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

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IV | Comparative conclusions on Finland and Germany

1 COMPARING FINLAND AND GERMANY

The detailed assessment of the Finnish and the German constitutional approaches to EU integration revealed that EU fiscal integration steps appear generally possible in both systems. This finding is supported by judicial developments during the Eurocrisis, as neither the Finnish Constitutional Law Committee nor the German Federal Constitutional Court identified an unsurmountable constitutional conflict. Yet, the established jurisprudence of both authorities suggests that EU fiscal integration steps are limited by procedural and substantive requirements.

The following concluding assessment will compare both national approaches and their implications for EMU reform plans focusing on the national framework for constitutional review (2.), the procedural framework for engaging in and administering EU commitments (3.) and finally the substantive benchmarks formulated by the respective authorities (4.).

2 COMPARING NATIONAL CONSTITUTIONAL REVIEW

The domestic framework for conducting constitutional review differs in both systems. In Finland, constitutional review is conducted by the Constitutional Law Committee.¹ Given that the Committee is part of the Finnish Parliament, its review is integrated in the parliamentary process. Consequently, it only conducts *ex ante* constitutional review which can be requested by either the

¹ Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361-362; Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 219; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 172 para 32; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 324; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 26; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 453; Ojanen, 'Constitutional Amendment in Finland' 96; Ojanen, 'The EU at the Finnish Constitutional Arena' 252; Lavapuro, 'Constitutional Review in Finland' 132; Lavapuro, Ojanen and Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' 510.

parliamentary plenary or specialized committees.² Therefore, the Constitutional Law Committee's opinions can be directly addressed by the Finnish Parliament before a constitutional conflict actually manifests. In contrast, the German Constitutional Court is established as judicial authority and is institutionally independent from other German institutions.³ It conducts *ex post* constitutional review upon application by either institutional or private applicants.⁴ Interestingly, the German legislator amended the German Constitution and erased the option to ask for advisory opinions of the Constitutional Court.⁵ Thus, the German constitutional review is separate from the parliamentary process and it can only be initiated once acts are formally adopted.

The different institutional roles are reflected in the institutions' composition and the legal status of their verdicts. The Finnish Constitutional Law Committee is composed of seventeen parliamentarians. The members of the Committee are not required to have legal qualifications, which is why they are assisted by constitutional law experts.⁶ The Committee's final statements or opinions

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- 2 Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 226; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 29; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459-460; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 532.
 - 3 Schlaich and Koriath, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 42-45; Hailbronner and Martini, 'The German Federal Constitutional Court' 365-366; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* para 670.
 - 4 With the only exception of international agreements, which can be challenged prior to the promulgation of such an agreement following Article 59 (1) (1) GG, but after the approval of the legislator following Article 59 (2) (1) GG, cf. 1 BvF 1/52 *Germany Agreement* [1952] (German Federal Constitutional Court) paras 61-62; Cf. as well: Hans G. Rupp, 'Judicial Review of International Agreements: Federal Republic of Germany' (1977) 25 *The American Journal of Comparative Law* 286, 291.
 - 5 Initially, § 97 BVerfGG provided either the legislator jointly with the government or the federal president with the opportunity to request for an advisory opinion, which was deleted in 1956, cf. Christian von Coelln, '§ 97 BVerfGG' in Theodor Maunz and others (eds), *Kommentar zum Bundesverfassungsgerichtsgesetz* (60th edn, C.H. Beck 2020) para 1; Wolfgang Heyde, '§ 97 BVerfGG – Gutachten-Verfahren' in Dieter C. Umbach, Thomas Clemens and Franz-Wilhelm Dollinger (eds), *Bundesverfassungsgerichtsgesetz – Mitarbeiterkommentar und Handbuch* (2nd edn, C.F. Müller 2005) 1340 paras 1-4.
 - 6 On Finland, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361-362; Lavapuro, Ojanen and Scheinin, 'Finland: Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice' 226; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 29; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459-460; Ojanen, 'The Impact of EU Membership

are not legally binding, yet, they are traditionally adhered to in the parliamentary process.⁷ In contrast, the sixteen judges on the German Constitutional Court have to be qualified lawyers and six seats are filled with judges that worked previously on one of the other German high courts.⁸ The German Constitutional Court's final decisions are legally binding on all other institutions.⁹ When comparing the composition and the effect of the final verdicts it becomes obvious that the Finnish and the German constitutional system follow different models. Arguably, these design differences of national constitutional review impact the resulting jurisprudence. The Finnish Committee is required to anticipate constitutional conflicts. Through its opinions it impacts the parliamentary work that leads to the potential adoption of the act in question. For example, the Committee found that the adoption of a prior version of the ESM-Treaty would have required the support of a two-thirds parliamentary majority, which led the Finnish Government to renegotiate the Treaty.¹⁰ Hence, the Finnish legislator can react to the Committee's views and alter the reviewed act. One result appears to be that the Constitutional Law Committee focusses mostly on procedural conditions that have to be met instead of imposing strict, substantive limitations. One reason for focusing on procedural requirements is that the Finnish Parliament is still able to comply with these requirements, given that all acts considered by the Finnish Constitutional Law Committee are not yet adopted legislation. Therefore, the Committee exercises both an advisory and supervisory mandate.

This is fundamentally different to the German Federal Constitutional Court, which only considers adopted acts. It thereby scrutinizes the work of the German legislator, instead of instructing it on the applicable procedural requirements. Obviously, this entails that the German Court cannot directly influence the decision-making process that leads to the adoption of a reviewed

on Finnish Constitutional Law' 532; On Germany, cf. Schlaich and Koriöth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 41.

7 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 361-362;; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 325; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 27-28; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459-460; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 205.

8 Cf. Schlaich and Koriöth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 41.

9 As stipulated in § 31 BVerfGG, cf. Ibid paras 495-496; Aust and Meinel, 'Entscheidungsmöglichkeiten des BVerfG – Tenor, Systematik und Wirkungen' 26.

10 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 174-175 para 39; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

act. Rather, the Court's jurisprudence has a signaling function for future decisions of the legislator, which could explain the emergence of substantive and material constitutional benchmarks. As the Constitutional Court cannot advise the legislator prior to taking a decision, its *ex post* jurisprudence has a guiding function for future parliamentary decisions.

Overall, this suggests that the moment of constitutional review impacts the resulting jurisprudence. The Finnish Constitutional Law Committee considers acts *ex ante*, which is why its decisions have an advisory function, which is reflected by the fact that only the Finnish Parliament can trigger the review and that decisions are not intended to solve constitutional disputes. In contrast, the German Constitutional Court considers and adjudicates on concrete constitutional disputes that are initiated by a wide range of entitled applicants. Therefore, the German constitutional jurisprudence does not merely focus on procedural requirements but equally includes substantive constitutional norms into its appraisal, as apparent in relation to EU integration.

3 COMPARING THE NATIONAL PROCEDURAL FRAMEWORK FOR EU FISCAL INTEGRATION

When comparing the procedural and institutional constitutional framework, it should be pointed out that both the Finnish Constitution in Section 94 as well as the German Constitution in Article 23 (1) GG contain a constitutional basis for the conferral of competences to the EU. In Finland, the conferral of competences has to meet the general framework for supranational cooperation established in Section 1 (3) Finnish Constitution. Once it is established that EU integration steps contribute to the listed constitutional aims, the transfer of competences can be adopted by a simple parliamentary majority, unless the envisaged conferral affects the national borders, the constitutional text or the principle of sovereignty. In such case a qualified two-thirds majority requirement is applicable. This suggests that even far-reaching EU integration steps, which conflict with the constitutional text or principles such as Finnish sovereignty, can be adopted by the Finnish Parliament. The determination of the applicable majority requirement is conducted by the Constitutional Law Committee. The Committee clarified that budgetary competences are important parliamentary prerogatives,¹¹ therefore it is likely that EU fiscal integration steps, which impact national budgetary decisions, will require the support of a qualified parliamentary majority.

11 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 463; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

Similarly, the German Constitution formulates structural requirements for EU cooperation laid down in Article 23 (1) (1) GG. Once these are met, the German Constitution imposes different majority requirements depending on the extent of the envisaged conferral. Notably, Article 23 (1) (3) GG clarifies that the internally applicable procedural framework for constitutional amendments applies to EU cooperation, including the German *eternity clause*, which constitutes an absolute constitutional limit.¹² Hence, EU fiscal integration proposals that alter the German Constitution, for example, by transferring budgetary competences to the EU-level, will likely require the support of a qualified two-thirds majority,¹³ provided that the conferral complies with the mentioned *eternity clause*, which evolved into the central constitutional concern for EU fiscal integration.¹⁴

When comparing the framework for competence conferrals, it appears that in both countries integration steps that impact parliament's fiscal and budgetary prerogatives have to be adopted by a two-thirds majority, given the importance of these prerogatives for parliament, the democratic process and sovereignty. Hence, both constitutional systems consider budgetary and fiscal competences as highly important constitutional prerogatives of the national parliament and therefore impose a qualified majority threshold for the conferral of such powers. Hence, although the ultimate constitutional conclusions differ, the underpinning constitutional consideration, notably that budgetary and fiscal decisions are important for parliament and the democratic process, is similar.

However, one major difference appears to be that the German Court defined the content of the *eternity clause* in its jurisprudence thereby restricting the substantive scope for EU integration, whereas the Finnish Constitutional Law Committee refrained from employing the mentioned Finnish *eternity-clause-like* provision in Section 94 (3) Finnish Constitution. One explanation for this difference may lie in the national constitutional conception of parliamentary prerogatives. The Finnish constitutional system appears to establish the Finnish Parliament as strong institutional actor, which is able to overcome constitutional conflicts by amending the constitutional text. The primary focus rests on the procedural involvement of parliament, which is then competent

12 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 902; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-146; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 125.

13 Cf. in general on Article 23 GG: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 24-27; Scholz, 'Art. 23 GG' para 118; Jarass, 'Art. 23 GG – Europäische Union'.

14 Through its identity review, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 138; *ESM-Treaty and Fiscal Compact* paras 107-109; *Lisbon-judgment* para 240; Cf. as well: Herdegen, 'Art. 79 GG' paras 60, 167-169; Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration' 27; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 177.

to engage in any commitment, provided the required parliamentary majority is attained.¹⁵ In contrast, the drafters of the German Constitution deliberately decided to limit the powers of the constituted institutions based on historical experiences. This restriction is laid down in the *eternity clause*, which exempts core constitutional principles from any change. The constitutional text thus distinguishes between the constituting power which only provided a limited mandate to the constituted institutions.¹⁶ This limited mandate extends to EU cooperation and therefore limits the constitutional space for EU integration steps,¹⁷ and it is actively defended by the German Constitutional Court.

Once competences are conferred to the EU, both constitutional systems ensure parliamentary participation in the national preparation of EU secondary acts. Notably, in Finland, this involvement is regulated in detail in the constitutional text itself. According to this framework, the parliamentary opinion is prepared by various parliamentary committees including, if necessary, the Constitutional Law Committee, and normally issued by the Grand Committee. Therein, it can formulate a political mandate to the Finnish Government for EU negotiations.¹⁸ Consequently, parliament is actively involved in the national preparation of EU decisions, which is firmly secured by the Finnish Constitution. Similarly, the German Constitution translates the internal framework for the legislator's involvement to the domestic preparation of EU law. Depending on which state level is constitutionally competent, either the German Parliament or the Federal Council can issue a position to the government, which is required to carefully consider the communicated views. However, many details of the concrete institutional interaction between German institutions are laid down in secondary provisions, which contrasts with the approach in Finland. Obviously, this more comprehensive constitutional basis available under the Finnish Constitution strengthens the position of the Finnish Parliament. As highlighted in the previous assessment, this comprehensive constitutional basis and, more importantly, the political culture surrounding the inclusion of the Finnish Parliament into the EU decision-making process could

15 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 373, 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458-459; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

16 Herdegen, 'Art. 79 GG' paras 60-61; Grawert, 'Homogenität, Identität, Souveränität – Positionen jurisdiktioneller Begriffsdogmatik' 197; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 715, 724.

17 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 902; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 685; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144-146.

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

serve as *best practice* example that could potentially relax the German constitutional concerns apparent under the procedural dimension of *overall budgetary responsibility*.

Specifically, the exemplary Finnish system allows for the issuing of parliamentary positions through a parliamentary Committee, traditionally the Grand Committee.¹⁹ This delegation of responsibilities ensures a quicker engagement of specialized parliamentarians and it can thereby ensure a thorough involvement of the Finnish Parliament in EU decision-making prior to reaching an agreement on the matter amongst governmental representatives at the EU-level. Here, the German Constitutional Court could relax the outlined reservations²⁰ and re-consider the possibility to delegate limited decision-making powers to the German EU Committee following Article 45 (2) GG in conjunction with § 93b (2) GO-BT,²¹ which could ensure quicker parliamentary decisions and ultimately guarantee that the German Parliament is not merely approving already taken EU decisions but that it could instead impact the content of such decisions.

Overall, the national constitutional framework suggests that the conferral of budgetary and fiscal competences is generally permissible both in Finland and in Germany. This was illustrated during the Eurocrisis, where EU-related measures such as the Fiscal Compact or the ESM were held to be compatible with national constitutional law. However, in both Member States budgetary and fiscal competences are considered particularly important prerogatives of the national parliament. In Finland, this was underscored by the Constitutional Law Committee when considering a draft version of the ESM-Treaty. Following the Committee, in case the financial commitment of Finland could be increased against the will of the Finnish Parliament, this would have required the support of a constitution-amending majority.²² Similarly, the German Constitutional

19 Miller, 'Finnish Judges and the European Union: An American Perspective' 503; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 555; Although the plenary of the Finnish Parliament was often consulted during the Eurocrisis, the final decisions are issued by the Grand Committee – which illustrates an additional layer of flexibility as the plenary can be involved if deemed required; Overall, cf. Auel and Raunio, 'Debating the State of the Union? Comparing Parliamentary Debates on EU Issues in Finland, France, Germany and the United Kingdom' 19.

20 *Participation of Members of German Parliament in the EFSF* paras 131, 136; Cf. as well: Bumke and Voßkuhle, *German Constitutional Law – Introduction, Cases, and Principles* paras 1634-1636.

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

22 Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori, '§ 98: Verfassungsgerichtsbarkeit in Finnland' 174-175 para 39; Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU

Court has constantly underscored the importance of budgetary competences for the German Parliament and with it German democracy through its *overall budgetary responsibility* doctrine.²³ Hence, EU fiscal integration proposals will likely require the support of a qualified parliamentary majority in both Finland and Germany, given the potential implications for parliamentary budgetary prerogatives. This qualified parliamentary majority might be challenging to attain in Finland, given an increasing Euroskepticism which impacts parliamentary work.²⁴ As a result, EU fiscal integration proposals might be constitutionally attainable in Finland, but they are confronted with an uncertain political context which could ultimately limit them. In contrast, in Germany too far-reaching fiscal integration proposals might conflict with the *eternity clause*, which prescribes that the German Parliament remains in charge of all central budgetary decisions. A detailed assessment of these requirements and their potential implications for EU fiscal integration ambitions is conducted in PART II below.

4 COMPARING THE NATIONAL SUBSTANTIVE BENCHMARK FOR EU FISCAL INTEGRATION

The analysis revealed that the German Constitutional Court increasingly relies on substantive limitations when confronted with EU integration proposals. In its jurisprudence, the Court identified particularly important competences under German democracy. Following its *Lisbon-judgment*, these protected competences include *inter alia* decisions on revenue and expenditure, which are characterized as core powers of the German Parliament essential for the democratic process.²⁵ A conferral of these competences to the EU-level could

Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247; Jokela, 'Finland: Towards a More Cautious Europeanization' 49.

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

24 Iso-Markku, 'Finland – Pro-European Arguments Prevail Despite the Rise of Euroscepticism' 65, 73; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 455; Jokela, 'Finland: Towards a More Cautious Europeanization' 49; Husa, *The Constitution of Finland – A Contextual Analysis* 36.

25 *Lisbon-judgment* paras 252, 256; Cf. as well: Christian Calliess, 'Bausteine einer erneuerten Europäischen Union – Auf der Suche nach dem europäischen Weg: Überlegungen im Lichte des Weißbuchs der Europäischen Kommission zur Zukunft Europas' (2018) 37 *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 1, 3; Ludwigs, 'Die Krisenpolitik der EZB zwischen Verfassungs- und Unionsrecht' 3565; Kottmann and Wohlfahrt, 'Der gespaltene Wächter?

significantly alter German democracy, which is built on an accountability and legitimacy relation between parliament and the people.²⁶ As emphasized by the Court, in case the German Parliament is stripped of its core competences, the people legitimize a parliament without the ability to take political decisions.²⁷ Given that budgetary and fiscal powers are considered particularly important domestic competences, the Constitutional Court raised serious constitutional concerns regarding the compatibility of increasing budgetary constraints with the principle of democracy and *overall budgetary responsibility*.²⁸

Notably, the Court introduced *overall budgetary responsibility* as a specific constitutional concept to address an increasing supranationalization of budgetary and fiscal competences. In a comparable way, the Finnish Constitutional Law Committee is concerned that EU budgetary and fiscal integration could undermine constitutional concepts such as Finnish sovereignty or parliamentary prerogatives in budgetary matters.²⁹ However, until now, these concerns only translated into procedural requirements, notably the adoption by qualified parliamentary majority. This confirms the previous finding that the initial constitutional concerns are similar in both Member States, however, the resulting constitutional approach or strategy differs significantly.

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- Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 460.
- 26 *Quantitative Easing (PSPP) Final Judgment* paras 99-101; *Final OMT-Judgment* paras 126, 129; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 233, 264; Cf. as well: De Sadeleer, 'The New Architecture of European Economic Governance' 36.
- 27 *Quantitative Easing (PSPP) Reference* para 56; *Final OMT-Judgment* paras 124, 135-138; *Lisbon-judgment* para 250; Also critically discussed in the academic debate, cf.: Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 516, 527; Cremer, 'Lissabon-Vertrag und Grundgesetz' 299-300; Kottmann and Wohlfahrt, 'Der gesplittete Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 447-448; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.
- 28 *Quantitative Easing (PSPP) Final Judgment* para 104; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 643-644; Payandeh, 'The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture' 408; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 285; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 682-683; Ungern-Sternberg, 'Parliaments – Fig Leaf or Heartbeat of Democracy? German Constitutional Court – Judgment of 7 September 2011 – Euro Rescue Package' 314-315; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.
- 29 *Adoption of the EU Six-Pack Legislation* 4-5; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

When considering the German constitutional opposition to budgetary and fiscal integration in greater detail, it should be emphasized that the relevant concept of *overall budgetary responsibility* has a procedural dimension and a substantive dimension. It suggests that the German Parliament can engage in budgetary and fiscal commitments at the EU-level, as long as these commitments remain reversible and as long as the central and major part of budgetary decisions is taken by the German Parliament itself. At the same time, national budgets are increasingly constrained by long-term political decisions, such as pension schemes, social policy or public health policy decisions, which limit the discretion of future parliaments.³⁰ Nevertheless, the jurisprudence implies that EU fiscal integration is restricted both in procedural terms, meaning how powers are conferred and what role the national parliament plays, as well as in substantive terms. Although the Constitutional Court did not yet define a specific percentage of the German federal state budget that has to remain under the control of the domestic level, the recent PSPP-judgment illustrates that the Court is carefully monitoring fiscal integration steps.³¹ In contrast, the Finnish Constitutional Law Committee focused on the procedural safeguards for parliamentary involvement in budgetary decisions.

According to the German Constitutional Court, the substantive dimension of *overall budgetary responsibility* protects the unamendable constitutional core of the *Grundgesetz* protected by Article 79 (3) GG.³² Therefore, *overall budgetary responsibility* constitutes an absolute limitation for EU fiscal integration steps which cannot be overcome by the German constitution-amending legislator. As highlighted, these material or substantive reservations are framed as *national constitutional identity* concern by the German Constitutional Court.³³ Given the absolute nature of these substantive identity concerns, they constitute a direct and serious limitation to the prospect of EU fiscal integration. Overall, such *national constitutional identity* concerns that protect budgetary and fiscal prerogatives constitute the most immediate and serious restrictions for such EU proposals. Yet, as the term *identity concern* already suggests, these are specific

30 As discussed previously, overall fiscal discretion for national parliaments is increasingly limited by such long-term policy decisions, cf. Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 53; Kube, 'Art. 110 GG' para 41; Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8.

31 *Quantitative Easing (PSPP) Final Judgment* paras 103-104; Cf. as well: Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 902.

32 Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892.

33 Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 902; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 293-294.

to the national constitutional order and vary in their design from Member State to Member State. Therefore, the subsequent Section assesses different national *constitutional identity* concerns raised in the context of EU cooperation to identify conceptual overlap and determine their potential limiting impact on EU fiscal integration ambitions.

In addition, in both Member States the principle of sovereignty is invoked when evaluating supranational budgetary and fiscal commitments. In Finland, the principle of sovereignty occupies a historically important position and is enshrined in Section 1 (1) Finnish Constitution.³⁴ As outlined, the initial absolute conception of Finnish sovereignty was altered by the constitution-amending legislator.³⁵ Therefore, not every conferral of powers to the EU is construed as a conflict with Finnish sovereignty. In Germany, the Constitutional Court employs the principle of sovereignty in conjunction with democracy. Given its historic origin, the German Constitution does not mention sovereignty explicitly but instead implies it.³⁶

Taken together, this illustrates that both national authorities employ national sovereignty when considering EU integration steps. The German Court seemingly addressed these concerns by emphasizing the derived status of the EU as well as by underscoring that *Kompetenz-Kompetenz* cannot be conferred to the EU-level. Similarly, the Finnish Constitutional Law Committee was concerned when evaluating the draft ESM-Treaty that the Finnish financial commitment could be increased without prior Finnish parliamentary approval, which would have equipped the EU with the power to overrule the Finnish Parliament and which would have resulted in some sort of EU *Kompetenz-*

34 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 331-332; Ojanen, 'The EU at the Finnish Constitutional Arena' 254; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 100; Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' 216; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 537.

35 Notably, Finnish sovereignty has to be balanced against the principle of internationality, cf. Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 366; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 335; Ojanen, 'The Europeanization of Finnish Law - Observations on the Transformations of the Finnish Scene of Constitutionalism' 100.

36 Cf. the German Court speaks of the sovereignty of the people, cf. Konertz, 'Historische und philosophische Grundlagen der Rechtsordnung im Überblick – Am Beispiel von BGB, GG und StGB' 203; Vinx, 'The Incoherence of Strong Popular Sovereignty' 114-115; Sennekamp, 'Alle Staatsgewalt geht vom Volke aus! – Demokratieprinzip und Selbstverwaltung der Justiz'; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* paras 130-133; Weber-Fas, *Das Grundgesetz* 52-53; Cf. as well: Huster and Rux, 'Art. 20 GG – Bundesstaatliche Verfassung; Widerstandsrecht' paras 62-66; Grzeszick, 'Art. 20 GG' para 61.

Kompetenz.³⁷ Furthermore, the Finnish Constitutional Law Committee started to equally consider the factual benefits that stem from EU cooperation for national sovereignty. According to the Committee, EU commitments are not primarily limiting Finnish sovereignty, but instead increasing the Finnish impact in a globalized world. For example, negotiating a trade agreement as a Union of almost 450 million inhabitants enhances the final agreement for Finland – as less populated Member State – too.³⁸ Therefore, the Committee argues that EU cooperation can in fact increase sovereign powers, which is factored into the constitutional assessment and illustrates a flexible conception of substantive constitutional principles to EU integration steps.

5 OVERALL COMPARATIVE CONCLUSION

Overall, EU fiscal integration steps seem possible in Finland and in Germany. However, given that budgetary and fiscal competences are considered particularly important prerogatives for national parliaments, additional procedural and substantive requirements apply to future EU fiscal integration steps. In addition, the German *constitutional identity limit*, specifically *overall budgetary responsibility*, restricts the available constitutional space for such integration. Notably, EU fiscal integration steps cannot restrict the German Parliament's ability to take all central budgetary decisions itself. In contrast, the Finnish Constitutional Law Committee did not develop such substantive limitations, but instead relied on effective parliamentary involvement and underscored the overall discretion of the Finnish Parliament when deciding on EU integration. Therefore, the Finnish constitutional system appears more flexible towards EU integration compared to the German constitutional order. Given that Finland has no domestic constitutional court, which could scrutinize *ex post* parliamentary work and given the traditionally wide discretion that the Finnish Parliament enjoys, no substantive limitation to EU (fiscal) integration emerged. In contrast, the German constitutional order can be characterized as more rigid in light of its constitutional features, the institutional framework and the analyzed resulting constitutional jurisprudence.

Despite all these major differences, the comparison revealed that the Finnish Constitutional Law Committee and the German Federal Constitutional Court base their constitutional assessment on comparable principles, notably national sovereignty and democracy, and that their appraisal is framed by the domestic

37 Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

38 *Adoption of the Lisbon Treaty*; Cf. as well: Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334.

enabling clause. Therefore, considerable conceptual overlap exists, and the constitutional departure point appears similar. However, in light of the identified differences in the overall constitutional and institutional design of both systems, both authorities reach different final conclusions on the relationship between the respective national constitution and the EU legal order.

Yet, given the identified conceptual overlap, it can be submitted that the comparative exchange of constitutional interpretation and arguments is general possible as the constitutional concerns overlap. Although, of course, the respective domestic interpretation of, for example, democracy is a prerogative of the national authority, the conceptual overlap may be employed as input to reconsider the national interpretation of certain principles. For example, the Finnish Constitutional Law Committee includes the factual benefits of EU cooperation into its evaluation of Finnish sovereignty. Similarly, one could consider the factual benefits stemming from EU budgetary and fiscal integration when constitutionally assessing the impact of such integration steps on the principle of democracy in Germany. An additional means to achieving this *constitutional flexibility* is the application of a consistent constitutional standard and thus not distinguish between internal cases and cases with an EU-dimension, as currently apparent in the German constitutional practice. Hence, even the rigid German constitutional order appears to offer additional constitutional space for EU integration steps in budgetary and fiscal matters, which is further explored in PART II.

