinks by Fastest Rate on Record' *Financial Times* (London 30 April 2020) <https://www.ft.com/content/dd6cfafa-a56d-48f3-a9fd-aa71d17d49a8> accessed 20 December 2020.
Barber T, 'Eurozone Reform Deadlock Reflects Deep Malaise Over Integration – The Fiscal Stalemate Derives in Part From the Frictions in Franco-German Relations' *Financial Times* (London 26 December 2019) <https://www.ft.com/content/8ffa04c6-1815-11ea-8d73-6303645ac406> accessed 20 December 2020.
Beisel KM, Finke B and Kolb M, 'Attacke auf die sparsamen Vier' *Süddeutsche Zeitung* (Munich 27 May 2020) <https://www.sueddeutsche.de/politik/750-milliarden-paket-attacke-auf-die-sparsamen-vier-1.4919406> accessed 20 December 2020.
Berschens R, 'Das haben Merkel und Macron in der Meseberger Erklärung vereinbart' *Handelsblatt* (Düsseldorf 20 June 2018) <https://www.handelsblatt.com/eu-reform-das-haben-merkel-und-macron-in-der-meseberger-erklaerung-vereinbart/22713150.html?ticket=ST-1195381-1mhV5xNNDISeuJcQkU2H-ap1> accessed 20 December 2020.
Braun E, 'French Government Lays Out Fresh €100B Stimulus Package' *Politico* (Brussels 3 September 2020) <https://www.politico.eu/article/france-coronavirus-100-billion-stimulus-package/> accessed 20 December 2020.
Brössler D and Finke B, 'Merkel und Macron setzen die Zauderer unter Druck' *Süddeutsche Zeitung* (Munich 19 May 2020) <https://www.sueddeutsche.de/politik/merkel-macron-corona-hilfspaket-1.4912662> accessed 20 December 2020.
Brunsden J, Chassany A-S and Chazan G, 'France and Germany to Press on With Eurozone Reform' *Financial Times* (London 20 May 2018) <https://www.ft.com/content/fdde302c-5c1c-11e8-ad91-e01af256df68> accessed 20 December 2020.

Chassany A-S, Chazan G and Khan M, 'Impatient Macron Pushes Merkel Hard on Eurozone Reform' *Financial Times* (London 16 March 2018) <https://www.ft.com/content/8c521504-2904-11e8-b27e-cc62a39d57a0> accessed 20 December 2020.

Ewing J and Stevis-Gridneff M, 'European Slump Is Worst Since World War II, Reports Show' *The New York Times* (New York City 30 April 2020) <https://www.nytimes.com/2020/04/30/business/europe-economy-coronavirus-recession.html> accessed 20 December 2020.

Fleming S and Arnold M, 'Eurozone Faces Economic Strains as Government Debt Piles Up' *Financial Times* (London 16 April 2020) <https://www.ft.com/content/a58cbfba-9f3e-4a91-85ca-e5090d2489bd> accessed 20 December 2020.

Funk A, 'Erst die 'Bazooka', dann der 'Wumms' – reichten die Corona-Hilfen?' *Der Tagesspiegel* (Berlin 31 August 2020) <https://www.tagesspiegel.de/politik/patient-wirtschaft-erst-die-bazooka-dann-der-wumms-reichten-die-corona-hilfen/26141752.html> accessed 20 December 2020.

Großner C and Lawton S, 'Merkel and Macron Roll Out €500 Billion COVID-19 Recovery Initiative' *EURACTIV* (Schiphol 19 May 2020) <https://www.euractiv.com/section/economy-jobs/news/merkel-and-macron-roll-out-e500-billion-covid-19-recovery-initiative/> accessed 20 December 2020.

Kafsack H, ''Alte Zwistigkeiten hintanstellen'' *Frankfurter Allgemeine Zeitung* (Frankfurt 21 May 2020) <https://www.faz.net/aktuell/wirtschaft/eu-kommissar-thierry-breton-ueber-deutsch-franzoesische-wiederaufbauplaene-16780172.html> accessed 20 December 2020.

Khan M and Peel M, ''Frugal Four' Fight to Protect EU Budget Rebates' *Financial Times* (London 18 August 2020) <https://www.ft.com/content/55f6796e-4a9f-43b2-8d94-da0804d1f83b> accessed 20 December 2020.

Pancevski B and Norman L, 'France, Germany Propose €500 Billion EU Pandemic Recovery Fund' *The Wall Street Journal* (New York City 18 May 2020) <https://www.wsj.com/articles/france-germany-propose-500-billion-eu-pandemic-recovery-fund-11589826351> accessed 20 December 2020.

Partington R, 'Inflation Collapses Around the World Amid Coronavirus Pandemic' *The Guardian* (London 5 May 2020) <https://www.theguardian.com/business/2020/may/05/inflation-collapses-world-coronavirus-pandemic-global-economy-business-great-depression-recession> accessed 20 December 2020.

Posaner J, 'Merkel Warns Against Trade Barriers in Face of Coronavirus Recession' *Politico* (Brussels 20 May 2020) <https://www.politico.com/news/2020/05/20/merkel-warns-against-trade-barriers-in-face-of-coronavirus-recession-271945> accessed 20 December 2020.

Rankin J, ''Defining Moment' as EU Executive Pushes for €500bn in Grants' *The Guardian* (London 27 May 2020) <https://www.theguardian.com/world/2020/may/27/defining-moment-coronavirus-as-eu-executive-pushes-for-500bn-in-grants> accessed 20 December 2020.

Rankin J, 'EU Faces 'Existential Threat' if Coronavirus Recovery is Uneven' *The Guardian* (London 13 May 2020) <https://www.theguardian.com/world/2020/may/13/eu-faces-existential-threat-if-coronavirus-recovery-uneven-paolo-gentiloni> accessed 20 December 2020.

Reuters, 'Euro Will Fail in 10 Years Without Reform, Emmanuel Macron Says' *The Guardian* (London 11 January 2017) <https://www.theguardian.com/world/2017/

jan/11/euro-will-fail-in-10-years-without-reform-emmanuel-macron> accessed 20 December 2020.

View TF, 'Macron's Worthy Goals for Eurozone Reform – The new French President's Ideas are very Ambitious but Largely Right' *Financial Times* (London 9 May 2017) <https://www.ft.com/content/7ea08a52-34b9-11e7-99bd-13beb0903fa3>accessed 20 December 2020.

Wesel B, 'EU fällt in tiefste Rezession seit Jahrzehnten' *Deutsche Welle* (Bonn 6 May 2020) <https://p.dw.com/p/3brIB> accessed 20 December 2020.

Zalan E, 'EU Set for Record Recession, Putting Euro at Risk' *EU-Observer* (Brussels 7 May 2020) <https://euobserver.com/coronavirus/148283> accessed 20 December 2020.

Online Sources

Delpla J and von Weizsäcker J, 'The Blue Bond Proposal (2010)' Bruegel Policy Brief <https://www.bruegel.org/wp-content/uploads/imported/publications/1005-PB-Blue_Bonds.pdf> accessed 20 December 2020.

Fasone C, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' EUI Working Papers (Max Weber Programme) <https://cadmus.eui.eu/bitstream/handle/1814/33859/MWP_WP_2014_25.pdf?sequence=1&isAllowed=y> accessed 20 December 2020.

Marzinotto B, Sapir A and Wolff GB, 'What Kind of Fiscal Union? (2011)' Bruegel Policy Brief <https://www.bruegel.org/2011/11/what-kind-of-fiscal-union/> accessed 20 December 2020.

Streeck W and Mertens D, 'An Index of Fiscal Democracy (2010)' MPIfG Working Paper <https://www.mpifg.de/pu/workpap/wp10-3.pdf> accessed 20 December 2020.

Jokela J, *Finland and the Eurozone Crisis* (Palgrave Macmillan 2014).

Jokela J and Korhonen K, *A Euroscpetic Big Bang – Finland's EU Policy in Hindsight from the 2011 Elections* (The Finnish Institute of International Affairs 2012).

Deloy C, 'General Elections in Hungary: Viktor Orban easily sweeps to victory for the third time running in the Hungarian elections' (*Fondation Robert Schuman*, 10 April 2018) <https://www.robert-schuman.eu/en/doc/oee/oee-1765-en.pdf> accessed 20 December 2020.

Leino-Sandberg P, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU' (*Verfassungsblog*, 18 June 2020) <https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/> accessed 20 December 2020.

Merler S, 'The Meseberg Declaration and Euro-zone Reform' (*Bruegel*, 25 June 2018) <https://www.bruegel.org/2018/06/the-meseberg-declaration-and-euro-zone-reform/> accessed 20 December 2020.

Moens De Fernig M, 'Factsheet: The Polish Sejm' (*European Parliament – Directorate-General for the Presidency*, 2018) <http://www.epgencms.europarl.europa.eu/cmsdata/upload/0398faee-9664-4eb0-8e1b-ac615ab65a49/Factsheet_PL_-_Sejm.pdf> accessed 20 December 2020.

Petersen T, Böhmer M and Stein Hv, 'How Germany Benefits from the Euro in Economic Terms (Policy Brief # 2013/01)' (*Bertelsmann Stiftung*, 2013) <https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Presse/imported/downloads/xcms_bst_dms_37730_37731_2.pdf> accessed 20 December 2020.

Publications EO, 'Population Structure and Ageing' (*Eurostat*, 2019) <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1271.pdf> accessed 20 December 2020.

Publications EO, 'Government Finance Statistics' (*Eurostat*, 2020) <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1137.pdf> accessed 20 December 2020.

Utrilla D, 'Insight: 'The European Deal for Post-Pandemic Economic Recovery: Content and Meaning'' (*EU Law Live*, 21 July 2020) <https://eulawlive.com/the-european-deal-for-post-pandemic-economic-recovery-content-and-meaning/> accessed 20 December 2020.

Walker A, 'Coronavirus: EU facing 'Deep and Uneven Recession'' (*BBC Online News*, 6 May 2020) <https://www.bbc.com/news/business-52557191> accessed 20 December 2020.

Wolff GB, 'EU Debt as Insurance against Catastrophic Events in the Euro Area: the Key Questions and aome Answers' (*Bruegel*, 22 April 2020) <https://www.bruegel.org/2020/04/eu-debt-as-insurance-against-catastrophic-events-in-the-euro-area-the-key-questions-and-some-answers/> accessed 20 December 2020.

Legislation, Official Documents and Reports

Besselink LFM and others, *National Constitutional Avenues for Further EU Integration* (European Parliament – Directorate General for Internal Policies 2014).

Bundeskanzlerin, *Press Release 173/20: A French-German Initiative for the European Recovery from the Coronavirus Crisis* (Presse- und Informationsamt der Bundesregierung 18 May 2020).

Commission Decision on Establishing an Independent Advisory European Fiscal Board (COM 2015/1937).

Commission Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Monetary Fund (COM (2017) 827).

Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354).

Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility (COM (2020) 408).

D'Alfonso A and Stuchlik A, *A fiscal capacity for the euro area?* (European Parliament 2016).

Eurogroup, *Term Sheet on the Budgetary Instrument for Convergence and Competitiveness* (Eurogroup 2019).

European Commission, *Press Release: Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control* (European Commission 3 April 2019).

European Commission, *Green Paper on the Feasibility of Introducing Stability Bonds (COM (2011) 818)* (European Commission 2011).

European Commission, *Communication from the Commission to the European Parliament and the Council – A Roadmap Towards a Banking Union (COM (2012) 510)* (European Commission 2012).

European Commission, *Completing Europe's Economic and Monetary Union – A European Minister of Economy and Finance* (European Commission 2017).

European Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* (European Commission 2017).

European Commission, *Reflection Paper on the Future of EU Finances* (European Commission 2017).

European Commission, *White Paper on the Future of Europe – Reflections and Scenarios for the EU27 by 2025* (European Commission 2017).

European Commission, *Commission Staff Working Document – Impact Assessment – Accompanying the Document for Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a European Investment Stabilisation Function (COM (2018) 297)* (European Commission 2018).

European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A Modern Budget for a Union That Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027 (COM (2018) 321)* (European Commission 2018).

European Commission, *Standard Eurobarometer 92 Autumn 2019 – 'Public Opinion in the European Union, First Results'* (Directorate-General for Communication 2019).

European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – Europe's moment: Repair and Prepare for the Next Generation (COM (2020) 456)* (2020).

European Commission, *Coordinated Economic Response to the COVID-19 Outbreak (Communication from the Commission) – COM(2020) 112 final* (European Commission 2020).

European Commission, *EU expenditure and revenue 2014-2020 (dataset)* (DG Budget data 2020).

European Commission, *Standard Eurobarometer 93 Summer 2019 – 'Public Opinion in the European Union, First Results'* (Directorate-General for Communication 2020).

European Commission, 'European Economic Forecast – Spring 2020' (*Publication Office of the European Union*, 2020) <https://ec.europa.eu/info/sites/info/files/economy-finance/ip125_en.pdf> accessed 20 December 2020.

European Commission, 'SURE – Supporting Member States to Help Protect People in Work and Jobs' (*European Commission*, 2020) <https://ec.europa.eu/info/sites/info/files/economy-finance/sure_factsheet.pdf> accessed 20 December 2020.

European Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* (General Secretariat of the Council 2020).

European Parliament Resolution of 20 November 2012 with Recommendations to the Commission on the Report of the Presidents of the European Council, the European Commission, the European Central Bank and the Eurogroup 'Towards a Genuine Economic and Monetary Union' (2012/2151(INI)) (2012).

European Summit, *Statement of the Euro Summit, 14 December 2018 (EURO 503/18)* (General Secretariat of the Council 2018).

Finnish Parliament, 'HE 248/2014 on the Government Proposal to Parliament on the Adoption of the Council Decision on the System of the European Union's Own Resources (2014/335 / EU, Euratom)' (*Finnish Parliament,* 2014) <https://www.finlex.fi/fi/esitykset/he/2014/20140248#idp446520544> accessed 20 December 2020.

Franco-German Ministerial Meeting, *Erklärung von Meseberg – Das Versprechen Europas für Sicherheit und Wohlstand erneuern* (German Government 2018).

French Conseil de Ministres, 'Annex au Project de Loi de Finances pour 2021 (Jaune Budgétaire) – Relations Financières avec l'Union Européenne' (*French Conseil des Ministres,* 2020) <https://www.budget.gouv.fr/documentation/file-download/6871> accessed 20 December 2020.

French Senate, 'Report of the Commission of Finances Issued for the French Senate Concerning the Decision 2014/335 (no. 685/2015) – Rapport fait au nom de la commission des finances (1) sur le projet de loi autorisant l'approbation de la décision du Conseil du 26 mai 2014 relative au système des ressources propres de l'Union européenne' (*Commission of Finances,* 2015) <http://www.senat.fr/rap/l14-685/l14-6850.html> accessed 20 December 2020.

German Federal Ministry for Economic Affairs and Energy (BMWi), *Facts About German Foreign Trade* (German Government 2019).

German Federal Ministry of Finance, 'Haushaltsrechnung des Bundes für das Haushaltsjahr 2012' (*German Government,* 2013) <https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Oeffentliche_Finanzen/Bundeshaushalt/Haushalts_und_Vermoegensrechnungen_des_Bundes/2013-06-13-haushaltsrechnung-des-bundes-2012.pdf?__blob=publicationFile&v=1> accessed 20 December 2020.

German Federal Ministry of Finance, *Bundeshaushalt 2019* (German Government 2019).

German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2011 bis 2015* (German Government 2011).

German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2016 bis 2020 (Drucksache 18/9201)* (German Government 2016).

German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2017 bis 2021 (Drucksache 18/13001)* (German Government 2017).

German Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2018 bis 2022 (Drucksache 19/3401)* (German Government 2018).

German Parliament, *Parlamentarische Zustimmungserfordernisse bei der Umsetzung des Vorschlags COM (2017) 827 final zur Errichtung eines Europäischen Währungsfonds* (German Parliament 2018).

German Parliamentary Fractions of CDU/CSU and FDP, *Entwurf eines Gesetzes zu dem Beschluss des Europäischen Rates vom 25. März 2011 zur Änderung des Artikels 136 des Vertrags über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist (Drucksache 17/9047)* (German Parliament 2012).

Juncker J-C and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* (European Commission 2015).

Leino P and Salminen J, *Constitutional Change Through Euro Crisis Law: 'Finland'* (European University Institute – Law Department Project, 2014).

Manifesto for the Democratization of Europe, *Draft Treaty on the Democratization of the Governance of the Euro Area ('T-Dem')* (2020).

Merkel A, *State of the Nation Address – Regierungserklärung der Bundeskanzlerin (19 Mai 2010)* (German Government 2010).

Monti M and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* (EU High Level Group on Own Resources (HLGOR), 2016).

OECD, *OECD Tourism Trends and Policies 2020* (OECD Publishing, 2020).

Parliamentary Fraction of CDU/CSU und FDP, *Drucksache 17/9046 – Gesetzentwurf der Fraktionen der CDU/CSU und FDP: Entwurf eines Gesetzes zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion* (German Parliament 2012).

Polish Parliament, 'Parliamentary Report on Adoption of Decision 2014/335/EU – Druk nr 3198: o ratyfikacji decyzji Rady z dnia 26 maja 2014 r. w sprawie systemu zasobów własnych Unii Europejskiej (2014/335/UE, Euratom)' (*Polish Parliament*, 2015) <http://orka.sejm.gov.pl/Druki7ka.nsf/0/E6E5C6BEE40F88B9C1257DFD004A8C82/%24File/3198.pdf> accessed 20 December 2020.

Proposal for a Council Regulation on the Establishment of a European Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency (SURE) Following the COVID-19 Outbreak – COM(2020) 139 final – 2020/0057(NLE).

Spanish Congreso de los Diputados, *Dictamen de la Comisión de Asuntos Exteriores (110/000176) – Decisión del Consejo de 26 de mayo de 2014 sobre el sistema de recursos propios de la Unión Europea (2014/335/UE, EURATOM), adoptada en Bruselas el 26 de mayo de 2014.* (Boletín Oficial de las Cortes Generales 2015).

Suvanto A and others, *Improving the resilience of Europe's Economic and Monetary Union (37b/2015)* (Finnish Ministry of Finance Publications, 2015).

Wissenschaftlicher Dienst des Deutschen Bundestages, *Reichweite der Wesentlichkeitslehre – Grenzfälle der Wesentlichkeit (WD 3 – 3000 – 043/15)* (Deutscher Bundestag, 2015).

Wissenschaftliche Dienste des Deutschen Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* (German Parliament 2020).

World Bank, 'GDP (current US$) – Euro area' (*The World Bank*, 2020) <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2019&locations=XC&start=2006&view=chart> accessed 20 December 2020.

World Economic Forum, *COVID-19 Risks Outlook – A Preliminary Mapping and Its Implications (Insight Report)* (<http://www3weforumorg/docs/WEF_COVID_19_Risks_Outlook_Special_Edition_Pagespdf>, 2020).

Curriculum vitae

Frederik Behre was born in 1991 in Hannover (Germany). After graduating from the Gymnasium Lehrte, he conducted a one-year voluntary civil service at *L'Arche* in Beauvais (France). After completing the civil service, Frederik decided to study German law and Information Technology and Intellectual Property Law (LL.B.) at Leibniz University in Hannover. As part of his studies, Frederik completed two exchange semesters at Lapland University in Rovaniemi (Finland). During his studies, he completed internships at the German Embassy in Paris and at VGH insurance group. He graduated from Leibniz University with distinction. In 2015, Frederik chose to study European Law (LL.M.) at Leiden University. He graduated *cum laude*. For his studies in Germany, Finland and the Netherlands, Frederik was awarded a scholarship from the *Studienstiftung des deutschen Volkes*. After graduating in 2016, Frederik was awarded a *Meijers* PhD-scholarship and started his PhD-research at the Europa Institute (Leiden University). During his PhD-research he conducted a research exchange at Helsinki University (Finland). Between 2018 and 2019, Frederik was selected as one of two Leiden University members of the *Europaeum Scholars Programme*, a PhD-programme organized by Oxford University and the Europaeum network.

In his research, Frederik is particularly interested in the interaction between national constitutional law and EU law, including a focus on comparative constitutional research. He explores the challenges and opportunities of this interaction through substantive areas of the law, such as the Economic and Monetary Union. Frederik is also interested in comparative regional integration law and the potential to exchange legal experiences across different regional integration projects globally. He participates in the activities of the Leiden Centre for Legal and Comparative Studies of the East African Community (LEAC) and most recently the Leiden Jean Monnet Centre of Excellence of Comparative Regional Integration (CompaRe). Finally, Frederik has a strong interest in transforming research and theoretical knowledge into practical outcomes. To that end and as part of the *Europaeum Scholars Programme*, Frederik designed and ran a social media campaign together with five PhD-researchers from all across Europe under the name You&EU in order to encourage young voters to participate in the 2019 EU parliamentary elections. You&EU was awarded the prize for best Europaeum Scholars project by the *Financial Times*.

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MI-335 M.R. Bruning e.a., *Kind in proces: van communicatie naar effectieve participatie. Het hoorrecht en de procespositie van minderjarigen in familie- en jeugdzaken*, Nijmegen: Wolf Legal Publishers 2020

MI-336 J. van Kralingen, *De ondeelbaarheid van het pand- en hypotheekrecht; deconstructie van een leerstuk. Een historisch-comparatieve studie* (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 782 9

MI-337 J.C.A. van Dam, *Guidance documents of the European Commission in the Dutch legal order*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-338 F. Jiang, *Greening' the WTO Ban on China's Export Duties. Should WTO law allow China to use export duties to protect the environment and, if so, in what manner?*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-339 M.J.R. Broekema, *Cognitive Bias in the Judgment of Business Valuations and Valuators. How Systematic Patterns of Irrationality Affect Entrepreneurs, Legal Professionals and Business Valuators*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-340 H. Horii, *Child Marriage as a Choice. Rethinking agency in international human rights*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-341 R. de Graaff, *Concurrence in European Private Law*, (diss. Leiden), The Hague: Eleven International Publishing 2020, ISBN 978 94 6236 134 8

MI-342 J.M.M. van der Vliet, *The International Legal Protection of Environmental Refugees. A human rights-based, security and State responsibility approach*, (diss. Leiden), The Hague: Eleven International Publishing 2020, ISBN 978 94 6236 139 3

MI-343 M. Samadi, *Normering en Toezicht in de Opsporing. Een onderzoek naar de normering van het strafvorderlijk optreden van opsporingsambtenaren in het voorbereidend onderzoek en het toezicht op de naleving van deze normen*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 816 1

MI-344 D.J. Verheij, *Credit rating agency liability in Europe. Rating the combination of EU and national law in rights of redress*, (diss. Leiden), The Hague: Eleven International Publishing 2020, ISBN 978 94 6236 144 7

MI-345 P. Rustenburg, *Een algemene normtheorie toegepast op open normen in het belastingrecht*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-346 J.V.O.R. Doekhie e.a., *Invoering jeugdstrafrecht in Caribisch Nederland: een verkenning naar een jeugdstrafrechtmonitor*, Den Haag: Boom criminologie 2020, ISBN 978-94-6236-151-5

MI-347 A. Varga, *Establishing State Responsibility in the Absence of Effective Government*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

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MI-350 S. Kouwagam, *How Lawyers Win Land Conflicts for Corporations. Legal Strategy and its Influence on the Rule of Law in Indonesia*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-351 A.D. Sarmiento Lamus, *The proliferation of dissenting opinions in international law. A comparative analysis of the exercise of the right to dissent at the ICJ and the IACtHR*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-352 B. Ribeiro de Almeida, *Building land tenure systems. The political, legal, and institutional struggles of Timor-Leste*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-353 K.A.M. van der Zon, *Pleegrechten voor kinderen. Een onderzoek naar het realiseren van de rechten van kinderen die in het kader van de ondertoezichtstelling in een pleeggezin zijn geplaatst* (diss. Leiden), Den Haag: Boom juridisch 2020

MI-354 E.G. van 't Zand e.a., *Bestuurlijke boetes en de Verklaring Omtrent het Gedrag. Een onderzoek naar de realiseerbaarheid en wenselijkheid van het betrekken van bestuurlijke boetes bij de VOG-*

screening aan de hand van een casestudy naar handhaving en integriteit in de financiële sector, Den Haag: Boom juridisch 2020, ISBN 978 94 6290 843 7

MI-355 J. Boakye, *Understanding Illegal Logging in Ghana. A Socio-Legal Study on (non)Compliance with Logging Regulations*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-356 N. Sánchez, *International law and the sustainable governance of shared natural resources. A principled approach,* (diss. Leiden), Amsterdam: Ipskamp Printing 2020, ISBN 978 94 0282 145 1

MI-357 S.S. Arendse, *De uiterlijke verschijningsvorm in het strafrecht. Een analyse van de jurisprudentie van de Hoge Raad*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 844 4

MI-358 J. Reef, M. Jeltes & Y.N. van den Brink, *De PIJ-maatregel doorgelicht. Juridische grondslagen, populatiekenmerken, gedragsverandering en recidive,* Nijmegen: Wolf Legal Publishers 2020, ISBN 978 94 6240 608 7

MI-359 S. Guo, *Recognition of Foreign Bank Resolution Actions*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-360 B. Muscat, *Insolvency Close-out Netting: A comparative study of English, French and US laws in a global perspective*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-361 J.M. ten Voorde, S.V. Hellemons & P.M. Schuyt, *Discriminatie als strafbeïnvloedende omstandigheid bij strafbare feiten, Een rechtsvergelijkende studie*, Den Haag: Boom juridisch 2020, ISBN 978 94 6290 8710

MI-362 F. Afandi, *Maintaining Order: Public Prosecutors in Post-Authoritarian Countries, the Case of Indonesia*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-363 R.M. Koenraadt, M.M. Boone, S.E. Rap & S. Kappert, *Financieel toezicht binnen het (jeugd)strafrecht. Een onderzoek naar het verloop, de resultaten en mogelijke uitbreiding van verplicht financieel toezicht binnen het (jeugd)strafrecht*, Den Haag: Boom juridisch 2020, ISBN 978 94 6290 933 5

MI-364 J.J. Asscher, Y.N. van den Brink, H.E. Creemers, E. Huls, E.K. van Logchem, N. Lynch & S.E. Rap, *De strafmaat voor jeugdige daders van ernstige gewelds- en zedenmisdrijven in internationaal perspectief*, Den Haag: Boom juridisch 2020, ISBN 978 94 6290 943 4

MI-365 M.P.A. Spanjers, *Belastingbudget. Onderzoek betekenis budgettaire impact belastingen bij parlementaire vaststelling belastingwetgeving* (diss. Leiden), Den Haag: Flosvier 2021, ISBN 978 90 8216 072 7

MI-366 J. Zhang, *The Rationale of Publicity in the Law of Corporeal Movables and Claims. Meeting the Requirement of Publicity by Registration?* (diss. Leiden), Den Haag: Boom juridisch 2021

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MI-369 M.E. Stewart, *Freedom of Overflight: - A Study of Coastal State Jurisdiction in International Airspace* (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-370 M.T. Beumers, *De bescherming van immateriële contractuele belangen in het schadevergoedingsrecht* (diss. Leiden), Den Haag: Boom juridisch 2021, ISBN 978 94 6290 962 5

MI-371 C.M. Sandelowsky-Bosman, T. Liefaard, S.E. Rap & F.A.N.J. Goudappel, *De rechten van ongedocumenteerde kinderen in Curaçao – een gezamenlijke verantwoordelijkheid*, Den Haag: Boom juridisch 2021, ISBN 978-94-6290-965-6

MI-372 G.J.A. Geertjes, *Staatsrecht en conventie in Nederland en het Verenigd Koninkrijk,* (diss. Leiden), Zutphen, Uitgeverij Paris bv 2021, ISBN 978 94 6251 270 2

MI-373 L. Noyon, *Strafrecht en publieke opinie. Een onderzoek naar de relatie tussen de strafrechtspleging en het publiek, met bijzondere aandacht voor het Openbaar Ministerie,* (diss. Leiden), Den Haag: Boom juridisch 2021, ISBN 978 94 6290 978 6

MI-374 F. Behre, *A European Ministry of Finance? Charting and Testing the National Constitutional Limits to EU Fiscal Integration*, (diss. Leiden), Amsterdam: Ipskamp Printing 2021