Reconciling Jurisdictions in the European System of Constitutional Adjudication

Reform Proposals for the CJEU

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Abstract

Several authors have concluded that an institutional reform of CJEU is necessary, with some putting forward reform proposals accordingly. This paper briefly recounts the reasons why such a reform may be indeed necessary, with due attention to the fact that national constitutional resistance to the Luxembourg court seems to be occurring with increasing frequency. In what follows, I present some of the institutional reform proposals that appeared in the academic discourse and make some critical observations in respect of these ideas. These proposals include: the introduction of a reverse preliminary reference procedure for cases related to national identity; a political override mechanism; a proposal for limiting preliminary reference rights to high courts (albeit with exceptions); and finally, the idea to establish a new court specialized in competence issues. Perhaps the latter proposal is the most popular, although various authors propose substantially different constructions. I conclude that a Subsidiarity Court specialized in competence issues could be an effective instrument for a better representation of national constitutional perspectives at the EU level, which would be essential, should open non-compliance be avoided. I also propose a complementary mechanism to the preliminary reference procedure, which would allow constitutional courts to participate in the European constitutional dialogue.

Keywords: CJEU, constitutional courts, reform, preliminary reference, subsidiarity court.

1. Why Should We Think about Reforming the CJEU?

During the last decade, there have been three occasions where a national constitutional court or supreme court ruled that the CJEU exceeded the competences conferred on it: first in the Czech Republic, then in Denmark, and finally in Germany.[1] In the same vein, the Polish Constitutional Court's *K 3/21*

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1 PL. ÚS 5/12.; Danish Supreme Court (Højesteret) Case no. 15/2014; BVerfGE 2 BvR 859/15.

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decision can be understood as an attempt of resistance against the integrationist role of the CJEU.[2] Even if we cannot speak of a coherent process, this series of *ultra vires* judgments is certainly spectacular, considering that this kind of resistance was previously completely unheard of. Although the resistance of the Czech and Polish Constitutional Courts or the Danish high court could have been seen as isolated cases, the *PSPP* decision of the *Bundesverfassungsgericht* raises the possibility that other constitutional courts may follow suit.[3] Of course, when national constitutional resistance emerges, its form and rationale may differ, nevertheless is possible that the underlying problems are intrinsic features of the system.

The case-law of the CJEU and the doctrines it has developed (in particular the principles of direct effect and primacy) have played a prominent role in the creation of the 'ever closer union', the current integrated legal system of the EU.[4] The preliminary reference procedure has played a crucial role in this process, in the framework of which the CJEU has developed intensive and mutually beneficial relations with the lower courts of the Member States.[5] The relationship between the CJEU and the constitutional courts of Member States, on the other hand, is not always amicable and is sometimes embittered by two interlocking problems. *(i)* First, the preliminary reference procedure can be used by ordinary courts to challenge the practice of the constitutional courts and, *in extremis*, even to question their role in the constitutional system, all with the CJEU's assistance.[6] *(ii)* Secondly, the control and delimitation of powers of the EU

2 Trybunał Konstytucyjny K 3/21.

3 Arthur Dyevre, 'Domestic Judicial Defiance in the European Union: A Systemic Threat to the Authority of EU Law?', *Yearbook of European Law,* Vol. 35, Issue 1, 2016, pp. 4-5. *Cf.* Arthur Dyevre, 'How Europe's legal equilibrium unraveled', at www.arthurdyevre.org/2020/05/19/how-europes-legal-equilibrium-unraveled/. About the PSPP decision, *see e.g.* Robert Böttner, 'The First Ever Ultra Vires Judgment of the German Federal Constitutional Court: PSPP – Will the Barking Dog Bite More Than Once', *Hungarian Yearbook of International Law and European Law,* Vol. 9, 2021, pp. 168-192; Maria Kordeva, 'The PSPP Judgment of the German Federal Constitutional Court – The Judge's Theatre According to Karlsruhe', *Hungarian Yearbook of International Law and European Law,* Vol. 9, 2021, pp. 193-211.

4 Joseph H. H. Weiler 'The Transformation of Europe', *The Yale Law Journal,* Vol. 100, Issue 8, 1991, pp. 2413-2418; Alec Stone Sweet, *The Judicial Construction of Europe*, Oxford University Press, New York, 2004, p. 53; Jean-Michel Josselin & Alain Marciano, 'How the court made a federation of the EU', *Review of International Organizations,* Vol. 2, Issue 1, 2007, pp. 67-73; Anne-Marie Burley & Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', *International Organizations,* Vol. 47, Issue 1, 1993, pp. 41-42.

5 Luigi Corrias, *The Passivity of Law – Competence and Constitution in the European Court of Justice*. Springer, New York, 2011, p. 15; Karen J. Alter, *The European Courts Political Power: Selected Essays,* Oxford University Press, New York, 2009, p. 32; Morten Broberg & Niels Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice,* 3rd edition, Oxford University Press, New York, 2021, p. 2; Ernő Várnay, 'Az Európai Bíróság és az aktivizmus délibábja', *Állam- és Jogtudomány,* Vol. 58, Issue 2, 2017, p. 94.

6 Michal Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts', *in* Monica Claes *et al.* (eds.), *Constitutional Conversations in Europe,* Intersentia, Mortsel, 2012, pp. 291-292; Jan Komárek, 'National constitutional courts in the European constitutional democracy', *International Journal of Constitutional Law*, Vol. 12, Issue 3, 2014, pp. 526-528.

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institutions (including the CJEU) is sought by both the Luxembourg court and the national constitutional courts reserving their right of *ultra vires* review (competence-problem).[7]

The prevalence of these problems is well illustrated by the responses given by the Czech and Polish Constitutional Courts to the *Landtová* and *A.B. and others* decisions.[8] In both cases, the supreme administrative court made a preliminary reference with the aim of challenging the practice or decision of the national constitutional court. In both cases, the CJEU was open to furthering this initiative.[9] The Czech Constitutional Court, defending its own reputation, declared the CJEU's judgment *ultra vires*, stating that it overstepped the powers conferred on the EU by the Czech Constitution.[10] The Polish Constitutional Court did not rule on the applicability of the specific CJEU judgment, but on the relationship between EU law and the Constitution in the context of an abstract constitutional interpretation upon the Prime Minister's motion. However, the Polish Constitutional Court made very clear that it did not consider the CJEU's

7 Joseph H. H. Weiler & Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', *Harvard International Law Journal,* Vol. 37, 1996, pp. 445-446. *Cf.* Theodor Schilling, 'The Autonomy of the Community Legal Order: An Analysis off Possible Foundations', *Harvard International Law Journal,* Vol. 37, 1996, pp. 406-407; Takis Tridimas, 'The ECJ and National Courts – Dialogue, Cooperation and Instability', *in* Anthony Arnull & Damian Chalmers (eds.), *The Oxford Handbook on European Union Law,* Oxford University Press, New York, 2015, pp. 417-419.

8 Judgment of 22 June 2011, *Case C-399/09, Landtová*, ECLI:EU:C:2011:415; Judgment of 2 March 2021, *Case C-824/18, A.B. and others*, ECLI:EU:C:2021:153

9 In *Landtová*, the CJEU has ruled that the practice of the Czech Constitutional Court regarding the so-called Slovak pensions is discriminatory and contrary to EU law. Judgment of 22 June 2011, *Case C-399/09, Landtová*, ECLI:EU:C:2011:415, paras. 41-54. In the Polish case, the question is more complex: the CJEU ruled that the referring court can continue to exercise its jurisdiction, which has been terminated by an 'amendment' of national law. It should be added that the legal provision on which the jurisdiction was based has been repealed by the Polish Constitutional Court. Judgment of 2 March 2021, *Case C-824/18, A.B. and others*, ECLI:EU:C:2021:153, paras. 26, and 71. More recently, the CJEU reached a similar conclusion in the Romanian *Euro Box* case. It stated that the primacy of EU law precludes "national rules or a national practice under which national ordinary courts are bound by the decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to" the law of the EU. Judgment of 21 December 2021, *Case C-357/19, Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para. 262.

10 Ústavni soud PL. ÚS 5/12.

judgment and the judicial development of European integration to be compatible with Poland's sovereignty.[11]

Although the displacement of constitutional courts and the conflict of jurisdiction, both separately and together, may pose a serious challenge to the proper functioning of the rule of law, the EU does not have an adequate response. In response to the German *PSPP ruling*, the European Commission launched infringement proceedings. The proceedings were due to end in December 2021, when the new German government promised the Commission that it would do everything to ensure that such judgments would not be taken by the Constitutional Court in the future. If they keep their promise, it will be most regrettable, representing a painful blow to the principle of the separation of powers.[12]

Recently, some have expressed concerns about the jurisprudence of the CJEU, calling *e.g.* for national constitutional resistance or institutional reforms.[13] However, the possible reform of the Luxembourg court has been a topic of academic debate for decades and there have also been political proposals from the Member States.[14] This paper aims to summarize reform proposals that could offer some solution to the problems described above. These include a reverse preliminary ruling procedure, limiting the preliminary reference right to higher courts, a political control mechanism for the jurisdictional review of CJEU judgments, and the establishment of a new court or chamber for competence review. Naturally, this paper does not aim to cover all existing proposals. It is also important to note that the ideas presented here are in part very general, sometimes lacking important details and leaving many questions open. In what follows, I critically assess these reform proposals and make some suggestions towards reconciliation by ensuring that Member States' constitutional concerns are properly addressed at EU level.

11 "Article 1, first and second paragraphs, in conjunction with Article 4(3) of the Treaty on European Union – insofar as the European Union, established by equal and sovereign states, creates 'an ever closer union among the peoples of Europe', the integration of whom – happening on the basis of EU law and through the interpretation of EU law by the Court of Justice of the European Union – enters 'a new stage' in which: *a)* the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties; *b)* the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application; *c)* the Republic of Poland may not function as a sovereign and democratic state – is inconsistent with Article 2, Article 8 and Article 90(1) of the Constitution of the Republic of Poland." Trybunał Konstytucyjny K 3/21.

12 *See* Márton Sulyok, 'Is This Loyalty In Fact Disloyalty? On the Remarks of the German Government to the Commission after PSPP', *Constitutional Discourse,* 12 January 2022, at www.constitutionaldiscourse.com/post/marton-sulyok-is-this-loyalty-in-fact-disloyalty.

13 Roman Herzog & Lüder Gerken, 'Stop the European Court of Justice', *EUobserver*, 10 September 2008, at https://euobserver.com/opinion/26714; Agustín José Menéndez, 'The Existential Crisis of the European Union', *German Law Journal*, Vol. 14, Issue 5, 2013, pp. 525-526; Jan Komárek, 'National constitutional courts in the European constitutional democracy: A rejoinder', *International Journal of Constitutional Law*, Vol. 15, Issue 3, 2017, p. 825.

14 Alter 2009, pp. 129-130.

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2. Reversing the Preliminary Reference Procedure

2.1. Making Two-Way Traffic Compulsory

According to Christoph Grabenwarter *et al.*, in order for their relationship to be a two-way traffic rather than just a one-way street, the CJEU should be obliged to refer a question to the national constitutional court for constitutional interpretation, when the case enters the sphere of national identity.[15] This way, the CJEU and the respective constitutional court would reach a joint conclusion, while at the same time taking decisions of binding force as independent courts.[16] Without invoking the concept of a reverse preliminary reference, the Hungarian Constitutional Court's *Decision No. 2/2019. (III. 5.) AB* also reflects the idea of harmonizing independent binding decisions. The authentic interpretation of the Constitutional Court cannot be impaired by any other body (including the CJEU), and the acting judicial fora must take into account each other's authentic interpretations.[17]

Considering the fact that the CJEU does not show openness to involve constitutional courts in the judicial process in cases concerning national constitutional identity, and that the treaties do not explicitly oblige the CJEU to do so, Grabenwarter *et al.* propose a treaty amendment. This would add an Article 267a to Article 267 TFEU, which would oblige the CJEU to refer a question to the competent constitutional court for a preliminary ruling when a case potentially affects the concept of national identity enshrined in Article 4 TEU.[18]

Other authors also argue that a reverse preliminary reference procedure would be in line with the bottom-up legitimacy structure of the EU and would also allow constitutional courts to regain their position in the national judicial hierarchy (and the position they would deserve in the European judicial system), that had been eroded by lower courts taking recourse to the preliminary reference procedure.[19]

15 Christoph Grabenwarter *et al.*, 'The Role of the Constitutional Courts in the European Judicial Network', *European Public Law,* Vol. 27, Issue 1, 2021, p. 51.

16 According to Grabenwarter *et al.*, a further advantage would be that the reverse preliminary reference procedure would better integrate the CJEU into the EU system of checks and balances.

17 Decision No. 2/2019. (III. 5.) AB, Reasoning [37]-[38]. About the decision, *see e.g.* Marcel Szabó, 'Practical Questions Concerning the Relationship Between a Member State's Constitution, EU Law and the Case-Law of the CJEU. Decision No. 2/2019. (III. 5.) AB of the Constitutional Court of Hungary', *Hungarian Yearbook of International Law and European Law,* Vol. 8, Issue 1, 2020, pp. 383-392.

18 They add that there are certainly other ways to involve the constitutional courts, and they also argue that the constitutional courts could at least be involved as interveners in cases involving constitutional identity, similarly to the European Commission or national governments in any case.

19 Denis Preshova, *On the Rise while Falling – The New Roles of Constitutional Courts in the Era of European Integration,* Inaugural-Dissertation zur Erlangung der Doktorwürde einer Hohen Rechtswissenschaftlichen Fakultät der Universität zu Köln, 2019, pp. 157-158.

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2.2. The Significance of Having the First Say

The purpose of the reverse preliminary reference procedure is that the substance of national identity can thus be fleshed out by the constitutional courts, upon request of the CJEU. This will, however, give much more importance to the 'right of the first word' than to the 'right of the final say'. The CJEU can decide for itself which issues fall within the scope of national identity and then require a reverse preliminary reference. The effect is that, although the constitutional courts would have the final say on national identity, it is the CJEU that would determine which issues involve national identity at all. In effect, this renders the procedure itself pointless. The above proposal is therefore unlikely to achieve its objective without some additional mechanism that would allow constitutional courts to determine not only the substance of national identity in the questions asked by the CJEU, but also to determine which questions fall under the national identity clause.

3. Involving the High Courts through the Exclusion of Lower Courts

3.1. Limitation of Preliminary Reference Rights to High Courts

Jasaron Bajwa proposes that, as a general rule, only national courts of last instance should be authorized to refer preliminary questions to the CJEU. He would make three exceptions: *(i)* a lower court must refer a case for a preliminary ruling if it finds that EU law is unlawful or invalid; *(ii)* a lower court can refer a case for a preliminary ruling if it can show that its inability to interpret a provision of EU law reaches a level that it renders the court unable to rule on the case in a reasonable way; *(iii)* a court of appeal must refer a case for a preliminary ruling if it reaches a different conclusion on the interpretation of EU law than the lower court.[20]

3.2. Exceptions to the Limitation – What Would Change?

The author justifies the first exception by arguing that it follows from the practice of the CJEU that national courts cannot decide on the invalidity of EU law, yet lower courts cannot be expected to apply EU law despite their conviction of its invalidity.[21]

Under the second exception, the lower court would have to show that its doubts regarding the interpretation are so serious that it is unable to decide the case – and the CJEU would obviously decide whether to admit the question.[22] However, this exception would in fact render the whole proposal pointless. The author also argues that the CJEU simply distrust the application of EU law by ordinary courts and prefers to keep it under as close scrutiny as possible. In this situation, it is difficult to imagine a scenario in which the CJEU, faced with the uncertainties of a national court, would not decide the question of interpretation itself, but would conclude that the doubts raised are not serious enough, and that

20 Jasaron Bajwa, '"Grow Up!": Rethinking the Preliminary Reference Procedure from the Perspective of Maturity', *LSE Law Review*, Vol. 6, Issue 2, 2020, p. 93.

21 Id.

22 Id.

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the national court could then decide the question. The exact opposite is likely to happen: the CJEU would in fact accept any question that would fall within the scope of this exception rule. It should also be borne in mind that the lower courts frequently make preliminary references, and it is conceivable that with this exception rule the restriction would only serve to turn even minor difficulties of interpretation into serious, undecidable questions for them. Although I cannot provide a comprehensive European analysis of this issue, such a solution does not exist in the Hungarian judicial system either: the judge decides the case even if his interpretation is uncertain, and if his decision is wrong, the appellate forum has an opportunity to course-correct.

The third exception is also based on interpretative uncertainty: according to the author, it can be assumed that the interpretation causes serious problems for national courts if they reach conflicting conclusions in the interpretation of EU law, and therefore the intervention of the CJEU is immediately necessary. However, the conclusion is overreaching: the presence of two conflicting interpretations does not mean that the task of interpretation is intolerably difficult. It can mean that at least one of the two interpretations is wrong, but two different interpretations may be correct in a legal system, depending on the circumstances of the case.[23] A lower court's incorrect interpretation may occur even if the correct interpretation, based on the CJEU's case law, has already been adopted by the courts. This exception rule is therefore contrary to the purpose of the proposal, as it could allow for a preliminary reference even in clear-cut situations.

On the whole, it may be concluded that the author's proposal would not result in a significant change in the current system due to the application of the last two exceptions. It is important to point out that the preliminary references in the *Landtová* and *A.B. and others* cases, which led to the conflict between the constitutional courts and the CJEU, were made by courts of last instance. It would therefore not in itself solve the problem if only supreme/constitutional courts could initiate preliminary reference procedures. It seems, it is the question asked, not the court who asks, that is of decisive nature.

4. A Political Override Mechanism to Curb the CJEU

4.1. Giving the Final Say to the Masters of the Treaty

Fritz W. Scharpf believes that the European Council is an institution whose members are both sensitive to the problems caused by the implementation of European law in the Member States and to *e.g.* the dangers of protectionist national measures. More importantly, he says, the members of the European Council are in fact the 'masters of the treaties' and are therefore best placed to determine whether the CJEU is interpreting EU law in a way that is more expansive than intended. Scharpf argued in 2009 that there was a lack of political

23 This is well illustrated in the Hungarian case law by the BH 2013.276. "The existence of two possibly conflicting decisions of lower courts does not justify the lack of unity of the case-law as a whole on a given law."

will to adopt a reform that would require treaty change, but this could change in the event of open opposition from a Member State – an event that would strike at the very foundations of the EU legal system, as the latter relies heavily on voluntary compliance.[24] Scharpf argued that it would be more appropriate if *ultra vires* complaints were not simply declared by a Member State, but they would be addressed to the European Council, with the promise that in the event of confirmation of the CJEU's judgment by a simple majority of the European Council, the complainant Member State would fully implement the judgment. He added that such a procedure would, on the one hand, absolve the Member State concerned from any accusation of disloyalty to the EU and, on the other hand, the potential political veto alone would encourage the CJEU to take into account the possible interests of Member States in the process of delivering judgments.[25]

4.1. Dangers of Political Override

Scharpf's proposal offers a practical solution with a number of arguments to consider. While a court can always develop rigid, rock-solid doctrines on competences, a political settlement mechanism may be able to offer a more flexible, adaptable solution. A criticism of Scharpf's proposal may be that it offers a political response to a legal dispute or that it makes the decision of the highest legal forum overridable for political reasons. However, the division of competences between Member States and the EU is also a political issue, and it is not unknown in different constitutional systems for the *e.g.* the legislature as a political actor to be able to override the highest legal forums decision.[26] It is not inconceivable, therefore, that the masters of the Treaty should have a say in the interpretation of competences.

The question is to what extent the constitutional basis of European integration can be ignored. The transfer of powers from a Member State to the EU is of constitutional nature. The jurisprudence of the CJEU has very quickly moved beyond the limits set by the contracting parties. Without going into detail, it can be said that what the practice of the CJEU stands for in relation to certain doctrines (*e.g.* the primacy principle) is accepted only with reservations by many Member States. Thus, some of the jurisprudention 'inventions' of the CJEU reaching beyond the treaties may be embraced by the majority of Member States, but not entirely by the rest. Bearing this in mind, Scharpf's proposal can be viewed from both an optimistic and a pessimistic perspective. Optimistically, this proposal means that a simple majority of European Heads of State and Government could decide that the mandate given to the CJEU has been exceeded. But from a pessimistic perspective, it could also mean that a simple majority of European Heads of State or Government could decide that a doctrine of the

24 Fritz W. Scharpf, 'Legitimacy in the multilevel European polity', *European Political Science Review*, Vol. 1, Issue 2, 2009, pp. 198-200.

25 Id. p. 200.

26 For instance, in Canada, the legislature can override the court's decision, after the latter repeals a law. *See* Kálmán Pócza, 'Többségi demokrácia és gyenge alkotmánybíráskodás: egy elszalasztott lehetőség', *in* Fruzsina Gárdos-Orosz & Zoltán Szente (eds.), *Jog és politika határán – Alkotmánybíráskodás Magyarországon 2010 után,* HVG-ORAC, Budapest, 2015, pp. 200-201.

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CJEU, that goes beyond the Treaty framework should be accepted as if it had been laid down in the Treaty through the consensus of all Member States. Also, the proposed procedure entails the risk that the vote on jurisdictional and competence issues may be subject to political bargaining on quite different matters.

5. A Special Court for Competence Review

5.1. A Constitutional Council for Europe

In 1995, Joseph Weiler *et al.* proposed the creation of an EU court specialized in competence matters, which would give a binding interpretation of the Treaty on the question of competence.[27]

In 1995, Weiler argued that the problem of competences could be solved in the long term through the creation of an EU Constitutional Council (modeled on the French namesake), which would deal with specific competence issues, including subsidiarity. This forum would decide on the quasi-constitutionality of any European legal act even before it enters into force (*i.e.* whether it exceeds the competences laid down in the Treaty). The review process could be initiated by any EU institution (including the European Parliament, with a majority of votes) or by any Member State. The Constitutional Council would be composed of delegated judges from the national constitutional courts (or equivalent high courts) and chaired by the current President of the CJEU. Member States would not have veto power and its composition would, according to Weiler, also symbolize that, although the settlement of competences is a matter of national constitutional arrangements, it should be subject to an EU solution. He argues that the Constitutional Council, which he believes would enjoy far greater public confidence than the CJEU, could protect the integrity of EU law by channeling problems and conflicts surrounding competences.[28]

5.2. New Proposal: a Mixed Grand Chamber

Interestingly, a quarter of a century later, Weiler would propose a different composition for the court that decides on EU competences. By declaring a CJEU judgment *ultra vires* in the *PSPP* case, the *Bundesverfassungsgericht* has apparently turned the tide of academic opinion against itself.[29] This is also true of Weiler, who, maintaining that if more constitutional courts follow this example, the integrated legal system, the rule of law, and the single market will all be lost, believes that *ultra vires* rulings should be avoided at all costs. To that end, Weiler and Daniel Sarmiento have yet again proposed the creation of a judicial forum

27 Joseph H. H. Weiler *et al.*, 'European Democracy and its Critique – Five Uneasy Pieces', *Florence: European University Institute Working Paper*, 1995/11, p. 43; *See also* Weiler & Haltern 1996, pp. 447-448.

28 Joseph H. H. Weiler *et al.*, 'European Democracy and its Critique', *West European Politics*, Vol. 18, Issue 3, 1995, p. 38.

29 *See e.g.* Pavlos Eleftheriadis, 'Germany's Failing Court', *Verfassungsblog*, 18 May 2020, at https://verfassungsblog.de/germanys-failing-court/.

that would decide on competence conflicts between the EU and the Member States.[30] This forum would operate strictly within the institutional framework of the CJEU, more specifically the Grand Chamber. The composition they put forward is the following: six judges of the CJEU, six constitutional judges from a constitutional court of a Member State according to a pre-defined order, and the President of the CJEU as the President of the panel (but no judge who was involved in the original CJEU judgment). The new body, to be known as the Mixed Grand Chamber, would have the power to annul EU acts (including judgments of the CJEU) that constitute a *serious breach* of conferred competences. They argue that if all the constitutional judges on the panel believe that the challenged act is *ultra vires*, it would be inappropriate for it to be adopted by seven judges of the CJEU, and therefore they would prefer a vote of eight or nine judges to validate an EU act from the point of view of competences. The review could be initiated by national constitutional courts, supreme courts, or even governments and parliaments, within one year of a CJEU judgment validating an EU act under scrutiny becoming final. The President of the court (or Member State) with which the appeal is lodged would participate in the Mixed Grand Chamber's section for national constitutional judges, otherwise, the national delegates would sit in a rotational order. In addition, Member States and EU institutions would be allowed to intervene.[31]

Important differences can be outlined between Weiler's 1995 Constitutional Council blueprint and his 2020 Mixed Grand Chamber proposal. At first glance, the most striking is the question of composition: while the Constitutional Council would have been composed of only the national judges of the Member States (aside from the President), the Mixed Grand Chamber, which already refers to the composition in its name, would be composed of a larger proportion of European judges. Although the proposal explicitly states that it would not be a good solution if the Luxembourg judges were to decide the issue alone, the difference is still striking, since in this case, it would be sufficient for one or two constitutional judges to vote with the European judges. While the Constitutional Council is described as having the distinctive function of *ex ante* review of European norms, the Mixed Grand Chamber, although not precisely delineated, is described as a

30 Joseph H. H. Weiler & Daniel Sarmiento, 'The EU Judiciary After Weiss: Proposing A New Mixed Chamber of the Court of Justice', *EU Law Live,* 1 June 2021, at https://eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler/#.

31 The proposal also includes minor additions, such as the idea that hearings should be broadcast live for transparency, or that the dissenting opinions should not be made public (but should be made public if the re-election of judges is excluded). On the issue of dissenting opinions, Roland Vaubel notes that, in the case of the CJEU, making public which judge voted which way in a case may encourage judges to take due account of national interests. They would then not only be biased towards the EU, but also to some extent towards the Member States, but he says the aim is not to make judges more biased, but not to make them biased at all. He himself suggests that the judges of the CJEU should be chosen from among the judges of the constitutional courts/higher courts of the Member States. *See* Roland Vaubel, *The European Institutions as an Interest Group – The Dynamics of Ever-Closer Union*, The Institute of Economic Affairs, London, 2009, p. 80.

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forum for ex-post review. While the Constitutional Council could decide on the validity of all legal acts (and thus certainly on the validity of CJEU judgments), the Mixed Grand Chamber would only examine European norms that have been validated by the CJEU after they had been challenged. This probably implies that before the Mixed Grand Chamber, judgments of the CJEU could not be challenged in general, but merely other European legal acts validated by the CJEU. In the case of the Constitutional Council, it is explicitly mentioned that the application of the subsidiarity principle would also be a task in connection with questions of competence, but in the case of the Mixed Grand Chamber, this is no longer explicitly mentioned by Weiler.[32] He does, however, explicitly mention that, in his view, the Mixed Grand Chamber should not repeal or declare inapplicable all EU acts that exceed the conferred competences, but only those that would constitute a serious infringement.

5.3. A "Sequential Model" to Soften the Mixed Grand Chamber

Władysław Jóźwicki would add to Weiler and Sarmiento's proposal, as he believes that the mere fact that an EU legislative act infringes the national identity of one (or more) Member State(s) does not justify a prohibition of its use in every other Member State. In such cases, therefore, the review forum should not declare an EU legal act completely inapplicable because of the constitutional identity of one Member State but should merely exempt that Member State from its obligation to apply it. According to Jóźwicki, this would not mean that the EU act in question would lose its harmonizing function. This solution, which he calls the 'sequential model', is only inapplicable if not applying it in one Member State is incompatible with the purpose of the EU legal act in question. In this case, the court has two options: either annul the challenged EU act or uphold it (in the latter case still at the risk of opposition from the national constitutional court).[33]

32 Nevertheless, it can be assumed that the Mixed Grand Chamber would also have jurisdiction to interpret the principle of subsidiarity, as this is inseparable from competence disputes.

33 Władysław Jóźwicki, 'Ultra vires and constitutional identity control – apples and oranges or two drops of water? Some remarks on the possible role of the New Mixed Chamber of the Court of Justice in the context of the "sequential" model of adjudication on art. 4(2) TEU', *Verfassungsblog*, 15 June 2020, at https://verfassungsblog.de/ultra-vires-and-constitutional-identity-control-apples-and-oranges-or-two-drops-of-water/. In a somewhat similar vein, Oliver Garner also proposes the use of the preliminary reference procedure. Here, the constitutional courts would have to make a second preliminary reference after an unfavorable judgment of the CJEU, and the CJEU could then reconsider its previous decision. If it does not reconsider, then legislative methods would have to be used to resolve the conflict. Oliver Garner, 'Squaring the PSPP Circle: How a 'declaration of incompatibility' can reconcile the supremacy of EU law with respect for national constitutional identity', *Verfassungsblog*, 22 May 2020, at https://verfassungsblog.de/squaring-the-pspp-circle/. What is somewhat overlooked is that the CJEU does not necessarily pay enough attention to answering the questions of the constitutional courts, and its answers are not sufficiently thorough. *See* Grabenwarter *et al*. 2021, p. 58. Maduro draws attention to the same point. Miguel Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court', *Verfassungsblog*, 6 May 2020, at https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/.

5.4. Advocates of the Neglected Subsidiarity Principle

The establishment of a court for competence review has also been suggested by other authors.[34] Although most of the proposals are either not detailed in this respect or would adopt a similar solution as Weiler in terms of organization and composition, interestingly, the proposed review forum is mostly referred to as a "subsidiarity court".[35] This points to a fundamental conceptual difference: subsidiarity court proposals tend to emphasize that the case law of the CJEU is constantly expanding and overstepping EU competences, with the Court being biased towards the EU institutions in its judgments, with a tendency to depart from *e.g.* the subsidiarity principle. The subsidiarity court is thus explicitly called upon to uphold the principle of subsidiarity in competence disputes, a task for which its own name will always be a reminder. By contrast, Weiler's Constitutional Council or Mixed Grand Chamber is not functionally intended to defend subsidiarity, but only to settle potential conflicts and to avoid situations of open non-compliance.[36]

6. Considerations for a Subsidiarity Court

The key question surrounding the proposals to set up a judicial forum for competence review is, of course, whether they can achieve the desired result. The aim is twofold: *(i)* to avoid the proliferation of *ultra vires* judgments endangering the integrated European legal system; *(ii)* to bring the CJEU's activism under control and to give greater weight to the principle of subsidiarity in EU case-law.

The first goal can be achieved through the competence review court but cannot be guaranteed. The existence of such a court would not in itself change the fact that the EU system of competences is based on the principle of conferral: integration clauses would therefore remain a legal 'bridge' through which national constitutional courts could claim to guard over the competences. Ultimately, *ultra*

34 Herzog & Gerken 2008; As early as 1993, Vaubel *et al.* as the European Constitutional Group proposed, for example, the creation of a separate court for competence review in a possible European constitution. *See* Roland Vaubel, 'Constitutional courts as promoters of political centralization: lessons for the European Court of Justice', *European Journal of Law and Economics,* Vol. 28, Issue 3, 2009, p. 218.

35 Pieter Cleppe, 'An EU Subsidiarity Court as a means to keep the ECJ in check', *BrusselsReport.eu,* 1 February 2016, at www.brusselsreport.eu/2016/02/01/an-eu-subsidiarity-court-as-a-means-to-keep-the-ecj-in-check/; Vaubel 2009, pp. 80-81; Lars P. Feld, 'The European constitution project from the perspective of constitutional political economy', *Public Choice,* Vol. 122, Issue 3-4, 2005, p. 440; Peter Kurrild-Klitgaard, 'The constitutional dilemma of European integration', *MPRA Paper,* No. 35437, 1998, at https://mpra.ub.uni-muenchen.de/35437/1/MPRA_paper_35437.pdf, p. 16; Steven Blockmans *et al.*, 'From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU', *CEPS Essay,* No. 10, 2014, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2429252, p. 10.

36 Weiler himself stresses that it is not that the review is needed because the CJEU's practice takes away national powers or erodes the authority of national constitutional courts, but that the creation of a review forum would be useful to avoid open non-compliance to CJEU rulings, and an ensuing collapse of the EU legal system, which he thinks would be the result of *ultra vires* judgments. *See* Weiler & Sarmiento 2020.

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vires control could only be ruled out if the treaty explicitly excluded it. However, if it did, Member States would lose control over the remaining part of their sovereign statehood – which would be contrary to the purpose of the proposal. Whether the establishment of a competence review court will indeed minimize the likelihood of *ultra vires* decisions depends only on the seriousness with which this forum takes the task entrusted to it. The fulfillment of the first of the two objectives of the proposal therefore depends on the extent to which the second is fulfilled, *i.e.* how effectively it can safeguard the Member States' perspective and the principle of subsidiarity in matters of competence.

In Weiler's Mixed Grand Chamber proposal, the CJEU, the supranational level, and the national constitutional courts, the national level, are in fact equal forces. This design gives the impression of a dispute settlement forum where the collective will of the Member States and the will of an EU institution are almost equally balanced. The court that would determine the competences should reflect the will of the Member States, not a compromise between the Member States as a whole and an EU institution that cherishes the dream of an ever closer integration. Such a court should therefore have room only for delegates from the Member States.[37] Indeed, it is worth considering that such an institution could be called a Subsidiarity Court, ensuring that the principle of subsidiarity is not lost sight of. It would also be essential for this Subsidiarity Court to have the right to review all EU legal acts at the request of a Member State or an EU institution – not only legislative acts but also judgments of the CJEU. As the CJEU has been a flagship institution in the process of integration, there is no reason to exempt its activities from under constitutional scrutiny in these terms.

It is also important to avoid the concern that the review process could in fact become a mere instrument to strengthen the activism of the CJEU if a simple majority is sufficient for validation. Of course, unanimity cannot be expected, nor is it appropriate for two or three closely cooperating Member States to be able to block EU adjudication. The right balance could be found between the two, for example by relying on the analogy of qualified majority voting (and the blocking minority) in the Council of the EU. For example, if a Member State (or a national constitutional court) considers an act of an EU institution (*e.g.* a judgment of the CJEU) to be *ultra vires*, a blocking minority of the members of the Subsidiarity Court would be sufficient to repeal the EU act in question.[38] Accordingly, the consensus of members of the court representing more than 35% of the EU population plus one member could repeal a legislative act or CJEU judgment.

It is clear that this Subsidiarity Court would differ significantly from the conventional concept of adjudication both in its composition and in its decision-

37 It could be of symbolic importance if the President of the CJEU could be present at the review court, maybe even presiding, but there is no reason to give them voting rights. It could also mean that, if Member States disagree on whether a particular competence has been conferred on the EU, the question could be decided by a vote of the President of the CJEU in favor of a 'yes' answer, whereas conceptually, in case of doubt, a 'no' answer would be appropriate.

38 Article 238(3)(a) TFEU: "A blocking minority must include at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained."

making process. It should not be seen strictly as an EU constitutional court but as the highest forum of judicial dialogue defending the constitutional perspective of the Member States. The Subsidiarity Court could be an institution of high legitimacy, with members who are perfectly aware of the importance of the uniform application and enforcement of EU law, yet it is their loyalty to the national constitutional systems that ultimately influences their decision-making.

7. A Supplementary Mechanism to the Preliminary Reference Procedure

As Jan Komárek pointed out, the separate treatment of issues falling within the scope of constitutional law is of particular importance in preserving the role of constitutional courts.[39] Therefore the issue of primary importance is whether a question referred to the CJEU by an ordinary court enters the *'domaine réservé'* of the constitutional court, that of constitutional adjudication and interpretation. A solution to the problem, that national constitutional courts are left out of the European constitutional dialogue, could be found if questions of a constitutional nature were to be raised by the constitutional courts.

In this context, I suggest distinguishing three categories. The first category is where a preliminary reference of an ordinary court raises the question of whether the constitutional court's decision is compatible with EU law. The second category is where the preliminary reference concerns the interpretation of EU primary law. The third category would include questions concerning the interpretation of secondary law which is also reflected in primary law or otherwise has constitutional relevance.[40] I propose that the preliminary reference procedure could be restructured in a way that the questions raised, if they are of constitutional relevance (as outlined above), would enter the European scene through the constitutional courts. More precisely, this would mean that all questions raised by lower courts would reach the CJEU, but the references would first go through the constitutional court. It would be at the discretion of the constitutional court to decide whether the question raised falls into one of the three categories above. If it falls outside these categories, it would simply forward the question to the CJEU unchanged. If it finds that the question falls within the three categories, it would have the opportunity (but not an obligation) to supplement the referral with its own views within a specified time limit, drawing attention to the specific features of the constitutional system and its own views, to which the CJEU would be subsequently obliged to respond in substance. This procedure is designed to ensure that the constitutional courts are not left out of the decision-making process on constitutional questions and that the CJEU cannot establish doctrines concerning the relationship between EU law and national law without giving serious consideration to national constitutional aspects in the process. Ultimately, if this mechanism fails to lead to consensus, the constitutional court could turn to the Subsidiarity Court as outlined above.

39 Komárek 2017, p. 825.

40 The prohibition of discrimination, for example, appears in secondary law and also in the Charter.

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8. Summary and Conclusions

Several authors have concluded that a comprehensive institutional reform of the relationship between the CJEU and the constitutional courts is needed, and some have proposed reforms accordingly. This paper started with briefly reviewing the reasons why a reform of the CJEU may be needed, with particular attention to the fact that national constitutional resistance to the CJEU seems to occur with increasing frequency. Aiming to provide concise but thorough summaries, I presented some of the institutional reform proposals that have appeared in the academic discourse and expressed some concerns about these ideas. Perhaps the proposal for a new court specialized in competence issues is the most popular idea. I arrived at the conclusion that a Subsidiarity Court specialized in competence issues could be an effective instrument for a better representation of national constitutional perspectives at EU level, which would be essential, if open non-compliance is to be avoided. I also proposed a complementary mechanism to the preliminary ruling procedure, which would allow constitutional courts to participate in the European constitutional dialogue. Together, these solutions could ensure that national constitutional aspects are sufficiently taken into account at European level, providing an institutionalized system of prevention and reconciliation.

Of course, a crucial issue is whether an institutional reform of the CJEU is politically feasible? An analysis of the attitudes and possible intentions of Member States and various political actors is, of course, not possible here. But in general, the reform of the CJEU is not on the European political agenda. However, this does not mean that there would be an absolute lack of political will to reform the CJEU. The proposals described above would require an amendment of the Treaties, which would need the support of all Member States. The likelihood of a Treaty amendment is very low: hitherto, all efforts to this end have failed.[41] Nevertheless, as Roman Herzog has put it, in terms of protection of national interests and subsidiarity, the CJEU is not up to the task of being the last instance forum.[42] Therefore, Member States should seek a more suitable solution.

41 Alter 2009, pp. 129-130.
42 Herzog & Gerken 2008.