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

Behre, F.

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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.

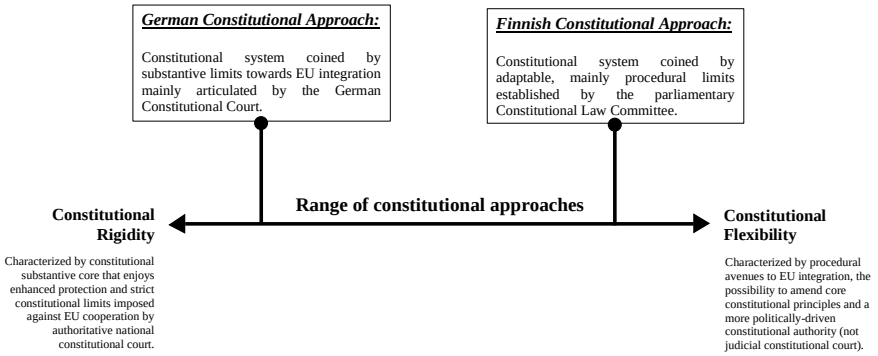

Figure 1: Underpinning comparative conceptualization of constitutional system

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.

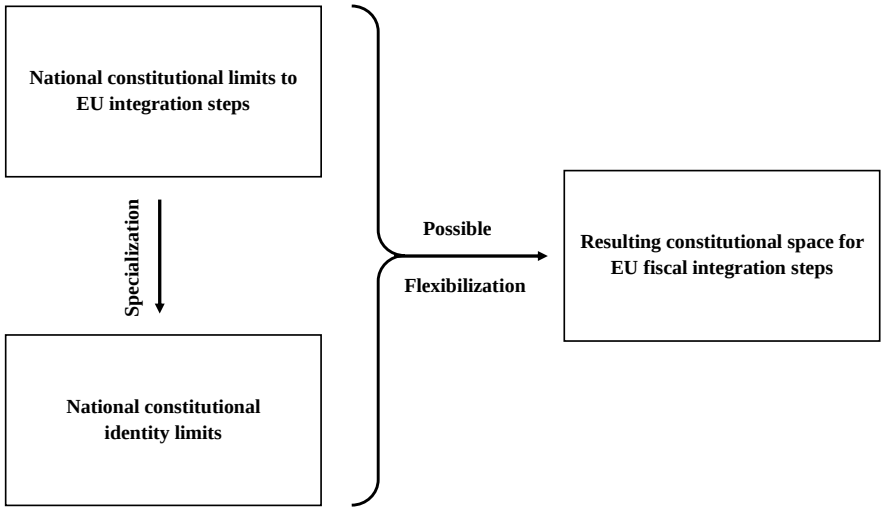

Figure 3: Interrelation of employed research concepts

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*.

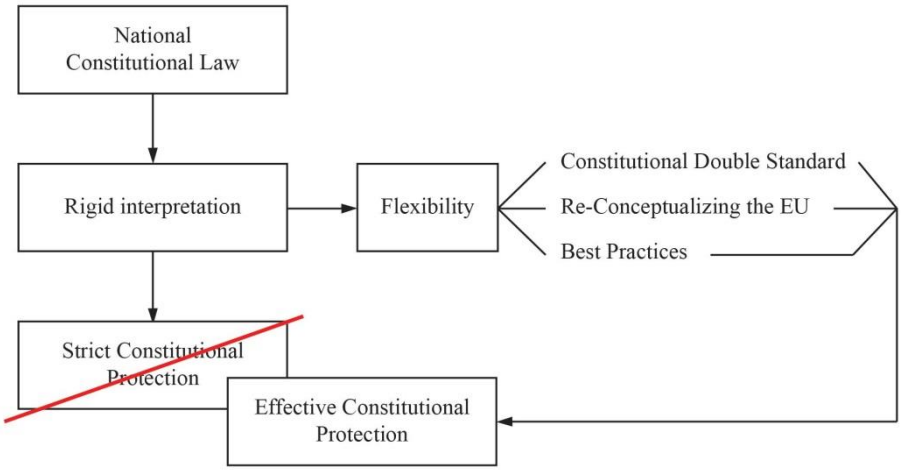

Figure 4: The research concept of constitutional flexibility

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.