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"Not Great, Not Terrible"[1] – EU Crisis Management and Constitutional Identity Regarding The COVID-19 Pandemic

Márton Sulyok

University of Szeged, Hungary

msulyok@juris.u-szeged.hu

Luca Sevaracz

University of Szeged, Hungary

sevaracz@mkab.hu

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Summary: The conformity of the European Union's Own Resources Decision with the constitution was brought before the authentic interpreters of the constitutions in Finland and Germany. This paper tends to examine the so-called 'identity review' engaged by these interpreters regarding procedural guarantees. In Finland, the competence-related debate between the Constitutional Law Committee and the Grand Committee and their interference with the EU-law as well as the subsequent Finnish legislative process raised some serious concerns. The relevant decisions of the German Federal Constitutional Court also highlight some disadvantages of decision-making in a crisis situation, for instance, the lack of reasoning or the failure to request a preliminary ruling from the Court of Justice of the European Union. In this paper, we aim to highlight the promising and the less favourable aspects of the (quasi-)constitutional courts' procedure.

Keywords: identity review, constitutional dialogue, procedural guarantees, Own Resources Decision, budgetary autonomy, preliminary ruling proceeding, preliminary injunction, crisis management.

1 Framing the Inquiry: Which Legal Path(s) to Choose on the Way Out of a Crisis?

The public health and economic implications of the COVID-19 pandemic have presented new challenges for the European Union as well besides national economies, considered on a global scale. This paper will focus on one explicit

1 Inspired by the now infamous catchphrase assessing the situation of the damage, from the primetime TV show 'Chernobyl', telling the story of the failed attempt to manage the most famous nuclear crisis of our times.

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aspect of the EU's response to the pandemic crisis that concerns constitutional identity, namely the Own Resources Decision (ORD) of the Council of the European Union.[2] In this context, constitutional identity is understood to mean the constitutional and political structures inherent in the national identities of the Member States, as defined in Art. 4(2) of the Treaty on European Union (TEU), and we will draw our conclusions on the basis of an analysis of the perceived and actual impact of the ORD on these structures. It follows from this that, within the context of pandemic crisis management, we are further narrowing our focus on the economic rather than the public health consequences, as these may have an impact on the constitutional and political structures that are an inherent part of the national identity of the Member States. Overarching analyses of constitutional identity, at least in the practice of national constitutional courts, are conducted generally within this framework of reference, and will be discussed as follows.

Our examination, in light of the procedural aspects, is based on the decisions of the Finnish Constitutional Law Committee (CLC) and the German Federal Constitutional Court (GFCC). The premise of the research is that an effective constitutional dialogue between the Court of Justice of the European Union (CJEU) and the constitutional courts of the Member States (MSCCs) is inconceivable without procedural guarantees surrounding 'identity review'. These guarantees are indispensable, primarily because of the uncertainty and the continuous evolution of the concept and content of identity.[3] In essence, we consider 'identity review' as an inquiry that can be conducted by MSCCs to pronounce or define the constitutional-law boundaries on the primacy of EU law.[4]

However, before presenting the ORD, it is essential to define the context in which the decisions of the EU and national constitutional authorities were taken. Within the framework of supranational cooperation, it is worth highlighting what has been long ago and most recently termed as 'European identity crisis'.[5]

2 Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom. Official Journal of the European Union L 424/1, 15.12.2020.

3 Erdős, Csaba: Adalékok az alkotmányos identitás-kérdés eljárási oldalához – Az előzetes döntéshozatali eljárás az Alkotmánybíróság legújabb gyakorlatában. [Additions to the Procedural Side of the Constitutional Identity Issue – The Preliminary Ruling Procedure in the Recent Practice of the Constitutional Court] Jog – és politikatudományi folyóirat, Különszám, 2022. pp. 85–105.

4 Von Bogdandy, Armin – Schill, Stephan: Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty. Common Market Law Review (48) 2011, p. 4.

5 See in more detail: Altomonte, Carlo – Villafranca, Antonio: A Revived EU Identity in the Age of Nationalism. In Altomonte, Carlo – Villafranca, Antonio (ed). Europe in Identity Crisis – The Future of the EU in the Age of Nationalism. Ledizione-Ledipublishing. Milano, 2019., Hoffmann, Stanley: Europe's Identity Crisis Revisited. The MIT Press. Cambridge, Massachusetts, 1994, 123/2. pp. 1–23.

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The argument is frequently made that identity is the weakest point of the EU,[6] thus limiting its capacity to respond in a coherent, rapid and, not least, effective manner to a series of crises.[7]

Prior to the constitutional review of the ORD by national forums, the GFCC examined the compatibility of the European Central Bank's bond purchase programme with the German Constitution (Grundgesetz, Basic Law) in a case known as the PSPP decision,[8] which was made on 5 May 2020, during the first wave of the pandemic. In its decision, the GFCC ruled, *inter alia*, that a judgment of the CJEU[9] in a preliminary ruling procedure (PRP) initiated by the GFCC was *ultra vires* and therefore inapplicable. The reasoning for the PSPP decision, which also considered the long-term economic consequences. In our view such foresight is indispensable in MSCC proceeding as it is necessary to effectively guarantee the operation of those political and constitutional structures that are inherent in the national identity of the Member States under Art. 4(2) TEU. Such an inquiry is also reflected in the first ruling of the Finnish Constitutional Law Committee,[10] which is presented below.

2 The Union's Own Resources Decision

On 14 December 2020, the Council of the European Union adopted the so-called Own Resources Decision, which is intended to provide the financial basis for the Next Generation EU (NGEU) program. According to the preamble of the ORD, economic shocks such as the economic consequences of the COVID-19 crisis call for an adequate financial capacity of the Union, without increasing the pressure on the Member States' public finances, which requires an

6 Martonyi, János: Law and Identity in the European Integration. Hungarian Journal of Legal Studies, 2021, 60/3, 227–235, p. 228.

7 This also motivates the movement in the general direction of an 'ever closer Union', much in the American mold, in the context of the dialogue on the future of Europe. We are not here to evaluate this tendency, but the paper will show the national constitutional jurisdictions should and continue to have a solid position in any future structure of the European Union's institutional framework, no matter the choice of words for the 'identitarian branding' of the Union.

8 Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16. Feichtner, Isabel: The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe. German Law Journal. 2020, no. 21, pp. 1090–1103., Viterbo, Annamaria: The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank. European Papers. 2020, vol. 5. no 1, pp. 671–685.

9 Judgment of 11 December 2018, Weiss and Others, C-493/17, EU:C:2018:1000.

10 Sulyok, Márton – Tribl, Norbert: „A gazda bekeríti házát"? A Német Szövetségi Alkotmánybíróság PSPP-döntésének jelentősége és az európai integrációért viselt alkotmányos felelősség realitása. ['The master pulls a fence around his house?' The Significance of the PSPP Decision of the German Federal Constitutional Court and the Reality of Constitutional Responsibility for European Integration] Európai Tükör, 2020/2. pp. 7–30.

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exceptional response from the organisation.[11] This is why the ORD justifies an exceptional authorisation for the European Commission to borrow up to EUR 750 000 million in 2018 prices[12] on the capital markets on behalf of the Union to be repaid in full by 31 December 2058 at the latest.[13]

In addition, pursuant to the most contested Art. 9(4) of the ORD, "if the authorised appropriations entered in the Union budget are not sufficient for the Union to comply with its obligation resulting from the borrowing referred to in Article 5 of this Decision and the Commission cannot generate the necessary liquidity by activating other measures provided for by the financial arrangements applying to such borrowing in time to ensure compliance with the Union's obligations, including through active cash management […], the Member States, as the Commission's last resort, shall make the resources necessary for that purpose available to the Commission." The entry into force of the ORD is subject to adoption by all twenty-seven Member States in accordance with their respective constitutional requirements.[14]

3 Triple ultra vires?

The Finnish case below perhaps sheds more light on why certain procedural guarantees are indispensable in shaping the content of constitutional identity. In Finland, three statements have been issued, causing a near constitutional crisis,[15] on the constitutionality of the ORD. The first[16] and the third[17] statements were released by the Constitutional Law Committee *(Perustuslakivaliokunta,* CLC*)*,[18] a quasi-constitutional-court-like body within the Finnish Parliament.

In its first opinion of 5 June 2020, the CLC, which under Art. 74 of the Finnish Constitution shall issues statements on the constitutionality of legislative proposals and other matters brought, declared the ORD (at that time known as a legislative proposal by the European Commission) to be an *ultra vires* act. One week later, on 12 June 2020, in a surprising turn of events, the Finnish Parliament's EU Committee, also known as the Grand Committee *(Suuri valiokunta,*

11 Recital 14 of the ORD
12 Art. 5(1) of the ORD
13 Art. 6 of the ORD
14 Art. 12 of the ORD
15 Leino-Sandberg, Päivi. Who is ultra vires now?: The EU's legal U-turn in interpreting Article 310 TFEU, VerfBlog, 2020/6/18. [online]. Available at: https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/ Accessed: 26.02.2023. DOI: 10.17176/20200618-124211-0.
16 Statement of the Finnish Constitutional Law Committee of 5 June 2020: PeVL 16/2020 vp
17 Statement of the Finnish Constitutional Law Committee of 27 April 2021: PeVL 14/2021 vp
18 See in more detail: Ojanen, Tuomas. EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament. Schandinavian Studies in Law, Stockholm, 2007. pp. 203–225.

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GC), replaced CLC's statement with its own statement,[19] stating that the European Commission's proposal was in line with Finnish constitutional requirements. Moreover, the Grand Committee vindicated for itself the power to judge EU law, since under Art. 96(2) of the Finnish Constitution, the Grand Committee considers EU drafts and issues a declaration as a result, as the CLC has no mandate to do so. In light of the above, the Grand Committee found the CLC's earlier statement an *ultra vires* act. The debate on the powers of the parliamentary committees finally ended with the statement of the CLC in April 2021, in which the Committee re-examined the ORD's compatibility with the Finnish Constitution. By that time, the ORD was already adopted by the Council of the European Union. Building on its previous statement of 2020, the CLC found the EU act in question compatible with the Finnish Constitution under certain conditions.

With regard to the Finnish case summarised above, we believe it is important to highlight two procedural aspects: (i) the parliamentary committees' internal clash of competence, and (ii) the point of interaction with EU- and the subsequent Finnish legislative process.

> Ad (i) As far as the debate on competences is concerned, the authentic interpreter of the Finnish Constitutional is the CLC. Other parliamentary committees and the Government are bound by its interpretation.[20] In this view, the GC's overruling of the CLC's statement is certainly unprecedented. When the Grand Committee considered the CLC's statement as an *ultra vires* act, it ignored the fact that the latter was conducting an examination of the possible infringements of constitutional identity and sovereignty in the context of an EU draft. This does not, however, exclude the competence of the Grand Committee, but only narrows the scope of the aspects of the examination that can be exercised within its competence, such as the examination of conformity with the Constitution. Finally, the procedural shortcomings, resulting from this competence debate, can be regarded as even more troublesome in the light of constitutional dialogue between a Member State and the Union, as such debates may reduce the chances of a constructive constitutional dialogue on European integration.
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> Ad (ii) The first statement of the CLC also pointed out that the CJEU only examined the compatibility of EU acts with the Treaties ex post, implicitly stating that this may give solid grounds for a preliminary constitutional examination by the Member States' forums entitled to engage in said examination during the EU legislative procedure. Nev-

19 Statement of the Grand Committee of 12 June 2020: SuVL 6/2020.

20 Leino-Sandberg, Päivi. Who is ultra vires now?: The EU's legal U-turn in interpreting Article 310 TFEU, VerfBlog, 2020/6/18. [online]. Available at: https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/ Accessed: 26.02.2023. DOI: 10.17176/20200618-124211-0.

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> ertheless, the procedure of the national bodies, which (also) exercise the function of constitutional authority, cannot replace the CJEU's procedure, since while the Luxembourg court is the authentic interpreter of the EU founding treaties, the national constitutional authorities would be the national fora empowered to authentically interpret their own constitutions.

The legislative process, whether it is carried out by the EU or national institutions, is essentially political. At this stage, granting (even quasi-) constitutional review by national forums is a matter of concern, which was recognised by the Hungarian Constitutional Court (HCC) at the very beginning of its operation.[21] In Decision 16/1991. (IV. 20.),[22] the HCC stated that it must exercise self-restrain (also known as judicial deference) in the preliminary, substantive examination of a legislative draft in the process of adoption, as this is the only way to be compatible with the principle of separation of powers.[23] Otherwise, the Constitutional Court would become a participant in the legislative process, limiting the legislator's decision-making powers and sharing its responsibilities, thus creating a kind of undesirable 'constitutional governance'.[24] To sum up, "The Constitutional Court is not an advisor of the Parliament, but rather a judge of the outcome of the legislative work thereof."[25] Thus, such inquiry (regarding the preliminary examination of the content of a law) is only compatible with the Constitutional Court's function "when [the piece of legislation] is submitted to the Constitutional Court in its final form, either before the vote on the proposal as a whole or after the vote but before promulgation."[26] (This practice, by the way, is maintained by the Hungarian rules legislation on norm control after the entry into force of the Fundamental Law.) In view of the above, the second resolution (statement) of the CLC, issued before the ratification of the ORD by the Finnish Parliament,[27] provided that the parliamentary proposal was not amended in the period between the statement and the final vote in the Parliament, is already more in line with the European constitutional traditions.

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21 Manhertz, Tamás István. Alkotmánybírósági hatáskörök jogösszehasonlító vizsgálata [Comparative Analysis of the Competences of the Constitutional Court]. Doctoral thesis. Pázmány Péter Catholic University, Doctoral School of Law and Political Science. Budapest. [online]. Available at: http://real-phd.mtak.hu/1115/1/Manhertz_Tamas_Istvan_dolgozatv.pdf Accessed: 27.02.2023.

22 Fifty-two Members of Parliament proposed the Constitutional Court's procedure during the detailed debate on the challenged bill.

23 HCC Decision 16/1991. (IV. 20.), Reasoning II.1.

24 HCC Decision 16/1991. (IV. 20.), Reasoning II.2.

25 Ib.

26 Ib.

27 According to the summary available on the European Parliament's website (page 3), the Finnish Parliament ratified the ORD on 21 May 2021. [online]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690520/EPRS_BRI(2021)690520_EN.pdf Accessed: 27.02.2023.

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The CLC's place within the state's inherent political and constitutional structure further complicates the assessment of this issue. As a parliamentary committee, it participates in the legislative process, monitors the Government's (EU-related) activities and, because of its special position, is also called upon to make a constitutional assessment of the outcome of the decisions in which it itself plays an active part itself, as a quasi-constitutional court. According to Päivi Leino-Sandberg, there is an ongoing debate on the question of whether the ex ante control of the CLC should be complemented by a much stronger ex post control by a possible separate constitutional court, given that the Commission operates within the Parliament, without being organisationally separate from it.[28]

It is important to note here that the pre-transition Hungarian model of the so-called Constitutional Law Council *(Alkotmányjogi Tanács)*[29] actually also functioned as a parliamentary committee and had limitations of its own, which were also due to its 'legislative embed' and the specificities of the socialist legal system and constitutional thought, as far as the scope of the legislation that could be subject to "constitutional" review and the extent of the review were concerned.

4 Is the Bundestag's budgetary autonomy in danger?

The ORD's conformity with the Basic Law also raised concerns in Germany. In 2021, the GFCC had to decide (*prima facie* urgently) whether the EU act endangered the budgetary autonomy of the *Bundestag* and thus, of course, the inherent constitutional and political structures of the Member States, which are part of the constitutional identity and support budgetary autonomy, to which the budget itself would apply. The *Bundestag* passed the ratification act, which was approved by the *Bundesrat*. Subsequently, the complainants filed a constitutional complaint against the act, even before the Federal President could sign it into law. On 26 March 2021, the GFCC enjoined the Federal President from signing the ratification act, until their decision on the application for a preliminary injunction will be made. On 15 April 2021, the GFCC rejected to issue the preliminary injunction, and the Federal President signed the act implementing the ORD on 23 March 2021, which entered into force on 1 June 2021. On 6 December 2022, the GFCC also rejected relevant constitutional complaints.

28 Leino-Sandberg, Päivi. Between European Commitment and 'Taking the Law Seriously': The EU Own Resources Decision in Finland, VerfBlog, 2021/4/29, [online]. Available at: https://verfassungsblog.de/between-european-commitment-and-taking-the-law-seriously/ Accessed: 28.02.2023. DOI: 10.17176/20210429-181619-0.

29 Jakab, András (ed.): Az Alkotmány kommentárja I. [Commentary on the Constitution I.] Budapest: Századvég Kiadó, 2009. pp. 1102–1103.

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4.1 Decisions of the GFCC of 26 March and 15 April 2021

In its decision[30] of 26 March 2021, the GFCC enjoined the Federal President from signing the ratification act without giving reasons,[31] promising to publish it afterwards. According to the sources available to us, to date, the GFCC has not provided the reasoning, even though the order states that *"Die Begründung wird nachgereicht"*, means "The reasoning will be provided later."[32] While it is not denied that it was the common interest of the twenty-seven Member States and the European Union to reach a decision as soon as possible, neither this nor the need to remedy the economic recession caused by the pandemic as soon as possible can be a sufficient reason for a constitutional court or body of similar authority of any kind to abandon the statement of the reasons their decision is based on. Such a reasoning is considered to be one of the fundamental procedural guarantees of (constitutional) judicial proceedings, under the principle of 'independence of the judiciary' in light of their accountability. We think no one would debate that far-reaching consensus supports this claim. More specifically:

> (i) If we examine the failure to state reasons from the perspective of the complainants, then, according to the consistent practice of the European Court of Human Rights (ECtHR), one of the partial rights to a fair trial enshrined in Article 6 of the European Convention on Human Rights, the right to a reasoned decision[33] can be invoked. "[A]ccording to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based."[34] The jurisprudence of the ECtHR does not require courts to assess all the circumstances of a case, as the level of a detailed reasoning given varies from case to case.[35] A briefer explanation of the reasons for the Federal President's prohibition on signing the ratification act would have been sufficed for the Second Senate to issue its decision. Failure to do so is

30 Order of 26 March 2021 – BvR 547/21, see in more detail: Repasi, René: Analysis: "Karlsruhe, again: The interim-interim relief of the German Constitutional Court regarding Next Generation EU" EU Law Live, 29th March 2021. [online]. Available at: https://eulawlive.com/analysis-karlsruhe-again-the-interim-interim-relief-of-the-german-constitutional-court-regarding-next-generation-eu-by-rene-repasi/ Accessed: 28.02.2023., Sulyok, Márton: Constitutional Justice in Europe – "Courting" Death? Constitutional Discourse, 6th April 2021. [online]. Available at: https://constitutionaldiscourse.com/marton-sulyok-constitutional-justice-in-europe-courting-death/ Accessed: 28.02.2023.

31 Order of 26 March 2021 – BvR 547/21

32 Ib.

33 See in more detail: https://www.echr.coe.int/documents/guide_art_6_eng.pdf Accessed: 28.02.2023.

34 Case of Suominen v. Finland (Application no. 37801/97) Judgment of 1 July 2003 § 34, Case of Vojtěchová v. Slovakia (Application no. 59102/08) Judgment of 25 September 2012 § 35.

35 Ib.

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also not compatible with general principles of judicial independence and with Germany's regional human rights obligations.

(ii) Furthermore, the failure to state reasons can also be assessed in the context of the constitutional dialogue between the bodies exercising public power, be they EU or national constitutional bodies. The explanation of a constitutional court's decision, the consideration and arguments weighed up against each other in the process, always unfold within the reasoning. Failure to do so significantly undermines the possibility of dialogue, as the GFCC intervened in the two-tier decision-making process – seemingly – without any (constitutional) justification, leaving the EU community and its decision-makers in doubt. (Based on sources available to us, there seemingly is no substantial public discourse or academic intervention in this German case, not even vaguely considered and we wonder why, as reason for it are plentiful, as shown above.)

However, after this lapse, the reasons for the Federal President's ban on signature are set out in the decision of the Second Senate of 15 April,[36] where the reasoning[37] states that a constitutional complaint may be lodged against an act approving an international treaty even before it enters into force, provided that, with the exception of the signing and proclamation by the Federal President, the legislative procedure has been completed. If a prior constitutional review were not possible, Germany would be in a position to recognise international conventions as binding on itself which are not in conformity with the German Basic Law.

In addition, the complainants requested that the Constitutional Court declares the ratification act unconstitutional by means of a preliminary injunction *(einstweiligen Anordnung)*, which would have temporarily prevented the launch of the EU crisis management program. According to the reasoning, a summary examination *(summarischer Prüfung)* is carried out in the context of the consideration of the preliminary injunction and will in fact determine whether there are overriding reasons why the ratification act cannot be entered into force, including the breach of constitutional identity alleged by the petitioners.[38] This is also an argument in favour of enjoining the Federal President from signing the law. Europe's eyes were once again on the GFCC.

Consequently, the question arises: In which cases is it therefore possible to order a preliminary injunction?

According to § 32(1) of the Federal Constitutional Court Act 1993 *(Bundesverfassungsgerichtgesetz, BVerfGG)*, the GFCC may provisionally decide a matter

36 Order of 15 April 2021 – 2 BvR 547/21

37 2 BvR 547/21, Reasoning 76

38 2 BvR 547/21, Reasoning 69

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by way of a preliminary injunction of this is urgently required to avert severe disadvantage, to prevent imminent violence or for another important reason in the interest of the common good. In line with the previous case-law, this assessment requires the above-mentioned summary examination, with two disjunctive and one negative conditions: a) if the petition challenges the approval of an international treaty or b) if the challenged provision, according to the complainant, violates the perpetuity/eternity clause *(Ewigkeitsklausel)* enshrined in Art. 79(3) of the Basic Law, c) but the EU norm under examination does not constitute an *ultra vires* act.[39] In the present case, all three conditions were met,[40] so the GFCC could examine the complainants' claim of a breach of constitutional identity in the context of a summary examination.

According to the GFCC, the necessity to order a preliminary injunction can only be decided by carefully weighing up the foreseeable (and long-term) consequences, as well as the advantages and disadvantages, as this is the guarantee that the protection of constitutional identity can be enforced.[41]

In this context, it is necessary to examine the division of competences between the bodies involved in the constitutional dialogue, namely the European Union, the Government, the Bundestag and the GFCC. According to the latter, the summary examination carried out by it does not appear to show any encroachment of the overall budgetary responsibility of the Bundestag[42] and thus of the right to democratic self-determination through the election of its representative body. This is in part due to the fact that the final decision on the ORD and the EU borrowing contained therein lies in the hands of the Bundestag, because of the ratification. On the other hand, the GFCC stressed that the Government has a wide discretionary power in Germany's relations with the EU, which would be significantly burdened if the GFCC were to annul the law enacting the ORD.[43] Both the *Bundestag* and the German Government would have been deprived of their discretion if the GFCC had annulled the law (which was adopted but not yet promulgated) by way of a preliminary injunction. Consequently, in exercising self-restrain, the GFCC rejected the application for a preliminary injunction in the constitutional complaints.

39 2 BvR 547/21, Reasoning 65

40 The right to democratic self-determination, as known in the Federal Constitutional Court's jurisprudence, which the complainants claimed had been infringed, is derived by the Constitutional Court from the combined interpretation of the right to vote in Art. 38 of the Basic Law, the principles of democracy and popular sovereignty [Art. 20(1)-(2)], the so-called Europe clause (Art. 23) and the eternity clause [Art. 79(3)]."

41 2 BvR 547/21, Reasoning 103

42 2 BvR 547/21, Reasoning 95

43 2 BvR 547/21, Reasoning 107

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4.2 The decision of the GFCC of 6 December 2022

On 6 December 2022, the GFCC rejected the constitutional complaints challenging the ratification act in its main proceedings. In the procedure of the Second Senate, the Federal President, the Bundestag, the Bundesrat and the governments of the federal states were invited to submit their statements.[44] According to the GFCC, contrary to the arguments of the *Bundestag* and the Federal Government, the admission of constitutional complaints alleging a violation of the right to democratic self-determination does not result in an excessive extension of this fundamental right. On the contrary, the admission of such complaints is necessary to safeguard the right to democratic self-determination, otherwise, it would sooner or later become meaningless.[45] In its earlier practice, the GFCC had already derived the right to democratic self-determination from the German Basic Law *(Grundgesetz)*, linking it to the *ultra vires* and the 'identity review' it exercised. This attitude towards EU law allows voters and NGOs – in the case of the ORD's ratifying act, the NGO *Bündnis Bürgerwille*, which alongside the Alternative for Germany (*AfD*) – to access EU law and to call for its constitutional conformity even before it is incorporated into the German legal system.

This is possible because, under the German Basic Law, a constitutional complaint can only be based on a violation of a fundamental right or a right which is equivalent to a fundamental right *(grundrechtgleiche Rechte)*. The right to democratic self-determination is derived from a combinated interpretation of the right to vote, the democratic clause and popular sovereignty, the Europe clause, as well as the eternity clause and is regarded as an equivalent right to a fundamental right.[46] This practice of the GFCC can in principle ensure that voters are brought closer to the result of the European Union's (and its Member States') decision-making processes and thus to the functioning of the EU in general.

However, the Second Senate's decision also reflects the complications of the rapid response required by crisis situations, as already indicated above. In its decision of 15 April 2021, the eight-member Senate had already underlined that, if it were found that Germany's constitutional identity had been infringed or that the ORD was an *ultra vires* act, the GFCC would have to request a PRP before the Court of Justice of the European Union (CJEU), which, based on previous experience, could take two or three years. This would clearly hamper – or in the worst scenario even thwart – the achievements of the economic objectives pursued. This would not only destroy the driving force for economic development that the NGEU program is supposed to provide but would also cast doubt on the EU's chances of economic development in a post-COVID-19 world.[47]

44 Judgment of the Second Senate of 6 December 2022, 2 BvR 547/21 – 2 BvR 798/21, Reasoning 49

45 2 BvR 547/21 – 2 BvR 798/21, Reasoning 115

46 2 BvR 547/21 – 2 BvR 798/21, Reasoning 106

47 2 BvR 547/21 – 2 BvR 798/21, Reasoning 105–106

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These aspects, which also weigh economic (as well as diplomatic) interests, are also reflected in the Senate's decision in the main proceedings. The necessity for requesting a PRP was partly justified by the Senate in the application of the so-called *acte éclairé* doctrine.[48] This doctrine provides an exception to the obligation to refer a question to the CJEU under Art. 267(3) of the Treaty on the Functioning of the European Union (TFEU) on the grounds that the CJEU has already ruled on the same question in law in another case so that the answer to the question posed by the national court is known with certainty.

This finding of the GFCC in the case at hand referred to Art. 125(1) of the TFEU, the so-called "no bail-out" clause, which was interpreted by the Luxembourg Court in *Pringle*.[49] This is interesting because, in paragraph 236 of GFCC decision, the Senate states that it does not consider it necessary to refer the matter for a PRP since "there is no reason to assume that the Court of Justice of the European Union would interpret the competences in Articles 122 and 311(2) TFEU more narrowly than the Federal Constitutional Court."[50] The former provides for economic measures and financial aid adopted in a spirit of solidarity between Member States, the latter for the financing of the budget from own resources. In this light, the Senate does not explain why they constitute an exception to the obligation to initiate a PRP, a serious lapse in relevant reasoning normally due to such impactful decisions in light of the accountability of any constitutional judiciary.

In his dissenting opinion, Justice Müller also considered the initiative of the PRP necessary on the basis of commitment to multi-level cooperation.[51] In addition, according to Müller, "from the past experiences with the implementation of similar legal interventions, it is well-known that temporary instruments created in times of crisis often, in practice, evolve into permanent mechanisms of the European Union's financial architecture and that, in the end, the Member States accept these developments. ([…]). The Senate majority, however, neglects to address this."[52] In our opinion, this also extends to a failure to address questions to the authentic interpreter of the Treaties, namely the CJEU, which is responsible for the compatibility of the EU legislative act with the Treaties.

5 Conclusion

In the dialogue between the European Union and the constitutional bodies of the Member States, there is a struggle between political and economic interests and values (including constitutional values) on the part of the political branch-

48 2 BvR 547/21 – 2 BvR 798/21, Reasoning 237
49 C-370/21, Case of Pringle, 27 November 2012, EU:C:2012:756
50 2 BvR 547/21 – 2 BvR 798/21, Reasoning 236
51 Dissenting opinion of Justice Müller to the Judgment of the Second Senate of 6 December 2022, 2 BvR 547/21 – 2 BvR 798/21, Reasoning 26
52 Dissenting opinion, Reasoning 31

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es of power. This prioritisation of economic interests, in light of the failure to request a PRP, is a new phenomenon in the GFCC practice. The existence and effectiveness of the channels that ensure the concept of cooperative constitutionalism remain a cardinal questions for the dialogue between authentic interpreters. The latter is a key aspect in dealing with crisis situations such as the COVID-19 pandemic, also in the context of a rapidly changing socio-economic environment.

In the Finnish and the German cases presented, the following procedural issues can be mentioned as indispensable in the context of the so-called 'identity review': (i) the necessity of the division of powers and self-restraint; (ii) the time of initiating ex ante norm control (understood review of conformity with the constitution); and (iii) the assessment of the success of the constitutional court's decision-making in a crisis situation regarding rapidity and the consideration of diverse opinions.

Ad (i) On the one hand, the necessity of the division of powers and self-restraint has been raised in the context of the Finnish parliamentary committees' clash of competence and the GFCC's decisions.

Under the Finnish Constitution, both committees may adopt statements during the legislative procedure, but their scrutiny criteria are different. While the assessment of EU drafts falls within the competence of the Grand Committee, the CLC (functioning as a quasi-constitutional court) can adjudicate their constitutionality. This distinction does not render the competence of the Grand Committee void merely limits it. Consequently, the Grand Committee should have (through exercising self-restraint) narrowed the scope of its own assessment, which, in our view, could have avoided a near-constitutional crisis.

In Germany, this dilemma arose in the context of the constitutional dialogue before the Second Senate, when it had to decide on the application for a preliminary injunction. Finally, the GFCC, weighing the Bundestag's budgetary and the Bundesrat's diplomatic discretion, rejected the request for a preliminary injunction in the constitutional complaints.

Ad (ii) The issues related to the "activation" of the (quasi-) constitutional courts' powers of ex ante norm control provide interesting lessons from both the Finnish and the German cases.

In Finland, the CLC's first statement, taken during the EU legislative procedure, turned it into an advisor of the Finnish Government on EU affairs, which justly raises concerns in terms of a body that has the authority to interpret the constitution in an authentic manner. This issue is obviously further complicated by the fact that the CLC is not organisationally separate from the Parliament and exercises both

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> parliamentary and constitutional court-related powers. However, the aforementioned 'advisory role' is a natural consequence of this type of "constitutional court", which is embedded in a parliamentary framework.
>
> At the same time, the well-established jurisprudence of the GFCC is equally forward-looking in that it recognises that a law implementing an EU act is open to constitutional challenge, even before its promulgation. In principle, this attitude could make voters and civil society organisations interested in monitoring the EU and German legislative processes by offering them a legal recourse.
>
> Ad (iii) There is less reason for confidence in the conduct of the bodies exercising the constitutional-court functions in a crisis situation.
>
> According to Päivi Leino-Sandberg,[53] in the name of four parliamentary groups, dissenting opinions were adopted within the second statement of the CLC. On the one hand, this is unprecedented in the Committee's case-law, as the members of the CLC rarely adopt dissenting opinions, but when they do, it contains their individual opinions on the decision, not their parliamentary groups'. On the other hand, this may put the decision-making in a rather political, than constitutional context which, again, underlines the necessity of a separate constitutional court.

The GFCC's failure to give reasons as described is not sufficiently justified by the rapid response required by the crisis situation and the tense attention of the European community. We believe the abandonment of the PRP is even more problematic, in which various economic and diplomatic interests may also have played a role. Neither fundamental rights nor rights equivalent to fundamental rights, under economic and diplomatic interests, were revealed within the GFCC's reasoning provided for their decision of 6 December 2022, that would – to a necessary and proportionate extent – justify the blocking of the constitutional dialogue in order to enforce the complainants' right to democratic self-determination.

After these conclusions, to end on a hopeful note, we must also mention the positive aspects of the presented decision-making processes. On the one hand, the CLC and the GFCC have heard experts in the proceedings, which has made it possible to include external and diverse views. In addition, the summary examination by the GFCC, which was conducted quickly, made it possible to raise the issue of 'identity review' before the decision on the preliminary injunction was made. Finally, the GFCC's reasoning on the admissibility of constitutional complaints, according to which the right to democratic self-determination would be

53 Leino-Sandberg, 2021.

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extinguished if the Constitutional Court rejected these petitions without examining their merits, is also encouraging.

As pointed out above, the possibility of reaching the necessary compromises for crisis management lies partly in an effective constitutional dialogue and partly in its proper procedural guarantees. The situation is perhaps best summed up, as in the miniseries 'Chernobyl', in the context of addressing a nuclear crisis situation: "not great, not terrible."

List of references

Altomonte, Carlo; Villafranca, Antonio. A Revived EU Identity in the Age of Nationalism. In Altomonte, Carlo; Villafranca, Antonio (ed). *Europe in Identity Crisis – The Future of the EU in the Age of Nationalism.* Ledizione-Ledipublishing. Milano, 2019.

Erdős, Csaba: Adalékok az alkotmányos identitás-kérdés eljárási oldalához – Az előzetes döntéshozatali eljárás az Alkotmánybíróság legújabb gyakorlatában. [Additions to the Procedural Side of the Constitutional Identity Issue – The Preliminary Ruling Procedure in the Recent Practice of the Constitutional Court] *Jog-és politikatudományi folyóirat*, Különszám, 2022. pp. 85–105.

Feichtner, Isabel. The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe. *German Law Journal.* 2020, no. 21, pp. 1090–1103.

Hoffmann, Stanley. *Europe's Identity Crisis Revisited.* The MIT Press. Cambridge, Massachusetts, 1994, 123/2. pp. 1–23.

Jakab, András (ed.). *Az Alkotmány kommentárja I. [Commentary on the Constitution I.]* Budapest: Századvég Kiadó, 2009. pp. 1102–1103.

Leino-Sandberg, Päivi. *Between European Commitment and 'Taking the Law Seriously': The EU Own Resources Decision in Finland,* VerfBlog, 2021/4/29, [online]. Available at: https://verfassungsblog.de/between-european-commitment-and-taking-the-law-seriously/ DOI: 10.17176/20210429-181619-0.

Leino-Sandberg, Päivi. *Who is ultra vires now?: The EU's legal U-turn in interpreting Article 310 TFEU*, VerfBlog, 2020/6/18. [online]. Available at: https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/ DOI: 10.17176/20200618-124211-0.

Manhertz, Tamás István. *Alkotmánybírósági hatáskörök jogösszehasonlító vizsgálata* [*Comparative Analysis of the Competences of the Constitutional Court].* Doctoral thesis. Pázmány Péter Catholic University, Doctoral School of Law and Political Science. Budapest. [online]. Available at: http://real-phd.mtak.hu/1115/1/Manhertz_Tamas_Istvan_dolgozatv.pdf Accessed: 27.02.2023.

Martonyi, János. Law and Identity in the European Integration. *Hungarian Journal of Legal Studies*, 2021, 60/3, 227–235, pp. 227–235.

Ojanen, Tuomas. EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament. *Schandinavian Studies in Law*, Stockholm, 2007. pp. 203–225.

Repasi, René: *Analysis: "Karlsruhe, again: The interim-interim relief of the German Constitutional Court regarding Next Generation EU"* EU Law Live, 29th March 2021. [online]. Available at: https://eulawlive.com/analysis-karlsruhe-again-the-interim-interim-relief-of-the-german-constitutional-court-regarding-next-generation-eu-by-rene-repasi/

Sulyok, Márton; Tribl, Norbert. „A gazda bekeríti házát"? A Német Szövetségi Alkotmánybíróság PSPP-döntésének jelentősége és az európai integrációért viselt alkotmányos felelősség realitása. ['The master pulls a fence around his house?' The Significance of the PSPP Decision of the German Federal Constitutional Court and the Reality of Constitutional Responsibility for European Integration] Európai Tükör, 2020/2. pp. 7–30.

Sulyok, Márton. *Constitutional Justice in Europe – "Courting" Death?* Constitutional Discourse, 6th April 2021. [online]. Available at: https://constitutionaldiscourse.com/marton-sulyok-constitutional-justice-in-europe-courting-death/

Viterbo, Annamaria. The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank. *European Papers.* 2020, vol. 5. no 1, pp. 671–685.

Von Bogdandy, Armin; Schill, Stephan. Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty. *Common Market Law Review* (48) 2011.

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