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

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VIII The compatibility of EU fiscal integration proposals with national constitutional concerns

1 INTRODUCTION

The previous comparative assessment of the different national constitutional frameworks applicable to EU fiscal integration illustrates how similarly and differently constitutional systems address, regulate and conceptualize EU integration. In that regard, the macro-comparative assessment distinguished between more flexible approaches,[1] as for example apparent in Finland, and more rigid approaches,[2] as for example the case in Germany. These varying approaches result from differences in the domestic design of the institutional framework, the constitutional text itself and the overall constitutional framework. The *macro-comparative* assessment revealed that both constitutional systems mainly impose procedural requirements towards EU fiscal integration steps. In addition, the German Constitution contains the highlighted *eternity clause* which sets absolute limits to the process of EU integration. In Finland, a comparable substantive limitation to EU cooperation does currently not exist. It was thus concluded that specifically rigid constitutional systems formulate the most relevant *substantive* opposition to EU fiscal integration proposals.

The subsequent *micro-comparative* assessment of a selection of strict national *constitutional identity limits* revealed that the constitutional concerns formulated against EU fiscal integration are rooted in similar constitutional principles across the analyzed Member States. Yet, despite protecting similar constitutional principles, the national constitutional systems compared, and in particular their national constitutional courts, employ different approaches to defend them. The resulting overview of different *constitutional identity limits* provides an insight into the variety of substantive constitutional concerns that might be formulated against EU fiscal integration steps and the ways in which they may be policed or operationalized.

In the following compatibility assessment, the charted constitutional space will be applied to the previously deconstructed elements of EU fiscal integra-

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1 Heringa, *Constitutions Compared – An Introduction to Comparative Constitutional Law* 9; Grewe, 'Methods of Identification of National Constitutional Identity' 43; Dixon, 'Constitutional Amendment Rules: a Comparative Perspective' 102.

2 Heringa, *Constitutions Compared – An Introduction to Comparative Constitutional Law* 7-8; Dixon, 'Constitutional Amendment Rules: a Comparative Perspective' 102; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123.

tion. Based on the previous research findings, it appears that fiscal integration proposals are confronted with four general types of constitutional hurdles ranging from simple procedural requirements as the 'lightest obstacle' to absolute limitations, as depicted in *Figure 19*. The color-coding that is introduced in the figure below is subsequently used to illustrate the results of the compatibility assessment in a graphic overview per substantive element of EU fiscal integration proposals.

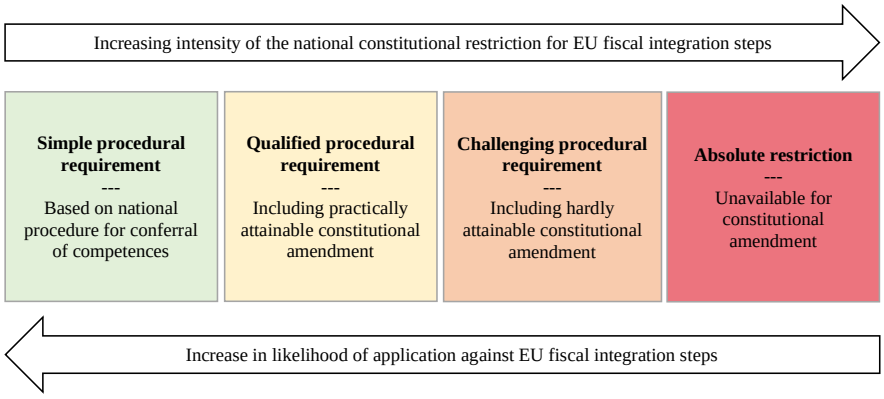

Figure 19: Categorization of national constitutional hurdles to EU fiscal integration

Overall, the conducted compatibility assessment determines which EU fiscal integration ideas are achievable within the existing national constitutional framework and which proposals might be confronted with severe national constitutional obstacles (2.). In a separate sub-section (3.), the compatibility assessment subsequently employs the research findings concerning the possibility to induce additional *constitutional flexibility* in the seemingly strict conception of certain constitutional limits, which would be located at the right end of *Figure 19*. In short, this assesses if more EU fiscal integration becomes legally feasible if one applies the different flexibility tools when applying national constitutional limits. Moreover, this assessment allows us to determine to what extent national constitutional concerns can be accommodated by EU fiscal integration steps in order to soften the apparent opposition emerging in some Member States.

2 Compatibility of fiscal integration with current national constitutional space

The compatibility assessment of the four proposed elements of EU fiscal integration – and, hence, of the outlined EMU reform proposals – with the charted

national constitutional space focuses in the following section on the currently available space within the Member States.

2.1 Compatibility of an EU fiscal capacity with national constitutional space

When considering the general compatibility of an EU budgetary capacity or instrument with the charted national constitutional requirements, two separate legal situations can be distinguished. A first set of ideas appears to be achievable within the existing EU Treaty-framework (2.1.1.), without requiring the conferral of additional competences from the national to the EU-level, as is the case, for example, with Next Generation EU, BICC or the European Investment Protection Schemes. A second set of ideas requires amendments to the EU Treaty-framework (2.1.2.).

2.1.1 A fiscal capacity or instrument based on the existing Treaty-framework

The proposed Eurozone-budget could be devised under the EU-Treaties as a limited support fund that is financed through the MFF. For example, Articles 175 (3) and 197 (2) TFEU served as the legal bases to establish Regulation 2017/825, which created the Structural Reform Support Programme for the period of 2017 to 2020 with a total volume of € 142,8 million in funding to support structural reforms in the Member States.[3] This combined legal basis was equally envisaged for the Reform Support Programme Regulation, the underpinning regulation for the BICC.[4] In contrast, the Recovery and Resilience Facility under Next Generation EU was based on Article 122 (2) TFEU, which allows for support in case of *asymmetric* economic shocks and which thus raises legal concerns considering the apparent symmetric nature of the economic shock.[5]

3 Cf. Article 4 Regulation 2017/825; Which was subsequently increased by €80 million by Regulation 2018/1671; Cf. as well: Menelaos Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford Studies in European Law, Oxford University Press 2020) 310-311.

4 Jointly with the proposed Regulation (COM (2019) 354) for the governing framework of the BICC, which was based on Articles 136 (1) (b) and 121 (6) TFEU.

5 As Article 122 (2) TFEU allows for financial support for a specific Member State, instead of establishing a full scheme of financial support for all Member States, cf. Rüdiger Bandilla, 'Art. 122 AEUV – Maßnahmen bei gravierenden Schwierigkeiten' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union – Kommentar* (70th edn, C.H. Beck 2020) para 6; Ulrich Häde, 'Art. 122 AEUV – Maßnahmen bei gravierenden Schwierigkeiten' in Christian Calliess and Matthias Ruffert (eds), *Kommentar zum EUV/AEUV – Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (5th edn, C.H. Beck 2016) paras 8-9.

The proposed more limited emergency instruments, including the proposed European Investment Protection Scheme[6] as well as the European Unemployment Reinsurance Fund,[7] would operate as so-called insurance-type mechanisms.[8] These schemes might possibly be adopted based on Article 122 (2) TFEU, too, if indeed established as emergency instruments that only operate in times of economic downturn.[9] Taken together, this suggests that the EU-Treaties contain various legal bases to accommodate a Eurozone budgetary capacity as a matter of secondary law. This triggers the question whether national constitutional law imposes any requirements or conditions for the initiation of a budgetary capacity based on EU secondary law.

2.1.1.1 Compatibility with the charted macro-comparative constitutional space

In Finland, the creation of a Treaty-based fiscal capacity could either require parliamentary approval following Section 94 Finnish Constitution in case Finnish financial commitments are increased by such capacity[10] or, in the alternative, the internal monitoring system for the exercise of already conferred competences enshrined in Section 96 Finnish Constitution could be triggered.[11] The proposed establishment of a Eurozone-budget or the envisaged emergency instruments would establish financial obligations for the Member States. It thus concerns the allocation of financial resources and has implications for the EU's financial planning itself, which in return affects the Member State's own domestic finances. According to Section 3 (1) Finnish Constitution, the Finnish Parliament determines the State Finances, which covers the adoption of the state budget, according to Section 83 (1) Finnish Constitution, including

6 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 26; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Cf. as well: Craig and Markakis, 'EMU Reform' 1426; Fabbrini, 'Fiscal Capacity' 115; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6.

7 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 26; Cf. as well: Craig and Markakis, 'EMU Reform' 1426; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6; Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 22.

8 Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6-7; Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 22.

9 As the case for the agreed SURE-scheme, cf. Commission, 'SURE – Supporting Member States to Help Protect People in Work and Jobs' Recitals 1-2; For a general analysis on the legal bases for such schemes, cf. Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 24-29.

10 Cf. for example: *Amendment to the EFSF (Increase in State Guarantee)* 3; *First Assessment Draft ESM-Treaty (I.)*; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452; Husa, *The Constitution of Finland – A Contextual Analysis* 47; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556.

11 *Adoption of the EU Six-Pack Legislation* 4-5; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

all revenue and expenditure, as established in Section 84 (1) Finnish Constitution.[12]

In light of these constitutional considerations, and building upon the experiences during the Eurocrisis, it appears that the Finnish constitutional appraisal differs for the different Eurozone-budget and the emergency instruments proposed. Regarding the allocation of funds under the proposed *Eurozone-budget* based on the current EU Treaty-framework, the monitoring procedure in Section 96 Finnish Constitution seems to apply, given that the envisaged secondary law-based budget concerns fiscal decisions, which are assigned to the Finnish Parliament. Therefore, the Finnish Parliament must engage in an *ex ante* assessment upon referral, which involves all relevant specialized parliamentary committees, including the Constitutional Law Committee. Finally, the Grand Committee will have to communicate the final parliamentary position to the Finnish representative in the EU Council of Ministers. Although the position is not legally binding,[13] it has high political authority given the strong institutional position of the Finnish Parliament within the Finnish constitutional system as well as the governmental dependence on continuous parliamentary support.[14] It is therefore likely that the parliamentary position will be followed by the Finnish representative, which secures an authoritative involvement of the Finnish Parliament in the adoption of any EU secondary act that would underpin an EU budgetary capacity.

Furthermore, any underlying core financial commitment to fund the Eurozone-budget – which would certainly increase Finnish financial responsibilities towards the EU – would likely be based on Article 311 TFEU and would thus require Finnish parliamentary approval under Section 94 Finnish Constitution as will be established subsequently in more detail.[15] Suffice it here to highlight that the allocation of additional financial capacities to the EU-level requires parliamentary authorization following Section 94 Finnish Constitution, given that the exercise of (financial) powers is conferred from the national to the EU-level.[16] In contrast, the subsequent use of these additional financial powers, based on the highlighted legal bases included in the EU-Treaties, would only have to be monitored by the Finnish Parliament following Section 96 Finnish Constitution.

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12 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 457.

13 As highlighted previously, Section 96 (2) Finnish Constitution does not specify the status of the statement, cf. Ojanen, 'The Europeanization of Finnish Law' 170; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556.

14 Ojanen, 'The Europeanization of Finnish Law' 170; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556; Raunio and Tiilikainen, *Finland in the European Union* 86.

15 Cf. the assessment within this Chapter in Section 2.2.1.

16 *Commission's Draft EU Recovery Plan and MFF Planning* 10; Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

Considering the adoption of an *emergency instrument*, similar constitutional considerations appear to apply. Notably, as such an EU instrument would depend on additional national contributions and liabilities, which would increase the current Finnish financial EU commitment, parliamentary approval following Section 94 Finnish Constitutional seems required, as already established by the Constitutional Law Committee in its appraisal of the EFSF- and the ESM-Treaty.[17] Depending on the precise modalities of the emergency instrument, the Finnish Parliament will likely have to approve these additional financial commitments by simple majority, unless the EU would be empowered to increase the Finnish commitment or liability autonomously without parliamentary approval which would require the support of a two-thirds parliamentary majority, as exemplified in relation to the draft ESM-Treaty.[18]

Taken together, this suggests that the Finnish constitutional appraisal focuses on whether the proposed fiscal integration steps actually increase the national financial commitment. If this is the case, the procedure in Section 94 Finnish Constitutional seems applicable. Otherwise, the Finnish Parliament is empowered to mandate the Finnish representative at EU-level to vote for the adoption of secondary law solutions, as laid down in Section 96 Finnish Constitution.

Similarly, under the more rigid German constitutional system, the provision for the conferral of competences enshrined in Article 23 (1) (2) GG seems not applicable to the allocation of the funds available under the proposed *Eurozone-budget*. This is because no additional competences are allocated to the EU-level but rather the existing EU Treaty-framework is employed.[19] Instead, the German

17 *First Assessment Draft ESM-Treaty (I.)*; *Second Assessment Draft ESM-Treaty (II.)*; *Final Assessment Draft ESM-Treaty (III.)*; Cf. as well: Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

18 *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

19 *Lisbon-judgment* para 243; Which is conceptualized in conjunction with German integration responsibility, cf. Armin von Bogdandy, 'Prinzipien der Rechtsfortbildung im europäischen Rechtsraum – Überlegungen zum Lissabon-Urteil des BVerfG' (2010) 63 Neue Juristische Wochenschrift (NJW) 1, 3; Also implied in the conception of *ultra vires* review, which scrutinizes EU secondary law that exceed the EU-Treaties, cf. for example: 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; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 292-293; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1001-1002; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 273-274.

Government would have to inform the German Parliament about the intention to adopt an EU budgetary capacity or instrument as required by Article 23 (2) GG. Given that the allocation of the Eurozone-budget would likely be established as an EU legislative act, and given that the identified possible legal bases in Article 122 (2), 175 (3), 197 (2) TFEU prescribe the adoption of an act following a legislative procedure, the German Parliament would be required to issue a parliamentary position following Article 23 (3) GG, which the German Government then has to take into due account for the negotiations at the EU-level.[20] Therefore, comparable to the Finnish Parliament, the *Bundestag* is centrally involved in the domestic *ex ante* assessment of the relevant EU secondary act.

Furthermore, the allocation of additional funds for this Eurozone-budget, which could be financed through the own resources system under the current EU-Treaties, would require German parliamentary approval under Article 23 (1) (2) GG.[21] Hence, the applicable constitutional procedures in Germany bear obvious similarity with those in Finland. Notably, the allocation of additional financial means to the EU level requires constitutive approval by the German Parliament given that the EU powers are extended – and hence Article 23 (1) (2) GG applies. In contrast, the allocation of the available funds is a matter of EU law and can be implemented based on the EU-Treaties. Given that the Treaty-framework itself was already ratified by national parliaments, the allocation of EU funds as a matter of EU secondary law is only supervised by the national parliament, notably under Article 23 (3) GG in Germany.

Considering now the adoption of the proposed *emergency instruments*, it appears that such instrument would likely require parliamentary approval following Article 23 (1) (3) in conjunction with Article 79 (2) GG – as displayed in relation to the adoption of the ESM-Treaty – given the likely considerable impact on German parliamentary budgetary prerogatives.[22] As highlighted in relation to the Eurozone-budget, the fact that additional financial means seem to be required to establish such EU instruments indicates that a conferral of (financial) competences from the national to the EU level is necessary. This conferral can only be adopted through constitutive approval by the German Parliament.

In addition to the national *ex ante* parliamentary involvement in the preparation of the adoption of such a Eurozone-budget and the parliamentary

20 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 37-39; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 181.

21 Cf. as well the conducted assessment within this Chapter in Section 2.2.1.

22 Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' 1779; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 359; FDP, *Drucksache 17/9046 – Gesetzentwurf der Fraktionen der CDU/CSU und FDP: Entwurf eines Gesetzes zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion*.

approval of the proposed emergency instruments, it seems, moreover, almost certain that constitutional review will be initiated against the envisaged measures. In contrast to the Finnish constitutional system, which limits the constitutional assessment to the *ex ante* involvement of the Constitutional Law Committee in the parliamentary process, an *ex post* constitutional review seems highly likely in Germany in light of the identified lowered standing requirements in EU-related proceeding.[23]

Notably, it is conceivable that individuals would challenge such EU secondary law in the framework of a constitutional complaint claiming that the legislative act exceeds the competences conferred upon the EU or that the resulting fiscal capacity violates German *constitutional identity* contained in Article 79 (3) GG.[24] Similar concerns could be raised by, for example, a political fraction in possible inter-institutional proceedings.[25] The German Constitutional Court would then assess whether the German Parliament, the German Federal Council or the German Government violated their integration responsibility, which imposes a constitutional obligation to continuously review that the EU stays within its mandate, that EU action does not infringe the German *constitutional identity* and that, if they do, German institutions take appropriate steps to remedy such a violation.[26] In light of established jurisprudence of the Court, it is highly likely that such a constitutional complaint or the inter-institutional proceedings would be deemed admissible.

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23 Cf. the assessment in Chapter III Section 3.1.3.; Which for example resulted in an *actio popularis* in EU matters, cf. 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.

24 Based on the individual's right to vote, cf. *Quantitative Easing (PSPP) Final Judgment* para 113; *OMT-reference* para 19; *Maastricht-Judgment* paras 61-62; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 294-295; Thiele, 'Friendly or Unfriendly Act? The 'Historic' Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' 251-253; Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' 189; Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' 108-109; Tomuschat, 'Lisbon – Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' 266.

25 *Lisbon-judgment* paras 204-206; Cf. as well: Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 305-306; Geis and Meier, 'Grundfälle zum Organstreitverfahren, Art. 93 I Nr. 1 GG, §§ 13 Nr. 5, 63ff. BVerfGG' 703; Mayer, 'Der Vertrag von Lissabon im Überblick' 194.

26 As recently illustrated in the PSPP-judgment of the Constitutional Court, cf. *Quantitative Easing (PSPP) Final Judgment* paras 106-107; *OMT-reference* paras 160 ff.; Cf. as well: Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1047; Engels, 'Die Integrationsverantwortung des Deutschen Bundestags' 212-213

The subsequent question is whether such applications are also likely to succeed. Regarding the assessment under the *ultra vires* review, the German Constitutional Court requires in a first step that the EU act in question constitutes a manifest overstepping of the conferred powers which results in a structurally significant shift of powers to the disadvantage of the Member State.[27] A major determining factor for this assessment will be the actual size, the remaining control of the *Bundestag* as well as the source of funding for such a fiscal capacity, which will be addressed in the subsequent section.

When considering the substantive question of conferral, focusing on the broad idea of initiating a Eurozone-budget to support structural reforms, this appears generally compatible with the legal bases in Articles 175 (3) and 197 (2) TFEU, as already illustrated by Regulations 2017/825 and 2018/1671.[28] These established the Structural Reform Support Programme between 2017 and 2020 and did not trigger German constitutional concerns. Article 175 (3) TFEU empowers the European Parliament and the Council to adopt 'specific actions' to complement the Structural Funds established under Article 175 (1) TFEU in order to attain the objective of an economically, socially and territorially more cohesive EU.[29] Arguably, a Eurozone-budget could complement the general scheme of Structural Funds by specifically targeting economic and social cohesion in the Euroarea, as also explicitly envisaged by the European Commission.[30] Hence, it seems convincing to argue that a Eurozone-budget could be generally based on Articles 175 (3) and 197 (2) TFEU in case it is geared towards economic as well as social cohesion and in case it remains limited in size, given the only supplementary function that Article 175 (3) TFEU seems to have. In the alternative, Article 136 (1) (b) in conjunction with Article 121 (6) TFEU could constitute a possible legal basis as suggested by the Commis-

27 As for example established by the Constitutional Court in: *Quantitative Easing (PSPP) Final Judgment* para 110; *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.' 927; Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' 297; Ludwigs, 'Der Ultra-vires-Vorbehalt des BVerfG – Judikative Kompetenzanmaßung oder legitimes Korrektiv' 538.

28 Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* 310-311.

29 As determined by Article 174 (1) TFEU; Cf. as well: Bastian Kern and Christoph Eggers, 'Art. 174 AEUV – Ziele, Regionen und benachteiligte Gebiete' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union – Kommentar* (70th edn, C.H. Beck 2020) paras 22-26; Adelheid Puttler, 'Art. 174 AEUV – Ziele der Strukturpolitik; benachteiligte Gebiete' in Christian Calliess and Matthias Ruffert (eds), *Kommentar zum EUV/AEUV* (5th edn, C.H. Beck 2016) paras 8-9.

30 Notably in relation to the proposed European Investment Stabilization Function, cf. Commission, *Commission Staff Working Document – Impact Assessment – Accompanying the Document for Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a European Investment Stabilisation Function (COM (2018) 297)*; Cf. as well: Fabbrini, 'Fiscal Capacity' 127.

sion in its BICC-proposal.[31] However, these legal bases only enable the EU to establish a framework for the governance of economic policy coordination, whereas the financial capacity seemingly would have to be established on a different legal basis. Regarding these different legal bases, the German Constitutional Court is not likely to find an excess of the conferred mandate, which ultimately depends, however, on the precise design of the actual EU legislative acts.

Similarly, the creation of the proposed emergency instruments based on Article 122 (2) TFEU appears generally compatible with the EU-Treaties, as long as they remain indeed emergency tools that only operate in economic crises.[32] Therefore, the general establishment of such instruments would likely not be considered an *ultra vires* act by the German Constitutional Court, presupposing that the respective schemes remain limited in scope and size.

A subsequent question in the constitutional evaluation will then be whether a Eurozone-budget or an EU emergency instrument would be compatible with German *overall budgetary responsibility* as protected by Article 79 (3) GG.[33] As previously established, the concept of *overall budgetary responsibility* has a procedural and a substantive dimension.[34] At a procedural level, *overall budgetary responsibility* requires that German parliamentary approval is constitutive for any budgetary commitment with impact on the German budget, that parliament is fully informed about the commitment as well as potential financial risks and that the commitment remains limited.[35] Applying this benchmark

31 Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354); Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 185-186.

32 Steinbach, 'Insurance-Type Cooperation Mechanisms Under EU Law' 24-29.

33 As for example established by the Constitutional Court in: *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: 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; 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; 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 Währverfassungsrechts' 807-808.

34 Cf. the assessment in Chapter III Section 4.2.2.2.

35 As established in Chapter III Section 4.2.2.2.; And as pointed out by the Constitutional Court: *Quantitative Easing (PSPP) Reference* para 48; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in

to the envisaged Eurozone-budget, the German Parliament was and will be involved at several stages of the adoption process. In the first place, the budget proposed here would be based on the EU-Treaties, which were ratified by the German Parliament. Thus, the parliament explicitly approved the legal bases in Articles 175 (3) and 197 (2) TFEU or Article 136 (1) (b) in conjunction Article 121 (6) TFEU. In addition, the previously outlined institutional *ex ante* involvement of the German Parliament secures parliamentary participation in the drafting of the secondary law details. Although this involvement does not include a constitutive approval of the German Parliament, given that the German Government is not legally mandated by the parliamentary position and given that the vote in the Council is taken by qualified majority if the act is adopted based on the mentioned provisions, the German Parliament can nevertheless impact the EU decision.

Moreover, the envisaged BICC as an example of a secondary-law-based budgetary capacity, would be financed through the MFF, which in return is funded through the EU's own resources that are approved by the Member States according to national constitutional requirements as established in Article 311 (3) TFEU. In Germany, this national adoption includes approval by the German Parliament. Hence, even in case the general scheme for a Eurozone-budget is based on Articles 175 (3) and 197 (2) TFEU or governed by Article 136 (1) (b) and 121 (6) TFEU, the budget itself would be financed through the general EU budget which is funded by the EU's resources determined based on Article 311 (3) TFEU and thus secures the constitutive German parliamentary approval. Overall, the outlined framework comprehensively involves the German Parliament, secures the constitutive approval for additional financial commitments and specifies the use of the attributed financial means through the EU Treaty-framework. Therefore, it seems that the procedural requirements of *overall budgetary responsibility* would be complied with.

Regarding the establishment of an emergency instrument under Article 122 (2) TFEU the constitutional conclusions drawn by the German Constitutional Court in relation to the ESM-Treaty appear applicable. Concerning the ESM, the Court established that the German Parliament could adopt the general scheme but it required that the concrete financial assistance programs receive prior approval by the German Parliament in order to provide parliament with the possibility to evaluate the inherent risk of the granted assistance.[36] Thus, considering the proposed emergency instruments which target asymmetric economic shocks, a similar design to the ESM could be implemented under

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der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 7.

36 *Participation of Members of German Parliament in the EFSF* para 112; Cf. as well: Herdegen, 'Art. 79 GG' para 183; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

which Member States would retain an impact on the financial assistance offered to the respective Member State. This would ensure the constitutive German parliamentary approval of financial commitments required under *overall budgetary responsibility* as established by the German Constitutional Court. Taken together, this suggests that the envisaged emergency instruments could be drafted in conformity with the procedural requirements under *overall budgetary responsibility* – which was displayed by the EFSF- and ESM-Treaty that both could be adopted in conformity with the German Constitution.

Regarding the substantive requirements of German *overall budgetary responsibility*, the Court established that the German Parliament could neither surrender budgetary autonomy for a considerable time nor transfer essential budgetary powers to the EU-level which would enable EU institutions to independently determine German spending.[37] Moreover, it was established that the German Constitutional Court seems reluctant in the application of this substantive benchmark, which seems to acknowledge the wide discretion that the German Parliament enjoys and equally showcases the inherent difficulty of defining and enforcing any substantive reference value.[38]

When applying this broad substantive framework to the proposed Eurozone-budget it seems that the financial impact of such a budget would be limited given its apparently insignificant size. For example, the reform program initiated under Articles 175 (3) and 197 (2) TFEU for the timeframe between 2017 and 2020 included financial commitments of € 222,8 million.[39] The proposed BICC was envisaged to 'only' have a financial volume of € 25 to € 55 billion for the timeframe between 2021 to 2027.[40] Given that the financing under the scheme was or will be guaranteed through the EU budget, Germany would only partially contribute to such a Eurozone-budget. Therefore, the financial and budgetary impact of the suggested Eurozone-budget remains limited and is not likely to suspend German budgetary autonomy for a considerable time. This conclusion seems particularly convincing when considering German commitments during the Eurocrisis that entailed significantly higher commit-

37 On the importance of budgetary autonomy and the exclusion of automatic liabilities for political decisions of third parties, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; On the exclusion of conferring essential budgetary powers to the EU, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 210-213; *ESM-Treaty and Fiscal Compact* para 163; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

38 Cf. the assessment and the conclusions drawn in Chapter III Section 4.2.2.3.

39 Cf. amendments to Article 10 (1) Regulation 2017/825 introduced by Regulation 2018/1671; Cf. as well: Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* 310-311.

40 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 217.

ments. The ESM, for example, amounted to total potential commitments of up to € 190 billion for Germany yet was deemed compatible with *overall budgetary responsibility*.[41] It appears, therefore, that a similar conclusion can be drawn in relation to any emergency instruments, which will provide financial assistance to Member States in strictly limited circumstances and which will likely be limited in size, too. Once again building on the findings in relation to the ESM-Treaty, larger financial commitments are generally compatible with the German Constitution as long as the previously outlined procedural safeguards are respected.[42]

Overall, this suggests that both an additional EU budgetary capacity as well as possible emergency instruments can be designed in compliance with the German concept of *overall budgetary responsibility*. However, this presupposes that any financial commitment in relation to the proposed secondary law mechanisms remains limited in scope, that it would be strictly confined in its overall size and that it remains under the final control of the German Parliament. Furthermore, it requires that the maximum financial liability for Germany under any of the schemes is strictly determined to avoid that German budgetary autonomy is suspended for considerable time. Given that most proposals remain vague on the specific details, which are however relevant for the legal-constitutional appraisal, it is only possible to indicate the general compatibility of such proposals with the German Constitution.

2.1.1.2 Compatibility with the charted micro-comparative constitutional space

How would the domestic constitutional authorities of the other Member States compared apply their respective national *constitutional identity limit* to a potential Eurozone-budget or an emergency instrument based on EU secondary law? Building on the findings in Chapter V and Chapter VI, which considered the French, Spanish and Polish *constitutional identity* concerns, several projections can be made.

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41 *ESM-Treaty and Fiscal Compact (interim relief)* para 167; Requiring, however, that the specific assistance program would be approved by the German Parliament, cf. Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' 274; Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 928; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 267.

42 *ESM-Treaty and Fiscal Compact (interim relief)* para 167; Cf. as well: Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' 274; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 928; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 267.

When considering the compatibility of such a Eurozone-budget with the French *constitutional identity limit*, it seems that the '*essential conditions for the exercise of national sovereignty*'-limit is not applicable, as this only applies to new EU primary law commitments.[43] Instead, the specific *constitutional identity limit* which the *Conseil Constitutionnel* applies to the French implementation of EU secondary law obligations appears relevant.[44] Following this limit, an EU secondary law obligation may not violate a 'principle inherent to the *constitutional identity* of France'[45], in particular the institutional balance enshrined in the French Constitution, the indivisibility of the French nation and France's republican status, without explicit confirmation of the constitution-amending legislator.[46] However, it seems that this constitutional benchmark is not applicable to the envisaged design of the Eurozone-budget or the emergency instruments, as these constitute EU secondary acts that do not require implementation into French law as they are based on the EU-Treaties. Given that the Conseil does not generally review EU secondary law but merely the implementation thereof into French law, no direct limit seems to emerge from the French Constitution.

When considering the Spanish *constitutional identity limit*, it was established that the Constitutional Tribunal developed this limit specifically in the context of conferring additional powers to the EU-level by ratifying a new EU Treaty or amending the existing Treaty-framework. This is for example visible from the limit's underpinning constitutional basis in Article 93 Spanish Constitution, which refers to the conclusion of supranational treaties through which domestic

43 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; *Treaty Establishing a Constitution for Europe* para 7; 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.

44 *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.

45 As established by the Conseil, cf. *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.

46 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 148; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 548; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 474-475; Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity' 388; Blachèr and Protière, 'Le Conseil Constitutionnel, Gardien de la Constitution Face aux Directives Communautaires' 135-135.

powers are conferred upon the supranational level.[47] In addition, the Tribunal emphasized that EU secondary law is based on ratified primary law and that it would generally not scrutinize such secondary law, as the EU-Treaties provide procedures to remedy excessive EU legislation and given that EU primary law must comply with the Spanish *constitutional identity limit* in order to be validly adopted.[48] Consequently, given that the type of Eurozone-budget envisaged here would be adopted based on EU primary law, the Spanish *constitutional identity limit* would only be applied by the Constitutional Tribunal in case of manifest violations by the EU act in question and an apparent impossibility of the EU-level to address this violation.[49] Given that establishing the Eurozone-budget as well as the emergency instruments in the proposed way appears generally compatible with the EU Treaty-framework, it is unlikely that a conflict between the Spanish *constitutional identity limit* and the respective EU secondary legislation arises. Furthermore, it seems particularly important for the Spanish Constitutional Tribunal that EU cooperation retains its derived status and that the Spanish legislator retains control within the process of EU cooperation.[50] This control is given in relation to the own resources decision, which would likely constitute the underlying funding mechanism for the proposed Eurozone-budget.[51] In the alternative, and in particular in relation to the proposed emergency instruments, the Member States' financial commitments might be determined by an intergovernmental agreement comparable to, for example, the ESM-Treaty, which equally requires national parliamentary approval. Consequently, the Spanish Parliament retains a fundamental role

47 *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' 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.

48 *Constitutional Complaint Melloni* Section II.3.; Which indicates that this limit primarily applies to the process of EU integration, rather than the subsequent application of the resulting EU secondary law, cf. for example: 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' 269-270.

49 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.

50 Thereby equally shielding the hierarchical position of the Spanish Constitution, cf. *Treaty Establishing a Constitution for Europe* Section II.4.; Plaza, 'The Constitution for Europe and the Spanish Constitutional Court' 358.: 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' 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.

51 Cf. the wording of the Treaties in Article 311 (3) TFEU; Margit Schratzenstaller and Alexander Krenek, 'Tax-Based Own Resources to Finance the EU Budget' (2019) 54 Intereconomics – Review of European Economic Policy 171, 174.

when determining its financial commitment in relation to any of the proposed mechanism based on the existing EU Treaty-framework, as will be further elaborated subsequently.[52]

And finally, when evaluating the compatibility of a possible secondary-law-based Eurozone-budget or emergency instruments with the Polish *constitutional identity limit*, it seems that no major constitutional conflict would emerge either. In the first place, Poland is not yet a Member State of the Eurozone,[53] therefore, any Eurozone-specific measure has only potential future implications and consequently a constitutional conflict remains hypothetical at this point. Yet, these reform steps could impact the Polish ability to join the Eurozone in case EU fiscal integration would be subsequently deemed incompatible with the Polish constitutional order. Furthermore, given that specifically the envisaged Eurozone-budget could potentially be financed by the EU's own resources, Polish approval is required according to Article 311 (3) TFEU. Given that Article 311 (3) TFEU prescribes unanimity in the Council as well as national approval, Poland could potentially block the adoption of the own resources decision, as was recently illustrated in relation to Next Generation EU and the MFF 2021-2027, which would make the attainability of the Eurozone-budget more difficult and could even expose the Eurozone to demands for concessions from non-Euro Member States in return for their vote.

Considering the Polish *constitutional identity limit*, which could be invoked against a Eurozone-budget or an emergency instrument after Polish accession to the Eurozone, no immediate conflict appears to emerge either. Notably, the Polish *constitutional identity limit* protects Polish statehood, the structure of the state with its institutions, the hierarchical position of the Polish Constitution as well as fundamental rights.[54] An additional budgetary capacity or instrument based on EU secondary law requires a primary law basis, which must have been ratified by the Polish legislator according to Article 90 Polish Consti-

52 Cf. the assessment within this Chapter in Section 2.2.1.

53 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.

54 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.

tution.[55] Therefore, in case any budgetary solution is validly enacted based on EU secondary law, it presupposes prior Polish approval of the general commitment. Consequently, in case an EU budgetary capacity can be based on the existing EU primary law, it seems unlikely that the Polish Constitutional Tribunal identifies a constitutional conflict. At the same time, given the current developments in Poland, new constitutional concerns or limits might emerge in the future.[56]

2.1.1.3 Interim conclusion

Overall, this suggests that the initiation of a Eurozone-budget and a limited emergency instruments based on EU secondary law is generally compatible with the national *constitutional identity limits* apparent in Germany, France, Spain and Poland as well as with the overarching constitutional framework in Finland and Germany. The overall assessment indicates that a secondary law solution is confronted with only limited constitutional concerns in the Member States, as even in more rigid systems the assumption prevails that the underpinning EU primary law basis was validly ratified by national parliaments. The assessment revealed that according to national constitutional logic the adoption of the general scheme – which allocates EU funds – has to be distinguished from the prior allocation of additional funds to the EU-level. The latter triggers additional constitutional concerns given that the EU would be equipped with additional (financial) competences.

When considering the EU secondary law solution in isolation, momentarily dis-regarding the legal details concerning possible funding, national constitutional courts appear to only adopt a subsidiary constitutional control, which mainly targets transgressions of powers in relation to secondary law. What is more, given that the most likely options concerning the funding of any of the proposed fiscal integration steps would either be integrated into the EU budget, and thus based on the own resources decision which has to be adopted by national parliaments, or on an intergovernmental solution, which equally requires national parliamentary approval, the respective national parliaments retain a major say on how extensive the domestic financial commitment would be. Arguably, this secures national control over the own national state budget and it thereby confines the discretion on the side of the EU.

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55 *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.

56 Sadurski, *Poland's Constitutional Breakdown* 85; Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' 69.

2.1.2 *A budgetary capacity or instrument introduced by EU Treaty amendment*

Instead of using existing legal bases, a future Eurozone-budget or the different emergency instruments could also be established by amending the EU-Treaties. Accordingly, a new legal basis and a new general legal framework for EU budgeting could be introduced into the EU-Treaties, which would then enable the enactment of a specific Eurozone budget or the initiation of emergency instruments. Arguably, this might be difficult to achieve in the current political context, but it could equally provide a specific, detailed legal framework for the envisaged Eurozone-budget or the potential emergency instruments. Member States could amend the EU-Treaties following either the simplified amendment procedure in Article 48 (6) TEU, which allows for limited amendments that do not confer additional substantive competences to the EU, or through a regular Treaty amendment based on Article 48 (1) (1) TEU. The appropriate basis for such amendment depends on the extent of the envisaged changes to the Treaties.

A clarification of the Treaty-framework, comparable to the amendment of Article 136 TFEU, could be attainable under Article 48 (6) TEU by simple parliamentary majority in Finland and Germany.[57] However, more fundamental changes to the EMU structure as envisaged by the proposed fiscal capacity would likely require a comprehensive Treaty amendment.

2.1.2.1 *Compatibility with the charted macro-comparative constitutional space*

When applying the charted *macro-comparative* constitutional framework to the envisaged creation of budgetary tools through EU Treaty amendment, it appears that particularly those proposals that aim to alter core constitutional features of the EMU-framework, including national responsibility for economic and fiscal policies as well as the no-bailout commitment, could transform the general nature of EU and EMU-cooperation. More specifically, the proposed changes could empower the EU to establish financial commitments that impact or reduce national budgetary prerogatives thereby challenging the core position of national parliaments in budgetary and fiscal matters. As a result, a qualified parliamentary majority might be necessary to ratify the proposed Treaty-

57 Cf. the respective national decisions on the amendment of Article 136 TFEU, *on Finland: Amendment of Article 136 (3) TFEU*; Cf. as well: Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* V.2; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 469.; *And on Germany: ESM-Treaty and Fiscal Compact (interim relief)* paras 128-129; German Parliamentary Fractions of CDU/CSU and FDP, *Entwurf eines Gesetzes zu dem Beschluss des Europäischen Rates vom 25. März 2011 zur Änderung des Artikels 136 des Vertrags über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist (Drucksache 17/9047)* (German Parliament 2012) 4; Cf. as well: Birgit Daiber, 'Das Integrationsverantwortungsgesetz in der Praxis des Deutschen Bundestages' (2012) 43 Zeitschrift für Parlamentsfragen 293, 296-298.

changes in Finland[58] as well as in Germany,[59] as will be analyzed in broader detail in the subsequent section on possible funding sources.

In addition, it is questionable whether the initiation of a far-reaching Eurozone-budget or the creation of additional emergency instruments, which presuppose amendments to the EU-Treaties, is compatible with German *overall budgetary responsibility*. Given the lowered standing requirements in EU-related proceedings, the initiation of admissible constitutional proceedings challenging the required conferral of competences is almost certain.[60] As determined, *overall budgetary responsibility* imposes procedural and substantive requirements, which are violated in case core budgetary competences are conferred to the EU-level outside German parliamentary control.[61] Specifically, the idea to create a Eurozone-budget of up to 3% Eurozone GDP[62] appears problematic as it would entail a permanent re-allocation of national revenue through the EU and would require the EU to conduct fiscal policy decisions on the distribution of the additional financial means. In the alternative, the envisaged emergency mechanisms[63] could result in large financial risks for all Eurozone Member States in case provided loans are defaulting. In both situations, the German

58 As highlighted by the Finnish Constitutional Law Committee in relation to Next Generation EU *Commission's Draft EU Recovery Plan and MFF Planning* 17-18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 457-458.

59 As highlighted by the Legal Service of the German Parliament, cf. Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5; Cf. as well: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 25; Lorz and Sauer, 'Verfassungsändernde Mehrheiten für die Stabilisierung des Euro? – Mehrheitserfordernisse bei der Zustimmung zum Fiskalpakt, zum ESM-Vertrag und zur Änderung des AEUV' 685.

60 Cf. the assessment in Chapter III Section 3.4.3.; Which resulted in an *actio popularis* in EU matters, cf. 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.

61 *Quantitative Easing (PSPP) Final Judgment* para 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.

62 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 182; Craig and Markakis, 'EMU Reform' 1423; Bara and others, 'A contribution to the work on the strengthening of the euro area' 8.

63 Craig and Markakis, 'EMU Reform' 1426; Fabbrini, 'Fiscal Capacity' 115; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6.

budget is impacted either directly by transferring revenue to the EU-level[64] or indirectly by guaranteeing financial risks. In light of the potential wide transformative impact on national budgetary and fiscal decision-making, it is imperative that the established requirements under *overall budgetary responsibility* are respected when devising such Treaty amendments to escape a conflict with the German *eternity clause*.

On the procedural level, the requirements prescribe that major financial commitments with implications for the German budget have to be confirmed by the *Bundestag* and that these commitments remain limited in size and scope.[65] This indicates that the German Parliament has to retain a central role in the approval and the administration of larger financial commitments. The constitutional jurisprudence suggests that for larger commitments with uncertain financial risks parliamentary approval is required at various stages.[66] For the adoption of the ESM-Treaty this implied that each country-specific assistance program had to be approved by the German Parliament.[67] It seems that a core constitutional element apparent in this jurisprudence is the concept of financial risk. Notably, the ESM provides financial assistance to Member States through conditional loans.[68] The entirety of participating Member States guarantees the operations of the ESM through paid-in and callable capital based

64 Note that even in case new taxes or levies are introduced to fund the additional EU budgetary capacity, these revenue sources are no longer available for the German Parliament and the budgetary space is thus curtate, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 208.

65 On the requirement that these commitments are confirmed by the German Parliament, cf. *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 107; *Participation of Members of German Parliament in the EFSF* paras 109-111; *Financial Support for Greece and EFSF* para 124; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; On the requirement that commitments are specific, cf. *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297.

66 *Participation of Members of German Parliament in the EFSF* para 112; Cf. as well: Herdegen, 'Art. 79 GG' para 183; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

67 *ESM-Treaty and Fiscal Compact (interim relief)* para 167; Requiring, however, that the specific assistance program would be approved by the German Parliament, cf. Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' 274; Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 928; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 267.

68 Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 96-97; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 105.

on a scheme that is proportionate to the population and economic power of the participating Member States.[69]

In the case of Germany, the maximum guarantees amount to € 190 billion, which is however only activated in case of defaulting loans.[70] Obviously, the probability of defaulting loans granted through the ESM's financial assistance programs depends on the specific Member State in question and the agreed conditions for receiving such assistance are crucial to determine the long-term impact that the financial support can have. These are essential considerations in the determination of the financial risk that is inherent in the commitment that the German Parliament has to approve. In case the decision on financial assistance would be exclusively exercised at ESM- or EU-level, the German Parliament would be unable to assess the projected concrete financial risk which would undermine parliamentary responsibility for national budgeting as protected by Article 79 (3) GG and more specifically the principle of democracy. For the envisaged EU budgetary capacity or instrument this suggests that the German financial commitments require that parliament is able to project the inherent financial risks. Hence, in case the EU Treaty amendment would introduce a legal basis to establish a Eurozone-budget or an emergency instrument, it seems constitutionally required to enable national parliaments to continuously evaluate the financial risks attached to the national financial commitment – and it would thus correspond to wider domestic constitutional calls for comprehensive involvement of national parliaments in budgetary and fiscal decisions.[71]

Next to the solution in the ESM-Treaty, which guarantees national parliamentary control over the administration of the available financial guarantees, Article 311 (3) TFEU illustrates how national parliamentary confirmation of financial commitments at EU-level can be implemented. Notably, Article 311 (3) TFEU requires the approval of the EU's own resources decision, which determines the EU's revenue and the Member States' maximum financial commitment to finance this revenue, in accordance with the national constitutional requirements applicable in the Member States.[72] This enables national parliaments to continuously assess the financial risk attached to the national financial commitment. Subsequently, these resources are broadly allocated

69 Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 95; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 104.

70 *ESM-Treaty and Fiscal Compact (interim relief)* para 167; Cf. as well: Beukers, 'The Eurozone Crisis and the Autonomy of Member States in Economic Union: Changes and Challenges' 274; Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' 267.

71 Inherent in the concept of *overall budgetary responsibility* and the identified *integration responsibility* of the German Parliament in that regard, cf. Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23.

72 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 205; Union, *European Union Public Finance* 131-132.

to the different EU policy fields in the MFF-Regulation which requires unanimous approval by the Council according to Article 312 (2) (2) TFEU,[73] and which thus again involves national parliaments through the outlined procedures applicable to the domestic *ex ante* control over EU decision-making.[74] Put differently, national parliaments have constitutive control over the maximum domestic commitments to the EU as well as decisive control over the allocation of funds according to policy fields under the current Treaty-framework.

In practice, the MFF-ceilings are agreed by the European Council in an unanimous decision as established by Article 15 (4) TEU, which was recently illustrated in relation to the 2021-2027 MFF-framework.[75] Under the German constitutional system, the German Chancellor, which is accountable to the German Parliament, represents Germany in the European Council.[76] Institutionally speaking, this guarantees a limited degree of parliamentary control also in relation to the initial European Council decision on the allocation of the EU's own resources. Finally, the current framework consisting of the EU's own resources decision as well as the MFF-Regulation is limited in time,[77] which ensures that the German financial obligations towards the EU are regularly re-negotiated. The outlined framework appears exemplary regarding national parliamentary involvement which is comprehensive, compulsory regarding maximum financial liabilities, as well as temporary and thereby it appears to comply with the procedural requirements formulated under *overall budgetary responsibility*. When designing EU Treaty amendments to introduce either a comprehensive Eurozone-budget or an emergency instrument to tackle asymmetric economic shocks, the submitted observations have to be taken into consideration.

On the substantive level, *overall budgetary responsibility* requires that Germany is not establishing automatic liabilities for political decisions taken by

73 Crowe, 'The European Budgetary Galaxy' 437; Union, *European Union Public Finance* 132.

74 Cf. the evaluated framework in Finland enshrined in Section 96 Finnish Constitution, Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452; Husa, *The Constitution of Finland – A Contextual Analysis* 47; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556; As well as the framework in Germany enshrined in Article 23 (3)-(6) GG, *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 127-131; Cf. as well: Scholz, 'Art. 23 GG' para 154.

75 Notably, the conclusions of the European Council contain a detailed outline of the MFF-ceilings per policy field, cf. Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 17-65.

76 As established in Article 67 (1) GG, the German Parliament can withdraw its confidence in the government, cf. as well: Roman Herzog, 'Art. 67 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) para 2; Jens Kersten, 'Parlamentarismus und Populismus' (2018) 58 Juristische Schulung (JuS) 929, 930.

77 Article 312 (1) (2) TFEU introduces a temporal dimension; More generally on the temporal dimension, cf. Crowe, 'The European Budgetary Galaxy' 437.

third parties, in order to preserve budgetary autonomy, and that essential budgetary competences remain at the national level.[78] It was established that the German Constitutional Court adopts a reluctant stance when applying these substantive requirements and that until now all EU-related financial commitments were deemed compatible with *overall budgetary responsibility*. However, this conclusion might be different in case of larger, permanent contributions to the EU budget as would be required by some of the more far-reaching proposals that advocate an annual Eurozone-budget of up to 3% Eurozone GDP,[79] which would amount to € 343 billion annually based on the available 2019 data.[80] In case the financing structure for the proposed Eurozone budget would follow a comparable approach to the current one, the annual German contribution could amount to around 27%[81] which would translate into up to € 92,6 billion annually. In absolute numbers and percentages, the German financial commitment to the EU could then be classified as substantial as under the current calculation about 25% of the German federal budget[82] would be effectively transferred to the EU-level. In light of the current conception of *overall budgetary responsibility*, it seems likely that the German Court would consider such commitment as too extensive as the German Parliament would be prevented from exercising its budgetary prerogatives in relation to over a quarter of the annual German budget.

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78 On the importance of budgetary autonomy and the exclusion of automatic liabilities for political decisions of third parties, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; On the exclusion of conferring essential budgetary powers to the EU, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* paras 210-213; *ESM-Treaty and Fiscal Compact* para 163; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

79 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 182; Craig and Markakis, 'EMU Reform' 1423; Bara and others, 'A contribution to the work on the strengthening of the euro area' 8; Also pointed out by the Commission, cf. Commission, *Commission Staff Working Document – Impact Assessment – Accompanying the Document for Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a European Investment Stabilisation Function (COM (2018) 297)* 52.

80 As determined previously, the Euroarea GDP amounted to around €11.430 billion according to the World Bank, cf. Bank, 'GDP (current US$) – Euro area'.

81 Based on EU data considering overall revenue from national contributions amongst Eurozone Member States (amounting to €94.245,5 million in 2019; €93.445,4 million in 2018; €72.720 million in 2017) and the German share of national contributions (amounting to €25.820 million in 2019; €25.266,7 million in 2018; €19.587 million in 2017) the share was 27,4% in 2019, 27% in 2018 and 26,9% in 2017, cf. the data: European Commission, *EU expenditure and revenue 2014-2020 (dataset)* (DG Budget data 2020).

82 Based on the previous calculation and data; €72 billion constitute 20,2% of the 2019 federal budget which amounted to €356 billion in 2019.

Overall, the presented arguments suggest that the German Constitutional Court could consider the creation of the proposed most far-reaching Eurozone-budget in conflict with *overall budgetary responsibility* given that it limits direct German parliamentary control over a significant part of the German budget. Obviously, such a constitutional verdict would have serious implications for the entire EU, as Germany would be constitutionally barred under Article 79 (3) GG to participate in the concrete integration step. Therefore, the research will evaluate in a separate section within this chapter (3.) whether the charted *constitutional flexibility* in the German constitutional approach could ease the apparent constitutional conflict and thereby prevent the emergence of an unsurmountable conflict with the *eternity clause*.

2.1.2.2 Compatibility with the charted micro-comparative constitutional space

As previously established, the different national constitutional limits protect similar constitutional principles in their jurisprudence, in particular national sovereignty, democracy and parliamentary control over budgeting. In light of this material overlap and given the previously established potential conflicts with German democracy, it appears likely that the French, Spanish and Polish *constitutional identity limits* conflict with the prospect of introducing a sizeable Eurozone-budget or an emergency instrument. Yet, given that constitutional systems equally adopt specific strategies on how to address conflicts with these core national principles, it has to be determined whether the respective *constitutional identity limit* imposes limitations towards the attainment of these integration steps.

In France, the *Conseil Constitutionnel* could be requested to rule on the compatibility of such a Treaty amendment with the French Constitution.[83] As established, the required conferral of competences to the EU can be challenged by a set of privileged applicants based on Article 54 or Article 61 (2) French Constitution.[84] In light of the previous constitutional practice,[85] it

83 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' 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.

84 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' 529.; Maugüé, 'Le Conseil Constitutionnel et le droit supranational' 53.

85 As highlighted, since the Maastricht Treaty all EU Treaty amendments were referred to the *Conseil Constitutionnel* with the exception of the Nice Treaty, 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; Azoulai

seems highly likely that such a review will be initiated in light of the constitutional importance of the matter.[86] The *Conseil* would then mainly determine whether the envisaged conferral of power is compatible with the French sovereignty doctrine. As established, the Conseil determines whether the envisaged conferral of competences from the national to the EU-level affects the French sovereignty.[87] In that regard, the *Conseil* established that not every conferral of competences to the EU-level is automatically in conflict with French sovereignty but only such conferrals that affect the 'essential conditions for the exercise of national sovereignty'.[88]

It appears that the *Conseil* construed these *essential conditions* mainly on a competence-centric basis. For example, the initiation of EMU and the required conferral of monetary competences to the EU required a constitutional amendment given that monetary competence were deemed an important competence area under French sovereignty and given that these competences were shifted to the EU-level.[89] In contrast, in its evaluation of the Fiscal Compact the *Conseil Constitutionnel* established that the intergovernmental instrument largely reiterated already conferred competences, which did not require anew confirmation through explicit constitutional amendment.[90] Only Article 3 (2) Fiscal Compact, which introduced the balanced budget rule, triggered constitutional concerns, as it was seen to potentially reduce the parliamentary budgetary

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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.

86 Notably, the *Conseil Constitutionnel* has identified EMU-related policies as important under the French conception of sovereignty, cf. *Review of Maastricht Treaty (Maastricht I)* para 43; 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' 296; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

87 As established by the *Conseil Constitutionnel*: *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.

88 Conception introduced by the *Conseil Constitutionnel* itself, cf. for example: *Fiscal Compact* para 9; *Lisbon Treaty* para 8; *Treaty Establishing a Constitution for Europe* para 6; *Revision of Amsterdam Treaty* para 6; Cf. as well: 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.

89 Cf. the findings of the *Conseil Constitutionnel*: *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; Gundel, *Die Einordnung des Gemeinschaftsrechts in die französische Rechtsordnung* 133; Oliver, 'The French Constitution and the Treaty of Maastricht' 13, 15.

90 *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.

prerogatives contained in Article 34 and 47 French Constitution, in case the rule would have had to be implemented into French constitutional law.[91]

Therefore, the central point of the *Conseil*'s scrutiny when assessing the fiscal integration steps appears to be whether the proposed EU Treaty amendment would alter the original EMU commitment introduced by the Maastricht Treaty and whether in that regard additional competences are conferred to the EU-level. The constitutional assessment will depend on the concrete design of the Treaty amendment and the envisaged conferral of national powers. However, it seems that particularly the introduction of a bigger Eurozone-budget could potentially impact French fiscal competences in the view of the *Conseil Constitutionnel*. At the same time, the Conseil was until now very reluctant to identify a conflict with the sovereignty limit in relation to EMU integration steps taken during the Eurocrisis,[92] which were, however, largely introduced as EU secondary law measures. Overall, it appears at least possible that the *Conseil* would find a proposed establishment of a bigger Eurozone-budget or the introduction of emergency instruments accompanied by EU Treaty amendment to be in conflict with the French sovereignty limit. Especially more far-reaching proposals which could result in a 'transfer union'[93] would significantly alter the original conception of EMU-cooperation and therefore exceed the initial conferral.

In case the *Conseil Constitutionnel* would conclude that the proposed Treaty amendment conflicts with French sovereignty, a constitutional amendment would be required in France to ratify the new EU obligations.[94] Such constitutional amendments can be enacted following Article 89 French Constitution,

91 *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' 119-120.

92 Actually, the only conflict in that regard was the creation of the EMU introduced through the Maastricht Treaty, which conferred exclusive monetary competences to the EU, cf. the wording of the Conseil *Review of Maastricht Treaty (Maastricht I)* paras 43, 45; 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' 296; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527; Oliver, 'The French Constitution and the Treaty of Maastricht' 15.

93 As previously introduced, cf. for the concept: Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 823; Eriksen, *Contesting Political Differentiation – European Division and the Problem of Dominance* 249-250; Oeter, 'Bundesstaat, Föderation, Staatenverbund – Trennlinien und Gemeinsamkeiten föderaler Systeme' 750; Weber, 'Die Reform der Wirtschafts- und Währungsunion in der Finanzkrise' 938.

94 Given that the French Constitution does not limit the scope for constitutional amendments, cf. Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; 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.

which requires the support of a three-fifth majority in Congress.[95] Thereby, it should be equally emphasized that such constitutional amendments are common in France prior to the ratification of new EU-Treaties and that the *Conseil* will not check if the adopted amendments themselves violate French *constitutional identity*.[96] Overall, the *Conseil Constitutionnel* occupies in this process its institutional role as 'pointsman' that identifies constitutional conflicts with EU integration steps but that refrains from imposing absolute limitations to the powers of the constitution-amending legislator.[97]

Similarly, in Spain the Constitutional Tribunal established that EU cooperation is limited by the Spanish *constitutional identity* doctrine. The *constitutional identity* doctrine protects *inter alia* Spanish sovereignty in conjunction with democracy as well as the fundamental constitutional structure established by the Spanish Constitution.[98] It was already established that the Constitutional Tribunal seems to adopt a rather reluctant approach when defining the content of the *constitutional identity limit*. From its jurisprudence, it can be deduced that the Tribunal construes Spanish sovereignty as an exercise of constitutional powers[99] and thus as a competence-based restriction to EU integration.[100] Furthermore, the Tribunal emphasized the constitutional importance of preserv-

95 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.

96 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.

97 Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 150-151; Moreover, the French Constitution does not contain supra-constitutional provisions, cf. *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.

98 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.

99 As emphasized by the Tribunal in relation to the right of EU citizens to vote in municipal elections, cf. *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.

100 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.

ing *Kompetenz-Kompetenz* and, more generally, the hierarchical position of the Spanish Constitution.[101] Based on this broad conceptual framework, it appears that budgetary and fiscal prerogatives are likely covered by the Spanish *constitutional identity limit*. Notably, the Spanish Constitution assigns the constitutional responsibility for the state budget in Article 66 (2) to the *Cortes Generales* – the joint assembly of Spanish Parliament and Spanish Senate.[102] In addition, Article 75 (3) Spanish Constitution clarifies that these budgetary prerogatives cannot be delegated to a standing legislative committee, but that these have to be exercised by the plenary. The constitutional consideration apparent in this constitutional provision suggests that the decision-making on the Spanish state budget is of high democratic importance which requires approval of the entire *Cortes Generales*. Finally, Article 134 Spanish Constitution establishes further details for the budget process, including the requirement that the adopted state budget has to contain all expenditure and revenue.

Any EU Treaty amendments, which would introduce a genuine Eurozone-budget or an emergency instrument to tackle asymmetric economic shocks, would likely alter these central constitutional prerogatives of the Spanish *Cortes Generales*, and thus affect Spanish democracy and sovereignty. Through such EU Treaty amendment, the EU could be entitled to take its own, independent budgetary and fiscal decisions as well as potentially generate its own revenue, which could interfere with the constitutional task to control the state budget assigned to the *Cortes Generales*. Notably, the possible additional national expenditure or potential financial liabilities could affect the principle of the completeness of budgetary planning and the currently required parliamentary approval for budgetary, financial as well as fiscal decisions and thereby interfere with the exercise of the constitutionally-assigned responsibilities of the *Cortes Generales*. As a result, a constitutional amendment might likely be required to prepare the conferral of the required budgetary and fiscal competences from the national to the EU-level.

Such constitutional amendments are governed by Articles 167 and 168 Spanish Constitution, which impose different constitutional requirements depending on which section of the Spanish Constitution is affected by the

101 *Constitutional Review of the Maastricht Treaty* Section II.4.; Cf. as well: 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; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1193-1194.

102 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.

envisaged amendment.[103] The previously mentioned constitutional provisions in Articles 66 (2), 75 (3), 134 Spanish Constitution, are not situated within the sections of the constitution enumerated in Article 168 Spanish Constitution. Amendments to these provisions would therefore not be considered as 'essential reforms' of the constitutional text and the stricter procedural framework is not applicable.[104] Hence, amendments to these provisions can be approved by a three-fifths majority in the Spanish Parliament and Senate.[105] Yet, the identified possible conflict with the Spanish *constitutional identity limit*, and more specifically with the principle of democracy and sovereignty alters this conclusion. Notably, budgetary and fiscal competences are not merely parliamentary prerogatives protected by the Spanish Constitution, but they have a particular constitutional link to these two principles and can be therefore identified as important state competences. Consequently, the envisaged EU Treaty-changes might not only alter the specifically identified constitutional provisions but these amendments appear to equally affect core constitutional principles enlisted in the Preliminary Part of the Spanish Constitution which compromises Articles 1 to 9. Concretely, Articles 1 (1) and 1 (2) Spanish Constitution establish the principle of democracy and sovereignty respectively. Consequently, the envisaged EU Treaty amendments could be characterized as amendments to these principles, which would result in an 'essential reform' in the sense of Article 168 Spanish Constitution.[106] Such essential reform has to be approved by a two-thirds majority of the Spanish Parliament and Senate. Both houses then have to be immediately dissolved and after new elections are concluded, the newly elected houses have to confirm the reform again by a two-thirds majority followed by a public referendum.[107] This constitutes a high constitutional hurdle that was never taken until now.

Taken together, this indicates that the Constitutional Tribunal might identify a conflict between the proposed EU Treaty amendments and the Spanish *constitutional identity limit*. The precise evaluation remains anticipatory, as the Tribunal did only define its *constitutional identity limit* at two occasions in a

103 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282; As previously illustrated, the Spanish Constitution does not restrict the scope for constitutional amendments, which was confirmed by the Constitutional Tribunal, cf. *Catalan Independence Declaration* Section II. 7.; Cf. as well: Ahumada Ruiz, 'The Spanish Constitutional Court' 636; Álvarez, 'Die spanische Dogmatik der Verfassungstreue – Geschichte einer fehlgeschlagenen Rezeption des deutschen Verfassungsdenkens' 442; Santaolalla Gadea and Martinez Lage, 'Spanish Accession to the European Communities: Legal and Constitutional Implications' 13-14.

104 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

105 Elvira, 'Spain' 282.

106 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

107 Elvira, 'Spain' 282-283.

very abstract manner. However, given the projected major impact on core Spanish constitutional responsibilities and the general receptiveness to comparative reasoning,[108] the emergence of such conflict is possible in light of the projected constitutional conflicts in other Member States. However, in case this conflict emerges, the Spanish constitution-amending legislator is empowered to overcome it by amending the constitutional text under the strict revision procedure following Article 168 Spanish Constitution. Given that the Spanish Constitutional Tribunal is not competent to review constitutional amendments, such amendments could not be challenged themselves.[109] Yet, the strict constitutional amendment procedure and the highly exceptional status of constitutional amendments in Spain[110] both ultimately render its attainability challenging.

Finally, the application of the Polish *constitutional identity limit* to the proposed EU Treaty amendment appears to result in comparable constitutional concerns, albeit this conflict remains hypothetical for now as Poland is not yet a member of the Eurozone.[111] As established in the *micro-comparative* assessment, the Polish Constitutional Tribunal identified the ability to design financial, budgetary and fiscal policies as a central component of Polish sovereignty.[112] Article 219 Polish Constitution assigns the prerogative to adopt the state budget to the Sejm and the constitutional text empowers the Polish Council of Ministers to draft internal policies, including economic and fiscal policies, as stipulated in Article 146 Polish Constitution.[113] Obviously, the

108 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 269; Particularly applicable to the *constitutional identity* discourse which possibly triggered the emergence of this limit in Spain, cf. Ahumada Ruiz, 'The Spanish Constitutional Court' 629.

109 De Visser, *Constitutional Review in Europe – A Comparative Analysis* 119; Alaez Corral and Arias Casta–o, 'The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation' 603.

110 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.

111 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.

112 *Treaty of Lisbon* Section III 2.1.; 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.

113 *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

envisaged amendments to the EU-Treaties could result in partial shifts of responsibilities in economic and fiscal matters to the EU-level. These modifications would then challenge the outlined constitutional responsibilities and prerogatives in financial, budgetary as well as fiscal competences of the Polish Parliament and the Polish Council of Ministers, which were identified as core components of Polish sovereignty. Therefore, it seems that the Polish Constitutional Tribunal will likely conclude that any proposed Treaty-changes on these matters alter constitutional provisions in Poland and will thus require explicit confirmation by the Polish legislator following Article 90 (1) and (2) Polish Constitution.[114]

The subsequent question is, whether the proposed EU Treaty amendment and the identified constitutional challenges would also be found to impact the material core of the Polish Constitution as protected by the *constitutional identity limit*. It should be recalled that, although the Polish Constitutional Tribunal identified fiscal competences as particularly important under Polish sovereignty, the Tribunal equally acknowledged the evolutionary potential of Polish sovereignty.[115] The evolutionary conception of sovereignty might ultimately even allow for the conferral of competences to the EU which were traditionally perceived as core powers of the sovereign state.[116] Furthermore, the Tribunal construed EU cooperation as an exercise of sovereign powers and argued that the respective competences remained at the national level, merely

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Lissabon im Lichte des Urteils des polnischen Verfassungsgerichtshofes zum Beschluss des Europäischen Rates zur Änderung von Art. 136 AEUV' 314.

114 As stipulated, the confirmation of the conferral of competences is construed as exercise of Polish sovereignty, cf. 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.

115 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.

116 *Challenges Against Article 136 (3) TFEU and ESM-Treaty* Section 6.4.2.; *Treaty of Lisbon* Section III.2.1.; As equally established in 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.

their exercise is transferred to the supranational level.[117] In addition, the conception of EU cooperation as a shared exercise of competences that remain attached to the national level is reflected in the derived status of the EU and the prohibition to confer *Kompetenz-Kompetenz* to the EU-level.[118] To that end, the Tribunal underscored that the conferral of competences is restricted to 'certain matters', which requires that the Polish legislator clearly outlines the extent of the conferred competences.[119]

When applying this constitutional benchmark to the envisaged EU Treaty amendment it is conceivable that the Polish Constitutional Tribunal would identify a major conflict with Polish *constitutional identity*, given that financial, budgetary and fiscal competences are construed as core powers under Polish sovereignty. In case major parts of these competences are conferred to the EU-level, the Tribunal might find a violation of the constitutional framework for the conferral of competences established in Article 90 Polish Constitution and in particular the requirement that the transfer of competences has to be limited to 'certain matters'.

Yet, in case the outlined EU fiscal integration steps would be deemed incompatible with Polish *constitutional identity* and the EU enabling clause in Article 90 Polish Constitution it appears that the Polish constitution-amending legislator is competent to overcome the resulting constitutional conflict. Although the Polish Constitutional Tribunal did never explicitly affirm this,[120] it continuously indicated that the Polish legislator could overcome a conflict between the Polish Constitution and envisaged EU commitments by either amending the constitutional text, by modifying the EU commitment, or by withdrawing from the EU following Article 50 TEU.[121] This can be seen as

117 *Treaty of Lisbon* Section III.2.1.; Cf. as well: Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

118 Directly deriving from Article 90 Polish Constitution, which restricts the conferral to 'certain matters', cf. *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.

119 *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.

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

121 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.

a confirmation of the wide discretion of the Polish legislator.[122] Moreover, it can be submitted that a possible absolute character of the Polish *constitutional identity limit* would have already been emphasized by the Polish Constitutional Tribunal. Therefore, the Polish constitution-amending legislator would likely be able to overcome a conflict between the Polish *constitutional identity limit*, specifically Polish sovereignty, and the envisaged EU Treaty amendment. However, the possibly required modifications in relation to core constitutional principles included in Chapter I of the Polish Constitution – in particular the conception of Polish sovereignty enshrined in Article 4 Polish Constitution – would have to be confirmed by public referendum as established in Article 235 (6) Polish Constitution. Hence, the seemingly required constitutional amendment to accommodate the outlined fiscal integration steps seems to entail major procedural hurdles.

2.1.2.3 Interim conclusion

The creation of an EU budgetary capacity or the introduction of emergency instruments through comprehensive EU Treaty amendment is generally possible in Finland, France, Spain and Poland. Only the German *constitutional identity limit* appears to impose an absolute restriction to its attainment. However, it was established that attaining the required two-thirds majority threshold in Finland could be politically challenging[123] and similarly the feasibility of constitutional amendments in Spain remains questionable in light of the high procedural threshold as well as the generally rare use of the amendment procedure. The latter corresponds to the situation in Poland where possible constitutional conflicts can be overcome, however, the attainability of the required majority to enact both a constitutional amendment including possibly a public referendum and subsequently to approve the conferral of competences under Article 90 Polish Constitution seems highly questionable, particularly in light of the current political situation.

Hence, the most far-reaching integration proposals concerning the creation of an additional EU fiscal capacity are confronted with significant national constitutional opposition that ranges from requiring support by qualified majority in Finland, requiring constitutional amendments in France, Spain and Poland to being seemingly incompatible with the German *eternity clause*. Thus, the most central question when designing the envisaged fiscal capacity appears to be to what extent the resulting budgetary tools are specific, limited in size and scope, what sort of control national parliaments can exercise as well as

122 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; Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context' 398.

123 Jokela, 'Finland: Towards a More Cautious Europeanization' 49; Ojanen, 'Constitutional Amendment in Finland' 95.

how they are financed. In case the introduction of the envisaged tools follows the existing framework of EU budgeting, it appears that no incompatible constitutional conflicts emerge, given that the central position of national parliaments in the control of fiscal and budgetary decisions would be warranted. In case, however, the Treaty amendment would confer discretionary decision-making in relation to these instruments for example regarding their size, national parliamentary prerogatives would be clearly impacted and the outlined constitutional concerns would be triggered.

2.1.3 Conclusion on feasibility of EU budgetary capacity or instrument

The assessment reveals that the envisaged EU Treaty amendment to introduce a budgetary capacity for the Euroarea or an emergency instrument to address asymmetric economic shocks affects important constitutional principles within the Member States. These constitutional principles are national democracy in combination with national sovereignty as well as the institutional prerogatives of the national parliaments. Given the importance of these principles for the respective national constitutional systems, the constitutional text as well as the constitutional authorities appear to impose additional hurdles to confirm the required conferral of competences to engage in the suggested EU Treaty amendments. However, in Finland, France, Poland and Spain it appears that constitutional concerns can be addressed by the constitution-amending legislator by explicitly confirming the conferral of competences through constitutional amendment – with partly high procedural hurdles. Only in Germany the constitutional concerns might partly not be overcome by amending the constitutional text itself. Overall, the assessment thus reveals that the emerging constitutional concerns are rooted in a similar conception of national democracy and national sovereignty, according to which budgetary and fiscal competences are essential powers of the national parliaments protected by both mentioned principles.

Furthermore, the compatibility assessment revealed that the German *overall budgetary responsibility* limit provides a kind of constitutional litmus test for the drafting of EU fiscal integration steps more generally, as it covers most constitutional concerns identified in other Member States given its comprehensive and far-reaching conception. As highlighted, the limit distinguishes between procedural and substantive requirements.[124] On the procedural level, the

124 Cf. the assessment in Chapter III Section 4.2.2.2.; As highlighted, on the requirement that these commitments are confirmed by the German Parliament, cf. *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 107; *Participation of Members of German Parliament in the EFSF* paras 109-111; *Financial Support for Greece and EFSF* para 124; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; On the requirement that commitments are specific, cf. *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im euro-*

German Constitutional Court requires that financial commitments remain limited in scope as well as overall size and that the German Parliament retains a central position in the approval as well as administration of EU fiscal decision-making.[125] For the design of the EU Treaty amendments, several design requirements appear to emerge. These design requirements include a compulsory involvement of the German Parliament in all major budgetary and fiscal decision at EU-level. For a Eurozone-budget, this would imply to develop a structure comparable to the current EU budgetary framework, which makes national parliamentary approval obligatory for determining EU revenue according to Article 311 (3) TFEU and which subsequently allows national parliaments to advice their respective national Council and European Council representatives according to the internally applicable procedures. In that regard, given that the fiscal decision-making space would be significantly increased under the envisaged scheme, additional national parliamentary involvement could be envisaged to tackle possible further constitutional concerns. In addition, the conferral of powers has to be limited in size and scope, which requires that national parliaments clearly define their financial commitments and that this commitment cannot be increased against the will of the respective national parliament.

Through these procedural requirements, the German Court aims to preserve the constitutionally enshrined control of the German Parliament over budgetary and fiscal decisions, which are essential competence areas under German democracy.[126] The result of these procedural requirements is ultimately that fiscal integration steps seemingly have to take a hybrid character, which allows for EU decision-making under strict German parliamentary control. The resulting hybrid character of fiscal decision-making in the specific areas identified is neither exclusively confined to the national level nor is it independently administered by the EU. Instead, the institutional requirements appear to balance decisive control of national parliaments with allocating fiscal decision-making space to the EU-level. The existing model under Article 311 (3) TFEU might serve as an example in that regard, although increased fiscal decision-

päischen Integrationsprozess 297; And on the substantive dimension, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

125 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' 23.

126 As initially concluded by the Constitutional Court in its *Lisbon*-decision, cf. *Lisbon-judgment* para 252; Cf. as well Calliess, 'Constitutional Identity in Germany – One for Three or Three in One?' 164-165; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1005.

making space in case of a larger Eurozone-budget appears to require an even more comprehensive involvement of national parliaments.

Adhering to the German procedural requirements under *overall budgetary responsibility* and pursuing a hybrid model for fiscal integration appears to not merely address the constitutional concerns of the German Constitutional Court. It appears to equally address potential constitutional concerns in the other evaluated Member States in relation to their national *constitutional identity limits*. Arguably, the central involvement of national parliaments in the fiscal decision-making of a more integrated EU might more generally address sovereignty or democracy concerns. Notably, in France and Spain the constitutional authorities appear to restrict the conferral of particularly important competences to the EU-level, but they seem not to necessarily oppose the shared exercise of core sovereign competences.[127] It can be submitted that respecting the German procedural requirements under *overall budgetary responsibility* ensures that democratically relevant constitutional budgetary and fiscal powers are not fully conferred to the EU-level but are instead only jointly exercised. The result might be that no constitutional amendment would be required in these Member States as the constitutional prerogatives are ultimately preserved. If this proved correct, the German procedural requirements under *overall budgetary responsibility* could function as indicatory constitutional benchmark for EU fiscal integration proposals in other EU Member States.

In addition, the resulting overview indicates that only the German *constitutional identity limit* imposes an irreconcilable limitation to the conferral of powers to the EU-level. Notably, in case the envisaged EU Treaty amendment conflicts with the substantive dimension of *overall budgetary responsibility* and therefore violates the core of German democracy, the German legislator may

127 On the Finnish conception of sovereignty, which allows to filter in the factual benefits that stem from supranational cooperation, cf. Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334; On the 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; On the conception of Spanish sovereignty, cf. *Treaty Establishing a Constitution for Europe* Section II.2.; 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; As well as on the Polish conception of sovereignty, which emphasizes the only temporary limitation of sovereignty through EU cooperation, cf. *Treaty of Lisbon* Section III.2.1.; cf. as well: Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 156.

Member State	Emergency instrument (ESM-design)	Discretionary emergency instrument (Treaty-change)	Budgetary capacity based on Article 311 TFEU	Discretionary budgetary capacity (Treaty-change)
Finland	Parl. approval by simple majority (Sect. 94 (2) (1) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).	*Ex ante* parl. monitoring (Sect. 96 FC). Own resources decision by qualified parl. majority (Sect. 94 (2) (2) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).
Germany (including *constitutional identity limit)*	Parl. approval by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG).	Apparent conflict with the German *eternity clause* (size of commitment and suspension of nat. parliamentary control). Partly flexibilization of conflict possible through: - EU benefits. - Net. calculation. - Consistent standard.	*Ex ante* parl. involvement (Art. 23 (3) GG). Parl. approval of own resources decision by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG).	Apparent conflict with the German *eternity clause* (size of commitment and suspension of nat. parliamentary control). Partly flexibilization of conflict possible through: - EU benefits. - Net. calculation. - Consistent standard.
French *sovereignty limit*	No apparent conflict with the *sovereignty limit*.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.	Not applicable to EU secondary law.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.
Polish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit*.	Possible conflict which might require const. amendment (Art. 236 PC), including possibly referendum. Apparent conflict, can be possibly overcome through "modern" interpretation of Polish sovereignty.	Not applicable to EU secondary law.	Possible conflict which might require const. amendment (Art. 236 PC), including possibly referendum. Apparent conflict, can be possibly overcome through "modern" interpretation of Polish sovereignty.
Spanish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit*.	Apparent conflict, can be overcome by const. amendment (Art. 168 SC) which imposes high threshold and is practically difficult to attain.	Generally not applicable to EU secondary law.	Apparent conflict, can be overcome by const. amendment (Art. 168 SC) which imposes high threshold and is practically difficult to attain.

Figure 20: Compatibility of charted constitutional space with proposals on fiscal capacity

not ratify the required conferral of powers.[128] Consequently, *overall budgetary responsibility* can be identified as the strictest constitutional hurdle for introducing the envisaged EU Treaty amendment to establish a discretionary Eurozone-budget and the proposed large financial instruments envisaged against asymmetric shocks in order to stabilize the Euro both in a preventive manner as well as in emergency situations. In contrast to the assessed *constitutional identity limits* in France, Poland and Spain, which could all be overcome by the constitution-amending legislator, the German Constitution does not allow constitutional modifications that affect the *eternity clause* in Article 79 (3) GG. Changes to this provision require the enactment of a new constitutional text following Article 146 GG confirmed by the constituting power in Germany.[129] It was already highlighted that such thorough constitutional reform process is currently unlikely in Germany, which is why EU fiscal integration has to address the German constitutional demands. Yet, it was submitted that different constitutional arguments could be included in order to deconstruct the substantive dimension of *overall budgetary responsibility* and thereby generate additional constitutional flexibility, as will be further elaborated below (3.). As it stands, the most ambitious EU fiscal integration steps will be likely considered incompatible with the German *constitutional identity limit*. The overall research findings on the creation of a Eurozone fiscal capacity are summarized in *Figure 20* above.

2.2 Compatibility of funding options with national constitutional space

The previous compatibility assessment illustrated that, although the more ambitious integration reforms would certainly trigger constitutional conflicts if implemented in the proposed way, the creation of some form of Eurozone-budget or emergency instruments is generally attainable under the charted national constitutional space. This triggers the subsequent question how to equip the EU with the required financial means.

The current EU-Treaties enable Member States to fund shared projects, ambitions or objectives, without putting the national constitutional order in question. As was previously established, the current budgeting practice at the EU-level relies heavily on the Member States and their approval for any EU

128 In light of the absolute conception of Article 79 (3) GG, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

129 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.

funding. Notably, and in addition to the fact that the EU budget is adopted following the special legislative procedure according to Article 314 (1) TFEU and requires approval of both the European Parliament and the Council,[130] the budget's underpinning funding has to be approved by the Member States as laid down in Article 311 (3) TFEU.[131] Therefore, Member States retain final control over their budgetary commitments under the existing Treaty structure, which seems to warrant domestic parliamentary control over financial involvement at EU-level, which was for example deemed a core procedural component of *overall budgetary responsibility* by the German Constitutional Court.[132]

At the same time, different ideas were advanced by the analyzed proposals to make EU revenue less dependent on the national budget. These proposals include, following the current Treaty-framework, the introduction of new EU own resource possibly generated through jointly introduced taxes (2.2.1.), or more far-reaching proposals suggesting the introduction of a genuine EU taxation power (2.2.2.) or the initiation of EU debts and shared liabilities (2.2.3.). All three ideas will be subsequently assessed concerning their compatibility with the charted national constitutional space.

2.2.1 Introducing new tax-based own resources for the EU

One possibility to generate additional EU revenue to finance the proposed modifications is to reform the existing EU own resources system. As mentioned before, currently almost three-quarters of the EU's own resources are financed through the direct contributions of the Member States.[133] These funds are thus expenditure for the Member States, which triggers particular domestic interests regarding the use of these funds, also referred to as 'just return' discussion.[134] To overcome this rhetoric, the *Monti*-Report proposed the introduction of new sources of genuine EU own resources, which could be

130 Cf. for example: Crowe, 'The European Budgetary Galaxy' 440-441.

131 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 205; Union, *European Union Public Finance* 131-132.

132 *Quantitative Easing (PSPP) Reference* para 48; *Final OMT-Judgment* para 214; *ESM-Treaty and Fiscal Compact (interim relief)* para 107; *Participation of Members of German Parliament in the EFSF* paras 109-111; *Financial Support for Greece and EFSF* para 124; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259.

133 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 203; Fabbrini, 'Fiscal Capacity' 128-129.

134 Cf. the point made by the *Monti*-Report: Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68; Cf. as well: Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 50; Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203; Fabbrini, 'Fiscal Capacity' 129; Crowe, 'The European Budgetary Galaxy' 433.

based on a levy or tax imposed upon EU-related improvements or achievements.[135] The idea of introducing new genuine own resources, which would be levied by the Member States but directly transferred to the EU without entering the national budgetary process,[136] was equally submitted in European Council conclusions on Next Generation EU.[137]

These new own resources would be largely tax-based and could include, for example a carbon-emission tax on flight tickets, a general carbon tax, a nuclear power tax, a national surcharge on fuel tax, a financial transaction tax, or even a wealth tax.[138] Such tax-based own resources could be established based on the tax approximation clauses in Articles 113, 115 TFEU or designed as fiscal measures to pursue the environmental and energy-related objectives established in the Treaties based on Articles 192, 194 TFEU.[139] Subsequently, Member States would have to agree to purpose the revenues from these harmonized or environmental taxes as own resources of the EU under Article 311 TFEU.[140] Hence, such tax-based EU own resources framework could be established under the EU-Treaties.

When applying the national constitutional framework to the adoption of such EU secondary law, it appears that national parliaments would retain considerable influence given the unanimity requirement for the Council voting in case national constitutions prescribe parliamentary *ex ante* participation comparable to the outlined Finnish or the German system.[141] In addition,

135 Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68, 41-56; Subsequently also put forward by the Commission, cf. European Commission, *Reflection Paper on the Future of EU Finances* (European Commission 2017) 27-28; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 183; Thereby changing the narrative of the debate to a re-allocation of jointly acquired 'Union wealth', cf. Fabbrini, 'Fiscal Capacity' 129.

136 Crowe, 'The European Budgetary Galaxy' 431; Similar to the current system according to which genuine own resources do not enter the budgetary process in the Member States, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 203.

137 Which include, for example, a revenue generated from non-recycled plastic waste, a carbon border adjustment mechanism, a digital levy, cf. Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 8 (A 29).

138 Cf. for example the various proposals submitted by the *Monti*-Report, Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 41-56; For a full overview, cf. Schratzenstaller and Krenek, 'Tax-Based Own Resources to Finance the EU Budget' 173-174; Margit Schratzenstaller, 'The EU Own Resources System – Reform Needs and Options' (2013) 48 Intereconomics – Review of European Economic Policy 303, 311-312.

139 Schratzenstaller and Krenek, 'Tax-Based Own Resources to Finance the EU Budget' 174-175.

140 Ibid 175.

141 Notably, Section 96 (1) and (2) Finnish Constitution, cf. Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452; Husa, *The Constitution of Finland – A Contextual Analysis* 47; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556; As well as

Article 311 (3) TFEU prescribes the adoption following the special legislative procedure by unanimous vote in the Council after consultation of the European Parliament as well as the subsequent approval by all EU Member States according to their respective constitutional procedures.[142]

In Finland, for example, this national implementation would require parliamentary approval according to Section 94 Finnish Constitution, as budgetary powers of the Finnish Parliament are affected by the envisaged commitment.[143] The required parliamentary majority to approve these financial commitments depends on the impact of the envisaged own resources decision on the Finnish Constitution. The Constitutional Law Committee has pointed out that a Council Decision based on Article 311 (3) TFEU can be generally approved by simple majority and that it is compatible with the Finnish sovereignty doctrine, as long as the general nature of EU cooperation is not altered by it.[144] Following the Committee, this requires in particular that the upper limits of the Finnish liabilities are determined in order to secure Finnish parliamentary budgetary sovereignty.[145] In that regard, it appears that the proposed tax-based own revenues would be clearly limited within the EU own resources decision both in relation to the taxes that are covered (scope restriction) as well as the maximum Finnish liabilities (size restriction).

Article 23 (3) GG, cf. *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* para 127; Cf. as well: Scholz, 'Art. 23 GG' para 154.

142 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 205; Union, *European Union Public Finance* 131-132; This even elevates the resulting decision to EU primary law *sui generis*, cf. Magiera, 'Art. 311 AEUV – Eigenmittel der EU' para 10; Henning Tappe and Rainer Wernsmann, *Öffentliches Finanzrecht* (2nd edn, C.F. Müller 2019) 196 (Recital 810); Michael Schweitzer, *Staatsrecht III* (10th edn, C.F. Müller 2010) 26 (Recital 63).

143 As for example visible in relation to Council Decision 2014/355, which required approval under Section 94 (1) Finnish Constitution, cf. Finnish Parliament, 'HE 248/2014 on the Government Proposal to Parliament on the Adoption of the Council Decision on the System of the European Union's Own Resources (2014/335 / EU, Euratom)' (*Finnish Parliament*, 2014) <https://www.finlex.fi/fi/esitykset/he/2014/20140248#idp446520544> accessed 20 December 2020 point 7.1.; Also pointed out by the Finnish Constitutional Law Committee in relation to Next Generation EU, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 10; Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

144 *Commission's Draft EU Recovery Plan and MFF Planning* 17.

145 As established in relation to the draft proposal on Next Generation EU, cf. Ibid 10; Also apparent in relation to the ESM and the possible increase of liabilities by unanimity, which was considered to require the support of a qualified majority under Section 94 (2) (2) Finnish Constitution, cf. *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, *Constitutional Change Through Euro Crisis Law: 'Finland'* VIII.1; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

Under the German constitutional framework, the Council Decision on the EU's own resources system has to be adopted by the German legislator following Article 23 (1) (3) GG, as it supplements the EU-Treaties.[146] Accordingly, Article 23 (1) (3) in conjunction with Article 79 (2) and (3) GG applies the adoption of the envisaged decision, which suggests that it would have to be adopted by constitution-amending majority in case it alters the German Constitution.[147] Considering that the allocation of tax-based revenues has considerable consequences for the national budgetary prerogatives, notably the German Parliament could not freely decide on the future use of the transferred revenue, it appears likely that a constitution-amending two-thirds majority would be deemed applicable. This conclusion is supported by the outlined German constitutional jurisprudence, which during the Eurocrisis continuously emphasized the importance of (free) parliamentary control over revenue and expenditure decisions – as summarized within *overall budgetary responsibility*.

Taken together, this suggests that in both EU Member States the proposed tax-based own resources could be adopted based on the domestic EU clause, possibly by qualified parliamentary majority. The national approval is constitutive for the adoption of the EU own resources decision, as specified in Article 311 (3) TFEU. Furthermore, national parliaments can influence the subsequent allocation of the new EU revenue through the analyzed domestic *ex ante* preparatory procedures applicable to EU secondary law. Finally, the scheme is negotiated for a limited period of time which ensures continuous parliamentary involvement. This comprehensive involvement of national parliaments appears to satisfy the German constitutional requirements under *overall budgetary responsibility*.[148]

Furthermore, given that the proposed tax-based own resources would be entirely based on existing EU law and would be implemented based on EU secondary law, Member States retain the possibility to alter their financial commitments. Notably, the own resources decision is traditionally re-drafted jointly with the EU's MFF every seven years.[149] Therefore, the national commitment appears more easily reversible compared to, for example, an explicit primary law commitment. If indeed enshrined in EU secondary law and if the

146 As established by the German Constitutional Court, cf. *Lisbon-judgment* paras 313-314; Cf. as well: Tappe and Wernsmann, *Öffentliches Finanzrecht* 196 (Recitals 809-810); Schweitzer, *Staatsrecht III* 26 (Recital 63).

147 As possibly required in relation to Next Generation EU, cf. Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 4-5, 10; Cf. more generally: Schweitzer, *Staatsrecht III* 26 (Recital 63).

148 Besides requiring that parliamentary approval remains constitutive for financial commitments and that these commitments remain limited, it also requires that the made commitments are reversible, cf. *ESM-Treaty and Fiscal Compact* para 244; *Financial Support for Greece and EFSF* para 136; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 188-189.

149 Cf. for example: Union, *European Union Public Finance* 130-132.

outlined procedure continues to apply, national parliaments would therefore have the possibility to regularly alter the financial commitments enshrined within the EU own resources decision. In addition, as a secondary law solution, the proposed additional tax-based own resources would not alter the EU and EMU constitutional framework, including core pillars such as economic policy coordination (Article 121 (1) TFEU) and the no-bailout clause (Article 125 (1) TFEU).[150]

Therefore, the constitutional impact of the proposed tax-based own resources appears limited. It further suggests that no constitutional conflict with the charted national constitutional limit is likely to emerge. As illustrated, neither the French nor the Spanish constitutional authority engages in a thorough assessment of EU secondary law with national constitutional law.[151] Although one could consider the EU own resources decision as a legal act that resembles EU primary law given its procedural requirements,[152] the adopted own resources decision is nevertheless embedded in the EU-Treaties, which were previously ratified. The adoption of this decision can therefore be seen as an exercise of the adopted Treaty-framework rather than as a substantial alteration of the EU-Treaties which warrants anew constitutional review in these Member States. In Poland, despite the apparent hypothetical nature of the conflict,[153] it appears questionable whether the *constitutional identity limit* applies, given the multi-centric conception of EU membership according to which both the Polish and the EU legal order co-exist[154] as well as the focus

150 Craig and de Búrca, *EU Law Text, Cases, and Materials* 738; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 91, 98.

151 As the core commitment inherent in the EU-Treaties was already reviewed by the *Conseil Constitutionnel* and anew review is generally preempted, cf. *Mr Daniel W and Others* paras 12-13; *Revision of Amsterdam Treaty* para 27; Cf. as well: Millet, 'Constitutional Identity in France – Vices and – Above All – Virtues' 139; And in Spain, the Spanish Constitutional Tribunal considered EU law to be 'infra-constitutional', cf. 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.

152 As previously indicated, cf. Magiera, 'Art. 311 AEUV – Eigenmittel der EU' para 10; Tappe and Wernsmann, *Öffentliches Finanzrecht* 196 (Recital 810); Schweitzer, *Staatsrecht III* 26 (Recital 63).

153 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.

154 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:

of the limit on scrutinizing the intended conferral of additional powers.[155] In the present case, the initial conferral is already confirmed by the Polish Constitutional Tribunal and introducing tax-based own resources appears not to alter this initial conferral.

Taken together, this suggests that the introduction of the proposed EU tax-based own resources would amend but not fundamentally change the existing own resources system. Member States have established constitutional approaches to confirm their maximum financial commitments to the EU, as required by Article 311 (3) TFEU. It was illustrated that in Finland and Germany additional procedures secure the *ex ante* involvement of national parliaments in the designing of the EU's budget. Both instances of national parliamentary involvement secure the decisive control of the national parliaments over the national budgetary and fiscal decision-making space that is partly constrained by the EU decision. Through this involvement, parliaments specify their commitments for a limited amount of time in terms of size as well as scope, which appears to meet German procedural requirements under *overall budgetary responsibility*. Furthermore, given that the proposed reform is based on the existing EU Treaty-framework and given the decisive role national parliaments retain, no conflict with the analyzed national *constitutional identity limits* appears to emerge.

2.2.2 *Genuine EU taxation competence*

A different, more far-reaching possibility is to confer upon the EU a genuine taxation competence, which would empower it to levy taxes in a pre-defined area.[156] As a result, the EU would no longer depend on the Member States' decision regarding the EU's funding, but instead it could unilaterally determine its own revenues.[157] This would obviously require an amendment to the EU-

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.

155 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.

156 As for example advanced by: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 183-184; Fabio Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' (2014) 52 Journal of Common Market Studies 420, 424-425;

157 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 183-184; In contrast to the current process of EU budgeting, which is dominated by the Member States and intergovernmental decision-making, cf. Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' 424.

Treaties and the explicit conferral of such taxation power to the EU-level, as the current Treaty-framework does not enable the EU to exercise genuine taxation competences itself.[158] At the same time, such taxation powers would alter the mode of cooperation in the funding of the EU, which is currently determined by the Member States through the system of own resources. In contrast, an EU taxation competence would allocate additional discretion in fiscal matters to the EU,[159] it would further limit the national control over national taxation, which is already indirectly affected by EU policies and taxation approximation,[160] and ultimately challenge core national constitutional values, such as democracy as well as (budgetary) sovereignty.

2.2.2.1 Compatibility with the charted macro-comparative constitutional space

When applying the charted constitutional space to this far-reaching integration idea, a major difference to the previously analyzed tax-based own resources proposal is that an explicit EU Treaty amendment would be required to award such taxation power directly to the EU. As established, Section 94 Finnish Constitution regulates the conferral of additional powers to the EU in Finland. The provision prescribes different parliamentary majority requirements depending on the intensity and extent of the envisaged conferral.[161] The Constitutional Law Committee identified budgetary and fiscal competence as core parliamentary prerogatives, which are essential for Finnish sovereignty and the related principle of democracy.[162] The proposed EU taxation power would limit national budgetary sovereignty, as the EU would be empowered to determine its tax revenue independent from the Finnish Parliament, which would ultimately limit parliamentary authority over taxation.[163] Although the Constitutional Law Committee adopted a highly flexible understanding

158 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 202-203; Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' 424; Walter Deffaa, 'New Impetus for EU Taxation Policy' (2011) 46 Intereconomics – Review of European Economic Policy 287, 287.

159 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 184.

160 Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' 425.

161 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 458; Ojanen, 'The EU at the Finnish Constitutional Arena' 247.

162 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

163 As emphasized by the Constitutional Law Committe, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 12; *On the Establishment of a European Monetary Fund* 3-4; *Second Assessment Draft ESM-Treaty (II.)* 2.

of Finnish sovereignty, it underscored that fundamental changes to the functioning of the EU with relevance for the Finnish Constitution had to be approved by constitution-amending parliamentary majority.[164] This approach was developed during the Eurocrisis, where the Committee established that an increase of the maximum Finnish financial liabilities under the draft ESM-Treaty without explicit confirmation of the Finnish Parliament constituted a serious interference with Finnish budgetary sovereignty and therefore had to be approved by constitution-amending majority according to Section 94 (2) (2) Finnish Constitution.[165]

When applying this jurisprudence to the introduction of an EU taxation competence, it can be first established that such a competence alters the current mode of EU cooperation given that the EU would be able to determine its own revenue independent from national control and thereby different to the current model established by Article 311 (3) TFEU.[166] Second, the proposed EU taxation competence would impact parliament's authority over budgeting and more specifically its own prerogative to determine taxation in Finland, as proclaimed in Sections 3 (1) and 81 (1) Finnish Constitution.[167] Both observations indicate that any Treaty amendment to introduce an EU taxation competence would require the support of a qualified two-thirds majority, given its implications for Finnish sovereignty and parliamentary budgetary prerogatives. Despite potentially serious political difficulties to attain this majority,[168] the introduction of EU taxation powers is, however, constitutionally possible in Finland.

In Germany, the envisaged conferral equally requires parliamentary approval under Article 23 (1) GG, most likely by qualified majority in the sense of Article 23 (1) (3) GG in conjunction with Article 79 (2) GG. Notably, Article

164 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

165 As established by the Constitutional Law Committee, cf. *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

166 As pointed out, such a taxation competence is not included in the current Treaty, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 202-203; Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' 424; Deffaa, 'New Impetus for EU Taxation Policy' 287; Moreover, the Finnish Constitutional Law Committee indicated that EU debts could undermine budgetary sovereignty, as decisions with budgetary implications can be taken by the EU, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 17-18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

167 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 457-458.

168 Jokela, 'Finland: Towards a More Cautious Europeanization' 49; Ojanen, 'Constitutional Amendment in Finland' 95.

23 (1) (3) GG specifies that EU Treaty-changes which amend the material content of the German Constitution have to be approved by a constitution-amending two-thirds majority according to Article 79 (2) GG.[169] Article 105 GG grants the power to introduce taxation to the federal as well as the regional German state level, depending on the area of taxation.[170] Allocating a genuine taxation power, which is defined as the power to introduce a financial contribution that is not attached to a direct return service and that is imposed by the state or public authority to generate revenue,[171] to a different organizational level would alter this German constitutional framework. Consequently, and in light of the general importance of democratic control over taxation,[172] it seems that the conferral of taxation competences to the EU-level has to be approved by constitution-amending two-thirds majority. Even this, of course, is only possible as long as the conferral of budgetary and fiscal competences is compatible with *overall budgetary responsibility*.[173]

As indicated, the Constitutional Court requires under *overall budgetary responsibility* that the German Parliament has to retain full control over all central budgetary and fiscal decisions.[174] On a procedural level, the Court

169 As highlighted by the Legal Service of the German Parliament, cf. Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5; Cf. as well: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 25; Lorz and Sauer, 'Verfassungsändernde Mehrheiten für die Stabilisierung des Euro? – Mehrheitserfordernisse bei der Zustimmung zum Fiskalpakt, zum ESM-Vertrag und zur Änderung des AEUV' 685.

170 Hanno Kube, 'Art. 105 GG – Steuergesetzgebungskompetenz' in Volker Epping and Christian Hillgruber (eds), *Beck Online Kommentar zum Grundgesetz* (45th edn, C.H. Beck 2020) paras 1-2; Christian Seiler, 'Art. 105 GG' in Theodor Maunz and Günter Düring (eds), *Grundgesetz-Kommentar* (92nd edn, C.H. Beck 2020) paras 41-42; As highlighted by the Constitutional Court, Article 105 GG intends to equip the state with the power to generate the financial revenue necessary, cf. 1 BvL 16/69 *Law Introducing an Additional Charge* [1972] (German Federal Constitutional Court) para 19.

171 See for the definition of 'taxation' in the sense of Article 105 GG: Kube, 'Art. 105 GG – Steuergesetzgebungskompetenz' paras 3-4; Seiler, 'Art. 105 GG' para 36.

172 Kube, 'Art. 105 GG – Steuergesetzgebungskompetenz' para 1; Fabbrini, 'Fiscal Capacity' 131; And given the general interconnection of the budgetary process with democracy, as highlighted previously, cf.: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 222; 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.

173 As continuously emphasized by the Constitutional Court: *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

174 *Quantitative Easing (PSPP) Final Judgment* para 104; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts'

requires that parliamentary approval remains constitutive for financial commitments and that these commitments remain limited as well as specific.[175] On a substantive level, the Court demands that German budgetary autonomy is not suspended for a considerable period of time and that central competences remain at the national level, including explicitly the competence to determine type, level and size of German revenue and expenditure.[176] When applying this constitutional benchmark to the proposed EU taxation competences, which would necessarily confer a degree of political discretion to the EU-level, two major constitutional concerns emerge.

In the first place, taxation is intrinsically linked with the principle of democracy.[177] As highlighted before, the decision of how, at what level and whom to tax constitutes an essential political prerogative at the core of the decision-making space that democratically legitimized institutions dispose of, and which is controlled by the voters through regular elections.[178] In case these core political decisions are conferred to the EU-level, the people would only have an indirect impact on the content of the taken decisions. This is democratically problematic in light of the highlighted centrality of revenue decisions for political decision-making. From that perspective, the power to tax concerns a competence associated with the nucleus of German democracy.[179]

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

175 As established in Chapter III Section 4.2.2.2.; And as pointed out by the Constitutional Court: *Quantitative Easing (PSPP) Reference* para 48; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 7.

176 *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

177 Cf. for example: Jaakkola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' 662; Fabbrini, 'Fiscal Capacity' 131.

178 On the German conception of democracy, cf. Chapter III Section 4.2.1.; On the importance of preserving the political space for democracy, cf. *Quantitative Easing (PSPP) Reference* para 56; *Final OMT-Judgment* paras 124, 135-138; Cf. as well: Cremer, 'Lissabon-Vertrag und Grundgesetz' 299-300; Kottmann and Wohlfahrt, 'Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil' 447-448.

179 Particularly in light of the apparent lacking democratic safeguards at the EU-level; On the democratic deficit of the EU, cf. Craig and de Búrca, *EU Law Text, Cases, and Materials* 151-159; Specifically, on an apparent substantive democratic deficit, cf. Marija Bartl, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit' (2015) 21 European Law Journal 23, 24.

Second, the conferral of tax powers might deprive the German Parliament of one source of public revenue. Notably, empowering the EU to tax in a specific field deprives the Member State from generating the same revenue.[180] Therefore, it appears that German budgetary autonomy would be impacted for a considerable time due to a restriction of potential revenue sources and ultimately a possible decrease in national state revenue. This could expose the German state budget to the political decisions taken by a third party, notably the EU, including hardly predictable financial risks, which was deemed incompatible with *overall budgetary responsibility* by the German Constitutional Court.[181] The specific assessment in this regard depends, however, on the scope and size of the EU taxation power – including possible limitations that could be attached to the conferral of such competences to the EU-level.

Nevertheless, as it stands, any proposed EU taxation competence would trigger serious constitutional concerns in both Finland and Germany given its discretionary character and its inherent political nature which involve hardly predictable financial risks for the national state budget. This appears to translate into a conflict with the German concept of *overall budgetary responsibility* which could result in the constitutional unattainability of such reform ambitions under the current German Constitution. Precisely the independent, discretionary character of the proposed EU taxation competence, which could secure an autonomous means to generate EU revenue, conflicts with the outlined national constitutional framework.

2.2.2.2 Compatibility with the charted micro-comparative constitutional space

When evaluating the compatibility of the outlined EU taxation power with the assessed national *constitutional identity limits*, it appears that the constitutional concerns are largely comparable to the German concerns. Notably, in France the sovereignty limit would be applicable to any conferral of tax powers to the EU, which would be governed by Article 88-1 French Constitution.[182] The *Conseil Constitutionnel* would have to determine, upon referral of a privileged institutional applicant, whether the introduction of EU taxation competences entails a significant shift of powers in domestic budgetary and fiscal prerogatives as laid down in Articles 34 and 47 French Constitution.[183] Notably,

180 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 208.

181 As established by the German Constitutional Court, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213.

182 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.

183 *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' 119-120.

Article 34 French Constitution stipulates that taxation has to be based on a statute, which according to Article 24 (1) French Constitution can only be adopted by the French Parliament. Consequently, the French Constitution assigns the power to tax exclusively to the French Parliament.[184] Hence, awarding this prerogative to the EU, even partially, would alter the current constitutional *status quo*. Furthermore, given the constitutionally enshrined importance of taxation powers to the French Parliament, a conferral of such competences to the EU-level would likely be seen as a significant interference with the French sovereignty limit. The resulting anticipated constitutional conflict could be overcome by the French constitution-amending legislator following Article 89 French Constitution, which prescribes the adoption by a three-fifths majority in the *Congrès*.[185] Given that the *Conseil Constitutionnel* is not empowered to review constitutional amendments,[186] these amendments would subsequently not be scrutinized. Moreover, enacting such constitutional reforms to accommodate EU integration steps is a common practice in France.[187] Consequently, the proposed EU taxation power will likely trigger a conflict with the French sovereignty limit, which can be overcome by the French legislator.

In Spain, the conferral of competences to the EU-level requires parliamentary approval following Article 93 Spanish Constitution. This conferral, however, has to respect the Spanish *constitutional identity limit*. As previously established, the Spanish constitutional order stresses the particular bond between the parliament and budgetary as well as fiscal decision-making, as apparent in Articles 66 (2), 75 (3) and 134 Spanish Constitution. It is furthermore reflected in the fact that the general power to tax is assigned to the Spanish legislator according to Article 133 (1) Spanish Constitution. Although the Constitutional Tribunal did not yet conclude that taxation prerogatives are covered by the Spanish *constitutional identity limit*, it established that sovereignty, democracy

184 *Fiscal Compact* paras 13, 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265.

185 Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 770; Cahill, 'Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power' 266-267.

186 As emphasized by the *Conseil Constitutionnel*, cf. *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' 150-151; Ziller, 'European Union Law in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 413; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

187 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.

and the overall constitutional structure are covered by this limit.[188] Given the crucial link between the power to tax and the principle of democracy,[189] which is recognized in other Member States too,[190] and given that the Spanish Constitution explicitly recognizes this important relationship in Article 133 (1) Spanish Constitution, it seems likely that taxation prerogatives are covered by the Spanish *constitutional identity limit*. Therefore, the proposed discretionary EU taxation competence would indeed conflict with the Spanish *constitutional identity* given its implications for budgetary sovereignty as well as the parliamentary, democratically legitimized control over taxation. Yet, even in case such a conflict with the Spanish *constitutional identity limit* is found by the Spanish Constitutional Tribunal, the constitution-amending legislator can overcome the resulting conflict by altering the constitutional text.[191] Given the outlined link of a possible EU taxation competence with Spanish sovereignty, democracy and the general state structure, it seems that the reform would be considered essential and thus Article 168 (1) Spanish Constitution is applicable, which imposes the previously mentioned strict procedural requirements.[192] Furthermore, the exceptional nature of constitutional amendments in Spain should be recalled. Therefore, although allocating the proposed

188 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.

189 On the traditional relationship between taxation and democracy, cf. Jaakkola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' 662; Fabbrini, 'Fiscal Capacity' 131; As well as on the traditional link of fiscal powers with democracy and sovereignty, cf. 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.

190 As for example established in Article 34 (4) French Constitution, cf. *Fiscal Compact* para 21; Cf. as well: Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 265; Or as established in Article 105 GG for Germany, cf. Kube, 'Art. 105 GG – Steuergesetzgebungskompetenz' paras 1-2; Seiler, 'Art. 105 GG' paras 41-42.

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

192 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282; Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

taxation power to the EU would be theoretically attainable – as the constitution assigns a clear procedural avenue to implement the seemingly required constitutional changes – the practical feasibility remains questionable.

And finally, in Poland the conferral of the required competences to introduce an EU taxation power will likely require parliamentary confirmation following Article 90 Polish Constitution. The core constitutional question is whether EU taxation powers are compatible with the Polish *constitutional identity limit*. It was already established that the Constitutional Tribunal would consider constitutional challenges against Eurozone-measures as being merely hypothetical at this point.[193] Nevertheless, given the Polish obligation to accede to the Eurozone,[194] an anticipatory analysis of the compatibility of an EU taxation competence with the Polish Constitution seems possible. As established, the Polish *constitutional identity limit* protects the power to conduct financial, budgetary and fiscal policies.[195] This power includes the power of the Polish Sejm to adopt the budget as established in Article 219 (1) Polish Constitution, that the Polish Council of Ministers devises economic internal policies as established in Article 146 (1) Polish Constitution, but also that taxes can only be introduced by means of statute by the Polish legislator, as established in Article 217 in conjunction with Articles 95 (1), 120, 121 Polish Constitution.[196] Conferring the power to tax to the EU would alter the outlined constitutional prerogatives, which are equally covered by the competence-centric conception of Polish sovereignty. Therefore, it appears likely that a constitutional amendment would be required, either to overcome the explicit conflict with the Polish Constitution or to address the anticipated conflict with

193 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.

194 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.

195 *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; 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.

196 Cf. the assessment of the ESM-Treaty by the Polish Constitutional Tribunal: *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.

the Polish *constitutional identity limit*, as prescribed by Article 235 Polish Constitution. Yet, the attainability of such constitutional amendment remains questionable given the high procedural hurdles attached to amending the Polish Constitution and given the current political circumstances.

2.2.2.3 Interim conclusion

Taken together, major national constitutional concerns appear to exist against the prospect of conferring a discretionary taxation competence to the EU-level. In all charted Member States, taxation is a constitutionally assigned parliamentary prerogative which is deeply rooted in the national conception of democracy and protected by *constitutional identity limits*.[197] This suggests that the emerging constitutional conflict between national democracy in combination with national (budgetary) sovereignty can only be overcome by constitutional amendment.

The assessment equally revealed that the German *constitutional identity limit* appears to fully exclude the conferral of far-reaching tax competences to the EU-level as this might be classified as violation of a core component of German democracy as well as a permanent interference with budgetary autonomy.

2.2.3 EU debts and shared liabilities

A final possibility to fund an EU budget or an emergency instrument is issuing either EU debt, as for example envisaged by Next Generation EU,[198] or shared liabilities, as for example suggested by various Eurobond-proposals.[199] To that end, the most recently proposed Next Generation EU sparked considerable national constitutional discussion. Notably, the national reactions to the envisaged EU recovery strategy revealed a general concern as to whether the extent of EU debts proposed to fund the Recovery Facility is incompatible with EU primary law, most notably Article 310 (1) (3) TFEU according to which revenue and expenditure of the EU have to be balanced.[200]

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197 Notably the highlighted traditionally important link between taxation and democracy, cf. Jaakkola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' 662; Fabbrini, 'Fiscal Capacity' 131.

198 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 3; Cf. as well: Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203.

199 As envisaged by the Commission, cf. Commission, *Green Paper on the Feasibility of Introducing Stability Bonds (COM (2011) 818)*; Cf. as well: Schäfer and Bigus, 'Consequences of Different Eurobonds Proposals' 553; Hild, Herz and Bauer, 'Structured Eurobonds: Limiting Liability and Distributing Profits' 251; Mayer and Heidfeld, 'Eurobonds, Schuldentilgungsfonds und Projektbonds – Eine dunkle Bedrohung?' 129; Mayer and Heidfeld, 'Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds' 422.

200 Concerns were for example raised by the Finnish Constitutional Law Committee, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 15; As well as the legal service of the German Parliament, cf. Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlus-*

These concerns correspond with wider constitutional concerns already apparent in the Eurocrisis-jurisprudence of the various national constitutional actors, which suggest that the impact of an EU financial commitment on the national budgetary space has to be limited in scope and size as well as that the national parliament has to retain ultimate control over fiscal decision-making that impacts the respective state budget.

2.2.3.1 Compatibility with the charted macro-comparative constitutional space

These requirements are, for example, apparent in the jurisprudence of the Finnish Constitutional Law Committee. The Committee established that significant changes to the working of the EU would be considered a major encroachment of Finnish sovereignty which could only be approved by a two-thirds parliamentary majority.[201] One example of significant change is the increase of Finnish financial commitments at the ESM-level without constitutive approval of the Finnish Parliament, which was seen as a significant alteration of Finnish budgetary sovereignty.[202] Building on this conclusion, the Finnish Constitutional Law Committee submitted in relation to Next Generation EU that the proposed financing structure through EU debts could significantly alter the mode of EU cooperation, as under the current Treaty-framework the EU finances its expenditure through own resources assigned by the Member States in order to achieve a balanced budget in accordance with Article 310 TFEU.[203] Furthermore, the proposed scheme appears to increase Finnish liabilities to a not yet predictable degree and the Finnish Parliament retains only very limited control over the subsequent spending of the newly available EU funds, which is considered by the Committee as a major interference with Finnish budgetary sovereignty.[204] Additionally, Section 82 (2) Finnish Constitution requires parliamentary approval for the issuing of state guarantees, which might be

ses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20) 6-7.

201 *Commission's Draft EU Recovery Plan and MFF Planning* 18; *Adoption of the Lisbon Treaty* 5; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

202 As established by the Constitutional Law Committee in its second appraisal of the draft ESM Treaty, cf. *Second Assessment Draft ESM-Treaty (II.)* 2; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

203 Note that the Constitutional Law Committee's assessment concerns the proposal of the European Commission, for the Committee's opinion cf. *Commission's Draft EU Recovery Plan and MFF Planning* 17-18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

204 *Commission's Draft EU Recovery Plan and MFF Planning* 13.

relevant to secure the proposed EU borrowing.[205] In light of these considerations, the Constitutional Law Committee concluded that the proposal had a significant impact on Finnish sovereignty and that the required adoption of the EU own resources decision might therefore require the support of a qualified two-thirds majority following Section 94 (2) (2) Finnish Constitution.[206]

When applying the outlined Finnish constitutional benchmark to the suggested EU debt through Eurobonds, it seems that the Constitutional Law Committee would equally consider Eurobonds as a considerable modification of the current EU-Treaties as well. More specifically, the Committee emphasized that Article 125 TFEU allowed for financial assistance amongst Member States as long as the Member States remained liable for their own obligations.[207] Arguably, Eurobonds would introduce shared liabilities and thereby alter the current conception of the EMU. Furthermore, given the possible overall size of the issued Eurobonds, it can be argued that considerable liabilities might arise and that these entail hardly predictable financial risks for the national budget. Notably, in case a Member State experiences difficulties and is unable to service its debts, the other Member States might be required to guarantee the financial obligations. This could have significant implications for Finnish budgetary sovereignty and affect the ability of Finnish state authorities to comply with their constitutional obligations.[208] Therefore, it seems that the Constitutional Law Committee would likely require a two-thirds majority in the sense of Section 94 (2) (2) Finnish Constitution to confer any competences to the EU-level to issue Eurobonds. In addition, subsequent parliamentary approval might be required to approve any connected Finnish state guarantees in the sense of Section 82 (2) Finnish Constitution in order to provide a sound constitutional basis for the joint liabilities under the resulting Eurobonds.

Comparable constitutional concerns arise under the German Constitution. Considering the national adoption of Next Generation EU and the issuing of EU debts which would be introduced by the proposed own resources decision, German parliamentary approval in the sense of Article 23 (1) GG is required to adopt the EU decision in compliance with Article 311 (3) TFEU.[209] Given the extent of the proposed program and the considerable increase in national financial commitments, it has to be determined whether the qualified majority

205 Ibid 12; *EIB Proposal for EU Covid-19 Guarantee Fund* 5; Cf. as well the Committee's view on the ESM, *First Assessment Draft ESM-Treaty (I.)*; As well as on the EFSF, *Amendment to the EFSF (Increase in State Guarantee)* 3.

206 *Commission's Draft EU Recovery Plan and MFF Planning* 17; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

207 *Commission's Draft EU Recovery Plan and MFF Planning* 13; PeVP 34/2020 vp *Protocol Concerning Possible EU COVID-19 Rescue Measures* [2020] (Finnish Constitutional Law Committee) 3.

208 *Commission's Draft EU Recovery Plan and MFF Planning* 13; *EIB Proposal for EU Covid-19 Guarantee Fund* 4.

209 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 4-5; Magiera, 'Art. 311 AEUV – Eigenmittel der EU' para 10.

threshold applies in the sense of Article 23 (1) (3) in conjunction with Article 79 (2) GG or whether the German legislator might be barred to approve the proposed recovery scheme due to a potential conflict with the *eternity clause*.

Article 23 (1) (3) GG is applicable in case an amendment to EU primary law or a comparable measure alters the substantive content of the German Constitution.[210] The own resources decision is characterized as measure comparable to an EU Treaty amendment, given the unanimity requirement and the national constitutional confirmation prescribed by Article 311 (3) TFEU.[211] The resulting question is whether this decision and Next Generation EU result in an amendment to the content of the German Constitution. This is the case if competences are conferred, which would enable the EU to deviate from the German Constitution or in case a comparable domestic act would have required a constitutional amendment.[212] Considering the German constitutional framework, it appears that the German Constitution prescribes the approval of state borrowing through an act of parliament that determines the actual size of the intended borrowing according to Article 115 (1) GG.[213] However, the envisaged borrowing to finance Next Generation EU is not financed through borrowing on behalf of the Member States but through borrowing on behalf of the EU, which is why Article 115 GG cannot be directly applicable.[214] Notably, Next Generation EU does not entitle the EU to borrow money on the financial markets in the name of the respective Member States.

Yet, the proposed increase of the own resources ceiling to finance the envisaged EU debts could be considered a material amendment of the constitution. Here, the concept of *overall budgetary responsibility* appears particularly relevant. Following the jurisprudence of the German Constitutional Court, the German Parliament has to remain in charge of all central budgetary decisions and must retain budgetary autonomy. Any suspension of *overall budget-*

210 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5; Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3089.

211 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5; As also highlighted by the German Constitutional Court, cf. *Lisbon-judgment* paras 313-314.

212 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5-6; Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 25, 27.

213 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 6; Kube, 'Art. 115 GG' para 2; Reimer, 'Art. 115 GG – Kreditbeschaffung' paras 27, 30.

214 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 7; Partly also seen differently, cf. Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3090.

ary responsibility is incompatible with the *eternity clause* and therefore constitutionally unachievable in Germany.[215] To that end, strictly limited budgetary commitments can be adopted by a simple parliamentary majority following Article 23 (1) (2) GG.[216] Financial commitments that are significant given their overall size as well as the attached modalities, but that do not suspend *overall budgetary responsibility* for a considerable time, have to be adopted by a constitution-amending majority, as they alter the constitutionally enshrined parliamentary responsibility for budgetary decisions.[217]

Considering the own resources decision, the envisaged maximum commitment under the Next Generation EU would amount to a maximum annual financial commitment of up to 1,4% of the Gross National Income (GNI) plus an additional 0,6% of the GNI until 2058 to fund the emergency schemes to tackle the economic impact of COVID-19.[218] This would entail an increase of the national commitment from previously 1,23% to now up to 2% of the GNI.[219] In absolute numbers, this would translate into annual financial commitments of up to € 70,7 billion based on the GNI of 2019.[220] This in itself constitutes a considerable amount in comparison to the overall German federal

215 Following the conception of the Constitutional Court, cf. *Quantitative Easing (PSPP) Final Judgment* para 104; *Lisbon-judgment* paras 252, 256; Cf. as well: Herdegen, 'Art. 79 GG' paras 182, 185; 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; Mayer, 'Rebels Without a Cause? Zur OMT-Vorlage des Bundesverfassungsgerichts' 497; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407.

216 Own resources require parliamentary approval according to Article 23 (1) (2) GG in conjunction with § 3 Integrationsverantwortungsgesetz, cf. Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3089.

217 Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 7.

218 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 3 (point A9); Cf. as well: Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 7; Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3087.

219 Cf. the scheme established for the period from 2014 and 2020 by Article 3 (1) Council Decision 2014/335/EU on the system of own resources of the European Union; As well as the new own resources ceiling: Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 3 (point A9); Cf. as well: Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3087.

220 Commission, *EU expenditure and revenue 2014-2020 (dataset)*.

expenditure for 2019 which amounted to € 356,4 billion.[221]

At the same time, the factual development of German contributions to the EU budget reveals that the own resources ceiling is traditionally not fully exhausted. For example, in 2019 the overall German contributions to the EU's own resources amounted to 0,846%, in 2018 to 0,847% and in 2017 to 0,713% of GNI.[222] This underscores that the own resources decision merely prescribes an upper limit of German commitments. Furthermore, although the supplementary increase of up to 0,6% of GNI applies until 2058, the core commitment of up to 1,4% of GNI is linked to the MFF which applies from 2021 to 2027.[223]

Moreover, the supplementary increase may only be triggered in case other means to service the EU debts are exhausted, as clarified by the European Council.[224] And in addition, this supplementary charge is designated to fund Next Generation EU, which although amounting to € 750 billion has to be further distinguished into grants, which amount to € 390 billion, and into favorable loans, which amount to € 360 billion, that have to be paid back by the Member States benefiting from them. Consequently, the supplementary own resources are mainly designated to finance the share of grants under Next Generation EU.

When projecting the possible financial implications for the German budget based on the calculations of the 2019 EU budget, where Germany contributed € 29,91 billion to the overall EU own resources of € 163,92 billion which equals 18,2%, the German commitment could amount to around € 71,2 billion until 2058. This would amount to around € 2 billion projected over a 36-year framework, which in comparison to the overall German budget is an arguably limited commitment. Given the long-term implications of the additional commitment and the considerable increase in the own resources ceiling from 1,23% of GNI to 2% of GNI, it seems that a qualified majority in the sense of Article 23 (1) (3) in conjunction with Article 79 (2) GG is applicable.[225] However, given that the financial commitments remain comparably limited, it seems that German *overall budgetary responsibility* and budgetary autonomy are sufficiently safeguarded.

The previous assessment suggests that more far-reaching forms of EU debts or shared liabilities are only constitutionally feasible in Germany under strict conditions. As apparent in relation to Next Generation EU, which limits the

221 For the research assessment on German expenditure, cf. Chapter III Section 4.2.2.5.; For the employed data, cf. Government, *Unterrichtung durch die Bundesregierung – Finanzplan des Bundes 2018 bis 2022 (Drucksache 19/3401)*.

222 Based on data from Commission, *EU expenditure and revenue 2014-2020 (dataset)*.

223 Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 8 (point A28).

224 Ibid 4 (point A10).

225 Ruffert, 'Europarecht für die nächste Generation – Zum Projekt Next Generation EU' 1779; Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion – Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU'' 3089.

maximum national financial liabilities, and as equally apparent in relation to the ESM, which similarly determines a maximum commitment, any such scheme has to be capped to prevent unpredictable financial risks for the national budget. This was continuously emphasized by the German Constitutional Court under its *overall budgetary responsibility* doctrine.[226] Hence, any form of EU debts or shared liabilities would have to be limited in their overall size, for example through the maximum ceilings established by the EU own resources decision. Otherwise, an essential procedural requirement under *overall budgetary responsibility* would be violated which would suggest its incompatibility with the German *eternity clause*. Hence, under the current German Constitution, the EU could not be empowered to autonomously engage in own borrowing or to established shared liabilities without acquiring prior confirmation of the German Parliament – for each batch – regarding the required German financial commitment. When subsequently considering the substantive dimension of the German *overall budgetary responsibility* doctrine it is hard to anticipate when this abstractly defined benchmark established by the Constitutional Court is violated. In all cases, far-reaching proposals that envisage a wide-scale supra-nationalization of national debts through shared guarantees, as for example apparent in the blue-and red-bond proposal,[227] seem incompatible with *overall budgetary responsibility* given the hardly predictable financial impact on the German state budget.

Hence, EU debts, borrowing or shared liabilities appear to be compatible with the German Constitution in case they are based on a limited financial commitment confirmed by the German Parliament that does not challenge the central parliamentary control over budgetary and fiscal decision-making. An apparent example that complies with these requirements is Next Generation EU. In contrast, under the current German constitutional jurisprudence proposals such as the envisaged blue and red-bonds would likely be considered to entail unpredictable financial commitments that could undermine *overall budgetary responsibility* and would therefore likely be incompatible with the German *eternity clause*.

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226 *ESM-Treaty and Fiscal Compact* para 160; *Lisbon-judgment* para 236; Cf. as well: Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297; Otherwise requiring successive parliamentary involvement, cf. *Participation of Members of German Parliament in the EFSF* para 112; Cf. as well: Herdegen, 'Art. 79 GG' para 185; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 4.

227 Commission, *Green Paper on the Feasibility of Introducing Stability Bonds (COM (2011) 818)* 14; Jacques Delpla and Jakob von Weizsäcker, 'The Blue Bond Proposal (2010)' Bruegel Policy Brief <https://www.bruegel.org/wp-content/uploads/imported/publications/1005-PB-Blue_Bonds.pdf> accessed 20 December 2020 1-3; Cf. as well: Mayer and Heidfeld, 'Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds' 422; Beck and Wentzel, 'Eurobonds – Wunderwaffe oder Sprengsatz für die Europäische Union?' 717-718.

2.2.3.2 Compatibility with the charted micro-comparative constitutional space
When considering the compatibility of EU debts, shared liabilities and in particular Next Generation EU with the different national *constitutional identity limits*, certain similarities with the assessment of the proposed EU taxation power can be identified. Despite differences in the legal design, both the power to tax as well as the ability to engage in public borrowing have considerable implications for budgetary prerogatives of national parliaments. In both situations the domestic fiscal discretionary decision-making space is limited, either due to reduced tax revenue or given that the respective debt might have to be serviced. Therefore, the previously drawn constitutional conclusions and the identified possible constitutional concerns regarding the creation of a genuine EU taxation power seem largely applicable.

For France, this entails that the proposed Next Generation EU including the intended financing through debts outlined in the own resources decision will have to be approved by the French legislator according to Article 53 (1) French Constitution, given the decision's impact on the finances of the French state.[228] Yet, as the decision is based on an existing EU Treaty provision, notably Article 311 TFEU, it does not entail the conferral of additional competences in the sense of Article 88-1 French Constitution and consequently the sovereignty limit appears not to be applicable.[229] This conclusion is in conformity with early decisions of the *Conseil Constitutionnel* concerning the EU's own resources system, where the Conseil highlighted that the decision was based on ratified international obligations that enjoyed primacy according to Article 55 French Constitution and that the decision had to be approved

228 Cf. the evaluation of the *Conseil des Ministres* submitted to the French legislator in the so-called 'Jaune Budgétaire', French Conseil des Ministres, 'Annex au Project de Loi de Finances pour 2021 (Jaune Budgétaire) – Relations Financières avec l'Union Européenne' (*French Conseil des Ministres,* 2020) <https://www.budget.gouv.fr/documentation/file-download/6871> accessed 20 December 2020 15; Cf. as well in relation to the previous own resources decision the assessment of the French Senate: French Senate, 'Report of the Commission of Finances Issued for the French Senate Concerning the Decision 2014/335 (no. 685/2015) – Rapport fait au nom de la commission des finances (1) sur le projet de loi autorisant l'approbation de la décision du Conseil du 26 mai 2014 relative au système des ressources propres de l'Union européenne' (*Commission of Finances,* 2015) <http://www.senat.fr/rap/l14-685/l14-6850.html> accessed 20 December 2020; As also pointed out by the *Conseil Constitutionnel*, cf. Decision 70-39 DC *Introduction of the EU's System of Own Resources* [1970] (French Conseil Constitutionnel) para 6.

229 Ministres, 'Annex au Project de Loi de Finances pour 2021 (Jaune Budgétaire) – Relations Financières avec l'Union Européenne' 15; Notably, the French sovereignty limit only applies to the conferral of new competences to the EU, cf. 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.

by the French legislator according to Article 53 French Constitution.[230] Therefore, the sovereignty limit is not applicable.[231]

Instead, the *Conseil Constitutionnel* would evaluate whether the proposed own resources decision as EU secondary law violates the French *constitutional identity limit* that applies to EU secondary acts.[232] It protects in particular the division of competences as established in Articles 34, 37 French Constitution, including parliamentary responsibility to determine state revenue and expenditure in a Finance Act.[233] It appears that this constitutional benchmark is largely respected by the own resources decision, which prescribes national approval and which complies with Article 53 (1) French Constitution. In that regard, it seems that Article 53 (1) French Constitution extends the internally applicable responsibility for budgetary decisions enshrined in Article 34 (4) French Constitution to supranational cooperation. Given that EU law allows for this national framework to apply, it can be submitted that the final own resources decision does not alter the established constitutional division of powers. This conclusion is also not put into question by the fact that Next Generation EU is largely financed through EU debts, as the underpinning funding mechanism established by the own resources system remains unchanged in its core function. Member States guarantee funds up to the own resources ceilings, which are then allocated through the EU budget and the proposed recovery fund. As a result, it seems that no constitutional conflict arises between the own resources decision or the proposed EU debts and the French Constitution as long as the French Parliament approves the decision following Article 53 (1) French Constitution by an act of parliament.

However, the previous assessment would differ in case additional competences are conferred to the EU, for example, in order to introduce an independent EU power to engage in public borrowing or to establish shared liabil-

230 *Introduction of the EU's System of Own Resources* paras 5-6; Cf. as well the subsequent findings of the *Conseil Constitutionnel*: Decision 77-90 DC *Concerning the Introduction of an Isoglucose Levy* [1977] (French Conseil Constitutionnel) para 4.

231 *Introduction of the EU's System of Own Resources* para 9.

232 *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' 141; Dubout, '"Les règles ou principes inhérents à l'identité constitutionelle de la France": une supra-constitutionalité?' 452.

233 Cf. the constitutional benchmark that the *Conseil Constitutionnel* established in relation to the Fiscal Compact: *Fiscal Compact* paras 13, 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.

ities. In such cases, the French sovereignty limit becomes applicable.[234] As highlighted, budgetary and fiscal prerogatives are constitutionally assigned to the French legislator, as laid down in Article 34 (4) French Constitution.[235] In case the EU would be entitled to engage in larger borrowing following a mechanism that differs from the own resources framework or by establishing shared liabilities following the Eurobond proposals, new challenges to these parliamentary prerogatives would emerge. Notably, Member States might be required to guarantee for financial commitments made through the EU, which alters the current framework that builds on national parliamentary approval for the determination of maximum financial commitments. Member States would guarantee larger borrowing jointly, with hardly predictable financial risks that could negatively impact national budgetary sovereignty as well as the parliamentary prerogatives to establish the state budget. The resulting interference with French sovereignty, democracy and parliamentary prerogatives[236] would likely be deemed incompatible with the French sovereignty limit. Therefore, it appears likely that a constitutional amendment would be required to adopt the proposed EU borrowing competence or the envisaged Eurobonds.[237] As previously emphasized, enacting constitutional amendments constitutes a common practice and a prerogative of the legislature, which is not scrutinized by the *Conseil Constitutionnel*.[238]

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234 *Fiscal Compact* para 10; *Lisbon Treaty* para 9; 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; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 123-124; Pfeiffer, 'Zur Verfassungsmäßigkeit des Gemeinschaftsrechts in der aktuellen Rechtsprechung des französischen Conseil constitutionnel' 490-491.

235 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; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 540.

236 Cf. the core components of French *constitutional identity*, as established by the *Conseil Constitutionnel*: *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.

237 Cf. for example: *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.

238 As emphasized by the *Conseil Constitutionnel*, cf. *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' 150-151; Ziller, 'European Union Law

In Spain, Next Generation EU, and more specifically the underpinning own resources decision, requires national approval following Article 94 (1) (d) as an international agreement 'which [implies] financial liabilities for the Public Treasury [...]'.[239] As the own resources decision is based on the existing EU Treaty-framework, it seems that no constitutional amendment is required to approve this decision in Spain. Arguably, the general system underpinning the EU's own resources was already ratified by the Spanish legislator when adopting the Lisbon Treaty, and therefore the own resources decision can be seen as a concretization of this initial commitment. What is more, given that the Spanish Constitutional Tribunal is generally not assessing the compatibility of EU secondary law with the Spanish Constitution,[240] it seems that a possible constitutional assessment of Next Generation EU would be limited to the Spanish approval of the financial commitments enacted following Article 94 (1) (d) Spanish Constitution.

Regarding the more far-reaching proposals concerning EU borrowing competences or the introduction of shared liabilities, the Spanish *constitutional identity limit* seems applicable. As clarified, the Spanish *constitutional identity limit* remains abstract and the Constitutional Tribunal did not yet explicitly define budgetary and fiscal competences as part of this limit. However, given that Spanish sovereignty and democracy are covered by it,[241] given that budgetary decisions have a particular importance for the electorate,[242] and

in the Jurisprudence of French Supreme Courts: Europe-Friendliness with a French Touch' 771; Vranes, 'Constitutional Foundation of, and Limitations to, EU Integration in France' 539; Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' 413; Ziller, 'Sovereignty in France: Getting Rid of the Mal de Bodin' 271.

239 As for example pointed out by the Spanish Parliament in its assessment of Council Decision 2014/335, cf. Spanish Congreso de los Diputados, *Dictamen de la Comisión de Asuntos Exteriores (110/000176) – Decisión del Consejo de 26 de mayo de 2014 sobre el sistema de recursos propios de la Unión Europea (2014/335/UE, EURATOM), adoptada en Bruselas el 26 de mayo de 2014.* (Boletín Oficial de las Cortes Generales 2015).

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

241 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.

242 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 222; Fabbrini, 'Fiscal Capacity' 131; Puntscher Riekmann and Wydra, 'Representation in the European State of Emergency:

given that the Spanish Constitution protects, in several places, the parliamentary control over state budgeting,[243] it appears convincing to argue that budgetary and fiscal prerogatives are covered by the Spanish *constitutional identity limit*.[244] As an extension of this parliamentary responsibility for the state budget, Article 135 (3) Spanish Constitution moreover prescribes a legislative act to approve public borrowing.

When applying this constitutional benchmark to a possible wider EU borrowing competence or shared liabilities through Eurobonds, several constitutional concerns arise. Notably, these new competences could result in considerable, hardly predictable financial risks for the Spanish state budget. Specifically, in case the borrowing or the shared liabilities are guaranteed by the Member States, given that the EU currently has no major revenue stream that is independent from the Member States, the factual decisions on Spanish revenue and expenditure might be taken at EU-level. Such a system would challenge the currently established constitutional design which allocates budgetary and fiscal decision-making to the Spanish legislator. The apparently resulting conflict with the Spanish *constitutional identity limit* would require a constitutional amendment following Article 168 Spanish Constitution,[245] which might be practically difficult to attain.

Parliaments Against Governments?' 567; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

243 For example, visible in Articles 66 (2), 75 (3), 133 (1) and 134 Spanish Constitution.

244 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; This conclusion can also be substantiated from a comparative perspective, for example visible from the German *overall budgetary responsibility* concept, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *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; 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; Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' 407; Or from the French jurisprudence, cf. *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.

245 Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain – Commitment to European Integration Without Giving Up the Essence of the Constitution' 282; Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

And finally, the compatibility of the various proposals with the Polish *constitutional identity limit* is considered.[246] Regarding Next Generation EU and the underlying EU own resources decision, national approval following Article 89 (1) (4) Polish Constitution is required,[247] which prescribes that the Polish Parliament confirms agreements with 'considerable financial responsibilities imposed on the State'. Different to the conferral of competences according to Article 90 (1) Polish Constitution, which has to be approved by a two-thirds majority in the Polish Sejm,[248] Article 89 Polish Constitution does not impose a qualified majority requirement. However, Article 311 TFEU was ratified as part of the Lisbon Treaty by the Sejm based on Article 90 Polish Constitution. Given the resulting dual parliamentary confirmation and the general constitutional respect for EU law obligations,[249] the own resources decision seems to be vested with high democratic legitimacy and the proposed financing through EU borrowing does not seem to alter that conclusion, as the mechanism in Article 311 TFEU allows for a continuous modification of the national financial commitment towards the EU.[250]

Regarding the more far-reaching proposal concerning EU borrowing competences or the introduction of shared liabilities, the Polish *constitutional identity limit* appears applicable. As established, the Polish Constitutional Tribunal identified the competence to conduct independent budgetary, financial and

246 Recalling that possible conflicts remain hypothetical until Polish accession to the Euro, cf. 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.

247 Cf. the parliamentary assessment: Polish Parliament, 'Parliamentary Report on Adoption of Decision 2014/335/EU – Druk nr 3198: o ratyfikacji decyzji Rady z dnia 26 maja 2014 r. w sprawie systemu zasobów własnych Unii Europejskiej (2014/335/UE, Euratom)' (*Polish Parliament*, 2015) <http://orka.sejm.gov.pl/Druki7ka.nsf/0/E6E5C6BEE40F88B9C1257DFD004A8C82/%24File/3198.pdf> accessed 20 December 2020 4.

248 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; Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 148.

249 Górski, 'European Union Law Before National Judges: the Polish Experience. Adept Multicentric Vision or Creeping Hierarchical Practice' 130-131; Wendel, 'Lisbon Before the Courts: Comparative Perspectives' 107; Also visible from the general friendliness of the Polish Constitution towards EU law, cf. Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Idenity and the 'German Model'' 251; Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 253; Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 1360.

250 Bainczyk, 'Das Ratifizierungsverfahren des Vertrages von Lissabon in Polen' 148; Bainczyk and Ernst, 'Urteil des polnischen Verfassungsgerichtshofs vom 11. 05. 2005 AZ.K 18/04' 241.

fiscal policies as particularly important powers under the Polish principle of sovereignty.[251] This includes the parliamentary responsibility for adopting the state budget enshrined in Article 219 Polish Constitution and the Sejm's responsibility to determine the conditions for state borrowing according to Article 216 (4) Polish Constitution.[252] The proposed conferral of competences to the EU would increase Polish liabilities and alter the current constitutional conception according to which state borrowing and state guarantees have to be approved by the Sejm, as apparent from the mentioned constitutional provisions. In addition, the budgetary discretion available to parliament would be reduced in case financial risks manifest at the EU-level, which could then impact national budgeting. As a result, the Constitutional Tribunal might consider the envisaged EU cooperation in conflict with the Polish *constitutional identity limit*. Such conflict can be, however, overcome by amending the constitutional text as previously established.[253] Although such constitutional amendment might be practically difficult to achieve, the *constitutional identity limit* does not impose an absolute limitation to the constitution-amending legislator.[254]

2.2.3.3 Interim conclusion

Overall, the compatibility assessment revealed that Next Generation EU is largely compatible with the national constitutional frameworks, even if financed through EU borrowing. It was highlighted that the Finnish Constitutional Law Committee raised concerns, as it characterized the proposed scheme as a departure from the current practice of EU budgeting under the EU-Treaties,

251 *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.

252 Cf. the constitutional arguments submitted in the inadmissible ESM-proceedings: *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.

253 Notably, Article 235 (6) Polish Constitution requires the confirmation of constitutional amendments that affect Chapters I, II, XII of the Polish Constitution by public referendum, thereby imposing a higher constitutional threshold for such amendments without excluding them in the first place, cf. 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.

254 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.

which, following the Committee's view, does not include large scale EU borrowing.[255] Therefore, the Committee suggested that a two-thirds parliamentary majority might be required to adopt Next Generation EU. Similarly, the underpinning own resources decision might require the support of a constitution-amending majority in Germany given the increased financial implications for the state budget.

However, no additional substantive constitutional concerns appear to emerge under the national *constitutional identity limits* across the assessed Member States. This appears to result from the fact that Next Generation EU is built on the existing EU Treaty-framework, which was already ratified by national legislators. The fact that the EU finances parts of its activities through borrowing appears not to alter the general financing structure of the EU's budget and it in fact appears to be caused by the aim to kick-start the EU recovery strategy in the aftermath of the COVID-19, which requires a major financial impulse in a short period of time. The envisaged financing structure through EU borrowing guaranteed by the Member States based on the EU own resources ceilings ensures that national budgets are not immediately overwhelmed by the required large financial investments. Given its design based on the existing EU budgeting framework and given that Member States retain a constitutive say under Article 311 (3) TFEU, Next Generation EU appears not to limit parliamentary budgetary prerogatives in an unconstitutional manner – and can thus be seen as a *constructive* example of how to devise EU fiscal integration steps in a legal-constitutionally sound manner.

Regarding a wider EU borrowing competence or the introduction of shared EU liabilities through Eurobonds, serious constitutional concerns appear to emerge. These concerns relate, on the one hand, to the potential impact of such EU discretionary competences on the national state budget and, on the other hand, to the difficulty of determining the potential financial risk inherent in the required national financial commitment. Here, a conceptual similarity with the constitutional concerns against a possible EU taxation competence can be identified. In fact, the discretionary competences to tax and issue debts appear to constitute the metaphorical two-sides of the same coin. Notably, by conferring taxation competences to the EU, Member States reduce their own prerogatives on generating state revenue which limits their fiscal decision-making space. Similarly, EU debts and liabilities could trigger financial obligations for the Member States, which restricts future domestic fiscal discretion.[256] Conse-

255 *Commission's Draft EU Recovery Plan and MFF Planning* 17; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

256 In general, it should be pointed out that debts will have to be paid in the future through, for example, tax money, cf. Violeta Ruiz Almendral, 'The European Fiscal Consolidation Legal Framework: Its Impact on National Fiscal Constitutions and Parliamentary Democracy' in Thomas Beukers, Bruno De Witte and Claire Kilpatrick (eds), *Constitutional Change Through Euro Crisis Law* (Cambridge University Press 2017) 29.

quently, both types of proposals trigger comparable national constitutional concerns.

As it stands, the constitutional concerns in Finland as well as the possible *constitutional identity* conflicts in France, Poland and Spain can be overcome based on the support of a qualified parliamentary majority that either confirms the EU commitment or that first enacts the required national constitutional amendments to then approves the conferral of powers to the EU-level. Yet, the practical-political feasibility of the required majority requirements seems questionable. Furthermore, only in Germany an absolute obstacle seems to exist, given the identified procedural and substantive conflicts with *overall budgetary responsibility*. Thereby, some of these concerns might be smoothened by deconstructing the conception of *overall budgetary responsibility*, addressing the apparent constitutional double standard and including the direct as well as indirect benefits from EU financial commitments into the constitutional appraisal, which is assessed in in further detail below (3.). Taken together, the German concept of *overall budgetary responsibility* appears to entail the most serious constitutional challenge to the prospect of the proposed additional EU competences.

2.2.4 Conclusion – Altering constitutional appraisal of Eurozone budgetary tool

The constitutional compatibility assessment of the possible funding options for the Eurozone revealed that the current EU Treaty-framework provides space to generate additional EU revenue in compliance with national constitutional law. Under the existing framework in Article 311 TFEU, national parliaments retain a final vote on the maximum financial commitments as well as influence on the administration of the conferred funds. Given that Article 311 TFEU is not limited in scope, Member States are able to assign new revenues to the EU-level. They can do so either by raising the national own resources ceiling and thereby increasing the direct national contributions, or, in the alternative, by introducing new tax-based EU resources that are collected at the national level and then assigned to the EU through the own resources decision, comparable to other traditional own resources.[257] The second option appears particularly interesting, given that it provides the EU with a more stable source of revenue different to the resources generated through national cooperation that continue to spark the outlined political debates on 'just return'.[258] Moreover, Member States and in particular national parliaments retain ultimate

257 Such as sugar levies, for example, cf. Magiera, 'Art. 311 AEUV – Eigenmittel der EU' paras 16-17; Crowe, 'The European Budgetary Galaxy' 431.

258 As previously highlighted, cf. Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 50; Alcidi and Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' 203; Fabbrini, 'Fiscal Capacity' 129; Crowe, 'The European Budgetary Galaxy' 433.

Member State	New own resources	Discretionary EU taxation competence	EU debts / borrowing	Next Generation EU
Finland	Parl. approval by simple majority (Sect. 94 (2) (1) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC) for the adoption of own resources decision.
Germany (including *constitutional identity limit)*	Parl. approval by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG).	Apparent conflict with the German *eternity clause* (given the discretionary nature, hardly predictable financial risks and the close link of taxation power with political decision-making which requires democratic control in Germany).	If design corresponds to Next Generation EU: Parl. approval by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG). If unlimited shared liability or discretionary EU competence to engage in borrowing without prior nat. approval of financial commitment: Apparent conflict with the German *eternity clause*.	Parl. approval by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG) for the adoption of the underlying own resources decision.
French sovereignty limit	Limit not applicable to EU secondary law.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.	Limit not applicable to EU secondary law. Parl. approval of own resources decision (Art. 53 (1) FC).
Polish constitutional identity limit	Limit not applicable to EU secondary law.	Apparent conflict which might require const. amendment (Art. 236 PC), including possibly referendum.	Apparent conflict which might require const. amendment (Art. 236 PC), including possibly referendum.	Limit not applicable to EU secondary law. Parl. approval of own resources decision (Art. 89 (1) (4) PC).
Spanish constitutional identity limit	Limit not applicable to EU secondary law.	Apparent conflict which might require const. amendment (Art. 168 SC).	Apparent conflict which might require const. amendment (Art.168 SC).	Limit not applicable to EU secondary law. Parl. approval of own resources decision (Art. 94 (1) (d) SC).

Figure 21: Compatibility of charted constitutional space with proposed EU funding options

control over the content of the own resources decision, which enables them to re-direct the proposed new traditional revenues if desired.

In contrast, allocating a discretionary power in order to either introduce taxation or engage in larger EU borrowing appears to interfere with national constitutional law. Inherent in such discretionary power is a degree of political decision-making power and flexibility which sits uneasily with national democratic concerns as well as (sovereign) budgetary planning, which involves the evaluation of financial risks. Therefore, the introduction of discretionary funding option seems constitutionally contested in Finland, France, Poland and Spain as well as prevented by the absolute German *constitutional identity limit*, which can only be overcome by repealing and replacing the entire constitutional text, following Article 146 GG.[259] Hence, these funding options seem hardly attainable within the currently available national constitutional space. The overall compatibility findings on the various EU funding options are summarized in *Figure 21* above.

2.3 Compatibility of an EU Ministry of Finance with national constitutional space

The previous constitutional compatibility assessment already identified major constitutional obstacles that EU fiscal integration ideas are confronted with. These constitutional obstacles or concerns equally apply to the creation of an EU Ministry or Minister of Finance to complement the institutional framework of the EMU. The following assessment draws on previous conclusions and focuses on identifying the most immediate constitutional limitations that might emerge considering this institutional reform ambition.

Considering the various proposals on creating a Eurozone Ministry of Finance, it was established in the previous Chapter that two particularly relevant elements for the national constitutional appraisal can be distinguished. In the first place, a structural-institutional dimension, which includes the general idea to pool existing EMU-related competences in one central EU institution[260] as well as the proposal to establish a Euroarea parliamentary assembly

259 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.

260 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 28; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 14, 18; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-61; Fabbrini, 'Fiscal Capacity' 116; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 8; Pilz, 'Ein Schatzamt für die Eurozone? – Überlegungen zu den Vorschlägen des Europäischen Parlaments und der Kommission zu einer Reform der

to supervise the Ministry (2.3.1.).[261] Second, a more substantive-institutional dimension which includes reform ideas to allocate new competences, such as a discretionary taxation competence or an EU veto power for national budgets, to this Eurozone Ministry (2.3.2.).[262]

2.3.1 Structural-institutional dimension of the proposed Eurozone Ministry

The different proposals advance two major institutional reform ambitions that are relevant for the constitutional compatibility assessment. Notably, these are the proposed creation of the Eurozone Ministry of Finance in charge of the pooled existing EMU-powers as such[263] and the envisaged establishment of a Eurozone parliamentary assembly that could supervise and administer the actions of this Ministry.[264]

2.3.1.1 Compatibility with the charted macro-comparative constitutional space

When assessing the compatibility of these institutional reform steps with the charted *macro-comparative* space, constitutional concerns arise in Finland concerning the implementation of the structural-institutional reforms at the EU-level as well as the potentially required conferral of additional competences to attain the proposed structural-institutional modifications. Notably, the Finnish Constitutional Law Committee established in its jurisprudence that changes to the EU institutional framework could constitute a modification of

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Wirtschaftsunion' 638.

261 Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-60; Europe, *Draft Treaty on the Democratization of the Governance of the Euro Area ('T-Dem')* Article 4 (1); Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 226; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 7.

262 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 170; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6-7.

263 Commission, *Completing Europe's Economic and Monetary Union – A European Minister of Economy and Finance*; Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 27; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 14, 18; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 59-61; Fabbrini, 'Fiscal Capacity' 131.

264 Cf. for example: Craig and Markakis, 'EMU Reform' 1441; The proposed Ministry could at least render the decision-making more transparent, cf. Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 188-189.

the initial parliamentary approval given to ratify the EU-Treaties.[265] Furthermore, the Committee established that budgetary and fiscal competences are considered particularly important competences of the Finnish Parliament according to Section 3 (1) and Chapter 7 Finnish Constitution.[266] Therefore, any institutional modification on the administration and modalities of EMU-related competences may be seen as particularly relevant to the Finnish Parliament and more specifically the Finnish sovereignty doctrine.[267] Finally, the Committee established that fundamental changes to the *modus operandi* of EU cooperation could constitute a significant interference with Finnish sovereignty and that they thus required approval by a qualified two-thirds majority following Section 94 (2) (2) Finnish Constitution.[268]

In light of this constitutional benchmark, it appears that the creation of a new institutional actor in charge of the coordination of EMU-related competences would require parliamentary approval following Section 94 (1) Finnish Constitution, as the initial parliamentary EU commitment is amended. Notably, the current EU-Treaties did not envisage the creation of a Ministry of Finance and the introduction of such a new institution, even if based on EU secondary law, would likely be seen as an amendment to the institutional balance currently enshrined in the EU-Treaties. Therefore, approval under Section 94 (1) Finnish Constitution appears to be required.

Furthermore, the proposed institutional reform step could alter Finnish parliamentary control over EMU decision-making. Notably, the Finnish Parliament participates in the national *ex ante* preparation of EMU decisions that are

265 The Constitutional Law Committee raised concerns regarding the reverse qualified majority vote, which was seen as an alteration to the institutional balance, cf. *Adoption of the EU Six-Pack Legislation*; Or in relation to Comitology, cf. PeVL 49/1998 vp *Comotology Procedure* [1998] (Finnish Constitutional Law Committee); Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 472.

266 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

267 As emphasized by the Constitutional Law Committe: *Second Assessment Draft ESM-Treaty (II.)* 2; *Adoption of the EU Six-Pack Legislation*; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

268 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

of parliamentary relevance.[269] Thereby the Finnish mandating practice only extends to the Finnish representative in the Council and European Council. Moreover, the parliamentary right to be informed about EU developments only obliges the Finnish Government following Section 97 Finnish Constitution.[270] Any changes to the existing EU institutional framework could also impact this constitutionally secured parliamentary oversight, as decisions might be centrally prepared by an EU Ministry – instead of the Council. What is more, relevant information might be accumulated outside the direct reach of the Finnish Government, and hence the Finnish Parliament. Consequently, the envisaged creation of an EU Ministry of Finance would not only alter the initial parliamentary approval of the EU-Treaties but it could equally have significant implications for the national parliamentary knowledge of and involvement in the EU decision-making process. These constitutional concerns are reinforced since the competence areas involved are particularly important parliamentary prerogatives protected by the Finnish sovereignty.

To a similar extent, the initiation of a Eurozone assembly would alter the initial parliamentary approval and with it the institutional framework, as such chamber would unite democratic structures of the national and the EU-level. These combined parliamentary structures are not anticipated by the current EU-Treaties and would thus alter the Finnish parliamentary EU-mandate. A new approval under Section 94 (1) Finnish Constitution therefore appears required to confirm these institutional modifications.

Moreover, the subsequent question is whether real decision-making responsibilities would be assigned to such assembly. In case such powers would be indeed allocated to the Eurozone assembly, this would constitute a shift of responsibilities from the exclusively national constitutional level to a combined national-EU decision-making space, which clearly impacts the outlined important budgetary prerogatives constitutionally protected in Section 3 (1) and Chapter 7 Finnish Constitution. Although the new Eurozone assembly would include Finnish parliamentarians, it would operate in a constitutional *in-between* space between the EU and the national level, in which neither of the established parliamentary tools appears to apply. In addition, the current functioning of the EU does not include such *sui generis* Eurozone parliamentary assembly, which may be thus classified as a major institutional transformation that alters the current *modus operandi* of the EU.

Taken together, this suggests that both institutional reform steps could have a major impact on the exercise of budgetary prerogatives, which are

269 As established in Section 96 Finnish Constitution; Cf. as well: Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 452; Husa, *The Constitution of Finland – A Contextual Analysis* 47; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 556.

270 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 459.

particularly important Finnish parliamentary competences. As a result, it seems that the required Treaty recognition and institutional transformation would likely necessitate confirmation by a qualified two-thirds parliamentary majority, as established in Section 94 (2) (2) Finnish Parliament.

When now considering the German constitutional framework, the established constitutional jurisprudence – similarly to the Finnish one – underscores the importance of explicitly recognizing institutional alterations such as the proposed structural-institutional modifications through Treaty amendment. Otherwise, the Constitutional Court could be potentially inclined to consider such modifications enacted on the basis of EU secondary law as *ultra vires* acts.[271] As illustrated, the fact that constitutional proceedings are highly likely given the lowered standing requirements[272] might incentivize the German legislator to be more diligent in its supervision of EU action in light of obligations stemming from the outlined *integration responsibility* doctrine.[273] Considering that the EU-Treaties do neither establish an EU Ministry of Finance nor a Eurozone assembly to supervise such Ministry and in light of the considerable authority that the different proposals aim to delegate and pool within this envisaged institutional actor, it seems likely that a Treaty amendment would be deemed necessary from a German constitutional perspective. This conferral might then require approval by a qualified majority under Article 23 (1) (3) in conjunction with Article 79 (2) GG.

As previously clarified, Article 23 (1) (3) GG prescribes a constitution-amending two-thirds majority for EU integration steps that amend the material content of the German Constitution.[274] This qualified majority was for

271 Particularly in light of the recent *ultra vires* finding, which could suggest a more active approach of the Constitutional Court, cf. for the decision: *Quantitative Easing (PSPP) Final Judgment* paras 163, 234; Cf. as well: Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 818; Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH? Zu den Folgen des Karlsruher PSPP-Urteils' 898; Kirchhof, 'Die Rechtsarchitektur der Europäischen Union' 2057.

272 Cf. the assessment in Chapter III Section 3.4.3.; For example, the Constitutional Court seemingly introduced an *actio popularis* in EU matters, cf. 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.

273 *Quantitative Easing (PSPP) Final Judgment* paras 106-107; Cf. as well: Weiß, 'Die Integrationsverantwortung der Verfassungsorgane' 1047; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 178-179.

274 As highlighted by the Legal Service of the German Parliament, cf. Bundestages, *Zum Erfordernis eines qualifizierten Mehrheitsbeschlusses des Bundestages hinsichtlich des Zustimmungsgesetzes zum Eigenmittelbeschluss der EU (WD 4 – 3000 – 055/20)* 5; Cf. as well: Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' paras 25, 27; Lorz and Sauer, 'Verfassungsändernde Mehrheiten für die Stabilisierung des Euro? – Mehrheitserfordernisse bei der Zustimmung zum Fiskalpakt, zum ESM-Vertrag und zur Änderung des AEUV' 685.

example required to adopt the ESM-Treaty as well as the Fiscal Compact,[275] given the instruments' implications for parliament's budgetary prerogatives.[276] Considering the reform proposals, it appears that the establishment of a Eurozone Ministry of Finance and a Eurozone assembly controlling EMU-related decisions would alter the currently applicable institutional framework, including the German constitutional framework that guarantees parliamentary involvement in the preparation of EU decisions with parliamentary relevance. Comparable to the framework in Finland, the German Constitution establishes the parliamentary obligation to issue a statement to the German Government on EU secondary law decisions that concern its constitutional prerogatives according to Article 23 (3) GG.[277]

In addition, given that budgetary and fiscal prerogatives are assigned to the German Parliament and protected under *overall budgetary responsibility*[278] as well as re-calling that the German Constitutional Court clarified that central budgetary decisions may not be delegated to a parliamentary committee but have to be taken by the entire *Bundestag*,[279] it seems incompatible with the German Constitution to confer the parliamentary responsibilities to the proposed Eurozone assembly. Instead, all central decisions have to be determined by the German Parliament, as for example the case under Article 311 (3) TFEU.

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275 Although both instruments are intergovernmental agreements, and thus, strictly speaking, not EU law, the German Federal Constitutional Court clarified that in case such agreements have a close connection to EU law, for example by complementing it, they are considered EU matters under German constitutional law and Article 23 GG is applicable, cf. *Right to Participation for German Parliament at the Occasion of ESM-Treaty and Euro-Plus-Pact* paras 135-137; Cf. as well: Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 359.

276 Richter, *Funktionswandel im Mehrebenensystem? Die Rolle der nationalen Parlamente in der Europäischen Union am Beispiel des Deutschen Bundestags* 176; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 6, 277; Calliess, 'Finanzkrise als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' 160.

277 Heintschel von Heinegg and Frau, 'Art. 23 GG – Mitwirkung bei Entwicklung der EU' para 39; Nettesheim, 'Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung' 181.

278 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' para 182; 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; 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; 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 Währverfassungsrechts' 807-808.

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

The proposed Eurozone assembly cannot replace the confirmation of financial commitments by the democratically elected German Parliament.

Furthermore, establishing a state-like institutional structure consisting of an EU Ministry and the corresponding parliamentary assembly might have a centralizing effect, which could result in a situation where the EU gains increasing control over budgetary and fiscal decisions in the long run. Given the possible implications for these competences, which are particularly protected under Articles 104a to 115 GG, as well as a potential decrease in German parliamentary oversight over EU decision-making as Article 23 (3) GG does not cover decisions by the EU Minister or the proposed Eurozone assembly, it seems likely that a constitution-amending majority in the sense of Article 23 (1) (3) in conjunction with Article 79 (2) GG will be deemed necessary to confirm the proposed institutional reform steps.

These institutional reforms remain restricted by *overall budgetary responsibility* and thus the German *eternity clause*. It was established that *overall budgetary responsibility* was defined to have both a procedural as well as a substantive dimension.[280] Regarding these constitutional requirements, it appears that the institutional reform steps themselves do not contain an incompatible conferral of competences, given that the proposals only create an institutional framework or infrastructure for the administration of existing EMU competences. Notably, these competences are already conferred to the EU-level without resulting in a conflict with the German *eternity clause* and the proposed modifications do not seem to alter the current ultimate control over budgetary decisions, which rests with the German Parliament. Consequently, the proposed institutional modifications appear not to result in an incompatible conflict with German *overall budgetary responsibility*.

2.3.1.2 Compatibility with the charted micro-comparative constitutional space

However, it is possible that substantive constitutional concerns emerge under the other charted national *constitutional identity limits*. In France, the proposed

280 On the procedural requirements, cf. *Quantitative Easing (PSPP) Reference* para 48; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 7; On the substantive requirements, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

institutional reform steps could trigger a conflict with the sovereignty limit[281] which protects budgetary and fiscal competences.[282] Therefore, the central question is whether the envisaged EU integration steps would confer additional competences to the EU-level, and would thus require an explicit constitutional amendment.[283] As previously highlighted, the proposed institutional reform steps appear to re-allocate existing EU responsibilities. The proposed reform steps therefore do not appear to entail an additional conferral of competences from the national to the EU-level but rather a re-shuffling of already conferred powers. Consequently, national budgetary and fiscal prerogatives appear not to be modified by these structural-institutional steps. Rather, the steps intend to render EU decision-making in these areas more transparent and more effective, which appears beneficial for the functioning of the single currency. At the same time, the *Conseil* continuously underscored in its constitutional decisions that the modalities attached to the conferred competences are similarly important for the conducted review.[284] However, it appears that the proposed initiation of the Ministry of Finance does not alter the final decision-making modalities itself but it would rather impact the preparation of such decisions. This seems not to conflict with the French sovereignty limit. Taken together, it appears that the *Conseil Constitutionnel* is unlikely to detect a conflict with the sovereignty limit given that the existing division of competences between the EU and the Member States appears not to be impacted by the proposed institutional modifications.

In Spain, the Constitutional Tribunal similarly established that EU integration steps have to respect Spanish *constitutional identity*, which protects sovereignty, democracy and the constitutional structure.[285] From the Tribunal's

281 As established by the *Conseil Constitutionnel*: *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.

282 Cf. the findings of the *Conseil Constitutionnel*: *Fiscal Compact* para 21; *Review of Maastricht Treaty (Maastricht I)* para 45; 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; 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.

283 *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.

284 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.

285 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,

jurisprudence it can be deduced that the concept is conceptualized as a competence-based limitation to the process of EU integration.[286] Consequently, the Tribunal is mainly concerned with the conferral of competences to the EU-level, which could alter the Spanish constitutional order in a manner that is incompatible with the identity of the Spanish Constitution for example by conferring *Kompetenz-Kompetenz* to the EU-level.[287] As illustrated, the structural-institutional reform steps appear to focus on modifications to the EU's institutional framework, which has implications for the mandate that the Member States conferred upon the EU. Notably, the modalities and conditions attached to the exercise of transferred competences are equally important for the constitutional conferral. However, given that the envisaged institutional reform steps do not entail an additional change of competences from the national to the EU-level or alter the final decision-making responsibility these modifications seem not contentious under the Spanish *constitutional identity limit*.

When now considering the Polish *constitutional identity limit*, it appears questionable whether a conflict would be triggered by the proposed institutional modifications. As highlighted, the Polish Constitutional Tribunal established that the conferral of powers to the EU is limited by the principle of sovereignty, which requires that important competence areas remain at the national level, including economic, financial and fiscal competences.[288] As established in relation to France, Germany, and Spain, the here envisaged institutional modifications do not concern the conferral of competences, but rather an alteration of the modalities of already conferred competences. These modifications do, however, not change the final decision-making authority. Therefore, it appears that the equally competence-centric *constitutional identity* concerns do not apply to the proposed reform steps, as the division of compet-

'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.

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 *Constitutional Review of the Maastricht Treaty* Section II.4.; Cf. as well: 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; Castillo de la Torre, '*Tribunal Constitucional* (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe' 1193-1194.

288 *Treaty of Lisbon* Section III 2.1.; 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.

ences between the EU and the Member States as well as the ultimate responsibility for the decisions taken on these competences would remain unchanged by these proposals.

Taken together, this suggests that no substantive constitutional conflict with the French, Polish or Spanish *constitutional identity limit* would emerge. As these limits primarily focus on conferral of competences, EU institutional amendments appear not to create any conflicts as long as no additional competences are conferred to the EU-level and given that the ultimate decision-making remains unaffected by the proposed reform steps.

2.3.1.3 Interim conclusion

Overall, it seems that the introduction of an EU Minister or Ministry of Finance – and thus an institution into which the existing EMU competences could be integrated – might require additional national constitutional approval in Finland and Germany. Notably, the creation of such an institutional actor would alter the currently existing EU institutional balance as enshrined in the EU-Treaties and approved by the national parliaments. Furthermore, the envisaged alterations to the EU institutional framework could impact on national procedures that ensure parliamentary participation in EU decision-making. The result could be that national parliaments would not be as comprehensively involved in the adoption of EMU-policies, which modifies the initial conferral of competences as well as the modalities attached to it. Therefore, these alterations could require a new confirmation by national parliaments – possibly even by a qualified parliamentary majority in case these institutional changes are deemed to modify the current mode of cooperation within the EMU.

In addition, the compatibility assessment illustrated that no conflict under the French, German, Polish or Spanish *constitutional identity limit* seems to emerge, given that the proposed institutional reform steps mainly concern the modalities attached to the exercise of already conferred competences and given that the ultimate decision-making responsibility appears not to be altered by these structural proposals. Therefore, these institutional modifications do not directly confer additional competences to the EU-level, which appears to be the most relevant requirement for triggering the national *constitutional identity limits*. This constitutional evaluation would change, however, in case the envisaged new institutional actors would be assigned additional competences beyond the currently conferred competences or in case the Ministry would be empowered to take decisions independently, as will be elaborated in the following section.

2.3.2 Conferring new competences to the Eurozone Ministry

A second set of ideas relates to the allocation of additional competences to the proposed EU Ministry of Finance. These competences include, for example,

a discretionary taxation competence to empower the EU to autonomously raise revenue if required[289] or the power to veto national budgeting.[290] Obviously, allocating these competences to the EU-level would require Treaty-recognition, as the envisaged powers go beyond the current EU Treaty-framework. Yet, the required Treaty amendments might conflict with national constitutional concerns, as will be evaluated subsequently.

2.3.2.1 Compatibility with the charted macro-comparative constitutional space

When considering the charted constitutional space in Finland, it seems that through the conferral of additional, far-reaching institutional responsibilities to this Ministry of Finance a conflict with Finnish sovereignty could emerge, which would require approval by a qualified parliamentary majority following Section 94 (2) (2) Finnish Constitution. Notably, as previously established in relation to the introduction of a discretionary EU taxation competence, the Constitutional Law Committee considers budgetary and fiscal competences particularly important parliamentary prerogatives.[291] Following its decisions, these prerogatives cover the introduction of new taxation following Sections 3 (1) and 81 (1) Finnish Constitution the general adoption of the state budget, as clarified in Section 83 (1) Finnish Constitution, including all revenue and expenditure as well as finally the issuing of state guarantees, as clarified in Section 82 (3) Finnish Constitution.[292]

In light of this constitutional benchmark, it appears that a discretionary taxation competence for the envisaged Eurozone Ministry of Finance would challenge precisely these parliamentary prerogatives established under Section

289 Cf. the Bruegel-proposal: Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 7.

290 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 169; Tuori and Tuori, *The Eurozone Crisis – A Constitutional Analysis* 255; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6.

291 Cf. decisions by Constitutional Law Committee: *Second Assessment Draft ESM-Treaty (II.)* 2; *Adoption of the EU Six-Pack Legislation*; Cf. as well: Ojanen and Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' 391-392; Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Tuori and Raitio, 'Finland' 328; Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

292 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 457-458; On the prerogatives in relation to issuing a state guarantee, cf. *Commission's Draft EU Recovery Plan and MFF Planning* 12; *EIB Proposal for EU Covid-19 Guarantee Fund* 5; Cf. as well the Committee's view on the ESM, *First Assessment Draft ESM-Treaty (I.)*; As well as on the EFSF, *Amendment to the EFSF (Increase in State Guarantee)* 3.

3 (1) Finnish Constitution. In addition, a veto possibility regarding the national budget after the approval of the Finnish Parliament alters the constitutional framework for national budgeting established under Section 83 (1) Finnish Constitution. Given that budgetary and fiscal prerogatives are essential competences under the sovereignty doctrine, and given that the EU influence would be considerable, it appears that the envisaged powers could only be conferred by a qualified parliamentary majority in the sense of Section 94 (2) (2) Finnish Parliament. This conclusion is further supported by the fact that the proposed reform steps would likely alter the general mode of EU cooperation in conflict with Finnish sovereignty. Notably, core decision-making abilities would be shifted from the national to the EU level thereby equally reducing the available decision-making space for the Finnish Parliament.[293] Hence, it seems likely that a qualified two-thirds majority would be required in Finland in order to equip the proposed EU Ministry of Finance with the envisaged substantive competences.

In Germany, the allocation of a discretionary taxation competence and an EU veto power regarding the national state budget to the proposed Eurozone Ministry of Finance will likely result in a major constitutional conflict. In the first place, it appears that both envisaged competences alter the German Constitution. As outlined, Article 105 GG allocates the power to tax to the federal as well as the regional German state level, depending on the specific area of taxation.[294] In addition, Article 110 GG assigns the independent responsibility to establish the German federal budget to the German Parliament.[295] Both constitutionally determined parliamentary prerogatives would be modified by the proposed substantive reform steps und would therefore require approval by a constitution-amending two-thirds parliamentary majority following Article 23 (1) (3) in conjunction with Article 79 (2) GG.

However, these reform steps could also conflict with *overall budgetary responsibility* given their impact on budgetary and fiscal parliamentary prerogatives. As stated, the German Constitutional Court requires that budgetary and financial commitments remain specific, limited and under the control of the

293 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

294 Kube, 'Art. 105 GG – Steuergesetzgebungskompetenz' paras 1-2; Seiler, 'Art. 105 GG' paras 41-42; As highlighted by the German Constitutional Court, Article 105 GG intends to equip the state with the power to generate the financial revenue necessary, cf. *Law Introducing an Additional Charge* para 19.

295 As established in Article 110 (2) Basic Law, the annual budget, which consists of all revenue and expenditure, has to be approved by parliament through a legislative act; Cf. as well: Schneider, 'Exkurs: Die Rolle des Haushaltsausschusses des Bundestages bei Aufstellung und Vollzug des Haushalts – ein Praxisbericht' 295-296; Moeser, *Die Beteiligung des Bundestages an der staatlichen Haushaltsgewalt* 114-116.

German Parliament[296] as well as that German budgetary autonomy is not suspended.[297] When applying this benchmark to the prospect of a discretionary taxation competence for the EU Ministry of Finance, the previously established conclusions in relation to the allocation of discretionary revenue powers to the EU apply. Notably, a discretionary EU taxation competence reduces the national fiscal decision-making space in Germany and it would shift political decision-making outside the reach of democratic control through the German people.[298]

Furthermore, the proposed EU veto power for national budgets would establish the EU as the final authorizer of national budgeting and thereby alter the current conception, which establishes national parliaments as highest budgetary authority. Such veto power would significantly alter the current framework, according to which Member States have to comply with the established fiscal rules as they could be otherwise sanctioned. Yet, this gives national parliaments a genuine political choice to either modify the national budgetary planning or to risk EU sanctions. This genuine political choice would be challenged in case an EU institution could simply block the adoption of a domestic state budget.

Therefore, it appears that the proposed increase in EU powers for the envisaged EU Ministry of Finance would be declared incompatible with *overall budgetary responsibility* by the German Constitutional Court. As a result, the proposed substantive reform steps appear constitutionally impossible in Germany in light of the current jurisprudence of the Constitutional Court and particularly its interpretation of Article 79 (3) GG.[299]

296 *Quantitative Easing (PSPP) Reference* para 48; Cf. as well: Calliess, '70 Jahre Grundgesetz und europäische Integration: 'Take back control' oder 'Mehr Demokratie wagen'?' 688; Reestman, 'Legitimacy Through Adjudication: The ESM Treaty and the Fiscal Compact Before the National Courts' 259; Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* 297; Nettesheim, 'Die "haushaltspolitische Gesamtverantwortung" in der Rechtsprechung des BVerfG' 23; Calliess, 'Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' 7.

297 *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

298 As established, political decision-making space is an essential component under the German principle of democracy, cf. Schröder, 'Das Demokratieprinzip des Grundgesetzes' 814; Gött, 'Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts' 516, 527; Voßkuhle and Kaiser, 'Grundwissen – Öffentliches Recht: Demokratische Legitimation' 804.

299 *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

2.3.2.2 Compatibility with the charted micro-comparative constitutional space

The outlined apparent conflict between the proposed discretionary decision-making abilities and the German *constitutional identity limit* indicates that these reform ambitions might be more generally constitutionally contentious for other Member States with a *constitutional identity limit* as well. The outlined German constitutional concerns appear to be echoed in France, where the *Conseil Constitutionnel* focuses within its sovereignty limit particularly on protecting domestic budgetary and fiscal prerogatives as laid down in Articles 34 and 47 French Constitution.[300] Both provisions establish the French legislator's responsibility to determine the broader budgeting framework, the sources of revenue and planned expenditure as well as the requirement that the French state budget has to be adopted by a legislative act. Clearly, the introduction of a discretionary taxation competence administered by the proposed EU Ministry of Finance would limit the constitutionally secured parliamentary taxation prerogatives of the French legislator. And the proposed EU veto power over national budgeting would challenge the parliamentary responsibility for establishing the state budget. Notably, the current French Constitution does not provide for the possibility that an EU institution can effectively block the adoption of the French state budget. As a result, the French legislator would be significantly restricted in its constitutionally assigned budgetary and fiscal prerogatives. Therefore, the proposed discretionary powers appear to require a constitutional amendment in France prior to confirming the required conferral of competences to the EU-level. As highlighted, such conferral is possible in all parts of the constitutional text and in fact common practice in France prior to the ratification of competence conferrals to the EU-level but equally requires political support.[301]

In Spain, the *constitutional identity limit* protects national sovereignty and democracy,[302] which seemingly includes the parliamentary prerogative to

300 *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' 119-120.

301 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.

302 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.

enact taxation[303] as well as to establish the state budget.[304] The proposed discretionary EU taxation competences would challenge this taxation authority of the Spanish legislator. It could furthermore impact national budgeting more generally, in case the resources generated by the EU are no longer available for the national budgetary process. In addition, Article 134 (1) Spanish Constitution establishes, in an exhaustive manner, that the *Cortes Generales* is responsible for examining, amending and approving the Spanish state budget. The provision does not qualify this prerogative by, for example, a veto option for the EU. Hence, a veto possibility for the proposed Eurozone Ministry of Finance would clearly alter these exclusive Spanish parliamentary prerogatives with potential implications for Spanish democracy more generally. Notably, the Spanish legislator would no longer be the final arbiter in the adoption process of the state budget. Given these major implications, the proposed substantive reform steps appear to require confirmation through constitutional amendment following Article 168 Spanish Constitution.[305] This suggests that the conferral of the required competences is generally constitutionally possible, but might prove highly challenging to attain.

In Poland, following an anticipatory constitutional analysis,[306] it appears that similar constitutional conflicts with the Polish *constitutional identity limit* could emerge. Notably, the Polish Constitutional Tribunal established that economic, financial and fiscal decision-making competences were particularly important under the Polish sovereignty concept.[307] This is explicitly confirmed by the Polish Constitution itself, which assigns these competences to the Polish Council of Ministers as well as the Polish Parliament as established in Articles 146 and 219 Polish Constitution.[308] Any discretionary decision-making powers on taxation at EU-level or the EU ability to veto national budgeting would challenge the established constitutional framework for budgeting in Poland. It is likely that the Tribunal would see in this a serious limit to the ability of

303 Established in Article 133 (1) Spanish Constitution.

304 Established in Article 134 (1) Spanish Constitution.

305 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

306 Given that these reform steps will likely be considered as hypothetical at the moment, cf. 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.

307 *Treaty of Lisbon* Section III 2.1.; 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.

308 *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.

the legislator to independently design budgetary and fiscal decisions, which was characterized as an essential component under Polish sovereignty. Therefore, the proposed substantive reform steps and the required conferral of competences to the EU-level appear to result in a conflict with the Polish *constitutional identity limit*. However, the resulting conflict could be accommodated by amending the constitutional text following Article 235 Polish Constitution.[309] The political feasibility of such constitutional reform remains however questionable.

2.3.2.3 Interim conclusion

Overall, this suggests that the proposed substantive reform steps, which are intended to equip the envisaged EU Ministry of Finance as well as the composed Eurozone assembly with discretionary decision-making possibilities, appear to be confronted with serious constitutional concerns. Both in Finland and Germany, these concerns would likely trigger the qualified majority threshold for confirming the conferral of powers to the EU-level.

In addition, multiple serious constitutional concerns could potentially result in a major conflict with German *overall budgetary responsibility*. Arguably, awarding discretionary taxation powers or a veto over national budgeting to the EU challenges German budgetary autonomy and amends the responsibility of the German Parliament for the German state budget. Comparable constitutional concerns can be identified in France, Poland and Spain, where the proposed substantive reform steps appear to result in conflicts with the respective national *constitutional identity limit*. However, only the German *constitutional identity limit* imposes an absolute limitation to the process of EU integration, which might consequently translate into an irreconcilable conflict with the German *eternity clause* in Article 79 (3) GG.

2.3.3 Conclusion on the creation of an EU Ministry of Finance

National constitutional concerns primarily emerge in relation to the proposed conferral of substantive decision-making competences to the EU-level and to a lesser extent in relation to the mere modification of the existing EU structural-institutional framework. This observation appears to confirm that national *constitutional identity limits* are mainly construed in light of competence areas

309 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.

Member State	Institutional dimension of establishing Eurozone Ministry	Substantive dimension of establishing Eurozone Ministry
Finland	Qualified parl. approval (Sect. 94 (2) (2) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).
Germany (including *constitutional identity limit)*	Parl. approval by two-thirds majority (Art. 23 (1) (3) in conjunction with Art. 79 (2) GG).	Apparent conflict with the German *eternity clause* (size of commitment and suspension of nat. parliamentary control).
		Partly flexibilization of absolute conflict possible through: - EU benefits. - Consistent standard.
French *sovereignty limit*	No apparent conflict with the sovereignty limit.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.
Polish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit.*	Possible conflict which might require const. amendment (Art. 236 PC), including possibly referendum.
		Apparent conflict, can be possibly overcome through "modern" interpretation of Polish sovereignty.
Spanish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit.*	Apparent conflict, can be overcome under strict const. amendments procedure in Art. 168 SC which imposes high threshold and is practically difficult to attain.

Figure 22: Compatibility of charted constitutional space with proposed Eurozone Ministry of Finance

and competence conferrals. As illustrated within the *macro-* and *micro-comparative* constitutional assessment, national constitutional authorities seem to conceptualize national sovereignty or national democracy, which constitute central principles under the various national *constitutional identity limits*, by identifying particularly important national competence areas and powers within the protected scope under these limits. Based on this competence-centric conception of national *constitutional identity limits*, the required conferral of competences to allocate the outlined substantive powers to the EU-level would

likely trigger the outlined major conflicts with national sovereignty and democracy.

In contrast, the envisaged structural-institutional modifications – that would result in the creation of the envisaged EU Ministry of Finance – seem to trigger fewer constitutional concerns under the national *constitutional identity limits*. However, these reform ambitions appear to require additional parliamentary support in Finland and Germany given that they alter the currently existing institutional framework. Depending on the resulting impact on the constitutionally secured involvement of national parliaments in EU decision-making as well as the potential implications for the *modus operandi* of the EMU – notably, by moving away from a mere coordination of fiscal decision-making towards taking these decisions at the EU-level – it is even conceivable that these structural-institutional reform ambitions would require qualified parliamentary support.

The overall compatibility findings on the establishment of a Eurozone Ministry are summarized in *Figure 22* above.

2.4 Compatibility of tightened EU supervision with national constitutional space

A final set of ideas relates to the enhanced EU supervision over national budgeting. To that end, it was established that the proposals mainly aim at better integrating the existing supervisory tools into the national and the EU budgetary process.[310] The Commission proposed the establishment of independent domestic 'Competitiveness Authorities' that evaluate the national economic development as part of a reformed European Semester[311] as well as the comprehensive use of the national recommendations issued under the European Semester for the allocation of EU funds.[312] The most far-reaching proposal even suggested the allocation of the previously discussed veto power over national budgeting to the EU.[313]

Obviously, the increased EU supervision of national budgetary and fiscal decisions would have implications for the Member States as these rules limit

310 To address the apparent overlap and in-transparency of the existing EU rules, cf. Craig and Markakis, 'EMU Reform' 1441; Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 190; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 3.

311 Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 8; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 169-170.

312 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 24-25; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6.

313 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 170; Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6.

the available national space to take decisions independently.[314] At the same time, EU fiscal rules were consistently identified as important tool to ensure that national budgeting complies with its responsibility towards the Eurozone and thereby to avoid moral hazards.[315]

Bearing these constitutional concerns in mind, the following compatibility assessment of the identified core ideas, including the proposed reform of the European Semester, a possible EU veto power over national budgets and the advocated strive to achieve greater national ownership, draws from the previous extensive conclusions and identifies major constitutional obstacles that the charted national constitutional space entails for their attainment.

2.4.1 Compatibility with the charted macro-comparative constitutional space

As indicated, the proposed increased EU supervision would limit the fiscal possibilities of the national parliaments and therefore impact on national budgetary prerogatives. Notably in relation to Finland, it was established that these budgetary prerogatives are considered central sovereign competences that enjoy enhanced constitutional protection.[316] Furthermore, given its flexible conception, EU integration steps are generally compatible with the Finnish sovereignty limit unless they impact essential features of parliamentary budgetary prerogatives[317] or in case the general *modus operandi* of EU cooperation is altered through such steps.[318]

In light of these constitutional concerns, it seems that the proposed more integrated European Semester and the establishment of the national 'Competitiveness Authority' do not entail a significant shift of powers to the EU-level. Rather, they build on the currently existing framework established for EU fiscal supervision. To that end, the Constitutional Law Committee even emphasized the benefits that stem from a stable Euro for Finland,[319] which may be attained through the envisaged increased fiscal supervision. Consequently, a better integrated European Semester with data provided by an inde-

314 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 200.

315 Ibid 218; Craig and Markakis, 'EMU Reform' 1421; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 55.

316 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 306-307; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 101; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' 541.

317 *Commission's Draft EU Recovery Plan and MFF Planning* 13; *EIB Proposal for EU Covid-19 Guarantee Fund* 4; Cf. as well: Tuori and Raitio, 'Finland' 328.

318 *Commission's Draft EU Recovery Plan and MFF Planning* 18; Cf. as well: Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU'.

319 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

pendent domestic authority and a possible connection of EU funds to the recommendations established within the European Semester jointly appear to strengthen the effectiveness of the existing framework. Therefore, these ideas can be likely confirmed by simple parliamentary majority.

The assessment would, however, differ in case the EU obtained a veto power over national parliaments, as previously outlined. Taken together, this suggests that additional EU supervision and EU-based incentives to comply with EU recommendations would generally be compatible with the Finnish Constitution as long as they remain *voluntary*. As soon as the EU can modify or block a national decision, the general mode of EMU-cooperation is altered and such reform steps would likely have to be confirmed by qualified majority under Section 94 (2) (2) Finnish Constitution.

In Germany, a similar constitutional appraisal appears to apply. Notably, the proposed enhanced enforcement of the existing framework as well as the creation of a new domestic authority appears not to entail additional challenges for *overall budgetary responsibility* or parliamentary prerogatives.[320] Hence, the proposed alterations would largely preserve the decision-making responsibility within the Member States – and the EU would thus mainly incentivize national parliaments in their political decisions. This implies that Member States would retain the final decision-making power which suggest that compliance could not be forced upon them and that such compliance would thus remain *voluntary*. As a result, the proposed improvements of the European Semester and the increased incentives to comply with the EU rules appear generally compatible with the German Constitution, as no additional powers or competences are conferred to the EU-level.

In contrast, awarding the EU-level with a genuine veto power over national budgeting would seriously interfere with the national constitutional framework. As previously established, it would challenge the German Parliament's position as final arbiter in budgetary matters.[321] Hence, similarly to the Finnish approach, the German constitutional framework appears to allow for the conferral of additional supervisory competence to the EU as long as Member States retain the autonomous decision-making power to comply or disregard the recommended EU action. In case, however, the EU can overrule a national

320 Richter, *Funktionswandel im Mehrebenensystem? Die Rolle der nationalen Parlamente in der Europäischen Union am Beispiel des Deutschen Bundestags* 176; Ketterer, *Zustimmungserfordernis beim Europäischen Stabilitätsmechanismus* 6, 277; Calliess, 'Finanzkrise als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' 160.

321 As inherent in *overall budgetary responsibility* which requires that essential budgetary competences are preserved at the national level, cf. *Quantitative Easing (PSPP) Final Judgment* paras 226-227; *Quantitative Easing (PSPP) Reference* para 129; *Final OMT-Judgment* para 213; *ESM-Treaty and Fiscal Compact (interim relief)* para 113; *Financial Support for Greece and EFSF* para 135; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

decision or take decisions on behalf of the Member State a conflict with German *overall budgetary responsibility* could arise.[322]

2.4.2 *Compatibility with the charted micro-comparative constitutional space*

The reform proposals might equally trigger *constitutional identity* concerns. As previously highlighted, the French, Polish and Spanish *constitutional identity limits* protect budgetary and fiscal decision-making prerogatives based on national sovereignty as well as democracy considerations.

In France, the *constitutional identity limit* covers *inter alia* the parliamentary competence to establish the budgetary planning and adopt the state budget, as established in Article 34 French Constitution.[323] This corresponds to the parliamentary budgeting powers established in 134 (1) Article Spanish Constitution[324] as well as in Article 219 Polish Constitution.[325] In light of these prerogatives, and considering the current framework according to which Member States are incentivized to comply with various EU fiscal rules as well as increased EU monitoring, EU restrictions for national budgeting seem generally compatible with national *constitutional identity limits*.

Importantly, however, the existing rules entail in the first place a political dimension, which is for example visible under the Excessive Deficit Procedure that has to be confirmed by a vote in the Council of Ministers according to Article 126 (6) TFEU.[326] And second, these procedures can only *strongly incentivize* Member States to comply with the agreed EU fiscal rules, with the possible imposition of penalties following Article 126 (11) TFEU. Conceptually,

322 Given the absolute nature of the German *constitutional identity limit*, cf. *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

323 *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' 119-120.

324 On the Spanish *constitutional identity limit* more generally: 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.

325 *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.

326 Craig and de Búrca, *EU Law Text, Cases, and Materials* 736; Lastra and Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' 109-110.

the EU rules build on the *voluntary compliance* of the Member States, with the possibility to fine any violation. Yet, Member States and more specifically national parliaments retain the possibility to make an autonomous decision, which preserves political discretion at the national level. The proposed enhanced operation of the European Semester and possible amendments to fiscal supervision in the Member States both appear not to alter this cornerstone of the EMU-architecture. Therefore, it appears that no conflict with the charted national *constitutional identity limits* arises in relation to these reform ambitions.

In contrast, the introduction of discretionary fiscal instruments, such as the veto power for national budgets, appears to conflict with the fundamental underlying notion namely that compliance with EU fiscal rules is incentivized but ultimately remains a political responsibility of the Member States' parliaments. Therefore, the introduction of such *mandatory* or *non-discretionary* elements appears to conflict with these *constitutional identity limits* in all three Member States, as previously established, and the adoption of such steps would thus require constitutional amendments.

2.4.3 Conclusion on tightened EU fiscal supervision

Overall, this suggests that the tightened EU supervision over budgetary and fiscal decisions in the Member States is generally compatible with the national constitutional framework, as long as those decisions follow the current mode of cooperation which allocates the final decision-making power to the Member State. As highlighted, the current system identifies unsustainable national budgeting, confronts Member States with the EU concerns and might finally result in a penalty. The system builds thus on the *voluntary* cooperation of the Member States, without awarding the EU with an autonomous decision-making power over domestic decision-making. Hence, the Commission can identify unsustainable fiscal policies, it might engage with Member States on the matter and even suggest financial penalties, it can, however, not change itself the contested domestic policy decision. Therefore, the political responsibility for budgetary and fiscal decisions is preserved at the national level.

It was substantiated that the allocation of an enforcement power for common fiscal rules to the EU-level, for example the power to veto national budgeting, would challenge this traditional conception and results in substantive conflicts with the charted national *constitutional identity limits*. Notably, national parliaments would no longer be able to adopt autonomously their respective state budget but instead the EU could block their adoption. Ultimately, this would undermine the position of national parliaments as final arbiters of budgetary decision-making which appears to conflict with the national conception of sovereignty and democracy in Finland, France, Germany, Poland and Spain. Therefore, the level of political discretion in budgetary and fiscal decision-making allocated to the EU-level is a crucial reference point for the

constitutional appraisal. It seems to suggest that the bigger EU discretion in budgetary and fiscal matters is, the more limited the national decision-making powers are respectively – which is constitutionally contentious. The findings of the compatibility assessment concerning an enhanced EU supervision of national budgeting are summarized in *Figure 23*.

Member State	Enhanced EU supervision based on voluntary tools	Enhanced EU supervision based on compulsory tools
Finland	Parl. approval by simple majority (Sect. 94 (2) (1) FC).	Qualified parl. approval (Sect. 94 (2) (2) FC).
Germany (including *constitutional identity limit)*	Parl. approval by simple majority (Art. 23 (1) (2) GG).	Apparent conflict with the German *eternity clause* (suspension of nat. parliamentary control).
		Partly flexibilization of absolute conflict possible through: - EU benefits.
French *sovereignty limit*	No apparent conflict with the sovereignty limit.	Apparent conflict, can be overcome by const. amendment (Art. 89 FC), which is common practice in France.
Polish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit.*	Possible conflict which might require const. amendment (Art. 236 PC), including possibly referendum.
		Apparent conflict, can be possibly overcome through "modern" interpretation of Polish sovereignty.
Spanish *constitutional identity limit*	No apparent conflict with the *constitutional identity limit.*	Apparent conflict, can be overcome under strict const. amendments procedure in Art. 168 SC which imposes high threshold and is practically difficult to attain.

Figure 23: Compatibility of charted constitutional space with enhanced EU supervision

Finally, EU fiscal rules provide an important source for stability in the Eurozone as they discipline national fiscal decision-making and thereby confine the possible emergence of moral hazards.[327] From that perspective, these *soft*

327 Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 218; Craig and Markakis, 'EMU Reform' 1421; Ruffert, 'The Future of the European Economic and Monetary Union – Issues of Constitutional Law' 55.

EU fiscal limits to national budgeting provide a major stabilization advantage for the Eurozone as a whole. Therefore, enhancing the operation of the European Semester, a better inter-connection of EU funding with EU fiscal rules as well as more effective supervisory instruments appear constitutionally beneficial, as for example pointed out in the Finnish constitutional debate on the introduction of the ESM.[328] Therefore, it might be required to start an additional reflection on how to increase EU incentives for national compliance with this set of rules beyond the imposition of financial penalties but without restricting the final national political authority over fiscal and budgetary decisions.

2.5 Interim conclusion: Fiscal integration within the current constitutional space?

The compatibility assessment demonstrated that while EU fiscal integration steps devised on the current EU Treaty-logic appear largely feasible, more far-reaching integration proposals that envisage the conferral of discretionary, political competences to the EU-level seem incompatible with core national constitutional principles. In particular, the establishment of a discretionary budgetary capacity, the discretion to engage in EU borrowing, a discretionary tax competence, a veto power for the envisaged Ministry of Finance as well as the enhanced supervision conferring direct enforcement powers for the EU-level appear to conflict with national democracy, national sovereignty and the parliamentary prerogatives in fiscal matters.

It was shown that the implementation of these proposals would therefore likely require confirmation of the competence conferral by a qualified parliamentary majority and, regarding national *constitutional identity limits*, most likely constitutional amendments in order to overcome the emerging conflicts. Notably, in Finland and Germany the required conferral of competences would likely have to be adopted by a qualified two-thirds majority following Section 94 (2) (2) Finnish Constitution or Article 23 (1) (3) in conjunction with Article 79 (2) GG respectively – and in France, Poland as well as Spain the apparent conflict with the respective *constitutional identity limit* could only be overcome by enacting a constitutional amendment. Although such constitutional amendments are common practice in France, their attainability remains questionable in Poland in light of the political circumstances and it appears challenging in Spain given the high majority requirements as well as the factual scarcity of constitutional amendments. Finally, the apparent conflict with German democracy and specifically *overall budgetary responsibility* seems to amount to an unsurmountable hurdle in light of the absolute design of the German

328 Leino and Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' 464.

eternity clause.[329] Taken together, these constitutional obstacles appear to seriously impact the feasibility of more far-reaching EU fiscal integration proposals, as they challenge the traditional budgetary and fiscal responsibilities that national parliaments exercise under the comprehensive protection of national constitutions.

Comparing the resulting constitutional conflicts per assessed Member State, it is apparent that while being confronted with strict procedural requirements in Finland, France, Poland and Spain, only the German Constitution imposes absolute limitations to the prospect of EU fiscal integration. In anticipation of this conflict with the German *red-lines*, the research employed the concept of *constitutional flexibility* in the previous *micro-comparative* assessment. It thereby revealed that the seemingly rigid German constitutional limitations entail constitutional flexibility that could ultimately ease the seeming deadlock between EU fiscal integration steps and the German *constitutional identity limit*, which is explored subsequently.

3 Compatibility through constitutional flexibility

Through the following assessment, the research explores whether the different methods employed to locate *constitutional flexibility* in the German constitutional approach could be applied to the constitutional appraisal of the highlighted challenging EU fiscal integration proposals to solve the apparent deadlock.

Therefore, the first part of the assessment focuses on the application of the previous conclusions on the apparent German constitutional double standard (3.1.) as well as the application of *best practice* examples to the strict German constitutional limit (3.2.), which has obvious implications for the other restrictive national constitutional approaches as well. In a second part, the research considers the possibility to re-conceptualize the competence-centric national *constitutional identity limits* more generally in order to better reflect the constitutional advantages stemming from EU cooperation within the national evaluation of EU (fiscal) integration steps (3.3.).

3.1 Consistent constitutional standard in Germany

A first method to locate and activate additional *constitutional flexibility* in the seemingly rigid German constitutional approach is the application of a constitutional consistency assessment. As previously substantiated, constitutional

329 *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

provisions and principles have to be interpreted consistently.[330] Yet, the conducted evaluation of the German constitutional jurisprudence revealed that the Constitutional Court appears to apply a constitutional double standard in the interpretation of constitutional concepts and provisions to the disadvantage of EU cooperation. The research therefore proposed the application of a consistent interpretation, which could have the net effect of flexibilizing some of the currently more rigid constitutional limits to EU integration more generally, thereby potentially creating additional constitutional space for the adoption of the outlined contested EU fiscal integration proposals, without substantively undermining the effective protection of the German constitutional core.

Following the conclusions in Chapter III, this consistent application would first entail a stricter application of the constitutionally enshrined standing requirements for the initiation of constitutional proceedings – as practiced by the Constitutional Court in relation to *internal* constitutional proceedings. The result could be fewer admissible constitutional proceedings. In turn, this corresponds to the German constitutional framework which excludes procedures in the general interest and which restricts access to the Court for privileged applicants as well. The Court would thereby simply apply its established *internal* jurisprudence on the admissibility of constitutional proceedings towards EU-related applications, too. Although this would certainly reduce the likelihood of admissible constitutional proceedings against the identified EU integration steps, the underlying substantive constitutional question remains in place and in fact other traditional privileged applicants might be inclined to challenge these EU fiscal integration steps given their apparent impact on core German constitutional principles.

Second, as previously established, the consistent application of the constitutional framework would entail a more reluctant application of the substantive dimension of constitutional principles as well as the *eternity clause*, as apparent in the internal case law. Notably, the Court seems very cautious in the scrutiny of internal budgetary and fiscal decisions in order to respect the political discretion that the German Parliament enjoys under the German constitutional framework. Furthermore, it was substantiated that the underlying assumption of *overall budgetary responsibility*, which suggests that the German Parliament controls all central budgetary and fiscal decisions, can be challenged, as the national budgetary decision-making space is increasingly limited by *internal* long-term policy decisions.[331]

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330 Under rule of law and legal certainty considerations, cf. Kischel, 'Artikel 3 GG – Gleichheit vor dem Gesetz' para 83; Which is secured by employing accepted interpretation methods, cf. Schäfers, 'Einführung in die Methodik der Gesetzesauslegung' 886.

331 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8; Cf. as well: Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 53.

And finally, the Court refrained from applying the *eternity clause* to internal budgetary commitments, which contrasts with its EU-related approach where the *eternity clause* is continuously applied with the ultimate consequence that constitutional conflicts cannot be overcome by the German legislator.[332]

The latter two points demonstrate that the Constitutional Court adopts a more reluctant stance towards *internal* budgetary commitments of the German Parliament, which could potentially be extended to EU fiscal integration steps. The following evaluation explores four opportunities or considerations that could be employed by the German Court to conceptualize and apply *overall budgetary responsibility* – together with the *eternity clause* – in a more flexible, consistent and yet even more effective way. Notably, additional German flexibility towards EU fiscal integration could be, for example, achieved by carefully assessing the actual financial commitment at the EU-level (3.1.1.), by focusing on the operating budgetary balance (3.1.2.), by including wider EU advantages as well as the German economic dependency on a functioning Eurozone into the constitutional appraisal (3.1.3.) and finally by focusing on the procedural dimension of *overall budgetary responsibility* (3.1.4.). All four considerations will be presented as brief constitutional arguments that could be adopted by the German Constitutional Court when applying *overall budgetary responsibility*.

3.1.1 Actual German contributions to the EU budget

A first consideration that could be incorporated into the German constitutional assessment of parliamentary decisions with budgetary or fiscal implications is the actual German contribution to the EU budget, which differs from the agreed maximum contribution established by the own resources ceilings. Notably, under the 2014 EU Own Resources Decision (Council Decision 2014/335/EU) the own resources ceilings are determined at 1,23% of GNI. These own resources ceilings establish the upper limit for national contributions. The actual national contributions are, however, calculated by the Commission based on the EU's financial needs. For Germany, these actual contributions amounted in 2019 to 0,846% of GNI, in 2018 to 0,847% of GNI and in 2017 to 0,713% of GNI.[333] Hence, the actual German contributions were significantly lower than the maximum target values determined by the 2014 EU Own Resources Decision.

This suggests that the own resources ceilings are generally not fully exhausted by the EU. Instead, these ceilings can be conceptualized as maximum,

332 *Financial Support for Greece and EFSF* para 127; 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.

333 Based on data from Commission, *EU expenditure and revenue 2014-2020 (dataset)*.

upper national financial commitments. These upper commitments are not fully employed by the Commission as apparent from the outlined actual German contributions between 2017 and 2019 – which amounted to around two-thirds of the maximum target value determined by the own resources ceiling. Hence, when constitutionally assessing new national financial commitments towards the EU-level the discrepancy between maximum and anticipated actual national contribution could be more thoroughly examined and taken into account in order to determine the national contributions that can be realistically expected.

3.1.2 Net contribution of Germany

A subsequent consideration is the direct, immediate financial 'return' from the German contribution to the EU budget through the allocation of EU funds to Germany. To conceptualize this 'return', the Commission determines the so-called operating budgetary balance, which indicates the balance between the EU funds allocated to the respective Member State minus the Member State's actual contribution to the EU budget.[334] The underlying argument is that the national contribution of funds to the EU-level is not a one-directional effort for the Member State, but it in fact entails direct financial benefits for the respective Member State – thereby making it a two-directional transaction; i.e. Germany does not only pay money, but it also receives money from the EU, which should be taken into account.

For Germany, the operating budgetary balance amounted to € -14.323 billion or -0,41% of GNI in 2019. This suggests that the German contributions were in fact higher than the immediate financial 'return' allocated to Germany through the various EU policies.[335] Nevertheless, by contrasting the EU funds allocated to Germany, which amounted to € 12.214 billion in 2019, with the total German own resources contribution, which amounted to € 25.820 billion in the same year, it becomes obvious that almost half of the German contribution directly returned to Germany through, for example, agricultural subsidies or cohesion funds.

Thus, the German contributions to the EU budget result in direct financial 'returns' that could be incorporated into the constitutional appraisal of any new German financial commitments to the EU. Although these 'returning' funds are of course administered by the EU – and not the German Parliament – the operating budgetary balance illustrates that national financial contributions are in fact two-directional and result in direct financial benefits in the Member States, besides, of course, generating wider domestic benefits such as access to the internal market.

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334 For an explanation of the concept, cf. Zsolt Darvas, 'A New Look at Net Balances in the European Union's Next Multiannual Budget' (2019) Bruegel Working Paper 3.

335 For the data, cf. Commission, *EU expenditure and revenue 2014-2020 (dataset)*.

3.1.3 Wider EU advantages and German interest in a functioning Euro

In addition to these direct 'returns', reforming the Eurozone in order to stabilize the Euro could also result in broader economic advantages for Germany. For example, German exports to the Eurozone accounted for 37,5% of all German exports in 2018.[336] The German economy is thus closely intertwined with the Eurozone economy and it has a genuine economic interest in the overall well-being of the Euroarea.

Moreover, studies estimate that the German GDP-growth could be at least 0,5% lower without German membership within the single currency.[337] Therefore, German Eurozone-membership translates into a higher GDP and additional economic prosperity, which underscores the German interest in a functioning single currency.

Furthermore, the discussed fiscal integration reforms could render the EMU more potent in the long run, particularly in case an increased budgetary capacity is created or in case new, bigger emergency instruments against macro-economic shocks are initiated. Two immediate benefits appear to emerge from these reforms for Germany. In the first place, increasing particularly the firepower of the emergency instruments could guarantee that the Eurozone is equipped to financially assist Germany in the future as well if needed. Hence, the envisaged reforms could provide a supranational safety net in case Germany experiences economic hardship. And second, the proposed comprehensive reforms of the Euro intend to make the single currency crisis-resistant for the future, which would make *ad-hoc* crisis-solutions – as were required during the Eurocrisis or as apparent now in relation to COVID-19 – with high immediate costs less likely.

These considerations illustrate that the envisaged EU fiscal integration steps are in fact in the genuine interest of Germany, given the economic interconnection with the Eurozone, the possible safety net stemming from the envisaged EU instruments as well as to prevent an anew crisis-situation. The constitutional appraisal of possible EU fiscal integration steps could thus more thoroughly rely on the added benefits that stem from such integration measures for the German constitutional order, thereby relaxing the outlined constitutional resistance expressed through *overall budgetary responsibility*.

336 Federal Ministry for Economic Affairs and Energy (BMWi), *Facts About German Foreign Trade* (German Government 2019) 1.

337 Thieß Petersen, Michael Böhmer and Henning vom Stein, 'How Germany Benefits from the Euro in Economic Terms (Policy Brief # 2013/01)' (*Bertelsmann Stiftung*, 2013) <https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Presse/imported/downloads/xcms_bst_dms_37730_37731_2.pdf> accessed 20 December 2020 6.

3.1.4 Focus on procedural dimension of overall budgetary responsibility

A final example for a more consistent and thus more flexible German constitutional approach towards the proposed EU fiscal integration steps is to re-evaluate the creation of the substantive requirement formulated by the Constitutional Court under *overall budgetary responsibility* which appears to constitute a major hurdle for more far-reaching integration proposals.

Notably, the basic assumption underlying this substantive requirement is that the German Parliament actually controls all central budgetary decisions. However, the research established[338] that in reality the German Parliament has only limited discretion in budgetary and fiscal decisions *internally* given the impact of long-term political commitments on the state budget for example through social welfare and pension policy decisions.[339] Yet, in case parliament is not actively determining the majority of budgetary and fiscal decisions given that these are pre-determined by previous parliaments, it is questionable whether EU fiscal integration steps can undermine an internally apparently non-existent fully independent fiscal decision-making space of the German Parliament.

Therefore, the research submitted that instead of introducing an upper limit of financial commitments as substantive requirement under *overall budgetary responsibility*, which can be challenged in light of the apparent reduction in discretionary fiscal decision-making space, the concept could be limited to the procedural requirements. These procedural requirements ensure that the German Parliament retains final control over budgetary commitments – at least as long Article 50 TEU allows for the unilateral withdrawal from EU cooperation. Arguably, this provision allows to retrieve any transferred fiscal competences – and hence a newly elected German Parliament could ultimately reverse EU budgetary commitments if desired.

Thus, it can be argued that the German Parliament retains ultimate control over fiscal decisions as long as it can reverse such commitment. This reversibility opens a political decision-making space that a newly elected parliament can explore if so desired. It furthermore underscores the final decision-making responsibility of the German Parliament and protects cornerstones of the German constitutional approach to EU cooperation, namely the derived status

338 Cf. Chapter III Section 4.2.2.5.

339 Streeck and Mertens, 'An Index of Fiscal Democracy (2010)' 8-11; Seemingly, German Governments tend to introduce new social benefits after being elected, cf. Thiele, 'The 'German Way' of Curbing Public Debt: The Constitutional Debt Brake and the Fiscal Compact – Why Germany Has to Work on Its Language Skills' 30-31; Overall, the trend of decreasing fiscal democracy or decision-making space can be observed in other states, too, cf. Abdellatif and others, 'Transparency of law making and fiscal democracy in the Middle East' 53-54, 71; Roženský, 'Mandatory Expenditure and the Flexibility of Fiscal Policy in the Czech Republic (in Czech: Mandatorní Výdaje A Flexibilita Fiskální Politiky V Ċr)' 47, 57; Steuerle, 'America's Related Fiscal Problems' 878.

of the EU as well as *Kompetenz-Kompetenz*. The research furthermore substantiated that the availability of only future, medium-term reversibility corresponds to the *internal* budgetary and fiscal planning process which is increasingly dominated by long-term political decisions, and which appears to comply with constitutional requirements under German democracy.[340]

Adopting the suggested approach – apparent in the *internal* constitutional appraisal of fiscal decisions – to EU-related proceedings would offer additional flexibility for German participation in the proposed EU fiscal integration steps. Within this assessment, the focus would then rest on procedural involvement of the German Parliament and the underscored cornerstones of the German perspective on EU cooperation. These requirements correspond with the procedural requirements formulated under *overall budgetary responsibility*.

3.1.5 Interim conclusion on the German constitutional approach

Jointly, these considerations could be employed to devise the German constitutional assessment of EU fiscal integration steps and in particular the concept of *overall budgetary responsibility* in a more flexible manner.

As established, this additional *constitutional flexibility* could result from a stronger focus on the political discretion that the German Parliament enjoys when devising EU integration steps within the constitutional appraisal of the German Constitutional Court. Notably, it would enable the Court to be more receptive towards the outlined economic, political and societal advantages stemming from EU cooperation. Moreover, these advantages are also apparent on the constitutional level, as outlined throughout the research. Namely, the EU offers an additional supranational layer of protection for core constitutional principles such as democracy, the rule of law or the protection of fundamental rights. Other constitutional authorities even highlighted that the attainment of some of these principles required supranational cooperation.[341] Thus, the proposed more flexible conception of German constitutional limits can ultimately even contribute to a more effective protection of the underlying German constitutional principles.

But this constitutional flexibility can equally derive from a stronger focus on the procedural requirements under *overall budgetary responsibility*, an explicit acknowledgment that Article 50 TEU secures ultimate control of the German

340 Cf. the conclusions drawn within the assessment in Chapter III Section 4.2.2.5.

341 As previously established in relation to the Polish Constitutional Tribunal, cf. *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.

Parliament over EU-centered budgetary prerogatives as well as from an abstention to enforce an abstract substantive dimension of *overall budgetary responsibility*. Ultimately, this modified constitutional approach would also be an acknowledgment of the apparent necessity for national parliaments to make long-term, major budgetary commitments which are binding upon successive parliaments as well – which is accepted within the *internal* jurisprudence of the German Constitutional Court.

Overall, this suggests that the German Constitutional Court could generate additional constitutional space for the outlined EU fiscal integration steps that appear to currently conflict with *overall budgetary responsibility*. In addition, the proposed more flexible approach to EU fiscal integration would enable the German Court to more effectively protect the core constitutional values that are at the center of its constitutional jurisprudence. However, the potential success of the proposed approach mainly depends on the receptiveness of the German Court which is confronted with the highly challenging task of balancing national constitutional considerations that are protected by the absolute *eternity clause* with the prospect of continuous EU integration.

3.2 Best practice examples

An additional method to generate *constitutional flexibility* identified by this research is the exchange of *best practices* across constitutional systems. Through a transnational exchange of constitutional reasoning and arguments[342] the seemingly strict national constitutional limitations might be redesigned. The exchange of constitutional reasoning is facilitated due to the detected overlap of constitutional principles protected throughout the various assessed constitutional systems – including democracy, sovereignty and parliamentary prerogatives – employed by the respective constitutional authority when reviewing the compatibility of EU fiscal integration proposals with the domestic constitution.

In particular, the conception of EU cooperation in both Finland and Poland appears to offer a constructive perspective on how to balance the principles of national sovereignty with EU integration ambitions. Notably, it was previously established that the Finnish Constitutional Law Committee emphasized in its decisions the wider benefits that EU cooperation entails for Finland.[343] Specifically, the Committee highlighted in its interpretation of Finnish sover-

342 Ginsburg and Dixon, 'Introduction' 4.

343 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 328-332; Ojanen, 'The EU at the Finnish Constitutional Arena' 245; Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' 100.

eignty that EU cooperation constitutes an exercise of sovereign powers and that it increases the reach of national powers through the pooling of competences at the supranational level.[344] Similarly, the Polish Constitutional Tribunal highlighted that the 'modern' interpretation of Polish sovereignty presupposed international cooperation in order to achieve wider constitutional commitments established within the Polish Constitution.[345]

Both examples illustrate that the national constitutional authorities conceptualize EU integration not exclusively as a decrease in national, sovereign decision-making competences but instead as a potential increase in the reach or impact of sovereign powers. Hence, through EU cooperation Member States might be able to attain wider national constitutional objectives, for example the protection of fundamental rights, environmental objectives or the supranational stabilization of core national values, but also to compete in a globalized world, for example by negotiating trade agreements as Union of 27 Member States instead of negotiating as individual country.

Taken together, this suggests that traditional constitutional principles, such as national sovereignty, can be construed in a more EU-friendly and yet equally effective manner in case national constitutional authorities are willing to consider the resulting national benefits stemming from EU cooperation in their respective appraisal of EU integration steps. As highlighted, through an exchange of constitutional reasoning, other national constitutional authorities could implement a similar interpretation which could render the highlighted EU integration more attainable. At the same time, the compatibility assessment illustrated that even these flexible *best practices* could potentially reach a limit when confronted to more far-reaching budgetary and fiscal integration steps that would alter the general *modus operandi* of the EU.

Therefore, the potential constitutional flexibilization through these *best practices* remains ultimately limited. Yet, they could mark the starting point of a more receptive national constitutional approach towards EU fiscal integration steps and trigger a necessary engagement with the question how to adapt existing national and internal doctrines to an EU and global reality. When applying these *best practices* to the most rigid limits apparent in Germany, it seems that the previously outlined flexibilization of *overall budgetary responsibility* through consistent application could be supplemented by a 'modern' or

344 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334.

345 *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.

more receptive interpretation of German democracy, the underlying constitutional principle protected by *overall budgetary responsibility*. Notably, the German Constitutional Court could include the direct and indirect benefits of EU cooperation for national democracy – for example apparent in economic, legal and political advantages – into the constitutional appraisal. Ultimately, this could contribute to a more flexible interpretation of German democracy *vis-à-vis* EU fiscal integration steps.

3.3 Re-conception of national approach and EU benefits

A final proposition relates to the potential re-conception of the assessed national *constitutional identity limits*. Notably, the compatibility assessment revealed that these *constitutional identity limits* appear to be devised and designed as competence-centric limitations against EU integration steps. National constitutional authorities in all assessed Member States identified a list of national competences as particularly important for national sovereignty or democracy under their *constitutional identity* doctrines.[346]

According to this conception, the conferral of such important competences to the EU-level triggers the *constitutional identity limit* by default. This was illustrated within the previous compatibility assessment which demonstrated that the conferral of budgetary and fiscal competences, which qualify as particularly important competence areas under the national sovereignty and democracy throughout all assessed Member States, in itself is sufficient to trigger the respective *constitutional identity limit*.

346 *On France, cf. 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' 119-120; *On Germany, cf. Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' paras 127, 167; 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; *On Poland, 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; *And on Spain, cf.* 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.

For example, the German Constitutional Court focusses on the impact of an envisaged financial commitment on the German budget[347] to determine whether increased German EU contributions or additional liabilities reduce German budgetary autonomy.[348] Through this conception, the German Constitutional Court emphasizes the direct impact of EU financial commitments for the German state budget without, however, thoroughly considering the added benefit that might stem from the conferral of these competences to the EU-level. Hence, the apparent competence-centric conception of *constitutional identity limits* seems to render national constitutional systems partially un-receptive for benefits that might arise for national budgetary and fiscal prerogatives through supranational cooperation. A more flexible approach, which acknowledges the benefits that supranational cooperation might entail and which thereby is not only focused on preserving a set of core competences at the national level, could reduce the identified constitutional conflicts.

The proposed constructive conception of national *constitutional identity limits* could be further stimulated by EU fiscal integration proposals by connecting fiscal integration steps to actual EU achievements. For example, an EU taxation power or new EU levy could be devised in a substantive area that is a direct consequence from EU cooperation and thus a revenue stream that the national budgetary legislator would not have had at its disposition without such supranational cooperation.[349] The EU would then generate its revenue through its own activities or advantages directly generated from EU cooperation, which has to be conceptually differentiated from the traditional budgetary decision-

347 Cf. for example the wording of the Constitutional Court in the recent PSPP-decision *Quantitative Easing (PSPP) Final Judgment*: '(104) [...] It is for the German Bundestag, as the organ directly accountable to the people, to take all essential decisions on revenue and expenditure; this prerogative forms part of the core of Art. 20(1) and (2) GG, which is beyond the reach of constitutional amendment (cf. BVerfGE 70, 324 <355 and 356>; 79, 311 <329>; 129, 124 <177>; 142, 123 <195 para. 138>). It falls to the Bundestag to determine the overall financial burden imposed on citizens and to decide on essential expenditure of the state (cf. BVerfGE 123, 267 <361>). Thus, a transfer of sovereign powers violates the principle of democracy at least in cases where the type and level of public spending are, to a significant extent, determined at the supranational level, depriving the Bundestag of its decision-making prerogative [...].'; The requirements stemming from the concept seemingly do not include the potential benefits stemming from budgetary integration for Germany, cf. Nettesheim, '"Euro-Rettung' und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion' 773-776.

348 *Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 210-213; *ESM-Treaty and Fiscal Compact* para 163; Cf. as well: Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' 927.

349 As proposed by the *Monti*-Report, cf. Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68, 41-56; And subsequently the European Commission, cf. Commission, *Reflection Paper on the Future of EU Finances* 27-28; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 183; Fabbrini, 'Fiscal Capacity' 129.

making potential available within a Member State under the control of the national legislator. Here, the proposed conception could be considered less contentious under the domestic principle of democracy as the budgetary powers traditionally enjoyed by national parliaments would not be curtailed. Conceptually, the EU would then only occupy budgetary space that it created itself, which should also render such integration steps less contentious under the competence-centric conception of national *constitutional identity limits*.

3.4 Interim conclusion: EU integration as two-way street

Taken together, this suggests that additional *constitutional flexibility* can be generated within the seemingly strict national constitutional limitations. This *flexibility* can be activated through the conducted constitutional consistency assessment, which albeit being limited to the German constitutional approach in this research can be applied to other Member States as well. Furthermore, national *best practices* can stimulate constitutional re-configurations across the EU. Here, the Finnish and Polish example illustrate how traditional national constitutional concepts can be interpreted in a 'modern', more receptive way. And finally, the research identified that *national constitutional identity limits* appear to be devised in a competence-centric manner through which national constitutional authorities consider conferrals of budgetary and fiscal decision-making powers to the EU as a *de facto* conflict with these limits. To that end, the research proposed a more comprehensive constitutional appraisal that allows to filter EU benefits into the constitutional assessment. Furthermore, considering these EU benefits, it was proposed to devise EU fiscal integration proposals based on EU achievements.

Overall, these steps could ease the partially detected national constitutional opposition against EU fiscal integration steps by at the same time offering national constitutional systems an apparently more efficient and effective manner to protect the underlying constitutional values in a changed, globalized world.

4 Final conclusions on the constitutional feasibility of EU fiscal integration

All these observations on the various components of EU fiscal integration proposals and their compatibility with the charted national constitutional space result in a complex, multilayered picture. Notably, core structural proposals such as the initiation of an additional Eurozone budget or an emergency instrument with an underlying funding structure that corresponds to the current Treaty-logic as well as the establishment of an EU Ministry of Finance and enhanced supervision of national fiscal decision-making appear feasible

within the existing constitutional framework, albeit partly requiring confirmation by a qualified parliamentary majority. However, the evaluation equally demonstrated that several core components of the various 'integration' reform proposals, most notably the allocation of discretionary powers to the EU-level, appear constitutionally contested in all assessed Member States.

Concretely, the comparative assessment suggests that the creation of a secondary-law-based emergency instrument – comparable to the ESM-design – to stabilize public investments or to support Member States in the payment of unemployment benefits during asymmetric shocks, as proposed by the European Commission,[350] is compatible with national constitutional law. Similarly, the creation of a (limited) Eurozone budget, as proposed by the EU Five Presidents' Report, the BICC, the Franco-German Meseberg Declaration and as agreed under Next Generation EU,[351] is attainable under national constitutional law if based on the existing EU Treaty-framework, and specifically Article 311 TFEU. It was established within the assessment that the required national budgetary commitments will likely require confirmation by a simple parliamentary majority in Finland and by a two-thirds majority in the German Parliament. As the proposed emergency instruments and the budget would be devised within the EU Treaties, the central and constitutive involvement of national parliaments in the creation of a Eurozone fiscal capacity appears to be secured which arguably pre-empts national constitutional democracy and sovereignty concerns. Furthermore, the assessment illustrated that the required additional funds to sustain the fiscal capacity could be devised under the existing EU Treaty framework, either by increasing the own resources ceilings, as the case with Next Generation EU or as put forward by the BICC-proposal,[352] or by introducing new own resources, as proposed by the HLGOR Report.[353] These funding options will likely require confirmation

350 Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* 26; Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Cf. as well: Craig and Markakis, 'EMU Reform' 1426; Fabbrini, 'Fiscal Capacity' 115; Comments, 'Editorial Comments – Tinkering with Economic and Monetary Union' 6.

351 In chronological order: Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* 15; Meeting, *Erklärung von Meseberg – Das Versprechen Europas für Sicherheit und Wohlstand erneuern*; Eurogroup, *Term Sheet on the Budgetary Instrument for Convergence and Competitiveness*; Summit, *Statement of the Euro Summit, 14 December 2018 (EURO 503/18)*; Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354); Council, *Conclusions Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – EUCO 10/20* 2-3.

352 Commission Proposal for a Regulation of the European Parliament and of the Council on the Governance Framework for the Budgetary Instrument for Convergence and Competitiveness for the Euro Area (COM (2019) 354); Eurogroup, *Term Sheet on the Budgetary Instrument for Convergence and Competitiveness*; Summit, *Statement of the Euro Summit, 14 December 2018 (EURO 503/18)*.

353 Monti and others, *Future Financing of the EU – Final report and recommendations of the High Level Group on Own Resources December 2016* 68.

by a simple majority in the Finnish Parliament – although the size of the funding potential is essential and might alter this assessment – and in Germany a two-thirds majority will likely be applicable. Again, the *constitutional identity limits* seem not to conflict with the proposed funding options, as they are devised under the current EU Treaties and thus preserve the central control of national parliaments. In addition, the comparative assessment revealed that pooling existing EMU competences in a 'Eurozone Ministry' – as proposed by the Five Presidents' Report – is generally attainable if the final decision-making modalities remain unchanged. Finally, the charted constitutional space would enable Member States to agree on additional EU supervision of national budgetary processes as long as these remain *voluntary* and Member States cannot be legally forced to modify their budgetary planning.

In contrast, the implementation of larger, long-term-oriented budgetary commitments, as for example proposed by *Bibow*,[354] or the allocation of discretionary fiscal powers to the Eurozone, which would empower the EU to take and implement independent fiscal decisions, as envisioned by the *Bruegel*-proposal,[355] appear more difficult to achieve within the charted national constitutional space. Notably, the comparative assessment revealed that a two-thirds majority would likely be required to adopt the necessary EU Treaty-changes in Finland. The probability of overcoming this procedural hurdle remains uncertain. In Germany, a conflict with *overall budgetary responsibility* appears to emerge as the central oversight of the German Parliament over budgetary and fiscal decision would be challenged by discretionary EU decisions on these matters. Comparable conflicts with the *constitutional identity limits* in France, Poland and Spain appear to emerge – as will be further explained below. Whilst overcoming the resulting constitutional conflict by constitutional amendment seems practically achievable in France, the high majority thresholds in Poland and Spain for confirming constitutional amendments put the feasibility of these more ambitious EU integration steps into question. These constitutional concerns equally apply to the proposed discretionary funding options, including the introduction of a genuine EU taxation power, as proposed by the Bruegel-proposal,[356] or the issuing of Eurobonds, as initially suggested by the European Commission.[357] Notably, the comparative assessment illustrated that any funding solution, which would offer the Eurozone discretionary funding powers independent from Member States' approval, would likely have to be adopted by a two-thirds majority in Finnish Parliament. In Germany, such discretionary funding powers could even be

354 Bibow, 'Making the Euro Viable: The Euro Treasury Plan' 4.

355 Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 5, 7.

356 Ibid 5, 7.

357 Commission, *Green Paper on the Feasibility of Introducing Stability Bonds (COM (2011) 818)*; Cf. as well: Hild, Herz and Bauer, 'Structured Eurobonds: Limiting Liability and Distributing Profits' 252; Mayer and Heidfeld, 'Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds' 422-423.

characterized as a conflict with *overall budgetary responsibility* and therefore be constitutionally unattainable. Similar constitutional concerns appear to emerge in France, Poland and Spain, which suggests that constitutional amendments are required in order to overcome the apparent conflicts with national *constitutional identity limits*. Finally, these concerns equally apply to conferring the power to veto national budgeting to a Eurozone Ministry, as envisioned by the Bruegel-proposal.[358]

When considering the substance of the applicable national constitutional limits, the assessment revealed that the identified concerns against the most ambitious EU fiscal integration steps are based on national sovereignty, national democracy and the parliamentary prerogatives in fiscal competences or a combination of these. Therefore, even in the highly flexible Finnish constitutional system a qualified parliamentary majority appears mandatory to confirm the required conferral of competences to the EU-level. In France, Poland and Spain the anticipated conflict with the *constitutional identity limits* seems to require constitutional amendments and in Germany the reform ambitions appear to collide with the *eternity clause* which constitutes an almost unsurmountable hurdle for EU integration.[359] Therefore, while the constitutional conflicts in France,[360] Poland[361] and Spain,[362] could be overcome by amending the constitutional text with all related practical and procedural difficulties, the German Constitution appears to impose an absolute limitation to these EU fiscal integration ambitions.[363]

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358 Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union? (2011)' 6; Cf. as well: Lionello, *The Pursuit of Stability of the Euro Area as a Whole – The Reform of the European Economic Union and Perspectives of Fiscal Integration* 170.

359 *Quantitative Easing (PSPP) Final Judgment* paras 114-115; *Final OMT-Judgment* para 153; *OMT-reference* para 29; *Lisbon-judgment* para 230; Cf. as well: Rademacher, 'Die "Verfassungsidentität" als Grenze der Kompetenzübertragung auf die Europäische Union?' 144; Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH' 1002.

360 As established by the *Conseil Constitutionnel*, cf. *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' 150-151; 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.

361 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.

362 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 192; Ferreres Comella, *The Constitution of Spain – A Contextual Analysis* 57.

363 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.

Although, this suggests that the German *overall budgetary responsibility* limit imposes the most rigid substantive hurdle for EU fiscal integration steps, the strict national procedural requirements apparent in the other Member States seem equally challenging. Therefore, the research identified the proposals which envisage the establishment of a discretionary budgetary capacity, the discretion to engage in EU borrowing, a discretionary tax competence, a veto power for the envisaged Ministry of Finance as well as the enhanced supervision conferring direct enforcement powers for the EU-level as hardly feasible under the current national constitutional space given the apparent conflict with national democracy, national sovereignty and the parliamentary prerogatives in fiscal matters.

Obviously, this conclusion significantly limits the fiscal reform possibilities for the EU, which is why the research employed the concept of *constitutional flexibility* in order to soften the rigid constitutional opposition in Germany, which proves to be the key bottle-neck. Furthermore, in order to ease the apparent constitutional deadlock between EU fiscal integration ambitions and national constitutional concerns more generally the research proposed modifications to the conception of national *constitutional identity limits* as well as the design of EU fiscal integration proposals.

Considering national *constitutional identity limits*, it was established that the assessed national constitutional authorities appear to mainly devise these essential restrictions as competence-centric limitation to EU integration ambitions. As established, the French, German, Polish and Spanish constitutional authority identified a set of core competences that are particularly important for national sovereignty or democracy and that are thus covered by the respective *constitutional identity limit*.[364] The result is that these limits are focused on a shift of competences or decision-making powers from the national to the

364 *On France, cf. 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' 119-120; *On Germany, cf. Quantitative Easing (PSPP) Final Judgment* para 104; *Final OMT-Judgment* para 212; Cf. as well: Herdegen, 'Art. 79 GG' paras 127, 167; 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; *On Poland, 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; *And on Spain, cf.* 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.

EU-level. This is particularly apparent in relation to budgetary and fiscal competences, which are traditionally important constitutional prerogatives of national parliaments.[365] Given that these competences are identified as particularly important sovereign and democratic powers which are protected by *constitutional identity limits*, EU fiscal integration steps are almost automatically considered as potential interference with these limits. Here, the research proposed an alternative design or conception of *constitutional identity limits* in order to allow for the holistic appraisal of added values and advantages that stem from EU cooperation in these competence areas, which was conceptualized within the *constitutional flexibility* assessment.

As pointed out within the national *best practices*, the consideration of factual benefits stemming from EU cooperation is already conducted by the Finnish Constitutional Law Committee[366] and it appears to offer the opportunity to include the constitutional advantages of EU integration steps into the constitutional appraisal. Ultimately, this could result in a flexibilization of national *constitutional identity* concerns apparent in the assessed Member States without compromising on the effective protection of the underlying constitutional core, which could allow for the implementation of more far-reaching EU fiscal integration steps.

Considering the general conception of EU fiscal integration, it was highlighted that current reform plans focus on the conferral of competences from the national to the EU-level, which sparks the outlined conflict with the competence-centric national *constitutional identity limits*. This focus on 'competence-shifts' appears problematic and the research therefore suggested to modify the conception of EU fiscal integration proposals which could alter the national constitutional appraisal. Notably, EU fiscal integration proposals could be designed based on advantages and benefits directly resulting from EU cooperation. The underlying argument is that EU integration creates or enables Member States to tap fiscal space that would otherwise not be available to the Member States. Hence, EU cooperation results in direct or indirect financial benefits – for example through access to the internal market – which Member States could not have created independently. By devising EU fiscal integration steps within this EU-generated fiscal space, the EU would arguably not undermine traditional national fiscal competences controlled by national parliaments which would remain unaffected. In addition, it could be submitted that as long as

365 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; Dawson and De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' 827; Baranger, 'The Apparition of Sovereignty' 61; Bonnie, 'The Constitutionality of Transfers of Sovereignty: the French Approach' 527.

366 Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain other EU Member States* 334.

the financial benefits outweigh the financial costs and Member States are thus able to partially exploit the EU-generated fiscal space, supranational cooperation as well as possible EU fiscal integration steps can be characterized as beneficial for the budgetary, financial and fiscal decision-making powers of the Member States.

More generally, the identified potential to locate and activate *constitutional flexibility* within (rigid) national constitutional limits, but also the proposed reflection on how to best design EU fiscal integration in light of national constitutional concerns, both are relevant beyond the EMU. Arguably, national constitutional law and EU law concepts must understand and regulate our current (global) reality in which supranational cooperation entails benefits for national constitutional law, too. Notably, national policy objectives in environmental, health, digital, or defense matters – which are often reflected in constitutional guarantees such as environmental protection or social state principles – can often better and even sometimes only be achieved at the supranational level. The employed *constitutional flexibility* provides national constitutional actors with a tool to more comprehensively include the benefits that supranational cooperation entails for national constitutional objectives.

Overall, this indicates that more far-reaching EU fiscal integration steps could be possible in case the national constitutional space would more comprehensively incorporate EU benefits into the constitutional appraisal and in case fiscal integration proposals are conceptually modified. In the alternative, the compatibility assessment illustrated a variety of feasible reform steps that are compatible with the current national constitutional space. These attainable reform steps would be devised on the basis of the currently existing Treaty-framework, which guarantees the central involvement of national parliaments in the confirmation of any additional financial burden on the respective national state budget. The recent Next Generation EU recovery strategy forcefully illustrates that sufficient legal space – also at the national constitutional level – exists to equip the EU-level with additional financial means if the political actors reach an agreement. Given the identified constitutional hurdles that more far-reaching reform proposals are confronted with as well as the current political tensions within the EU – which mostly relate to the distribution of the envisaged EU fiscal capacities and which constitute a genuine political question that EU fiscal integration steps would have to answer[367] – it appears most realistic to employ this existing legal space to devise a more long-term

367 As pointed out in the Introductory Chapter; Cf. as well: Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' 823; Eriksen, *Contesting Political Differentiation – European Division and the Problem of Dominance* 249-250; Oeter, 'Bundesstaat, Föderation, Staatenverbund – Trennlinien und Gemeinsamkeiten föderaler Systeme' 750; Weber, 'Die Reform der Wirtschafts- und Währungsunion in der Finanzkrise' 938; And thus, *re-distributive* policies, cf. on that notion: Sefton, 'Distributive and Redistributive Policy' 607.

framework in order to stabilize the Euro without potentially fueling a new fundamental conflict between the EU and national constitutional authorities.