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

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V Micro-Comparative Assessment of French, German, Polish and Spanish Limit to EU Fiscal Integration

1 INTRODUCTION

This Chapter evaluates each national *constitutional identity limits* separately. To structure the assessment and to facilitate the following comparison across Member States, the assessment is structures based on the developed and previously introduced *Constitutional Identity Classification Board*, which is displayed in *Figure 11*.

The following assessment first considers the French *constitutional identity limit* (2.), before then considering the Spanish (3.) and the Polish one (4.). Subsequently, the previously established main findings on the German *constitutional identity limit* will be reiterated (5.).

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

Figure 11: Design of the Constitutional Identity Classification Board

2 THE FRENCH CONSTITUTIONAL APPROACH TO EU FISCAL INTEGRATION

The comparative assessment departs from the French material constitutional limits to EU fiscal integration. The inclusion of France in this *micro-comparison* is vital given the influential position the country occupies within the Eurozone. Politically, France can be characterized as the crucial driving force next to Germany behind the integration dynamics within the Eurozone.[1] Economically,

1 Amandine Crespy and Vivien Schmidt, 'The clash of Titans: France, Germany and the discursive double game of EMU reform' (2014) 21 Journal of European Public Policy 1085, 1085-1086; Michele Chang, 'Reforming the Stability and Growth Pact: Size and Influence in EMU Policymaking' (2006) 28 Journal of European Integration 107, 115; Although both

France is the second biggest Eurozone-economy, after Germany, which translates, for example, into the ESM-funding guarantee that France represents.[2] Jointly, France and Germany represent almost 50% of the ESM funding guarantees.[3] This illustrates the economic, political and relative power of France both individually and jointly with Germany. Arguably any EMU-reform will require the support of the French-German axis. However, the political ideas in both Member States about Eurozone-reforms diverge considerably,[4] as French President Macron continuously advocated an ambitious fiscally more integrated single currency.[5] Yet, these far-reaching political ambitions must be separated from possible legal obstacles that might be imposed by the French Constitution towards EU fiscal integration.

In fact, when considering the French constitutional approach to EU integration, certain features of a rigid constitutional system become apparent. In the first place, the French constitutional approach is shaped by an influential constitutional authority, the *Conseil Constitutionnel*.[6] The *Conseil* has the prerogative to conduct *ex ante* constitutional review – including the review of

countries have different priorities concerning EMU-reform, both are politically influential, cf. Thomas Lehner and Fabio Wasserfallen, 'Political Conflict in the Reform of the Eurozone' (2019) 20 European Union Politics 45, 47, 61.

2 Which equals more than 20%, cf. Annex I of the ESM-Treaty; Carri Ginter and Raul Narits, 'The Perspective of a Small Member State to the Democratic Deficiency of the ESM' (2013) 38 Review of Central and East European Law 54, 65; Which gives France a *de facto* veto for qualified majority decisions, cf. Fabian Amtenbrink, 'New Economic Governance in the European Union: Another Constitutional Battleground?' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation* (Springer 2014) 223.

3 Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016) Chapter 2.3.B (Difference in Power); Ginter and Narits, 'The Perspective of a Small Member State to the Democratic Deficiency of the ESM' 65.

4 Lehner and Wasserfallen, 'Political Conflict in the Reform of the Eurozone' 47; Joachim Schild, 'Leadership in Hard Times – Germany, France, and the Management of the Eurozone Crisis' (2013) 31 German Politics and Society 24, 30.

5 Tony Barber, 'Eurozone Reform Deadlock Reflects Deep Malaise Over Integration – The Fiscal Stalemate Derives in Part From the Frictions in Franco-German Relations' *Financial Times* (London 26 December 2019) <https://www.ft.com/content/8ffa04c6-1815-11ea-8d73-6303645ac406> accessed 20 December 2020; Yet, the reform plans of Macron triggered German opposition, cf. Jim Brunsden, Anne-Sylvaine Chassany and Guy Chazan, 'France and Germany to Press on With Eurozone Reform' *Financial Times* (London 20 May 2018) <https://www.ft.com/content/fdde302c-5c1c-11e8-ad91-e01af256df68> accessed 20 December 2020; Anne-Sylvaine Chassany, Guy Chazan and Mehreen Khan, 'Impatient Macron Pushes Merkel Hard on Eurozone Reform' *Financial Times* (London 16 March 2018) <https://www.ft.com/content/8c521504-2904-11e8-b27e-cc62a39d57a0> accessed 20 December 2020; The FT View, 'Macron's Worthy Goals for Eurozone Reform – The new French President's Ideas are very Ambitious but Largely Right' *Financial Times* (London 9 May 2017) <https://www.ft.com/content/7ea08a52-34b9-11e7-99bd-13beb0903fa3> accessed 20 December 2020.

6 In English: Constitutional Council.

new EU commitments.[7] Thus, the compatibility of EU commitments with the French Constitution is determined prior to their ratification.[8] In addition, the *Conseil* conducts a limited review of the national implementation of EU-related obligations.[9] All its decisions are legally binding[10] and overall the *Conseil* can be described as central adjudicator for constitutional questions in France.[11] Considering its institutional prerogatives and the effect of its decisions, the *Conseil* can thus be compared to traditional constitutional courts such as the German *Bundesverfassungsgericht*.

At the same time, the *Conseil* is mainly composed of (former) politicians, including former French Presidents, instead of jurists.[12] Its composition thus more resembles a constitutional advisory body, comparable to the Finnish Constitutional Law Committee. Hence, the *sui generis* institutional nature of

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7 As enshrined in Articles 54 and 61 French Constitution, cf. Steiner, *French Law – A Comparative Approach* 7; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 769-770; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 871; David Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' (1988) 23 Irish Jurist 2, 13.

8 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 102; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 769-770; Federico Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' (2014) 32 Berkeley Journal of International Law 101, 119; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 529.

9 Chloé Charpy, 'Droit constitutionnel et droit communautaire – Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'État' (2009) 80 Revue Française de Droit Constitutionnel 795, 801-802; Philippe Blachèr and Guillaume Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' (2007) 69 Revue francaise de Droit constitutionnel 123, 140; Thomas M. Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 469, 475.

10 As established in Article 62 French Constitution, cf. Steiner, *French Law – A Comparative Approach* 68; Arthur Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' in Monica Claes and others (eds), *Constitutional Conversations in Europe* (Intersentia 2012) 319; Franz C. Mayer, Edgar Lenski and Mattias Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' (2008) 43 Europarecht (EuR) 63,, 68.

11 Marie-Luce Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' in John Bell and Marie-Luce Paris (eds), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing Limited 2016) 328-329; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 312.

12 Steiner, *French Law – A Comparative Approach* 68; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 302-303; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 319.

the *Conseil Constitutionnel*, which reflects both flexible and rigid constitutional features, appears to offer an interesting additional case study to complement the findings of the *macro-comparison*. And second, the French Constitution formulates different limits toward EU cooperation. Prominently, Article 89 (5) French Constitution excludes constitutional amendments that alter the republican status of France, which could possibly restrict EU fiscal integration.[13] In addition, the *Conseil Constitutionnel* has established a French sovereignty limit[14] and an explicit *constitutional identity limit*[15] which both might constrain the constitutional space available for EU fiscal integration steps under the French Constitution.

The economic-political as well as the comparative legal-constitutional relevance of the French constitutional limits to EU fiscal integration justify its inclusion in the conducted *micro-comparison*. The subsequent analysis is structured in four parts. In a first step, the relevant constitutional framework for EU fiscal integration steps is identified and the ambiguity of the constitutional terminology in relation to '*constitutional identity*' discussed (2.1.). Second, the French sovereignty limit, as the most immediate constitutional restriction for the conferral of additional competences to the EU is evaluated (2.2.). Third, the particularities of the French *constitutional identity limit* are outlined (2.3.). Finally, the resulting French constitutional space for EU fiscal integration is determined (2.4.).

2.1 Identifying the relevant French constitutional limits

Three French *final* judicial authorities adjudicate on the interaction between French and EU law. These different judicial authorities adopted contrasting approaches to the compatibility of EU law with French law and its general effect based on their respective field of judicial responsibility.[16] Notably, the

13 Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 124; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388-389; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 270-271.

14 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540.

15 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 141-142; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386; Furthermore, Germany and France could be seen as driving actors to stimulate the discourse on *constitutional identity limits*, cf. Saiz Arnaiz and Alcoberro Llivina, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' 7-8.

16 Steiner, *French Law – A Comparative Approach* 8; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France', 526; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid

Conseil Constitutionnel adjudicates on constitutional law questions, the *Conseil d'État* (Council of State) in last instance on administrative law, and the *Cour de Cassation* (Supreme Court) in last instance on civil as well as criminal law.[17] Obviously, given the wide range of matters regulated by EU law, all three high courts are confronted with EU law questions. The focus of the subsequent analysis rests, however, on constitutional law questions and in particular on substantive constitutional limits to EU fiscal integration steps. Therefore, the analysis will be limited to the jurisprudence of the *Conseil Constitutionnel*, given the *Conseil*'s central position as constitutional adjudicator.[18] This position was strengthened by the 2008 French constitutional reform, which introduced a referral system for constitutional law question emerging in front of lower courts in France.[19] By initiating a so-called *Question Prioritaire de Constitutionalité* (*QPC*), lower courts can refer questions on the constitutionality of a French legislative act to the *Conseil Constitutionnel*. This referral mechanism integrates the different branches of the judiciary and reinforces the position of the *Conseil Constitutionnel* as the most authoritative adjudicator on constitutional law questions in France.[20]

The *Conseil Constitutionnel* conducts constitutional review *inter alia* on the compatibility of EU law with the French Constitution. This review can either

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to Ask)' 313; With a general overview: John Bell, 'Court Institutions' in John Bell, Sophie Boyron and Simon Whittaker (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008) 37-43.

17 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 766-767; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 137; John Bell, *French Legal Culture* (Butterworths 2001) 29, 31, 33.

18 Arthur Dyevre, 'The French Constitutional Council' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 328; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 328-329; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 137; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 312.

19 Enshrined in Article 61-1 French Constitution and entered into force on 1. March 2010 following constitutional amendment, cf. Otto Pfersmann, 'Concrete Review As Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective' (2010) 6 European Constitutional Law Review 223,, 227; Constituting a major constitutional transformation, cf. Frangois-Xavier Millet and Nicoletta Perlo, 'The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law? ' (2015) 16 German Law Journal 1471, 1471; Resulting in increased caseload of the *Conseil Constitutionnel*, cf. Susan Wright, 'The French Conseil Constitutionnel Since Early 2010: Its Growing Caseload and Its First Contact With the Court of Justice of the European Union' (2014) 20 European Public Law 23,, 23-25.

20 Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 328-329; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 312.

be initiated against the conferral of additional powers to the EU[21] or against the national implementation of EU secondary law into French law.[22] The intensity of the review and the employed constitutional concepts, both depend on the challenged act. Notably, when assessing new EU primary commitments, the *Conseil* will conduct a full *ex ante* constitutional review,[23] traditionally following Article 54 French Constitution.[24] In contrast, when confronted with EU secondary law, the Conseil only conducts a limited review, as the secondary act benefits from the special presumption of constitutionality of ratified international agreements.[25] This is now specifically acknowledged for EU law obligations in Article 88-1 (2) French Constitution which states: '[France] shall participate in the European Union in the conditions provided for by the Treaty of Lisbon [...]'.[26] This obviously applies to the implementation of EU law into the national legal order. And furthermore, the *Conseil*'s jurisdiction is limited to French law, which restricts the review of EU secondary law to the French

21 Following Article 54 French Constitution, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 140-141; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126-127; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540.

22 Following Article 61 (2) French Constitution, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126-127; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386.

23 Any conferral of competences to the EU has to be compatible with the French Constitution, which potentially requires constitutional amendment prior to it, cf. *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; Decision 97-394 DC *Revision of Amsterdam Treaty* [1997] (French Conseil Constitutionnel) para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541.

24 Triggering Article 54 French Constitution prior to the adoption of new EU obligations constitutes a 'political routine' in France, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539.

25 As established by the *Conseil Constitutionnel*, cf. *Fiscal Compact* para 18; *Review of Maastricht Treaty (Maastricht I)* para 7; Cf. as well: Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 121; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478-479.

26 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 533; Jan-Herman Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' (2005) 1 European Constitutional Law Review 302, 303.

implementation act.[27] One consequence is that no direct conflict between secondary EU law and French constitutional law can emerge in front of the Conseil, which is an expression of the Conseil's respect for the prerogatives of the CJEU.[28] Despite both aspects, the *Conseil Constitutionnel* did however develop a specific limit that applies to the French implementation of EU secondary law, namely the *constitutional identity limit*.[29]

2.1.1 Relevant constitutional limits for EU primary law

When adjudicating on the compatibility of an anticipated conferral of competences to the EU, for example by ratifying a new EU Treaty, an amendment of the Treaty or by creating new EU obligations,[30] the Conseil applies a threefold constitutional scrutiny.[31] This scrutiny consists of both formal and material elements that restrict the constitutional space and that might require constitutional amendments prior to the ratification of an envisaged conferral. The *Conseil* established:

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27 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 140-141; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 775-776; Chloé Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' (2007) 3 European Constitutional Law Review 436, 442; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 307; Jacqueline Dutheil de la Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' (2005) 42 Common Market Law Review 859, 861.

28 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 142;

29 *Comprehensive Economic and Trade Agreement (CETA)* para 14; Decision 2010-605 DC *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* [2010] (French Conseil Constitutionnel) para 18; Decision 2008-564 DC *French Law on Genetically Modified Organisms* [2008] (French Conseil Constitutionnel) para 44; *Copyright and Related Rights in the Information Society* para 19; Cf. as well Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 141; Joris Larik, 'Prêt-à-Ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017' (2017) 13 European Constitutional Law Review 759, 764; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Édouard Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' (2010) 83 Revue française de Droit constitutionnel 451, 452.

30 This applied to the Fiscal Compact, which was considered as a potentially new, EU-related obligation, cf. *Fiscal Compact*; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119-120.

31 *Lisbon Treaty* para 9; *Fiscal Compact* para 10; Cf. as well: Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541.

> 'Considering however that where the commitments signed to this effect or which are closely related to this goal contain a clause which *is unconstitutional, call into question the rights and freedoms guaranteed by the Constitution or run contrary to the essential conditions for the exercise of national sovereignty* [emphasis added], [authorization] to ratify them may only be granted after the Constitution has been amended.'[32]

According to this constitutional benchmark, envisaged new EU obligations may not explicitly contradict the French Constitution, as this would result in a direct, formal conflict with French constitutional law. This formal requirement is complemented by substantive restrictions which exclude competence conferrals that either conflict with constitutional rights or with the French sovereignty doctrine.[33] Considering the first, the conferral may not challenge 'rights and freedoms guaranteed by the Constitution'.[34] This constitutes essentially a safeguard for the protection of fundamental rights and other subjective rights specifically recognized by the French Constitution.[35] Concerning the latter, the conferral may also not violate 'the essential conditions for the exercise of national sovereignty'. Whereas the prior substantive limit protects individual, subjective rights, this second substantive limit protects French sovereignty and with it the democratic decision-making process in France.[36]

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32 *Fiscal Compact* para 10; Which confirms the *Conseil*'s established jurisprudence, cf. *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; Prior to its judgment on the EU Constitutional Treaty, the Conseil did not explicitly mention the second limit on the protection of constitutional rights, cf. *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541.

33 Although one might actually identify three separate limits in this, the academic writing emphasized that a 'simple' textual/formal contradiction is not sufficient for identifying a conflict, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771-772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539.

34 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138.

35 For example, the collective rights established in Articles 1 to 3 French Constitution are covered by the EU Charter protection and therefore fall under the constitutional rights benchmark according to the *Conseil Constitutionnel*, cf. *Treaty Establishing a Constitution for Europe* para 16; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 542; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 498.

36 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539-541; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel'

In case the *Conseil Constitutionnel* identifies a conflict between an envisaged EU commitment and one of the two constitutional limits the French legislator can either modify the EU commitment in order to preempt the constitutional conflict or it can amend the French Constitution.[37] Since the Maastricht Treaty, the constitution-amending legislator opted for the second option and modified the French Constitution whenever the *Conseil Constitutionnel* identified an incompatibility. The result is therefore, that the French Constitution contains several explicit acknowledgements of competence transfers to the EU in its Title XV.[38]

When confronted with EU fiscal integration proposals, the sovereignty limit appears to be the most relevant obstacle within the French constitutional order.[39] This can be deduced from the Conseil's previous decisions, where it identified monetary, economic and fiscal matters as competence areas that are closely related to national sovereignty.[40] Therefore, it seems possible that EU fiscal integration proposals will conflict with the sovereignty limit.

2.1.2 *Relevant constitutional limits for EU secondary law*

In light of the outlined *internal* constitutional obligations that apply to ratified international and EU commitments,[41] the *Conseil Constitutionnel* applies a less comprehensive constitutional review *vis-à-vis* EU secondary acts. The previously outlined material limits are not applicable. Instead, the *Conseil Constitutionnel*

493-494; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884.

37 Following Article 89 French Constitution, as emphasized by the *Conseil*, cf. *Review of Maastricht Treaty (Maastricht I)* para 14; *Treaty Establishing a Constitution for Europe* para 7; *Lisbon Treaty* para 9; Cf. as well Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123.

38 Introduced with the Maastricht Treaty, cf. Peter Oliver, 'The French Constitution and the Treaty of Maastricht' (1994) 43 International & Comparative Law Quarterly 1, 16; Generally speaking, these limited acknowledgements result in a sort of constitutional 'patchwork', cf. Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 530.

39 See for example the constitutional assessment of EMU, which was deemed to affect essential sovereign competences, cf. *Review of Maastricht Treaty (Maastricht I)* para 43; Or the assessment of the Fiscal Compact under the sovereignty limit, cf. *Fiscal Compact* paras 16, 30; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265.

40 *Fiscal Compact* para 16.

41 Namely, the combined reading of the concept 'immunité des conventions ratifiées' and the principle of 'pacta sunt servanda' that apply to international commitments according to the *Conseil Constitutionnel*, cf. *Review of Maastricht Treaty (Maastricht I)* para 7; Cf. as well: Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478-479; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303.

developed the concept of French '*constitutional identity*'.[42] Namely, the *Conseil* established:

> 'Firstly, the transposition of a Directive cannot run counter to *a rule or principle inherent to the constitutional identity of France* [emphasis added], except when the constituting power consents thereto [...].'[43]

Based on this concept, the *Conseil* assesses whether the French implementation of obligations stemming from EU secondary law, in particular EU Directives, conflicts with core constitutional values inherent in the identity of the French Republic.[44] Subsequently, the Conseil extended the scope of this *constitutional identity* review to the implementation of obligations stemming from EU regulations[45] and to international agreements that are based on exclusive EU competences,[46] yet it did not extend it to EU primary law obligations.

Although the primary focus of the comparison rests on the available constitutional space for EU fiscal integration steps, and thus on the material limits that apply to the conferral of additional competences, the French *constitutional identity* doctrine will be equally assessed. One reason for this is that the French conception of *constitutional identity* differs from the conception in other Member States, which established *constitutional identity limits* as strict restrictions for the conferral of powers. Therefore, the French limit might constitute an interesting example for a different design of *national constitutional identity* concerns. It could function as a *best practice* inspiration. Another reason is that EU fiscal integration ambitions will likely require the enactment of EU secondary law, which would be confronted with the French *constitutional identity limit*.[47] Consequently, when drafting EU fiscal integration steps, considering this potential French limit to the effect of Eurozone secondary law might be equally taken into account.

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42 *Comprehensive Economic and Trade Agreement (CETA)* para 14; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 18; *French Law on Genetically Modified Organisms* para 44; *Copyright and Related Rights in the Information Society* para 19; Cf. as well Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 452; Characterized as a 'low-intensity review', cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 141.

43 *Copyright and Related Rights in the Information Society* para 19.

44 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 147-148; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Referring to constitutional principles that are specific to France, cf. Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 312; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388.

45 *National Law Related to the Protection of Personal Data Under the GDPR* paras 3, 26; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 143.

46 *Comprehensive Economic and Trade Agreement (CETA)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 145; Larik, 'Prêt-à-Ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017', 764.

47 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 148.

2.1.3 Ambiguity of the term 'constitutional identity' in the French context

When considering the prospect of EU fiscal integration in France, one might presume that the *constitutional identity limit* developed by the *Conseil Constitutionnel* is the most significant obstacle to EU fiscal integration proposals.[48] This conclusion seems convincing from a comparative perspective. In Germany, the *constitutional identity* lock is an absolute restriction to further EU integration step. Any conflict with this German identity is an impermissible violation of Article 79 (3) Basic Law.[49] Similarly, the subsequent assessment highlights that the constitutional tribunals in Spain[50] and Poland[51] equally employ *constitutional identity* as a strict limit to the conferral of competences to the EU. Hence, the French constitutional terminology might be characterized as 'misleading' from a comparative perspective.[52]

As previously highlighted, the French *constitutional identity limit* is restricted in its scope of application to derived EU law and does not apply to the initial conferral of competences.[53] Furthermore, the concept is a judicial concept

48 *National Law Related to the Protection of Personal Data Under the GDPR* para 3; *Comprehensive Economic and Trade Agreement (CETA)* para 14; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 18; *French Law on Genetically Modified Organisms* para 44; *Copyright and Related Rights in the Information Society* para 19; Cf. as well Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues'; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?'.

49 The German *constitutional identity lock* is based on Article 79 (3) German Constitution, cf. Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem', 293-294; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388.

50 *Treaty Establishing a Constitution for Europe* Section II. 2. and 3.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 269-270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

51 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 501; Władysław Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' (2011) 12 ERA Forum 197, 201.

52 Importantly, constitutional actors employ their own terminology, cf. Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 878.

53 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 147; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478-479; Reestman, 'France –

without an explicit constitutional basis.[54] In fact, the constitution-amending legislator even refused to introduce an explicit *constitutional identity* provision into the French Constitution.[55] Instead, the concept was developed by the *Conseil Constitutionnel*, which drew inspiration from EU law itself.[56] Through this limit, the *Conseil* assesses whether the EU offers an equivalent protection for the protected *constitutional identity* concerns under review[57] by equally acknowledging the ability of the legislator to overcome any resulting conflict.[58] Therefore, the French *constitutional identity limit* is, on the one hand, only of indirect importance for EU fiscal integration proposals. On the other hand, it is obvious that the French *constitutional identity* concept differs from the mentioned strict *constitutional identity limits* apparent in other Member States. Thus, the characteristics and function of the different limits are of primary relevance to allow for an insightful comparison – and not the constitutional terminology.[59]

Therefore, the following assessment focusses on the highlighted material limits applied to the conferral of competences, which seem comparable to the *constitutional identity* limits in other Member States, as they restrict the available scope for EU integration steps (2.2.).[60] And only subsequently, the analysis

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Conseil Constitutionnel on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303.

54 In contrast to, for example, the German *constitutional identity lock* which is based on Article 79 (3) Basic Law, cf. Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem', 293-294.

55 Notably, when debating the constitutional amendments following the Maastricht Treaty, cf. Saiz Arnaiz and Alcoberro Llivina, 'Why Constitutional Identity Suddently Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' 7.

56 Notably, the identity provision in the proposed EU Constitutional Treaty, now enshrined in Article 4 (2) TEU, cf. Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 387-388; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*', 445.

57 Comparable to the German *Solange*-approach, cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 547; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 454; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 389.

58 As explicitly highlighted by the *Conseil*, cf. *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Denis Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' (2011) 41 Israel Law Review 389, 402-403.

59 Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 878.

60 As seen in the past, where the *Conseil Constitutionnel* declared several EU-Treaties in conflict with the national sovereignty doctrine and required constitutional amendments, cf. *Lisbon Treaty* para 34; *Treaty Establishing a Constitution for Europe* para 43; *Revision of Amsterdam Treaty* para 32; *Review of Maastricht Treaty (Maastricht I)* para 52; Cf. as well: Millet, 'Constitu-

considers the design of and the protection offered by the French *constitutional identity limit* in order to potentially identify a national *best practice* (2.3.).

2.2 Essential conditions for the exercise of national sovereignty

Based on the jurisprudence of the *Conseil Constitutionnel*, the *essential conditions for the exercising of national sovereignty ('conditions essentielles d'exercice de la souveraineté nationale')*[61] constitute the most immediate constitutional obstacle to EU fiscal integration proposals in France.[62] Based on this concept, the *Conseil Constitutionnel* determines whether an envisaged transfer of competences (limitation of sovereignty due to substantive changes) or whether a modification of the conditions for the exercise of already conferred competences to the EU (limitation of sovereignty due to procedural changes) affect French sovereignty.[63]

2.2.1 Institutional actor enforcing the limit

The French sovereignty limit was developed by the *Conseil Constitutionnel*, an institution that was established by the 1958 French Constitution.[64] The constitutional drafters envisaged the *Conseil* as an independent stabilizer for and supervisor of the new French separation of power.[65] Thus, the *Conseil* was

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tional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772.

61 Consistently employed by the *Conseil Constitutionnel* in relation to EU commitments since the Maastricht Treaty, cf. *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14.

62 Confirmed by its application to the Fiscal Compact, cf. *Fiscal Compact* para 10; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 122-123; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491.

63 *Lisbon Treaty* para 20; *Revision of Amsterdam Treaty* paras 27-28; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 526.

64 Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Sophie Boyron, 'Constitutional Law' in John Bell, Sophie Boyron and Simon Whittaker (eds), *Principles of French Law* (2nd edn, Oxford University Press 2008) 156.

65 Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 305-306; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 7; Albeit originally, designed as a 'secondary institution', cf. Sylvain Brouard,

created to monitor the political process and the new division of competences between the executive and the legislative powers in a mixed parliamentary and presidential constitutional system introduced by the 1958 Constitution.[66] The established institution resembled in its structure, organization as well as its initial tasks a constitutional advisory body,[67] which is also reflected in its name: a 'constitutional *council*' rather than a 'constitutional *court*'.[68]

Notably, the conception as 'advisory body' is reflected in its composition and the appointment of its members.[69] The 9 members of the *Conseil Constitutionnel* are appointed in equal parts by the French President, the President of the *Assemblée Nationale* and the President of the *Sénat* for a term of 9 years. The appointed members are not required to have a legal professional qualification.[70] Furthermore, former French Presidents have the constitutional right to sit on the *Conseil Constitutionnel* as *member by law*.[71] Hence, the *Conseil*'s members are not trained lawyers and have clear political affiliations. These affiliations seem to impact its final verdict. As research by *Brouard* shows, in case a majority of the members shares the same political affiliation as the government, the *Conseil* is more likely to rule in favor of the government.[72] This suggests that political considerations which motivate the appointment of a new member to the *Conseil Constitutionnel* partly permeate into the final constitutional judgments.[73] From the initial design as 'advisory body', the *Conseil Constitutionnel* developed into an institution that increasingly resembles

'The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition' (2009) 32 West European Politics 384, 385.

66 Susan Wright, 'The French *Conseil Constitutionnel* Under an Evolving Constitution' (2017) 23 European Public Law 245,, 251; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Boyron, 'Constitutional Law' 156; Bell, *French Legal Culture* 33; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?', 6-7.

67 Reflecting the historic rejection of 'judge-made law' in France, cf. Steiner, *French Law – A Comparative Approach* 64; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 308; Boyron, 'Sources of Law' 15; Axel Spies, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' (1990) 9 Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1040, 1041.

68 Bell, 'Court Institutions', 42; Bell, *French Legal Culture* 33; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 7.

69 Boyron, 'Constitutional Law' 156; Bell, *French Legal Culture* 42; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 7.

70 Bell, 'Court Institutions' 42.

71 As established in Article 56 French Constitution, cf. Boyron, 'Constitutional Law' 156; Spies, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' 1042;

72 Brouard, 'The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition' 394.

73 Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 302; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 7.

a judicial constitutional court. It conducts constitutional review[74] and its decisions are final and binding on all French state authorities.[75]

Clearly, the highlighted new referral mechanism for constitutional questions (*QPC*) integrates the *Conseil Constitutionnel* into the judicial branch of state power and thereby supports this on-going transformation.[76] Thereby, the mechanism requires the *Conseil Constitutionnel* to address concrete private disputes and adjudicate on subjective constitutional rights, which constitutes a core task of constitutional courts.[77] It thereby equally requires the *Conseil* to increasingly interact with the CJEU on EU law-related questions.[78]

Overall, the *Conseil Constitutionnel* adjudicates centrally on the constitutionality of EU primary law. In case the *Conseil* identifies a conflict between the sovereignty limit and a conferral of competences such conferral requires a prior amendment of the constitutional text.[79] Through its review, the *Conseil* traditionally functions – as *Ziller* fittingly puts it – as a constitutional '*points-*

74 Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 302-303; Pfersmann, 'Concrete Review As Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective', 223.

75 Cf. Article 62 French Constitution, Steiner, *French Law – A Comparative Approach* 68; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 319; Note as well the systematic-hierarchical importance of constitutional decisions, as the French Constitution sits 'at the summit of the domestic legal order', *Lisbon Treaty* para 8; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539.

76 Dyevre, 'The French Constitutional Council' 328; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 328-329; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 137; Dyevre, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 312.

77 Wright, 'The French *Conseil Constitutionnel* Under an Evolving Constitution', 250-251; Core intention of the constitutional reform that introduced the QPC, cf. De Visser, *Constitutional Review in Europe – A Comparative Analysis* 136.

78 Note, the first references by the *Conseil*: C-168/13 PPU *Jeremy F* [2013] (CJEU); Cf. as well: Millet and Perlo, 'The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law? ' 1475.

79 Steiner, *French Law – A Comparative Approach* 7; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Wendel, 'Lisbon Before the Courts: Comparative Perspectives', 103; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)', 69; Bell, *French Legal Culture* 200.

man'[80] that identifies constitutional conflicts, which can then be overcome by the French legislator.[81]

2.2.2 *Procedural framework – or how to trigger the limit*

The *Conseil Constitutionnel* applies the sovereignty limit in its abstract *ex ante* constitutional review of envisaged conferral of competences to the EU, which can be initiated based on Article 54 and Article 61 (2) French Constitution. Article 54 French Constitution empowers the French President, the French Prime Minister, the President of the *Assemblée Nationale*, the President of the *Senat*, 60 members of the *Assemblée Nationale* or 60 senators, to initiate an abstract *ex ante* review of the EU agreement itself. Hence, this constitutional review occurs prior to the ratification of the supranational obligations and although triggering Article 54 French Constitution is not compulsory, all EU-Treaties since Maastricht were reviewed following Article 54 French Constitution, with the exception of the Nice Treaty.[82] It seems convincing to argue that the same would apply to future EU Treaty reforms, including possible conferrals required to accommodate the more far-reaching EU fiscal integration steps. In case the new EU commitment is not directly challenged, the conferral of powers can also be indirectly disputed by proceeding *ex ante* against the French legislative act that ratifies the EU Treaty following Article 61 (2) French Constitution.[83]

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80 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 270; Spies, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' 1041; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 6-7.

81 As the *Conseil* consistently emphasized in relation to the sovereignty limit, cf. *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Equally emphasized in relation to the *constitutional identity limit*, cf. *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403.

82 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 871.

83 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France', 529; Christine Maugüé, 'Le Conseil Constitutionnel et le droit supranational' (2003) 2 Le Seuil 53, 53.

Furthermore, it might be possible that a *concrete ex post* review is initiated following the *QPC*-mechanism.[84] Based on this procedure, private applicants can challenge the validity of a French statue claiming that their constitutionally guaranteed rights and freedoms are violated. The matter is then submitted to either *Conseil d'État* or the *Cour de Cassation*, which filter the references based on constitutional importance.[85] Only important and new constitutional questions will be referred to the *Conseil Constitutionnel*. Considering the potential implications of this mechanism for challenges against EU primary law, three observations can be submitted. First, the *Conseil Constitutionnel* has refused to review statutes against international agreements, including EU law, given that Article 55 French Constitution assigns a special status to duly ratified international law.[86] Second, an evaluation of the EU-Treaties or a Treaty-provision through the *QPC*-mechanism is conceptually excluded as the *Conseil Constitutionnel* is not re-considering matters it already ruled on before.[87] Given that all EU-related conferrals of powers were in the past challenged following Article 54 French Constitution, an additional consideration of the constitutionality of EU-Treaties through Article 61-1 French Constitution appears preempted.[88] And finally, it is questionable whether EU fiscal integration steps would directly violate subjective constitutional rights, which constitute the basis of this *concrete constitutional review*.

Consequently, it seems that EU fiscal integration measures will likely only be challengeable *ex ante* by privileged applicants following Articles 54 or 61 (2) French Constitution. These procedures impose tight deadlines as the Conseil is required to deliver its ruling within one month after receiving the application. The government may even request an expedited procedure, which requires the Conseil to rule within eight days.[89] Considering the Conseil's most

84 Pfersmann, 'Concrete Review As Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective' 231-232.

85 Ibid 238-239.

86 *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* paras 11, 16; Decision 2010-4/17 QPC *Mr Alain C. an others* [2010] (French Conseil Constitutionnel) para 11; Cf. as well: Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 778-779; Alina Berger, *Anwendungsvorrang und nationale Verfassungsgericht*, vol 113 (Jus Internationale et Europaeum, Mohr Siebeck 2015) 230.

87 As determined by Section 23 (2) no. 2, a re-examination is only possible in case of changed circumstances, cf. Decision 2010-14/22 QPC *Mr Daniel W and Others* [2010] (French Conseil Constitutionnel) paras 12-13; *Revision of Amsterdam Treaty* para 27.

88 As outlined, it is a political convention to challenge EU-Treaties *ex ante*, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Subsequently, principle of res judicata prevents *Conseil* to reconsider the matter, cf. *Mr Daniel W and Others* paras 12-13; *Revision of Amsterdam Treaty* para 27.

89 As stipulated in Article 61 (3) French Constitution, which applies equally to the ex ante review of international agreements according to Article 19 Ordinance 58-1067 on the *Conseil Constitutionnel*, cf. Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 530-531.

recent decisions on EU integration matters, it delivered its decision on the EU Constitutional Treaty within 22 days,[90] its decision on the Lisbon Treaty within only eight days,[91] and its decision on the Fiscal Compact within 28 days.[92] Particularly in light of the complexity of EU-Treaties, these deadlines seem very tight. Yet, they ensure that the ratification of international commitments is not delayed in France because of constitutional proceedings. Taken together, the conducted *ex ante* review underscores the *Conseil Constitutionnel*'s function as '*pointsman*'[93], given that the *Conseil* identifies constitutional conflicts before they actually materialize.

2.2.3 *Constitutional basis of the employed limit*

The French '*essential conditions for the exercising of national sovereignty*'[94] limit was established by the *Conseil Constitutionnel* and, as the name suggests, it is based on the French sovereignty doctrine. The *Conseil Constitutionnel* derived this constitutional limit from a combined reading of several provisions of the French *bloc de constitutionnalité*, namely Article 3 *Declaration* of 1789, Articles 3 and 53 French Constitution (of 1958), as well as § 15 Preamble of French Constitution of 1946.[95] Since its decision on the EU Constitutional Treaty, the

90 *Treaty Establishing a Constitution for Europe*, where the French President referred the matter on 29.10.2004 and the *Conseil Constitutionnel* delivered its decision on 19.11.2004.

91 *Lisbon Treaty*, where the French President referred the matter on 13.12.2007 and the *Conseil Constitutionnel* delivered its decision on 20.12.2007.

92 *Fiscal Compact*, where the French President referred the matter on 13.07.2012 and the *Conseil Constitutionnel* delivered its decision on 9.08.2012.

93 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 270; Spies, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' 1041; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 6-7.

94 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 493-494; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884.

95 *Lisbon Treaty* paras 3-5; *Fiscal Compact* paras 4-6; For historic reasons, the 1958 French Constitution incorporates parts of previous French constitutional documents, which together form the so-called *'bloc de constitutionnalité'*, cf. Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 773; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 538; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491.

Conseil also refers to the EU enabling clause in Article 88-1 French Constitution.[96] Hence, the French sovereignty doctrine is enshrined in different constitutional provisions, which jointly constitute the textual and conceptual basis for the sovereignty limit.

The enumerated provisions serve different constitutional functions. It appears that Article 3 *Declaration* of 1789 and Article 3 French Constitution (1958) are primarily concerned with establishing the principle of sovereignty as such and its general conceptual design. To that end, Article 3 *Declaration* of 1789 establishes that sovereignty lies in the Nation, whereas Article 3 French Constitution (1958) establishes that sovereignty is vested in the people. One may identify here a combination of conceptual elements relating to national sovereignty and elements of popular sovereignty, as *Ziller* observes.[97] In addition, Article 3 French Constitution (1958) establishes the principle of democracy, including the right to vote and the electoral principles. Thus, the provision specifies the form of exercising French sovereignty.[98] Subsequently, the other enumerated provisions establish the specific framework for international and in particular EU cooperation.[99] Article 53 French Constitution (1958) determines that the conclusion of international agreements requires parliamentary approval. § 15 Preamble of the French Constitution of 1946 clarifies that French sovereignty can be limited for the sake of international cooperation, however requiring that such limitation of sovereignty is based on reciprocity.[100] And finally, Article 88-1 French Constitution (1958) reiterates these conditions for EU cooperation, thereby clarifying that it entails a common exercise of the conferred powers, and importantly not the conferral of sovereignty as such.[101]

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96 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 538; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 492-493.

97 Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 267; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520.

98 Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520.

99 Notably Title XV of the French Constitution, cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 533; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 861; Oliver, 'The French Constitution and the Treaty of Maastricht' 16.

100 Andrea Hamann, 'Sur un 'sentiment' de souveraineté' (2018) 20-21 Jus Politicum – Revue de droit politique 187, 188; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 538; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520; Oliver, 'The French Constitution and the Treaty of Maastricht' 12.

101 Thereby reflecting the *Conseil Constitutionnel*'s conception of French sovereignty, cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 532; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 861-862; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884.

A combined reading of these five constitutional provisions reveals that they cover the conceptual origin of French sovereignty as well as conditions and requirements for the exercise of sovereign powers. This underlying intention is equally reflected in the name of the constitutional limit '*essential conditions for the exercising of national sovereignty*', which suggests that the limit is focused on the use or the exercise of sovereign powers, rather than merely preserving sovereignty as such. In addition, given the reference to Article 88-1 French Constitution, the conception of the sovereignty limit is specific to the conferral of competences to the EU.[102]

2.2.4 *Substantive core protected by the limit*

The resulting French sovereignty limit is primarily a judicial creation of the *Conseil Constitutionnel*, which is defined on a case-to-case basis.[103] The subsequent analysis will determine the substantive content of this constitutional limit *vis-à-vis* EU fiscal integration by departing from the underpinning French sovereignty doctrine (2.2.4.1.) and subsequently turning to the concretization of the identified abstract elements of French sovereignty (2.2.4.2.).[104]

2.2.4.1 The conception of the French sovereignty doctrine

The principle of sovereignty serves as an underlying basis for limiting the conferral of competences to the EU. Obviously, this constitutional principle predates the EU integration process. The principle of sovereignty is of historical importance, as can be deduced from the Conseil's reference to Article 3 *Declaration* of 1789, and it has been subject to intense academic and political debate.[105] An important element of this historically rooted debate is, for

102 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 533-535; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 861-862.

103 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539-540; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 526; As the *Conseil* limits its assessment to what is strictly required to deliver a decision on the referred matter, cf. Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 773.

104 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771-771; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 875; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 525; Oliver, 'The French Constitution and the Treaty of Maastricht' 12.

105 Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 264; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 519-520.

example, the conception of sovereignty as sovereignty of the nation or as sovereignty of the people.[106] Despite the historic importance of sovereignty in the French constitutional culture, it should be emphasized that the references to Article 3 *Declaration* of 1789 and to § 15 Preamble of French Constitution of 1946 are a judicial creation of the *Conseil Constitutionnel*.[107] The Preamble of the current French Constitution merely acknowledges an 'attachment' of the French people to the principle of sovereignty as established in *Declaration* of 1789 and complemented by Preamble of French Constitution of 1946.[108] This historic origin of the French principle of sovereignty impacts the jurisprudence of the *Conseil Constitutionnel*, as for example visible in the evaluation of competence transfer of traditionally important competences which are deemed generally incompatible with French sovereignty.[109]

In addition, the constitutional significance of the principle of sovereignty can be deduced from the systematic position of the principle within the French Constitution. As already mentioned, the Preamble refers to the principle of sovereignty in its first phrase, together with fundamental rights and the protection of the environment, as protected in specifically mentioned constitutional documents. Furthermore, the first title of the French Constitution, which covers Articles 2 to 4, is entitled 'On Sovereignty'.[110] The principle is further specified in Articles 3 (1) and 4 (1) (3) French Constitution, which link sovereignty to the people and the principle of democracy. Given the prominent position within the constitutional text, one can deduce that sovereignty is a core constitutional principle[111] and, moreover, that it is conceptually closely interrelated with the principle of democracy.[112] Based on this constitutional framework, the *Conseil Constitutionnel* draws several conclusions which are summarized in its sovereignty limit.[113]

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106 Olivier Beaud, 'Le Conseil constitutionnel sur la souveraineté et ses approximations' (2018) 20-21 Jus Politicum – Revue de droit politique 143, 147; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 264-268; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520.

107 Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491-492; Oliver, 'The French Constitution and the Treaty of Maastricht' 2.

108 Reflecting the highlighted 'bloc de constitutionnalité', cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 527; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 518; Oliver, 'The French Constitution and the Treaty of Maastricht' 2.

109 Hamann, 'Sur un 'sentiment' de souveraineté' 188; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520.

110 Hamann, 'Sur un 'sentiment' de souveraineté' 187.

111 Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491-493.

112 Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520-521.

113 Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19

First, the *Conseil Constitutionnel* infers from the conception of sovereignty in the French Constitution, that the French legislator may limit sovereignty by participating at the international or EU-level. Here, the *Conseil Constitutionnel* refers to Articles 53 and 88-1 French Constitution to point out that the constitutional text allows explicitly for a limitation of national sovereignty.[114] As a result, not every transfer of competences to the EU conflicts in an unconstitutional manner with the principle of sovereignty, but rather transfers of competences which affect the *essential conditions of the exercising of national sovereignty*.[115]

Second, the *Conseil Constitutionnel* changed its rhetoric in the course of EU integration. Originally, it argued that the French Constitution allowed for a limitation but not a transfer of sovereignty to the supranational level. In its first EU-related decision on the direct election of the European Parliament, the Conseil established:

> 'Considering that, while the preamble to the French Constitution of 1946, confirmed by that of the Constitution of 1958, provides that, subject to reciprocity, France may consent to such limitations of sovereignty that are necessary for the establishment and preservation of peace, *no provision of the French Constitution authorizes transfers of the entire or parts of national sovereignty* [emphasis added] to any international organization whatsoever;'[116]

Hence, initially the *Conseil* apparently distinguished between the limitation of sovereignty, which was permissible under the French Constitution, and the impermissible transfer of sovereignty.[117] This constitutional benchmark proved difficult to apply, given that a limitation of sovereignty conceptually entails the partial shared exercise of sovereign decision-making abilities together with

November 2004, on the Treaty establishing a Constitution for Europe' 873; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 520.

114 *Lisbon Treaty* para 7; *Fiscal Compact* para 8; Cf. as well: Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 132; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 873.

115 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138-139; Sophie Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' (1999) 6 Maastricht Journal of European and Comparative Law 169, 175-176.

116 Decision 76-71 DC *Direct Election of the European Parliament* [1976] (French Conseil Constitutionnel) para 2 (own translation).

117 Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 274-275; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 521; Jörg Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung*, vol 42 (Schriften zum Europäischen Recht, Duncker & Humblot 1997) 115-116; Oliver, 'The French Constitution and the Treaty of Maastricht' 7-8.

the supranational level.[118] Subsequently, the *Conseil* departed from this distinction and established in its decision on the Maastricht Treaty:

> 'It follows from these various institutional provisions that respect for national sovereignty does not preclude France, acting in accordance with the Preamble to the 1946 Constitution, from concluding international agreements relating to participation in the establishment or development of a permanent international [organization] enjoying legal personality and decision-making powers on the basis of *transfers of powers decided on by the Member States* [emphasis added], subject to reciprocity.'[119]

Thus, the *Conseil Constitutionnel* clarified that the French sovereignty doctrine allowed for a transfer of (sovereign) powers.[120] The previously established prohibition of a transfer of sovereignty was consequently scrapped by the *Conseil*, as becomes also obvious from the subsequent decisions.[121] According to the new conception, powers and competences can be conferred to the European level, which is in fact the exercise of national sovereignty by the legislator, without putting French sovereignty directly into question. This indicates an evolution of the principle of sovereignty from an absolute, indivisible construct to a more open conception, which defines sovereignty based on the competences of the state, which can be partly conferred to the supranational level without eroding French sovereignty.[122] The apparent openness of French sovereignty towards the conferral of competences to the EU-level is, however, confined by the *essential conditions limit*.[123]

Finally, the altered conception of the French sovereignty doctrine indicates that the judicial review of sovereignty conducted by the *Conseil Constitutionnel*

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118 Hamann, 'Sur un 'sentiment' de souveraineté' 188; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 522; Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 119; Oliver, 'The French Constitution and the Treaty of Maastricht' 8.

119 *Review of Maastricht Treaty (Maastricht I)* para 13.

120 Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 523; Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 132-134;

121 *Fiscal Compact* para 9 (although speaking of 'transfer of competences' in this decision); *Lisbon Treaty* para 8; *Treaty Establishing a Constitution for Europe* para 6; *Revision of Amsterdam Treaty* para 6; Cf. as well: Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 523

122 Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 492; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 524.

123 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138-139; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 883; Oliver, 'The French Constitution and the Treaty of Maastricht' 12.

focuses on the transfer of powers and competences to the EU. The emerging question becomes whether the EU commitment under consideration entails a shift of powers to the EU which is relevant for the exercise of national sovereignty.[124] Based on this conception, it seems likely that EU fiscal integration steps could conflict with French sovereignty as these integration steps would entail the conferral of important national competences, which is substantiated in the following.

2.2.4.2 Sovereignty as limit to EU integration: A competence-based approach

The established case law provides for an indication of which competence conferrals fall within essential areas and might therefore conflict with the sovereignty limit. In that regard, the conferral of competences in relation to Union citizenship, cooperation in AFSJ matters and the free movement of persons as well as second, the transfer of powers required to establish the EMU and the single currency were considered particularly contentious under the French sovereignty limit.

– *Union citizenship, AFJS and free movement*

In its Maastricht-judgment, the *Conseil Constitutionnel* identified two envisaged competence transfers in this area as constitutionally problematic. The first one concerned the right for EU citizens to vote and stand as candidate in French municipal elections.[125] In its appraisal, the *Conseil* pointed out that these proposed rights conflicted with the French Constitution, given that Article 3 French Constitution limited the right to vote and stand in French municipal elections to French citizens.[126] In contrast, the right to vote and stand in the French elections to the European Parliament for EU citizens was deemed unproblematic, for two reasons. First, according to the Conseil, Article 3 French Constitution only applied to elections provided by the French Constitution and the European Parliament is an institution based on the EU-Treaties.[127]

124 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 526-529.

125 *Review of Maastricht Treaty (Maastricht I)* paras 26-27; Cf. as well: Gerald L. Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' (2012) 45 Cornell International Law Journal 257, 297; Oliver, 'The French Constitution and the Treaty of Maastricht' 13.

126 *Review of Maastricht Treaty (Maastricht I)* paras 26-27; Cf. as well: Oliver, 'The French Constitution and the Treaty of Maastricht' 13.

127 *Review of Maastricht Treaty (Maastricht I)* paras 32-35; Cf. as well: Oliver, 'The French Constitution and the Treaty of Maastricht' 13.

Second, the *Conseil* emphasized that the European Parliament was not 'a sovereign assembly with general lawmaking power.'[128] In a legislative follow-up, the constitution-amending legislator addressed these concerns and introduced Article 88-3 French Constitution.

The second concern related to the common EU visa system. Initially, all decisions were to be taken unanimously by the EU Council. The *Conseil Constitutionnel* clarified that under these procedural rules, no conflict with the French sovereignty limit arose.[129] However, given that the procedural rules would change to a qualified majority vote by 1. January 1996, the *Conseil* identified a constitutional conflict with the French Constitution.[130] In the subsequent proceedings on the Amsterdam Treaty, the *Conseil Constitutionnel* was again confronted with the common EU visa system. In its decision, the *Conseil* clarified that it would not consider the general conferral of competences, as the 'status of res judicata of the Constitutional Council's decision preclude[d]'[131] to re-consider this conferral. However, it highlighted that the procedural conditions for the exercise of the conferred powers changed, given that following the proposed rule the co-decision procedure would apply after five years.[132] Hence, the changes to the procedural framework required an additional amendment of the French Constitution. Taken together, this confirms that visa policy is seen as a competence area that is essential to the exercise of French sovereignty.

In its subsequent case law, the *Conseil* identified a sovereignty conflict between the new competences under the title 'Asylum, immigration and crossing of internal borders', which was introduced by the Amsterdam Treaty. Interestingly, coordinating the decision-making process at the EU-level was not deemed problematic under the sovereignty limit, as long as decisions were taken in the Council by unanimity.[133] However, the Treaty provisions allowed for a modification of the procedural requirements from a unanimous vote in

128 *Review of Maastricht Treaty (Maastricht I)* para 34.

129 Ibid para 49; Cf. as well: Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

130 *Review of Maastricht Treaty (Maastricht I)* para 49; Cf. as well: Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

131 *Revision of Amsterdam Treaty* para 27; As the Conseil confirmed the original conferral, cf. Decision 92-312 DC *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* [1992] (French Conseil Constitutionnel) paras 37-40.

132 *Revision of Amsterdam Treaty* para 28.

133 Ibid para 23; Specifically, the *institutional choices* under the conferral were important for the assessment, cf. Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 177.

the EU Council to the co-decision procedure after five years.[134] The *Conseil* pointed out that such a change of the procedural requirement would not require national ratification[135] and therefore a constitutional amendment was required.[136] It becomes obvious that not only the nature of the conferred competences is closely reviewed by the *Conseil*, but also the conditions attached to the exercise of this competence – and therefore the remaining control of national parliaments over decision taken – at the supranational level. Hence, the *essential conditions* limit has both a substantive as well as a procedural or *institutional* dimension to it.[137] From the previous outline, it appears that common decision-making at the EU-level in important sovereign matters are permissible, as long as decisions are taken by unanimity. In case decisions on these matters are taken by qualified majority vote, a conflict with the French sovereignty limit will likely emerge. Therefore, it seems that both the substantive dimension, namely, to identify an essential sovereign competence, and the procedural dimension, namely, to consider the procedural modalities attached to them, are cumulative.[138]

This finding is confirmed by the *Conseil*'s Lisbon-judgment. In this judgment, the *Conseil* identified additional conflicting competence transfers in relation to AFSJ-matters enshrined in Title V of the TFEU.[139] Regarding these transfers, the Conseil paid particular attention to the attached procedural framework. The *Conseil* noted:

> 'The provisions of the Treaty of Lisbon which transfer to the European Union under the *'ordinary legislative procedure'* [emphasis added] powers inherent in the exercising of national sovereignty require a revision of the Constitution.'[140]

134 Andoni Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' (2009) 75-76 Revista de Derecho Político 409, 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 177.

135 *Revision of Amsterdam Treaty* para 24.

136 Ibid paras 25-26; Cf. as well: Marie-Luce Paris, 'Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law' (2010) 29 Yearbook of European Law 21, 28; Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 177; Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 Common Market Law Review 703, 717.

137 Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884-885; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

138 Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

139 Notably, Articles 75, 77, 79 (2) lit. d, 81, 82, 83, and 86 TFEU, cf. *Lisbon Treaty* paras 18, 19; Cf. as well: Paris, 'Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law' 56.

140 *Lisbon Treaty* para 18.

Hence, the modalities attached to the conferral are as important for the *Conseil*'s assessment as the competence area as such. Overall, the outline reveals that citizenship rights, the control of national borders, including immigration and asylum, cooperation in security matters, for example by police forces, and judicial cooperation are competence areas that are 'inherent to the exercising of national sovereignty'.[141] However, the assessment of the previous case law also shows that not only the competence area as such is decisive, but also the (procedural) modalities attached to it. As previously outlined, limiting sovereign powers to exercise them jointly at the EU-level is perceived as an exercise of French sovereignty and is therefore, as such, not incompatible with the French Constitution. Yet, in case the legislator transfers these important competences to the supranational level without retaining a constitutive say, a conflict with the sovereignty limit might emerge.

– *EMU and single currency*

The *Conseil Constitutionnel* also identified decision-making powers on EMU policies as important for the exercising of national sovereignty. In the Maastricht-decision, the *Conseil* found the Treaty provisions on the creation of the Economic and Monetary Union, and more specifically the creation of the Euro, to be in conflict with national sovereignty. It established:

> 'The effect of the provisions applicable from the beginning of the third stage of economic and monetary union is that such an objective will result in the conduct of *single monetary and exchange-rate policies* according to arrangements which deprive the Member States of their own powers in a matter which is *vital to the exercise of national sovereignty*.'[142]

Thus, the Conseil characterized monetary policy, including specifically exchange-rate policy, as a central or core competence area of the sovereign state.[143] Consequently, the French constitution-amending legislator was required to amend the French Constitution, and introduced Article 88-2 (1), which

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141 Ibid para 20; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 541; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 884; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

142 *Review of Maastricht Treaty (Maastricht I)* para 43; Cf. as well: Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

143 *Review of Maastricht Treaty (Maastricht I)* para 45; cf. as well Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527; Oliver, 'The French Constitution and the Treaty of Maastricht' 13, 15; This conflict was anticipated in light of the *Conseil Constitutionnel*'s decision on the IMF, cf. Decision 78-93 DC *Law Authorizing an Increase in France's Share in the International Monetary Fund (IMF)* [1978] (French Conseil Constitutionnel) para 5; As pointed out by Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 133.

enshrined French participation in the EMU into the constitutional text.[144] The *Conseil* confirmed this constitutional assessment in relation to the Fiscal Compact during the Eurocrisis, where it determined that economic and fiscal policies are competences that are closely related to the core of national sovereignty.[145] Following the *Conseil*'s reasoning, economic and fiscal decisions are crucial elements of the annual budgetary planning which is conducted by the French Parliament and which relates to the individual's right to democracy.[146] Specifically, the *Conseil* recalls that the democratic parliamentary control of the budget stems from Article 14 *Declaration* of 1789.[147] As outlined in the decision, the importance of democratic parliamentary control of the budget translates into parliamentary prerogatives constitutionally enshrined in Articles 24, 34, 47 and 47-1 French Constitution.[148]

When assessing the Fiscal Compact, the *Conseil* concluded that it did not establish any new constraints on national sovereignty, as it was merely reiterating the already existing EU balanced budget rules.[149] The *Conseil* conducted a more nuanced assessment of the requirement to implement the balanced budget rule into constitutional – or similarly binding national – law. Following the Conseil's assessment, two different readings of this obligation may be adopted: Either, a directly binding rule would have to be enacted which would alter parliamentary and governmental budgetary prerogatives, enshrined in Articles 34 and 47 French Constitution.[150] Such a binding rule would then require a constitutional amendment.[151] Or, in the alternative, if only an institutional act – which sits in the hierarchy of norms below the constitution and which could determine multiannual guidelines for public finances – would have to be adopted, no such constitutional amendment would be required.[152] Such an institutional act would only establish a (temporary) framework for the exercise of these prerogatives, which would furthermore be reviewed by

144 *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 35; Interestingly, Article 88-2 French Constitution is formulated in a very open manner without specifying what competences are transferred, cf. Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 302.

145 *Fiscal Compact* para 16.

146 Ibid para 13.

147 Ibid para 13.

148 Ibid para 13.

149 Ibid paras 14, 16; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 119.

150 *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265.

151 *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 120.

152 *Fiscal Compact* paras 23-24; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265;

the *Conseil Constitutionnel* according to Article 61 (1) French Constitution.[153] The *Conseil* left the decision concerning the applicable interpretation to the legislator.[154] The French legislator opted for the second interpretation and did not amend the French Constitution, which appears paradoxical, as it undermines specifically the purpose of the Fiscal Compact to ensure that a permanent national implementation of the balanced budget rule is ensured.[155] At the same time, one can again see the *Conseil*'s institutional role as '*pointsman*' from the assessment conducted, which merely signaled possible constitutional conflicts to the legislator.

Based on this jurisprudence, it can be concluded that economic and fiscal policies are considered as essential for the exercising of national sovereignty. This equally covers the process of determining the national budget, without being legally restricted by international or EU commitments. Any such binding commitment would conflict with the parliamentary and governmental budgetary prerogatives enshrined in Articles 34, 47 French Constitution. Both provisions constitutionally secure the democratic control of the people over budgetary decisions covered as an important element by the French sovereignty limit,[156] which has major implications for EU fiscal integration proposals.

2.2.4.3 Interim conclusion – a substantive limit to EU fiscal integration?

Overall, the assessment reveals that the sovereignty limit is mainly construed as a competence-based restriction to EU integration. In its jurisprudence, the *Conseil* identified two broad competence areas that are important for the exercise of national sovereignty.[157] These are, first, citizenship rights, the control of national borders, the judiciary and security matters, as well as second, budgetary, economic, financial, fiscal and monetary policies. For EU fiscal integration the second competence area is highly relevant. In particular, the parliamentary and governmental fiscal, budgetary prerogatives enshrined in Articles 24, 34, 47 and 47-1 French Constitution as well as the individual's right to democratically control fiscal decisions, enshrined in Article 14 *Declaration* of 1789, might conflict with EU fiscal integration proposals.[158]

The assessment further revealed that the modalities attached to the conferred competences significantly affect the constitutional appraisal. Hence, a

153 *Fiscal Compact* para 27; Cf. as well: Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' 122.

154 *Fiscal Compact* para 28; Which illustrates a reluctance of the *Conseil* to address *political* questions, cf. Pietro Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) 42 Brooklyn Journal of International Law 491, 508.

155 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 266.

156 *Fiscal Compact* para 13.

157 Corresponding to the outlined 'regalian' competences, cf. Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

158 *Fiscal Compact* para 13.

mere coordination of decisions appears less problematic, even in important competence areas. However, in case France is no longer able to take its own decisions or to veto decisions at the EU-level, the exercising of national sovereignty is affected. Therefore, the procedural framework attached to EU fiscal integration steps will be important to determine whether a conflict with the French sovereignty limit exists.

2.2.5 *Longevity and absoluteness of the constitutional limit*

The subsequent question is whether a possible conflict between EU fiscal integration and the French sovereignty limit could be overcome. Considering its constitutional mandate, it can be established that *Conseil Constitutionnel* is not competent to review constitutional amendments. Through its decisions, the *Conseil Constitutionnel* identifies conflicts,[159] which can then be overcome by amending the constitution following Article 89 French Constitution, which is common practice in EU integration matters.[160] Subsequently, however, these constitutional amendments cannot be reviewed by the *Conseil Constitutionnel*. Put differently, in case the French legislator amends the constitution, which requires broad political[161] or popular support,[162] the Conseil cannot scrutinize such amendments.[163] Therefore, the constitution-amending legislator can overcome a constitutional conflict with the sovereignty limit by amending the French Constitution, even though the amendment may not fully cover or address the obstacles identified by the *Conseil*.

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159 Which corresponds to the *Conseil*'s role as '*pointsman*', cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 150-151; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 413.

160 *Review of Maastricht Treaty (Maastricht I)* paras 36-44; Cf. as well: Steiner, *French Law – A Comparative Approach* 7; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 535.

161 As outlined in Article 89 (3) French Constitution, requiring a 3/5-majority of the votes casted in Congress (the joined assembly of the Assemblée Nationale and the Sénat), cf. Maria Cahill, 'Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power' (2016) 75 Cambridge Law Journal 245, 266-267; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 770.

162 As established in Article 89 (2) in conjunction with Article 11 French Constitution; For example, employed in relation to the Maastricht Treaty and the Constitutional Treaty, cf. Cahill, 'Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power' 266-267; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 770-771; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 392, 421; Thomas König and Simon Hug, 'Ratifying Maastricht: Parliamentary Votes on International Treaties and Theoretical Solution Concepts' (2000) 1 European Union Politics 93, 99-100.

163 Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 413.

Second, the French Constitution does not contain 'supra-constitutional' principles.[164] Although Article 89 (5) French Constitution stipulates a limit to the powers of the constitution-amending legislator, this provision seemingly only has a symbolic function as *Dubout* concludes.[165] This is confirmed by *Baranger* who points out that the drafters of the 1958 French Constitution did not intend to establish an absolute material limit to the powers of the constitution-amending legislator.[166] Furthermore, the previous outline indicates that the *Conseil Constitutionnel* as 'pointsman' would not be in an institutional position to enforce such supra-constitutional provision against the democratically legitimized legislator.[167] The result is that the constitution-amending legislator is competent to modify the constitutional text as it sees fit to accommodate EU integration, as explicitly confirmed by the *Conseil Constitutionnel*.[168]

Therefore, the *essential conditions of the exercising of national sovereignty* limit does not impose absolute restrictions to EU fiscal integration proposals. A potential conflict between such integration proposals and the French Constitution can be overcome by amending the constitutional text, which is common practice in France. This ultimately transforms substantive limits into procedural limits – as the main legal hurdle is to attain the required constitution-amending majority.

2.3 Particularity of the French constitutional identity limit

As previously indicated, the *Conseil Constitutionnel* developed an explicit *constitutional identity limit* ('*identité constitutionnel de la France*').[169] The sub-

164 *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272.

165 Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 458; The predecessor of this provision was established to prevent the re-emergence of a monarchy in France, cf. Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

166 Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

167 For now, the French Constitution does not contain any mechanism to constitutionally enforce Article 89 (5) French Constitution, cf. Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

168 *Lisbon Treaty* paras 9, 34; *Revision of Amsterdam Treaty* paras 7, 32; *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272.

169 As established by the *Conseil Constitutionnel*, cf. *National Law Related to the Protection of Personal Data Under the GDPR* paras 2-3; *Comprehensive Economic and Trade Agreement (CETA)*

sequent assessment will focus on the scope of application (2.3.1.) and the substantive content of the French *constitutional identity limit* (2.3.2.) in order to allow for a comparison with the other national *constitutional identity limits*.

2.3.1 Scope of application of the constitutional identity limit

Generally speaking, the *Conseil Constitutionnel* does not review EU secondary law,[170] as Article 55 French Constitution stipulates that duly ratified international law prevails over acts of parliament.[171] In addition, Article 88-1 French Constitution formulates the commitment to participate in the EU and to commonly exercise the conferred competences, which entails the constitutional obligation to implement EU law.[172] As a result, EU law has a special status under French constitutional law and is generally not reviewed by the *Conseil*.[173]

Nevertheless, the *Conseil Constitutionnel* started to review French legislative acts, which implement EU law obligations, under Article 61 (2) French Constitu-

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paras 13-14; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 18; *French Law on Genetically Modified Organisms* para 44; Decision 2006-543 DC *French Act Pertaining to the Energy Sector* [2006] (French Conseil Constitutionnel) para 6; *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 546-547; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386-387; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 445.

170 Based on the 'pacta sunt servanda'-principle, cf. *Fiscal Compact* para 18; *Review of Maastricht Treaty (Maastricht I)* para 7; Decision 77-90 DC *Final Supplementary Budgetary Law for the Year 1977* [1977] (French Conseil Constitutionnel) para 4; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 247; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 126; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 443; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303; Furthermore, the *Conseil* identified the implementation of Directives as a constitutional obligation under Article 88-1 French Constitution, cf. *National Law Related to the Protection of Personal Data Under the GDPR* para 2; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 17.

171 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 531.

172 *National Law Related to the Protection of Personal Data Under the GDPR* para 2; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 17; Cf. as well: Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 305-307.

173 Previously, the *Conseil Constitutionnel* seemed to accord constitutional immunity to EU secondary law based on Article 55 French Constitution, cf. *Final Supplementary Budgetary Law for the Year 1977* para 4; Cf. as well: Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 126; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 443; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303.

tion. This results in an indirect review of EU secondary law.[174] Initially, the *Conseil* established that the constitutional obligation of the French legislator to implement EU law could not violate an 'express contrary provision of the [French] Constitution'.[175] The concept of *explicit contrary provision* was criticized as unspecific,[176] and subsequently replayed by the concept of '*identité constitutionnel de la France*'.[177] Following this new concept, the implementation of EU Directives may not conflict with 'a rule or principle inherent to the *constitutional identity* of France, except when the constituting power consents thereto'.[178] The *Conseil* requires, however, that the French implementation is manifestly incompatible with the respective EU Directive, before declaring a conflict with the French *constitutional identity* doctrine.

On the one hand, this pays tribute to the outlined special status of EU law. On the other hand, given that the *Conseil Constitutionnel* operates under strict procedural deadlines, it is normally not in a position to refer preliminary

174 The *Conseil Constitutionnel* now indirectly assesses the EU Directives: *National Law Related to the Protection of Personal Data Under the GDPR* paras 2-3; *Copyright and Related Rights in the Information Society* para 19; Decision 2004-496 DC *Digital Economy* [2004] (French Conseil Constitutionnel) para 7; Cf. as well: Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 442-443; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 860-861.

175 *Digital Economy* para 7; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 533; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 452; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 126; Rochère, 'Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi Pour La Confiance Dans L'Économie Numérique (Ecommerce)' 862.

176 Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 485-486; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 444; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 306-307.

177 In English: '*constitutional identity* of France'; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 546-547; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 386-387; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 445.

178 *Copyright and Related Rights in the Information Society* para 19; *French Act Pertaining to the Energy Sector* para 6; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 547-548; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' 71.

questions to the CJEU.[179] The reluctant application of the *constitutional identity limit* acknowledges this procedural constraint.

Finally, the *Conseil Constitutionnel* expanded the scope of application in its subsequent jurisprudence to the transposition of obligations stemming from EU Regulations[180] as well as the review of international (trade) agreements that are based on exclusive EU competences.[181]

The *constitutional identity limit* can be triggered by privileged applicants based on Article 61 (2) French Constitution. The *Conseil* will then assess whether the French implementing law conflicts with French *constitutional identity* and whether the French implementation manifestly conflicts with the EU secondary law, or whether the French legislator enjoyed discretion when implementing it.[182] In contrast, individuals are generally barred from challenging French implementing acts based on the *constitutional identity limit*, as the identity limit is based on Article 88-1 French Constitution and concerns the constitutional duty to implement EU law.[183] This constitutional duty is, however, no subjective right or freedom in the sense of Article 61-1 French Constitution

179 *Copyright and Related Rights in the Information Society* para 20; *French Act Pertaining to the Energy Sector* para 7; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Charpy, 'Droit constitutionnel et droit communautaire – Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'État' 799; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' 71; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 450-451.

180 Which was clarified in relation to the French implementation of the EU GDPR, cf. *National Law Related to the Protection of Personal Data Under the GDPR* paras 2-3; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 143.

181 The power to conclude such agreements in areas of exclusive competences was explicitly conferred upon the EU, which is why the *Conseil Constitutionnel* does not see itself competent to conduct a full constitutional review, cf. *Comprehensive Economic and Trade Agreement (CETA)* paras 13-14; Cf. as well: Xavier Magnon, 'Commentaire de Décisions: Décision n° 2017-749 DC du 31 juillet 2017, Accord économique et commercial global entre le Canada, d'une part, et l'Union européenne et ses États membres, d'autre part' (2018) 113 Revue française de droit constitutionnel 173, 176-177; Larik, 'Prêt-à-Ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017' 764.

182 *Copyright and Related Rights in the Information Society* paras 19-20; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 141-142; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 776; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548.

183 *Copyright and Related Rights in the Information Society* para 17; Decision 2004-498 DC *Bioethics-Act* [2004] (French Conseil Constitutionnel) para 4; *Digital Economy* para 7; Cf. as well: Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 312; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 546; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' 70-71.

and it can therefore not serve as a basis for concrete constitution review following the *QPC*-mechanism.[184]

Overall, the limited procedural means to enforce the *constitutional identity limit* correspond with the importance that the French constitutional system assigns to adhering to EU law obligations and the special status that EU law enjoys under the French Constitution.[185]

2.3.2 *Substantive content covered by the French constitutional identity limit*

The concept of *constitutional identity* is based on the case law of the *Conseil Constitutionnel* and it is defined on a case-to-case basis. Regarding the protected substantive content, several conclusions can be drawn from the case law of the *Conseil* so far. In the first place, the *Conseil* appears to aim at protecting French constitutional particularities, including for example the principle of secularism ('laïcité'), the principle of equality and the indivisibility of the nation,[186] the 'French' separation of powers enshrined *inter alia* in Articles 34, 37 French Constitution and the republican status enshrined in Article 89 (5) French Constitution.[187] It seems that the *Conseil Constitutionnel* mainly conducts an equivalence assessment to determine whether the EU legal order protects the respective French constitutional principle at stake to an equivalent level.[188] In case such protection is warranted or in case the constitution-amending legislator consented to a limitation of the French constitutional

184 Decision 2010-79 QPC *Mr Kamel D.* [2010] (French Conseil Constitutionnel) para 3; Which could amount to an indirect review that is excluded by Article 55 French Constitution, cf. Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 321.

185 Namely, the outlined concept of 'immunité des conventions ratifiées', cf. Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478-479; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 137, 142.

186 As laid down in Article 1 French Constitution; Cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 148; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388.

187 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 148; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 474-475; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 135.

188 Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 454; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity'387-388; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 132-133.

particularity,[189] the *Conseil Constitutionnel* will not find a conflict with the French *constitutional identity limit*. Obviously, this implies that the *Conseil* accepts that the EU legal order is capable of protecting core French constitutional values and a conceptual overlap to the *Solange*-jurisprudence can be identified, as the French *constitutional identity limit* is only applied in case the EU is not offering an equivalent level of protection.[190]

Furthermore, the *Conseil Constitutionnel* employs an evolutionary conception of French *constitutional identity*. Namely, as the *Conseil* emphasized both in relation to EU primary law but also EU secondary law obligations, the constitution-amending legislator is able to modify the constitutional text and thereby overcome constitutional conflicts[191] – even conflicts with the French *constitutional identity*.[192] Given that such amendments are common practice in France as a precondition for the ratification of new EU-Treaties, the constitutional framework regularly changes.[193]

For EU fiscal integration proposals, it seems that the division of powers between French institutions as enshrined in Articles 34 and 37 French Constitution, the indivisibility of the nation as well as the republican status are particularly relevant. All three aspects are concerned with the state and institutional structure of France. In case EU fiscal integration proposals interfere with these areas through discretionary EU secondary law obligations, which are then implemented into French law, the French *constitutional identity* would possibly be triggered. In addition, the French *constitutional identity limit* is not absolute

189 Faraguna, 'Taking Constitutional Identities Away from the Courts' 508; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 133; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 387-389.

190 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 547; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 454; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 389.

191 *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272.

192 As the *Conseil Constitutionnel* continuously stressed, it is verifying whether the constitution-amending legislator actually consented to this limitation of French *constitutional identity*, cf. *National Law Related to the Protection of Personal Data Under the GDPR* para 3; *Copyright and Related Rights in the Information Society* para 19; *French Act Pertaining to the Energy Sector* para 6.

193 Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Paris, 'France: The French System of Rights-based Review: From Exceptionalism to Parochial Constitutionalism' 306; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 871; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 530.

in nature but can be overcome by the French constitution-amending legislator.[194] As already outlined, the *Conseil Constitutionnel* is neither empowered to conduct constitutional review of constitutional amendments,[195] nor is it in an institutional position to limit the choices made by the constitution-amending legislator.[196]

2.3.3 Interim conclusion: No immediate limit for EU fiscal integration

Overall, the *Conseil Constitutionnel* applies the concept of French *constitutional identity* in a very restrictive manner. In the first place, the application is limited to the French implementation of EU secondary law and of international trade agreements concluded by the EU on the basis of exclusive competences. Second, the *Conseil Constitutionnel* will only declare a French implementing law invalid based on this limit, in case the implementing law manifestly conflicts with the EU act it aims to implement. The Conseil emphasized that it is not able to refer preliminary questions to the CJEU due to the strict time constraints,[197] which is why it refused to strike down French implementing acts which are

194 *National Law Related to the Protection of Personal Data Under the GDPR* para 3; *French Act Pertaining to the Energy Sector* para 6; *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388.

195 Decision 2003-469 DC *Constitutional Revision of French Decentralisation Law* [2003] (French Conseil Constitutionnel) para 2; Decision 92-313 DC *Revision of the Act of Approval to Ratify EU Treaty (Maastricht III)* [1992] (French Conseil Constitutionnel) paras 2, 5; Decision 62-20 DC *Law on the General Election of French President* [1962] (French Conseil Constitutionnel) paras 2, 5; Cf. as well: Steiner, *French Law – A Comparative Approach* 7; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 772; Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 303-304; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 396-397; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388-389; Bell, *French Legal Culture* 204.

196 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 270; Spies, 'Verfassungsrechtliche Normenkontrolle in Frankreich: der Conseil Constitutionnel' 1041; Pollard, 'France's Conseil Constitutionnel – Not Yet a Constitutional Court?' 6-7.

197 The *Conseil Constitutionnel* has to deliver its decision within one month as stipulated in Article 61 (3) French Constitution, cf. *Copyright and Related Rights in the Information Society* para 20; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Mayer, Lenski and Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkungen zur Entscheidung des französischen Conseil d'Etat vom 8. Februar 2007 (Arcelor u.a.)' 71; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 450-451.

merely transposing unconditional EU law obligations.[198] This indicates a friendliness towards the EU legal order.[199] Moreover, the substantive content of the *constitutional identity concept* only covers French particularities that are not protected at the EU-level in an equivalent manner and it is open to modification by the French constitution-amending legislator.

Consequently, the French *constitutional identity* seems to be only of indirect importance for EU fiscal integration proposals. Given the very narrow scope of application and the confined instances in which the *Conseil Constitutionnel* will strike down a French law based on the *constitutional identity limit*, it seems unlikely that this will have an immediate limiting effect on EU fiscal integration proposals. One may add that the *Conseil Constitutionnel* seems to have trust in the political process[200] – and therefore possibly refrains from establishing absolute constitutional limits towards EU secondary law commitments.

2.4 Conclusion on the French constitutional identity limit

Overall, the assessment revealed that EU fiscal integration proposals will very likely trigger a conflict with the French sovereignty limit. When assessing the compatibility of new EU fiscal integration steps, a full constitutional assessment will be conducted by the *Conseil Constitutionnel*. As part of this scrutiny, the Conseil assesses whether the new EU commitments entails a transfer of competences that could affect the *essential conditions of the exercising of national sovereignty*.[201] The *Conseil* developed a two-stepped approach under its sovereignty limit. It first assesses whether the conferral occurs in an important competence area. In its jurisprudence, the Conseil identified economic, financial, fiscal and monetary policies as such particularly important competence

198 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 776; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548.

199 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 776; A tendency that can be observed within the jurisprudence of the *Conseil* more generally, cf. Larik, 'Prêt-à-Ratifier: The CETA Decision of the French *Conseil constitutionnel* of 31 July 2017' 774-777.

200 Faraguna, 'Taking Constitutional Identities Away from the Courts' 508; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 133; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 390.

201 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771-772; Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure' 126; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540-542; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 491-492.

areas.[202] In a second step, the *Conseil* reviews the modalities that are attached to the conferral of such important competences to the EU. Based on the previous case law, it seems that a conflict with the sovereignty limit will arise if the conferred important competences are to be exercised under the ordinary legislative procedure, by qualified majority vote or if France loses its ability to initiate legislation.[203] The *Conseil Constitutionnel* applies this limit to new EU commitments prior to their adoption, following the procedure established in Article 54 French Constitution. In case the *Conseil* identifies a constitutional conflict, the constitution-amending legislator can modify the French Constitution to explicitly accommodate the conflicting EU obligations.[204]

Once EU law obligations are ratified by the French legislator, the *Conseil Constitutionnel* is not empowered to review them. EU law, including EU secondary law, benefits from the special status the French constitutional order awards to ratified international law more generally.[205] Nevertheless, the *Conseil* developed a French *constitutional identity limit*, which it applies to the French implementation of EU-law related obligations.[206] However, the *Conseil Constitutionnel* only applies the *constitutional identity limit* in case the French legislator enjoyed discretion in the implementation of EU law.[207] Therefore, also the *constitutional*

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202 *Fiscal Compact* para 16; *Review of Maastricht Treaty (Maastricht I)* para 45; *Law Authorizing an Increase in France's Share in the International Monetary Fund (IMF)* para 5; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527; Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 133; Oliver, 'The French Constitution and the Treaty of Maastricht' 13, 15.

203 Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

204 *Lisbon Treaty* paras 9, 34; *Revision of Amsterdam Treaty* paras 7, 32; *Compatibility of the Maastricht Treaty with the French Constitution After Constitutinal Amendments ("Maastricht II")* para 19; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272.

205 Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 247; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 126; Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' 443; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 303.

206 With potentially indirect consequences for EU law, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 142-143; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 126; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 132-133; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 452.

207 *Copyright and Related Rights in the Information Society* para 20; *French Act Pertaining to the Energy Sector* para 7; Cf. as well: Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 776; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548.

identity limit embraces the assumption that EU law is in accordance with the French Constitution.[208]

In addition, the *Conseil Constitutionnel* consistently held that the EU legal order is a derived legal order and is thus based on the French Constitution, which is, for example, apparent in the two outlined constitutional limits requiring that EU law is consistent with the French Constitution.[209] Yet, the French Constitution provides a high degree of flexibility in this regard, as the constitution-amending legislator can alter the constitutional text in order to accommodate EU law obligations and as the *Conseil Constitutionnel* operates as constitutional 'pointsman' that identifies constitutional conflicts, without however restricting the powers of the constitution-amending legislator.[210] It seems therefore that EU fiscal integration proposals are mainly confronted with procedural-political obstacles in France, given that the anticipated conflict with the French sovereignty limit seems to require a constitutional amendment.

208 *National Law Related to the Protection of Personal Data Under the GDPR* para 3; *Comprehensive Economic and Trade Agreement (CETA)* paras 13-14; *Act Pertaining to the Opening Up to Competition and the Regulation of Online Betting and Gambling* para 18; *French Law on Genetically Modified Organisms* para 44; *French Act Pertaining to the Energy Sector* para 6; *Copyright and Related Rights in the Information Society* para 19; Cf. as well: Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388.

209 *Lisbon Treaty* para 8; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 877; The derived legal status is also visible in the fact that the implementation of EU Directives is seen as a constitutional duty stemming from Article 88-1 French Constitution, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 140; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 306.

210 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Copyright and Related Rights in the Information Society* para 19; *Treaty Establishing a Constitution for Europe* para 7; *Revision of Amsterdam Treaty* para 7; *Review of Maastricht Treaty (Maastricht I)* para 14; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 127; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403.

Constitutional Identity Classification Board for France
1 ***Which institutional actor enforces the constitutional limit?***   The *Conseil Constitutionnel* applies the *national sovereignty*. The *Conseil* issues binding decisions on the compatibility of acts – including EU law – with the French Constitution. Its institutional role may best be described as 'pointsman' that identifies constitutional conflicts.
2 ***How can the constitutional identity limit be triggered?***   The *national sovereignty limit* is employed by the *Conseil Constitutionnel* in the *ex ante* constitutional review of EU primary law commitments following Article 54 or Article 61 (2) French Constitution. The review can only be initiated by privileged actors.
3 ***What is the constitutional basis of the constitutional identity limit?***   The concept of 'fundamental conditions of the exercising of national sovereignty', is based on a combined reading of Articles 3, 53, 88-1 French Constitution of 1958, Article 3 Declaration of 1789 and § 15 Preamble of French Constitution of 1946, which protect national sovereignty and which allow at the same time for international cooperation.
4 ***What constitutional principles and substantive content are covered?***   The limit is based on the principle of French sovereignty. It is conceptualized by the *Conseil* as a competence-based limit. Hence, it verifies whether the envisaged conferral concerns an important sovereign area as well as the final modalities attached to the exercise of the considered conferral of competences at the EU-level. The *Conseil* identified budgetary, economic, fiscal and monetary matters as particularly important competences, which suggests that EU fiscal integration proposals will likely conflict with French sovereignty.
5 ***How – if at all – can the constitutional identity limit be overcome (longevity/ absoluteness of the limit)?***   The national sovereignty limit may be overcome by the French constitution-amending legislator by modifying the French Constitution. Subsequently, the *Conseil Constitutionnel* has no jurisdiction to review such constitutional amendments. Hence, French sovereignty does not impose absolute limits to EU fiscal integration proposals.

Figure 12: Constitutional Identity Classification Board for France

3 THE SPANISH CONSTITUTIONAL PERSPECTIVE – AN EMERGING *CONSTITUTIONAL IDENTITY*?

An emerging constitutional opposition to EU (fiscal) integration can also be observed in Spain. The Spanish Constitutional Tribunal has established a material constitutional limit that restricts the available constitutional space

for the conferral of competences to the EU.[211] This Spanish *constitutional identity limit* was first established in the Tribunal's opinion on the EU Constitutional Treaty.[212] Since then, however, the Tribunal only referred once to this limit in its well-known *Melloni*-judgment on the European Arrest Warrant.[213]

The highly restricted judicial use of the *identity limit* might be surprising in light of the major impact that the Eurocrisis had on Spain. Spain was amongst the Eurozone Member States worst hit by the Eurocrisis. In fact, it also had to request a bailout program for its banks,[214] with considerable (internal) political and legal implications. Just as in the situation of other Eurozone Member States that requested financial assistance, the EU financial support for the Spanish banking sector was tied to strict and maybe even *invasive* bailout conditions.[215] Given this invasive nature and given the constitutional debate triggered elsewhere in light of all the Eurocrisis-related measures,[216] it seems remarkable that the Spanish Constitutional Tribunal did not employ, or at least test, the *constitutional identity limit* against these measures. Based on the apparent absence of judicial references to the *constitutional identity limit* in Spain, the subsequent assessment will analyze whether the *identity limit* has the potential to develop into a constitutional obstacle for EU fiscal integration proposals – or whether it can be seen as an example for a more *flexible* application of the *constitutional identity limit*.

211 *Treaty Establishing a Constitution for Europe* Section II. 2. and 3.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 269-270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

212 *Treaty Establishing a Constitution for Europe* Section II. 2. and 3.; Cf. in particular: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

213 *Constitutional Complaint Melloni* Section II.3.; Cf. the initial Spanish reference to the CJEU, *Preliminary Reference Concerning EAW (Melloni)*; Cf. as well: Torres Pérez, 'Constitutional Dialogue on the European Arrest Warrent: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011'.

214 Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 122.

215 Royo and Steinberg, 'Using a Sectoral Bailout to Make Wide Reforms: the Case of Spain' 164-166; Meiers, *Germany's Role in the Euro Crisis – Berlin's Quest for a More Perfect Monetary Union* 91, 116-117; On the internal receptiveness for the protection awarded by the EU legal order, cf. Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 359.

216 As for example the case in Germany, where the Constitutional Court developed *overall budgetary responsibility* in light of the different measures enacted during the Eurocrisis, cf. Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12.

As mentioned, the *constitutional identity limit* was established by the Spanish Constitutional Tribunal,[217] which functions as strong and independent institutional guardian of the constitutional order. Its institutional design was modelled on the German Constitutional Court.[218] Thus, the institutional competences and prerogatives as well as the procedural framework for the work of the Spanish Constitutional Tribunal all bear similarity with its German counterpart. Given the similarity in the conception of the German and the Spanish constitutional review, the assessment of the Spanish *constitutional identity limit* might offer an alternative perspective on how a similarly authoritative constitutional actor can devise its constitutional role in a less confrontational manner towards the EU.

One unique Spanish aspect of potential constitutional turmoil is the relationship between the regional level (Autonomous Communities) and the federal level, which created continuous constitutional conflicts. Despite the primarily internal tension, particularly regarding Spanish unity and indivisibility in the sense of Article 2 Spanish Constitution,[219] these conflicts have an obvious EU dimension. In fact, considering the constitutional challenges initiated during the Eurocrisis, it becomes clear that most challenges against EU-related decisions were initiated as a constitutional review of the internal allocation of competences between Autonomous Communities and the Spanish Federation.[220] And although the Constitutional Tribunal did not review national laws against EU law, given that the Tribunal can generally only review Spanish

217 In Spanish: *Tribunal Constitucional de España.*

218 Joan Solanes Mullor and Aida Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Asser Press 2019) 544; Marian Ahumada Ruiz, 'The Spanish Constitutional Court' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 606; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 68; Joaquín Verela Suanzes-Carpegna, 'El constitucionalismo español en su contexto comparado' (2010) 19 Giornale di Storia Costituzionale 93, 106-107; Victor Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' (2008) 3 Journal of Comparative Law 22, 23; James Casey, 'The Spanish Constitutional Court' (1990) 25 Irish Jurist 26, 28.

219 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282; Enric Martínez-Herrera and Thomas Jeffrey Miley, 'The Constitution and the Politics of National Identity in Spain' (2010) 16 Nations and Nationalism 6, 17.

220 Cristina Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' EUI Working Papers (Max Weber Programme) <https://cadmus.eui.eu/bitstream/handle/1814/33859/MWP_WP_2014_25.pdf?sequence=1&isAllowed=y> accessed 20 December 2020 36; On the historic constitutional dimension of this conflict, cf. Martínez-Herrera and Miley, 'The Constitution and the Politics of National Identity in Spain' 9-10; Casey, 'The Spanish Constitutional Court' 27.

legislation against constitutional law,[221] a possible judgment of unconstitutionality of an EU-related Spanish measure could have had major consequences for the underlying EU law, too. Therefore, the internal conflict on regional autonomy and independence will be reflected in the subsequent analysis.

All four points, namely the existence of a *constitutional identity limit*, the practical experiences during the Eurocrisis, the centralized constitutional review with a strong constitutional authority as well as the federal tensions, are compelling reasons for including Spain into this comparative exercise. The subsequent assessment will first provide a brief outline of the Spanish constitutional approach to EU cooperation (3.1.), before subsequently analyzing the *constitutional identity limit* in detail (3.2.).

3.1 Identifying the core constitutional limit to EU fiscal integration in Spain

Spanish EU membership coincided with a domestic constitutional transformation, which was successfully initiated with the adoption of the new Spanish Constitution in 1978, and it equally falls into the period of returning to a democratic state structure after the end of the *Franco*-dictatorship.[222] In light of the (constitutional) experiences during the dictatorship, the drafters of the 1978 Spanish Constitution awarded special protection to fundamental rights and the basic democratic structure of Spain.[223] Furthermore, the drafters anticipated Spanish accession to the European Communities and included Article 93 into the new constitutional text, which allowed for the conferral of competences to the international and supranational level.[224] The broad political support for EU cooperation resulted in Spanish EU accession in 1986[225] and subsequently in Spanish participation in the Eurozone.[226]

221 Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 567-568; Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' 36; Benito Alaez Corral and Abel Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' (2009) 15 European Public Law 597, 604.

222 Juan Luis Requejo Pagés, 'The Spanish Constitutional Tribunal' in Armin von Bogdandy, Peter Michael Huber and Christoph Grabenwarter (eds), *Constitutional Adjudication: Institutions*, vol III (The Max Planck Handbook in European Public Law, Oxford University Press 2020) 723-724; Casey, 'The Spanish Constitutional Court' 26-27.

223 Obvious from the extremely high threshold for amending these parts of the Spanish Constitution, as enshrined in Article 168 Spanish Constitution, cf. Ascensión Elvira, 'Spain' in Carlo Fusaro and Dawn Oliver (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing 2011) 282-283.

224 Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 354.

225 Craig and de Búrca, *EU Law Text, Cases, and Materials* 6; David Ramiro Troitino, *European Integration : Building Europe* (Nova Publishers 2013) 76; Juan Díez-Nicolás, 'Spaniards' Long March Towards Europe' in Sebastián Royo and Paul Christopher Manuel (eds), *Spain and*

The current Spanish constitutional approach to EU integration is coined by a political and a legal-constitutional dimension. Amongst Spanish political institutions support for EU integration is traditionally high. It is, for example, visible in the design of the Spanish EU enabling clause in Article 93 Spanish Constitution, which allows for the conferral of competences to the EU by absolute majority after the constitutional legislator explicitly rejected the introduction of a qualified majority requirement.[227] Hence, the political openness is reflected in the initial design of the constitutional framework for EU cooperation. It is subsequently reflected in the broad support across political parties for Spanish membership in the European Communities.[228] And it can be deduced from the fact that the only two constitutional amendments successfully enacted in Spain related to EU integration steps. The first amendment in 1992 introduced the right for EU citizens to vote and stand as candidate in municipal elections now enshrined in Article 13 (2) Spanish Constitution.[229] The second amendment was adopted in 2011 and implemented the EU balanced budget rule into Article 135 Spanish Constitution, in order to comply with the obligations stemming from the Euro-Plus-Pact and the Fiscal Compact.[230] This wide political support is further mirrored amongst the Spanish people.[231]

Portugal in the European Union?: The First Fifteen Years (Frank Cass and Company Limited 2003) 100.

226 Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 72; Charles Powell, 'Spanish Membership of the European Union Revisited' in Sebastián Royo and Paul Christopher Manuel (eds), *Spain and Portugal in the European Union?: The First Fifteen Years* (Frank Cass and Company Limited 2003) 125.

227 Antonio Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' (1999) 5 European Public Law 269, 273; Without imposing any scope limitation in the provision, cf. Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 548.

228 Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 273-274.

229 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 270; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 27; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 354.

230 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 270; Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 545-548; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 85-86.

231 Broad support for Spanish accession to the European Communities, cf. Suanzes-Carpegna, 'El constitucionalismo español en su contexto comparado' 106; Díez-Nicolás, 'Spaniards' Long March Towards Europe' 100; Powell, 'Spanish Membership of the European Union Revisited' 124; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 269-270; Michael T. Newton and Peter J. Donaghy, *Institutions of Modern Spain – A Political and Economic Guide* (Cambridge University Press 1997) 306.

For example, almost 77% voted in favor of the EU Constitutional Treaty in a national referendum.[232] In addition, in the July 2020 Eurobarometer (Standard Eurobarometer 93), 79% of the interviewed people in Spain indicated that they identify as EU citizens.[233] Thus, the EU continues to enjoy broad popular support, despite the challenging experiences during the Eurocrisis as well as the migration crisis.

The legal-constitutional dimension is shaped by the Spanish Constitutional Tribunal, which was partly described as 'hostile' by *Estella de Noriega*[234] or 'unreceptive' by *Requejo Pagés*[235] regarding EU law. One example is the Tribunal's refusal to adjudicate on conflicts between EU law and Spanish law, as the Tribunal characterized EU law as 'infra-constitutional'.[236] Although this initial resistance arguably changed more recently,[237] the Tribunal formulated constitutional reservations that reduce the available constitutional space for EU integration and that limit the effect of EU law in Spain. The initial Spanish constitutional reservation to EU law, the so-called Spanish constitutional nucleus, covered Spanish sovereignty and the protection of fundamental rights.[238] Subsequently, this constitutional nucleus transformed into the *national constitutional identity limit*, a substantive limit that the legislator has to respect when conferring powers to the EU.[239] Although this *constitutional identity*

232 Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 356; Although the turnout of the referendum was low at around 42%, cf. Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1169.

233 European Commission, *Standard Eurobarometer 93 Summer 2019 – 'Public Opinion in the European Union, First Results'* (Directorate-General for Communication 2020) 14; Slightly decreased from 86% in the previous Eurobarometer, cf. European Commission, *Standard Eurobarometer 92 Autumn 2019 – 'Public Opinion in the European Union, First Results'* (Directorate-General for Communication 2019) 14.

234 Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 275.

235 Requejo Pagés, 'The Spanish Constitutional Tribunal' 773-774.

236 Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 277.

237 The Tribunal initiated, for example, its first preliminary reference, cf. *Preliminary Reference Concerning EAW (Melloni)*; Cf. as well: Torres Pérez, 'Constitutional Dialogue on the European Arrest Warrent: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011'.

238 Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 276.

239 Introduced with Declaration 1/2004, cf. *Treaty Establishing a Constitution for Europe* Section II. 3.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Pierre Bon, 'La Identidad Nacional o Constitucional, una Nueva Noción Jurídica' (2014) 100 Revista Española de Derecho Constitucional 167, 172-173; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law'

remains abstract and vague in the constitutional jurisprudence until today,[240] it seems likely that the Tribunal will continue to refine this limit possibly in relation to EU fiscal integration steps. In that regard, the Tribunal might also draw further inspiration from the constitutional developments in other Member State, given the particular importance of comparative reasoning in the Spanish constitutional jurisprudence.[241]

Bringing both dimensions together, a nuanced picture emerges. On the one hand, Spain is politically receptive to EU integration, which was recently illustrated through the constitutional amendment that introduced the balanced budget rule into Article 135 of the Spanish Constitution. On the other hand, the Spanish Constitutional Tribunal appears to adopt a more reluctant approach towards EU law and developed substantive limits to further EU integration steps,[242] with possible implications for EU fiscal integration steps.

3.2 Spanish constitutional identity limit

The Tribunal established the Spanish *constitutional identity limit* in its Declaration 1/2004,[243] where it suggested that EU integration is confronted with

270; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 361; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

240 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282-283; Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 549; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271.

241 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 269; Given that national *constitutional identity* is a 'dialectic concept', which is defined in relation to the EU legal order, cf. Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 263; Furthermore, the Constitutional Tribunal employs comparative constitutional reasoning, which might explain the emergence of the *constitutional identity* discourse in Spain, cf. Ahumada Ruiz, 'The Spanish Constitutional Court' 629.

242 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

243 *Treaty Establishing a Constitution for Europe* Section II. 3.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bon, 'La Identidad Nacional o Constitucional, una Nueva Noción Jurídica' 172-173; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 361; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186.

a material limit deriving from Article 93 Spanish Constitution. The subsequent assessment will further investigate into the substantive content of this identity limit and its overall constitutional setting.

3.2.1 *Institutional actor enforcing the limit*

The Tribunal is a judicial institution, separate from the other judicial branches in the Spanish legal system. It is in charge of supervising that Spanish state institutions comply in their actions with the obligations and rights laid down in Spanish Constitution.[244] To that extent, the Tribunal has the monopoly to conduct constitutional review.[245] In its constitutional assessment, the Constitutional Tribunal is bound by the constitutional questions raised by the applicants.[246] All its judgments are final, binding decisions with *erga omnes* effect.[247] Thus, the Tribunal is an authoritative institutional actor that can restrict the political room to maneuver based on the Spanish Constitution.[248]

The Tribunal consists of twelve constitutional judges that are appointed by different institutions. Four judges are elected by the Spanish Congress of Deputies and an additional four by the Spanish Senate – confirmed respectively by a three-fifths majority. Two judges are nominated by the Spanish Govern-

244 Requejo Pagés, 'The Spanish Constitutional Tribunal' 728-729; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 68; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 23; Newton and Donaghy, *Institutions of Modern Spain – A Political and Economic Guide* 26.

245 Either in abstracto ex ante as laid down in Article 161 (1) lit. a Spanish Constitution ('recurso de inconstitucionalidad'), in concreto ex ante as established in Article 163 Spanish Constitution ('cuestión de inconstitucionalidad'), when considering international agreements, in abstracto ex ante as enshrined in Article 95 (2) Spanish Constitution, when adjudicating on competence conflicts between the different institutional actors as well as between the Autonomous Communities and the federal level, as established in Article 161 (1) lit. c Spanish Constitution ('conflictos de competencia') or finally when deciding individual constitutional complaints as enshrined in Articles 161 (1) lit. b, 53 (2) Spanish Constitution ('recursos de amparo'), cf. Nuno Garoupa, Fernando Gomez-Pomar and Veronica Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' (2011) 29 The Journal of Law, Economics, and Organization 513, 517; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 598; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 25, 28; Casey, 'The Spanish Constitutional Court' 52.

246 The Constitutional Tribunal is not competent to investigate a matter 'ex officio', cf. Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

247 According to Article 164 (1) Spanish Constitution as well as Articles 38 and 39 Constitutional Court Act (Organic Law 2/1979), Cf. Ahumada Ruiz, 'The Spanish Constitutional Court' 611; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 599; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 26; Casey, 'The Spanish Constitutional Court' 41.

248 Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 27.

ment and an additional two by the Council for the Judiciary.[249] The Spanish Constitution requires that the appointed candidates are qualified jurists with a working experience in their field of at least 15 years.[250] Constitutional judges are appointed for a not directly renewable mandate of nine years with an alternated replacement every three years.[251] Overall, this makes the Tribunal less vulnerable to political interferences. First, the appointed judges have to be trained jurist with considerable working experience, which ensures that candidates are professionally fit for the office. Second, constitutional judges that are elected by Spanish Congress or the Senate require support by a broad three-fifths majority, which ensures that the nominated candidates are respected across political parties.[252] Third, the replacement of judges on the bench of the Constitutional Tribunal is not aligned with the legislative term.[253]

Taken together, this illustrates that the Spanish Constitutional Tribunal is the central, independent (judicial) institution in charge of constitutional review in Spain. Its decisions are binding on all Spanish state institutions and can therefore limit the scope for political action.[254] Consequently, the constitutional jurisprudence may equally restrict the available constitutional space for EU fiscal integration steps.

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249 As established in Article 159 (1) Spanish Constitution, cf. Ahumada Ruiz, 'The Spanish Constitutional Court' 616; Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 517; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 599; Newton and Donaghy, *Institutions of Modern Spain – A Political and Economic Guide* 26; Casey, 'The Spanish Constitutional Court' 33.

250 According to Article 159 (2) Spanish Constitution, cf. Requejo Pagés, 'The Spanish Constitutional Tribunal' 729; Ahumada Ruiz, 'The Spanish Constitutional Court' 616; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 599.

251 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 219-220; Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 517; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 24; Casey, 'The Spanish Constitutional Court' 33.

252 Which requires governing majority and opposition to work together, cf. Nuno Garoupa, Joan Solanes Mullor and Teresa Violante, 'Constitutional Courts and National Parliaments in Spain and Portugal' in Jorge M. Fernandes and Cristina Leston-Bandeira (eds), *The Iberian Legislatures in Comparative Perspective* (Routledge 2019) 242; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 209.

253 Both, the Spanish Congress and the Senate are elected for a four-year term, as established in Articles 68 (4) and 69 (6) Spanish Constitution, which implies that not during every legislative term constitutional judges are appointed by Congress or Senate, cf. Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 517;

254 Requejo Pagés, 'The Spanish Constitutional Tribunal' 776-777; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 33.

3.2.2 *Procedural framework – or how to trigger the limit*

The Spanish *constitutional identity limit* can be triggered through different constitutional procedures.[255] Prior to the ratification of new EU commitments, the Spanish Government, the Congress, or the Senate may initiate an abstract *ex ante* constitutional review based on Article 95 (2) Spanish Constitution. Following this procedure, privileged applicants can request the Tribunal to assess whether an envisaged international or EU agreement conflicts with the Spanish Constitution. Subsequently, the Constitutional Tribunal issues a binding 'declaration', which determines the compatibility of this envisaged commitment with the Spanish Constitution. Similarly, to the situation in Finland and France, this *ex ante* review enables the legislator to tackle potential constitutional conflicts prior to the enactment of the EU agreement. Until today, the procedure has been employed twice, in relation to the Maastricht Treaty and the EU Constitutional Treaty.[256]

However, the possibility to initiate an *ex ante* review does not preclude an *ex post* constitutional review of such commitment.[257] After ratification of EU commitments, the Prime Minister, 50 deputies from the Congress, 50 Senators, the Ombudsperson, the government of any Autonomous Community or their legislative assemblies are able to initiate an abstract *ex post* constitutional review based on Article 162 (1) lit. a Spanish Constitution.[258] It seems that this provides an important procedural tool for political minorities and opposition parties to challenge legislative decisions.[259] In addition, regional governments and legislative assemblies employ the proceedings in order to

255 Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 600, 603; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 27; Casey, 'The Spanish Constitutional Court' 35.

256 Declaration 1/1992 *Constitutional Review of the Maastricht Treaty* [1992] (Spanish Constitutional Tribunal); *Treaty Establishing a Constitution for Europe*; Cf. as well: Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 546; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 106; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 27.

257 *Constitutional Review of the Maastricht Treaty*; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 27; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 294.

258 Ahumada Ruiz, 'The Spanish Constitutional Court' 612; Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 517; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 601-602; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 26; Casey, 'The Spanish Constitutional Court' 35; As the Spanish Constitution does not entitle individuals to initiate abstract constitutional review, cf. Ahumada Ruiz, 'The Spanish Constitutional Court' 612-613.

259 Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 601; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 34.

defend their respective regional prerogatives against the federal level.[260] Particularly, the interpretation of Articles 147-150 Spanish Constitution on the federal division of competences triggers judicial challenges, which could be equally observed during the Eurocrisis. Notably, Autonomous Communities proceeded to defend their own budgetary and fiscal prerogatives against federal intervention – which was required by the imposed EU conditions for financial assistance – before the Constitutional Tribunal.[261]

In addition, the Spanish Constitution allows for concrete constitutional review, which can be initiated by a reference from an ordinary court.[262] However, it seems less likely that EU fiscal integration measures will be challenged following this procedure. Ordinary courts are required to interpret the challenged law in conformity with the Spanish Constitution,[263] and they have to establish that the law in question is crucial for deciding the case,[264] prior to referring the matter to the Tribunal. Furthermore, the Constitutional Tribunal only considers the compatibility of the challenged act with the Spanish Constitution.[265] Various challenges were brought by Spanish trade unions against EU-related measures based on the outlined procedure, which was however found not to affect the underlying EU law obligation itself.[266]

Finally, the Constitutional Tribunal also hears individual constitutional complaints against alleged fundamental rights violations.[267] Such individual complaints are, however, restricted to violations of fundamental rights enshrined in Chapter II Section 1 (Articles 15-29) of the Spanish Constitution, the non-discrimination principle in Article 14 Spanish Constitution, or the

260 As laid down in Article 32 (2) Constitutional Court Act, cf. Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 518; The relationship between the federal and the regional level is traditionally contentious, cf. Martínez-Herrera and Miley, 'The Constitution and the Politics of National Identity in Spain' 9; Casey, 'The Spanish Constitutional Court' 31.

261 Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' 36.

262 As laid down in Article 163 Spanish Constitution and Article 35 Constitutional Court Act, cf. Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 607.

263 Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 26-27.

264 Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 607; Casey, 'The Spanish Constitutional Court' 40.

265 Solanes Mullor and Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' 567-568; Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' 36; Alaez Corral and Arias Castaño, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 604.

266 María Luz Rodríguez, 'Labour Rights in Crisis in the Eurozone: The Spanish Case' in Claire Kilpatrick and Bruno De Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, vol 2014/05 (EUI Working Paper LAW, EUI 2014) 106.

267 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 146-147; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 28.

objection against military duties enshrined in Article 30 (2) Spanish Constitution.[268] Furthermore, the complaint can only be brought against an administrative or judicial decision, and not against legislative acts.[269] Given both restrictions, it is unlikely that individuals would be able to challenge EU fiscal integration measures. This conclusion corresponds with observations made during the Eurocrisis.[270]

Taken together, the Spanish procedural framework entrusts privileged applicants to initiate a constitutional review either in an abstract *ex ante* manner following Article 95 (2) Spanish Constitution, or in an abstract *ex post* manner according to Article 162 (1) lit. a Spanish Constitution. The judicial experiences during the Eurocrisis reveal that most constitutional challenges were initiated by Autonomous Communities and concerned the compliance with the internal competence allocation between Autonomous Communities and the Spanish Federal Government.[271] Despite the fact that these challenges centered around a primarily internal constitutional conflict, the constitutional decisions issued on these matters might ultimately have consequences for the related EU law as well.

3.2.3 Constitutional basis of the employed limit

The *Constitutional Tribunal* developed its *constitutional identity limit* on the basis of Article 93 Spanish Constitution,[272] which states:

268 Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 28; Casey, 'The Spanish Constitutional Court' 28-29.

269 Ahumada Ruiz, 'The Spanish Constitutional Court' 613; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 146-147; Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)'8; Maribel González Pascual, 'Welfare Rights and Euro Crisis – The Spanish Case' in Claire Kilpatrick and Bruno De Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, vol 2014/05 (EUI Working Paper LAW, EUI 2014) 98; Rodríguez, 'Labour Rights in Crisis in the Eurozone: The Spanish Case' 106; In case the underlying legislative act is also violating constitutionally enshrined fundamental rights, the Constitutional Tribunal has to hear the case as a full court, cf. Garoupa, Solanes Mullor and Violante, 'Constitutional Courts and National Parliaments in Spain and Portugal' 244; Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 29.

270 Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)'8; González Pascual, 'Welfare Rights and Euro Crisis – The Spanish Case' 98.

271 Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' 36.

272 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175-1176.

> 'Authorization may be granted by an organic act for concluding treaties by which powers derived from the Constitution shall be transferred to an international organization or institution.'

Based on the wording, the Tribunal traditionally conceptualized Article 93 Spanish Constitution as a mere procedural provision that proclaimed the constitutional requirements for empowering an international or EU institution to exercise a specific competence.[273] However, since its findings in Declaration 1/2004,[274] the Constitutional Tribunal recognizes that Article 93 Spanish Constitution also contains a material or substantive dimension, which shields core constitutional matters from being conferred to the international or EU-level.[275] Notably, the Tribunal stipulated in this decision:

> 'Therefore, the constitutional transfer which is made possible by Article 93 Spanish Constitution *has material limits, which apply to the transfer of powers itself* [emphasis added]. These material limits, which are not expressly set out in the constitutional text, but which are implicitly derived from the Spanish Constitution and its essential meaning, translate into respect for the sovereignty of the Spanish state, for our basic constitutional structures and for the system of values and principles enshrined in our Constitution, in which fundamental rights acquire their own substantive effect (Article 10.1 EC) [...].'[276]

As noted by the Constitutional Tribunal, the material content covered by Article 93 Spanish Constitution is not linked to specific constitutional provisions but rather to general constitutional concepts, including sovereignty, the structural organization of the state including democracy and the protection of fundamental rights. This rather general framing might result from the broad questions referred to the Tribunal within these proceedings by the Spanish

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273 Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1182-1183; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 295.

274 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 269-270.

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

276 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176.

Government.[277] Overall, this suggests, however, that the *constitutional identity limit* derives essentially from the jurisprudence of the Spanish Constitutional Tribunal. Notably, it was the Tribunal that proclaimed that Article 93 Spanish Constitution entailed a material core – the Spanish *constitutional identity limit* – which protects a set of constitutional principles and restricts Spanish participation in the EU integration process.

3.2.4 Substantive core protected by the limit

Based on the Tribunal's Declaration 1/2004, three substantive constitutional aspects that fall under the material dimension of Article 93 (1) Spanish Constitution can be identified: First, Spanish sovereignty; second, the constitutional structure of the state; and third, the protection of fundamental rights, which are seen as an expression of Spanish constitutional values.[278] Together, these three aspects form the implicit material core that the Spanish legislator has to respect when conferring competences to the international or the supranational level. Yet, the Tribunal formulates these aspects in an abstract, general manner, without further defining the specific material conditions attached to them – as pointed out by *Martín Y Pérez de Nanclares*.[279] Given this vagueness, the subsequent analysis considers the Spanish *constitutional identity limit* from three different dimensions, namely the Tribunal's explicit intention to protect Spanish sovereignty and with it Spanish statehood (3.2.4.1.), the underlying intention to shield the Spanish Constitution as such (3.2.4.2.), and finally the

277 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 356-357.

278 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Victor Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' in Carlos Closa Montero (ed), *Constitución Española y Constitución Europea – Análisis de la Declaración del Tribunal Constitucional (DTC 1/2004, de 13 de Diciembre)* (Centro de Estudios Políticos y Constitucionales 2015) 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; José M. De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' (2005) 73 Revista Española de Derecho Constitucional 365, 370-371.

279 The Tribunal employed the *constitutional identity limit* only twice: *Constitutional Complaint Melloni* Section II.3.; *Treaty Establishing a Constitution for Europe* Section II. 2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279.

Tribunal's concrete application of this vague constitutional benchmark so far (3.2.4.3.).[280]

3.2.4.1 Protecting Spanish sovereignty and its statehood

The constitutionally most authoritative substantive element that the Tribunal enumerates under its *constitutional identity limit* is the principle of Spanish sovereignty and with it the status of the Member States as final decision-makers. Sovereignty was previously already employed by the Constitutional Tribunal as a constitutional benchmark for the assessment of EU integration steps.[281] Therefore, this prior jurisprudence can be taken into account when determining the protective scope of Spanish sovereignty. Although, it appears that the Tribunal did not (yet) provide a conclusive definition of sovereignty,[282] its case law reveals several characteristics that seem particularly important in the interpretation of this constitutional principle.

First, the Spanish Constitution establishes in Article 1 (2) that 'National sovereignty is vested in the Spanish people, from whom emanate the powers of the State.' Hence, the constitutional text identifies the Spanish people as origin of sovereign power, which establishes a close link between sovereignty and democracy.[283] Article 1 (3) Spanish Constitution clarifies that this sovereign power is framed in a parliamentary monarchy. Hence, the people confer the sovereign power to representative state institutions, which creates a crucial bond between the Spanish people and these institutions as recognized by the Constitutional Tribunal. Notably, when asked whether extending the right to vote in Spanish municipal elections to EU citizens interfered with Spanish sovereignty the Tribunal concluded:

> 'Without entering into other considerations, it is sufficient to note [...] that the attribution to non-nationals of the right to vote in elections to representative bodies could only be constitutionally contentious [...] if such bodies were those that hold powers directly attributed by the Constitution and the Statutes of Autonomy and therefore linked to the ownership of sovereignty by the Spanish people.'[284]

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280 Partly inspired by the distinction made by former constitutional judge Pablo Pérez Tremps, cf. Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270-271; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1183.

281 *Constitutional Review of the Maastricht Treaty* Section II.3.C.; Namely, under the theory of the constitutional nucleus, cf. Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 276, 297.

282 Luis I. Gordillo, *Interlocking Constitutions – Towards an Interordinal Theory of National, European and UN Law* (Hart Publishing 2012) 37 para 30.

283 *Treaty Establishing a Constitution for Europe* Section II.4.; *Constitutional Review of the Maastricht Treaty* Section II.3.C.

284 *Constitutional Review of the Maastricht Treaty* Section II.3.C.

The Tribunal found that this was not the case for municipal institutions, which do not hold powers that are directly attributed to them by the Constitution. Consequently, entitling EU foreigners to vote in municipal elections was not in contradiction with Spanish democracy or sovereignty.[285] Based on this decision, it can be deduced that the Tribunal conceptualizes the principle of sovereignty based on the Spanish people. It further indicates that the Tribunal is mainly concerned about the exercise of constitutionally assigned powers (or competences) by state institutions, which are in turn representing the Spanish people. Hence, the Spanish Tribunal seems to construe sovereignty as a competence-based limitation for the EU integration process. The consequence is that a set of core competences has to remain at the national level under the control of Spanish institutions.[286]

Moreover, the Tribunal emphasized that the introduction of Article 93 Spanish Constitution constituted 'an unmistakable act of exercise of the sovereignty of Spain'.[287] One consequence is, that the conferral of powers by the Spanish legislator according to Article 93 Spanish Constitution is perceived as an exercise of sovereign powers.[288] At the same time, the Tribunal underscored that Article 93 Spanish Constitution did not automatically entail a constitutional amendment, but instead, in case of conflicts between Spanish constitutional law and supranational cooperation, the constitutional text would have to be amended following the framework established in Articles 167 and 168 Spanish Constitution.[289] Therefore, compliance with the principle of sovereignty requires that the constitutional procedures are adhered to.

In addition, Article 93 Spanish Constitution does not transfer the actual competence to the supranational level, but merely mandates the exercise of this competence at the EU-level. The sovereign competence remains at the national level, following the conception of the Constitutional Tribunal.[290] This

285 Ibid Section II.3.C.; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185.

286 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1183-1184.

287 *Treaty Establishing a Constitution for Europe* Section II.2.

288 Ibid Section II.2.; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175.

289 *Constitutional Review of the Maastricht Treaty* Section II.3.C.; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 283-284; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 272; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 354; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 292.

290 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 286; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1182.

implies, in the first place, that the EU legal order is derived from and dependent on the Spanish Constitution. It furthermore suggests that the sovereign powers remain at the national level, and supranational cooperation constitutes only a shared exercise of certain powers. This shared exercise is, in itself, expression of Spanish sovereignty, given that the Spanish legislator decided to enable supranational cooperation through Article 93 Spanish Constitution and subsequently to transfer certain powers by adopting the EU-Treaties.[291] An additional indication for the preservation of Spanish sovereignty is, according to the Tribunal, the explicit possibility to withdraw from EU cooperation following Article 50 TEU.[292] The Tribunal concluded on this point:

> 'Therefore, the primacy operates with regard to the competences transferred to the Union by the sovereign will of the State and also sovereignly recoverable by means of the procedure of 'voluntary withdrawal' as set forth in Article I-60 of the Treaty.'[293]

Finally, the Tribunal connected the principle of sovereignty with the overall constitutional framework, which is an expression of the sovereign decision of how to organize the functioning of the state. The Tribunal ruled:

> '[...] [T]he transfer of the exercise of competences to the European Union and the consequent integration of Community legislation into our own [legislation] impose[s] *unavoidable limits to the sovereign faculties of the State* [emphasis added], acceptable only when European legislation is compatible with *the fundamental principles of the social and democratic State of Law* [emphasis added] established by the national Constitution.'[294]

This confirms the observation that the Tribunal is seemingly not merely shielding the principle of sovereignty in isolation. Instead, it relates sovereignty to the ability of the state to take core structural and organizational (value) decisions, which clearly connects sovereignty with the principle of (representative) democracy. At the same time, the Tribunal seems to strengthen the hierarchical position of the Spanish Constitution in the quoted section. Notably, the Tribunal requires that supranational cooperation complies with the core constitutional principles protected by the Spanish Constitution. This suggests in the first place that the Spanish legislator can only transfer powers to the extent

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291 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175.

292 *Treaty Establishing a Constitution for Europe* Section II.4.; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 286-287; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1187.

293 *Treaty Establishing a Constitution for Europe* Section II.3.

294 Ibid Section II.2.

that this is compatible with the Spanish Constitution – or it would have to otherwise modify the constitutional text. But it also reinforces the position of the Spanish Constitution as most authoritative legal document in the hierarchy of legal norms in Spain. At the same time, one could also see in this passage a request of the Constitutional Tribunal to the Spanish constitution-legislator to establish clear structural requirements for the EU,[295] as for example the case in Germany.[296]

3.2.4.2 Protecting the hierarchical position of the Spanish Constitution

The analyzed jurisprudence suggests that the Spanish Constitutional Tribunal not only protects the principle of sovereignty in isolation, but instead it protects sovereignty together with the constitutional framework. Notably, the Spanish Constitution is understood as formal expression of sovereignty.[297] As expressed through Article 93, the Spanish Constitution forms the basis for the Spanish EU membership, as competences have to be conferred following the requirements established by the Spanish constitutional text.[298] Therefore, the Tribunal emphasized in its assessment that the Spanish Constitution had to remain the basis for Spanish participation in EU cooperation, and with it the constitutionally prescribed procedure in Article 93 Spanish Constitution, which in the reading of the Tribunal includes the mentioned material *constitutional identity* dimension.[299] As noted by the Tribunal:

> 'By virtue of Article 93, the Cortes Generales can [...] attribute the exercise of "powers derived from the Constitution", but not disposing of the Constitution itself [...].'[300]

This implies that the Spanish Constitution forms the basis for and sits hierarchically on top of EU law. Therefore, EU law may not challenge the integrity of Spanish constitutional law. Any direct (textual) conflict between the Spanish

295 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution'.

296 Notably the structural requirements established in Article 23 (1) (1) German Basic Law, cf. Scholz, 'Art. 23 GG' paras 70-71; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 686.

297 Sentencia 28/1991 *Spanish Rules on the Elections to the European Parliament* [1991] (Spanish Constitutional Tribunal) Section II.4.; Cf. as well: Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

298 *Spanish Rules on the Elections to the European Parliament* Section II.4.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 273; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271.

299 As pointed out by the Spanish Constitutional Tribunal in its earlier case-law, cf. *Spanish Rules on the Elections to the European Parliament* Section II. 4.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 273.

300 *Constitutional Review of the Maastricht Treaty* Section II.4 (own translation).

Constitution and EU law has to be resolved in favor of the constitution. The Tribunal established a reserve competence to give preference to the Spanish Constitution in case of conflict between the Spanish Constitution and EU law in case the EU itself did not resolve the Spanish concerns against the EU legal provision in question. The underpinning logic is, obviously, that the Spanish legislator cannot confer powers to the EU which contradict the Spanish Constitution. Hence, in case such a conflict would be identified a sort of EU *ultra vires* act would be given, which the Tribunal considers unconstitutional in Spain.[301] However, this review is very unlikely to occur and the Tribunal itself considers it only a hypothetical option at this point.[302] In addition, the Tribunal would allow the EU to address the matter in the first place, in case such a situation emerges. This corresponds with the Tribunal's conception of the EU and Spanish legal order as separate systems, that have their respective tools and mechanisms to address legal questions.[303] Finally, the Tribunal appears rather reluctant in its scrutiny of EU law, which suggests that an open conflict between EU and Spanish law is unlikely to emerge.[304]

Furthermore, the three aspects that the Tribunal identified as material dimension of Article 93 Spanish Constitution, namely sovereignty, the state structure, and constitutional rights are covered by Article 168 Spanish Constitution.[305] This provision imposes additional procedural requirements for constitutional amendments that concern particularly important constitutional matters, notably amendments to the Preliminary Part (Articles 1 to 9 Spanish Constitution),[306] Part 1 Chapter II Division 1 (Articles 15 to 29 Spanish Constitution),[307] as well as Part II (Articles 56 to 65 Spanish Constitution).[308] Therefore, it seems that the Constitutional Tribunal expands the special constitutional protection awarded to particularly important provision of the Spanish Constitution – which can only be amended under the strict amendment-procedure laid down in Article 168 Spanish Constitution – to the process of EU integration.

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301 *Treaty Establishing a Constitution for Europe* Section II.4.; Cf. as well: Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1195; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 292.

302 *Treaty Establishing a Constitution for Europe* Section II.4.

303 Ferreres Comella, 'The Spanish Constitutional Court: Time for Reforms' 36; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 293.

304 In contrast to the German Constitutional Court, which frequently employed the *ultra vires* review as a means to adjudicate on German and EU law questions, cf. *Quantitative Easing (PSPP) Final Judgment*.

305 Bon, 'La Identidad Nacional o Constitucional, una Nueva Noción Jurídica' 183.

306 Covering basic constitutional principles, such as sovereignty, democracy, state structure, and the status of the Spanish Constitution.

307 Covering core fundamental rights, including the freedom of speech, freedom of religion, and other civil liberties.

308 Special constitutional arrangements on the Spanish monarchy.

3.2.4.3 The Tribunal's concrete assessment

When considering the concrete application of the *constitutional identity limit*, it can be observed that the Tribunal frames the Spanish limit in its jurisprudence in vague and broad terms.[309] One consequence from this abstract wording is that no actual, concrete conflict with the constitutional text was identified until now. This might suggest that the Tribunal does not have the intention to impose strict constitutional limits to EU integration steps. Instead, it could be argued that the Tribunal might aim to recall core constitutional principles and values *vis-à-vis* the Spanish legislator, which is in charge of EU integration steps. Put differently, through the *constitutional identity limit* the Tribunal might illustrate the transformative constitutional impact that EU integration has and thereby require the legislator to consider this specific impact when debating EU integration steps. In fact, the Tribunal's limit might counterbalance the open wording of Article 93 Spanish Constitution.[310] One might even see in this proclaimed material limit, as *Martín Y Pérez de Nanclares* formulates it, an indirect judicial request to amend the constitutional framework for the conferral of powers to the EU-level.[311] At the same time, the Constitutional Tribunal clarified its own role in the constitutional appraisal of EU integration steps. Although the Tribunal remains largely in the background, it confirmed its competence – and readiness – to adjudicate on conflicts between Spanish constitutional law and EU law if required.[312]

In the concrete application of the *constitutional identity limit* against the EU Constitutional Treaty, the Tribunal found that the EU commitments replicated the Spanish material constitutional concerns. Namely, the proposed Treaty included the protection of national constitutional identities, the protection of core constitutional values, and the protection of EU fundamental rights.[313] This

309 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279.

310 Ibid 277.

311 Ibid 280; Antonio López Castillo, 'La Unión Europea 'en constitución' y la Constitución estatal en (espera de) reformas – A propósito de la DTC 1/2004 de 13 de diciembre' in Carlos Closa Montero (ed), *Constitución Española y Constitución Europea – Análisis de la Declaración del Tribunal Constitucional (DTC 1/2004, de 13 de Diciembre)* (Centro de Estudios Políticos y Constitucionales 2015) 49.

312 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 368; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1195.

313 Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 83; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 359; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1192-1193.

seems to suggest that the Constitutional Tribunal is receptive to accept an EU-law-based protection of material constitutional concerns.[314]

Finally, once EU-Treaties are adopted, EU law is seen as 'infra-constitutional', which implies that it lacks constitutional status.[315] Therefore, the Constitutional Tribunal refused to review national law against EU law, which it considered instead a matter for the other Spanish courts.[316] During the Eurocrisis, one could observe the consequences stemming from this approach. Notably, in constitutional challenges brought by the Spanish Autonomous Community of Catalonia against the federal balanced budget rules, which translated EU requirements into Spanish law. In its decision, the Tribunal confirmed that the Spanish law was closely interrelated with EU law, however, it subsequently assessed whether the federal law was compatible with the Spanish Constitution. Ultimately, it found that the Spanish Government was competent to enact the federal laws in question.[317]

3.2.4.4 Interim conclusion on the Spanish substantive core

Taken together, the substantive core of the Spanish *constitutional identity limit* remains vague and abstract. The vagueness stems from the open constitutional framework for conferring competences to the EU enshrined in Article 93 Spanish Constitution. The absence of further detail might indicate the Tribunal's intention to compensate for a lacking material constitutional guidance for this conferral,[318] it might equally indicate that the Tribunal intended to trigger the legislator without setting strict material limits, or it might simply

314 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 263; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1185-1186; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 359.

315 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 263; Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 292; Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 277.

316 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 263; Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 292.

317 Sentencia 134/2011 *EMU-Related Challenge* [2011] (Spanish Constitutional Tribunal) Sections II.6. and II.7.; Cf. as well: Giacomo Delledonne, 'A Legalization of Financial Constitutions in the EU? Reflections on the German, Spanish, Italian and French Experiences' in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 188.

318 A constitutional reform was discussed at the time when Declaration 1/2004 was issued, cf. Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 280; López Castillo, 'La Unión Europea 'en constitución' y la Constitución estatal en (espera de) reformas – A propósito de la DTC 1/2004 de 13 de diciembre' 49; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 377.

stem from the fact that the Tribunal was never explicitly asked to clarify the protected content.[319]

The Constitutional Tribunal identified Spanish sovereignty, basic constitutional principles, and the protection of fundamental rights as the core material concerns that EU integration steps might be confronted with.[320] When considering EU fiscal integration proposals, the prior two are of immediate constitutional relevance. The Tribunal seems to construe Spanish sovereignty as a competence-based constitutional limit which secures that core powers remain under the democratic control of the Spanish people. Despite the fact that the Tribunal did not yet specify which powers fall into this category, it seems very likely that fiscal, budgetary and financial matters could be conceived as such important powers. First, the competences are traditionally characterized as particularly important powers of a sovereign state.[321] And second, the Constitutional Tribunal incorporates comparative constitutional considerations into its constitutional jurisprudence. It seems that particularly the German, and the French constitutional debates are influential in that regard.[322] Given that both constitutional systems identified fiscal, budgetary and financial powers as especially relevant under the principles of sovereignty and democracy,[323]

319 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 356-357.

320 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

321 Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency: Parliaments Against Governments?', 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

322 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ahumada Ruiz, 'The Spanish Constitutional Court' 629; López Castillo, 'La Unión Europea 'en constitución' y la Constitución estatal en (espera de) reformas – A propósito de la DTC 1/2004 de 13 de diciembre' 48-49; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

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

it seems possible that the Spanish Constitutional Tribunal draws inspiration from these constitutional debates.

Moreover, the *constitutional identity limit* aims at securing the hierarchical position of the Spanish Constitution. As pointed out, the Tribunal determined that Article 93 Spanish Constitution formed the basis for EU cooperation in Spain, that the legislator was not entitled to confer constitution-amending powers to the EU-level, and that Spain retained the possibility to withdraw from the supranational cooperation.[324] By conceptualizing the EU legal order as derived from the Spanish Constitution, the Tribunal clearly limits the available constitutional space for EU (fiscal) integration steps.[325] Consequently, EU fiscal integration steps could possibly conflict with the Spanish *constitutional identity limit* in light of a possible comparative exchange of constitutional reasoning as well as in case such integration steps modify the outlined derived nature of EU cooperation. Although the Tribunal indicated readiness to accept possible EU safeguards as well as showed reluctance in the concrete application of this limit, it might ultimately use its competences in the future to formulate more detailed substantive requirements for EU cooperation.[326] At the same time, the Tribunal refrained from further fleshing out the *constitutional identity limit* when partly confronted with Eurocrisis-measures, which could possibly indicate a general reluctance to apply the limit to (EU) budgetary and fiscal policy decisions.

3.2.5 Longevity and absoluteness of the constitutional limit

Finally, the question is whether this *constitutional identity limit* constitutes an absolute limit to EU fiscal integration proposals. When considering the constitutional framework, it is first apparent that Articles 167 and 168 Spanish Constitution do not contain any restriction for the scope of constitutional amendments.[327] Conversely, this implies that the Spanish Constitution can be amended

German Federal Constitutional Court' 407; *And for the French debate: Fiscal Compact* para 13; *Review of Maastricht Treaty (Maastricht I)* para 43; Cf. as well Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

324 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 271; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 373-374.

325 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279.

326 Ibid 271, 283; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1186.

327 Article 169 Spanish Constitution only formulates a prohibition for constitutional amendments in times of war or during state of emergency, cf. José M. V. Santos, 'La Reforma del Procedimiento de Reforma Constitucional en España' (2016) 96 Revista de Derecho

in all parts.[328] Therefore, one may conclude that possible conflicts between EU fiscal integration proposals and the *constitutional identity limit* can be overcome by amending the Spanish Constitution.[329]

Furthermore, it seems that the Tribunal has no competence to review constitutional amendments. According to Article 161 (1) lit. a Spanish Constitution and Article 27 Constitutional Court Act, which together define the Tribunal's jurisdictional competences, the Tribunal can review the constitutionality of 'laws and regulations having the force of law.'[330] However, a constitutional amendment is neither a law nor a regulation having the force of law, as becomes obvious from the wording in Articles 167 and 168 Spanish Constitution. This suggests that Article 161 (1) lit a Spanish Constitution confers upon the Tribunal 'merely' the power to review parliamentary and governmental acts, but not constitutional law as such.[331] Thus, the constitution-amending legislator could overcome the *constitutional identity limit* by amending the Spanish Constitution in order to accommodate conflicting EU fiscal integration steps.

As a result, EU fiscal integration proposals might be confronted with the procedural requirements enshrined in Article 167 Spanish Constitution, in case an ordinary revision is required, or with the stricter requirements enshrined in Article 168 Spanish Constitution, in case constitutional amendments concern particularly important areas.[332] Following the ordinary procedure, the constitutional amendment can be adopted by a three-fifths majority in Congress and Senate.[333] According to Article 168 Spanish Constitution, stricter procedural

Político 13, 23-24.

328 Sentencia 259/2015 *Catalan Independence Declaration* [2016] (Spanish Constitutional Tribunal) Section II. 7.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 281; Ahumada Ruiz, 'The Spanish Constitutional Court' 636; Leonardo Álvarez, 'Die spanische Dogmatik der Verfassungstreue – Geschichte einer fehlgeschlagenen Rezeption des deutschen Verfassungsdenkens' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 433, 442; Francisco Santaolalla Gadea and Santiago Martinez Lage, 'Spanish Accession to the European Communities: Legal and Constitutional Implications' (1986) 23 Common Market Law Review 11, 13-14.

329 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 272.

330 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 119.

331 Alaez Corral and Arias Casta–o, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 603.

332 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282.

333 If this initial 3/5-majority cannot be reached a joint committee will be set up, which proposes a new wording of the amendment and which then requires an absolute majority in the Senate and a 2/3-majority in the Congress, as laid down in Article 167 (2) Spanish Constitution, cf. Elvira, 'Spain' 282.

requirements apply to any constitutional reform which affects (fully or in parts)[334] the Preliminary Part (Articles 1 to 9 Spanish Constitution), Part 1 Chapter II Division 1 (Articles 15 to 29 Spanish Constitution), or Part II (Articles 56 to 65 Spanish Constitution) of the Spanish Constitution. Under the strict constitutional amendment procedure Congress and Senate have to be dissolved by the approval of a two-thirds majority as a first step. Subsequently, the newly elected assemblies have to confirm the constitutional amendments with a two-thirds majority. Finally, the approved constitutional amendment will have to be confirmed by public referendum.[335]

When applying this framework to EU fiscal integration steps, it seems likely that the stricter amendment procedure is applicable in case such integration steps conflict with the *constitutional identity limit* and thus core constitutional principles established in the preliminary part of the Spanish Constitution. Nevertheless, the Tribunal continuously emphasized that the Spanish Constitution is open for a full revision,[336] which suggests that the *constitutional identity limit* constitutes ultimately a high procedural hurdle for the constitution-amending legislator.

3.3 Conclusion

The assessment revealed that the Spanish *constitutional identity limit* was established by the Constitutional Tribunal in order to protect a material constitutional core of the Spanish Constitution against continuous EU integration. The limit was first pronounced in the constitutional opinion of the Tribunal on the EU Constitutional Treaty[337] and it protects Spanish sovereignty, the basic constitutional structure as well as fundamental rights against constitutional

334 Given the broad wording, any textual change of the covered constitutional provision has to comply with the strict procedural requirements, cf. Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 192; Victor Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* (Hart Publishing 2013) 57.

335 Elvira, 'Spain' 282-283.

336 *Catalan Independence Declaration* Secion II. 7.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 167-168; Ahumada Ruiz, 'The Spanish Constitutional Court' 636; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 272.

337 The EU Constitutional Treaty included specific safeguards for national (constitutional) identities, which might explain the emergence of the Spanish limit in this decision, and also other Member States established similar limits, cf. Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 269; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 263.

erosion.[338] It was pointed out that the precise substantive content of the *constitutional identity limit* remains vague, given its sporadic mentioning by the Tribunal. Yet, by taking previous decisions into account, it was shown that the Tribunal's main intention appears to be the protection of Spanish statehood as well as sovereign and democratic decision-making.[339] The latter seems to imply that core competences have to remain at the national level under the democratic control of the Spanish Congress, as democratic representation of the Spanish people.

These core competences could include budgetary, financial and fiscal decisions, which then might impact the proposed EU fiscal integration ambitions. However, the Tribunal did not yet provide more specific guidance on the competence areas covered by the *constitutional identity limit*. At the same time, the Tribunal accepted in its appraisal that the EU legal order might offer adequate protection for the outlined constitutional concerns.[340] When applying this abstract constitutional benchmark to EU fiscal integration proposals, it seems that these proposals could affect important sovereign competences which might require confirmation under the strict constitutional amendment procedure.[341]

Overall, this suggests that the Tribunal has no intention to employ the *constitutional identity limit* as an absolute constitutional restriction to EU fiscal integration proposals. Over the past decades, the Spanish Constitutional Tribunal was critical towards EU integration, more so than the Spanish political institutions and the Spanish people.[342] Yet, the Tribunal remained constructive

338 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bon, 'La Identidad Nacional o Constitucional, una Nueva Noción Jurídica' 172-173; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

339 Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270-271; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1183.

340 Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 359; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1192-1193.

341 As Article 168 Spanish Constitution allows for a 'total revision', cf. *Catalan Independence Declaration* Section II. 7.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 281.

342 Estella de Noriega, 'A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration' 275.

and open towards EU law and further integration steps. One example in that regard is the refusal of the Constitutional Tribunal to generally review EU law but instead restrict itself to matters that are close to the Spanish constitutional core.[343] Obviously, this approach reduces the risk that situations of direct conflict between Spanish (constitutional) law and EU law, as well as in institutional terms between the Spanish Constitutional Tribunal and the CJEU, emerge. As it stands, the Spanish *constitutional identity limit* is an abstract constitutional warning towards the political institutions of Spain to preserve Spanish statehood, the basic constitutional structures, and the protection of fundamental rights.[344] The Tribunal might specify the limit's content in future decisions, and thereby restrict the constitutional space for the political decision-making process decisively.

Constitutional Identity Classification Board for Spain
1 ***Which institutional actor enforces the constitutional limit?***   The Spanish *constitutional identity limit* was developed by the Spanish Constitutional Tribunal, which is in charge of constitutional review. Its decisions are final and binding.
2 ***How can the constitutional identity limit be triggered?***   Most commonly, EU (integration) measures are challenged through abstract ex ante (Article 95 (2) Spanish Constitution) or ex post review (Article 161 (1) lit. a Spanish Constitution). The Eurocrisis-measures triggered internal conflicts on the allocation of competences.[345]
3 ***What is the constitutional basis of the constitutional identity limit?***   Article 93 Spanish Constitution is the basis on which the Constitutional Tribunal grounds its *constitutional identity limit*. In Declaration 1/2004, it identified that this provision has a material dimension which shields core constitutional principles and values.

343 Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1200.

344 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176.

345 Fasone, 'Constitutional Courts Facing the Euro Crisis – Italy, Portugal, and Spain in a Comparative Perspective (2014)' 36.

Constitutional Identity Classification Board for Spain
4 ***What constitutional principles and substantive content are covered?*** The material core identified by the Constitutional Tribunal covers: Spanish sovereignty; basic constitutional structures; the system of constitutional values and principles; as well as fundamental rights.[346] However, the jurisprudence on the *constitutional identity limit* is brief[347] and its content remains abstract and vague. In light of EU fiscal integration proposals, the Tribunal seems mainly concerned about preserving core decision-making abilities in central sovereign competence areas within the Spanish constitutional order
5 ***How – if at all – can the constitutional identity limit be overcome (longevity/absoluteness of the limit)?*** The Spanish Constitution does not restrict the scope for constitutional amendments. Given that EU fiscal integration steps might impact core constitutional principles, the strict constitutional amendment procedure in Article 168 Spanish Constitution appears to apply.

Figure 13: Constitutional Identity Classification Board for Spain

4 The Polish perspective on EU fiscal integration

Finally, the comparison will consider the material limits that the Polish constitutional order formulates against EU fiscal integration proposals. In light of the comparative setting of this research, Poland provides for an interesting addition to the comparison for at least four related reasons.

First, Poland is not (yet) a member of the Eurozone, which distinguishes it from the previously analyzed Member States. However, the EU's *acquis communautaire*, to which Poland subscribed in 2004, establishes a legal obligation for the country to accede to the single currency once it meets the prescribed convergence criteria.[348] Therefore, Poland currently has the perspective

346 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Idenity in Spanish Constitutional Court Case-Law' 270.

347 Only confirmed once by the Constitutional Tribunal, cf. *Constitutional Complaint Melloni* Section II. 3.

348 Czuczai, 'Accession to the EU, But to Which EU? The Legal Impact of the Constantly Evolving EMU Acquis on the EU Enlargement Process' 595; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 72-73; Rinaldi-Larribe, 'Is Economic Convergence in New Member States Sufficient for an Adoption of the Euro?' 269-270; Louis, 'The Economic and Monetary Union: Law and Institutions' 605; For a detailed overview on the different convergence criteria cf.: Frédéric Allemand, 'The Impact of the EU Enlargement on Economic and Monetary Union: What Lessons Can Be Learnt From the Differentiated Integration Mechanisms in an Enlarged Europe?' (2005) 11 European Law Journal 586, 589-591; It should also be noted that Poland was ambitious to join the Eurozone prior to its accession to the EU, cf. Zbigniew Polański, 'Poland and the Euro Zone

of a Euro-candidate country and not that of a Eurozone member. Nevertheless, the currently debated EU fiscal integration steps are equally relevant for Euro-candidate countries, as they might render Eurozone membership harder to achieve constitutionally in the future, leading to a clash between the EU obligation to join and possible constitutional obstacles to the level of fiscal integration required for joining. This may particularly happen as several constitutional limits have already been established by the Polish Constitutional Tribunal[349] against too far-reaching competence conferrals to the EU.[350] A more integrated Eurozone could trigger these limits and render Polish accession to the Euro constitutionally impossible. Therefore, it seems crucial to include the constitutional perspective of Euro-candidate Member States into the assessment in order to balance the required reform steps with, on the hand, political ambitions of the current 19 Eurozone countries, and, on the other hand, the ambition to extend the Eurozone. Hence, EU fiscal integration should take the available constitutional space in Euro-candidate countries into account in order to keep full Eurozone-membership constitutionally attainable for these countries.[351]

Second, Poland is historically shaped by its communist past under the influence of the Soviet Union. The Polish Constitution of 1997 was drafted in light of these experiences and it entails a strong fundamental rights protection as well as constitutional safeguards against the (institutional) abuse of public power.[352] These constitutional characteristics equally developed in other Central and Eastern European states, given their comparable historical experiences.[353] The Polish constitutional order can therefore be seen as a

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Enlargement: Monetary Policy, ERM II, and Other Issues' (2004) 32 Atlantic Economic Journal 280, 285-286.

349 In Polish: *Trybunał Konstytucyjny*.

350 *Poland's EU Membership* Point 18.7; Cf. as well: Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 161; Anneli Albi, '"Europe" Articles in the Constitutions of Central and Eastern European Countries' (2005) 42 Common Market Law Review 399, 408.

351 Jan Barcz, 'Polish Policy in the Context of the Euro Area Reform' (2013) 16 Yearbook of Polish European Studies 69, 71.

352 Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 31; Cezary Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 393-397.

353 Anneli Albi and Samo Bardutzky, 'Revisiting the Role and Future of National Constitutions in European and Global Governance: Introduction to the Research Project' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 14; Stanislaw Biernat and Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 748.

sufficiently representative example of a wider group of Member States that joined the European Union since 2004. Consequently, the conclusions drawn on the Polish material limits to EU fiscal integration proposals might be equally relevant for other constitutional systems in Central and Eastern European Member States that have a similar constitutional design to Poland.

Third, as already indicated, the Polish constitutional approach to EU integration is mainly shaped by an authoritative constitutional court, namely the Polish Constitutional Tribunal. The Tribunal established for example the Polish *constitutional identity limit*, through which it protects core constitutional principles against EU integration.[354] Hence, the institutional design and the existence of substantive constitutional limits characterize the Polish constitutional order as relatively rigid towards EU integration, which squarely fits within the employed comparative framework. In addition, the Polish Constitutional Tribunal itself draws inspiration from the constitutional jurisprudence of other EU constitutional courts.[355] This comparative approach is especially noticeable in relation to the *constitutional identity limit*, which was strongly influenced by German jurisprudence.[356] At the same time, both the substantive content and the absolute nature of the limits differ, as will be elaborated.

Lastly, the Polish constitutional system is undergoing a process of constitutional decay, which is scrutinized at the supranational level with limited success.[357] This decay concerns in particular the rule of law and erupted after

354 Introduced with the *Lisbon*-judgment into Polish constitutional logic, *Treaty of Lisbon* Section III.2.1; subsequently confirmed in relation to the ESM, cf. *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 243; Marcin Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' in Bruno de Witte and others (eds), *Judicial Review and Cooperation series, National Courts and EU Law: New Issues, Theories and Method* (Edward Elgar Publishing Limited 2016) 129; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 31-32; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 128-129.

355 The *Lisbon*-judgment contains an entire section dedicated to a comparative overview of constitutional developments in other EU Member States, cf. *Treaty of Lisbon* Section III 3.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 243; Magdalena Bainczyk, 'Die erste Vorabentscheidungsfrage des polnischen Verfassungsgerichtshofs an den EuGH' (2017) 52 Europarecht (EuR) 121, 123.

356 *Treaty of Lisbon* Section III.3.3.; Cf. as well: Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 130-131.

357 Rech, 'Some Remarks on the EU's Action on the Erosion of the Rule of Law in Poland and Hungary' 335-336, 343; Tomasz Tadeusz Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 Review of Central and East European Law 116, 134-136; Also given the rejection of this process from the Polish side, which could result in a lasting credibility damage for the EU, cf. Armin von Bogdandy, 'Tyrannei der Werte? Herausforderungen und Grundlagen einer europäischen Dogmatik systemischer Defizite' (2019) 79 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 503, 511; Note that the PiS-party is traditionally

the election of the PiS[358]-party into governmental power in 2015. The contested measures taken by the government were *inter alia* target against the Polish Constitutional Tribunal.[359] Naturally, these developments put constitutional precedent and the Tribunal's established approach in EU matters into question.[360] This constitutes a challenge for the subsequent analysis, as the future Polish constitutional jurisprudence might be more difficult to predict due to the on-going constitutional transformation. Assuming that the current political interferences remain temporary, the relevant constitutional jurisprudence established prior to 2015 will likely regain significance – or otherwise serve as basis for an even more protectionist and nationalist constitutional approach. Consequently, the focus on the established approach seems justified. In addition, analyzing the Polish case also offers the possibility to reflect on the potential stabilizing function of national constitutional values through supranational cooperation. Furthermore, it will allow for a reflection on the importance of the rule of law – possibly even a necessary precondition – for the stability of the Euro.

The following assessment will first outline the applicable constitutional framework (4.1.), before subsequently evaluating the *constitutional identity limit* (4.2.) as well as substantiating the rule of law concerns and its implications for EU fiscal integration proposals (4.3.).

4.1 Identifying the core constitutional limits to EU fiscal integration in Poland

Since Polish accession to the EU in 2004, the Constitutional Tribunal developed a detailed constitutional approach towards EU integration and towards the effect of EU law in Poland. This constitutional approach includes an *ultra vires limit* as well as a *constitutional identity limit*, which were both inspired by the German jurisprudence.[361] Both limits are rooted in the principle of Polish

skeptical of the EU, also in relation to the previous integration steps, cf. Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156-157.

358 Referring to Poland's Law and Justice political party (in Polish: *Prawo i Sprawiedliwoúæ*).

359 Wojciech Sadurski, 'Constitutional Crisis in Poland' in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 262; Sava Jankovic, 'Polish Democracy Under Threat? An Issue of Mere Politics or a Real Danger?' (2016) 9 Baltic Journal of Law & Politics 49, 51.

360 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 264; Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' 547, 572-573; Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2019) 11 Hague Journal on the Rule of Law 63, 77; Obviously, constitutional courts are of core interest for illiberal governments, given the courts' powers, cf. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 49.

361 *Treaty of Lisbon* Section III 3.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 243; For

sovereignty – which entails that core decisions have to be taken by Polish institutions and which protects the supreme status of the Polish Constitution.[362] Through its *ultra vires* review, the Tribunal scrutinizes competence excesses of EU institution not covered by the mandate awarded by the Polish legislator through the conferral of competences based on Article 90 Polish Constitution.[363] It is thus primarily applied to the exercise of conferred competences. In contrast, the *constitutional identity limit* restricts the available material constitutional scope for the conferral of competences.[364] Under the *identity limit* the Tribunal reviews whether EU integration steps sufficiently respect Polish democracy, the rule of law, fundamental rights, as well as Polish sovereignty and statehood.[365] When considering EU fiscal integration proposals, the *constitutional identity limit* seems particularly relevant, as it formulates restrictions to the material scope available for such integration steps under the Polish Constitution.

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example, the Polish *ultra vires* review was inspired by the German jurisprudence, cf. Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 130.

362 As enshrined in Article 8 (1) Polish Constitution, cf. Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 250; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 156; Krystyna Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' (2005) 6 German Law Journal 1355, 1365.

363 Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 130-131; Stanislaw Biernat, 'Offene Staatlichkeit: Polen' in Armin von Bogdandy, Pedro Cruz Villalón and Peter Michael Huber (eds), *Handbuch Ius Publicum Europaeum, Band II: Offene Staatlichkeit – Wissenschalft vom Verfassungsrecht* (C.F. Müller 2008) para 46; Sven Höbel, 'Polish and German Constitutional Jurisprudence on Matters of European Community Law: A Comparison of the Constitutional Courts' (2007) 3 Croation Yearbook of European Law and Policy 515, 525-526.

364 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 501; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201.

365 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499, 501; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

In addition to constitutional limits, the Polish Constitutional Tribunal also established more receptive approaches towards EU law. One example in this regard is its so-called *multi-centric* approach according to which legal norms enacted by different authorities can coexist in Poland.[366] The most prominent example is the coexistence of Polish and EU law. Corresponding to the idea of the EU as a pluralistic constitutional legal order, the Constitutional Tribunal aims at avoiding conflicts between legal instruments stemming from the different orders and thereby preserve both orders equally. This multi-centric approach also entails that the Tribunal adopts a *European-law-friendly* interpretation of the Polish Constitution[367] and that it presumes the constitutionality of newly enacted EU obligations.[368] Taken together, the multi-centric approach enables the Tribunal to reduce hierarchical disputes between Polish and EU law. Obviously, this would equally extend to EU fiscal integration measures. In the first place, such integration steps would benefit from the rebuttable presumption of constitutionality. And subsequently, once the measures are duly ratified, the Tribunal would likely adopt a European-law-friendly reading of the Polish Constitution in light of possible new obligations. Nevertheless, the Tribunal can rebut the presumption of constitutionality in light of the outlined *constitutional identity limit*. Therefore, the subsequent assessment will focus on the possible substantive restrictions of this limit for EU fiscal integration steps.

4.2 The Polish *constitutional identity* limit – protecting a *sovereign* Poland?

The Polish *constitutional identity limit* imposes substantive restrictions to the conferral of powers to the EU.[369] Comparable to the function of *constitutional*

366 Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multi-centric Vision or Creeping Hierarchical Practice' 132; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 251; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 156; Höbel, 'Polish and German Constitutional Jurisprudence on Matters of European Community Law: A Comparison of the Constitutional Courts' 522; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1363-1364.

367 Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multi-centric Vision or Creeping Hierarchical Practice' 132; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 251; Magdalena Bainczyk and Ulrich Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' (2006) 41 Europarecht (EuR) 236, 253; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1360.

368 Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multi-centric Vision or Creeping Hierarchical Practice' 130-131; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107.

369 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 129.

identity limits developed in other EU Member States, the Polish limit shields core constitutional principles against external intervention,[370] as will be assessed in the following analysis.

4.2.1 Institutional actor enforcing the limit

The Polish *constitutional identity limit* was established by the Polish Constitutional Tribunal. The Tribunal was initially created on a provisional basis under Communist rule in 1982 with only a limited set of responsibilities.[371] The apparent underlying aim of its creation was to convey the impression that Poland was a constitutional system under the supervision of an 'independent' *constitutional court*.[372] Its institutional position as guardian of the Polish Constitution was cemented under the new 1997 Polish Constitution, with widely extended competences.[373] It is established as independent judicial actor, as explicitly established in Article 173 Polish Constitution,[374] and entitled to conduct constitutional review of acts of parliaments, normative acts including governmental decrees as well as international agreements.[375] Furthermore, its judgments are binding for all Polish state institutions, including the Polish Government and the Polish Parliament (Sejm).[376] Decisions take binding effect

370 As pointed out by the Constitutional Tribunal itself, cf. *Treaty of Lisbon* Section III 2.1. and Section III.3.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

371 Including a mechanism according to which decisions by the Tribunal on the compatibility of legislative acts with the constitutional text were referred to the Polish Parliament, which could then confirm the constitutionality by overruling the constitutional decision, cf. De Visser, *Constitutional Review in Europe – A Comparative Analysis* 71-72; Csilla Kiss, *Constitutional Democracy in Eastern Europe: The Role of Constitutional Courts in Democratic Consolidation in Post-Communist Hungary and Poland* (ProQuest Dissertations Publishing 2005) 57-58; Ernst-Wolfgang Böckenförde, 'Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation' (1999) 52 Neue Juristische Wochenschrift (NJW) 9, 16; Mark F. Brzezinski and Leszek Garlicki, 'Judicial Review in PostCommunist Poland: The Emergence of a Rechtsstaat?' (1995) 31 Stanford Journal of International Law 13, 26.

372 Kiss, *Constitutional Democracy in Eastern Europe: The Role of Constitutional Courts in Democratic Consolidation in Post-Communist Hungary and Poland* 56;

373 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 72-73; Wioleta Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' (2009) 44 Europarecht (EuR) 131, 132.

374 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 212.

375 As established in Article 188 Polish Constitution, cf. *Treaty of Lisbon* Section III 1.1.1.; Cf. as well: De Visser, *Constitutional Review in Europe – A Comparative Analysis* 260; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1361.

376 Established in Article 190 (1) Polish Constitution.

after their official publication.[377] In its function as guardian of the Polish Constitution, it furthermore delivered crucial judgements on the relationship between Polish constitutional law and EU law.[378] Consequently, the Tribunal is a key player when considering additional EU integration steps, including fiscal integration.

The Constitutional Tribunal is composed of 15 constitutional judges, which are appointed for 9-year-terms by the Sejm.[379] The Sejm votes on proposals that are either submitted by the *Presidium of the Sejm* or by at least 50 members of the Sejm. A proposed candidate requires the support of a simple majority, with at least half of the parliamentarians participating in the vote.[380] Both the Tribunal's President and the Vice-President are appointed by the Polish President upon proposal of the Assembly of all 15 constitutional judges.[381] In order to be nominated as a constitutional judge, candidates need to be qualified to become a judge at either the Polish Supreme Court or the Highest Administrative Court, which requires *inter alia* at least 10 years of working experience in a legal profession.[382] As could be witnessed during the rule of law crisis in Poland, particularly the low majority requirement for the appointment of constitutional judges (simple majority in parliament) enabled the appointment of controversial, political candidates.

Hence, the Tribunal is an authoritative constitutional court with far-reaching review powers, which can, however, be influenced by political interests given the outlined appointment procedure of constitutional judges – as apparent from the recent crisis in Poland.

4.2.2 Procedural framework – or how to trigger the limit

The main procedure to trigger the *constitutional identity limit* is the initiation of constitutional review of an international or EU agreement following Article 188 No. 1 Polish Constitution.[383] This review can be either initiated *ex ante* by the Polish President following Article 133 (2) Polish Constitution[384] or *ex post*[385]

377 Enshrined in Article 190 (2) and (3) Polish Constitution.

378 For example, the judgment on Polish accession to the EU *Poland's EU Membership* and the *Lisbon*-judgment *Treaty of Lisbon*; Cf. as well: Adam Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' (2011) 48 Common Market Law Review 503, 504;

379 Established in Article 194 (1) Polish Constitution.

380 Established in Article 5 (4) Act on the Polish Constitutional Tribunal, cf. De Visser, *Constitutional Review in Europe – A Comparative Analysis* 207.

381 As laid down in Article 194 (2) Polish Constitution as well as Article 15 (1) and (2) Act on the Polish Constitutional Tribunal.

382 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 212;

383 Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1362.

384 Magdalena Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichts-

by various privileged applicants enumerated in Article 191 (1) No. 1 Polish Constitution. These privileged applicants are *inter alia* the Polish President, the Marshal of the Sejm and of the Senate, the Prime Minister, 50 members of the Sejm or 30 Senators.[386] Both the *ex ante* and the *ex post* constitutional review are conducted *in abstracto*. Interestingly, the Constitutional Tribunal requires that the applicable standing requirements are met throughout the entire proceedings. An application against the Fiscal Compact was declared inadmissible after two of the thirty senators that initiated the challenge in March 2013 transferred to the European Parliament in 2014.[387] Similarly, applications initiated by the Sejm have to be confirmed after general elections by the newly elected Sejm to determine whether the proceedings still enjoy parliamentary support.[388] Hence, the Constitutional Tribunal assesses the admissibility of the application throughout the entire proceedings, and not only at the moment of submission of the application.[389]

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hofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' (2017) 52 Europarecht (EuR) 306, 319; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 107; Nina Półtorak and Sławomir Dudzik, ''The Court of the Last Word.' Competences of the Polish Constitutional Tribunal in the Review of European Union Law' (2012) 15 Yearbook of Polish European Studies 225, 227; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005.' 154; Which constitutes an exclusive prerogative of the Polish President, cf. K 11/13 *Challenge Against the Fiscal Compact* [2013] (Polish Constitutional Tribunal); Cf. as well: Biernat and Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context' 785.

385 *Poland's EU Membership* Section 1.2.; Cf. as well: Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 151-152; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 154.

386 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 107, 118-119; Półtorak and Dudzik, ''The Court of the Last Word.' Competences of the Polish Constitutional Tribunal in the Review of European Union Law' 226-227; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107; Anna Wyrozumska, 'Poland' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011) 471; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 151-152; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 154;

387 Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 319.

388 *Challenge Against the Fiscal Compact*; Cf. as well: Biernat and Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context' 774; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 319; Alicia Hinarejos Parga, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015) 148.

389 Through which difficult political questions might be avoided by the Tribunal, cf. Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von

Moreover, the *constitutional identity limit* could also be triggered by individuals initiating a constitutional complaint.[390] However, the constitutional framework establishes that individuals may only challenge a 'statute or *another normative act*' that violates them in their constitutional rights.[391] The Constitutional Tribunal specified, in this regard, that the term 'normative act' covers EU law acts, both of primary and secondary law, as they have direct implications for the constitutional rights of individuals and therefore qualify as normative acts.[392] Yet, for a constitutional complaint to be admissible individuals have to substantiate that the protection of constitutional rights at the EU-level is considerably lower than the protection awarded by the Polish Constitution.[393] This suggests that the rebuttable presumption exists that the EU fundamental rights protection corresponds to the national protection. Overall, it shifts the burden of proof to the applicants who have to substantiate a lower fundamental rights protection at EU-level, which makes the admissibility of such complaints, particularly against EU fiscal integration steps, relatively unlikely.[394] It further suggests that individual constitutional complaints against future EU fiscal integration will likely be considered inadmissible by the Tribunal.

Overall, this indicates that constitutional review can be triggered by a range of both privileged and non-privileged applicants at different stages. The review can take the form of an abstract *ex ante* or *ex post* constitutional review as well as a concrete *ex post* review. In relation to EU law, and more specifically EU primary law, constitutional review is most commonly initiated by the named privileged applicants in an abstract *ex post* manner.[395] Although the Polish

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Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 320.

390 Based on Article 79 (1) and Article 188 No. 5 Polish Constitution.

391 Cf. wording in Article 79 (1) Polish Constitution; Cf. as well De Visser, *Constitutional Review in Europe – A Comparative Analysis* 151.

392 In general: Półtorak and Dudzik, ''The Court of the Last Word.' Competences of the Polish Constitutional Tribunal in the Review of European Union Law' 246; Cf. in relation to EU primary law: SK 54/05 *Constitutional Complaint Against Protocol No. 4 to the European Agreement* [2007] (Polish Constitutional Tribunal); Cf. as well: Wyrozumska, 'Poland' 471; And in relation to EU secondary law: SK 45/09 *Constitutional Complaint Against Brussels I Regulation* [2011] (Polish Constitutional Tribunal); Cf. as well: Katarzyna Granat, 'Kontrolle des EU-Sekundärrechts durch den polnischen Verfassungsgerichtshof – Anmerkung zum Beschluss des polnischen Verfassungsgerichtshofs vom 16. November 2011, SK 45/09' (2013) 48 Europarecht (EuR) 205, 208.

393 *Constitutional Complaint Against Brussels I Regulation* Section III.8.2. and III.8.5.; Cf. as well Granat, 'Kontrolle des EU-Sekundärrechts durch den polnischen Verfassungsgerichtshof – Anmerkung zum Beschluss des polnischen Verfassungsgerichtshofs vom 16. November 2011, SK 45/09' 213.

394 Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 310;

395 Particularly, because of the political disagreement across Polish political parties, cf. Ibid 310.

Constitution also provides for an *ex ante* assessment, the Polish President did not yet employ this prerogatives in relation to EU integration steps.[396] In all cases, the Tribunal is bound by the application brought before it and may not extend the scope of review *ex officio*.[397]

4.2.3 Constitutional basis of the employed limit

The Polish *constitutional identity limit* is a judicial concept established by the Polish Constitutional Tribunal. Its conceptual basis is the Polish sovereignty doctrine[398] and the Tribunal established that the concept of *constitutional identity* corresponds to the normative, substantive manifestation of sovereignty, which is specified in different provisions of the Polish Constitution.[399] Namely, it covers particularly important sovereign competences that have to remain under the control of Polish institutions laid down in the Preamble as well as Articles 2, 4, 5, 8, 90, 104 (2), 126 (1) Polish Constitution.[400] These provisions protect core constitutional principles, such as sovereignty, (representative) democracy, the rule of law, Polish statehood, the supreme status of the Polish Constitution, the protection of fundamental rights, and national security, as well as the constitutional basis for the conferral of competences to the EU.

Article 90 Polish Constitution can be identified as the main constitutional vehicle for the operationalization of the *constitutional identity limit*. The provision states:

> 'The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.'

Thus, the provision generally entitles the Polish legislator to confer powers to the EU as long as the conferral remains limited 'to certain matters'. The Tribunal interpreted this restriction as a direct acknowledgement of the Polish *constitutional identity* doctrine, as it only allows for a conferral of a limited set

396 The Polish President did, for example, not use the presidential prerogatives in Article 133 (2) Polish Constitution to challenge the *Lisbon Treaty*, cf. Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107;

397 *Treaty of Lisbon* Section III 1.2.1.; Cf. as well: Magdalena Bainczyk, 'Die praktische Anwendung des Unionsrechts in Polen – Anmerkung zum Urteil des EuGH v. 7.3.2017, Rs. C-390/15 (RPO), und zum Beschluss des polnischen Verfassungsgerichtshofes v. 17.5.2017, Akz. K 61/13' (2017) 52 Europarecht (EuR) 725, 740-741.

398 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 248; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 129.

399 *Treaty of Lisbon* Section III. 2.1.

400 Ibid Section III 2.1.; Cf. as well: Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 525.

of competences.[401] In the reading of the Constitutional Tribunal, this implies, on the one hand, that the conferral to the EU has to be specific and limited in scope,[402] and, on the other hand, that the conferral of powers may not occur in competence areas that are covered by Polish *constitutional identity*, as these are not included in the term 'certain matters'.[403] Put differently, according to the Tribunal the wording 'certain matters' indicates that the Polish constitutional legislator wanted to exclude competence areas from the possibility of conferral. Finally, it should be added that although Article 90 (1) Polish Constitution limits the scope for EU cooperation, the provision has to be distinguished from the German *eternity clause*, which entails a scope restriction for constitutional amendments in general.[404]

4.2.4 Substantive core protected by the limit

As concluded, the *constitutional identity limit* imposes substantive restrictions for the conferral of competences. Conceptually, the Constitutional Tribunal derives the limit from the material manifestation of Polish sovereignty, which it bases on Article 90 Polish Constitution.[405] These substantive restrictions are defined in the Tribunal's jurisprudence on a case-to-case basis and mainly depend on the questions raised by the applicants.[406]

Here, the fact that Poland is not yet a member of the Eurozone becomes relevant. Up to this point, the Tribunal did not conduct an elaborate assessment

401 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252.

402 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 250; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 313; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1364.

403 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 525;

404 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 246; Bainczyk, 'Die praktische Anwendung des Unionsrechts in Polen – Anmerkung zum Urteil des EuGH v. 7.3.2017, Rs. C-390/15 (RPO), und zum Beschluss des polnischen Verfassungsgerichtshofes v. 17.5.2017, Akz. K 61/13' 742;

405 *Treaty of Lisbon* Section 2.1.; *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510-511.

406 As highlighted, the Tribunal is bound by the applications brought before it, cf. *Treaty of Lisbon* Section III 1.2.1.; Cf. as well: Bainczyk, 'Die praktische Anwendung des Unionsrechts in Polen – Anmerkung zum Urteil des EuGH v. 7.3.2017, Rs. C-390/15 (RPO), und zum Beschluss des polnischen Verfassungsgerichtshofes v. 17.5.2017, Akz. K 61/13' 740-741.

of the constitutional implications of Polish Eurozone-membership or of the Eurocrisis-measures taken by the Eurozone. It considered these questions as hypothetical and thus inadmissible. As established in Article 90 (1) Polish Constitution, the Polish legislator has to *confer the competence* to enact legally binding measures.[407] However, given that Poland is currently only a Euro-candidate country, no legally binding obligations can directly derive for Poland. The Tribunal emphasized in this regard that Poland is currently merely bound by the EU convergence rules.[408] The Tribunal only noted that accession to the Euro might require a constitutional amendment of Article 227 Polish Constitution.[409]

Despite the absence of specific Euro-related jurisprudence, the Tribunal identified a set of constitutional principles that are particularly important for the functioning of the political system in Poland. These principles are covered by the *constitutional identity limit* (4.2.4.1.) and they are subsequently evaluated in light of EU fiscal integration proposals (4.2.4.2.).

4.2.4.1 Constitutional identity limit: general characteristics

In its *Lisbon*-judgment the Constitutional Tribunal established that Polish *constitutional identity* covers the inalienable institutional prerogatives which are the 'normative manifestation'[410] of the principle of sovereignty. Although the Tribunal explicitly highlighted that it was difficult to provide a detailed list of these inalienable competences, it provided a non-exhaustive overview of 'matters' that fall under a 'complete prohibition of conferral' under Article 90 Polish Constitution.[411] According to the Tribunal, these matters are:

> '[...] decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, *in particular* [emphasis added], the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring

407 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 249; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

408 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.6.1.

409 *Poland's EU Membership* Point 33; Cf. as well: Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 509; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 161.

410 *Treaty of Lisbon* Section III 2.1.

411 Ibid Section III 2.1.; The non-exhaustive character stems from the Tribunal's wording 'in particular', cf. Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201.

> better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences [...].'[412]

Considering this list, one can identify four broad constitutional areas covered, namely the protection of fundamental rights, the preservation of the Polish state, the protection of the state structure as well as retaining *Kompetenz-Kompetenz*.[413] Obviously, this list is formulated in an abstract manner and only covers broad constitutional principles or values, without identifying more specific underlying constitutional provisions or competences connected to them. Moreover, some of the identified matters are already affected by EU law. For example, the protection of fundamental rights is largely regulated at EU-level based on the Charter of Fundamental Rights[414] and General Principles of EU law. The Polish Tribunal explicitly acknowledged the equivalent degree of fundamental rights protection awarded by both legal orders.[415] Therefore, the enlisted constitutional areas are apparently not entirely banned from supranational cooperation, which is why the Tribunal's wording referring to a 'complete prohibition' is misleading. Instead, the Tribunal seems to suggest that the ultimate control or the 'heart of the matter'[416] remains at the Polish constitutional level. This can be observed in relation to fundamental rights protection, where the Tribunal employs the rebuttable presumption that the EU protection corresponds to the Polish Constitution.[417] This is equally visible in relation to the *constitutional identity* doctrine, where the Tribunal identified the EU protection of national (constitutional) identities, enshrined in Article 4

412 *Treaty of Lisbon* Section III 2.1.

413 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

414 To which Poland negotiated Protocol 30, however, the CJEU clarified that the Protocol did not alter the obligation of Poland to comply with the Charter, cf. Joined Cases C-411/10 and C-493/10 *N.S. and M.E. et al. v. Minister for Justice, Equality and Law Reform* [2011] (CJEU) para 120; Cf. as well: Craig and de Búrca, *EU Law Text, Cases, and Materials* 395.

415 As, for example, apparent from the outlined admissibility assessment of individual constitutional complaints on EU-related matters, cf. *Constitutional Complaint Against Brussels I Regulation* Section III.8.5.; Cf. as well: Granat, 'Kontrolle des EU-Sekundärrechts durch den polnischen Verfassungsgerichtshof – Anmerkung zum Beschluss des polnischen Verfassungsgerichtshofs vom 16. November 2011, SK 45/09' 213.

416 *Treaty of Lisbon* Section III 2.1.

417 *Constitutional Complaint Against Brussels I Regulation* Section III.2.2.; *Poland's EU Membership* Point 23; Cf. as well: Granat, 'Kontrolle des EU-Sekundärrechts durch den polnischen Verfassungsgerichtshof – Anmerkung zum Beschluss des polnischen Verfassungsgerichtshofs vom 16. November 2011, SK 45/09' 213.

(2) TEU, as an 'equivalent' concept.[418] Similarly to its findings on fundamental rights, the Tribunal concluded that the protection enshrined in Article 4 (2) TEU corresponds to the constitutional concerns of the Member States, which is why this EU provision constitutes a safeguard for Polish *constitutional identity*.[419] Nevertheless, both concepts remain independent from each other and the Constitutional Tribunal retains the ability to employ the *constitutional identity limit* in case the EU protection is no longer deemed equivalent.[420]

Furthermore, when considering the matters covered by the *constitutional identity limit* it can be observed that the major concern seems to relate to the preservation of the Polish state, including its sovereign decision-making abilities based on a democratic structure and guided by the protection of subjective constitutional rights.[421] This corresponds to the Tribunal's conclusions on the Polish EU membership where it established that Article 90 (1) Polish Constitution did '[...] not [authorize] the delegation of competences to such an extent that it would signify the inability of the Republic of Poland *to continue functioning as a sovereign and democratic state* [emphasis added].'[422] Hence, the Tribunal clarified that the existing constitutional framework in Article 90 Polish Constitution, which forms the basis for the *constitutional identity limit*, restricts the scope of EU integration. Notably, the EU may not develop into an own state, thereby transforming Poland into a (federal) state entity and depriving it of its statehood.[423]

Taken together, this suggests that the Tribunal mainly shields Polish statehood from EU integration through the *constitutional identity limit*. To that end, it identified a list of core competences that may not be transferred to the EU. The Tribunal infers this restriction from the wording in Article 90 Polish

418 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 254; Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 170; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 253, 258; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 501.

419 *Treaty of Lisbon* Section III 2.2.

420 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 254-255.

421 *Treaty of Lisbon* Section 2.5.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251-253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252-253.

422 *Poland's EU Membership* Point 8.

423 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251-253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252-253.

Constitution, which limits the conferral to 'certain matters'.[424] However, the specific constitutional matters that the Tribunal includes in its *constitutional identity limit* remain abstract and they entail only limited guidance for EU fiscal integration proposals. The subsequent analysis therefore focuses on the principle of sovereignty, which forms the conceptual-normative basis of the Polish *constitutional identity limit*.

4.2.4.2 Polish sovereignty

The assessment of the Polish sovereignty doctrine is divided into a general outline of the principle and a following assessment of the material competences covered by it.

– *General conception of Polish sovereignty*

The concept of sovereignty is of particular historic importance for the Polish constitutional order. Specifically, during the Communist time, the influence of the Soviet Union reduced the Polish political decision-making abilities considerably. Poland was only able to claim political autonomy and sovereignty over its own national decisions in the aftermath of the Communist past and after the breakdown of the Iron Curtain.[425] This historic consideration might explain the restrictive framework for the conferral of powers to the supranational level laid down in Article 90 Polish Constitution. As highlighted, Article 90 Polish Constitution is restricted to 'certain matters'[426] and the procedural requirements for the conferral of competences under Article 90 (1) Polish Constitution are stricter than for constitutional amendments.[427] At

424 *Treaty of Lisbon* Section III.2.5.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510.

425 Christoph Grabenwarter, 'National Constitutional Law Relating to the European Union' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2. edn, Hart Publishing and C. H. Beck 2009) 98; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 393.

426 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

427 As laid down in Article 235 Polish Constitution, cf. Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 249-250; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 312; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107.

the same time, Article 90 Polish Constitution is an expression of the sovereign decision to open the Polish Constitution and to allow for supranational cooperation.[428] Both, the historic importance of sovereignty in the Polish constitutional order and the constitutional decision to allow for supranational cooperation, albeit under strict conditions, are reflected in the jurisprudence of the Polish Constitutional Tribunal.

Notably, the Tribunal concluded that the conferral of competences to the EU-level following Article 90 Polish Constitution constituted in itself an exercise of sovereign powers.[429] It furthermore stressed that the conferral of competences did not entail a transfer of sovereignty, but that it rather constituted a revocable and democratically-made restriction of Poland's ability to take unilateral decisions on the conferred matters.[430] Hence, the conferral only entails a substantive limitation of national sovereign competences to allow for joint action at the supranational level. It, however, does not constitute a loss of these competences to the EU or a challenge to the supreme status of the Polish Constitution, which is further clarified in Article 8 (1) Polish Constitution.[431] Therefore, the principle of sovereignty imposes at least two requirements for EU integration steps.

First, the Polish legislator's decision is constitutive for the conferral, as enshrined in Article 90 (1) Polish Constitution. Hence, the EU can only exercise competences that were attributed to it by the Polish legislator. Obviously, the EU's principle of conferral mirrors this Polish constitutional requirement accordingly.[432] As a conceptual opposite, the Tribunal further requires that

428 Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241.

429 Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 27; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 33; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510-511; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157; Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

430 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 250; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32, 34; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498-499; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 511.

431 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 250-251; As the Tribunal already pointed out in its judgment on Polish EU accession, cf. Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 509.

432 *Treaty of Lisbon* Section III.2.2.; Cf. as well: Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 500.

Poland can terminate the supranational cooperation, which is enshrined in Article 50 TEU.[433] This implies that Poland retains the final say over the extent of EU commitments.

Second, the conferral only entails the exercise of the conferred sovereign competences and not the loss of the competence itself. Therefore, the conferral is only a restriction on the exercise of sovereign powers by Polish institution for the benefit of joint EU action. Conceptually, this can be secured by characterizing the EU as a derived legal order, which is based on the Polish Constitution.[434] For EU fiscal integration proposals, this implies that the approval of the Polish legislator for the conferral of powers following Article 90 (1) Polish Constitution is constitutive. Furthermore, the derived status of the EU legal order and the Member States' status as 'Masters of the Treaties' may not be altered by such integration steps. Thus, the sovereign decision-making space available to the Polish legislator has to be preserved and respected by EU fiscal integration proposals.

At the same time, the Constitutional Tribunal established in its jurisprudence the dynamic and evolutionary character of the principle of sovereignty.[435] This evolutionary potential can be triggered by EU cooperation, which is introduced into the Polish constitutional order by a sovereign Polish decision.[436] Obviously, if the Polish Constitution allows for an opening of the Polish constitutional order the principle of sovereignty is required to evolve, for example by accepting the exercise of sovereign competence at the supranational level.[437] The Tribunal even highlighted that the 'modern' interpretation of the principle of sovereignty requires international cooperation in order to achieve constitutional commitments laid down in the Polish Consti-

433 *Treaty of Lisbon* Section III.2.1.; Cf. as well: Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156; Article 90 Polish Constitution is seemingly based on the assumption that the conferral is revocable, cf. Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

434 *Treaty of Lisbon* Section III.2.1.

435 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; Cf. as well: *Treaty of Lisbon* Section III.2.1.; Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

436 Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241.

437 Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 34; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498-499.

tution.[438] Here, once again the protection of fundamental rights is a good example, which in a globalized world requires, according to the Tribunal, the opening of the domestic order to EU and international commitments in order effectively protect fundamental rights.[439] Given the evolutionary potential of Polish sovereignty, and given that sovereignty constitutes the basis of Polish *constitutional identity*, it seems convincing to argue that the *constitutional identity limit* is – just as the underlying principle of sovereignty – open to evolve. From that perspective, the Polish *constitutional identity limit* is not a fixed, inflexible substantive core of constitutional principles, but it is rather a concept that is open to future development.

Furthermore, the Tribunal explicitly recognized that a 'modern' interpretation of sovereignty requires international and supranational cooperation in order to comply with national constitutional duties. One might apply the same logic to *national constitutional identity* and submit that a protection of core constitutional values is no longer only a domestic matter but instead requires supranational cooperation. The potential stabilizing benefits of EU safeguard for national constitutional values can be seen with regard to the current rule-of-law-crisis in Poland. Here the EU carefully monitors and tries to prevent the deterioration of this core constitutional value, which is equally included in the Polish *constitutional identity limit*.

Overall, this indicates that the principle of sovereignty is a historically important constitutional concept, which is reflected in the constitutional basis for supranational cooperation in Article 90 Polish Constitution. This provision allows for a limited transfer of the exercise of sovereign power. According to the Constitutional Tribunal, the fact that supranational cooperation is based on the sovereign Polish decision to transfer competences and given that Poland retains the possibility to withdraw suggest that Poland retains full sovereignty. At the same time, the Tribunal recognized that the understanding of sovereignty has to evolve, which suggests that also the Polish *constitutional identity limit* is receptive to such evolution.

438 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; Cf. as well: Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

439 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 271-272.

– *Specific material dimension of sovereignty covered by constitutional identity limit*

In fact, the Constitutional Tribunal equally developed a material dimension of the principle of sovereignty. This material dimension is mainly a competence-based conception of Polish sovereignty.[440] In its *Lisbon*-judgment the Tribunal established the subsequent list of particularly important domestic competences, that are accordingly covered by this material dimension. Following this judgment, these competences are:

> '[...] having the exclusive power of jurisdiction as regards the territory of a given state and its citizens, conducting foreign policy, deciding about war and peace, freedom as to [recognizing] other states and governments, maintaining diplomatic relations, deciding about military alliances and membership in international political [organizations], conducting an independent financial, budget and fiscal policies [...].'[441]

Thus, the Constitutional Tribunal identified a wide field of important competences of Polish institutions that are the expression of Polish sovereignty and that constitute the Polish *constitutional identity*.[442] As previously already submitted in relation to the matters listed under the *constitutional identity limit*,[443] this material dimension of sovereignty can hardly be seen as completely off-limit. Clearly, EU integration already triggered constitutional transformation in these areas, without putting Polish sovereignty and *constitutional identity* into question. This is equally recognized by the Tribunal, which subsequently referred to the previously outlined evolution of sovereignty that moved away from absolute and strict sovereignty claims to a modern or

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440 Which can be deduced from the competence-catalogue that the Tribunal established, cf. *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499.

441 *Treaty of Lisbon* Section III 2.1.

442 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; The similarity with the German catalogue may be pointed out here, cf. *Lisbon-judgment* para 252.

443 Cf. *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

contemporary understanding of this constitutional doctrine.[444] Therefore, not every conferral of competences, which affects these competence areas, is seen as a violation of Polish sovereignty. One may conclude that the areas enumerated by the Tribunal may serve as guidance, together with the previously outlined core constitutional matters, when ruling on the constitutionality of competence conferrals to the EU-level.[445]

Considering the prospect of EU fiscal integration proposals, the mentioned 'conducting an independent financial, budget and fiscal policies'[446] as protected competence area seems particularly relevant. A more integrated Eurozone would most likely require a conferral of competences in these areas. However, the Tribunal identified all three areas as particularly important competences under the Polish sovereignty doctrine.[447] Based on this finding, one may conclude that EU fiscal integration proposals could potentially conflict with the competence-based material conception of Polish sovereignty. Yet, given the evolutionary nature of the sovereignty doctrine, and given that supranational cooperation in the identified three areas might be deemed necessary, the Tribunal could consider the conferral of these competences to be less problematic by invoking the modern interpretation of national sovereignty.[448] Furthermore, the Tribunal already indicated that Polish Eurozone-membership might require internal constitutional amendments,[449] which implies that the

444 As recognized by the Tribunal: *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; And as highlighted in the academic writing, cf. Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

445 As noted by the Tribunal in relation to the effective protection of fundamental rights, cf. *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 271-272.

446 Cf. wording of the Tribunal: *Treaty of Lisbon* Section III 2.1.

447 Ibid Section III 2.1.; The Constitutional Tribunal was confronted with the question whether the Fiscal Compact eroded fiscal and economic competences in a manner incompatible with the Polish Constitution, which was clearly inspired by this benchmark, however, the Tribunal did not have to answer the question due to the inadmissibility of the action, cf. *Challenge Against the Fiscal Compact*; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314-315.

448 Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

449 Specifically, the amendment of Article 227 Polish Constitution on the National Central Bank, cf. *Poland's EU Membership* Point 33; Cf. as well: Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 509; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish

conferral required for such membership is generally attainable under the Polish sovereignty doctrine.

When considering the overall Polish constitutional framework, the Tribunal's concern for financial, budget and fiscal policies seems to correspond with the institutional prerogatives enshrined in Articles 146 and 219 Polish Constitution, as highlighted by *Bainczyk*.[450] Article 146 Polish Constitution establishes, *inter alia*, the competence of the Polish Ministerial Council to implement the domestic economic policy. Article 219 Polish Constitution establishes the prerogative of the Sejm to adopt the annual budget as well as the different budgetary commitments under this state budget. In proceedings against the ESM-Treaty and the amendment of Article 136 (3) TFEU, the applicants submitted that European Council Decision 2011/199/EU violated these two constitutional provisions. However, the Tribunal did not rule on the substance of these claims, given that the applicants did not further elaborate on the possible constitutional conflict that could arise.[451] Nevertheless, it seems that these institutional prerogatives could be seen as specific constitutional concretizations and thus fall under the essential competences covered by Polish sovereignty.

At the same time this remains indicative. For now, the Polish Constitutional Tribunal did not mention these two provisions when enumerating the constitutional core protected by the *constitutional identity limit* – which might stem from the fact that Poland is not yet a Eurozone member and therefore the Tribunal never had to consider the implications of a transfer of competences in financial, fiscal, and budgetary matters in detail. In all cases, it seems likely that a conferral in these areas will undergo close constitutional scrutiny by the Polish Constitutional Tribunal.

4.2.4.3 Interim conclusion

Overall, the *constitutional identity limit* shields core national competences, that are crucial for the sovereign Polish political democratic process, against the transfer to the EU-level. To that end, the Tribunal identified four core constitutional matters, which are described as inalienable institutional competences. These matters cover the protection of fundamental rights, the preservation of Polish statehood, the defending of the constitutional structure of the state

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Contitution. Decision of 11 May 2005.' 161.

450 Which were raised in constitutional proceedings on the ESM, cf. *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

451 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 7.7.; Cf. as well: Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

as well as the continuous existence of the Polish Constitution itself.[452] However, the Tribunal did not point out specific constitutional or institutional features that had to be preserved in the process of conferring competences to the EU.

Further guidance on the substantive content of the *constitutional identity limit* may be derived from the sovereignty doctrine, which constitutes the conceptual basis of this limit.[453] Here, the assessment revealed that the doctrine protects the initial decision to confer competences to the EU and the conception of the EU as derived legal order. Furthermore, the Tribunal adopted a modern interpretation of sovereignty, which allowed for the evolution of the doctrine from an absolute, strict reading to a more open, EU-friendly understanding.[454] Given the intrinsic interconnection between sovereignty and *constitutional identity*, this evolutionary potential will likely apply to the *constitutional identity limit*.

Finally, it was illustrated that budgetary, financial, and fiscal competences are characterized by the Tribunal as traditionally important sovereign competence areas,[455] which is of particular relevance for EU fiscal integration steps. Yet, the Tribunal did not specify any institutional prerogatives that fall under the *constitutional identity limit*. Until now, the Tribunal has refused to engage with the compatibility of Eurozone-obligations with the Polish constitutional order, given their now only hypothetical nature. Therefore, no detailed constitutional jurisprudence on this matter exists in Poland.

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452 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158;

453 *Treaty of Lisbon* Section III.2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 503; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 501; Claes, 'National Idenity: Trump Card or Up for Negotiation?' 128; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510-511.

454 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; Cf. as well: Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 32; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

455 *Treaty of Lisbon* Section III.2.1.; Cf. as well: Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 499.

4.2.5 Longevity and absoluteness of the constitutional limit

Ultimately, the question emerges whether the substantive content protected by the Polish *constitutional identity limit* can be amended. Considering the constitutional framework itself, Article 90 (1) Polish Constitution explicitly limits competence conferrals to 'certain matters'.[456] Furthermore, the Polish Constitution treats the conferral of competences to the international or the EU-level as a particularly important and yet highly restricted matter.[457] This is visible from the procedural requirements that Article 90 Polish Constitution establishes for this conferral. Conferring competences to the EU requires the support of a two-thirds majority in both the Polish Sejm and the Polish Senate or the approval by referendum. These are the highest procedural thresholds that the Polish Constitution imposes. Even the requirements for amending the Polish Constitution itself are less strict.[458] At the same time, and although the procedural requirements for the conferral of competences are stricter than the requirements for constitutional amendments, a conferral of powers may not violate the constitutional text itself. Thus, competence conferrals might require a prior constitutional amendment.[459] The emerging question is therefore whether Article 90 (1) Polish Constitution, and specifically the mentioning of 'certain matters' may be amended by the constitution-amending legislator to possibly overcome the *constitutional identity limit*.

Until now, the Polish Constitutional Tribunal did not explicitly have to rule on this question.[460] Nonetheless, certain conclusions may be drawn from the Tribunal's established constitutional jurisprudence. In the first place, the Constitutional Tribunal underscored that the constitution-amending legislator had three alternatives when confronted with a conflict between national constitutional law and new EU primary law obligations. First, the legislator

456 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510.

457 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 249-250.

458 Cf. the framework for constitutional amendments in Article 235 Polish Constitution, Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107; Given these strict procedural requirements, treaties ratified following Article 90 Polish Constitution have a high degree of legitimacy, cf. Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 148.

459 Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 155.

460 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244.

could change the Polish Constitution. Second, the legislator could aim at changing the EU commitment. Or third, the legislator could decide to withdraw from the EU altogether following Article 50 TEU.[461] In fact, underscoring these three possibilities emphasizes the sovereign abilities of the Polish legislator.[462] Put differently, excluding certain competence areas from the constitution-amending legislator's powers might result in a limitation of the sovereign decision-making process in Poland. Therefore, it seems convincing to argue that the Polish constitution-amending legislator can overcome the *constitutional identity limit* by changing the Polish Constitution. Such changes might entail a modification of the Polish sovereignty doctrine, the framework for conferring powers and most notably Article 90 Polish Constitution. The Constitutional Tribunal already indicated that a future Eurozone membership might require a constitutional amendment to Article 227 Polish Constitution,[463] which suggests that this constitutional amendment is constitutionally feasible. Otherwise, the Polish Constitutional Tribunal would have pronounced the absoluteness of the *constitutional identity limit*, as for example occurred in Germany.[464]

The absence of such explicit mentioning suggests that the Polish limit is not absolute and may in fact be overcome following the prescribed framework, which would entail a constitutional amendment as well as the conferral under Article 90 Polish Constitution. Particularly in light of the political divide in the Polish party system[465] such support might be hard to achieve. Furthermore, constitutional amendments are very rare in Poland. Between 1997 and 2019 only two constitutional amendments were enacted on less far-reaching matters.[466] Therefore, although the constitution-amending legislator is seem-

461 Ibid 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157.

462 Czaputowicz, 'Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal' 33; Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241; also expressed in Article 90 Polish Constitution, which indicates that conferring powers to an international or supranational level is not diminishing Polish sovereignty, cf. Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

463 *Poland's EU Membership* Point 33; Cf. as well: Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 161.

464 As outlined by the German Constitutional Court, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* paras 230, 240; Cf. as well: Herdegen, 'Art. 79 GG' para 60; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 177.

465 Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 310.

466 Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 42.

ingly competent to overcome the *constitutional identity limit*, the required constitutional amendment might be politically difficult to achieve.

4.3 The rule of law at risk in Poland: The independence of the Constitutional Tribunal

After having analyzed the established Polish constitutional approach to possible EU fiscal integration steps, the subsequent outline constitutes a conceptual caveat. Namely, the Polish rule-of-law-crisis erupted in the aftermath of the parliamentary elections in late 2015 during which the Polish PiS-party gained an absolute majority in the Sejm (235 out of 460 seats) and the Polish Senate (61 out of 100 seats).[467] Since 2016, this process is critically monitored by the EU as well as by the Venice Commission of the Council of Europe.[468] The political crisis also received great academic attention.[469] The following analysis does not claim to be comprehensive but will instead focus on the impact of this crisis on the Polish Constitutional Tribunal. In particular, three significant actions taken by the Polish Parliament and the Polish Government will be outlined to assess the potential impact of the ongoing transformation on the discussed Polish constitutional approach towards the EU.[470]

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467 Jankovic, 'Polish Democracy Under Threat? An Issue of Mere Politics or a Real Danger?' 60; Tomasz Tadeusz Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' (2016) 53 Common Market Law Review 1753, 1754; Although, the PiS-party was apparently only elected by 1/5 of the eligible voters during the 2015 elections (in light of the overall turnout and the spread of the vote), cf. Radoslaw Markowski, 'Creating Authoritarian Clientelism: Poland After 2015' (2019) 11 Hague Journal on the Rule of Law 111, 130.

468 At the EU-level, the monitoring started with the initiation of a dialogue with Poland under the Rule of Law framework, for an outline cf: European Commission, *Press Release: Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control* (European Commission 3 April 2019); Moreover, the Venice Commission issued six critical Opinions on Poland between 2016 and 2020, the first concerned the amendments made to the Constitutional Tribunal Act, cf. *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland* [2016] (Venice Commission); For a general overview, cf. Sadurski, 'Constitutional Crisis in Poland' 262; Jankovic, 'Polish Democracy Under Threat? An Issue of Mere Politics or a Real Danger?' 51.

469 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); Miroslaw Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' (2019) 11 Hague Journal on the Rule of Law 417; Marcin Matczak, 'Poland's Rule of Law Crisis: Some Thoughts' (2019) 11 Hague Journal on the Rule of Law 407; Mattias Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice After LM' (2019) 15 European Constitutional Law Review 17; Sadurski, 'Constitutional Crisis in Poland'.

470 Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 57-58; Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' 547-548; Hatje and Schwarze, 'Der Zusammenhalt der Europäischen Union' 179-181; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 5-6.

In the first instance, the appointment of several constitutional judges raises serious concerns. In 2015, the Sejm of the seventh legislative term elected five new constitutional judges, shortly before the 2015 parliamentary elections. However, at that moment only three constitutional seats were vacant, the two additional seats were only becoming vacant during the next legislative term after the 2015 parliamentary election. In response, the newly elected Sejm under control of a new political majorities annulled the nomination of all five constitutional judges, and elected instead five new judges. These newly elected five judges were subsequently appointed by the Polish President.[471] In a judgment delivered by the Constitutional Tribunal on the matter, the constitutional bench found that the original nomination of the three judges, who were filling the seats that became vacant during the seventh legislative term, was constitutional. However, the nomination of the two additional judges, whose seat only became vacant during the eighth legislative term, was considered unconstitutional.[472] Despite a clear verdict from the Constitutional Tribunal, the judgment was not followed by the government. Later, after the composition of the constitutional bench shifted in favor of the PiS-party, the Tribunal even reverted its initial judgment and confirmed the appointment of all five constitutional judges appointed by the Sejm of the eighth legislative term.[473] Regarding this second judgment, two points may be raised. First, the shift in the political affiliation of the constitutional judges obviously affected the final verdict. In its decision, the Constitutional Tribunal altered established, long-standing constitutional jurisprudence in relation to Article 194 (1) Polish Constitution,[474] which illustrates a severe risk, namely that constitutional jurisprudence may be disrupted

471 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 65-66; Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 57; Brauneck, 'Rettet die EU den Rechtsstaat in Polen?' 1424; Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' 1755-1757.

472 K 34/15 *Appointment of Constitutional Judges* [2015] (Polish Constitutional Tribunal); Cf. as well Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 66; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 6; Brauneck, 'Rettet die EU den Rechtsstaat in Polen?' 1424; Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' 1755.

473 Namely, in the decision K 1/17 *Constitutionality of Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal* [2017] (Polish Constitutional Tribunal); As pointed out by, Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 67; Cf. as well: Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 57; Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 264.

474 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 67.

by political actors which exercise significant influence on the composition of the Polish Constitutional Tribunal. Second, the latter case concerned *indirectly* the nomination of the controversial three constitutional judges from 2015. The judgment validated their appointment, however, two of these *controversial* judges were part of the deliberations and ruled therefore on their own case.[475] Overall, this instance demonstrates the risk that constitutional courts are confronted with, namely the political interference in their independent work through the composition of the constitutional bench.

The second instance concerns the appointment of Judge *Julia Przyłêbska* as (current) President of the Constitutional Tribunal, which was equally controversial. Judge *Przyłêbska* was appointed as President of the Constitutional Tribunal by the Polish President, without having been properly elected by the General Assembly of Constitutional Judges, as required by both Article 194 (2) Polish Constitution and Articles 15 (1) and 14 (1) No. 3 Act on the Polish Constitutional Tribunal.[476] Notably, the General Assembly of Constitutional Judges did not have a quorum to issue a formal nomination.[477] Nevertheless, the Polish President appointed *Przyłêbska* as president, only one day after receiving a letter informing him about her apparent election which was criticized by constitutional scholars.[478] This instance illustrates again the emerging political interference in the constitutionally established work of the Constitutional Tribunal as well as the limited means to of the Tribunal to resist against such political influence. This illustrates how the Polish President and the Government deliberately cooperated in the disregarding of the applicable rules, which resulted in a favorable outcome for the PiS-governmental majority.[479]

The third instance concerns the refusal of the Polish Government to publish the judgements of the Constitutional Tribunal. The Polish Constitution prescribes that constitutional judgments have to be published in order to acquire binding legal effect, as enshrined in Article 190 (2) and (3) Polish Constitu-

475 Ibid 67; Sadurski, *Poland's Constitutional Breakdown* 63-64.

476 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 69; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 17.

477 Brauneck, 'Rettet die EU den Rechtsstaat in Polen?' 1424; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 17; Tina de Vries, 'Bedrohungen für die Unabhängigkeit der Justiz in Polen – Teil 1' (2018) 27 Wirtschaft und Recht in Osteuropa (WiRO) 105, 106.

478 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 69; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 17-18.

479 Namely, that the Tribunal seemingly rules increasingly in line with the governmental positions, cf. Sadurski, *Poland's Constitutional Breakdown* 84-86; Castillo-Ortiz, 'The Illiberal

tion.[480] The refusal to publish certain judgments in the official journal therefore implied that these judgments could not acquire binding force. Sufficient here to point out that the refusal to publish a selection of judgments indicates that the government appears to have conducted a political 'quality control' – thereby deciding which judgments should acquire binding legal effect. Obviously, this significantly hinders the work of the Constitutional Tribunal and entails a challenge to the constitutionally enshrined institutional balance of powers.[481] One result was that the Tribunal could no longer perform its core task, namely, to supervise the constitutionality of parliamentary and governmental actions.

These three instances illustrate clear political interference with the Polish Constitutional Tribunal. Given that the constitutional judges are appointed by the Sejm in Poland and given the absolute majority that the governing PiS-party commands in the Sejm, candidates with clearly political affiliations have been elected in the past years. These apparently politically motivated appointments affect the work of the Tribunal considerably, as, first of all, established constitutional jurisprudence is questioned and, in addition, the Constitutional Tribunal appears to side increasingly with the governing party, which, according to *Sadurski*, transformed the Tribunal into a 'government's ally'.[482] Obviously, this has implications for EU law. On the one hand, the current governing party has been critical towards the EU,[483] which might be increasingly reflected in the jurisprudence of the Tribunal, too. On the other hand, the established constitutional approach towards the EU might no longer be imperative, as the Tribunal could decide to alter its constitutional appraisal of EU integration steps significantly.

Considering the content covered by the *constitutional identity limit*, it could be argued that the current internal political interferences with the judiciary – which is established as independent institutional branch of the state accord-

Abuse of Constitutional Courts in Europe' 60; Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' 547.

480 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 74; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 13.

481 Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 74; Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' 547; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 13.

482 Sadurski, *Poland's Constitutional Breakdown* 85; Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 264; Thereby, the Tribunal lost its core function as guardian of the Polish Constitution, cf. Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' 417; The Constitutional Tribunal is employed as a 'tool for constitutional mutation', cf. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 69.

483 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 246; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156-157.

ing to Articles 45 (1), 173, 178 (1), 195 (1) and 199 (3) Polish Constitution – undermine core constitutional principles, namely the rule of law, democracy and the separation of powers.[484] As indicated, the EU can offer an external safeguard and become a supplementary guarantor of such constitutional principles. These foundational principles are mainly enshrined in Article 2 TEU, and largely correspond with the principles covered by the Polish *constitutional identity limit*.[485] This illustrates that the EU legal order can have an additional protective value for core constitutional principles and thereby function as an external stabilizer for national *constitutional identity*.

Furthermore, considering the analysis of the Polish *constitutional identity limit* it seems that adverse constitutional developments within one Member States have not only internal consequences, but also impact the EU and its other Member States. Obviously, these negative external impacts are equally applicable to EU fiscal integration proposals. Given the dismantling of the Polish Constitutional Tribunal, it is hardly predictable what substantive limits EU fiscal integration proposals are confronted with in the future. Hence, these interferences reduce the reliability and predictability of the Polish constitutional system in EU matters. In addition, they put into question whether Poland can become a reliable member of the Eurozone, which is increasingly dependent on predictable (and enforceable) constitutional commitments.

4.4 Conclusion

The Polish *constitutional identity limit* was established by the Constitutional Tribunal. The limit is rooted in the Polish basis for the conferral of competences to the EU as well as the Polish sovereignty doctrine. More specifically, the Tribunal established in its *Lisbon*-judgment that the *constitutional identity limit* covers the inalienable institutional competences that constitute the 'normative manifestation' of the principle of sovereignty.[486] Thus, *constitutional identity* and the principle of sovereignty are closely interconnected in the Polish constitutional jurisprudence. Furthermore, the Tribunal identified budgetary, financial and fiscal policy decisions as particularly important sovereign competences.[487] It however equally indicated that the interpretation of sovereignty

484 Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland' 418.

485 As also stressed by the Polish Constitutional Tribunal itself, cf. *Treaty of Lisbon* Section III 2.2.; Cf. as well Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 255-256.

486 *Treaty of Lisbon* Section III 2.1.

487 Ibid Section III 2.1.; *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1. Treaty of Lisbon Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253;

evolves, particularly in light of increasing international and supranational cooperation in a globalizing world.[488] This might indicate an openness towards more integrated forms of supranational cooperation.

When applying this *constitutional identity limit* to EU fiscal integration proposals, the conclusions are only indicative, as Poland is not yet a member of the Eurozone.[489] First, EU fiscal integration proposals affect competence areas that are particularly important under the principle of sovereignty.[490] Second, the conception of the EU as a derived legal order, the required constitutive approval of the Polish Parliament for the conferral of powers to the EU-level, the preservation of *Kompetenz-Kompetenz* in Poland and the ability of Poland to withdraw from EU cooperation jointly guarantee according to the Tribunal that Poland retains its statehood and that EU cooperation is not challenging the Member States as sovereign entities.[491] Given that the material content of sovereignty is currently evolving, it is possible that the required conferral of competences in budgetary, financial and fiscal matters is finally deemed permissible under the *constitutional identity doctrine*.[492] This illustrates that the *constitutional identity limit* is flexible, and the protected content crucially depends on the precise constitutional findings of the Constitutional Tribunal.

Regardless of whether the Tribunal identifies a conflict between EU fiscal integration steps and the *constitutional identity limit*, it is to be expected that

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Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252.

488 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; Cf. as well: Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 26; Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 498; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 200.

489 Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 249; Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321.

490 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 129; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201.

491 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 250-251; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 509.

492 *Treaty of Lisbon* Section III 2.1.; *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland - Is the Emperor Putting on the Old Clothes of Sovereignty' 253; Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 252.

the Tribunal will find a conflict between such EU integration and the text of the Polish Constitution which would require a constitutional amendment. In particular, Article 146, 219 and 227 Polish Constitution were previously identified as constitutional provisions that might conflict with membership in the Eurozone.[493] It was already emphasized that such constitutional amendments are practically rare[494] and the conferral of powers will depend on both the procedural requirements in Article 90 and 235 Polish Constitution. At the same time, given that the procedural hurdles for the conferral of powers in Article 90 Polish Constitution compared to the procedural requirements in Article 235 Polish Constitution, it seems likely that a constitutional amendment can be adopted in case the conferral of power is supported by the required majority.

Therefore, it was concluded that even a conflict of the Polish *constitutional identity limit* with EU fiscal integration proposals might be overcome by amending the Polish Constitution, for example Article 90 (1) Polish Constitution.[495] This corresponds in the first place with the Tribunal's established jurisprudence.[496] What is more, the combined effort of amending the Polish Constitution following Article 235 and subsequently the conferral of competences following Article 90 Polish Constitution would require compliance with high constitutional procedural hurdles and therefore vest this undertaking with a high level of democratic legitimacy.[497] Thus, it seems that the *constitutional identity limit* does not impose absolute limits for Polish participation in EU fiscal integration steps.[498] Instead, such integration steps mainly face a political-procedural hurdle, as attaining the required majorities might prove challenging. All these conclusions ultimately depend on the future course of the Constitutional Tribunal, which is interfered with in its work by other Polish institutions driven by political power games. This highlights a risk when

493 *Poland's EU Membership* Point 33; *Challenge Against the Fiscal Compact* Section 7.7.; Cf. as well: Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 161.

494 Granat and Granat, *The Constitution of Poland – A Contextual Analysis* 42.

495 Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1364.

496 *Poland's EU Membership* Point 13; Cf. as well: Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Contitution. Decision of 11 May 2005.' 157; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1364.

497 Particularly, Article 90 (2) Polish Constitution presupposes broad political support, cf. Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 150.

498 Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 253.

relying on strong (independent) constitutional courts for determining the constitutional feasibility of EU fiscal integration.

Constitutional Identity Classification Board for Poland
1 ***Which institutional actor enforces the constitutional limit?*** The Polish Constitutional Tribunal established the *constitutional identity limit* in Poland. The Tribunal takes binding decisions on the compatibility of international agreements with the Polish Constitution (Articles 188 (1) and 190 (1) Polish Constitution).
2 ***How can the constitutional identity limit be triggered?*** The *constitutional identity limit* can be triggered either *ex ante* by the Polish President, or *ex post* by a set of privileged applicants enlisted in Article 190 (1) Polish Constitution, including Members of the Sejm or the Senate.
3 ***What is the constitutional basis of the constitutional identity limit?*** The Polish Constitutional Tribunal developed the *constitutional identity limit* on the basis of the normative manifestation of the Polish sovereignty doctrine, which are specified in the Preamble as well as Articles 2, 4, 5, 8, 90, 104 (2), 126 (1) of the Polish Constitution. Besides, the Tribunal employs Article 90 (1) Polish Constitution as constitutional basis for the limit.
4 ***What constitutional principles and substantive content are covered?*** The Polish *constitutional identity limit* protects *inter alia* Polish statehood, the state structure, the status of the constitution and fundamental rights. This protection mainly translates into formal safeguards, including the principle of conferral, the preservation of *Kompetenz-Kompetenz*, the derived status of the EU and the withdrawal possibility. In addition, the Tribunal emphasized the evolutionary potential of the principle of sovereignty.
5 ***How – if at all – can the constitutional identity limit be overcome (longevity/ absoluteness of the limit)?*** As it stands, the Polish Constitutional Tribunal did not establish the absoluteness of the *constitutional identity limit* which suggests that the constitution-amending legislator is able to overcome any conflict with EU fiscal integration proposals.

Figure 14: Constitutional Identity Classification Board for Poland

5 Research findings on German constitutional identity limit

The German *constitutional identity limit* is based on the German *eternity clause* enshrined in Article 79 (3) Basic Law, which equally applies to EU integration steps according to Article 23 (1) (3) Basic Law. From this, the German Constitutional Court, as most authoritative interpreter of the German constitutional text, developed an absolute substantive limit for EU integration. When considering EU fiscal integration proposals, the most apparent conflict could arise with

overall budgetary responsibility, which the Court developed during the Eurocrisis on the basis of the principle of democracy.[499]

This limit can be triggered by both private individuals and privileged institutional applicants. The assessment revealed that the constitutional standing requirements are, however, applied differently when deciding on EU-related matters. It was outlined that the Court is inclined to find EU-related proceedings more readily admissible.[500] The result is that a wide range of institutional and private actors could proceed against EU fiscal integration proposals and thereby trigger the *constitutional identity limit*.[501]

Overall budgetary responsibility shields central fiscal and budgetary decisions against too far-reaching supranationalization in order to preserve the democratic decision-making process on these highly political matters within Germany. The underlying aim of this judicial concept is to ensure that the German Parliament, as the directly democratically legitimized institution, retains the necessary space to make politically important decisions, which include fiscal and budgetary matters. Therefore, the Court required that supranational fiscal and budgetary commitments remain sufficiently limited in volume, connected to strict conditions as well as clear objectives, and finally, no automatic liability – without prior authorization of the German Parliament – may arise.[502] Put differently, the German Parliament has to remain the central institution that evaluates fiscal and budgetary commitments that impact the German state budget.

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499 Established by the Court's decision on the first Greek loan package and the EFSF, cf. *Financial Support for Greece and EFSF* para 120; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 285; Zwingmann, 'The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*' 682-683; Ungern-Sternberg, 'Parliaments – Fig Leaf or Heartbeat of Democracy? German Constitutional Court – Judgment of 7 September 2011 – Euro Rescue Package' 314-315.

500 Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 172; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 634; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 279-280; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 535.

501 Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 641-642; Ruffert, 'Europarecht: Vorlagebeschluss des BVerfG zum OMT-Programm – Die Europarechtswidrigkeit des Kaufs von Staatsanleihen durch die EZB im Rahmen des OMT-Programms ist vom EuGH zu prüfen.' 374.

502 *ESM-Treaty and Fiscal Compact (interim relief)* para 124; Cf. as well: Nettesheim, '"Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 772.

Finally, given that the German Constitutional Court connected this material limit to the *eternity clause*, the limit imposes an absolute restriction to the constitutional space available to the German legislator when considering EU fiscal integration proposals.[503] At the same time, the concrete application of the limit reveals a degree of judicial reluctance. Consequently, one could conclude that the Court seemingly focusses on the procedural requirements of *overall budgetary responsibility*, which ensure that the key political decisions are taken by the German Parliament, within predictable, reasonable limits. For EU fiscal integration proposals this implies that the German Parliament has to be integrated as central decision-maker into the supranational institutional architecture. In addition, the recent *PSPP*-judgment illustrates the importance of an unambiguous conferral of competences, in order to pre-empt national constitutional challenges under the *ultra vires* review.[504]

503 *OMT-reference* para 29; *Lisbon-judgment* para 216; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 150; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 286; Preuss, 'The Implications of 'Eternity Clauses': the German Experience' 440.

504 *Quantitative Easing (PSPP) Final Judgment* paras 138, 159-160; *Final OMT-Judgment* paras 144-145; Cf. as well: Steinbach, 'All's Well That Ends Well? Crisis Policy After the German Constitutional Court's Ruling in Gauweiler' 142.

Constitutional Identity Classification Board for Germany
1 ***Which institutional actor enforces the constitutional limit?***   The German *constitutional identity limit* is developed by the German Constitutional Court. The Court takes authoritative and binding decisions on the compatibility of the German Constitution with EU integration steps.
2 ***How can the constitutional identity limit be triggered?***   The experiences during the Eurocrisis show that individual constitutional complaints (Article 93 (1) no. (4a) Basic Law) and institutional proceedings (Article 93 (1) no. (1) Basic Law) are the most relevant proceedings to challenge Euro-related measures.
3 ***What is the constitutional basis of the constitutional identity limit?***   Article 79 (3) Basic Law is the constitutional basis for the German *constitutional identity limit*, which shields core constitutional values against constitutional amendments, and against EU integration, as specified in Article 23 (1) (3) Basic Law. The content includes the principle of democracy, which is the conceptual basis for *overall budgetary responsibility*.
4 ***What constitutional principles and substantive content are covered?***   When considering EU fiscal integration, the concept of *overall budgetary responsibility*[505] seems most relevant. According to this concept, core budgetary decisions have to remain at the domestic level. This requires that fiscal commitments remain limited in volume, restricted to specific objectives, attached to clear conditions, and that the German parliamentary approval has to remain constitutive for any German participation. Furthermore, the Court established an abstract material benchmark, according to which the budgetary decision-making ability of the German Parliament may not be suspended for a considerable time.
5 ***How – if at all – can the constitutional identity limit be overcome (longevity/absoluteness of the limit)?***   Article 79 (3) Basic Law formulates an absolute limit to the powers of the constitution-amending legislator, which can only be overcome by adopting a new constitution.[506]

Figure 15: Constitutional Identity Classification Board for Germany

505 Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 12.

506 Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 157; Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33.