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The Netherlands

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

Behre, F.

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## VI | Comparing the different national *constitutional identity limits* and their implications for EU fiscal integration proposals

### 1 INTRODUCING THE COMPARATIVE EVALUATION

The observations made in the previous Chapter in relation to the German, the French, the Spanish and the Polish *constitutional identity limits* indicate a degree of conceptual, substantive and institutional convergence, despite the limits' intention to protect core national constitution particularities as can be deduced from the combined national *constitutional identity* classification board in *Figure 16* below.

The subsequent comparison of these limits first considers the substantive dimension, which includes the determination of the constitutional space for EU fiscal integration (2.). Then the institutional and procedural side of the analyzed limits are compared in order to evaluate the likelihood of constitutional challenges against EU fiscal integration steps that might conflict with national *constitutional identity limits* (3.) before concluding on the combined limiting effect that the assessed *constitutional identity limits* have on the proposed EU fiscal integration ambitions (4.).

### 2 WHAT NATIONAL CONSTITUTIONAL SPACE FOR EU FISCAL INTEGRATION?

Although national constitutional systems and their constitutional actors employ their own distinctive terminology and constitutional mechanisms,<sup>1</sup> the assessment of the four *national constitutional identity limits* uncovered clear similarities in their underlying objectives, their constitutional basis and the protected core principles and material content. It especially seems key to all of them to protect sufficient space for national democratic decision-making, whether this is seen as part of the right to vote, democracy more generally, or more abstract notions such as sovereignty or statehood. The significant substantive overlap is further demonstrated by the fact that all the compared systems identify very similar

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1 Azoulay 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.

<i>Components of the Constitutional Identity Classification Board</i>	<i>Germany</i>	<i>France</i>	<i>Spain</i>	<i>Poland</i>
1 Which institutional actor enforces the constitutional limit?	Constitutional Court (judicial)	Constitutional Council (judicial-like, advisory body)	Constitutional Court (judicial)	Constitutional Court (judicial)
2 How is the <i>constitutional identity limit</i> triggered?	Ex post Privileged and non-privileged applicants	Ex ante Privileged applicants	Ex ante + ex post Privileged applicants	Ex ante + ex post Privileged and non-privileged applicants
3 What is the basis of the <i>constitutional identity limit</i> ?	EU enabling clause + <i>eternity clause</i>	EU enabling clause + core constitutional provisions	EU enabling clause	EU enabling clause + core constitutional provisions
4 What constitutional principles and substantive content are covered?	Democracy (competence-centric, including budgetary and fiscal competences)	Sovereignty (competence-centric, including budgetary, fiscal and monetary matters)	Sovereignty + democratic decision-making	Sovereignty (competence-centric, financial, budget and fiscal policy)
5 How – if at all – can the <i>constitutional identity limit</i> be overcome (longevity/absolute-ness of the limit)?	Absolute limitations (replacement by new constitution)	Amendable (normal constitutional amendment procedure)	Amendable (strict constitutional amendment procedure)	Amendable (strict constitutional amendment procedure)

Figure 16: Combined Constitutional Identity Classification Board

substantive domains as the most contentious and threatening aspects of EU (fiscal) integration.

Such overlap is visible with regard to the constitutional basis of the *constitutional identity limits*. The Spanish Constitutional Tribunal, the Polish Constitutional Tribunal and the French *Conseil Constitutionnel* all base their limits, at least partly, on the domestic clause that regulates the conferral of competences to the EU. The Spanish Constitutional Tribunal derives its *constitutional identity limit* from Article 93 Spanish Constitution, which allows for the conferral of powers to the supranational or international level.<sup>2</sup> The Polish Constitutional

2 Treaty Establishing a Constitution for Europe Section II.2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 270; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Identity in Spanish Constitutional Court Case-Law'

Tribunal employs Article 90 Polish Constitution as legal basis for its limit, which allows for the transfer of ‘certain powers’ to an international organization.<sup>3</sup> Finally, the French *Conseil Constitutionnel* lists Article 88 French Constitution as one of the constitutional bases for its essential conditions limit.<sup>4</sup> One can equally argue that even the *Bundesverfassungsgericht* bases its identity review (partly) on the German EU clause. Although the underpinning constitutional mechanism in Article 79 (3) and the protected constitutional principles in Articles 20 (2) and (3) Basic Law<sup>5</sup> are not specific EU-related provisions, the German Court mentioned Article 23 (1) (3) Basic Law in its EU-related review – which refers back to the *eternity clause*.<sup>6</sup>

Thus, all four *constitutional identity limits* are at least partly based on the national provisions that allow for the participation in EU and international cooperation. The resulting constitutional review is consequently rooted in constitutional provisions that are specifically designed for EU cooperation – and which depart from the perspective that the national constitution is the basis – and thus also limit – for any EU collaboration. These provisions traditionally aim to balance the possibility to conclude international agreements

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270; Castillo de la Torre, ‘*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe’ 1176.

3 *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziolkowski, ‘Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty’ 251; Bainczyk, ‘Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV’ 313; Rideau, ‘The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the ‘German Model’ 252; Kowalik-Bańczyk, ‘Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law’ 1364.

4 In addition to other provisions of the ‘*bloc de constitutionnalité*’, cf. *Lisbon Treaty* paras 3-5; *Fiscal Compact* paras 4-6; Cf. as well: Ziller, ‘European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch’ 773; Vranes, ‘Constitutional Foundation of, and Limitations to, EU Integration in France’ 538; Pfeiffer, ‘Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel’ 491.

5 The *eternity clause* equally covers other principles established in Articles 1 and 20 Basic Law, yet, democracy is the basis of *overall budgetary responsibility*, which is the focus of this comparison, cf. *Quantitative Easing (PSPP) Final Judgment* paras 103-104; *Lisbon-judgment* paras 252, 256; Cf. as well: Calliess, ‘Constitutional Identity in Germany – One for Three or Three in One?’ 164-165; Pilz, ‘Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion’ 643-644; Payandeh, ‘The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture’ 408; Calliess, ‘The Future of the Eurozone and the Role of the German Federal Constitutional Court’ 407.

6 Mayer, ‘Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union’ 763; Schönberger, ‘Die Europäische Union zwischen ‘Demokratiedefizit’ und Bundesstaatsverbot – Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts’ 553; Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory and Practice of Weimar Constitutionalism* 177.

and participate in EU integration with the preservation of national constitutional principles and decision-making capacity. Notably, EU cooperation requires a modified constitutional approach in the national constitutional systems. An illustrative example is the protection of fundamental rights, which constitutes a pivotal part of the national constitutional order and which is thus covered by all four *constitutional identity limits*.<sup>7</sup> Given that fundamental rights are extensively protected at the EU-level, the German Constitutional Court developed its *Solange*-approach,<sup>8</sup> which was followed by other constitutional courts.<sup>9</sup> The Polish Constitutional Tribunal even established that an effective protection of fundamental rights, as warranted under the Polish Constitution, seems to

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7 Germany: *Solange II-Decision* para 132; *Solange I-Decision* para 56; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 690; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292; France: *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 138; Spain: *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Identity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176.; Poland: *Treaty of Lisbon* Section III 2.1.; Cf. as well: Śledzińska-Simon and Ziolkowski, '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 Identity and the 'German Model'' 252; Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' 201; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 157-158.

8 *Solange II-Decision* para 132; Cf. as well: Craig and de Búrca, *EU Law Text, Cases, and Materials* 280-281.

9 Spanish Constitutional Tribunal only scrutinizes Spanish implementing acts that violate the core of a fundamental right, which was particularly relevant in relation to the EAW, cf. Torres Pérez, 'Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011' 108; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1197; The *Conseil Constitutionnel* conducts an equivalence assessment under its *constitutional identity limit*, cf. Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 547; Dubout, 'Les règles ou principes inhérents à l'identité constitutionnelle de la France': une supra-constitutionnalité?' 454; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 389.

require international cooperation.<sup>10</sup> This indicates that national constitutional systems are able to consider and take into account the constitutional value of supranational cooperation when determining the overall balance between integration and protecting the national constitution and space for domestic (political) decision-making.

When now considering the relevant substantive issues protected under the *constitutional identity limits* clear conceptual similarities can be identified, too. Notably, the four assessed *limits* protect – to a varying degree – national sovereignty, the democratic decision-making process, and the hierarchical position of the respective national constitution.

Regarding the principle of sovereignty, all four national constitutional actors refer directly to this concept. The German Constitutional Court established that EU integration had to respect the sovereignty of the German people to take autonomous decisions in a list of core competence areas.<sup>11</sup> Similarly, the French *Conseil Constitutionnel* found that a transfer of competences may not affect the essential conditions for the exercise of national sovereignty.<sup>12</sup> The Spanish Constitutional Tribunal concluded that certain constitutional competences were closely linked to Spanish sovereignty as well as the Spanish people as sovereign.<sup>13</sup> Finally, the Polish Tribunal held that supranational cooperation cannot alter the substantive manifestation of Polish sovereignty.<sup>14</sup> Hence, all four *constitutional identity limits* identify sovereignty as a core principle, which they aim to protect or preserve through their review. Put differently, one of the core functions of the four *constitutional identity limits* is to shield national sovereignty against EU integration steps. In parts, this relates to the protection

10 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.1.; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 271-272; One motivation for Central and Eastern European Member States to join the EU was the stabilization of core constitutional values, cf. Craig and de Búrca, *EU Law Text, Cases, and Materials* 304.

11 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Klein, 'Art. 38 GG' paras 145-146b; Herdegen, 'Art. 79 GG' paras 177-179; Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion' 644; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 6-7; Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Verfassungsrechts' 807-808.

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

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

14 *Treaty of Lisbon* Section III 2.1.

of statehood in a process of ever closer supranational cooperation.<sup>15</sup> At the same time, the assessment revealed that sovereignty is mostly construed in conjunction with or to preserve the underlying principle of national democracy. Therefore, a major aim of the analyzed limits seems to be to prevent the creation of too integrated forms of EU cooperation – that could otherwise replace national constitutional systems – in order to guarantee democratic decision-making in the Member States, whilst the protection of statehood appears to mostly function as a conceptual means to attain this objective.

In addition, national constitutional actors characterize EU integration as a reversible transfer of competences. Here, the derived legal status of the EU legal order can be identified as the core similarity across all systems, which entails that the national constitution remains the highest legal benchmark.<sup>16</sup> Also, the reversibility of the transfer of competences was emphasized as an important conceptual element, which is now explicitly enshrined in Article 50 TEU. In the context of Brexit, the CJEU explicitly acknowledged that triggering Article 50 TEU constituted a sovereign decision of the Member State.<sup>17</sup> In the national constitutional conception, the possibility to withdraw is, on the one hand, an expression of the derived status of EU cooperation – which implies

15 For example, the perception in Poland, cf. Śledzińska-Simon and Ziolkowski, '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 Identity and the 'German Model'' 252-253.

16 *Germany: Quantitative Easing (PSPP) Final Judgment* para 102; *OMT-reference* para 37; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 929; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274; *France: Lisbon Treaty* para 8; Cf. as well: Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Azoulai and Ronkes Agerbeek, '*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' 877; The derived legal status is arguably also visible in the fact that the implementation of EU Directives into French law is seen as a constitutional duty stemming from Article 88-1 French Constitution, cf. Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 140; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 478; Reestman, 'France – *Conseil Constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order – Decision of 10 June 2004, 2004-496 DC' 306; *Spain: Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1175; *Poland: Treaty of Lisbon* Sections III.2.2. and III.2.3.; Cf. as well: Wróbel, 'Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts' 500.

17 C-621/18 *Wightman* [2018] (CJEU) para 50.

that the EU is not replacing the national constitutional system.<sup>18</sup> On the other hand, it indicates that Member States can take the decision to terminate the limitation to their sovereign powers and exercise them independently from EU coordination, after withdrawal.<sup>19</sup> Obviously, allocating highest legal importance to the national constitution equally safeguards the position of the constitutional authorities that established the national *constitutional identity limits*.

Regarding the substantive dimension of national sovereignty and democracy, all four constitutional actors operationalized the principle of sovereignty by identifying a core of substantive competence areas – which arguably relates back to the principle of democracy. The most detailed ‘competence-catalogue’ was developed by the German Constitutional Court, which established that revenue and expenditure had to remain under (sovereign) national democratic control of the German Parliament following the *overall budgetary responsibility limit*.<sup>20</sup> This limit excludes that parliamentary budgetary prerogatives are transferred to such an extent that the German Parliament can no longer determine revenue and spending autonomously to a sufficiently significant degree.<sup>21</sup> The French *Conseil Constitutionnel* identified monetary, economic,

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18 As apparent in Spain: *Treaty Establishing a Constitution for Europe* Section II.4.; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 286-287; Castillo de la Torre, ‘*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe’ 1187; Or Poland: *Treaty of Lisbon* Section III.2.1.; Cf. as well: Bainczyk, ‘Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen’ 156; Article 90 Polish Constitution is based on the assumption that the conferral is revocable, cf. Mik, ‘State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context’ 398.

19 As established by the Spanish Constitutional Tribunal, cf. *Treaty Establishing a Constitution for Europe* Section II.4.; Cf. as well: Berger, *Anwendungsvorrang und nationale Verfassungsgericht* 286-287.

20 *Quantitative Easing (PSPP) Final Judgment* paras 102-104; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 250-252; Cf. as well: Calliess, ‘Constitutional Identity in Germany – One for Three or Three in One?’ 164-165; Pilz, ‘Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der Wirtschaftsunion’ 643-644; Payandeh, ‘The OMT Judgment of the German Federal Constitutional Court – Repositioning the Court within the European Constitutional Architecture’ 408; Wendel, ‘Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court’s OMT Reference’ 285; Zwingmann, ‘The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years After *Lisbon*’ 682-683; Ungern-Sternberg, ‘Parliaments – Fig Leaf or Heartbeat of Democracy? German Constitutional Court – Judgment of 7 September 2011 – Euro Rescue Package’ 314-315; Calliess, ‘The Future of the Eurozone and the Role of the German Federal Constitutional Court’ 407.

21 Summarized under the concept ‘budgetary autonomy’, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Financial Support for Greece and EFSF* para 127; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 70; Nettesheim, ‘Die “haushaltspolitische Gesamtverantwortung” in der Rechtsprechung des BVerfG’ 13; Calliess, ‘The Future of the Eurozone and the Role of the German Federal Constitutional Court’ 411.

fiscal and budgetary policies as 'vital for the exercise of national sovereignty'.<sup>22</sup> Therefore, the introduction of the Euro was found to conflict with the French sovereignty doctrine, and the adoption of the Maastricht Treaty required thus a constitutional amendment in France.<sup>23</sup> The Spanish Constitutional Tribunal appears to adopt a similar competence-based conception of Spanish sovereignty when assessing EU integration steps, albeit being less detailed.<sup>24</sup> And finally, the Polish Constitutional Tribunal also established a list of core competences that have to remain at the national level, which seem to include financial, budget and fiscal policy decisions.<sup>25</sup>

Consequently, all four national constitutional limits protect core sovereign competences against EU integration steps. In Germany, France and Poland, the constitutional authorities explicitly identified budgetary-related competences, including economic, financial and fiscal competences as particularly important national competences, that enjoy the protection of the national *constitutional identity limits*. Although the Spanish Constitutional Tribunal did not yet identify these competence areas explicitly under the *constitutional identity limit*, it seems likely that it would consider these matters as particularly important, too.<sup>26</sup> Considering the concrete application of these limits, it was observed that Eurozone-membership required an amendment of the French Constitution, given that it was found incompatible with the French sovereignty doctrine.<sup>27</sup> The Polish Constitutional Tribunal indicated that Eurozone-member-

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22 *Fiscal Compact* para 16; *Review of Maastricht Treaty (Maastricht I)* para 43; Cf. as well Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

23 *Review of Maastricht Treaty (Maastricht I)* para 35; Cf. as well Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540; Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 302.

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

25 For the competences, cf. *Treaty of Lisbon* Section III 2.1.; For the general conception, cf. *Ibid* Section III.2.5.; Cf. as well: Śledzińska-Simon and Ziolkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 251; Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 510.

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

27 *Fiscal Compact* para 16; *Review of Maastricht Treaty (Maastricht I)* para 43; Cf. as well Neuman, 'The Brakes that Failed: Constitutional Restriction of International Agreements in France' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

ship will likely trigger constitutional conflicts.<sup>28</sup> In Spain and in Germany, such constitutional conflicts between Euro-related integration steps and the principle of sovereignty (in conjunction with democracy) did not yet materialize. Regarding the German approach, it can be noted that the German Constitutional Court has so far appeared rather reluctant, as it has merely defined certain procedural safeguards, given that any conflict between *overall budgetary responsibility* and EU integration steps could be overcome.<sup>29</sup> Based on the constitutional precedent in all four Member States, it can be argued that future EU fiscal integration steps will be considered a contentious constitutional conferral. This corresponds with the traditional characterization of budgetary and fiscal competences as core, sovereign state powers.<sup>30</sup> Hence, a conferral of decision-making powers in these competence areas seems to open a sort of 'material scope of application' attached to the national *constitutional identity limits*.

However, it appears that even if this *material scope of application* is triggered no immediate outright prohibition is resulting. Instead, the assessment revealed that the German Constitutional Court and the French *Conseil Constitutionnel* equally consider the modalities attached to the conferral of these important competences. Notably, the German Court emphasized the importance of German parliamentary approval for budgetary commitments and underscored that any conferral of such competences to the supranational level had to be specific as well as limited.<sup>31</sup> According to the German case law, these safeguards are intended to ensure that the '[...] the type and level of public spending are [not], to a significant extent, determined at the supranational level, [which would otherwise deprive] the Bundestag of its decision-making pre-

28 Notably Article 227 Polish Constitution, cf. *Poland's EU Membership* Point 33; Cf. as well: Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' 509; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005.' 161.

29 Given the highlighted connection with the *eternity clause*, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Real Estate Reform I* para 130-131; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 146; Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG?' 33; Schöbener, 'Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland' 892; Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' 715.

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

31 As highlighted, no 'blanket empowerment' can be given to the EU, cf. *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297.

rogative [...].<sup>32</sup> One could therefore argue that the German Constitutional Court not only developed a substantive dimension but that it equally includes a procedural dimension into its *constitutional identity* review.

Notably, the German Constitutional Court assesses the procedural arrangements connected to the conferral of competences to determine the institutional and general impact on the national constitutional framework. A similar observation was made in relation to the French approach, where the *Conseil Constitutionnel* established that the modalities attached to the conferred competences were equally important to the competence area affected. Namely, the principle of sovereignty would only be violated in case the exercise of the conferred competences is supranationalized and France is prevented from acting autonomously.<sup>33</sup> It appears that the Spanish and the Polish Constitutional Tribunal do not employ a separate assessment of these procedural modalities, however, it seems that the degree of supranational influence when exercising the competence is equally important for their constitutional assessment. Consequently, the procedural requirements attached to the conferral of fiscal competences to the EU are highly relevant. In particular, the nature of the competence (i.e. exclusive, shared, or coordinating competence), the legislative procedure attached to it (i.e. ordinary or special legislative procedure), the veto possibilities, the degree of harmonization, and the extent of the competence (i.e. fixed volume, temporary financial framework, conditions for increase), all have to be taken into consideration in order to determine their compatibility with the national *constitutional identity limits*. In other words, when designing EU fiscal integration, the question is not only how far the EU can go substantively, but also how all these national procedural requirements, including especially the required sufficient influence of national parliaments, can be met, without making the resulting system unworkable as a whole.

In addition, the assessment reveals that national systems are not concerned about the principle of sovereignty in isolation, but rather about the principle in conjunction with other constitutional principles, including in particular the principle of democracy. In Germany, the Constitutional Court established the importance of budgetary and fiscal decisions for the democratic process and the self-determination of the German people.<sup>34</sup> In France, the *Conseil Constitutionnel* reviews whether the essential conditions for the exercising of sover-

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32 *Quantitative Easing (PSPP) Final Judgment* para 104.

33 *Lisbon Treaty* para 18; Cf. as well: Perez Ayala, 'La Unión Europea y el Proceso de Revisión Constitucional en Francia (1992-2008)' 427; Boyron, 'The French Constitution and the Treaty of Amsterdam: A Lesson in European Integration' 176.

34 *Quantitative Easing (PSPP) Final Judgment* paras 99-101; *Final OMT-Judgment* paras 126, 129; *Financial Support for Greece and EFSF* para 120; *Lisbon-judgment* paras 233, 264; Cf. as well: De Sadeleer, 'The New Architecture of European Economic Governance' 36.

eignty are affected,<sup>35</sup> which clearly focusses on the ability and process of employing national sovereignty. Similarly, the Spanish Constitutional Tribunal connects the preservation of sovereignty with structural, organizational characteristics of the state, including democracy,<sup>36</sup> just as the Polish Constitutional Tribunal.<sup>37</sup> Consequently, one may submit that the protection of sovereignty occurs jointly with the protection of national democracy, as the four analyzed national constitutional actors are concerned about the exercise of the important sovereign competences by the democratically legitimized domestic state institutions. Obviously, this interconnection between sovereignty and democracy is equally reflected in the detailed assessment of the modalities attached to the conferred competences – including the remaining influence of national parliaments – that national constitutional actors conduct. Thus, the crucial question is not only at what level a competence is located (i.e. national or supranational level) but also who is essentially controlling this competence and how this control is framed.

Finally, the comparison revealed that only the German Constitutional Court established the *constitutional identity limit* as an absolute limit to the powers of the constitution-amending legislator. Based on Article 79 (3) Basic Law, the German Court concluded that the *constitutional identity limit* can only be

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

36 *Treaty Establishing a Constitution for Europe* Section II.2.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 279; Ferreres Comella, 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea – Un comentario a la Declaración 1/2004 del Tribunal Constitucional' 82; Bustos Gisbert, 'National Constitutional Identity in European Constitutionalism: Revisiting the Tale of the Emperor's New Clothes in Spain?' 77; Pérez Tremps, 'National Identity in Spanish Constitutional Court Case-Law' 270; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1176; De Areilza Carvajal, 'La Inserción de España en la Nueva Unión Europea: La Relación entre la Constitución Española y el Trato Constitucional (Comentario a la DTC 1/2004, de 13 de diciembre de 2004)' 370-371.

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

overcome by replacing the German Constitution altogether.<sup>38</sup> The power to amend the German Constitution on matters covered by Article 79 (3) Basic Law is not vested in the German legislator. Hence, any conflict between EU fiscal integration proposals and the German *constitutional identity limit* could only be overcome in following the radical replacement of the German Constitution. In contrast, the constitutional authorities in France, Spain and Poland have highlighted the possibility to amend the constitutional framework in order to accommodate EU integration steps.<sup>39</sup> None of the three national constitutions seems to contain a restriction for constitutional amendments comparable to the German *eternity clause*, and hence the respective domestic *constitutional identity limits* appear not to set absolute restrictions to the process of EU (fiscal) integration in these Member States. Even though the respective national constitutional authorities emphasize the significance of a constitutional conflict by framing it through the *constitutional identity review*, the constitution-amending legislator may overcome these constitutional concerns by following the prescribed procedure. Consequently, EU fiscal integration proposals could be overcome in France, Spain and Poland by amending the constitutional text, which requires, however, compliance with the strict procedural requirements that appear particularly difficult to attain in Spain and Poland. As highlighted, it seems likely that Article 168 Spanish Constitution would apply to constitutionally accommodate EU fiscal integration reforms in Spain, which requires the dissolution of Congress and Senate, supported by two-thirds majorities, the confirmation of the constitutional amendment within the newly elected Congress and Senate, again supported by two-thirds majorities, and finally

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

39 *France: Compatibility of the Maastricht Treaty with the French Constitution After Constitutional Amendments ("Maastricht II")* para 19; Cf. as well: Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 402-403; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 272; *Spain: Catalan Independence Declaration* Section II. 7.; Cf. as well: Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 281; Ahumada Ruiz, 'The Spanish Constitutional Court' 636; Álvarez, 'Die spanische Dogmatik der Verfassungstreue – Geschichte einer fehlgeschlagenen Rezeption des deutschen Verfassungsdenkens' 442; Santaolalla Gadea and Martínez Lage, 'Spanish Accession to the European Communities: Legal and Constitutional Implications' 13-14; *And Poland: Śledzińska-Simon and Ziółkowski, 'Constitutional Identity in Poland – Is the Emperor Putting on the Old Clothes of Sovereignty' 244; Brandt, 'Verfassungsrecht in Polen: Verfassungsbeschwerde und Rechtsprechung des polnischen Verfassungsgerichtshofes zu Fragen der EU-Mitgliedschaft' 139; Łazowski, 'Case Note: Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005.' 157.*

approval by public referendum.<sup>40</sup> Although in Poland the procedural requirements for a constitutional amendment under Article 235 Polish Constitution are 'lighter' compared with the requirements that apply to the conferral of competences to the EU-level,<sup>41</sup> constitutional practice illustrates that constitutional amendments are only rarely considered a (political) possibility.<sup>42</sup>

Taken together, it should be pointed out that none of the examined constitutional limits has so far proven to be an insurmountable legal barrier to further EU integration. All identified constitutional obstacles in relation to the Treaty of Maastricht in France and Spain as well as in relation to the EU Constitutional Treaty in France were overcome by amending the constitutional text. The same holds true for the German constitutional order, which imposes seemingly the strictest limit to EU integration steps.<sup>43</sup> Although the *eternity clause* could theoretically result in an unsolvable constitutional conflict, the German Constitutional Court did (until now) conclude that all EU integration steps were compatible with the German Constitution.

What is more, the emergence of the *constitutional identity limit* discourse is arguably only re-framing previously articulated national constitutional concerns. When considering EU fiscal integration steps, the most relevant constitutional concerns are national sovereignty and democratic decision-making. In order to render such EU fiscal integration steps constitutionally attainable, it therefore seems required to design EMU-reforms in light of the identified constitutional concerns. A particular focus thereby rests on the procedural and institutional framework envisaged for EU fiscal competences. As highlighted, the weaker the role of the democratically legitimized national parliaments in the exercise of supranationally coordinated EU fiscal competences, the more likely a conflict with national sovereignty and national democracy. Ultimately, such a conflict can result in the unattainability of EU fiscal integration, either because of absolute constitutional hurdles, as the case in Germany, or because of the parliamentary majorities required to first amend the constitutional text and subsequently confer the powers to the EU, as the case in France, Spain and Poland.

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40 Elvira, 'Spain' 282-283.

41 Bainczyk, 'Folgen einer mangelnden Anpassung der polnischen Verfassung nach dem Vertrag von Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 321; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107.

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

43 As highlighted, this finding is not affected by the recent PSPP-judgment, despite the fact that the German Court identified *ultra vires* acts, the general possibility of the ECB to run this program was not questioned, cf. *Quantitative Easing (PSPP) Final Judgment* para 235.

### 3 INSTITUTIONAL AND PROCEDURAL FRAMEWORK OF NATIONAL CONSTITUTIONAL IDENTITY LIMITS

As with the substantive limits, the institutional and procedural framework that surrounds the four assessed *constitutional identity limits* entails clear overlap. To start with, in all four Member States the *constitutional identity limit* is established by an independent constitutional court – or quasi-court in the case of France.<sup>44</sup> Importantly, the respective national constitutional framework guarantees their institutional independence and entitles them to conduct constitutional review.<sup>45</sup> The judgments of all four constitutional actors are binding on the state institutions and can therefore limit the constitutional space available for political action.<sup>46</sup> One could argue that the competence of the German Constitutional Court is even more far-reaching, given that its findings based on Article 79 (3) Basic Law are outside the reach of the constitution-amending legislator.

This institutional independence is reflected in the composition of the German Court and the Spanish Tribunal, which consist of qualified lawyers appointed by different institutional actors. In Germany constitutional judges are appointed to equal parts by *Bundestag* and *Bundesrat* by a two-thirds

44 Cf. on the specific institutional design and the position of the *Conseil Constitutionnel*, which transformed from an advisory body to a body with clear judicial resemblance, Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 267; Bell, *French Legal Culture* 32-33.

45 *Germany*: Schlaich and Koriath, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* paras 475-500; Florian Meinel, 'The Constitutional Miracle on the Rhine: Towards a History of West German Constitutionalism and the Federal Constitutional Court' (2016) 14 *International Journal Of Constitutional Law* 277, 283; De Visser, *Constitutional Review in Europe – A Comparative Analysis* 63-65; Limbach, Jutta, *Das Bundesverfassungsgericht* (2nd edn, C.H. Beck 2010) 56-57; Ewald Wiederin, 'Die Gesetzeskraft der Entscheidungen des Bundesverfassungsgerichts' in Michael Brenner, Peter M. Huber and Markus Möstl (eds), *Der Staat des Grundgesetzes – Kontinuität und Wandel: Festschrift für Peter Badura zum siebzigsten Geburtstag* (Mohr Siebeck 2004) 605-608; *France*: Steiner, *French Law – A Comparative Approach* 68; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Dyeve, 'The *Melki* way: The *Melki* Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' 319; *Spain*: Ahumada Ruiz, 'The Spanish Constitutional Court' 611; Alaez Corral and Arias 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; *And Poland*: De Visser, *Constitutional Review in Europe – A Comparative Analysis* 260; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1361; Although the current Polish rule-of-law-crisis puts the independence of the Tribunal into question, cf. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 57-58; Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' 547-548; Hatje and Schwarze, 'Der Zusammenhalt der Europäischen Union' 179-181; Czarny, 'Der Streit um den Verfassungsgerichtshof in Polen 2015-2016' 5-6.

46 Claes, 'National Identity: Trump Card or Up for Negotiation?' 116; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 131.

majority.<sup>47</sup> Given the qualified majority threshold, constitutional judges have to enjoy cross-party support, which renders political appointments less likely.<sup>48</sup> A similar constitutional decision in favor of a more 'unpolitical' constitutional bench can be observed in Spain, where respectively 4 judges are appointed by the Spanish Congress and the Senate by a three-fifths majority and respectively an additional 2 judges are appointed by the government and the Council for the Judiciary.<sup>49</sup> Hence, the Spanish nomination procedure combines high majority thresholds with diversification across different institutional actors. The French Constitution institutionally diversifies the appointment prerogatives regarding the *Conseil Constitutionnel*. In equal parts the French President, the President of the Parliament and the President of the French Senate appoint the 9 members of the Conseil.<sup>50</sup> However, judges do not have to be qualified lawyers, which reflects the institutions original more advisory role.<sup>51</sup> Finally, Polish constitutional judges are elected by a simple majority in the Polish Sejm and subsequently appointed by the Polish President.<sup>52</sup> The judges have to be legally qualified with a considerable working experience in a legal profession.<sup>53</sup> The lower majority requirement as well as the lacking institutional diversification therefore concentrate the prerogative to nominate constitutional judges in the parliamentary governing majority. Although the strong role of the Sejm in the appointment of constitutional judges is counterbalanced by the mentioned qualification requirement, the Polish developments since 2015 illustrate the central importance of institutional diversification, higher majority thresholds, but also a cross-party dialogue on the nomination of constitutional judges. Otherwise, constitutional courts risk to be captured between opposing political interests, as visible in Poland.<sup>54</sup>

47 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 214; Klaus Schlaich and Stefan Koriöth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* (5th edn, C.H. Beck 2001) para 39.

48 Hailbronner and Martini, 'The German Federal Constitutional Court' 366; Schlaich and Koriöth, *Das Bundesverfassungsgericht – Stellung Verfahren, Entscheidungen* para 43.

49 Ahumada Ruiz, 'The Spanish Constitutional Court' 616; Garoupa, Gomez-Pomar and Grembi, 'Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court' 517; Alaez Corral and Arias 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.

50 Bell, 'Court Institutions' 42.

51 Ibid 42.

52 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 207.

53 Ibid 212;

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

Clearly, these internal constitutional problems in Poland have implications for the EU as well. On the one hand, the jurisprudence of constitutional judges impacts EU law and EU integration. Through their jurisprudence, national constitutional courts ensure that EU law enjoys constitutional authority, which complements the political authority that national parliaments vest in EU law by ratifying the EU-Treaties. In case national constitutional courts cannot exercise their constitutional review independently, EU law can arguably not acquire full constitutional authority. On the other hand, the interferences with the composition of the national constitutional court might reflect a broader rule-of-law-problem. However, EU law in general and Eurozone cooperation in particular are based on *legal* safeguards. This is apparent for example in the EU balanced budget rules, as the Fiscal Compact specifically requires Member States to implement them into constitutional law – or a source equally effective – in order to create legal safeguards against the violation of Eurozone rules.<sup>55</sup> Consequently, such a potential rule-of-law-crisis in a Eurozone Member State could cast doubts regarding the credibility of the Eurozone and negatively affect all other Member States.

Considering the constitutional review of EU law, it was outlined that such national constitutional review will be, most likely, initiated by privileged applicants and will either take the form of an abstract *ex ante* review (mostly the case in France and Spain) or an abstract *ex post* review (mostly the case in Germany and Poland). Suffice it here to point out that the advantages of an *ex ante* review are most visible in France – and as apparent under the flexible Finnish constitutional system – where the constitution-amending legislator overcame the incompatibility between envisaged EU commitments and the French Constitution by modifying the constitutional text, so that a conflict would not materialize in the first place.<sup>56</sup> The possible problems that could emerge from an *ex post* unconstitutional verdict against EU law are well visible in Germany, where such a decision from the Court in Karlsruhe could risk the stability of the Euro.<sup>57</sup> In addition, the criticized apparent double standard employed by the German Constitutional Court in EU matters renders

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55 On the importance of the rule-of-law in EMU-cooperation, cf. Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 241-243.

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

57 Stemming from the German *ultra vires* finding on the ECB's PSP-program, cf. *Quantitative Easing (PSPP) Final Judgment*; Cf. as well: Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP case.' 936.

proceedings against EU law more likely admissible.<sup>58</sup> For EU fiscal integration measures, this entails that the constitutional status and the ability to challenge such measure depend on the national system. The previous analysis illustrates this diversity. Such challenges are particularly likely in Germany, where Article 38 (1) Basic Law enables every German citizen that is entitled to vote to proceed against EU law.

#### 4 IMPLICATIONS OF THE COMPARATIVE FINDINGS FOR EU FISCAL INTEGRATION

The comparison in this Section demonstrates that EU fiscal integration steps are not per definition unconstitutional. It appears that all four national constitutional actors identified fiscal competences as important domestic sovereign powers, which require a high degree of democratic control. Therefore, the modalities and specific design of EU fiscal integration steps are crucial for the constitutional assessment. Particularly the German and the French jurisprudence place great importance on sufficient national parliamentary (or presidential) control of fiscal decisions, which suggests that conferring upon the EU an exclusive competence in fiscal competence areas would likely be declared incompatible with the national constitution. As highlighted at different occasions, this would prevent German participation in such far-reaching fiscal integration steps, in light of the *eternity clause*. Instead, a coordination of this policy field seems more realistically achievable, whereby particular attention has to be paid to preserve the *right kind* and *right amount* of national decision-making capacity without rendering the coordination and collaboration ineffective. As long as national consent remains constitutive for any additional financial commitment, for example, and as long as the German Parliament is not liable for budgetary decisions taken by other EU Member States, such a supranational cooperation seems also achievable under the more rigid German Basic Law.

Given the importance of the concrete design of EU fiscal integration measures in order to determine their compatibility with the available national constitutional space, the subsequent PART II uses the framework developed so far and in particular the *charted* national constitutional space to assess several concrete proposals for deeper EU fiscal integration. Through this application the outlined comparative conclusions are further sharpened and the limiting potential of the respective national *constitutional identity limit* – but

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58 Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 172; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305; Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 192; Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes *Ultra-vires*-Vorlage an den EuGH' 641-642.

also more generally of more flexible and more rigid constitutional systems – in relation to EU fiscal integration steps is determined in broader detail.