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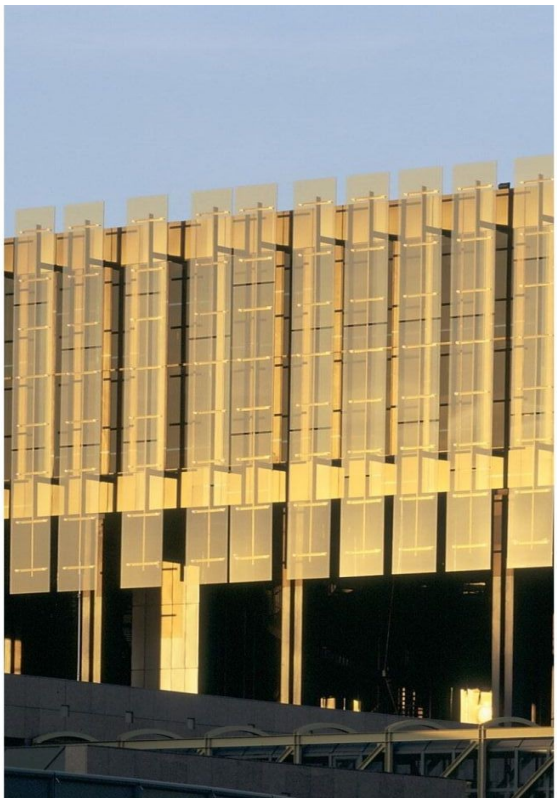
Courts, Values and European Identity

A cura di Gianluca CONTALDI e Roberto CISOTTA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The *Bitter Sweet Symphony* of Courts in Europe's Moment

DI ROBERTO CISOTTA*

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1. The Current Bad Times of the EU: Dialogue or Quarrels between Courts?

In these days, the founding structures of EU Law, like primacy, are being re-discussed both at the institutional and at the doctrinal level. This discussion has reached critical pitches and the whole system seems under attack[1]. Although going through crises has often stimulated Europe to make important moves onwards, many worrying signals arise. While European Institutions strive to consolidate EU's capacity to defend its fundamental values and to strengthen the structures on which the EU legal order has been built, as well as to expand European capacities to face new challenges to the maximum extent possible, sceptical or openly antagonistic attitudes recurrently emerge on the part of Member States (or at least of some of them). These pages, building in particular on some of the findings of the papers published in this collection, contain a few observations on the legal implications arising out of the dangerous game involving the recalled opposed forces.

Before starting, I will clarify some choices and assumptions.

First, one may wonder whether we are really going through ...just one crisis, or a bundle of crises (e.g. the pandemic, the rule of law crisis, the Ukraine invasion...). Tensions and reactions may come with some delay after their originating facts and different strains of events overlap: as a consequence, the *real* causes and starting dates of the turbulences to which I refer can be the object of debate. Such overlaps are also likely to shift from the historical succession of events to the legal world, with a transfer of tensions that may sometimes hit some founding

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[1] See Daniele, "L'integrazione europea in crisi? Riflessioni sul tema", in Amalfitano, Condinanzi (a cura di), *Paura dell'Europa: spunti di razionalizzazione – atti del webinar del 18 maggio 2020, "Chi ha (ancora) paura dell'Europa* (Giappichelli, 2020), 49.

structures of the EU legal order (at least apparently) not directly related to the origins of such tensions. Exploring the propagation of such forces could be the object of an interesting enquiry, but it falls outside the scope of this introductory essay. Therefore, without referring to one or more specific 'crises' anymore, I will select a few relevant events, essentially – but not exclusively – turning around the *fil rouge* of the recent jurisprudence of the German Constitutional Court, and of some of the connected legal issues. The choice is made only for the purpose of addressing some specific legal points: other issues and events neglected here are indeed important from other points of view.

Second, the very existence of a sceptical or antagonistic attitude, or its real capacity to cause real and effective harm to the functioning of the EU legal order, or to the progress of the European integration project, is sometimes called into question: it is submitted that, in a series of situations, the reported harmful effects for the EU legal order of some acts are, if put and understood in the correct context, *lighter* than they may *prima facie* appear or, at the end, not really critical[2]. Inaccurate narratives can – intentionally or not – certainly distort the legal reality conferring negative connotations (negative form the point of view of the progress of European integration) to acts or events well beyond their real content and the attitudes of the organs that have adopted or caused them. These reconstructions will not be discussed in detail, but they will be considered only incidentally or implicitly: without addressing points that are not *per se* problematic, I will rather try to take stock of the criticisms that, in my opinion, are effectively arising.

Third, I will not dwell upon proposals implying changes of the EU Treaties.

The attitude shown in recent times by the *Bundesverfassungsgericht* (hereinafter also 'BVerfG'), the German Constitutional Court, will be used to discover some specific problems: tides flowing from Karlsruhe are fuelling the debate, *inter alia*, on primacy of EU law over national laws, while the *Recovery Plan* has been kept under threat for quite a long time. I will focus in particular on some consequences flowing from the judgment delivered on 5 May 2020 on the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB)[3] and I will then briefly analyze the ruling regarding the ratification of the new own resources decision, necessary for the setting up of the *Recovery Fund* for Europe[4].

The first decision, given in the *Weiss* case after a preliminary reference to the Luxembourg Court, applied the *counter-limits*, in the German version, against the PSPP. More specifically, the Programme and the insufficiently strict scrutiny, carried out by the Court of justice in its preliminary ruling over the proportionality of the PSPP[5], constituted for the Judges of the

[2] See, from two different perspectives, Pace, "Il principio del primato è "sotto attacco"? Brevi note su (presunti) limiti scaturenti dalle Costituzioni nazionali e dal sindacato delle Corti costituzionali", BlogDUE 2022, https://www.aisdue.eu/wp-content/uploads/2022/10/Pace-BlogDUE-1.pdf and Ziller, "Dialogo, confronto, o contrapposizione tra Corti?", in this Issue.

[3] 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 (2020).

[4] 2 BvR 547/21, 2 BvR 798/21 (2021 and 2022). I will not touch upon the recent decision on the ratification of amendments to the Treaty establishing the European Stability Mechanism: 2 BvR 1111/21 (2022).

[5] Case C-493/17, *Weiss*, EU:C:2018:1000.

BVerfG an act trespassing the boundaries of the enumerated competences of the EU (an *ultra vires* act).

The judgment in question, based on long and often redundant argumentations, has triggered a wide debate[6] and just two points will be highlighted here.

1.1. The issue of competences and the misunderstandings of the BVerfG

In the first place, there is an issue regarding the reconstruction of EU competences. The PSPP constitutes the exercise by the EU, via the ECB, of monetary policy for the euro area, which is one of its exclusive competences under Art. 3(1)(c) TFEU. In the view of the Karlsruhe Judges, the PSPP ran the risk of breaking the perimeter of monetary policy – thus becoming *ultra vires* –, because its disproportionateness, or the inaccurate scrutiny over its proportionality, did not take into account its effects in the field of economic policy, which essentially rests in the hand of Member States.

It has nevertheless to be borne in mind that, in the context of economic policy, 'specific provisions apply to Member States whose currency is the euro' (see Article 5(1) second indent TFEU). This statement is contained the first Part of the TFEU and precisely in its Title I, dedicated to the definition of 'Categories and Areas of Union Competence'. This collocation must have a meaning: in my opinion, Member States have to sacrifice not just monetary policy – which, as seen, becomes an exclusive competence of the Union – but also something of their economic policy to enter the euro area.

This implies a certain intrusion into national economic policies of euro area Member States, which does not only mean that, within the excessive deficit procedure, real sanctions ('coercive means of remedying excessive deficit' in the words of the Treaties) can be applied (see Articles 126(9)(11) and 139(2)b TFEU) and that, in the context of the European Semester, national budget decisions are more strictly overseen than for Member States with a derogation.

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[6] See, amongst many others, Ziller, "The unbearable heaviness of the German constitutional judge: On the judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 concerning the European Central Bank's PSPP programme", CERIDAP, 7 May 2020, https://ceridap.eu/the-unbearable-heaviness-of-the-german-constitutional-judge-on-the-judgment-of-the-second-chamber-of-the-german-federal-constitutional-court-of-5-may-2020-concerning-the-european-central-banks-pspp/, Tesauro and De Pasquale, "La BCE e la Corte di Giustizia sul banco degli accusati del Tribunale costituzionale tedesco", *Il Diritto dell'Unione europea: Osservatorio europeo*, 11 May 2020, http://images.dirittounioneeuropea.eu/f/sentenze/documento_DWGpI_DUE.pdf; Viterbo, "The PSPP Judgment of the German Federal Constitutional Court: Throwing Sands in the Wheels of the European Central Bank" (2020), *European Papers*, 671; "The German Federal Constitutional Court's PSPP Judgment" (2020), Special Issue, *German Law Journal* 21, 1078, https://germanlawjournal.com/; Bobic and Dawson, "National Courts Making sense of the "incomprehensible": The PSPP Judgment of the German Federal Constitutional Court", LVII *Common Market Law Review*, 1953; Tridimas, "From Banking to Biting: Reflections on the *Bundesverfassungsgericht* Judgment of 5 May 2020" and Violini, "Le reserve tedesche nei riguardi della UE: un po' di storia e qualche considerazione sulla sentenza del *BVERFG* sul *PSPP* (*EZB-URTEIL*), both in Amalfitano, Condinanzi (a cura di), *Paura dell'Europa: spunti di razionalizzazione*, cit., respectively 143 and 63; Petersen and Chatziathanasiou, "Primacy's Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law", Study for the European Parliament's AFCO Committee, 2021, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/692276/IPOL_STU(2021)692276_EN.pdf, Baquero Cruz, "Karlsruhe and its Discontents", *EUI Working Paper*, LAW 2022/10, http://hdl.handle.net/1814/74716.

Making monetary policy work entails giving a certain room for manoeuvre to the ECB also as regards the genuinely economic effects of its monetary actions: Article 127(1) and 282(2) TFEU, laying down the objectives of the European System of Central Banks and of the ECB, should therefore be intended as granting the ECB the needed freedom to evaluate such economic effects, without undue encroachments also in the context of judicial scrutiny over the related measures. This reconstruction can also ensure the respect of the independence of the ECB (see Articles 130 and 282(3)). In other terms, a *deferential* approach – which does not amount to say absence of scrutiny – should be deserved by courts to the Central Bank of the euro in this respect[7].

It is probably not surprising that the German Constitutional Court has reserved something similar to the advocated *deference* to the German Federal Government and the *Bundestag* when called to ensure the follow-up to its *Weiss* judgment, by carrying out an additional proportionality assessment of the PSPP via some additional documents provided by the ECB. In an order issued on 29 April 2021[8], the Second Senate, the same that adopted the judgment in the *Weiss* case, stated the following:

'When exercising their 'responsibility with regard to European integration', the constitutional organs in principle decide autonomously how to fulfil their mandate of protection; in this respect, they have a broad margin of appreciation, assessment and manoeuvre; they must consider existing risks and take political responsibility for their decisions (...)'[9].

There were no room, at the end, for evaluations different from those, positive with regard to the PSPP, expressed by the Federal Government and the *Bundestag*. The BVerfG has added – on the basis of its preceding case-law – that the national organs can take a variety of legal or

[7] See in general on this issue Goldmann, "Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review", 15 *German Law Journal*, 265, 2014. With direct reference to the *Weiss* case, see Bay Larsen, "Legal Bridges over Troubled Waters? Standard of Review of ECB Decisions by EU Courts", Egidy, "Judicial Review of Central Bank Action: Can Europe Learn from the United States?"; Huber, "The ECB under Scrutiny of the Bundesverfassungsgericht"; Zilioli, "The Standard of Review of Central Banks Decision: an Introduction", in *Building Bridges: Central Banking Law in an Interconnected World* (European Central Bank, 2019), https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf, respectively 47, 53, 28, 23.

[8] 2 BvR 1651/15 (2021) and 2 BvR 2006/15 (2001).

[9] Order of 29 April 2021, para 90, quotation of the English translation provided on the official website of the BVerfG: https://www.bundesverfassungsgericht.de/. Before stating that the national organs in question enjoy a wide margin of discretion, the BVerfG found that the applications filed to obtained an order of execution were procedurally inadmissible. The German Federal Constitutional Judges maintained that such an order cannot 'amend, modify, add to or expand the decision on the merits which it serves to enforce' (Order of 29 April 2021, para 77). Thus the Court is not enabled to carry on a new analysis of the situation from the point of view of facts and law. This implies that measures adopted after the first decision – the one whose execution should be under control – fall outside the scope of the review the Constitutional Court can exercise. These are technical constraints that pertain to the type of control related to the execution of a precedent decision: expanding its scope would unduly favour applicants' position, which could however start a new action, with the activation of full powers of the BVerfG (Order of 29 April 2021, para 78). The Karlsruhe Court specifically states that the assessment implied in the action for execution sought would involve, *inter alia*, the question whether the actions taken (or not taken) by the Federal Government and the Bundestag fall within constitutional law or EU law, with the possible activation of a new preliminary reference procedure on the point (para 86 of the 29 April 2021 order).

political measures, which may imply the transfer of competences related to an (initially) *ultra vires* act from the national level to the EU, or to '*rescind* acts that are not covered by the EU integration agenda', or to restrict the domestic effects of the act in question to the maximum extent possible[10].

It is beyond doubt that the German Constitutional Court was seeking to preserve the needed margin for manoeuvre to ensure a correct balance between the constraints emerging from the national Constitution and the dynamics of European integration: national organs are, in this respect, those that hold the best position to evaluate the steps to be taken and no one could claim that such organs should be deprived of their prerogatives and duties under national constitutional law. Besides, political institutions bear a precise responsibility (also 'with regard to European Integration') and it would be difficult to recognize a similar responsibility, and thus the same discretion, to a 'technical' Institution like the ECB when performing its monetary policy tasks[11].

Nonetheless, one can hardly escape the impression that there is a fundamental *distrust* towards (not just the organs that performs their specific 'technical' tasks but) the whole EU structure, where the appropriate checks and balances, including space for political controls and judicial review, are (and should be) provided for the exercise of competences that were (once) national. Indeed, the attack had been carried out against the ECB and the Court of justice while, only when the *business* comes back to the national level, spaces for technical and political appreciations are re-expanded. Even if one accepted that the ultimate legitimacy source should rest in the national Constitutions, it is clear that, in the referred rulings of the BVerfG, EU Institutions and the EU in general are judged not really capable to bear the responsibilities related to the management of the dynamics of EU competences, seen as very risky for the national system (even if such dynamics, as reconstructed in the *Weiss* judgment of the Court of justice, rested faithfully in line, in my view, with the EU Treaties and did not include any *ultra vires* act on the part of EU Institutions[12]).

It must be admitted that, guided by distrust towards EU Institutions or not, the *Bundesverfassungsgericht*, with its order delivered on 29 April 2021, has finally dismantled the bomb. It seems in fact that, adjudicating on the merits of the action despite its procedural inadmissibility[13], the German Constitutional Court has finally closed the door to the grievances related to the PSPP. It is not a laudable story anyway and the Karlsruhe Judges could have contributed, with a different attitude – as I will argue in the next section –, to make it a less confrontational exercise.

As I will briefly recall below, the national organs which were granted the referred ample discretion will have taken an explicit engagement to the effect that a review like that carried out

[10] Order of 29 April 2021, paras 91-92, emphasis added.
[11] It is interesting that, with reference to the national framework, the BVerfG states that '[a]s an institution that forms part of indirect state administration (*mittelbare Staasverwaltung*), the *Bundesbank* itself is not an independent bearer of the 'responsibility with regard to European integration" (Order of 29 April 2021, para 88).
[12] See in particular the reconstruction of the relations between economic and monetary policy above, in this same section.
[13] See *supra*, at 9.

by the BVerfG, apt to undermine the founding structures of the EU – and in particular the judicial system –, would be avoided in the future.

It has to be recognized that some ambiguities effectively existing in the EU competence framework have given leeway to the Karlsruhe Court to play its hazardous game, paying homage to the vested interests of those who had filed the action in the *Weiss* case[14]. Although the existence of an EU economic policy has to be certainly admitted on the basis of the considerations set out at the beginning of the present section, it rests a not well defined field of competences. This is due to the political compromise at the origin of the Economic and Monetary Union, where clear powers were conferred upon the Union only as regards monetary policy. Furthermore, the border between economic and monetary policy results, in general, blurred[15]. Thus, monetary and economic acts fall in an area where the establishment of an appropriate praxis – also as regards the definition of the dividing line between the two domains – should be left as far as possible to the interaction between the actors to which the respective responsibilities are conferred. This should be considered as an additional reason why courts should exercise a cautious review on the relative acts.

There is a first lesson to be learnt from this bitter episode of *judicial dialogue*, in particular as regards EU competences. Even if one moves away from the difficulties and specificities of economic and monetary policy, it is evident that the crucial principle of conferral enshrined in Article 5 TEU – which constitutes the basis of the pretensions of the Karlsruhe Judges – has to be read in conjunction with the duty of sincere cooperation laid down in Article 4(3) TEU[16]. What the BVerfG in essence failed to do was to understand that competences are conferred to attain the objectives set out in the Treaties (as stated by Article 5(2) TEU) and when such competences are exercised, Member States are under a duty to cooperate loyally with the EU Institutions assisting them in pursuing such objectives[17]. This implies also granting the European Institutions a certain margin in the implementation of those competences.

The coming into play of the duty of sincere cooperation leads us to the second aspect of the recent case-law of the *Bundesverfassungsgericht* I would like to examine and will be extremely useful also to interpret some legal problems related to other recent events.

1.2. The Duty of Sincere Cooperation: a German Perspective in the Aftermath of Weiss

[14] See Verola, "Corte di Lussemburgo e Giudici costituzionali degli Stati membri nel (faticoso) avanzamento del processo di integrazione europea", in this Issue.

[15] See Bean, "Central Banking has never looked more daunting", in *Financial Times*, 4 December 2017.

[16] Neframi, "Principe de coopération loyale et principe d'attribution dans le cadre de la mise en œuvre du droit de l'Union" (2016), Cahiers de droit européen, 221, 245; Casolari, *Leale cooperazione tra Stati membri e Unione europea – Studio sulla partecipazione all'Unione al tempo delle crisi*, (Editoriale scientifica, 2020), 192 ff.

[17] On this point please see Poli and Cisotta, "The German Federal Constitutional Court's Exercise of *Ultra Vires* Review and the Possibility to Open an Infringement Action for the Commission", Special Issue, German Law Journal 21, 1078, 1085 ff., 2020.

Judges sitting in Karlsruhe could have paid more attention to the principle of sincere cooperation. As argued elsewhere[18], in the judgment of 5 May 2020 a series of acts of the ECB analyzing in detail the proportionality of the PSPP were not considered: a different (probably new) preliminary question could have been submitted to the Court of justice[19], for example on the legal value of such acts. By avoiding such a move, the *Bundesverfassungsgericht* has put itself outside the virtuous circle of loyal cooperation: a more sincere attitude is required to join such circle, where courts should take the courage to speak openly and directly and, if necessary, newly engaging in the dialogue if other or new questions still emerge.

What is interesting here is that sincere cooperation has come into question again when the infringement procedure, initiated by the Commission against Germany for the *Weiss* judgment, has been closed. Such proceedings has been launched (surprisingly) sometimes after the problem had been solved at the national level, at least with regard to the practical effects of the *Bundesverfassungsgericht*'s ruling in *Weiss*. The closing point has been, as seen, the acquisition by the Federal Government and the *Bundestag* of additional justification of the proportionality of the PSPP, judged sufficient to meet the requirements spelled out in the 5 May 2020 judgement of the German Constitutional Court (and in some way endorsed by the BVerfG itself).

Just a few lines published in the Commission's website inform us of the engagements undertaken by the German Government (while the formal letter of the latter is unfortunately not available). Those few lines are worth quoting:

'The Commission considers it appropriate to close the infringement, for three reasons. First, in its reply to the letter of formal notice, Germany has provided very strong commitments. In particular, Germany has formally declared that it affirms and recognises the principles of autonomy, primacy, effectiveness and uniform application of Union law as well as the values laid down in Article 2 TEU, including in particular the rule of law. Second, Germany explicitly recognises the authority of the Court of Justice of the European Union, whose decisions are final and binding. It also considers that the legality of acts of Union institutions cannot be made subject to the examination of constitutional complaints before German courts but can only be reviewed by the Court of Justice. Third, the German government, explicitly referring to its duty of loyal cooperation enshrined in the Treaties, commits to use all the means at its disposal to avoid, in the future, a repetition of an 'ultra vires' finding, and take an active role in that regard'[20].

The referred engagements appear particularly significant in the light of the observations formulated above.

I would like to stress that all the commitments have a precise and defined object (autonomy, primacy, effectiveness and uniform application of Union law, as well as the values

[18] Please see Poli and Cisotta, at 17, 1088.
[19] For a different view, see Baquero Cruz, cited at 6, 46-47.
[20] See European Commission, "December Infringements Package: Key Decisions", 2 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

laid down in Article 2 TEU; the authority of the Court of Justice and the absence of jurisdiction of German courts over EU law acts) except for those stemming from the application of the duty of sincere cooperation. The latter are focussed on the need to have no *ultra vires* declaration of EU acts anymore.

The avoidance of new *ultra vires* findings may be problematic under national law, as it might be capable to impinge on the independence of the BVerfG: the Federal Government has promised to the Commission a kind of sterilization, whose contours are not very clear, of some of the judicial activities of the Constitutional Court. Leaving such questions to national law, it can be just observed here that this commitment can be read in the light of the responsibility of national political organs to take corrective steps like those envisaged by the BVerfG itself, as seen in the preceding section, when (alleged) *ultra vires* acts had to be adopted by the EU Institutions. Such steps could be also taken, in principle, before any constitutional complaint is lodged to the Court in Karlsruhe or at least before such Court could take any dangerous decision – but there cannot be any guarantee that the national political organs will win the run with professional applicants – and can be intended as an effort to find a solution inside the circuit of the EU institutional dialectic and of its legal order.

German political organs are sandwiched between the duty, arising from the jurisprudence of the BVerfG, to take any useful step also at the EU level in case there was a risk that an EU law act is considered *ultra vires* by the Constitutional Court itself and the obligation – stemming from the EU Treaties and specified in the commitments undertaken to close the infringement procedure in question – to avoid ...any new possible *ultra vires* declaration by the same Court. Conflicts between the two obligations may arise in particular where the points of view of the Court of justice is not shared by the Karlsruhe Court, just like in *Weiss*. However, in certain situations, the same or similar actions, aimed at eliminating the sources of possible clashes, could be considered in line with both duties.

1.2.1. Acting in Line with the Duty of Sincere Cooperation in Difficult Times

There is a second lesson to be learnt here, again on the basis of the duty incumbent on Member States to cooperate loyally with the EU, this time making a shift towards *more procedural* – but with a clear impact on substance – issues[21].

As regards national courts, it is evident that their role is crucial in the framework of the preliminary reference procedure: in that context, they bear big responsibilities as regards the respect of the duty of sincere cooperation[22]. In particular, EU lawyers are well acquainted with

[21] The understanding of what is 'procedural' in contrast with what is 'substantial' can vary on the basis of different factors. Here I essentially refer to the use of procedural means by national judges with a view to acting under the duty of sincere cooperation, thus to ensuring the results imposed by obligations stemming from the EU Treaties. Without using the last statement as a too strict definition, I basically intend the concept of procedural means in a broad sense, in accordance with the well known jurisprudence of the Court of justice on procedural autonomy, however including, *inter alia*, the rules and relevant practice regarding the choices on the activation of a preliminary reference procedure.

[22] See Adinolfi, "I fondamenti del diritto dell'UE nella giurisprudenza della Corte di giustizia: il rinvio pregiudiziale" (2019), in *Il Diritto dell'Unione europea*, 2019, 441; Casolari, at 16, 156 ff.

the idea that a duty to refer preliminary questions is incumbent on courts of last resort, unless one of the cases indicated in *CILFIT* and in the subsequent jurisprudence[23] occurs. A duty to refer is imposed also on courts not adjudicating at last instance, if a doubt about validity arises under the terms specified in *Foto-Frost*[24]. The recalled criteria can emerge in different situations, however the exclusive competence of the Court of Justice to declare the invalidity of an EU law act cannot be called into question (therefore no flexibility as to the duty to refer can be claimed by national judges when a serious doubt about validity arises). In other cases, national courts enjoy, under Article 267 TFEU, the widest discretion to decide on the opportunity to start a preliminary reference procedure, as well as to choose the appropriate stage of the proceedings in which that should be done[25], with a view to ensuring uniform interpretation of EU law across the Union[26].

There is, however, something *more* national courts have to do, in particular when called upon to exercise their powers in the difficult situation we are witnessing in some Member States. The duty to refer should arise in new cases, or in cases where old and well known requisites can become concrete under new conditions.

It has been submitted here that the BVerfG should have considered making a second preliminary reference to the Court of Justice. A second reference is, indeed, something exceptional and it cannot be required unless there are no other means to resolve problems, not raised in the first reference or not enough clarified, that have to be necessarily submitted to the Luxembourg Court. Nor could a national court be asked to submit new questions up until any possible divergence with the Court of justice is eliminated. This frustrating and virtually infinite regress would weaken the substantive idea of cooperation lying at the roots of Article 267 TFEU[27]. Even Germany – when taking its commitments aimed at closing the infringement procedure started after the judgment in the *Weiss* case of the BVerfG – did recognize the binding and 'final' character of the judgments of the Court of justice.

New cases of duty to refer would come out of other situations. We should start from the following renowned statements of the Court of justice:

'(...) the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law (...). Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate

[23] See joined cases 28-30/62, *Da Costa*, EU:C:1963:6 and case 283/81, *CILFIT*, EU:C:1982:335, paras 10 ff.; see now also case C-561/19, *Consorzio Italian Management*, EU:C:2021:799, paras 27 ff. See, on this case-law, Broberg and Fenger, "If You Love Somebody Set Them Free: On the Court of Justice's Revision of the *Acte Clair* Doctrine", 60 CMLR, 711, 2021; Munari, Il "dubbio ragionevole" nel rinvio pregiudiziale, forthcoming.

[24] Case 314/85, *Foto-Frost*, EU:C:1987:452, paras 14-17.

[25] See Opinion 1/09, *Agreement creating a Unified Patent Litigation System*, EU:C:2011:123, para 83 amongst many others. See Baratta, "National Court as "Guardians" and "Ordinary Courts" of EU Law: Opinion 1/09 of the ECJ", Legal Issues of Economic Integration, 2011, 297. Furthermore, see, in the context of the rule of law *saga*, Joined cases C-585/18, C-624/18 and C-625/18, *A.K.*, EU:C:2019:982, para 103, Case C-824/18, *A.B.*, ECLI:EU:C:2021:153, paras 91-93.

[26] See, *inter alia*, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454, para 176.

[27] See, for similar considerations, Baquero Cruz, at 6, 46-47.

measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law (...)'[28].

When considering the need of a preliminary ruling of the Court of justice[29], national courts, of last instance or not, should understand whether their final decision, *as well as the probable following development of the case*, is apt to have a *significant* impact on the uniform application of EU law[30], or on the framework governing the relationships between the domestic and the European legal order, or on the respect of the EU values. These considerations should be included in those the judge normally carries out when he freely decides whether to refer or not. I submit that, if a national court evaluates that such an impact exists, it should be considered under a duty to refer, even if it is not adjudicating at last instance. Such situations, certainly exceptional in normal conditions, are unfortunately likely to materialize in current times, especially in some EU Countries.

I will now try to clarify how the three provided criteria should be interpreted and then how the probable following development of the case should be intended.

The *significant* impact on the uniform application of EU law should be regarded in the light of the developments likely to occur after the decision of the judge who should decide whether to refer or not, including possible following phases of the proceedings (appeal, execution, etc.). For instance, it should be taken into account whether a following judicial instance exists – and if questions related to the merits, the legality and execution of the decision can be the object of review before it – and to what extent it offers concrete guarantees with regard to the correct application of EU law. In particular, the possibility to refer a preliminary question and the likelihood, on the basis of the existent praxis, that the rules on the obligation to refer will be respected before such successive judicial instance should be considered[31].

The impact on the framework of relations between the domestic and the European legal order can be considered a specification of the first criterion, just explained. Under the second criterion, it should be evaluated how the application of general rules on implementation of EU law (like direct and indirect effects of EU law provisions), compliance with EU obligations

[28] See Opinion 1/09, para 68 and Opinion 2/13, para 173.

[29] I assume that all requirements regarding the admissibility and relevance of the questions to be referred are met.

[30] The obligation to refer a preliminary question regarding validity also by courts that are not of last resort serves, at the end, the purpose of uniform application of EU law: if a national judge pretends to declare the invalidity of EU law acts, the impact of his decisions would have destructive effects on the uniformity of application of EU law and on the coherence of its judicial system. In the words of the Luxembourg Court, the 'requirement of uniformity is particularly imperative when the validity of a Community act is in question' (*Foto-Frost*, para 15).

[31] It is the same logic underlying the obligation of judges of last resort to refer: the inexistence – or, the ineffectiveness (see below, in the main text) – of other possible judicial instances gives to the judge the (virtually) last word on individual's rights stemming from the EU legal order. This solution – being (virtually) the definitive one – is also likely to influence other judges (formally or informally, depending on the rules existing under national law). See Case C-224/01, *Köbler*, EU:C:2003:513, paras 34-35. See on this point Daniele, Comment on Article 267 TFUE, in Tizzano, *I Trattati dell'Unione europea* (Giuffrè, 2014), 2103, 2111.

(including the principle of primacy) within the national legal order could be affected by the decision in question. Such scrutiny should be carried out also in the light of the formal and informal effects that the decision of the judge, as well as the future possible developments of the case, might have, on the basis of national rules, on other judges or authorities.

The last suggested criterion is founded on the relevance of Article 2[32]. Where an issue regarding interpretation or validity of EU law concerns the concretization of Article 2 values[33] and the decision or the possible developments of the case – in the sense just clarified – would have a significant impact on the application of the piece of EU law in question, a national court should be obliged to refer to the Court of justice.

Such criteria may be of help in circumstances that cannot be all and fully predicted. However, to sum up, if uniform application, rules on coordination between legal orders or EU values are at stake, initiating a preliminary reference procedure would amount to an 'appropriate particular measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union', within the meaning of the case-law of the Court of justice on the point (see the passage quoted above). The criteria just provided are aimed at offering a *general rule*, to be intended as the result of a possible development on the basis of the existing case-law on the duty to refer. The consideration of other aspects, also of a *procedural* kind, may help to define more precisely the relevant cases.

The kind of problems identified, in which there would be a duty to refer, are likely to arise before supreme or constitutional courts. The general rules on courts of last instance would apply (but sometimes constitutional courts can also be called to adjudicate within incidental proceedings, like in Italy and in other Countries). Nonetheless, some situations can be imagined in which such cases arise before judges not adjudicating at last instance, on the basis of real examples that might be considered *extreme*, but no one can exclude similar situations will arise again at some point.

A few further elements would be useful to clarify such cases and how the development of the case should be evaluated.

According to a well established orientation of the Court of justice, confirmed in the recent case-law on the rule of law, rulings by supreme or constitutional courts have to be disregarded by lower courts, if such rulings are in contrast with EU law, even where those lower courts are bound by the rulings in question under national procedural rules[34]. Also the rulings of another

[32] The introduction of a new duty to refer in case of relevance of the values enshrined in Article 2 TEU has been already proposed: see von Bogdandy and Spieker, "Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges", *European Constitutional Law Review* 15, 391, 396, 2019. That proposal, connected to the 'Reverse *Solange*' doctrine, would, if compared with the hypothesis presented here, entail a relatively smaller number of cases in which the new duty to refer should arise, but with a much larger scope of the scrutiny of the Court of justice. In fact, the latter, under the proposal of the two Authors, would adjudicate also national acts not falling within the EU competences. I will not discuss these broader systematic implications here and the hypothesis I propose is not connected with the 'Reverse *Solange*' doctrine, however my reconstruction does not *per se* exclude the acceptance of such doctrine.

[33] I do not investigate the problem of the possibility to invoke Article 2 all alone: see von Bogdandy and Spieker, at 32, 409 ff.

[34] See in particular, with reference to a constitutional court's ruling, Case C-416/10, *Križan*, EU:C:2013:8, para 73, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *PM*, EU:C:2021:1034, paras 239-242 and

judge, competent for a certain case, but who does not meet the requirements of independence under Articles 19(1) TEU and 47 of the Charter of Fundamental Rights of the EU[35], have to be disregarded; what is more, the national rule conferring jurisdiction upon that judge shall be set aside, as established in *A.K.* (where the rule to be set aside conferred even exclusive jurisdiction), one of the cases the rule of law *saga*[36]. Jurisdiction will be exercised, in such case, by the court, meeting the requirement of independence, which would be competent without the rule on jurisdiction that has been set aside.

Here is finally the situation where a national judge may be under a duty to refer a preliminary question.

We can envisage the situation of a national judge (judge A), called upon to rule on a legal point, already addressed by a supreme judicial organ (judge B), in its jurisprudence, in a way inconsistent with EU law. Judge A is bound under national law by the decisions of judge B. We know that judge A is obliged to disregard the rulings of judge B in contrast with EU law. Let us assume that there are no other intermediate competent courts between judge A and judge B. Can that lower judge even consider that the last remedy, that would bring the case before the supreme judicial organ, would be ineffective from the point of view of the judicial protection to be ensured to individual rights under EU law?[37] There might be also aggravating factors: for

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251-260, Case C-430/21, *RS*, EU:C:2022:99, paras 75-77; as regards the duty to disregard decisions by supreme courts, see Case C-173/09, *Elchinov*, EU:C:2010:581, paras 30-31, Case C-396/09, *Interedil,* EU:C:2011:671, paras 36-39, case C-554/14, *Ognyanov*, EU:C:2016:835, paras 67-70.

[35] For some references to the relevant case-law on the point, see below, at 60 and 61.

[36] See Joined cases C-585/18, C-624/18 and C-625/18, *A.K.*, para 166. However, the mere fact that a judge has been selected or has been promoted to a higher office when an illiberal regime was exercising power, in the Member State concerned, before its accession to the EU, or on the basis of provisions that would have been declared unconstitutional, is not sufficient to consider the judge not independent. The same would apply in case the selection procedure has been 'neither transparent nor public nor open to challenge before the courts, provided that such irregularities are not of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to serious and legitimate doubts, in the minds of individuals, as to the independence and impartiality of the judge concerned, from being considered to be an independent and impartial tribunal previously established by law': see Case C-132/20, *Getin Noble Bank S.A.*, EU:C:2022:235, paras 80 ff.
The issue of the rule of law will be *per se* not the object of attention. It will be dealt with only incidentally and, therefore, references to the relevant case-law and to the legal doctrine will be limited. See in general on the matter of EU Values and of the rule of law Baratta, "Droits fondamentaux et "valeurs" dans le processus d'intégration européene", (2019) Studi sull'integrazione europea XIV, 289, Carta, *Unione europea a tutela dello stato di diritto negli Stati membri* (Cacucci, 2020), Rossi, "Il valore giuridico dei valori. L'art. 2 TUE: relazioni con alter disposizioni del diritto primario dell'UE e rimedi giurisdizionali", *Federalismi*, 2020, www.federalismi.it, IV; Pech and Kochenov, "Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case", 20 May 2021, SIEPS, Stockholm, 2021-3. On the role of the Court of Justice in defending Article 2 TEU values, see Cannizzaro, "Il ruolo della Corte di giustizia nella tutela dei valori dell'Unione europea", in *Liber Amicorum Antonio Tizzano – De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne* (Giappichelli, 2018), p. 13.

[37] According to the European Court of Human Rights, where a remedy does not give the real possibility to bring a claim, also because of a constant national judicial interpretation inconsistent with the ECHR, it has to be considered not effective under Article 13 of the ECHR. Therefore, there is not a duty for an applicant to go through any such legal avenue, proven to be ineffective within the meaning of Article 13 of the ECHR, to meet the requirement of the previous exhaustion of national remedies under Article 35 of the ECHR (and thus having the possibility to bring a claim before the Strasbourg Court). See ECtHR, Appl. No. 36813/97, *Scordino v. Italy (No. 1)*, Judgment of 29 March 2006, paras 140-149. Similarly, in our situation the flaws affecting the last remedy that would bring the case

instance, judge B may have refused on other occasions to refer preliminary questions, thus engaging the responsibility of the State[38]; furthermore, the national rules conferring jurisdiction upon that supreme judicial organ might have to be set aside by the other national judges due to lack of independence.

In the envisaged situation, judge A should consider that an additional judicial action aimed at bringing the uncertain EU law question before judge B would not ensure an effective judicial protection of EU rights. Judge A should consider himself as the *effective* judge adjudicating at last instance. This may appear a mere speculative exercise. However, specificities of cases can make legal problems peculiar and the envisaged situation, despite apparently byzantine, is not very far from some recent real cases to which reference has been made. Sadly enough, the lack of independence of a supreme court is not something simply coming out of imagination. The verification of all the *worst* conditions imagined should lead judge A to consider *automatically* himself as the judicial organ adjudicating at last instance.[39].

Should the case be anyway be brought before judge B, it should be recalled that the Court of justice – on the basis of its recent judgment in *Getin Noble Bank* – would accept to respond to a preliminary question that judge may decide, contrary to expectations, to refer to Luxembourg: in so doing, the Court of justice accords a general presumption to national courts that present a request for a preliminary ruling that they satisfy the requirements of independence flowing from Articles 19(1) TEU and 47 CFR[40]. Such presumption can anyway be rebutted 'where a final judicial decision handed down by a national or international court or tribunal leads to the

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before judge B could lead to consider that last remedy as ineffective from the point of view of EU law. Considering such remedy ineffective would have consequences on the duties of judge A (see in the main text).
When it has recently ascertained the lack of independence of the Civil Chamber of the Sąd Najwyższy (Polish Supreme Court), the Strasbourg Court has rejected the objection of the Government based on an alleged non exhaustion of domestic remedies. The Government held that the applicant should have resorted to the Constitutional Court. The European Court of Human Rights noted that the Constitutional Court had interpreted Article 6 of the ECHR not in line with its jurisprudence and therefore an application before it would have been ineffective ('Having regard to all the above considerations that led the Court to reject the Constitutional Court's position on the manifest breach of the domestic law and its interpretation of Article 6 of the Convention, in the particular circumstances of this case the Court does not see sufficiently realistic prospects of success for a constitutional complaint based on the grounds suggested by the Government): see ECtHR, Appl. No. 1469/20, *Advance Pharma sp. z o.o* v. *Poland*, Judgment of 3 February 2022 paras 319-321.

[38] See Case C-416/17, *Commission v. France (Advance Payment)*, EU:C:2018:811, paras 105 ff.

[39] Once these extreme conditions occur, at least two of the three criteria set out in the main text – existence of a significant impact on uniform application of EU law, or on rules on coordination between legal orders or on EU values – should be considered as verified. In fact, if Judge B clearly fails to meet the requirement of independence of a judicial organ as set out in the case law of the Court of justice, or the remedy that could lead the case before him is to be considered as ineffective within the meaning just explained (see at 37 and corresponding text), there would certainly be a significant impact of the final decision to be adopted by judge A on the uniform application of EU law. For the reasons set out in the main text ,judge A would in fact *substantially* perform his duties as the real judicial organ of last resort. Furthermore, the existence of a position heavily affected by lack of independence like that of judge B would *per se* amount to a threat to EU values. As to the rules on coordination between legal orders, the existence of a significant impact should not be considered automatic, but such rules may nevertheless be affected, as the application of principles like primacy are likely to be negatively influenced in such scenario.
There is also an additional argument that reinforces that conclusion: on the basis of a different strain of case-law, a judicial organ that is not independent, like judge B, should also lose its qualification as 'court or tribunal' enabled to refer preliminary questions under Article 267 TFEU. See Case C-54/96, *Dorsch Consult*, ECLI:EU:C:1997:413, para 23, Case C-53/03, *Syfait*, ECLI:EU:C:2005:333, para 29, amongst many others.

conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter'[41].

The European Court of Human rights had declared that the Civil Chamber of the Polish Supreme Court – the referring Court in *Getin Noble Bank* – did not meet the requirement of being established by the law, but the ruling in question would have become final only after the publication of the *Getin Noble Bank* judgment of the Court of Justice[42]. This may imply that *Getin Noble Bank* has been the last reference of the Polish Supreme Court – or at least of its Civil Chamber – to which the Luxembourg Judges have replied. However, the issue is even more complex: the Supreme Court had also asked the Luxembourg Court to state on the independence of the judge that had issued the decision brought before it on appeal. According to the Court of justice, such judge should have been considered, in principle, independent[43], but this specific circumstance makes the whole game problematic, as also one of the lower judges (like judge A in

[40] See Case C-132/20, *Getin Noble Bank S.A.*, para 69. The question, raised by the Polish Ombudsman, concerned the possibility to qualify the *Sąd Najwyższy* (Supreme Court) of Poland, which made the reference, as a 'court or tribunal' under Article 267 TFEU (see the preceding note).
The wording used by the Court of justice ('In so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it satisfies those requirements (...), irrespective of its actual composition') seems to imply that it is not eager to ascertain incidentally whether the court making the reference is independent. The Court underlines (in para 68) that the independence of that judge was undisputed and that the preliminary questions regarded the independence of another judicial organ (the one that delivered the decision that was appealed before the referring judge). This seems a very 'formalistic' approach (see De Falco "Indipendenza della magistratura in Polonia: brevi note a margine della sentenza Getin Noble Bank S.A.", Post di AISDUE (2022), 130, 138, https://www.aisdue.eu/wp-content/uploads/2022/10/Post-Emanuela-De-Falco-1.pdf): to let the Court of justice be enabled to assess the independence of the referring judge, it must be envisaged that the issue should be brought to its attention in the preliminary questions ...referred by that same judge! In addition, by requiring that the lack of independence should be ascertained in the final decision of a national or international judge (see below in the main text), the incidental control on the independence of the referring judge by the Court of justice becomes almost impossible. This position seems to privilege the readiness of the Court of justice to respond *anyway* to a preliminary reference, with a view to avoiding any possible hindrance to the mechanism and any potential judicial short circuit (the referring court should *accept* the declaration of the Court of justice on *his* lack of independence; anyway, with or without such acceptance, ensuring any successive step may become problematic). See more in general, Iannuccelli, "L'indépendance du juge national et la recevabilité de la question préjudicielle concernant sa propre qualité de «juridiction»", *Il diritto dell'Unione europea*, n. 4, 2020, p. 823.
[41] See Case C-132/20, *Getin Noble Bank S.A.*, para 72.
[42] As noted by De Falco at 41, 138, https://www.aisdue.eu/wp-content/uploads/2022/10/Post-Emanuela-De-Falco-1.pdf: see ECtHR, *Advance Pharma sp. z o.o* v. *Poland*, at 38.
[43] I will not discuss here the arguments put forward by the Luxembourg Court to consider that the judge in question is independent. For a critical appraisal – based on the problems arising out of differentiated criteria adopted by the Court of justice on various occasions and with the 'context' substituting for more reliable standards – see Kochenov and Bard, "Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe", 60 *Journal of Common Market Studies* 2022, 150. According to another interpretation, the use by the Court of justice of a different standard to assess independence in cases like that at issue allows to avoid the interruption of the dialogue with the Polish jurisdictional system (see also the main text, with reference to practical consequences) and it is highlighted that some footholds for such differentiated approach can be found in the case-law (as well as in recent proposals by some Advocates General): see, also for the relevant references, De Falco at 41, 141 ff. For a discussion of the judgment in the light of the referred dilemma on the meaning to be given to independence in the context of Article 267 TFUE mechanism, see Fisicaro, "La Corte di giustizia nella sala degli specchi: il principio di indipendenza giudiziaria tra art. 267 TFUE, art. 47 della Carta e art. 19 TUE", 16 *Diritti umani e diritto internazionale* 2022, 384.

our situation) could be affected by lack of independence. In *Getin Noble Bank*, the problem had to be traced back to acts regarding the selection or promotion of a judge, adopted under the communist regime in Poland, or based on rules that the Constitutional Court would have declared unconstitutional after the acts in question[44]. As widely known, the Party holding power in Poland is engaged in a crusade against everything born or conceived under the old communist regime. This is probably one of the reasons why the Court of justice, trying to avoid to enter in a vortex of *cross-recriminations* with the Supreme Court and maybe also with other sectors or organs of the Polish Judiciary, tried to make it clear that it does not want to choose its interlocutors. In other words, the Court of justice has effectively tried to leave the organization of the judicial power to Member States, trying to speak with those who are anyway asking questions, although maybe provocative ones. At the same time, the Court of justice has set the stage also for future dialogues with Polish judges: the Supreme Court should be cut off due to the lack of independence ascertained by the European Court of Human Rights, while judges like the one in question should be considered independent and thus part of the *EU circuit*.

Let us now come back to our example. Even if the chain of *non independent* judges may extend also to lower judges, we will assume, for the sake of our example, that judge A is definitely independent. Under the conditions explained before, judge A would be under a duty to refer.

It is true that the Court of justice has a different attitude towards judges, like judge A in the example proposed, than that emerging from my reconstruction: the Luxembourg Court is clearly inclined to relieve such judges from duties, coming in particular from the national legal order, and clearly contrasting with obligations arising from the Treaties. On the basis of the reconstruction proposed, a new and additional burden would be imposed on judge A, this time towards the EU and namely the Court of justice. Instead of making his life easier, adding a new burden might worsen his situation.

This is a serious counterargument, but it can be at least partially reversed.

What the reconstruction proposed tries to protect is, in the end, the uniform application of EU law and the freedom of judges, also not adjudicating at last instance, to refer preliminary questions to the Court of justice, in line with the classical and well-established case-law of the latter. The 'only' freedom to refer a preliminary question – well rooted in EU law – should be enough to let such judges decide on the opportunity and precise stage of the proceedings to do it. However, acting under a duty under EU law to refer a preliminary question would in fact make those judges really free to do it, as we are witnessing the tendency to punish judges that apply EU law and activate the Article 267 TFEU mechanism. As we see in *RS*, Romanian judges were precluded to examine the compatibility of a national provision with EU law, once the national Constitutional Court had established its conformity with a provision prescribing that national legislation has to respect the principle of primacy of EU law. The Romanian Constitutional Court claimed to examine judgments of the Court of justice and to assess if some parts had to be judged in contrast with the national constitutional identity (see Article 4(2) TEU), therefore precluding

[44] See above, at 36 and corresponding text.

their application in the State. Furthermore, departing from the case-law of the Constitutional Court, even if in contrast with the primacy of EU law, constituted a disciplinary offence for judges[45]. The attitude of the Romanian Constitutional Court clearly revealed the intent to claim to be the last and only judge in the State to adjudicate at least on certain aspects of EU law. It is also evident that this would lead to 'close' to some extent the national judicial circuit. On the contrary, giving national judges an additional argument to contrast the attitude of their (Supreme or) Constitutional Court, by opposing their right/duty, under certain conditions, to go before the Court of justice would help to re-open that national judicial circuit.

The Polish case is even more evident: judges are exposed to the risk of disciplinary proceedings if they make a preliminary reference to Court of justice[46].

A battle of opposed duties, respectively under national and EU law, may not be considered the ideal solution for problematic situations like those at issue. Nonetheless, it should be borne in mind that a failure to comply with the duty to refer a preliminary question to the Court of justice would engage the responsibility *of the State*: where it has been a free choice of the judges, this may engage, under the appropriate conditions, their responsibility at the national level; if judges were in some way prevented from operating references to Luxembourg, the responsibility would rest of the State as a whole (or should be incumbent on other specific organs) and this would draw new attention on the matter (for instance thanks to an infringement procedure[47], like for the Polish case, or by virtue of actions by individuals).

Leaving aside other possible situations in which national courts should use procedural tools to ensure uniform application of EU law (like for instance the issuance of provisional measures)[48], duties of courts do not end *within* the judicial proceedings.

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[45] Case C-430/21, *RS*, at 27, paras 19-22. The issue of national constitutional identities of Member States will not be addressed here. It is however sufficient to underline that Article 4(2) TEU does not enable national courts, maybe only supreme or constitutional courts (or national political organs), to decide autonomously the exact content of the concept and the extent to which such identity has to be respected. The provision at issue rests in the domain of EU law and, due to the need of uniform application already recalled, it should be only for the Court of justice to interpret it (hopefully with the help of the elements brought by the national courts of the interested Member State on each relevant occasion via the preliminary reference mechanism). This is evidently the point of view of EU law, while different national courts are keen to exercise some kind of review, under different formal mechanisms: see Spieker, "Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts" (2020), 59 CMLR, 361, 364 ff.

[46] See Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, EU:C:2020:234, para 58, Case C-791/19, *Commission v. Poland*, EU:C:2021:596, paras 222-233. Where a lower judge had to, also if only incidentally, ascertain that a superior judge lacks independence under the criteria laid down by the European jurisprudence and then act consequently may risk sanctions under national law, also if he would be protected under the European framework. Polish judges often undergo disciplinary proceedings for having applied the case-law of the Court of justice regarding the independence of the Supreme Court: see cases Synakiewicz v. Poland (Appl. No. 46453/21), Niklas-Bibik v. Poland (no. 8687/22), PiekarskaDrążek v. Poland (no. 8076/22) and Hetnarowicz-Sikora v. Poland (no. 9988/22), in which the Strasbourg Court granted interim measures at least to ensure that the judges in question enjoy the rights stemming from Article 6 ECHR, in particular as regards notice before hearings or in camera sessions: see Interim measure in cases concerning charges brought against Polish judges, ECHR Press release, 24 March 2022, https://echr.coe.int/.

[47] See von Bogdandy and Spieker, at 32, 398.

[48] The lack of independence of a national jurisdictional organ may have also other consequences on the EU judicial system that will not be dealt with here. For instance, lack of independence may undermine mutual trust between judges in the context of the mechanism of the European arrest warrant: see Case C-216/18 PPU, *LM*,

In accordance with the duty of sincere cooperation laid down in Article 4(3) TEU, any potentially disruptive decision should be avoided, or, however, all possible negative effects likely to occur in the aftermath of the adoption of a ruling should be prevented. In this respect, it must be admitted that the BVerfG, when settling the *Weiss* case, has used the means at its disposal by suspending the effects of the decision and by referring to national political organs the task to acquire additional evidence for the assessment of the proportionality of the PSPP.

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As to all other national authorities different from judges, it is well known that they are also bound by the duty of sincere cooperation and, like in the case of Germany after the *Weiss* case, they might find themselves caught by opposite loyalties, respectively to the EU and to national constitutions (including also the duty to respect a national judicial decision covered by *res judicata*, which is in contrast with EU law). All that can be said in the current state of evolution of EU law is that they should work to reconcile contrasting exigencies, provided that a legal and political *space* has been possibly left after the rising of potential clashes. Depending on a multiplicity of factors, this might entail actions within the EU circuit (actions before the Court of justice, initiatives in other Institutions, etc.), as well as moves at the national level aimed at introducing new legislation, and/or new administrative practices, etc.

2. Dear markets, please lend us some argent de poche …we need it to set up the Recovery Plan for Europe

As announced in Section 1, above, another proceedings of the BVerfG will be the object of attention. With order of 15 April 2021, the BVerfG ruled on the application seeking a provisional measure aimed at blocking the ratification of the new own resources decision[49], needed for the setting up of the *Recovery Fund* for Europe[50]. In a first decision issued on 26 March 2021, the BVerfG had provisionally halted the ratification process, to grant the Court the needed time to adjudicate on the application for a preliminary measure[51]. With the 15 April order, the issue regarding provisional measures was finally settled with a rejection.

The launch of the ambitious programme proposed by the European Commission in Spring 2020 for a '*Recovery Plan for Europe*' (hereinafter *Recovery Plan*)[52], aimed at repairing the

EU:C:2018:586 and Joined Cases C-354/20 PPU and C-412/20 PPU, *L and P*, EU:C:2020:1033.

[49] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, *O.J. 2020, L 424/1*. Such decision, to be adopted unanimously by the Council – where all Member States are represented – after consultation of the European Parliament, is subject to ratification by Member States under Art. 311, third indent TFEU.

[50] 2 BvR 547/21, 2 BvR 798/21 at 4.

[51] See Repasi, Karlsruhe, again: The interim-interim relief of the German Constitutional Court regarding Next Generation EU, 29 March 2021, EUlawlive, https://eulawlive.com/analysis-karlsruhe-again-the-interim-interim-relief-of-the-german-constitutional-court-regarding-next-generation-eu-by-rene-repasi/.

[52] See European Commission, *Europe's moment: Repair and Prepare for the Next Generation*, Bruxelles, 27.05.2020, COM(2020) 456 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?

economic and social harm caused by the pandemic and at stimulating economic rebound, endorsed by the European Council in July 2020[53], is based on a complex series of measures.

The collocation of long term (thirty years) debt instruments on the market implies a change in the understanding of the financial responsibilities the EU can undertake. Meanwhile, the new own resources linked to 'Next Generation EU' will entail a fiscal harmonization that will be probably kept at the European level after the thirty-years debt will be repaid: after such a long period, it is likely that such resources will be definitely become part of the legal and political *acquis* of the EU[54]. Many Authors consider this complex construction as paradigm shift[55] for what concerns the capacities of the EU to intervene with consistent economic resources to face crises. In this respect, the referred construction can be also intended as a substantiation of EU economic policy[56].

The *Bundesverfassungsgericht* has been called upon to assess if the financial obligations linked to NGEU can be considered as exactly defined, provided that the Bundestag could not undertake obligations not precisely indentified in their amount. Moreover, claimants argued that the plan give rise to a mutualisation of debts and to the misuse of the legal basis for own

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qid=1593096930230&uri=CELEX:52020DC0456. The list of all programmes is contained in an annex to the Communication: https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/1_en_annexe_autre_acte_part1_v11.pdf. For some first comments, see Cannizzaro, "Nor Taxation Neither Representation? Or the «Europe's Moment» Part I" (2020) European Papers, p. 703 ; Contaldi, "Il *Recovery Fund*", Studi sull'integrazione europea (2020), p. 587; Croci, *Solidarietà tra Stati membri dell'Unione europea e governance economica europea* (Giappichelli, 2020), 325; Partsch, Plan de reliance européen: premier bilan (2020) Journal de droit européen, p. 1; Tosato, The Recovery Fund: Legal Issues, Policy Brief 23/2020, LUISS School of Political Economy, 1 May 2020, <https://sep.luiss.it/sites/sep.luiss.it/files/The%20Recovery%20Fund.%20Legal%20Issues.pdf>; European Papers – European Forum, Special Focus on Covid-19 and the EU, https://www.europeanpapers.eu/en/news/european-forum-special-focus-on-covid19-and-eu>; L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive (2020) *Eurojus*, Special Issue http://www.eurojus.it/pdf/l-emergenza-sanitaria-Covid-19-e-il%20diritto-dell-Unione-europea-la%20crisi-la-cura-le-prospettive_2.pdf. Se also on own resources, more recently, Rossolillo, "Risorse proprie, democrazia, e autonomia: il ruolo di istituzioni e Stati membri nella determinazione delle entrate dell'Unione europea" (2022), 17 *Studi sull'integrazione europea*, 211.

[53] European Council Conclusions, 17-21 July 2020, https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf.

[54] See Fabbrini, "The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic" (2022), *Journal of Common Market Studies* 60, 195; Cafaro, "L'evoluzione della costituzione economica dell'Unione: si è conclusa l'era della stabilità?", *I Post di AISDUE*, IV (2022), www.aisdue.eu 275, 298.

[55] See Contaldi, "Il *Recovery Fund*" (2020), 15 Studi sull'integrazione europea, 587; Fabbrini, "La nuova governance economica europea post-pandemia" (2020), Il Diritto dell'Unione europea, 4, 771; Calzolari and Costamagna, "La riforma del bilancio e la creazione di SURE e Next Generation EU", in Manzini, Vellano (eds.), *Unione europea 2020. I dodici mesi che hanno segnato l'integrazione europea*, (Giuffrè, 2021), 169; De Witte (2021), "The European Union's COVID-19 recovery plan: the legal engineering of an economic policy shift", CMLR 58, 635, Fabbrini, *Next Generation EU – Il futuro di Europa e Italia dopo la pandemia* (Il Mulino, 2022).

[56] See above, Section 1.1. The launch of Next Generation EU thus marks a crucial step also for the EMU. In this respect, it has to be noted that the EU Institutions have always to deal with the weaknesses of economic policy also as regards the legal bases contained in the Treaties. In particular, resort has been made to, *inter alia*, Article 122 TFEU, included in Title VIII of Part III of the TFEU (dedicated to the EMU) and conceived to frame emergency interventions for difficulties emerging in the 'supply of certain products, notably in the area of energy', as well as for 'severe difficulties caused by natural disasters or exceptional occurrences beyond [the] control' of the Member State affected. Such provision had been used in the first phase of the responses to the crisis erupted in 2008 (especially for the adoption of instruments aimed at build up the financial intervention for the Greek recovery).

resources (Article 311 TFEU). In fact, borrowed financial means would not be 'own' resources (the new own resources should back the lending operations). It was also submitted that the decision in question would make Germany undertake liabilities that might virtually arrive to cover the whole budget of the operation (i.e. 750 billion Euros): in such a case, control over national financial resources would be effectively lost by the national Parliament.

Judges sitting in Karlsruhe stated on 6 December 2022, in a new detailed ruling, that the challenged own resource decision does not trespass the boundaries of the European Integration Agenda (*Integrationsprogramm*) currently in force and does not infringe – as the claimants sustained – the *no bail-out* clause laid down in Article 125 TFEU. On the contrary, authorizing a new *programme* would have required a Treaty change or to apply one of the 'evolutionary clause' contained in the EU Treaties (which do not include Article 311 TFEU), as these are the only avenues through which new competences can be conferred upon the EU; in other words, an *ultra vires* act of the EU cannot be authorized thanks to an ordinary internal act[57]. On the substantial plane, in the Karlsruhe Court's view, the European Integration Agenda is respected. Actually, the BVerfG provides a detailed list of reasons which should lead to a negative assessment and it is clearly stated that borrowing cannot in anyway provide general financing of the EU budget. However, at the end, it indicates four essential criteria that should be considered, in the extraordinary situation at issue, respected[58]. First, it is the Union only that is authorised to borrow, with no decision imposed on the *Bundestag*: indeed, it is up to the latter to authorize each single financial commitment. This would not be even sufficient where there is a structural impact on the budgetary powers of the *Bundestag* and in such case 'it must also be ensured that [it] retains sufficient influence on how the means provided will be used'[59]. Second, the use of resources collected on the markets is limited to tasks falling within EU competences, in line with the principle of conferral. Despite being quite critical as regards the existence of a genuine connection of the *Recovery Plan* with the economic exigencies coming out of the pandemic[60], the Karlsruhe judges have recognized at least the existence of a sufficiently defined object. Third, borrowing operations are duly limited both in time and amount. Fourth, it is established that 'other revenue' within the meaning of Article 311(2) TFEU shall not exceed the amount of own resources: borrowed funds should be considered amongst 'other revenue'[61].

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[57] In fact, 'special authorising laws' (*Mandatsgesetze*), whereby new competences would be conferred to the EU or other International Organizations outside the formal procedures provided for such conferrals, are not admitted under German Basic Law. Besides, if an EU act violates national constitutional identity no correction whatsoever would be possible. See on these points Judgment of 6 December 2022, paras 112-113.

[58] See Judgment of 6 December 2022, paras 147 et seq. and. The BVerfG takes the view that the legal foundations of the Next Generation EU are not completely sound (in relation to the use of Article 122 TFUE, as well as to the respect of the principle of conferral and of the *no bail-out* clause), but no gross violation can be found (see in particular para 149).

[59] Judgment of 6 December 2022, para 135.

[60] The issue is connected with the problematic use of Article 122 TFEU as a legal basis, as well as with the suspected circumvention of Article 125 TFEU: see Judgment of 6 December 2022, in particular paras 149 173 et seq., 207, 210.

[61] Article 311(2) TFEU states that '[w]ithout prejudice to other revenue, the budget shall be financed wholly from own resources'.

With reference in particular to the last two points, the BVerfG has highlighted that other revenue have exceeded the amount of own resources in 2021 and 2022 'in isolation', but it has accepted to evaluate the situation under the multiannual financial framework[62]. Furthermore, no particular problems have been raised concerning the uncertainty as to the exact level of the liabilities (given that economic conditions are subject to change in the course of the multiannual financial framework 2021-2027 and even more up until the end of repayments, i.e. 2058), with reference to the prohibition for the *Bundestag* to authorize financial engagements, related to permanent mechanisms based on decisions of other States or International Organizations, with no clearly foreseeable impact[63]. Finally, 'while a circumvention of Art. 125 TFEU cannot be ruled out completely' in the framework of the *Recovery Plan*, the BVerfG has ascertained that the general architecture should not be contrary to the *no bail-out* clause. Risks of 'financial equalisation' amongst Member States may arise out of mechanisms that should provide, in principle, only provisional responsibility (of other Member States) for liabilities not covered by a Member State and always on the basis of the proportional responsibility for contributions to the EU budget. In this respect, the *Bundestag* has acted within its wide margin of appreciation for the undertaking of financial responsibilities ('overall budgetary responsibility'). However, the *Bundesverfassungsgericht* has entrusted the *Bundestag* itself with the task of monitoring the situation and of taking, 'when necessary', any appropriate measure to protect the Federal budget[64].

Despite the doubts raised as to the complete fulfilment of the requirements set forth, green light has been given to the new own resource decision. Some passages are interesting, in particular with reference to the discretion enjoyed by the Bundestag in undertaking certain financial responsibilities (although within the referred limits). Generous as it may be towards the architecture of Next Generation EU, the BVerfG has however imposed relevant limits to future possible developments. On top of the prohibition of general financing of EU budget via borrowing – which seems shared by the EU Institutions themselves[65] –, the Karlsruhe Court has clearly established that the 'final say' granted to Member States on own resources decisions through the ratification required by Article 311(3) TFEU 'is imperative from a constitutional perspective – under the Basic Law it is prescribed by Art. 20(1) and (2) GG in (...) conjunction with Art. 79(3) GG – in order to safeguard the budgetary autonomy of national parliaments'[66].

[62] See Judgment of 6 December 2022, paras 197-202.

[63] See, for some references to this problem, Judgment of 6 December 2022, paras 135, 201-202 and 225 (for instance, in this last paragraph, maximum liabilities to be borne by Germany are calculated assuming constant prices and this can evidently provide only an approximate indication of such liablities). In a comprehensive and more realistic appraisal, with reference to a statement made by the representative of the Federal Court of Audit, the BVerfG has stated that '[u]ltimately, it was found that the liability risks stemming from contingent liabilities such as EFSF, ESM, Temporary Support to mitigate Unemployment Risks in an Emergency (SURE) and NGEU could not be verified with certainty, given that it would not be possible to conduct a reliable appraisal of the overall risk resulting from EU-related commitments', although the risk to incur in liabilities covering the entire amount of Next Generation EU budget are, of course, highly unlikely (para 231). Therefore the Bundestag has to monitor the situation and act consequently (see para 233; see also at 62 and corresponding main text).

[64] See Judgment of 6 December 2022, paras 203 et seq .

[65] See the references to the relevant documents in Judgment of 6 December 2022, para 152.

[66] Judgment of 6 December 2022, para 166.

Therefore, the conferral upon the EU itself of a real fiscal capacity – intended here as the capacity to determine its resources – seems not possible for the BVerfG, even if provided with a Treaty change and with all due democratic guarantees within the relative decision procedure[67].

Before the formulation of the referred arguments, there is a long and reiterated vindication of democratic rights of German citizens, based on Article 38 of the German Basic Law, whereby any public power must be subject to democratic control and to the possibility of each citizen to influence, on a free and equal basis, the exercise of such power. And the long vindication is connected, in the magnificent edifice of the German constitutional jurisprudence, to the respect of the principle of conferral in the case of the EU and of other International Organizations, as well as with the internal guarantees provided by the EU Treaties as regards in particular the respect of the rule of law and of fundamental rights[68].

The referred arguments provoke mixed feelings. The sacred tribute to democracy must of course be respected and the relative constraints emerging at the national level can be defined only by the competent authorities, namely constitutional courts, in an endeavour to strike the right constitutional balance. At the same time, one can hardly escape the sensation that the already referred distrust towards the European Institutions and democratic framework has not disappeared. The choice of not engaging a new dialogue with the Court of justice, claiming that every legal point was clear, or already clarified, leaves, according to early commentators, more than a doubt on the real cooperative attitude of the BVerfG[69]. Moreover, this *méfiance* towards the *European way* goes hand in hand with the claim, renewed on the basis of well-known arguments, to carry out an *ultra vires* review (as well as an 'identity review') of EU law acts: such review rests written in stone for the BVerfG, notwithstanding the engagements – questionable as they may be under national law – undertaken by the German Government to close the infringement procedure after the *Weiss affaire*[70]. Anyone taking care of the current state of European integration should content himself with the *positive* final outcome of the judgment at issue.

Policies and decisions of European Institutions can certainly be the object of debate and I do not intend as absolutely 'positive' any outcome which, at the end, endorses European choices whatever they are. However, this last episode[71] generates again a sense of uncertainty that does

[67] See Nguyen and van den Brink, *An early Christmas Gift from Karlsruhe?: The Bundesverfassungsgericht's NextGenerationEU Ruling*, *VerfBlog,* 9 December 2022, https://verfassungsblog.de/an-early-christmas-gift-from-karlsruhe/. For some critical remarks on the lack of democratic legitimacy of the legal architecture of the *Recovery Plan* in general, see Judgment of 6 December 2022, paras 233-234.

[68] See Judgment of 6 December 2022, paras 112-146.

[69] See Nguyen and van den Brink, at 67.

[70] The highest point reached by Karlsruhe judges is laid down in the passage where they state that: '*Ultra vires* review and identity review are exercised with restraint and in a cooperative manner that is open to European integration. This requires – when necessary – that the Federal Constitutional Court request a preliminary ruling from the Court of Justice of the European Union in accordance with Art. 267(3) TFEU and, in the course of its own review, interpret the measure in question in accordance with the understanding determined by the Court of Justice' (Judgment of 6 December 2022, para 139). The well-known doctrine of *ultra vires* review is however reiterated in the following parts of the decision.

[71] As said from the outset, the 9 December 2022, at 4, decision on the ratification of the recent amendments to the Treaty establishing the European Stability Mechanism will not be analyzed here.

not seem useful for the progress of European integration, to which the BVerfG continue nevertheless to show deference. Without entering here in a thorough analysis of the 6 December 2022 judgment, it is striking in particular that arguments are presented with the usual attitude aiming to show great solidity, but clear requirements as to the enactment of constitutional conditions deemed crucial for the participation of the German Federal Republic to the life of the EU are not provided. Here I refer to the issue of financial engagements and in particular for the notion of 'evident breach of absolute outer limits in budget matters'[72], thus the door rests obviously open to a possible future tightening by the BVefrG of the conditions in question.

The issue regarding the German participation to Next Generation EU has been settled quite rapidly. The Judges of the *Bundesverfassungsgericht* were certainly aware of the potential impact of a negative decision on their part and – leaving aside here all legal issues which were certainly at the heart of their evaluations – one may suppose that they did not want to replicate the experience of the PSPP decision. What they have probably drawn from that past experience is the option to entrust directly the *Bundestag* with the task of overseeing the action of the EU. It is true that for Next Generation EU (unlike the PSPP) no additional justification was required on the part of the EU, and thus the BVerfG has not felt the need to apply the *counterlimits* and then to throw the ball in the court of the political institutions to ascertain whether the EU Institutions have done their *job*, as done in the *Weiss* case. Anticipating any possible successive legal action on the follow up to its judgment (like that filed after *Weiss*), the Karlsruhe Court has highlighted its various perplexities and then has left the issue directly in the hands of the *Bundestag*.

Despite some uncertainties until the end of the proceedings, there has not been a deep impact on the progress of the dossier in question at the European level. However, it has not been fully and entirely clarified what it is legally possible and what is not for Germany: while uncertainty offers precious spaces for political negotiations, the severe eyes of the BVerfG rest open on any new step to be taken.

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Before the intervention of the BVerfG, the launch of the *Recovery Plan* had been blocked for some time by the Hungarian and Polish veto.

[72] See in particolar para 136, which is worth quoting: 'In its case-law, *the Second Senate has not yet decided whether and to what extent justiciable limits regarding the assumption of payment obligations or liabilities can be derived from the principle of democracy*. In any case, only evident breaches of absolute outer limits would be relevant for the purposes of constitutional review (...). Similarly, payment obligations or assumptions of liability can only be considered to be in breach of any such outer limit following directly from the principle of democracy if, when they are called, such financial commitments not only had the effect of restricting budgetary autonomy, but would essentially negate this autonomy, at least for an appreciable period of time (...)' (emphasis added). The formulation used defines apparently broad criteria, which should shape a narrow scope for the scrutiny of the Constitutional Court (and in the following paragraph it is stated that a 'wide margin of appreciation' should be reserved to the Parliament). At the same time, it seems clear that the opening of the quoted passage is aimed at leaving the door open to future definitions by the same Second Senate of the exact boundaries of financial engagements stemming from the democratic principle. See also para 219, where the BVerfG states again that the precise contours of the notion of '"evident breach of absolute outer limits" in budget matters' rest undefined.

As widely known, these two Member States were deeply concerned about the proposal for a regulation establishing a '*general regime of conditionality for the protection of the Union budget*', intended to preclude disbursement of European funds – not only those of the foreseen *Recovery Plan* – in case of breaches of the rule of law[73]. Concerns for the respect of the rule of law have not found a satisfactory response thus far. Two Article 7 TEU procedures for suspected violation of the founding values of the Union, enshrined in Article 2 TEU, namely the rule of law, were brought against Hungary and Poland. However, the two procedures have been hitting the stumbling block of the solidarity between the two Member States, that would oppose a veto against any ultimate decisions against each other[74].

The regulation on the '*general regime of conditionality for the protection of the Union budget*' should be triggered only when threats to the rule of law have been perpetrated in the context of the implementation of the EU budget[75]. Therefore, the instrument in question has a much narrower scope than Article 7 Procedures, that do not even encounter the limit of EU competences[76].

Meanwhile, other means of interventions for breaches of the values of the EU had found a much larger way to go ahead. The Court of justice has carved out of Articles 19(1) TEU and 47 CFR a wider room than that that would result from the simple application of Article 51 of the Charter. In fact, while the latter provision defines the scope of the Charter, as regards Member States, clarifying that this include their acts and behaviours '*only when they are implementing Union law*', Article 19(1), second indent TEU states the duty of Member States to provide appropriate judicial remedies '*in the fields covered by Union law*', without requiring that they are acting to implement EU law. In particular, where a judicial organ may be called upon to state on matters pertaining to EU law also in future situations – therefore with an assessment of the

[73] New means to protect EU values conceivable, but the point cannot be dealt with here. See Bonelli, Claes, De Witte and Podstawa (eds.), "Usual and Unusual Supects in Protecting EU Values" (2020) 7, *European Papers Special Issue*, 641.

[74] See Mori, Il primato dei valori comuni dell'Unione (2021), Il Diritto dell'Unione europea, 1, 73.

[75] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ* L 433/1, 22.12.2020, p. 1 envisages that 'appropriate measures' shall be taken only for breaches of the rule of law that 'affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way' (Article 4(1)).

[76] The evaluation to be carried out by political Institutions in the framework of Article 7 TEU procedures should not be subject to the limit of EU competences, as a breach of the EU founding values has to be appreciated in the broadest possible sense. Should a threat to those values be subtracted to the type of control at issue on the sole basis of being (allegedly) carried out without connections to EU law (whatever the sense and the intensity of such links may be), the effectiveness and credibility of the mechanism itself would be undermined. Moreover, as the Court of Justice is not involved, the evaluation of the existence of links with the EU legal order would pose additional difficulties and might be the object of political bargaining in the context of an Article 7 TEU procedure. Thus, possible incoherencies could be introduced in the system, the evaluations of the political Institutions not necessarily being in line with views of the Court of Justice on the point. On the inexistence of the limit of competences under Article 7 Procedures, see also European Commission, *A new EU Framework to strengthen the Rule of Law*, COM (2014)158 final, para 3.

potential exercise of judicial competences –, the issue falls within the combined scope of Articles 19 TEU and 47 CFR[77].

Alleged breaches of rule of law in a series of cases could amount to a breach of specific provisions of EU law, as well. In particular, issues connected with the independence of the Judiciary[78] have been brought before the Court of Justice – on the basis of the arguments, just reported, that broaden the scope of intervention of the Luxembourg Court – both by some national judges via preliminary proceedings and by the Commission[79]. The harsh game before the Court of Justice does not seem to have come to an end. The proposed enlargement of the duty to refer a preliminary question to the Court of justice, under the terms specified above, goes in the direction of a further strengthening of the role of the Luxembourg Judges, although without trespassing the boundaries of their competences as laid down in the Treaties[80].

Let us now come back to the regulation establishing a general regime of conditionality for the protection of the Union budget. Late November 2020, the European Parliament and the Council have found a deal on a text for the aforementioned instrument, whereby financial leverage is used to obtain what Article 7 TEU procedures seem currently unable to achieve.

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[77] Therefore, when assessing whether the Judiciary of a Member State enjoys sufficient independence to take part, on the basis of Article 19 TEU, in the EU judicial protection system, the scrutiny of the Court of Justice covers an area which is not strictly confined to the implementation of EU law pursuant to Article 51(1) of the CFR. See Case C-64/16, *Associação Sindical dos Juízes Portugueses (ASJP)*, EU:C:2018:117, para 29, C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, para 50, Joined cases C 585/18, C 624/18 and C 625/18, *A.K.*, para 82, C-896/19, *Repubblika* v *Il-Prim Ministru*, EU:C:2021:311, para 36. For a different appraisal of a situation in which there were no questions related to the application of EU law and the Court of justice declared the preliminary reference inadmissible, see Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, para 49.
The creation of direct effects arising out of the combination of Article 19(1) TEU and of Article 47 CFREU has been criticized: see Rasi, "Effetti indiretti della Carta dei diritti fondamentali? In margine alla sentenza *Commissione c. Polonia (Indépendance de la Cour suprême)*", in European Papers 2/2019, *Insight of 31 July 2019*, 615, Martín Rodríguez, "Poland before the Court of Justice: Limited or Limitless Case Law on Article 19 TEU?", in European Papers 5/2020, *Insight of 25 April 2020*, 331, www.europeanpapers.eu. On the issue see also Mori, at 56, 73 ff. See also Lazzerini, "Inapplicabile, ma comunque rilevante? La Carta dei diritti fondamentali nella giurisprudenza recente della Corte di giustizia sull'indipendenza dei giudici nazionali", AA.VV., *Temi e questioni di Diritto dell'Unione europea – Scritti offerti a Claudia Morviducci* (Cacucci, 2019), 171, 178.

[78] The independence of the Judiciary, on top of being an essential element of the rule of law, is seen – in the context of the design of Article 19 TEU – as a basic condition for the functioning of the EU judicial protection mechanism, where national judges adjudicate rights arising out of the EU legal order. Thus, the right to access to a judge and to an effective judicial remedy, laid down in Article 47 of the Charter of fundamental rights of the EU, is at stake. See, *inter alia*, Case C-216/18 PPU, *LM*, paras 48-54, Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, paras 42-52, Joined cases C-585/18, C-624/18 and C-625/18, *A.K.*, paras 79-86, Case C-824/18, *A.B.*, paras 108-112, Case C-791/19, *Commission* v. *Poland* (Disciplinary Regime of Judges).
The idea that the independence of the Judiciary is essential for the functioning of the EU judicial protection system as envisaged by Article 19 TEU, which gives '*concrete expression*' to the value of the rule of law, included amongst the EU founding values enshrined in Article 2 TEU, and is at the core of the guarantees contained in Article 47 of the CFR, as well, is not entirely new in the case-law of the Court of Justice: see, with reference to other precedents, Case C-64/16, *ASJP*, paras 30-44. Almost all the judgments of the rule of law *saga* cited in these pages contain indications regarding the independence of the Judiciary. For another recent appraisal of the criterion of independence, see Case C-896/19, *Repubblika* v *Il-Prim Ministru*, paras 51-72. See in general on this issue, Carta, at 36, 57 ff.

[79] See in particular the infringement procedures in Case C-192/18, *Commission v. Poland*, EU:C:2019:924, Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, Case C-791/19, *Commission v. Poland*, at 38.

[80] See above, Section 1.2.1.

Feeling to be the victims of the envisaged cut of all European funds on the basis of their alleged violations of the rule of law, Hungarians and Polish have resorted to the use of their veto power on the parallel negotiating table where the start of the *Recovery Plan* were being discussed, and where a unanimous decision was needed. In particular, both the decision on the new own resources – which is necessary to back the borrowing on the markets of the big resources needed for the *Plan* – and the establishment of a Multiannual Financial Framework (MFF) require a unanimous decision within the Council (see Articles 311 an 312 TFEU respectively).

The credibility of the entire edifice and the prompt response to the worst economic crisis ever faced by the Union were at stake. As the shortly described events unfolded, it has become rapidly too late to forestall a highly dangerous deadlock. On 25 November 2020, the President of the Commission declared before the European Parliament that disagreements over the general regime of conditionality should have been finally settled by the Court of Justice in Luxembourg[81] and attached her stigma on the Hungarian-Polish move aimed at blocking the approval of the *Recovery Plan*. Hence the matter of the rule of law seemed not considered as part of a possible bargaining by the EU executive[82].

However, political pragmatism reversed the rigorist approach the Commission had trumpeted just before the European Council meeting. Thanks to a compromise incorporated in the December 2020 European Council Conclusions, Hungary and Poland decided to renounce to oppose their veto against the setting up of the *Recovery Plan*[83]. The regulation would have not been applied until the final decision of the Court of Justice on the action challenging its validity that a Member State may have proposed. Hungary and Poland finally filed two actions for annulment, which were recently rejected by the Court of justice. The judgments are the object of the writings of Cesare Pinelli and Gianluca Contaldi[84].

In the context of the referred political compromise, even the Commission has accepted to suspend the application of the regulation, thus giving to Hungary and Poland what, more appropriately, could have been granted by a provisional measure delivered by the Court of justice after the filing of the actions for annulment. It is another not laudable story and some early

[81] These are the words by Ursula von der Leyen: '*For anyone who would nevertheless harbour doubts, there is a clear path: they can go to the European Court of Justice and have the new rules scrutinised down to the last detail. That is the place where we usually thrash out differences of opinion regarding legal texts. And not at the expense of millions of Europeans waiting desperately for our help'*. See Speech by President von der Leyen at the European Parliament Plenary on the preparation of the European Council meeting of 10-11 December: https://ec.europa.eu/commission/presscorner/detail/en/speech_20_2204.

[82] See also EU Commissioner Paolo Gentiloni, Speech at the webinar '*Dialoghi Italo-Francesi per l'Europa - Strumenti per rilanciare le economie italiana e francese nel contesto del Covid-19*', 3 December 2020, https://www.luiss.it/evento/2020/12/03/dialoghi-italofrancesi-strumenti-per-rilanciare-le-economie-italiana-e-francese-nel-contesto-del-Covid-19, as reported by ANSA, www.ansa.it. On top of that, Ursula von der Leyen in other statements openly threatened to propose the setting up of a *Recovery Plan* for 25 Member States, cutting off Hungary and Poland, although the technical solution that could have been used was unclear.

[83] See European Council Conclusions, 10-11 December 2020, Paras 1-4.

[84] See Pinelli, "Valori comuni agli Stati membri e interesse finanziario dell'Unione", Contaldi, "Le sentenze della Corte di giustizia sui ricorsi di Polonia e Ungheria e l'emersione del concetto di identità europea", both in this Issue. On the two judgments see also Circolo, "Strumenti alternativi di tutela dei valori: il regolamento sulla condizionalità dello Stato di diritto" (2022), IV *I Post di* AISDUE, https://www.aisdue.eu/wp-content/uploads/2022/09/Post-Andrea-Circolo.pdf.

commentators have highlighted the paradox of a possible breach the rule of law inside the EU itself[85]. Also after the endorsement by the Luxembourg judges, the game is not over: future decisions on effective restrictions to disbursement of funds are likely to be challenged.[86] Hence, the situation rests, in this respect, under uncertainty.

The game is not over also as regards the quest for identity: the protection of national constitutional identities – unsuccessfully invoked by Hungary and Poland in the referred judgments – rests problematic under EU law, while we can spot the, uncertain as it may be, emergence of a European identity[87].

3. Primacy is everywhere, primacy is nowhere…

As observed by Luke Dimitrios Spieker[88], the decision to close the infringement procedure against Germany due to the 5 May 2020 judgment of its Constitutional Court[89] has been made public less than a month before the announcement of the launch of the infringement procedure against Poland for having breached the primacy of EU law[90]. The breach by Poland came out of two rulings of the Constitutional Tribunal of 14 July and 7 October 2021[91]. The decision of 7

[85] See Alemanno and Chamon, *To Save the Rule of Law you Must Apparently Break It, VerfBlog,* 11 December 2020, https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/.

[86] See Fisicaro, "Protection of the Rule of Law and 'Competence Creep' via the Budget: The Court of Justice on the Legality of the Conditionality Regulation", ECJ Judgments of 16 February 2022, Cases C-156/21, Hungary v Parliament and Council and C-157/21, Poland v Parliament and Council, (2022) *European Constitutional Law Review*, 1, 22 ff. <https://doi.org/10.1017/S1574019622000128>.

[87] See on the point Pitruzzella, "L'integrazione tramite il valore dello "Stato di diritto"", *Federalismi*, 2022, www.federalismi.it, IV, V; Contaldi, at 84.

[88] See Spieker, "The Conflict over the Polish disciplinary regime for judges – an acid test for judicial independence, Union values and the primacy of EU law: *Commission* v. *Poland*, Annotation to Case C-791/19, *Commission* v. *Poland* (Régime disciplinaire des juges)", 61 CMLR (2022), 777, 807. See Case C-791/19, *Commission v. Poland*, at 38.

[89] See European Commission, "December Infringements Package: Key Decisions", at 20.

[90] Commission Press Release, "Rule of law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal", 22 December 2021, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070.

[91] See in particular ruling K- 3/21 of 7 October 2021, analysed in the paper by Jacques Ziller in this collection; reference is made to the press release, as the full text of the judgment is still not available at the time of writing (The texts of the press releases, or, where available, of the judgments, are published on the website of the Tribunal: https://trybunal.gov.pl/en/). On the judgment in question, see also Di Federico, "Il Tribunale costituzionale polacco si pronuncia sul primato (della Costituzione polacca)": *et nunc quo vadis*?", BlogDUE, https://www.aisdue.eu/wp-content/uploads/2021/10/Di-Federico-BlogDUE-1.pdf; more in general on the case-law of the Polish constitutional Tribunal on primacy of EU law, see Zoll, Południak-Gierz and Bańczyk, "Primacy of EU Law and jurisprudence of Polish Constitutional Tribunal", Study for the European Parliament's JURI Committee, 2022, https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf.
On Judgment P 7/20 of 14 July 2021, see Circolo "Ultra virse e Rule of Law: a proposito della recente sentenza del Tribunale costituzionale polacco sul regime disciplinare dei giudici" (2021), III *I Post di AISDUE*, https://www.aisdue.eu/wp-content/uploads/2021/07/Segnalazione-Andrea-Circolo-2.pdf.
The strikes of the Polish Constitutional Tribunal are not limited to the EU Treaties. Even Article 6 of the ECHR has been considered to some extent incompatible with the Polish Constitution by judgment K-6/21 of 24 November 2021. This last ruling is intended as a reaction to ECtHR, Appl. No. 4907/18, *Xero Flor w Polsce sp. z o.o.* v. *Poland*, Judgment of 7 May 2021, see Ploszka, "It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional", *Hague Journal on the Rule of Law* (2022),

October 2021, rendered on an application by the Polish Government, contained in particular a direct attack at the EU legal order and affirmed that primacy as a principle, alongside a series of EU primary law provisions, are in contrast with the Polish Constitution. In essence, the Polish Constitutional Tribunal claimed, similarly to the BVerfG, that EU Institutions are acting *ultra vires* and that primacy is bringing an attack to the democratic character of Poland. Furthermore, the Tribunal claimed that Article 19(1) is contrary to the Polish Constitution as it gives competences to national judges to (in the word of the press release) 'bypass the provisions of the Constitution in the course of adjudication (…)' and 'adjudicate on the basis of provisions which are not binding, having been revoked by the Sejm [the lower house of the Parliament] and/or ruled by the Constitutional Tribunal to be inconsistent with the Constitution'[92]. Finally, the Tribunal asserted that Articles 2 and 19(1) TEU are in contrast with the Polish Constitution, because they recognize the competence of domestic courts to review a series of aspects related to the internal organization of the Judiciary and essentially related to the issue of appointment of judges.

Spieker raises the issue of the difference in treatment between the German and the Polish case, as both contain an attack to primacy. The Author uses clear words to differentiate the two rulings respectively of the BVerfG and of the Polish Constitutional Tribunal – as well as the two judicial intervention models lying behind them – that are worth quoting:

'(…) substantively, *PSPP* is hardly comparable to the judgment in K 3/21. While the former concerned the isolated act of an EU institution, the latter declared the ECJ's interpretation of central Treaty's provisions to be unconstitutional. The BVerfG generally accepts the primacy of EU law over the *Grundgesetz* and intervenes only with regard to a narrowly defined part, whereas the [Polish] Tribunal asserts the primacy of the entire Constitution over EU law. (…) In addition, PSPP is – even though highly questionable – the outcome of nearly 30 years of judicial development. (…) The [Polish] Tribunal reasoning, by contrast, is largely unsubstantiated and incoherent'[93].

In addition, the Author points out two other basic reasons for differentiation of the two cases at issue. In the first place, the two governments have shown a very different attitude. We have seen that the German Government formally recognized primacy, the rule of law in the EU legal order and other founding principles of EU law. Moreover, it undertook the obligation to avoid new *ultra vires* rulings[94]. This makes clear that the willingness of the Government to

https://link.springer.com/content/pdf/10.1007/s40803-022-00174-w.pdf. See, in the same vein, the more recent judgment K-7/21 of 10 March 2022: similarly to what happens with EU law (see in the main text) the problem arises because national judges are called upon to to disregard national (also constitutional) rules regarding the organization of the Judiciary.

[92] It seems that the Tribunal does not accept, *inter alia*, the A.K. doctrine, whereby the Court of justice imposes to national judges to set aside national provisions on the jurisdiction of judges that are not independent. See *A.K.*, at 36 and corresponding text.

[93] Spieker, at 69, 806.

[94] See above, section 1.2.

conclude a fastidious incident have eased the closure of the infringement proceeding. On the contrary, judgment K 3/21, as just seen, comes out of an application of the Polish Government.

In the second place – leaving aside doctrines that set out criteria to qualify certain judicial moves as destructive (as opposite to constructive), or as abusive (as opposite to loyal) – Spieker advocates the application of a '*substantive understanding of primacy*'[95]. In essence, the Author refers to a basic judicial concept of effectiveness of EU law widely used by the Court of justice in its case-law (that would be weak and insufficient) and to more advanced theories, which find the basis of primacy in the need to ensure equality between Member States[96], or between individuals[97]. Building upon this last understanding, the position of Germany and Poland would be very different. While in the former the practical effects of the *Weiss* judgment of the BVerfG were very limited, and with no effective implications for individuals, in the latter the right to access to independent judges and to the Court of justice through preliminary references – which is, as seen, amongst the founding structures of the EU legal order – is impaired. This would justify the difference in treatment between the two cases.

These considerations might have played a role, however what is interesting is that the Author invokes a substantive understanding of primacy. An investigation into the long standing and complex debate about the origins and nature of primacy lays beyond the scope of this study.

I will offer a very brief appraisal of a few and selected simplified positions, acknowledging from the beginning that mostly each of them catches a part of the legal reality. Primacy can be intended a simple 'conflict rule'[98], similar to those existing in private international law, with the limited function of selecting the applicable – national or European – norm, chosen by reason of competence only. I consider that the idea to maintain equality between Member States, which certainly contains a substantial element, still descends from a 'technical' conception of primacy, where coherence and impartiality are to be seen as the inevitable results of the correct functioning of a treaty-based system (where discrimination between contracting parties to a treaty is not admissible)[99]. The neutrality of these ideas is easily called into question and

[95] Spieker, at 47, 808; emphasis original.

[96] Fabbrini (2015), "After the OMT case : The supremacy of EU law as the guarantee of equality of the Member States, 16 GLJ, 1003; Lenaerts, "L'égalité des États Membres devant les traités", (2021) *Revue du droit de l'Union européenne*, 7.

[97] Klamert, "Rationalizing supremacy: Supremacy, effectiveness, and two standards of equality in EU law", Verfassungsblog, 18 October 2021. For further references, see Spieker, at 47.

[98] See Szpunar, "The Principle of Primacy", intervention at the Study Meeting between the Corte costituzionale and the Court of justice of the European Union, *Member States' National Identity, Primacy of European Union Law, Rule of Law And Independence of National Judges*, Rome, 5 September 2022, p. 7, https://cortecostituzionale.it/jsp/consulta/convegni/5_sett_2022/Giornata-Studio-Szpunar.pdf.

[99] The literature on primacy is very vast. For interesting discussions of the foundations of primacy in the case-law of the court of justice, see, in addition to other writings to which I make reference in this essay and amongst many others, Arena, "Sul carattere "assoluto" del principio del primate del diritto dell'Unione europea" (2018), XIII *Studi sull'integrazione europea*, 317 and, with a focus on the historical origins of primacy, Id., "From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v ENEL (2019), 30 *European Journal of International Law*, 1017; for a more recent inquiry which moves from an original 'circular' idea, to the requirement of an unrestricted acceptance of the principle, connected to the building of a European identity, see Weber, "The Identity of Union Law in Primacy: Piercing through *Euro Box Promotion and Others*", (2020) 7, *European Papers*, 749. On the last developments of the case-law see also Dougan, "The Primacy of Union Law over Incompatible National Measures: Beyon Disapplication and Towards a Remedy of Nullity?", 61 CMLR

considered only apparent when results of the application of primacy lead to solutions that are perceived as unsatisfactory. Such perceptions can emerge at the national level (where sometimes objections to primacy are founded on the need to protect national constitutional identity), or, from the perspective of EU law, for the sake of a coherent reconstruction of the system on the basis of values and choices that should be made openly and explicitly.

Approaches that can be qualified as 'federalist' tend to underline the need of European rules to prevail[100]. Primacy is also seen as becoming an overwhelming principle, in particular to the detriment of direct effects, which should constitute its pre-requisite, but are sometimes not (explicitly) required or non (at least accurately) analyzed by the Court of justice[101]. In a different perspective, the principle in question is sometimes intended in a narrow or strict sense, linked to direct effects and effectiveness of the protection of rights stemming from EU law, as opposed to a 'broad' one, whereby primacy is called into question where any infringement of EU law arises[102].

As a reaction to these possible criticisms, substantial understandings emerge to promote what we can call an individual-oriented conceptualization of primacy. Spieker's suggestion on a differentiation among infringements of the rule of primacy depending on the effects on the position of individuals openly renounces to impose formally the same treatment to all, but is presented as a return to the real origins, when the judicial defence of the position of individuals occupied the centre of the stage. Leonard Besselink also advocates a substantial understanding of primacy in this Special Issue[103], with regard, in essence, to the content and standard envisaged in rules enjoying primacy. Convergence of standards and a race to the to the top, in particulart when it comes to fundamental rights protection, should, in his view, guide the developments of European integration. Reaching the correct equilibrium between different instances rests the big daily challenge to which European and national courts are faced.

Navigating through the meandering courses and intersections of these conceptions proves to be very difficult, while cutting questions and running to the ultimate option 'primacy yes/primacy no' constitutes an oversimplification of a central problem in the current state of development of EU constitutional law. Orientations as to the best understanding of primacy – amongst those just recalled or including other ones – cannot be provided here. Just a limited indication can only regard the method. What flows, again, from the principle of sincere cooperation, is the need for courts to learn to speak *common words*, as argued by Silvana Sciarra in this Special Issue[104]. The responsibility for the construction of the European legal order is

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2022, 1301.

[100] Traces of this conception can be found in Case *Simmenthal*, where the Court of justice underlines the hierarchical dimension that, in its view, existed in the relationships between national and European norms.

[101] See Gallo, "Controlimiti, identità nazionale e i rapporti di forza tra primato ed effetto diretto nella saga Taricco" (2017), *Il diritto dell'Unione europea*, p. 249, Id. *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali: evoluzione di una dottrina ancora controversa* (Giuffrè, 2018), 163 ff. and 351 ff., Id., "Effetto diretto del diritto dell'Unione europea e disapplicazione, oggi" (2019), 12 *Osservatorio sulle fonti*, 2.

[102] See Szpunar, at 71, p. 6.

[103] See Besselink, The Problem with Primacy, in this issue.

[104] See Sciarra, "First and Last Word: Can Constitutional Courts and the Court of Justice of the EU Speak Common Words?", in this issue. On the last developments of the case-law of the dialogue between the Italian Constitutional

definitely shared between national and European courts. The contribution of the former is essential also for legal concepts like primacy: the questions raised, the way the legal and factual background is analyzed already imply the promotion or marginalization of certain legal conceptions. I will provide just an example: direct effects are marginalized …but the question as to the existence of direct effects is often not even asked: other preoccupations of national courts overthrow that question and other legal concepts come under the spotlight. Without having the possibility of further explore this interesting issue, the evolution of the way primacy – and other connected legal concepts – is intended will be shaped by the judgments of the Luxembourg Court, which of course take the stimulus offered by the national courts making questions (as well as by the Commission, when bringing infringement cases).

At the end, what marks the difference between experiences of dialogue that may be defined successful and those which are, on the contrary, unsatisfactory – the first not necessarily concluded with identity in arguments and/or solutions between the national court involved and the Court of justice – is exactly the existence or inexistence of a real and sincere effort to find a common ground. And, definitely, *common words*. Given that the quantum leap towards a federal system has not been made and is not likely to happen anytime soon[105], only where constitutional practices or traditions, implications and limits become understandable and effectively shared with the companion court, a common ground does exist. This implies that the courts engaged in the dialogue are ready to consider new formulations, interpretations and solutions and that their rejection will be subject not to a proper judicial scrutiny, but to a kind of peer-review where the reasonableness of argumentations and solutions is examined. Subsequent steps to better solutions will only be possible in a continuous dialectic exercise.

In this connection, the evaluation related to the *new* duties to refer by national judges proposed here, as well as, more in general, their responsibility to act under the principle of sincere cooperation – also going beyond what is strictly required, like when *second questions* are asked (also in the same preliminary reference to present additional options and without anyway watering down the sense of preliminary rulings) – recognize an extremely relevant and delicate position to *EU common judges*.

Finally, coming back to the jurisprudence of the BVerfG, that has offered the path for these reflections, it must be observed that the responsibility just sketched becomes evident with reference to the attitude taken and the words used. The 5 May 2020 decision seemed to have

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Court and the Court of justice, see also Gallo and Nato, "L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte Costituzionale, *Eurojus*, 2020, https://rivista.eurojus.it/wp-content/uploads/pdf/gallo-nato.pdf; Gallo, "Migrants' Social Rights in the Dialogue between the CJEU and the Italian Constitutional Court: Long Live Article 267 TFEU!", 8 September 2021, *EUlawlive*, https://eulawlive.com/op-ed-migrants-social-rights-in-the-dialogue-between-the-cjeu-and-the-italian-constitutional-court-long-live-article-267-tfeu-by-daniele-gallo/; Nascimbene and Anrò, "Primato del Diritto dell'Unione europea e disapplicazione. Un confronto fra Corte costituzionale, Corte di Cassazione e Corte di giustizia in materia di sicurezza sociale", *Giustizia insieme*, 2022, https://www.giustiziainsieme.it/en/diritto-ue/2269-primato-del-diritto-dell-unione-europea-e-disapplicazione-un-confronto-fra-corte-costituzionale-corte-di-cassazione-e-corte-di-giustizia-in-materia-di-sicurezza-sociale?hitcount=0.

[105] See Verola, at 13.

intended consequences, revealed, *inter alia*, by a subsequent *call for action* where the role of national constitutional courts is pushed up to a level in which, in my opinion, the dialogue between courts would become a run to the expropriation of reciprocal competences[106]. This is how I read the idea that constitutional courts should enhance the limits of EU law (principle of conferral, respect for national identities), also with the establishment of a 'reverse preliminary ruling procedure'. As far as I understand, the Luxembourg judges should ask national courts guidance as regards certain problems. Here I see the difficulty in accepting that those limits are inherent to the system and their respect could only by evaluated within the system and according to its logic. Notwithstanding the comprehensible fatigue experienced when trying to act within the system (with its current limits and difficulties), the rationale of the preliminary reference procedure must be found in unity, while forcing the Court of justice to go to each national constitutional court to ask for the definition of such limits (and without investigation of the concrete framing of such system) would lead, to say the least, to a fragmented, completely inefficient and incoherent situation. This is not a way to enhance sincere cooperation, but to content some national well organized groups' appetites. These proposal would not even be useful to reaffirm the idea of Member States as 'Masters of the Treaties', as this could not anyway imply a power of each of them to keep EU Institutions that should rest independent, like the Court of justice, under the control of national organs, even important ones like constitutional courts. The autonomy of EU law and of the EU legal order should be preserved by the same Member States – again in line with the principle of sincere cooperation, read in conjunction with the principle of conferral[107] – while Member States have always in their hands the power to amend the EU founding Treaties[108], or to choose the ultimate option of exiting the Union.

The *Weiss* decision of the *Bundesverfassungsgericht* has also had unintended consequences. According to a widespread idea, the Polish Constitutional Could would have acted under the 'mighty shadow' of the German colleagues[109]. This and other initiatives flourishing at the national level do not seem in line with the need to a refined and accurate understanding of the delicate and complicated framework governing the relationships between national and European legal orders and, at the end, with the duty of sincere cooperation.

Intertwined problems of a procedural, substantial and methodological nature emerge as regards primacy and the other delicate problems lying at the forefront of these difficult times for European integration and addressed in this Special Issue. Many doubts arise on which the other contributions shed some light.

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[106] Grabenwarter, Huber. Knez and Ziemele, "The Role of Constitutional Courts in the European Judicial Network", (2021) 27 European Public Law, 43 ff.

[107] Please see Poli and Cisotta, cited at 17, 1085 ff.

[108] I do not address the issue of the limits the Member States may encounter in amending the EU Treaties. It is sufficient to say that, although competences may be diminished, it should be considered impossible to impair the autonomy of the legal order and its essential features, including primacy and the basic framework of its judicial system. See, to that effect, Opinions 1/09 and 2/13, at 25, 2 and 28.

[109] See Spieker, at 47, 806; Weiler, Why *Weiss*? I•CON (2021) 19, 179, 180 and 182.