INTEGRATION RESPONSIBILITY: THE RELATIONSHIP OF NATIONAL CONSTITUTIONAL COURTS TO THE COURT OF JUSTICE OF THE EUROPEAN UNION. HIERARCHY OR COLLEGIALITY?

Norbert Tribl[1]

ABSTRACT

As long as the peoples of Europe are unable to create a homogeneous, united society, the principle of 'unity in diversity' will be a natural limit to the development of the 'ever closer union' clause, and this is not a mere philosophical or theoretical argument; it is rather a fact-based inadequacy that must be reflected in the European legal order and the concrete competences and their limits, especially in the relationship between the Court of Justice of the European Union and the European national constitutional and higher courts. The undefined nature of the relationship between European Union (EU) law and national constitutions (resulting from the supranational nature of integration) forced European national constitutional courts to assume a role that could also be seen as a functional change in terms of the entirety of the European constitutional judiciary. The role of these bodies seems to be complemented by a kind of 'integrational' function; the European national constitutional courts must no longer only defend their national constitutions but must do so while considering the proper advancement of the integration process. They must act in a manner that upholds the Court of Justice of the European Union's (CJEU) right to an authentic interpretation of the Treaties; however, taking into account that the CJEU, as an institution of the EU, is not entitled to make decisions ultra vires against the framework set by the Treaties.

KEYWORDS

ever closer union
unity in diversity
constitutional courts
Future of Europe
ultra vires

1 | Senior Lecturer, International and Regional Studies Institute, Faculty of Law, University of Szeged, Hungary; tribl.norbert@gmail.com; ORCID: 0000-0002-4045-4192.

https://doi.org/10.55073/2024.1.251-269

1. Introduction

Perhaps one of the biggest challenges faced in recent years is the future of Europe and European integration.[2] Since its inception, European integration has been built on compromise, in want of a better solution, and has been in a constant search for a way forward: How do we define European unity? What are the goals of European unity? It is a process that determines and shapes the constitutional arrangements of the Member States involved in it. Conversely, the constitutional development of the Member States must also shape the development of the European integration process and, in this context, the European legal order, which is now symbiotically united with the constitutional and legal systems of the Member States.

The European Union has no sovereignty of its own. Its existence, power, and nature depend on the will of the Member States. Consequently, the EU cannot oppose the will of the Member States. German constitutional doctrine refers to this direction, which is in accordance with the will of the Member States and can be read in the Treaties, as the '*Integrationsprogramm*'.[3] This common program is practically the soul of European integration. The prevailing view in the EU approach is that EU law and integration must be defended by the EU institutions, particularly the Court of Justice of the European Union (CJEU).[4] This is beyond dispute, but it is important to note that it does not imply absolutism. On the contrary, the idea of integration, the *Integrationsprogramm*, must be defended from two sides: on the one hand, from the side of the Union, so that the Member States cannot infringe the provisions of the Treaties, and on the other hand, from the side of the Member States, so that the Union itself cannot go beyond the scope of the Treaties.[5]

The other side of the coin is the responsibility of the constitutional institutions to comply with the provisions of the Treaties and to act in the spirit of the Treaties at all times, which is called in German constitutional law '*Integrationswerantwortung*'.[6] The national constitutional courts, like the Hungarian or German constitutional courts, are the supreme guardians of the national constitutions and are responsible for ensuring that the process of European integration remains within the framework of the Treaties and does not undermine the integrity of the constitutional order of the Member States, which the Treaties are designed to protect.

The EU and the European legal order are not something that the EU institutions must protect from the Member States. Rather, it is a *sui generis* legal order, born of the will of the Member States, capable of acting on the basis of their

2 | In 2021 a Conference on the Future of Europe was launched by the European Parliament, the Council and the European Commission. Cf.: https://futureu.europa.eu/en/pages/about (Accessed: 28 September 2023).
3 | Cf.: Degenhart, 2022.
4 | Cf.: Article 19(1) of TEU.
5 | Martucci, 2021, pp. 17–24.
6 | See the so-called '*Integrationsverantwortungsgesetz* – IntVG' in Germany: Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union.

sovereignty, which must be protected from both sides, the Member States, and the integration process. The European Community law must be implemented jointly by the European courts and the national constitutional courts within the limits and powers laid down in the Treaties. However, it must also be stressed that the authentic treaty interpretation powers of the CJEU should not imply interpretative hegemony or result in an expansive interpretation of powers that would lead to the CJEU taking over the role of national constitutional courts or placing itself above them in matters that fall within the competence of national constitutional courts.[7]

The CJEU generally has the final word on the interpretation of Founding Treaties, but national constitutional courts cannot be deprived of the right to review national mandates, allowing the exercise of shared competences, or individual EU acts adopted based on such mandates, for their conformity with national core constitutional requirements. It is in this examination, among other things, that the responsibility of the national constitutional courts for integration is embodied. They are responsible for the integration process, as is the CJEU. The responsibility for integration is twofold: On the one hand, constitutional courts are responsible for ensuring that the institutions of the Union, including the CJEU itself, do not go beyond the scope of the Treaties, and on the other hand, the integration institutions guarantee that the Member States remain within the scope of the Treaties.

This also means, therefore, that the constitutional courts and higher courts of the Member States have a duty, by virtue of their function, to safeguard the values, institutions, and legal principles that constitute the uniqueness of the constitutional arrangements of the Member States–in essence, the constitutional identity of the Member States.

In the EU, 28 sui generis legal systems must be reconciled: the legal systems of the 27 Member States and the legal system of the EU. We must do all this within the principle of unity in diversity, which is not so much a principle as a value. The very basis of European integration is that the Member States retain their sovereignty and the uniqueness that this implies, and it is with this in mind that they participate in the whole.

In practice, constitutional identity is equivalent to the principle of unity in diversity. This is not based on an arbitrary decision; it is the result of the kind of cooperation that has been and is best suited to the social and legal structures and constitutional cultures of the Member States that have achieved integration. It is clear from the founding Treaties of the EU that the Member States wish to protect this diversity institutionally. One only needs to consider Article 4(2) TEU. This is true even if today there is an attempt to push this diversity into the background and to replace the principle of *'unity in diversity'* with an *'ever closer union'* clause.

7 | The relationship between national constitutional courts and the CJEU, and the role of national constitutional courts in the European integration process, has been a major topic in Europe in recent years. Nothing illustrates this better than the numerous conferences organised by the actors involved. For example the 'EUnited in diversity: between common constitutional traditions and national identities' International Conference in Riga, Latvia, 2–3 September 2021, organised by the CJEU.

However, it must be stressed that the direction of the European integration process cannot be abstracted from the peoples who make up Europe or from their social arrangements. Thus, as long as the peoples of Europe are unable to create a homogeneous, united society, the principle of *'unity in diversity'* will be a natural limit to the development of the *'ever closer union'* clause. This is not a mere philosophical or theoretical argument; rather, it is a fact-based inadequacy which must be reflected in the European legal order and, as I will explain later, in the concrete competences and their limits.[8]

European constitutional courts began at an early stage to identify the constitutional values and institutions that form the immanent core of the constitutional order of their Member States, which can be read in the constitutions of the Member States. Among other things, this is how the concept of constitutional identity was born, at least as far as the practices of European constitutional courts are concerned. Among the constitutional courts or supreme courts of the Member States, the German constitutional court has so far been the most active in interpreting what constitutional identity means, how it relates to *ultra vires* EU acts, and in which cases the identity test and the ultra vires test should be applied.[9] Hungary's approach to the concept of constitutional identity is special, and perhaps it is not an exaggeration to say that it is also somewhat pioneering. Only the Fundamental Law of Hungary contains a requirement to protect constitutional identity, which is thus binding on the Constitutional Court.[10]

2. The relationship of national constitutional courts to the Court of Justice of the European Union

One of the most important issues in the constitutional debate on Europe's future is the relationship between the CJEU and national constitutional courts[11], as the former is the authentic interpreter of EU law, while the latter is an authentic *erga omnes* interpreter of national constitutions.[12] However, the issue of the relationship between these organs is a consequence of the relationship between EU law and national constitutions being only seemingly regulated[13] based on a fragile state of balance below the surface. The principle of the primacy of EU law over the constitutions of the Member States is not an *expressis verbis* clause laid down in the Treaties; the CJEU developed it in the *van Gend en Loos* and then the *Costa v. E.N.E.L.* decisions as general principles of EU law in the 1970s. However, the CJEU did not (even then) receive unreserved support from the Member States. From the

8 | Piris, 2022, pp. 969–980.
9 | Calliess, 2020, pp. 153–182.
10 | The official translation of the Fundamental Law of Hungary is available: https://njt.hu/jogszabaly/en/2011-4301-02-00 (Accessed: 28 September 2023). See: Art. Q, para. 4.
11 | Várnay, 2019, pp. 63–91.
12 | Vincze and Chronowski, 2018, pp. 493–515.
13 | Belov, 2017, pp. 72–97.

1970s onwards, the German Federal Constitutional Court (GFCC) declared in the Solange decisions that it reserved the right not to apply EU law against the German constitution if certain conditions were met.[14] However, the findings of the principle of the Federal Constitutional Court have never become a reality. Since the creation of the *reservation for the protection of fundamental rights* and the *ultra vires test*, the Federal Constitutional Court has never taken a position that would have applied the wording of Solange decisions to a concrete case or issue.[15]

However, over the decades, internal tensions have intensified as the EU has become a community of value. The potential conflict between EU law and national constitutions has seemingly become a political debate, becoming an increasingly used synonym for Euroscepticism. Meanwhile, the absolute primacy of EU law over national constitutions has become a doctrine. However, the risk of destabilisation is coded into a system based on an implicit integration of the absolute, no-exception primacy of EU law.[16]

However, in the midst of increasingly heated political debates, one of the most important legal problems of European integration remains, and we pay a serious price manifested in constitutional law due to the lack of political consensus. Certain parts of the relationship between the EU and the Member States must be determined by the national constitutional courts and the CJEU. Thus, a force field is created where originally neutral constitutional interpreters start to actively shape the integration process, supplementing the original functions of the continental (Kelsenian, centralised) system of constitutional justice. Owing to the unstable situation created by the Treaties, Member States' constitutional interpreters have been given a de facto new obligation: 'to make heads or tails' of the relationship between the EU legal order and the Member States' constitutional systems, of which they are the gatekeepers. If we approach this issue dogmatically, we could even say that in the continental, centralised model of constitutional justice, the functions of constitutional courts are complemented by a kind of 'integrational function'.[17] The relationship between national constitutional courts and the CJEU, and the primacy of EU law over the constitutions of the Member States, has been and still is sought to be maintained by the European Constitutional Dialogue, while the claim to define these relations simultaneously supports the need to protect constitutional identity.[18] Perhaps the real question, however, is whether EU law takes precedence over national constitutions.

In the scientific discourse of recent years, we have repeatedly encountered glimpses of a moment of *'open bread-breaking'*, when, due to the vagueness of the relationship between the two, these courts and these sources of law collided. On 5 May 2020 the German Federal Constitutional Court's decision[19] on the PSPP scheme seemed to have taken a step; however, the consequences were controversial. This

14 | Cf.: BVerfGE 37, 271 – Solange I., BVerfGE 73, 339 –Solange II.
15 | Vincze and Chronowski, 2018, pp. 197–218.
16 | Kelemen et al., 2020.
17 | The phenomenon is somewhat similar to the form of responsibility for *'Integrationsverantwortung'* described later, which was developed by German constitutional law.
18 | Cf.: Orbán, 2018.
19 | 2 BvR 859/15, paras. 1–237.

study had a limited purpose in examining GFCC decisions. However, its aim is to present the similarities that can be explored between the previous practices of the Hungarian Constitutional Court (HCC) and the GFCC's PSPP decision. In addition, these decisions outline a possible perspective for the problematic relationship between European judicial forums, which are not adequately regulated by the Treaties and where the CJEU seems to be seeking hegemony.

2.1. The Weiss II. (PSPP) Decision

This approach has a long tradition in German constitutional doctrine and was partly used by the GFCC in its controversial Weiss II, or PSPP, decision of 5 May 2020.[20] In this decision, the GFCC 'prohibited' the Federal President from signing a law that would have enacted the EU Council Decision on own resources into German law, paving the way for an economic rescue package to deal with the effects of COVID. In the PSPP decision, the GFCC, in the spirit of responsibility to integrate, essentially obliged the German public authorities, German government, and Bundestag to demand that the European Central Bank (ECB) carry out a comprehensive proportionality test when making its decisions and continuously monitor that it does not exceed its powers.

On 9 June 2021 the European Commission announced that it had started infringement proceedings against Germany[21] in response to the ruling by the GFCC on 5 May 2020 regarding the ECB Public Sector Purchase Programme (PSPP). According to the Commission, the judgment of the GFCC regarding ECB bond purchases violated the primacy and autonomy of EU law.[22] In December 2021, the procedure was closed. The European Commission said that it had received assurance from Berlin that the supremacy of EU law would be respected. According to the Commission's announcement

> 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.[23]

20 | Decision 2 BvR 859/15 of the German Federal Constitutional Court on 5 May 2020.
21 | INFR(2021)2114.
22 | Fabbrini, 2021.
23 | Cf.: Infringements package (December 2021) of the European Commission.

The case, therefore, appears to have been decided in favour of the CJEU, but it should be noted that the infringement proceedings involved two political bodies: the European Commission and the German government. However, what is special about the GFCC decisions?

In the Decision 2 BvR 859/15 (PSPP decision), the GFCC made a number of findings defining European integration and the EU legal order, which, however, can only be classified as 'anti-integration' provisions at a very sloppy and superficial first reading. The genesis of the GFCC's decision is not rotted in an anti-integration sentiment, but in the legal doctrine of *Integrationsverantwortung*[24] developed in German constitutional law, which literally refers to a form of 'integrational responsibility' of the German constitutional organs – in the current case the Federal Government, the Bundestag and the GFCC –, in other words their constitutional responsibility for the integration process (*Integrationsprogramm*[25]).

The responsibility of the German constitutional organs for the integration process is based on Article 23 (1) of the Fundamental Law of Germany–the integration clause of the Fundamental Law. According to the settled case law of the GFCC and the PSPP decision, the German constitutional organs, within their responsibility for the integration process, are obliged to take appropriate steps to implement and protect it.[26] However, the GFCC emphasised that the *Integrationsverantwortung* is not a unilateral instrument that obliges the constitutional organs of Germany to accept the decisions of EU institutions without restrictions. On the contrary, it can be interpreted as the implementation of the *Integrationsprogramm*, that is, the idea of integration enshrined in the Treaty on the Functioning of the European Union (TFEU), and as such, its masters are the Member States.[27] Consequently, it is the responsibility of the German constitutional organs to comply with and enforce the acts of the EU institutions insofar as they are in line with the idea of the *Integrationsprogramm* in accordance with the Treaties. However, if the acts of these EU institutions run counter to the *'idea of integration',* the responsibility of the German constitutional organs for the process of European integration requires them to take action against *ultra vires acts*, but at least to seek to mitigate their harmful effects.[28]

According to the GFCC, which also argued in the preliminary ruling procedure, the ECB's bond purchase program goes beyond the ECB's and the ESCB's powers, given that, in addition to its monetary policy implications for the Eurozone, it has economic policy consequences and long-term implications[29] that fall exclusively within the non-delegated powers of the Member States.[30] In its PSPP decision of 5 May 2020 the Federal Constitutional Court found, in its decision of 11 December 2018 in Preliminary ruling procedure C-493/17, that the CJEU stated that the ECB's decisions and the PSPP program complied with the requirements of EU law, in

24 | Tischendorf, 2016, pp. 7–9.
25 | Degenhart, 2019.
26 | 2 BvR 859/15, 116.
27 | 2 BvR 859/15, 53, 89, 105–109.
28 | 2 BvR 859/15, 89, 105–106, 107, 109, 116, 231.
29 | 2 BvR 859/15, 133, 136, 139, 159, 161–162.
30 | 2 BvR 859/15, 109, 120, 127, 136.

particular proportionality without examining the merits of the ECB's decisions in question or the long-term economic policy implications of the PSPP program.[31] According to the GFCC, the CJEU's review did not cover the real economic and long-term effects of the PSPP, and thus did not examine the merits of whether the ECB exceeded its monetary powers under primary law.[32]

According to the GFCC, the CJEU did not properly apply the proportionality test,[33] so proportionality, as laid down in the second sentence of Article 5 (1) and (4) TEU could not fulfil its function of protecting Member States' powers and preventing *ultra vires acts*, thus emptying the principle of delegation of power enshrined in the second sentence of Articles 5 (1) and 5 (4) TEU.[34] According to the decision, the fact that the CJEU did not properly assess the economic policy implications of the PSPP (or marginalised it or quasi-subordinated it to the monetary objectives of the Eurozone[35]) is an arbitrary interpretation of EU law[36] that allows the ECB to go beyond the powers conferred on it by the Treaties (monetary policy) and ultimately excludes its activities entirely from the possibility of judicial review.[37] This leads to a precedent-setting practice which would allow the EU institutions, in this case the ECB, to establish or extend their own powers (*Kompetenz-Kompetenz*[38]), which is contrary to integration efforts and the provisions of the Treaties.[39] Therefore, the GFCC does not consider itself as bound by the interpretation of the law contained in the CJEU's decision.[40] According to the Court, since the CJEU's decision was due to an insufficient examination of the principle of proportionality, and in view of the above consequences, it does not ensure proper judicial review of the ECB's decisions[41] and thus extends the powers of the EU institutions.

German constitutional organs, such as the Federal Government, the Bundesbank and the GFCC, have a constitutional obligation to protect the principle of democracy, which is protected by Articles 20 and 79 of the Fundamental Law of Germany (*Grundgesetz*). The second is the eternity clause, which is the main source of Germany's constitutional identity.[42] In the decision, the Federal Constitutional Court explains that the German people, due to their sovereignty, have the right to democratic self-determination, the principle of democracy, which is a fundamental constitutional factor that cannot be endangered by the integration process.[43] The system of division of competences is intended to ensure the preservation of the principle of democracy and sovereignty of the people, and thus democratic legitimacy, during the integration process. For the decisions of the EU institutions to have the requisite democratic

31 | 2 BvR 859/15, 2, 6, 81, 116, 119-120, 161–162.
32 | 2 BvR 859/15, 116–120, 133.
33 | 2 BvR 859/15, 116, 126–128.
34 | 2 BvR 859/15, 6b, 6c, 116, 119, 123–126.
35 | 2 BvR 859/15, 120-122, 161–163.
36 | 2 BvR 859/15, 112–113.
37 | 2 BvR 859/15, 156.
38 | 2 BvR 859/15, 102, 156.
39 | 2 BvR 859/15, 102, 105–106, 116.
40 | 2 BvR 859/15, 154, 163, 178.
41 | 2 BvR 859/15, 156, 111–113, 116–119.
42 | 2 BvR 859/15, 115, 230.
43 | 2 BvR 859/15, 100–101.

legitimacy, they must be traceable to the provisions of the Treaties and to the idea of the integration that creates them. The stability of the division of competences is intended to be ensured by the requirement of proportionality, and any failure to comply with it risks destabilising the division of competences within the EU.[44] According to the decision, the idea of integration does not infringe on the principles of popular sovereignty or democracy as long as the decisions of the EU institutions and bodies are not ultra vires; that is, they remain within the scope of the powers derived from the Treaties, which are intended to be ensured by one of the main principles of the EU, the delegation of powers, and the requirements (and guarantees) imposed on it.[45]

The decision states that if the CJEU's interpretation of the law does not respect the powers set out in Article 19 (1) TEU and goes beyond them[46], it violates the minimum requirement of democratic legitimacy of EU acts, and thus the decision in light of the above is not applicable in relation to Germany.[47] Therefore, the GFCC does not consider the judgment of the CJEU in the preliminary ruling procedure to be binding, given that its consequences are contrary to the basic idea of integration[48] and lead to a misuse of powers.

| *2.2. Decisions of the Hungarian Constitutional Court*

2.2.1. Decision 143/2010. (VII. 14.) CC and Decision 22/2016. (XII. 5.) CC

Decision 143/2010. (VII. 14.) of the HCC was the first such ruling in Hungary that examined the constitutionality of Act CLXVIII of 2007 on the promulgation of the Treaty of Lisbon. The decision failed to address the protection of national sovereignty as part of EU integration; this issue was raised only in one of the concurring opinions.[49] In 2010, the HCC did not mark a constitutional direction regarding the relationship between the Hungarian legal system and European integration. However, according to their Decision 22/2016. (XII. 5.), the HCC took to consider the interpretation of Article 4 (2) TEU in light of the 'integration clause' of the FL (primarily Article E) and to answer the questions it left open in the Lisbon decision. Simultaneously, the HCC thwarted the concept of constitutional identity from becoming the centre of Hungarian constitutional theory.

The HCC argued, using a very strange and untranslatable terminology, that the 'self-identity' of Hungary is to be understood under the concept of constitutional identity, and the scope of this identity can only be considered on a case-by-case

44 | 2 BvR 859/15, 101, 158.
45 | 2 BvR 859/15, 142, 158.
46 | 2 BvR 859/15, 154–156.
47 | 2 BvR 859/15, 2, 154, 157–158.
48 | 2 BvR 859/15, 113, 116.
49 | László Trócsányi emphasised in his concurring opinion that when Member States have transferred some of their powers to EU organs, did not give away their statehood, sovereignty and the essence of their independence. The Member States retained the right of disposal to the fundamental principles of their constitution that are indispensable for maintaining statehood and constitutional identity. The state, by joining the integration, maintains state sovereignty without a separate declaration, as it is the basis of the constitutions of the Member States (and the Community legal order). Cf. László Trócsányi's concurring opinion.

basis, based on the *'whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of the historical constitution – as required by Article R) (3)*[50] *of the Fundamental Law.'*[51] Simultaneously, the HCC regards constitutional identity as a bridge between Member States and European integration when it states that the protection of constitutional identity should be granted in the framework of informal cooperation with the CJEU– namely, constitutional dialogue – based on the principles of equality and collegiality.[52]

With reference to the German Solange decisions[53], the HCC declared that it must act with regard to the possible application of European law to protect fundamental rights. However, the HCC also noted, as a last resort, that *'it must grant that the joint exercising of competences under Article E) (2) of the Fundamental Law would not result in violating human dignity or the essential content of fundamental rights.'*[54] With regard to *ultra vires acts,* the HCC emphasised the fact that the 'Integration clause' of the FL allows for the application of the EU legal acts in Hungary but also means the limitation of any joint exercise of competences.[55] In accordance with the above, based on Article E) (2) FL and Article 4 (2) TEU, as a constraint on the joint exercise of powers within European integration, the HCC established the 'sovereignty control' and 'identity control' tests based on an influence from the GFCC's past cases (elaborated for the protection of Hungarian constitutional identity).[56] In this context, the HCC essentially declared and strengthened consensus on constitutional identity in Hungarian academic literature, stating that the HCC is the supreme guardian of the protection of constitutional self-identity.[57] However, following this declaration of principle, the HCC noted that *'the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts.'* [58]

Although the HCC has laid out the results of a broad-ranging comparative overview of different constitutional jurisdictions in Europe to justify its decision, its position was most significantly influenced by the judgments of the GFCC. The HCC was criticised for having too many references to the practice of European constitutional (and supreme) courts (in the name of the constitutional dialogue), and despite the declarations of theoretical significance in the decision, the relationship between Hungarian national law and the legal order of the EU was not exactly determined.[59] As far as European judicial dialogue is concerned (not as a

50 | According to Article R (3) of the Fundamental Law: '*The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution*'.
51 | Decision 22/2016. (XII. 5.) CC [64].
52 | Decision 22/2016. (XII. 5.) CC [63].
53 | For more detail see: Solange I. and II.
54 | Decision 22/2016. (XII. 5.) CC [49].
55 | Decision 22/2016. (XII. 5.) CC [53].
56 | Decision 22/2016. (XII. 5.) CC [54].
57 | Decision 22/2016. (XII. 5.) CC [55].
58 | Decision 22/2016. (XII. 5.) CC [56].
59 | Chronowski and Vincze, 2018, p. 96.

criticism but rather as an opportunity for constitutional courts), the applicability of the preliminary reference procedure has been mentioned by scholars as a future possibility on the issue which was set aside by the jurisprudence of the HCC.[60] (It should be noted that HCC is not precluded from initiating referrals to the CJEU, as the authentic interpreter of the EU law, on this issue[61] with reference to the identity test. The HCC made an abstract interpretation of Article E of the FL and did not decide on the concrete conflict between EU law and national law in the decision.)

2.2.2. Decision 2/2019. (III. 5.) CC

Unlike the 'Identity decision', in Decision 2/2019. (III. 5.), the HCC approached the relationship between the European legal order and the national constitution not through constitutional identity, but specifically through the integration clause of the FL. It was concluded that the HCC's authentic (*erga omnes*) interpretation of the FL should be respected by all other organs (national and European).[62] The case was relevant to the awarding of refugee status, and the HCC held that the Hungarian State is not constitutionally obliged to award such status to all applicants. Based on the petition submitted by the Government, the HCC had to answer three questions for which it had to interpret Articles R) (1), E), 24 (1), and XIV (4) of the FL.[63]

Based on the petition, the particular constitutional problem addressed in the case was the relationship between the FL and the legal order of the EU, more specifically, the HCC's monopoly over interpreting the FL. The background of the case was the formal notice sent by the European Commission regarding compliance with the EU law of Act VI of 2018 on amending certain acts relating to measures to combat illegal immigration and the Seventh Amendment[64] of the FL. According to the Commission's interpretation, the amended Article XIV of the FL on asylum violated certain Articles of Directive 2011/95/EU of the European Parliament and of the Council on 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. According to the petitioner, in the context of this interpretation of the FL, a particular constitutional issue has been raised regarding the relationship between the interpretation of the FL by an organ of the EU and the authentic interpretation provided by the HCC.[65]

The HCC pointed out that according to Article R) (1) of the FL, the FL shall be the foundation of Hungary's legal system, and Article E) thereof contains the constitutional basis upon which Hungary participates, as a Member State, in the EU, which also serves as a constant basis for the enforcement of the Union's law as internal

60 | Chronowski and Vincze, 2018, p. 122.
61 | Chronowski and Vincze, 2018, p. 109.
62 | The English version of the decision is available in the following link: https://web.archive.org/web/20220119154617/https://hunconcourt.hu/uploads/sites/3/2019/03/2_2019_en_final.pdf (Accessed: 28 September 2023).
63 | Cf.: 2/2019. (III. 5.) CC [7].
64 | The Seventh Amendment of the FL was adopted on 20 June 2018.
65 | Cf.: 2/2019. (III. 5.) CC [2].

law, as well as for direct applicability.[66] In its decision, the HCC recalled that Article E) (1) of the FL specifies participation in the development of European unity as an aim of the State. The HCC noted regarding the so-called 'Lisbon decision'[67] (cf. above), that this participation is not self-serving as it should serve the purpose of expanding human rights, prosperity and security.[68] The HCC indicated that Hungary participates in the EU as a Member State in the interest of developing European unity, for the purpose of expanding the freedom, prosperity and security of European nations.[69] (The rules contained in Article E) and the interpretation of the HCC therefore are consistent with the terminology of '*Integrationsprogramm*' used in German constitutional law, as presented above.[70])

This decision of the HCC highlighted that EU law as internal law does not fit into the hierarchy of the domestic sources of law specified by the FL under Article T): it is a set of laws to be applied mandatorily on the basis of the constitutional order incorporated in the FL, and the HCC has no competence to annul EU law.[71] (The HCC may only apply such legal consequences under Article 24 of the FL to the legal regulations listed in Article T) (2), while EU law provides for generally binding rules of conduct based on Article E) (3).)[72] According to the HCC, therefore, the Court's lack of competence to annul EU law results from the fact that Union law is not part of the system of the sources of law according to Article T) and there is a separate constitutional provision that makes Union law, as a mandatorily applicable law, part of the legal system.[73]

The HCC pointed out that the transfer of competences based on Article E) (2) of the FL is based on the Founding Treaties as international treaties signed by the Member States, the ratification of which requires a majority required for the adoption of a constitution under Article E) (4).[74] In the opinion of the HCC, the requirement of a majority for the adoption of a constitution specified in Article E) (4) results in the obligation of a cooperative interpretation of the law, and the Union law shall enjoy primacy of application in contrast to the internal law created by the domestic legislator. The HCC cited the jurisprudence of the GFCC, stating that '*the uniform enforcement of the European law in the Member States is of central importance concerning the success of the European Union*'[75] and the legal community of the *28 members* could not survive without the uniform enforcement and effect of European law in the Member States.[76]

66 | 2/2019. (III. 5.) CC [14].
67 | 143/2010. (VII. 14.) CC.
68 | 2/2019. (III. 5.) CC [15].
69 | 2/2019. (III. 5.) CC [15].
70 | 2 BvR 859/15, 116.
71 | 2/2019. (III. 5.) CC [20].
72 | Hamuľák, Sulyok and Kiss, 2019, pp. 130–150, 133–137.
73 | 2/2019. (III. 5.) CC [20].
74 | 2/2019. (III. 5.) CC [21].
75 | Cf.: BVerfGE 73, 339, 368.
76 | Cf.: BVerfGE – 2 Bvr 2735/14, 37.

The HCC stated, in accordance with the *'principle of maintained sovereignty'*[77], that EU membership shall mean the joint exercise of competences in an international community rather than a surrender of sovereignty.[78] Moreover, in the decision, the HCC explained that FL allows the joint exercise of competences through the constitutional self-restraint of Hungary's sovereignty. As a consequence, the limitations set by the FL shall also be respected in the case of the jointly exercised competences, in particular the protection of fundamental rights, which is 'the primary obligation of the State' under Article I (1) of the FL as well as the inalienable elements of sovereignty in accordance with the last sentence of Article E) (2).[79] The reasoning of the HCC is essentially in line with the PSPP decision on 5 May 2020 in which the GFCC stated that the German people, by virtue of their sovereignty, have the right to democratic self-determination to enforce the principle of democracy, which is a fundamental constitutional factor that cannot be jeopardised by the integration process (cf. above).

HCC, similar to the PSPP decision, stated in Decision 2/2019. (III. 5.) that in view of the CJEU, the Union law is defined as an independent and autonomous legal order.[80] However, the HCC continues – the EU is a legal community with the power – in the scope and the framework specified in the Founding Treaties and by the Member States – of independent legislation, concluding international treaties in its own name, and the core basis of this community is the international treaties concluded by the Member States.[81]

At this point, Decision 2/2019. (III. 5.) CC can again be parallel to the PSPP decision. One of the basic arguments of the PSPP decision is the concept of *Integrationsverantwortung* developed in German constitutional law, which can be interpreted as the special constitutional responsibility of the German constitutional institutions for the integration process. The responsibility of the constitutional organs for the integration process is based on Article 23 (1) of the GG–that is, their integration clause. According to the settled case law of the GFCC, German constitutional institutions are obliged to take appropriate steps to implement and protect the integration process (i.e. integration).[82] However, the GFCC emphasised that the *Integrationsverantwortung* is not a unilateral instrument which obliges constitutional institutions to adopt the decisions of the EU institutions in an unlimited manner. By contrast, it can be interpreted as an implementation of the idea of integration enshrined in the TFEU, and as such, its masters are the Member States[83]. Consequently, it is the responsibility of the German constitutional institutions to comply with and enforce the provisions of the EU organs insofar as they are in line with the spirit of the *Integrationsprogramm* in accordance with the Treaties. However, if the acts of the EU institutions run counter to the 'idea of integration', the responsibility of the German constitutional institutions for EU integration

77 | 22/2016. (XII. 5.) CC [60].
78 | 2/2019. (III. 5.) CC [23].
79 | Cf.: 22/2016. (XII. 5.) CC [97].
80 | 2/2019. (III. 5.) CC [24].
81 | 22/2016. (XII. 5.) CC [32].
82 | 2 BvR 859/15, 116.
83 | 2 BvR 859/15, 53, 89, 105–109.

requires them to take action against *ultra vires* acts, but at least to seek to mitigate their harmful effects.[84]

According to the HCC, the laws and the FL should be interpreted in a manner that complies with the EU law. The view of the HCC was based on the presumption that both the Union law and the national legal system based on the FL aimed to carry out the objectives specified in Article E) (1) of the FL.[85] In essence, the starting point of the HCC again corresponds to what was written in the subsequent PSPP decision, in which it is stated that the failure to respect Article 19 (1) TEU violates the minimum requirement of democratic legitimacy for EU acts[86] and constitutional identity.[87] Consequently, if the CJEU is required to respect the constitutional identity of the Member States that arise from the constitution, it must necessarily interpret the constitution of the Member States. Conversely, when the GFCC found that the CJEU had decided *ultra vires*, it interpreted the TEU. Based on the reasoning above, in its answer to the petitioner's second question, the HCC stated that according to Article 24 (1) of the FL, the HCC is the authentic interpreter of the FL, and its interpretation shall not be derogated by any interpretation provided by other organs and shall be respected by everyone. It was also stated that, despite the above, in the course of interpreting the FL, the HCC shall consider the obligations binding on Hungary based on its membership in the EU and under international treaties.[88]

2.2.3. Decision 32/2021 (XII. 20.) CC

Finally, Decision 32/2021 (XII. 20.) CC should be mentioned[89], in which the HCC examined the impact of migration. The Hungarian Minister of Justice submitted a petition to the HCC seeking an interpretation of Articles E (2) and XIV (4) of the Hungarian Fundamental Law (HFL) because the implementation of the judgment of the CJEU delivered on 17 December 2020 in Case C-808/18 raises a constitutional problem that requires an interpretation of the Fundamental Law. The HCC, interpreting the Europe Clause of the Fundamental Law, stated that where the exercise of joint competences with the EU is incomplete, Hungary shall be entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU until the institutions of the EU take the measures necessary to ensure the effective enforcement of the joint exercise of competences.

The HCC also stated that where the incomplete effectiveness of the joint exercise of competences leads to consequences that raise the issue of violation of the right to identity of persons living in the territory of Hungary, the Hungarian State shall be obliged to ensure the protection of this right within the framework of its obligation of institutional protection. Finally, the HCC stated

84 | 2 BvR 859/15, 89, 105–106, 107, 109, 116, 231.
85 | 2/2019. (III. 5.) CC [36].
86 | 2 BvR 859/15, 2, 154, 157–158.
87 | 2 BvR 859/15, 1, 33–42.
88 | 2/2019. (III. 5.) CC [37].
89 | For an analysis of the decision, see also: Blutman, 2022.

that protecting Hungary's inalienable right to determine its territorial unity, population, form of government, and state structure shall be part of its constitutional identity.

However, in its decision, the HCC could not assess whether the incomplete effectiveness of the joint exercise of competences was released in the specific case. The HCC could not take a position on whether the petitioner's argument that, as a consequence of the CJEU judgment, the foreign population may become a part of Hungary's population is correct. According to the HCC, this is a matter to be judged by the body applying the law, and not by the HCC. Simultaneously, the court emphasised that the abstract interpretation of the HFL cannot be aimed at reviewing the judgment of the CJEU, nor does the HCC's procedure in the present case, due to its nature, including the examination of the primacy of EU law.

In view of the above, a detailed analysis of the decision is not included in the scope of the present study.[90]

3. Summary

Both the PSPP decision of the GFCC and the relevant practice of the HCC are trending; one thing needs to be stated: both bodies made their decisions in the context of their assumed constitutional responsibility for European integration, in light of the founding treaties and the process of integration.

While each of these decisions is individually significant, there is another emerging trend that seems positive: one can point to the existence of a form of responsibility of the Member States' constitutional courts for the European integration process. The undefined nature of the relationship between EU law and national constitutions (resulting from the supranational nature of the integration) forced European national constitutional courts to assume a role that could also be seen as a functional change in terms of the entirety of the European constitutional judiciary. The role of European constitutional justice seems to be complemented by a kind of 'integrational' function: the European national constitutional courts must no longer only defend their national constitutions but must do so while considering the proper advancement of the integration process. They must do so in a way that respects the right of the CJEU to an authentic interpretation of the Treaties, taking into account that the CJEU, as an institution of the EU, is not entitled to make decisions *ultra vires* against the framework set by the treaties. Just as we distinguish between substantive law and constitutional law rules in national law, we can distinguish between the 'ordinary provisions' of the European legal order and the fundamental provisions arising from supranationalism by analogy. The primacy of EU law is beyond dispute and is safeguarded by the CJEU. However, the

90 | The official translation of the decision is available at: https://web.archive.org/web/20230609182914/https://api.alkotmanybirosag.hu/en/wp-content/uploads/sites/3/2021/12/32_2021_ab_eng.pdf (Accessed: 28 September 2023).

CJEU and the EU institutions are not federal bodies above the Member States but are much more like the Member States themselves, subordinated to the consensual frames of the Founding Treaties in the integration process. European national constitutional courts can collectively build a bridge to establish a balance between national legal systems and supranational structures of the EU. Thus, the European system of constitutional justice seems to play a key role in the constitutional matrix of responsibility for the integration process.

However, the decision of the GFCC has raised serious concerns across Europe and the German state (or more precisely, the German government!) guaranteed the EU that the GFCC would not follow this path.[91] In addition, the aforementioned highlights a trend in the practice of the European Constitutional Courts that is not necessarily in line with the evolving practice of the CJEU. Just to give one example: In Joined Cases of C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 the CJEU has made a decision which partly provided for the admissibility of decisions of national constitutional courts. According to this decision,

> Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 are to be interpreted as not precluding national rules or a national practice under which the decisions of the national constitutional court are binding on the ordinary courts, provided that the national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability.

The decision states as well that

> the principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by 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 second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928.

The CJEU's approach places the national constitutional courts in a hierarchical system in which the ordinary courts of the Member States (including the higher courts of the Member States), the national constitutional courts, and the CJEU are organised in a single hierarchical order, with the CJEU at the top. By contrast, the national constitutional courts, based on national constitutions and Founding Treaties, seek to establish a system of relations between European courts which respects the sovereignty of the Member States and is based on the competences of the EU and the Member States. This is in accordance with the requirement of

91 | Riedl, 2021.

legal certainty (and therefore the rule of law), whose approach has the keywords of dialogue and collegiality while building the European constitutional space by maintaining a delicate balance between the ever closer union clause and the narrative of unity in diversity.

Bibliography

Belov, M. (2017) 'The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States', *Perspectives on Federalism*, 9(2), pp. 72–97.

Blutman, L. (2022) 'Az Alkotmánybíróság határozata arról, hogy egyes uniós jogi aktusok végrehajtása mellőzhető-e az Alaptörvényre tekintettel', *Jogesetek Magyarázata,* 13(1), pp. 5–12.

Calliess, C. (2020) 'Constitutional Identity in Germany. One for Three or Three in One?' in Calliess, C., Van der Schyff, G. (eds.) *Constitutional Identity in a Europe of Multilevel Constitutionalism*. Cambridge: Cambridge University Press, pp. 153–182; https://doi.org/10.1017/9781108616256.

Degenhart, C. (2022) *Staatsrecht I.* C.F. Müller GmbH.

Fabbrini, F. (2021) *Saving the BVerfG from itself: the Commission infringement proceedings against Germany and its significance* [Online]. Available at: https://bridgenetwork.eu/2021/06/10/saving-the-bverfg-from-itself-the-commission-infringement-proceedings-against-germany-and-its-significance/ (Accessed: 25 June 2023).

Hamuľák, O., Sulyok, M., Kiss, L. N. (2019) 'Measuring the 'EU'-Clidean Distance Between EU Law and the Hungarian Constitutional Court – Focusing on the Position of the EU Charter of Fundamental Rights', *Czech Yearbook of Public & Private International Law*, 2019(10), pp. 130–150.

Kelemen, R D. et al. (2020) *National Courts Cannot Override CJEU Judgments. A Joint Statement in Defense of the EU Legal Order* [Online]. Available at: https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/ (Accessed: 25 June 2023).

Martucci, F. (2021) 'Primacy, identity and ultra vires: forging the Union through the law without foregoing the rule of law', *RED*, 3(2), pp. 17–24.

Orbán, E. (2018) 'Quo vadis, „alkotmányos identitás"?', *Közjogi Szemle,* 11(3), pp. 1–13.

Piris, J C. (2022) 'The European Union in Crisis: What Should the Member States Do?', *European Papers*, 7(2), pp. 969–980.

Riedl, B. (2021) 'Ultra Vires Control and European Democracy', *VerfBlog,* 18 June [Online]. Available at: https://doi.org/10.17176/20210618-193307-0 (Accessed: 28 September 2023).

Tischendorf, M. (2016) 'Theorie und Wirklichkeit der Integrationsverantwortung deutscher Verfassungsorgane', *Jus Internationale et Europaeum*, 129, Universitat Augsburg.

Várnay, E. (2019) 'Az Alkotmánybíróság és az Európai Bíróság. Együttműködő alkotmánybíráskodás?', *Állam- és Jogtudomány*, 60(2), pp. 63–91.

Vincze, A., Chronowski, N. (2018) *Magyar alkotmányosság az európai integrációban* (Third, revised edition). Budapest: HVG Orac, pp. 493–515.

Infringements package (December 2021) of the European Commission [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201?fbclid=IwAR1w6wbHhdcA5vxlqXTohUjxcgF7mJbpSBxTXjxaNWXpMJ0MIzb9Zyuwv7I (Accessed: 25 June 2023).