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

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PART I

Charting the national constitutional space

SECTION I

Macro-Comparative Assessment of Finland and Germany

INTRODUCING THE MACRO-COMPARATIVE ASSESSMENT

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

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

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- 1 Although the Constitutional Law Committee raised constitutional concerns in relation to a draft ESM-Treaty, cf. Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 174-175 para 39; Päivi Leino and Janne Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* (European University Institute - Law Department Project, 2014) VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247; Jokela, 'Finland: Towards a More Cautious Europeanization' 49.
 - 2 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' paras 167-169, 177; Hans H. Klein, 'Art. 38 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 145-146; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? - Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Christian Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' (2012) 31 *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 1, 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Verfassungsrechts' 807.
 - 3 *Quantitative Easing (PSPP) Final Judgment* paras 163, 234; Cf. as well: Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 818; Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 898; Kirchhof, 'Die Rechtsarchitektur der Europäischen Union' 2057.

that distinguishes between more flexible and more rigid constitutional approaches towards the prospect of EU integration. On that scale, Finland can be characterized as a more flexible constitutional system,⁴ which stems from its institutional design⁵ and an absence of substantive constitutional limitations to EU integration.⁶ Notably, the Eurocrisis-related decisions of the Constitutional Law Committee indicate a particular focus on procedural safeguards that secure the comprehensive participation of the Finnish Parliament in EU decision-making.⁷ By contrast, Germany can be located on the other end of that scale, given the authoritative institutional position of the Constitutional Court in the appraisal of EU law as well as the highlighted *eternity clause* that formulates an absolute restriction to the available space for EU integration steps.⁸ Based on this clause, the Constitutional Court developed its *constitutional identity* review,⁹ which gained particular importance in the constitutional

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- 4 Grewe, 'Methods of Identification of National Constitutional Identity' 43; Markku Suksi, 'Finland' in Oliver Dawn and Carlo Fusaro (eds), *How Constitutions Change - A Comparative Study* (Hart Publishing 2011) 114.
 - 5 As Finland has no constitutional court, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 76; Ojanen, 'Constitutional Amendment in Finland' 97.
 - 6 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 324-325; De Visser, *Constitutional Review in Europe - A Comparative Analysis* 26-27; Ojanen, 'Constitutional Amendment in Finland' 109.
 - 7 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.
 - 8 *Lisbon-judgment* para 230; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686; Alexander Thiele, 'Die Integrationsidentität des Art. 23 Abs. 1 GG als (einzige) Grenze des Vorrangs des Europarechts' (2017) 52 *Europarecht* (EuR) 367, 371; Jaggi, 'Revolutionary Constitutional Lawmaking in Germany – Rediscovering the German 1989 Revolution' 619; On the difficulty to amend the *eternity clause*, cf. Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-145; Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' 430; Tobias Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' (2012) 45 *Zeitschrift für Rechtspolitik* (ZRP) 33, 33; Burkhard Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' (2011) 43 *Juristische Arbeitsblätter* (JA) 885, 892; Jaques Ziller, 'The German Constitutional Court's Friendliness Towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' (2010) 16 *European Public Law* 53, 68.
 - 9 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-146; Matthias Kottmann and Christian Wohlfahrt, 'Der gesplante Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' (2009) 69 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 443, 447-448.

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

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

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

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

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

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

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