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Jasper Nebel

Constitutional Pluralism in the aftermath of the *PSPP* judgment.

Reflections on the enhancement of judicial dialogue in the EU.

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Faculty of Law
Maastricht University
Postbox 616
6200 MD
Maastricht
The Netherlands

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ABSTRACT

The *PSPP* judgment of the Bundesverfassungsgericht (BVerfG) has given fresh impetus to the decades-long discussion on the European constitutional order and more specifically on the concept of constitutional pluralism. While the judgment itself does not seem to be a methodological and argumentative masterpiece, important lessons can be drawn from it with respect to the persuasive power of constitutional pluralism. It has plainly demonstrated that the competing claims for final authority within the EU did – unsurprisingly – not diminish. On the contrary, the issue was forcefully put back on the agenda. While this seems to make the case for the descriptive power of constitutional pluralism, the approach and language of the BVerfG imply the exact opposite. With the current dialogue framework at its disposal, the BVerfG was obliged to present its claims in this confrontative way in order to be heard. Hence, the judicial dialogue requires further institutionalisation. For the sake of the EU's unity, this thesis applies constitutional pluralism only to a limited extent by explicitly upholding the CJEU's monopoly to interpret EU law. To improve the current framework, this thesis proposes a Constitutional Dialogue Mechanism (CDM) that is based on the existing Early Warning Mechanism. It shall equip national constitutional courts with a possibility to voice their reservations on CJEU jurisprudence in a constructive and respectful manner within the framework of so-called constitutional fora.

TABLE OF CONTENT

1. INTRODUCTION

The *PSPP* judgment of the Bundesverfassungsgericht (BVerfG) was another episode of the infamous judicial saga between the Court of Justice of the European Union (CJEU) and the BVerfG.[1] Unlike before, the BVerfG did not only threaten but actually made use of its elaborately established *ultra vires* doctrine. The court declared the PSPP-decision of the ECB[2] as well as the CJEU's *Weiss* judgment[3] as *ultra vires* and denied their legally binding force in Germany. This dualism between the BVerfG and the CJEU already began prior to the BVerfG's judgments on the ECB's monetary policy.[4] In its decision on the Maastricht and Lisbon Treaties[5] and in the *Honeywell* decision[6], the BVerfG indicated that it will reserve itself the right to examine whether EU institutions remain in line with the European competence order – remain *intra vires*. In this sense, the BVerfG neither accepts the unconditional primacy of EU law nor the CJEU's self-attribution as final arbiter of EU law.

The *PSPP* judgment has shown that the constitutional order of the European Union is not only dogmatically but also practically still in motion.[7] Academia has struggled for decades to generate a sophisticated conceptualisation of the European constitutional order.[8] One of the more successful attempts was the idea of constitutional pluralism.[9] It considers the European legal order as multipolar and non-hierarchical in which different courts can articulate their constitutional claims in an inter-institutional bargaining.[10] But not only has this concept opponents among scholars,[11] the *PSPP* judgment has also prompted questions on how far constitutional pluralism is able to mirror the constitutional reality. Due to the harsh language and the approach of the BVerfG, this judgment can hardly be seen as part of a judicial dialogue in the sense of constitutional pluralism. At the same time, however, one of the learnings of the *PSPP* judgment is that there still exist diametrically different views on the European legal order that all claim to have the final say. Accordingly, constitutional pluralism

[1] BVerfG, 05.05.2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (*PSPP*)
[2] Decision (EU) 2015/774 (04 May 2015)
[3] CJEU C-493/17 (*Weiss*). I refer to the judgment of the CJEU as *Weiss* and to the judgment of the BVerfG as *PSPP.*
[4] The *PSPP* judgment together with the *OMT* judgment (BVerfG, 21.06.2016, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (*OMT*)
[5] BVerfG, 12.10.1993, 2 BvR 2134 and 2 BvR 2159/92 *(Maastricht)*. BVerfG, 30.06.2009, BvE 2/08, 2 BvE 5/08, 2 BvR 010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09 (*Lissabon*).
[6] BVerfG, 06.07.2010, 2 BvR 2661/06 (*Honeywell*)
[7] Cuyvers 2017, p. 181
[8] Schütze 2020, p. 76
[9] Maduro 2012, p. 67. Pierdominici 2017, p. 126
[10] For example Kumm 1999, p. 384 and Maduro 2012, p. 79
[11] Critique was regularly stated: De Boer 2018; Davies 2012; Loughlin 2014; Pech, Kelemen 2019. After *PSPP* a group of scholars brought up harsh critique on constitutional pluralism (Kelemen, Eeckhout, Fabbrini, Pech, Uitz 2020)

regains descriptive power since it rejects any hierarchical and unilateral power structure within the European legal order.

In the aftermath of *PSPP* the legal scholarship focused on the methodological and legal inconsistencies of this judgment.[12] However, this thesis discusses the lessons that can be drawn from the judgment in light of the constitutional order of the European Union. The existence of different dogmatic approaches concerning the constitutional nature of the European Union has become apparent again. From the individual perspectives of both courts, the two approaches are comprehensible.[13] On the one hand, the BVerfG is constitutionally responsible for protecting the German constitution. If the EU acts outside its competences, its acts are not covered by the Member States' mandate and therefore infringe the national constitutions. On the other hand, the European legal order in its uniqueness, by nature, is fully effective only when EU law is supreme over any national law, and if any kind of unilateral opt-out is excluded. The two positions that are - from their perspective - legitimate seem to be impossible to reconcile or as Garner put it: the task is nothing less than "squaring the PSPP circle"[14]. However, due to the limited scope and factual unfeasibility, this thesis does not propose a final solution to European constitutionalism. It rather seeks to find a *modus operandi* which satisfies (more or less) all actors and establishes a constructive dialogue that does not harm the project of European integration. Therefore, the research question of this thesis reads as follows: What lessons can be drawn from the *PSPP* judgment with regards to the European constitutional order within the context of constitutional pluralism? Based on this discussion, it is asked how the idea of constitutional pluralism can be further institutionalised within the EU.

This is done at two levels: First, this thesis argues that constitutional pluralism remains normatively a convincing concept and that judicial dialogue between the CJEU and national apex courts must be enhanced. The *PSPP* judgment has shown that both courts only reluctantly have contributed to a meaning- and respectful judicial exchange. Thus, the descriptive dimension of constitutional pluralism only partly holds true. Second, this thesis argues that the judicial dialogue must be further institutionalised and therefore, proposes a constructive mechanism that could facilitate this judicial dialogue. The Constitutional Dialogue Mechanism (CDM) could be a possibility to enable a more sophisticated dialogue which might foster a constructive co-existence of the distinct legal orders within the framework of a unique European legal system.

[12] Sauer 2020 and Nguyen, Chamon 2020 being two examples (out of dozens of contributions) that present a coherent critique of the judgment itself. Especially the application of the proportionality test was criticised considerably. Cf Nicolaides 2020. The German Law Journal has dedicated a special section of volume 21, issue 5 to the *PSPP* judgment.
[13] Engel, Nowag, Groussot 2020, p. 149 and Höpner 2021, p. 15
[14] Garner 2020

This thesis is structured as follows. Firstly, the positions of both the CJEU and the BVerfG are briefly summarised, and the concept of constitutional pluralism is presented. Secondly, it is discussed how the *PSPP* judgment contributed to the discourse on the constitutional order of the EU. Thirdly, this thesis argues that the normative claims presented by constitutional pluralism are still convincing though to a limited extent. Fourthly, the current state of judicial dialogue within the EU is assessed. Fifthly, this thesis presents a mechanism that could remedy the shortcomings of the current state of constitutional pluralism within the EU. Finally, the main findings of this thesis are summarised.

2. CONTEXTUAL AND CONCEPTUAL BACKGROUND

This section aims at introducing the EU law jurisprudence of the BVerfG - including its *ultra vires* review - on the one hand and the CJEU's primacy doctrine and its justification on the other hand. Thereafter, the concept of constitutional pluralism, its merits and the constitutional pluralist's reception of the *PSPP* judgment are discussed.

a) Position of the BVerfG

The case law of the BVerfG concerning the European integration has evolved over a long time. The BVerfG always had problems accepting absolute and unconditional EU law primacy as promoted by the CJEU and therefore, retained the right to review Union actions with regards to fundamental rights protection, *ultra vires* review and the identity clause in the German constitution.[15]

The BVerfG's jurisprudence regarding the CJEU's (insufficient) protection of fundamental rights[16] became less important after the Charter of Fundamental Rights came into force and the CJEU considerably enhanced its level of protection.[17] Today's more important concept - the *ultra vires* review - was established in 1987[18] and reiterated in the *Maastricht* judgment.[19] The BVerfG determined that EU institutions act *ultra vires* if they exceed the limits of their mandate and that these Union actions do not have binding force in Germany. The justification was based on the so-called "Act of Approval" in which the German legislator has agreed to the transfer of sovereign powers to the EU. Together with Art. 23 (1)

[15] Kyriazis 2020
[16] Established by the CJEU in *Solange II* (BVerfG, 22.10.1986, 2 BvR 197/83)
[17] Claes 2016, p. 155
[18] BVerfG, 08.04.1987, 2 BvR 687/85 (*Kloppenburg*). The BVerfG ruled on the validity of the direct effect of EU Directives whereby the judges indicated that the CJEU possibly could exceed its competences.
[19] BVerfG, 12.10.1993, 2 BvR 2134 and 2 BvR 2159/92 (*Maastricht*)

of the German Basic Law, this act defines the transfer's scope.[20] If the EU acts outside its mandate, it would not only be in breach with the Treaties (principle of conferral (Art. 5 TEU)) but would also infringe Art. 23 (1) of the German constitution. Hence, the BVerfG gave itself the power to patrol the boundaries of EU competences and potentially declare EU acts *ultra vires*.[21] Thereby, the BVerfG underlined that the EU shall not be able to have a *Kompetenz-Kompetenz*, the competence to define the scope of its own powers.

In *Honeywell* the BVerfG set out criteria for this *ultra vires* application.[22] The exceeding of competences by one of the EU institutions must be manifest and structurally significant in order to be declared *ultra vires*. Next to substantial requirements the BVerfG established a formal protocol for potential *ultra vires* situations. First, the BVerfG would need to make a preliminary reference to the CJEU and challenge the legality of the disputed act. And second, in case the CJEU does not share its view, both the CJEU judgment and the act itself would be declared *ultra vires.*[23] In *OMT* the BVerfG already indicated strong doubts in the context of CJEU judgments but declared that the self-imposed criteria were not fully fulfilled.[24] This argumentation, however, laid the ground for the *PSPP* judgment. In the latter decision the court considered the criteria to be fulfilled. Both - the CJEU and the ECB - were exceeding their mandates in a manifest and structurally significant way. Neither the CJEU judgment itself nor the ECB decision are therefore binding in Germany.[25]

Next to the *ultra vires* review, the BVerfG has developed another line of reasoning that justifies the review of EU acts by referring to the identity clause in Art. 79 (3) of the German Basic Law. The clause defines the unamendable core of the German constitution that is also seen as benchmark for the validity of constitutional amendments in Germany.[26] Consequently, the identity clause limits – according to the BVerfG – the scope of action for Union actors.[27] If one of the protected principles is touched upon by a Union action, the BVerfG finds itself forced to declare the act as non-binding in Germany.

Concluding, the BVerfG does not fully accept the CJEU's role as final arbiter but instead empowers itself – under strict conditions - to review EU law on its conformity with the German Basic Law.

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[20] Originally the transfer of power was based on Art. 24 (1) of the German Constitution since Art. 23 was only introduced after the Maastricht Treaty (Di Fabio 1993, p. 191).
[21] Claes 2016, p. 155
[22] BVerfG, 06.07.2010, 2 BvR 2661/06 (*Honeywell*)
[23] Sarmiento 2020, p. 10
[24] BVerfG, 21.06.2016, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (*OMT*)
[25] BVerfG, 05.05.2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (*PSPP*), par. 119
[26] BVerfG, 05.05.2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (*PSPP*), par. 223
[27] Gärditz pleas for a more substantive use of the identity review instead of the *ultra vires* review (Gärditz 2020, p. 506).

b) Position of the CJEU

In *Costa v. ENEL* the CJEU declared that in order for EU law to be fully effective, it must have absolute and unconditional primacy over any national law.[28] Closely linked to the primacy of EU law is the CJEU's monopoly to interpret EU law and to invalidate EU secondary legislation (Art. 267 TFEU). Furthermore, the judgments of the CJEU have binding effect on national courts. In later judgments, the CJEU reiterated that EU law has primacy over national constitutional law, too[29] and that any national court is obliged to set aside national provisions that conflict with EU law.[30] The key term is 'full effect', *effet utile*. Due to its uniqueness the EU would not be fully effective if EU law would not be supreme over national law. If all Member States could decide individually to what extent EU law applies on their territory and to their citizens, European integration would only be half the success story it is today.[31] Art. 19 (1) TEU underlines the importance of national legal orders for the enforcement of EU law. Naturally, national courts take a key position in this regard and are functionally seen as EU courts. The 'complicity' of national courts enforcing EU law is regularly seen as one of the main reasons for the success of the CJEU.[32] Therefore, the CJEU determined that this legal order *sui generis* requires the principle of primacy in order to be fully effective. The equal application of EU law (irrespective of the national law) is indispensable to ensure the effective achievement of the Treaty's objective.

Following the *PSPP* judgment, the CJEU reiterated its own well-known reading of primacy of EU law without explicitly mentioning "primacy".[33] It slightly twisted its argumentation by introducing the principle of equality among Member States as justification for the primacy of EU law. When single Member States would be able to unilaterally opt-out, this would lead to inequalities among the Member States. Thereby, the CJEU was able to base its argumentation on a Treaty provision (Art. 4 (2) TEU).[34]

After this summary of the relevant positions and doctrines of both courts, the concept of constitutional pluralism is presented. Constitutional pluralism might serve as a theoretical starting point to foster the dialogue between the constitutional courts and the CJEU.

c) Constitutional Pluralism

[28] CJEU C-6/64 *(Costa v. ENEL*)
[29] CJEU C-11/70 (*Internationale Handelsgesellschaft*)
[30] CJEU C-106/77 (*Simmenthal*)
[31] Cuyvers 2017, p. 177
[32] Hofmann 2018, p. 264
[33] Lindebloom 2020, p. 1033. The CJEU has released a press release shortly after the *PSPP* judgment (CJEU 2020 (Press Release))
[34] Lindebloom 2020, p. 1042

The constitutional order of the European Union did not evolve by following a theoretical and conceptual superstructure.[35] Traditional doctrines such as monism and dualism were evaluated as too under-complex and unable to mirror the substantial overlaps and intertwinements of international law in general and more specific within the European legal order.[36] Accordingly, Neil MacCormick developed the concept of constitutional pluralism in the context of the *Maastricht* judgment.[37] It is understood as a refinement of the former classical constitutional debates[38] and as such the nearest approximation to a fully developed concept of the European constitutional order.[39]

It is important to differentiate the descriptive and normative claims of constitutional pluralism. On a descriptive level, constitutional pluralism intends to enhance the understanding of the European constitutional order. It entails two major aspects: On the one hand, an acknowledgement of the existing plurality of legitimate constitutional orders which all claim to be the final authority.[40] On the other hand, it captures the discursive practice between the CJEU and the national constitutional courts and evaluates it as constructive and respectful with the ultimate aim of accommodation.[41] Without this productive dialogue, constitutional pluralism as such cannot work.[42]

The normative perspective goes beyond a mere description of the status quo and promotes the idea of a heterarchical constitutional order within the European Union, contrary to the hierarchical order implied by the doctrine of primacy. Going further than solely acknowledging the pluralist reality, it rejects any supreme and one-dimensional legal order.[43] It therefore dismisses absolute primacy of EU law and the CJEU as final arbiter.[44] It pleads for a co-existence of the highest European courts[45] and proposes a complex system of relationships between all kinds of institutions.[46] In that sense, constitutional pluralism accepts the diverging positions between national constitutional courts and the CJEU and intends to

[35] Maduro 2012, p. 67
[36] Preshova 2019, p. 66
[37] MacCormick 1993 and MacCormick 1995. The concept was further spelled out by among others Kumm, Komárek and Maduro who also count as the most prominent proponents (Maduro 2012 and Komárek 2012).
[38] Pierdominici 2017, p. 124. These 'classical' readings of European constitutionalism were coined by authors such as Weiler (1995), Habermas (1995) and Grimm (1995)
[39] Pierdominici 2017, p. 121. Weiler has even called it an orthodoxy (Weiler 2012, p. 8)
[40] Maduro 2012, p. 70
[41] Maduro 2012, p. 70. Ćapeta 2021, p. 7: This specific breakdown of the descriptive dimension is based on Carpet's contribution who even adds a third aspect by claiming that there shall be no hierarchy between the claims. However, this last aspect should be rather located in the normative dimension.
[42] Höpner 2021, p. 4
[43] MackCormick 1995, p. 265 and Walker 2002, p. 337
[44] Komárek 2012, p. 233
[45] Kumm 1999, p. 384
[46] Komárek 2012, p. 236

accommodate them; thereby promoting "stability in instability"[47]. Constitutional pluralism does not, however, define the European constitutionalism order as such but rather defines the nature of interaction between European constitutionalism and the different national constitutional orders.[48]

Over the last years, many variations of constitutional pluralism have evolved. Maduro's idea – also termed the participative strand - is worth to be mentioned due to its focus on the institutional dimension of constitutional pluralism.[49] Maduro presents the theory of contrapunctual law that focuses on a voluntary commitment of the courts among each other.[50] Their judicial conduct and their interaction should be guided by the so-called harmonic principles of contrapunctual law, being: pluralism, consistency and vertical and horizonal coherence, universality, and institutional choice. Thereby, different views should be incorporated and accommodated within a judicial dialogue based on those principle. This idea primarily aims at decreasing the potential of constitutional conflicts that could threaten the unity the European constitutional order.[51] Therefore, Maduro concentrates on preventing constitutional conflicts rather than providing for a conflict resolution mechanism.[52]

In his conception of the European constitutional order, Weiler has developed the principle of constitutional tolerance. He claims that the acceptance of the European constitutional order and the subordination of national legal orders shall be "an autonomous voluntary act, endlessly renewed on each occasion" ultimately rendering the legal order to "the aggregate expression of other wills".[53] Essential part of constitutional tolerance is the respectful acknowledgment of the 'otherness' and the Other's identity. Consequently, Weiler pleas for a voluntary subordination of EU law primacy based on constant accommodation. While he does not characterise himself as constitutional pluralist[54], others have argued for "Weiler's membership within the pluralist family".[55]

Earlier criticism on constitutional pluralism was mainly directed at the basic tenets of the concept. More recently the normative desirability of constitutional pluralism was challenged due to its practical unfeasibility.[56] It is empirically doubted whether a conflict between European and national constitutional law exists or if the critique is solely put forward

[47] Pierdominici 2017, p. 124
[48] Maduro 2012, p. 67
[49] Jaklic 2014, p. 102 and p. 126. Pierdominici 2017, p. 126
[50] Maduro 2003, p. 524
[51] Preshova 2019, p. 82
[52] Simultaneously this is formulated as critique on Maduro's proposal. Cf Komárek 2007, p. 33
[53] Weiler 2003, p. 21
[54] Preshova 2019, p. 78
[55] Jaklic 2014, p. 74
[56] Pierdominici 2017, p. 128. Fundamental critique was coined among others by Loughlin (Loughlin 2014), Somek (Somek 2012 and Somek 2014) and Davies (Davies 2012). Recent critique focused on the inherent danger of constitutional pluralism in the context of the Euro crisis (Kelemen 2016a) and with regards to the Eastern European abuse of constitutional pluralism (Pierdominici 2017, p. 138)

by very few powerful actors such as the BVerfG.[57] Furthermore it is contested whether the descriptive dimension is still able to describe the constitutional order after *PSPP*.[58] Accordingly, critics claim that the judgment does not help the cause of constitutional pluralism since it blatantly shows its limits.[59] The BVerfG chose a language and tone incompatible with the idea of constitutional pluralism. Neither the BVerfG nor the CJEU tried to find a compromise solution to the issue at hand.[60] Nonetheless, others have pointed towards a "radical view of constitutional pluralism" in the judgment.[61] Even critics of the normative dimension acknowledge the suitability of the descriptive perspective in describing the constitutional reality.[62]

On a normative level, scholars claim that constitutional pluralism does not ensure equality between Member States but that it would enable cherry picking.[63] Furthermore, Kelemen stated that any constitutional order "worthy of the name" must need to explicitly define a supreme authority.[64] In the context of the jurisprudence of the BVerfG, its potential domino effects in countries such as Poland and Hungary were emphasised. In this regard, a group of renowned scholars has characterised constitutional pluralism and consequently the *PSPP* judgment, too, as being "prone to abuse by autocrats and their captured courts".[65] If it causes comparable judgments, constitutional pluralism undermines the EU legal order and thus could threaten the idea of European integration as such.[66] Others have challenged the fundamental premises of constitutional pluralism: the whole process of discursive deliberation – as suggested by constitutional pluralism – lacks the democratic element. Hence it is questionable whether constitutional courts are generally best suited to define a constitutional order.[67]

This section sought to introduce the main ideas relevant for the understanding of this thesis. First, it summarised the main doctrines of the BVerfG and the CJEU. Afterwards it elaborated on the present state of constitutional pluralism. Special attention was given to the critique on constitutional pluralism and how it is connected to the *PSPP* judgment.

[57] Perju 2020, p. 1017
[58] Ćapeta 2021, p. 8
[59] Engel, Nowak, Groussot 2020, p. 149
[60] Ćapeta 2021, p. 8
[61] Engel, Nowak, Groussot 2020, p. 143
[62] De Boer 2018, p. 3
[63] Kelemen, Pech 2019
[64] Kelemen 2016a, p. 136
[65] Kelemen, Eeckhout, Fabbrini, Pech, Uitz 2020
[66] Pierdominici 2017, p. 142
[67] De Boer 2018, p. 8

3. *PSPP* AND THE DESCRIPTIVE PERSPECTIVE OF CONSTITUTIONAL PLURALISM

This section discusses whether the descriptive dimension of constitutional pluralism still holds after the *PSPP* judgment. It elaborates how the BVerfG jurisprudence strengthened the case of constitutional pluralism while at the same time exposing the shortcomings of the descriptive power of the theory. As seen above, some scholars have indicated doubts with regards to the persuasive power of constitutional pluralism after *PSPP*, while others consider the BVerfG's jurisprudence as constitutional pluralism 'in action'.[68] This section is structured in accordance with the two descriptive assumptions indicated by Maduro.[69] Accordingly, the first step is to evaluate whether different claims of equal legitimacy regarding the final authority exist. Secondly, it is assessed whether the BVerfG and the CJEU have been engaged in a constructive dialogue as suggested from the descriptive perspective of constitutional pluralism.

a) Existence of legitimate claims for final authority?

It is important to consider this issue from two viewpoints: On the one hand, it must be determined to what extent the opposition against the primacy of EU law is quantitatively relevant. On the other hand, the competing claims are considered from a qualitative perspective, and it is in essence asked whether the doctrines of both the CJEU and BVerfG are legitimate within their own legal context.

i. Quantity: Solitary or universal resistance?

In the following paragraphs, this thesis determines whether quantitatively a relevant number of courts have shown their opposition vis-à-vis the CJEU's primacy doctrine. If it would turn out that the BVerfG is the only national court opposing the primacy of EU law, the necessity to further consolidate the European constitutional order would diminish. Some scholars disputed whether there is a continuity of national resistance by national constitutional courts.[70] According to them, many courts – especially at lower level – have frankly accepted the primacy of EU law. Lower courts often considered the CJEU as potentially powerful judicial ally outside their national judicial hierarchy.[71] Furthermore, Claes has worked out methodological mistakes by the BVerfG when referring to judgments of other courts, implying

[68] Engel, Nowag, Groussot 2020, p. 144. Others have argued that the BVerfG's case law was locatable within constitutional pluralism until the *OMT* judgment (Ćapeta 2021, p. 7)
[69] Maduro 2012, p. 70
[70] Perju 2020, p. 1017 and Claes 2016, p. 157
[71] Kelemen 2016b, p. 133

that only very few courts effectively share the views of the BVerfG.[72] Thus, the BVerfG could be more isolated than it wants us to believe.[73]

But with regards to *PSPP* three important arguments are to be mentioned. First, the issue was taken up in prominent judgments of various national constitutional courts.[74] Not all of these courts have as plainly resisted the CJEU as the BVerfG did. Nevertheless together with the BVerfG's jurisprudence, the impact of these judgments should not be underestimated.[75] While ordinary primacy – EU law takes priority over 'ordinary' national law – is more willingly accepted by national courts (at least on an abstract level), primacy of EU law over national constitutional law in its far-reaching and unconditional sense is accepted by almost no constitutional court.[76] Furthermore, it is the task of very few but important courts (the national constitutional courts) to echo these sorts of fundamental issues. Due to their natural subordination it is therefore not surprising that ordinary courts have formally accepted primacy while national constitutional courts were more sceptical. Next to the judicial sphere, the issue is extensively and controversially discussed in the academic literature.[77] Hence, the existence of multiple competing claims of final authority and competing legal orders cannot be disregarded;[78] also because it produces increasingly unsatisfactory results.[79]

Secondly, national courts may have accepted primacy in principle but there are many policy areas where lower courts only reluctantly apply the case law of the CJEU.[80] Though not actively rebelling, national courts do not diligently implement EU law either. National courts have wide discretion in deciding if they refer a case to the CJEU (also due to the *acte claire* doctrine). Therefore, national courts regularly do not use the preliminary reference procedure although it would be appropriate or alternatively do not strictly follow the CJEU's

[72] Claes 2016, p. 162
[73] Claes 2016, p. 153
[74] The Czech Constitutional Court (Czech Ústavni Soúd, decision of 31 January 2012, Pl. ÚS 5/12. (*Landtová*)) and the Danish Supreme Court (Danish Supreme Court, 06.12.2016, Case 15/2014 (*Dansk Industri)*) were – next to the BVerfG – the only European constitutional courts that have declared a Union act being non-applicable in their respective jurisdiction. The context of these judgments is different though. Especially with regards to the former one, it is argued that this judgment followed an internal conflict between the Czech Constitutional Court and the Highest Administrative Court (Claes 2016, p. 160) and it is therefore seen as an isolated incident (Preshova 2019, p.48). Another example is the *Taricco* judgment of the Italian Constitutional Court that is discussed later on more in detail. Next to the *ultra vires* doctrine of the BVerfG, the *controlimiti* doctrine of the ICC is the most relevant one.
[75] Dehousse, 2017, p. 23
[76] Claes 2016, p. 194. Reference also made to the analysis by Slaughter et al. (Slaughter, Stone Sweet, Weiler 2000), Mayer (Mayer 2000) and Lindner (Lindner 2015). In almost all constitutional courts reservations with regards to primacy were present.
[77] Preshova 2019, p. 65
[78] Maduro 2012, p. 80
[79] Höpner 2021, p. 2
[80] A very good example is the implementation of the CJEU case law with regards to State aid law and its private enforcement. Cf Unger & Hug 2020

interpretation after a preliminary reference.[81] The reasons for this can be found in a general reluctance of national judges to obey the interpretation of EU law as presented by the CJEU.[82] Although in theory they have accepted primacy of EU law, national courts do not flawlessly apply the primacy doctrine in practice.

Thirdly, the factual reality must be accepted. Although the BVerfG can be criticised for this judgment, the German judges at least reached their (ancillary) goal of agenda-setting. This issue will remain on the agenda. Other courts will take the *PSPP* judgment as role-model and as long as the constitutional inconsistencies in the European Union are not addressed sufficiently, their claim is at least partially comprehensible. Especially in cases where the CJEU exceeds its competences more blatantly – contrary to *PSPP*[83] – the likeliness of *ultra vires* judgments rises. Other developments or judgments could have deserved more scrutiny than the *PSPP* judgment.[84]

This also serves as a bridge to the next section. This section determined that though not too many courts question the primacy of EU law, the issue was taken up by many national constitutional courts. Furthermore, lower courts as well only imperfectly apply EU law and thus indirectly challenge EU law primacy. Thus, in contrast to constitutional pluralism, unconditional primacy certainly does not match with the constitutional reality of the EU.[85] The issue is back on the agenda and as demonstrated below, the dogmatic of both positions is comprehensible from their individual perspective.

ii. Quality: Legitimacy of both courts' claims

The descriptive dimension is now considered from a qualitative perspective. Arguably both the claims of the BVerfG and the CJEU are legitimate from their individual perspective.

The BVerfG demonstrated that further deliberation within academia and the judicial sphere concerning the European constitutional order is urgently needed. The BVerfG echoes concerns grounded on constitutional law that deserve thorough attention. It legitimately claims that it is the role of the constitutional court to observe the conferral of competences to the EU.[86] Furthermore, EU law has not yet found a workable solution to the problem of

[81] Hofmann 2018, p. 265; Hübner's study has worked out that in her sample in about 80% of the cases, no references were made (Hübner 2017)
[82] Hofmann, 2018, p. 264. Interestingly enough national parliaments do not agree to an unconditional primacy of EU law either as visible in their reasoned opinions in the context of EWM (Jaroszynski 2020, p. 109)
[83] As argued by (among others) Sauer (Sauer 2020, p. 6)
[84] Gärditz considers the CJEU cases *Mangold* (CJEU C-144/04) and *Akerberg Fransson* (CJEU C-617/10) as more suitable cases (Gärditz 2020, p. 505). Sarmiento 2020, p. 16
[85] Höpner 2021, p. 3. Claes has listed the various reservations of other national constitutional courts with regards to the unconditional primacy of EU law over national constitutional law (Claes 2015, p. 198)
[86] Argument reiterated by the group of constitutional judges Grabenwarter et al. (Grabenwarter, Huber, Knez, Ziemele 2021, p. 52)

potential transgressions of power and breaches of the principle of conferral.[87] Assuming the situation that an EU institution would obviously exceed its competences and thereby limit the competences of the Member States, it seems legitimate for the constitutional court of the concerned Member State to intervene.[88] The CJEU – the responsible body - was in the past not very keen to invalidate Union actions due to transgressions of the EU mandate.[89] Hence, if the EU's legal system only ineffectively "patrols the boundaries"[90] of its mandate, it is only consequential that those actors originally agreeing to the transfer of power want to assume this task. If national constitutional courts would tolerate transgressions of power of the EU, it would equip the latter with a *de facto Kompetenz-Kompetenz* since it could define its own mandate.[91] The BVerfG rightly claims that the EU cannot have a *Kompetenz-Kompetenz*.[92] It would constitute a breach of the principle of conferral as codified in Art. 5 (2) TEU since the whole European legal order is originally based on the transfer of powers from the Member States. From a Member States perspective it is thus legitimate to claim that these actions exceed what was agreed upon in the transfer of powers.

In this context, it is important to take into account the "radicality of European constitutionalism"[93]. The Treaties, as interpreted by the CJEU, had unprecedented effects on the national legal order. The principles, created in essential judgments like *Van Gend en Loos, Simmenthal* and *Costa v. ENEL*, affected some of the very important national doctrines that were carefully defined and developed within the national legal orders. Due to the *Simmenthal* doctrine, regular national courts were suddenly enabled – by a back then foreign court – to set aside national legislation. In most national legal orders, the constitutional or supreme courts have had a monopoly of invalidating national legislation (e.g., Art. 100 of the German constitution). By giving regular national courts the power to set aside national legislation, this monopoly is considerably weakened.[94] Thus, it is only understandable that national constitutional courts were cautious with regards to the most important principles established by the CJEU.

Irrespectively, this thesis reiterates that the primacy doctrine of the CJEU was necessary and important. Primacy is essential since "the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty".[95] By establishing such a high

[87] Sarmiento & Weiler 2020
[88] Examples of hypothetical blatant transgressions in Di Fabio 2014, p. 108
[89] Sarmiento & Weiler 2020. Grabenwarter, Huber, Knez, Ziemele 2021, p. 57
[90] Claes 2016, p.155
[91] as argued by the BVerfG in BVerfG, 05.05.2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (*PSPP*), par. 111
[92] BVerfG, 05.05.2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (*PSPP*), par. 102
[93] Perju 2020, p. 1017
[94] Piqani 2016, p. 34
[95] CJEU, Case C-6/64 (*Costa v. ENEL*), p. 593

degree of integration, the Treaties created an unprecedented new legal order. Together with direct effect, primacy provides for the very needed efficient enforcement of EU law in the national legal orders.[96] If the Member States would be able to unilaterally opt out, the autonomy of EU law would be undermined as it would ultimately depend on national law.[97] Furthermore, attention must be given to the – back then – wholly exceptional and unprecedented nature of the founding Treaties. A far-reaching and 'integrationist' reading of the Treaties, ultimately leading to primacy and direct effect, was therefore only consequential.[98] Without this efficient enforcement, the objectives of the Treaties could not be achieved.

b) Constructive judicial dialogue between the CJEU and the BVerfG?

As argued above, the judgment has shown that the first assumption of the descriptive dimension of constitutional pluralism holds true by demonstrating quite plainly that there are still clearly identifiable dogmatic divergences with regards to the European constitutional order. Furthermore, those claims are considered to be of equal legitimacy and reasonable within their respective constitutional environment. In this section, it is claimed that neither the BVerfG nor the CJEU did, however, engage in a constructive dialogue and therefore did not follow the fundamental ethics of constitutional pluralism in its *PSPP* judgment. Thus, the validity of the second assumption of the descriptive dimension is called into question.

Already the term 'dialogue' seems to be misplaced when describing the interaction between the two courts. On the one hand, the BVerfG and its *ultra vires* doctrine - including the envisaged procedure - could hinder a proper dialogue. If the BVerfG has strong doubts concerning a Union act and indicates that the Union potentially has acted *ultra vires*, it first must refer the case to the CJEU. Therefore, in *PSPP*, too, the BVerfG referred the question not because it wanted an interpretation of the CJEU but rather to comply with its own standards.[99] Keeping in mind that the BVerfG was hesitant to refer matters to the CJEU for a long time, it remains – at least – questionable whether it lies close to the BVerfG's heart to start a proper dialogue with the CJEU or it the BVerfG only paid lip service.[100] Before *PSPP* the BVerfG referred a similar case – the *OMT* case – where the context and the argumentation of both courts were comparable to the *PSPP* saga. Therefore, the BVerfG is presumably aware of the CJEU's position on the ECB's monetary policy and that it is very unlikely that the CJEU will side with the BVerfG. Hence, the outcome of the preliminary reference in the *PSPP* case was expectable and it is questionable whether the BVerfG really

[96] Bobek 2020, p. 175
[97] Cuyvers 2017, p. 177
[98] Dehousse 2017, p. 6
[99] Lohse 2015, p. 1505
[100] Herrmann 2014, p.162

started a proper judicial dialogue.[101] The reference to the CJEU can rather be assessed as a self-imposed formal requirement that must be 'ticked' prior to the BVerfG's *ultra vires* declaration. Although the motives behind the *Honeywell* procedure were to considerably limit the applicability of *ultra vires* procedures to extraordinary cases, it also obliges the BVerfG to dwell on the validity of a judgment of the CJEU.[102] This does not promote a co-existence of differing views but leads to an open and inevitable conflict among the courts. Ćapeta argues that if the BVerfG would have solely declared the CJEU interpretation as non-applicable in Germany, it would not have needed to declare it incompatible with the European Treaties. Hence, the judgment cannot be considered to be looking for a compromise solution.[103]

On the other hand, the language chosen by the BVerfG in that specific case – but also in *OMT* for instance – is striking. The BVerfG declared that the CJEU judgment was "simply not comprehensible and objectively arbitrary".[104] "Arbitrary" is a seldomly used term and even against German lower courts the BVerfG often refrains from using harsh language.[105] In line with the *ultra vires*-procedure, the BVerfG was obliged to categorise the judgment following the preliminary reference as arbitrary and incomprehensible. The chosen language is thus a direct consequence of the *ultra vires*-procedure. Together with the procedure, this tone certainly does not contribute to a constructive dialogue with the CJEU and is not in line with the call of constitutional pluralists for consensus-oriented cooperation among the courts. The judgment is even characterised as the end of European integration through judicial dialogue.[106] Hence, the jurisprudence is regularly not seen as representing constitutional pluralism and as counterproductive or put differently: "it was easier to be a constitutional pluralist before the structuring and application of the *Honeywell* test".[107] The judgment could threaten the fragile equilibrium that also constitutional pluralist advocate.

Furthermore, the fulfilment of the *Honeywell*-standards is arguably not the only motivation to use this provocative language. In the end, they remain self-established, thus originally it was the BVerfG's own decision to establish such standards. Unless formulated as sharply, it would not have resulted in such an echo. The BVerfG would not be able to raise as much attention. This was at least an ancillary intention of the *PSPP* judgment. The fact that the practical implications of this judgment were rather non-existent[108] and that the BVerfG has rejected a subsequent action for enforcement by the same plaintiff quite sharply

[101] Also argued by Höpner 2021, p. 15
[102] Ćapeta 2021, p. 9
[103] Ćapeta 2021, p. 9
[104] BVerfG, 05.05.2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (*PSPP*), par. 118
[105] Kleine-Cosack 2020, p. 439
[106] Sarmiento 2020, p. 18
[107] Engel, Nowag, Groussot, p. 147
[108] Sarmiento 2020, p. 12

also supports this claim. [109] Thus, the judgment was rather of a (very strong) symbolical and political nature. This is also illustrated by the fact that the judgment was directly translated into French and English, thereby providing an indication of the internationally oriented German *Sendungsbewusstsein* (sense of mission) that is commonly ascribed to the BVerfG.[110] It is striking, too, that both the rapporteur of the *PSPP* judgment and the (back then) President of the BVerfG needed to explain and justify their decision in various newspaper interviews.[111] This illustrates neatly that the understanding of this judgment must go beyond monetary policy and the boundaries of the ECB's competences. Dyèvre even considers the BVerfG's EU jurisprudence as strategic moves with the ultimate aim to protect their own prerogatives.[112] In any case, the Karlsruhe judges have clearly intended to send a signal in various directions – Berlin, Frankfurt, Luxembourg and last but not least Brussels.

The partial success of this strategy is demonstrated by the fact that the CJEU itself deviated from its usual communication policy: it released a press statement only shortly after the *PSPP* judgment was published;[113] a unique move underlining the massive waves produced by *PSPP*. In addition, it has resulted in slightly differing theoretical explanations of the concept of primacy – with a strong focus on the equality among the Member States.[114] This idea was further developed by CJEU President Koen Lenaerts in an interview[115] and in an article.[116] Thus, the *PSPP* judgment had at least some kind of impact in Luxembourg, possibly – next to Frankfurt - one of the main addressees of the judgment. This communication policy illustrates that the strategy of the German judges was partly successful since they were able to rouse the CJEU. It only underlines that it was – from the perspective of the BVerfG – necessary to deliver this judgment since they would not have been able to arouse this level of attention.

The general quality of the current dialogue framework is discussed in a later section in depth. For now it suffices to mention the shortcomings of the preliminary reference procedure that became apparent in this case, too. Leaving aside the strategic and 'real' motives behind the preliminary reference of the BVerfG, it would not have been able to start a proper even if it intended to start one. The rigid format of Art. 267 TFEU does not enable anything that comes near to a constructive dialogue on constitutional issues. The preliminary reference is strictly limited to the case at hand and may not entail any hypothetical issues that are not related to the case. Some have even argued that the CJEU could have rejected

[109] BVerfG, 18.05.2021, 2 BvR 1651/15, 2 BvR 2006/15 (*PSPP Vollstreckungsantrag*)
[110] Engel, Nowag, Groussot, p. 136
[111] Di Lorenzo, Wefing 2020, Müller 2020
[112] Dyèvre 2013, p. 139
[113] CJEU 2020 (Press Release)
[114] Lindebloom discusses the concept of equality in this context in depth (Lindebloom 2020)
[115] Lenaerts 2020a
[116] Lenaerts 2020b

the *OMT* and *PSPP* references on grounds of inadmissibility since they were framed in overly general terms and the BVerfG was actually not competent to decide the case at hand.[117] The CJEU did not reject it and it shows that the CJEU is at least to some extent interested in a dialogue – or it was aware of the consequences of a non-admissibility ruling. In any case, however, it illustrates the narrow boundaries of the preliminary reference procedure. Besides, the CJEU has not contributed to a constructive dialogue either. The CJEU did not properly interact with the BVerfG's argument but repeated in the *Weiss* judgment "in its usual fashion, […] rather mechanically its past decisions (*Pringl* and *Gauweiler)* without much explanation of their relevance to the case at hand, even less justifying those arguments in relation to the FCC's concerns".[118] Therefore, the *PSPP* saga illustrates that the preliminary reference is not an ideal framework for a constructive dialogue.

It is, however, questionable whether a productive dialogue among the courts is always feasible in practice. In this context, attention must be given to the identity clause of the German Basic Law (Art. 79 (3) GG) that is used as basis for the identity review as also put forward in *PSPP*.[119] The identity clause is the core of the constitutional identity in Germany.[120] Constitutional traditions based on the Member States' constitutional identity are often seen as the main justification for constitutional pluralism because the conceived conceptual framework respects the Member States' constitutional identity to a greater extent.[121] Many European countries have century-long constitutional and legal traditions. They cannot be 'swept away' by a new legal order introduced by the CJEU. Therefore, constitutional pluralism aims at establishing a new European legal tradition that is based on a discourse about national traditions and peculiarities. It is, however, debatable whether the identity clause as interpreted by the BVerfG could be integrated into a common European constitutional order. In essence, the BVerfG demands that a core of democratic representation must remain at national level. Thus, it potentially places ultimate limits on a further democratisation of the European Union and is a strong hindrance for further European integration. The BVerfG also raised concerns regarding the democratic legitimacy of the EU.[122] This scepticism could further decrease the BVerfG's willingness to approve an additional shift of competences towards Brussels. Whether this integration-sceptical

[117] Herrmann 2014, p. 162. Lohse 2015, p. 1507. This argument is also submitted in both judgments by several Member States in the oral proceedings (CJEU *OMT,* par. 18-31), but was not followed by the CJEU. It was also put forward as an argument in the dissenting opinion of the *OMT* preliminary reference to the CJEU by BVerfG judge Lübbe-Wolf (par. 11) and more limited in the dissenting opinion of BVerfG judge Gerhardt (BVerfG, 14.01.2014, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (*OMT preliminary reference*))
[118] Ćapeta 2021, p. 10
[119] BVerfG, 05.05.2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (*PSPP*), par. 228. The BVerfG applies the identity review but in the end reject it.
[120] Calliess 2019
[121] Torres Pérez 2009, p. 114
[122] Feichtner 2020, p. 1094

constitutional tradition can be integrated into a European legal tradition is at least doubtful. Nevertheless, even in cases of diametral different views, a fruitful and plain dialogue among the courts could be helpful to sort out misunderstandings in order to find a common platform.

This section has discussed how the *PSPP* judgment comports with the idea of constitutional pluralism. On the one hand, the judgment illustrated the existence of divergent opinions regarding the European constitutional order that cannot simply be disregarded. It demonstrated that the first assumption of the descriptive perspective of constitutional pluralism is valid. On the other hand, the *PSPP* has illustrated that the second assumption does not hold since the courts did not engage in a constructive and respectful dialogue. Both sides were not (able to) engaging in a proper judicial dialogue since the current legal framework lacks a formalised instrument. Furthermore, the identity review – as postulated by the BVerfG – could become an obstacle to constitutional dialogue and thus, must be approached with additional sensitivity.

4. NORMATIVE POWER OF CONSTITUTIONAL PLURALISM

As described above, constitutional pluralism is only partly able to describe the reality of the European constitutional order after *PSPP*. Before proposing a mechanism that is potentially able to remedy the lack of a constructive dialogue among the courts and thus to render the second assumption valid again, it must be explained why constitutional pluralism is normatively desirable.

A lot of research has been invested in outlining the normative advantage of non-hierarchical structures.[123] Generally, heterarchy is desirable since the accommodation of constitutional conflicts can lead to more sustainable results and can help to crystallise what a constitutional order specifically entails and how constitutional values can be defined.[124] Within the EU the same is applicable with regards to the primacy of EU law.[125] The integration of the doctrine into the national legal order is a constitutive element of the doctrine itself.[126] In other words, the effectiveness of EU law primacy can only be ensured if national authorities including national courts voluntary accept the authority of the CJEU. Therefore, the CJEU should adopt a non-authoritative and cooperative style by considerably including national authorities and national courts in its constitutional discourse. Simultaneously, national courts' claim to authority -including the *ultra vires* claim - follow the same exclusivist logic.[127] This is underlined by the fact that the CJEU has used a similar argumentative line as

[123] Maduro 2012, p. 79
[124] Halberstam 2009, p. 13
[125] Boin Schmidt 2021, p. 143
[126] Perju 2020, p. 1008
[127] Perju 2020, p. 1011

the national constitutional courts (vis-à-vis the CJEU) in its opinions on the EU's accession to the ECHR.[128] Instead of following this binary and antagonistic logic, this thesis argues for a non-binary logic that does not stipulate an overly hierarchical relationship. Thus, it sticks to the 'spirit' of constitutional pluralism as promoted especially by Maduro who equally emphasises that the judicial dialogue within the EU must be based on recognition of each other's claim and constructive accommodation thereof.[129]

However, this thesis does not follow the call for an unconditional conception of heterarchy; thereby excluding any determination of the 'final say'. Due to its utmost importance for the EU's unity, the monopoly to interpret and invalidate EU law pursuant to Art. 267 TFEU must remain with the CJEU. Even committed proponents of constitutional pluralism have accepted similar potential limitations of constitutional pluralism. It should only be upheld "as long as the possible conflicts of authority do not lead to a disintegration of the European legal order".[130] This is in line with the reading of constitutional pluralism that is explicitly referring to a seemingly impossible combination of constitutionalism and pluralism.[131] Constitutionalism is understood in this context as a uniform legal order which is enforced by a strict hierarchy and an ultimate and final arbiter.[132] Adhering to this understanding, the concept of pluralism is only applied in a limited way: the national and the supranational order must commit themselves to the idea of pluralism within the European Union. Instead of artificial changes in the competence order, voluntary (partly obligatory) and good-faith cooperation should be promoted. Therefore, Weiler's concept of constitutional tolerance and his idea of a voluntary subordination is reiterated by this thesis, too.[133] Otherwise constitutional crises could occur that have the potential to undermine the unique legal order of the EU in the long term.[134] This approach highlights again the focus of this thesis' approach. Its goal is not to overturn the legal order of the EU but to consolidate and strengthen the status quo by proposing a low-threshold mechanism that enables a more efficient judicial dialogue. Therefore, the position of the final arbiter should not remain vacant and open for discussion. In contrast, the CJEU's position should be strengthened by a higher degree of legitimisation brought about by the proposed mechanism and an enhanced cooperation. Both sides – the CJEU on the one, the national constitutional court on the other hand, should adopt the cooperative spirit that is key to the concept of constitutional pluralism. Thereby, the European constitutional order can evolve based on fruitful discussions between

[128] Isiksel 2016, p. 576. The CJEU demands an accommodation of their reservation with regards to the ECHR accession that is not guaranteed to national constitutional courts in a comparable context.
[129] Preshova 2019, p. 82
[130] Maduro 2012, p. 83
[131] Walker 2012, p. 17
[132] Preshova 2019, p. 95
[133] Weiler 2003, p. 21
[134] Höpner 2021, p. 4 and Kelemen 2016a, p. 136. Kumm (Kumm 1999, p. 360) has called it the *Cassandra* scenario which he, however, did not follow.

the highest courts of the EU and its coherence is further strengthened. If the CJEU continues to rely on its unconditional primacy doctrine without establishing a more effective cooperation framework, a comparable outcome would be arguably not attainable.

Furthermore, it could be argued that the claims of the national constitutional courts are more legitimate since the European constitutional order is only insufficiently popularly legitimised. This argument could support the normative power of constitutional pluralism. The most important doctrines of the European legal order – primacy and direct effect – are not directly based on a Treaty provision. Instead, they have been established and further spelled out by an extensive set of case law of the CJEU. Therefore, it could be held that Europe's constitutional order was never approved by a European constitutional *demos.*[135] Weiler has argued that Europe's constitutional order lacks some of the most classical constitutional features. Since the EU is founded on the basis of international treaties and thereby the claim for primacy is fully dependent on the Member States' consent.[136] This is supported by the BVerfG as it does not evaluate the democratic level of the European Union as sufficient[137] and classifies the EU only as a confederation (*Verbund*)[138] – a rather intergovernmental than supranational reading.[139] It must be noted, however, that although the European *demos* never actively approved the Treaties as *the* European constitution – neither did the German *demos* in fact[140] - the Member States neither curtailed the competences and powers of the Union. On the contrary, over the time the EU has extended its competences considerably through the various Treaty changes showing that the deep integration was pursued actively by the Member States.[141] The same is true for the powers of the CJEU: Member States have never attempted to curtail the Court's power.[142] Originally, the primacy doctrine was even codified in the failed Constitutional Treaty before it was taken out again in the Lisbon Treaty. Therefore, it can be argued that the 'Masters of the Treaties' have accepted the status quo, arguably even the primacy and direct effect of EU law. Consequently, it cannot be held that the European constitutional order is only insufficiently legitimised. Nevertheless, the case law-based constitutionalisation of the European Union has an overtone that once again strengthens the normative power of constitutional pluralism and its cooperation-based approach.

[135] Schütze 2020, p. 82
[136] Weiler 2001b, p. 56
[137] Feichtner 2020, p. 1094
[138] BVerfG, BvE 2/08, 2 BvE 5/08, 2 BvR 010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09 *(Lissabon)*, par. 229
[139] Fabbrini 2020
[140] The occupying force determined the composition of the constituent assembly. Germany is obviously a particular example but also suitable since it is the *German* constitutional court.
[141] Barnard, Peers 2020, p. 3
[142] Boin, Schmidt 2021, p. 145

Finally, the *Taricco* saga involving the Italian Constitutional Court (ICC) and the CJEU is discussed and serves as a good example. In this sage, the CJEU has adopted the much-desired cooperative attitude that ultimately led to a more sustainable outcome.[143] Simultaneously, it shows that the existence of a sophisticated cooperation framework could have been even more beneficial. Following a preliminary request by an ordinary Italian court, the CJEU ruled in *Taricco I* that the limitation periods in criminal proceedings on VAT fraud were potentially violating Art. 325 TFEU and that national courts must set aside this national provision.[144] The provision being a national singularity, Italian courts doubted whether *Taricco I* is compatible with the Italian constitution and asked the ICC for clarification.[145] Although understanding the sensitivity of this issue, the ICC did not enter into an open conflict with the CJEU but rather gave it a second chance by sending another preliminary reference. The CJEU adapted the judgment in order for it to be compatible with the Italian constitution by adding an important qualification to its own interpretation of Art. 325 TFEU that offers the Italian courts a way out of the dilemma. This illustrates that judicial dialogue between courts can work.[146] Via the preliminary reference procedure, the ICC was able to express the singular Italian view on the matter. And although the ICC did not itself send two preliminary references, the ICC extended the dialogue to a proper dialogue in which the different courts were able to interact. While the *PSPP* judgment has shown the clear shortcomings of the current state of constitutional pluralism within the EU, the *Taricco* saga has illustrated that there is potential for a constructive dialogue between national courts and the CJEU.[147] Nevertheless, dialogue between the courts would not necessarily need to evolve into a 'saga' (like in *Taricco*) if national courts would have a formalised instrument at their disposal in order to enter into a dialogue with the CJEU.

5. STATUS QUO OF JUDICIAL DIALOGUE IN THE EU

Before presenting the CDM in detail, the status quo of judicial dialogue is evaluated. It is argued that the constitutional order of the EU lacks a mechanism that properly enables constitutional dialogue among the different institutions.

The main channel for judicial dialogue between the CJEU and the national courts is the preliminary reference procedure (Art. 267 TFEU). Any national court may request a preliminary ruling by the CJEU either concerning an interpretation of EU law or the validity of an EU act. In order to channelise the requests, the CJEU has developed its doctrine of *acte*

[143] Fichera 2017
[144] CJEU C-105/14 *(Taricco)*
[145] ICC, Order no. 24/2017, par. 1
[146] Bonelli 2018, p. 365
[147] Engel, Nowag, Groussot 2020, p. 144

claire stating that if a legal question has already been answered by the CJEU, the national court shall consult this judgment instead of referring once more to the CJEU.[148] Next to the questions, the referring court can also include a written statement already giving a hint at how itself would answer the questions. Thereby the referring court already tries to influence the outcome of the CJEU's ruling or to point at national legal and political traditions that could be at stake.[149] Those "pre-emptive opinions" are regularly used and can signal a 'red line' that should not be crossed.[150] Thereby some kind of bilateral appreciation of different views via the preliminary references already takes place and the CJEU has demonstrated in the past that it can change its jurisprudence if it is confronted with vigorous opposition. A prime example are the *Solange* rulings concerning the fundamental rights protection. Only after German courts have used the preliminary reference procedure in order to hint at the potential incompatibilities of EU law with German constitutional law, the CJEU – motivated among others by the references - adjusted its jurisprudence on fundamental rights protection.[151]

Nevertheless, the preliminary reference procedure has been criticised as insufficient. Instead of a real dialogue, Art. 267 TFEU often leads to one-sided dialogues. The dialogue mostly ends with the ruling of the CJEU, without providing for a proper dialogue with the referring court.[152] If the referring court would want to start a quasi-dialogue, it would be complied to again refer questions to the CJEU. When framing its critique, the referring court would nonetheless need to stick to the pre-determined framework of the preliminary reference. Furthermore, the CJEU is known for its authoritative style of reasoning that is caused by the limited and sharp judicial reasoning – also known as judicial minimalism.[153] Thus, the methodology behind a judgment often lacks coherence and lucidity.[154] In some cases, the CJEU does not even answer clearly formulated questions by national judges.[155] Already Weiler has underlined that this "cartesian style with its pretence of logical legal reasoning and inevitability of result" is not very productive in enabling a good conversation with national courts.[156] Others have pointed to the self-referential style of reasoning and the CJEU's disregard of the external impact of its judgments.[157]

Furthermore, the intention behind Art. 267 TFEU was not to foster a dialogue among the courts but rather to equip the CJEU with the monopoly to interpret and quash EU legislation. With this intention in mind it is only sensible that the preliminary reference is

[148] CJEU C-283-81 (*CILFIT)*
[149] Leijon 2021, p. 514
[150] Hofmann 2018 p. 264. The term "pre-emptive opinion" was coined by Nyikos (Nyikos 2006)
[151] Boin, Schmidt 2021, p. 151 and Jacobs 2002, p. 549
[152] Claes 2016, p. 170
[153] Komárek 2013, p. 448
[154] Dehousse 2017, p. 12-14
[155] Dehousse 2017, p. 23
[156] Weiler 2001a, p. 225
[157] De Burca 2013, p. 184

limited to case-related questions. For the establishment of a continuous and productive dialogue among courts, however, this limitation is again a considerable obstacle. In addition, neither the constitutional courts nor the referring court has standing in front of the CJEU. Only the Member States can submit observations during procedures before the CJEU and thereby are able to influence the outcoming of the proceedings. Thus, national governments can attempt to pre-empt unwanted judgments of the CJEU. Nevertheless, the CJEU is also willed to deliver judgments despite the clear opposition of Member States – also pronounced in observations before the CJEU.[158]

Next to this official – Treaty-based – procedure, the CJEU has used rather informal channels to create a dialogue with national courts. It actively established a systematic training of national judges to further increase the use of Art. 267 TFEU in national courts. After the enlargement of 2004, the CJEU was one of the EU institutions which pursued the socialisation of judges of the new Member States into the European legal community.[159] The Commission, too, has supported the CJEU in fostering pro-European networks of judges and lawyers by establishing the Fédération Internationale de Droit Européen (FIDE) where exchange among pro-European lawyers and CJEU judges can take place.[160] Despite all these efforts, it is questionable whether it really contributes to attaining the objective of an inter-institutional bargaining among the courts. Although these different fora surely make the CJEU more sensitive for the national courts' sentiments, the intention is nonetheless to 'bring national judges more in line' with the jurisprudence of the CJEU and to nurture a pro-European and pro-CJEU atmosphere within national courts. This is supportable from a different perspective, but it only insufficiently establishes a "two-way traffic".[161] Although the current framework provides for some kind of dialogue, it is unable to resolve fundamental constitutional conflicts. It must be kept in mind that – from the perspective of national constitutional courts – this dialogue represents the substitute for a self-created veto power and thus requires a high level of sophistication. Neither the preliminary reference nor informal forms of dialogue constitute a coherent and sophisticated framework that properly enables national constitutional courts to voice their concerns. Thus, the judicial dialogue within the EU requires a more sophisticated institutional framework to live up to the ideas of constitutional pluralism.

[158] Hofmann 2018, p. 261
[159] Kelemen 2016b, p. 134
[160] Boin, Schmidt 2021, p. 147
[161] Grabenwarter, Huber, Knez, Ziemele 2021, p. 59

6. MECHANISM TO ENHANCE THE JUDICIAL DIALOGUE

After having discussed the current state of judicial dialogue in the EU, this section elaborates on a mechanism that could enhance the judicial dialogue between the national constitutional courts and the CJEU. This proposal aims at remedying the shortcomings of the European constitutional order as illustrated by the PSPP judgment. In this regard, it can be seen as an attempt to further institutionalise the idea of constitutional pluralism. The lack of a proper institutional framework has among others arguably led to the case law of the BVerfG.

a) The Early Warning Mechanism

This thesis uses the Early Warning Mechanism (EWM) as a prototype. A mechanism based on the EWM should improve and institutionalise the dialogue between the highest national courts and the CJEU. Before the Constitutional Dialogue Mechanism is discussed, the EWM and its advantages and shortcomings are briefly evaluated.

Introduced by Protocol No. 2 of the Lisbon Treaty, the EWM was supposed to "kill two birds with one stone".[162] On the one hand, it should strengthen the enforcement of the principle of subsidiarity (Art. 5 (3) TEU) and on the other hand, it aimed at equipping the national parliament with a more substantial role in the European law-making process.[163] The principle of subsidiarity in turn was codified by the Maastricht Treaty and should ensure that the decisions are taken as closely as possible to the citizens; it should serve as a corrective tool for the allocation of competences.[164] The institutionalisation provided for by the Protocol is well known due to its football analogy: eight weeks after the national parliaments have received a legislative proposal, they can submit a reasoned opinion stating that the proposal does not comply with the principal of subsidiarity. If 1/3 of the national parliaments have lodged such an opinion, the 'yellow card'-stage is reached, and the draft must be reviewed by the Commission. It does not have to alter it but the decision to maintain the draft needs an explanation. If a simple majority of national parliaments have submitted a reasoned opinion (= orange card), the co-legislators, too, must review the issue of subsidiarity. Thus, the national parliaments' power does not come near to a veto power but rather a power to force the Commission (or the co-legislators) to review the draft. It is disputed how strict the principle of subsidiary should be read[165] and whether the principle of proportionality or the protection of national identity could be included. The practice has shown that the reasoned opinions drafted by the national parliaments often contain different points of criticism and rather sum up a general sense of dissatisfaction with the draft.[166] Most often the opinions are

[162] Goldoni 2014, p. 91
[163] Goldoni 2014, p. 91
[164] Jaroszyński 2020, p. 93
[165] Goldoni 2014, p. 101
[166] Hettne 2014, p. 7

not to be seen as a collective and coordinated effort by the national legislators but rather they are based on individual – sometimes even conflicting – motives.[167] Furthermore, harmonisation measures are by nature not better attainable at national level and thus the principle of subsidiary cannot be infringed in those cases.[168] Therefore, it is argued that the inclusion of other components such as proportionality or the legal basis is necessary in order to render the mechanism more forcefully.

The literature has already pointed out the relevance of the EWM with regards to the general debate on European constitutionalism. The EWM is also being considered as a means to contain the effects of European integration on national legal and regulatory systems. Thus, national peculiarities should be identified and protected by national parliaments within the scope of the EWM. This is comparable to the case law of national constitutional courts such as the BVerfG when it comes to the protection of national identities but also with regards to its *Solange* doctrine and the fundamental rights protection.[169] In this context, some scholars have categorised the EWM as a constitutional instrument. Thus, Hettne rather pleas instead for a council of constitutional courts that discusses the merits of the principle of subsidiarity (and possibly other principles, too).[170] Notwithstanding these various shortcomings, it is underlined that the EWM is a strong institutional setting already by giving national parliaments a floor where they can present their view – even if the thresholds to trigger the 'cards' are not reached.[171] The fact that an interinstitutional dialogue has been initiated is already worth it.[172] Thus, the EWM can be considered as an important instrument in the inter-institutional bargaining on the European constitutional order – as part of a European constitutional pluralism. The CDM seeks to take the same line.

b) Constitutional Dialogue Mechanism

The goal of the CDM is to enable a constitutional dialogue between national constitutional courts and the CJEU using the EWM as role model, as already briefly proposed by former Advocate General da Cruz Vilaça [173]. The literature already pointed to an insufficient integration of national constitutional courts within the European Union.[174] While the national parliaments' position was considerably enhanced by the EWM, the national constitutional

[167] Goldoni 2014, p. 106
[168] Hettne 2014, p. 7
[169] Goldoni 2014, p. 101. The latter is specifically true for social evasions caused by European Integration.
[170] Hettne 2014, p. 5
[171] Jaroszyński 2020, p. 93
[172] Goldoni has expressed dissatisfaction with the fact that the Commission withdrew a proposal without really interacting with the national parliaments' reasoned opinions (Goldoni 2014, p. 106).
[173] Da Cruz Vilaça 2020, p. 17
[174] Dani 2017, p. 796

courts were not yet integrated into a European framework.[175] This should be remedied by this proposal, too. The CDM could be construed as follows.

If the CJEU[176] renders a judgment, national constitutional courts[177] shall be able to submit a so-called 'constitutional statement', similar to the reasoned opinion. If 1/3 of the national constitutional courts submit a constitutional statement, the CJEU should convene a 'constitutional forum' with a certain number of judges of the courts that have submitted the statement. Each constitutional court counts as one vote and therefore at least nine constitutional courts must have submitted a constitutional statement.[178] In this forum, the judges have the possibility to exchange views and specifically the national judges are given the opportunity to voice their reservations with regards to that specific judgment. The forum as such however shall not be able to alter the judgment at hand. Thus, the content of the discussion does not have to be restrained but could instead be used as a starting point to discuss the fundamental doctrines of the judgment in depth. The constitutional statement, however, should be limited to aspects considerably related to the judgment. Furthermore, the national constitutional courts should have concerns of a rather fundamental nature. The mechanism should not be triggered if there is only a minor disagreement in the legal application. But contrary to the EWM, the CDM should not be artificially limited to certain principles but instead should be open to a variety of concerns including for instance the principle of proportionality or the issue of the appropriate legal basis.[179]

This proposal does not include a second, more far-reaching, instrument that is comparable to the 'orange card' of the EWM. If the proposal would entail an instrument that would force the CJEU to review the decision at hand, the whole procedure would be focused too much on that specific judgment and give the constitutional court a considerable gain in power that neither seems proportionate nor productive in the sense of constitutional pluralism. With regards to its implementation, the CDM could take the form of a protocol[180] or be based on an inter-institutional agreement.[181]

This mechanism can be considered to be some kind of *ex-post* standing for judges of national constitutional courts. It does not have any influence on the validity of the judgment at hand; similarly to the EWM it does not come close to a veto. Rather it is a low-threshold

[175] Komárek 2013, p. 426
[176] Only applicable to judgments of the Court of Justice, not the General Court since the judgments of the Court of Justice more often discuss fundamental principles of a high relevance.
[177] Either supreme courts or constitutional courts. The Member State should indicate what body shall be responsible for the CDM.
[178] Supreme courts and national constitutional courts can also submit a constitutional statement together, but it is still counted as one.
[179] Many scholars have argued that the EWM should become equally flexible since the current form increasingly reduces the effectiveness (Hettne 2014, p. 9)
[180] As already envisaged by Dani (Dani 2017, p. 796).
[181] This thesis does not amount to a policy proposal, therefore, only one sentence is spent to the practical implementation of CDM.

possibility to critically discuss the jurisprudence of the CJEU and to get into a substantial conversation with the European judges on constitutional matters. In this sense, as already argued by da Cruz Vilaça, the mechanism should have the nature of a preventive alert mechanism.[182] Although it seems contradictory to an *ex-post* dialogue, it should rather be understood as a means for national constitutional courts to signal their dissatisfaction also with a view to similar cases in the future. If possible, the CJEU could then incorporate this constructive input into future deliberations on similar judgments. If the CJEU is more sensitive regarding constitutional peculiarities of the Member States, the jurisprudence of the CJEU and consequently the EU legislation, too, could become more sustainable.[183] Although the mechanism as proposed above is also related only to one judgment, it nonetheless intends to promote a long-term dialogue. While the triggering of the mechanism is thus similar to the EWM, both mechanisms are not comparable when it comes to the consequence of reaching the threshold.

In the *PSPP* judgment, the BVerfG consequently would not have been able to alter the judgment of the CJEU. But – assuming that the mechanism would have been in place since several years – the BVerfG could have started a dialogue with the CJEU already years before the *PSPP* judgment – actually already after the *OMT* judgment of the CJEU. The BVerfG could have used this dialogue mechanism in order to voice its concerns with regards to the ECB's monetary policy and its scope. The monetary policy of the ECB is certainly a very delicate issue, and it is likely that discussions in such a framework could have led to better results. If the BVerfG would have advanced its opinion in a constructive way without picking the judgment of the CJEU apart, it can be assumed that the CJEU would be considerably more receptive for comments on its jurisprudence. With the current tone and atmosphere – set by both courts - it is understandable that valid points made by the other side are - as a matter of principle - only half-heartedly taken into account. The BVerfG certainly adopted the *ultra vires* doctrine also because it felt that there is a potential need for it. If its views would be more respected and taken into account – although acknowledging that the CJEU will certainly not simply accept the BVerfG's opinion if they are communicated in a more cooperative manner – it could potentially diminish the likelihood of another *ultra vires* judgment within the European Union. In the long run, a stable and cooperative community of the national constitutional courts and the CJEU could evolve.

The normative idea of constitutional pluralism is clearly strengthened by this mechanism. This thesis argues that the current attempts of dialogue are not conducted in the spirit of constitutional pluralism. Rather the relation between the CJEU and national constitutional courts is partly of a confrontational nature. As stated above, a constructive

[182] da Cruz Vilaça 2020, p. 17
[183] Dani 2017, p. 795

accommodation is normatively desirable. The CDM therefore further institutionalises the idea of constitutional pluralism and contributes to the attainment of its normative objective. The CDM could reasonably represent and strengthen the idea of a *Verfassungsgerichtsverbund* as promoted by Grabenwarter et al.[184] In this network of constitutional courts, the CJEU and the national constitutional courts are "flexible parts of a mobile" that make a serious effort of reaching a fair balance. It could also form a very important part towards a properly defined and fully spelled out European constitutional order. Each of these fora could contribute to developing a "common constitutional heritage".[185] In this regard, the CDM provides a helpful supplement to the existing informal channels when it comes to a European socialisation of national judges within a constructive *Verfassungsgerichtsverbund*. However, as already on the normative level, this proposal neither questions the primacy of EU law nor the perception of the CJEU as final arbiter of EU law. Although normatively heterarchy is superior to hierarchy, the unity of the EU would be substantially endangered. The CJEU still has the final say on European Law matters and the national constitutional courts do not have the possibility to use the CDM as a veto in any kind. Instead it should formalise and constitutionalise the cooperation between the CJEU and the national constitutional courts. The CJEU is still free to deliver its judgment as before, but the CDM should further motivate the European judges to take into account the views presented to them in various constitutional fora.

In this regard, the CDM is more suitable than other proposals such as a new appeal chamber of the Court of Justice as proposed by Sarmiento and Weiler.[186] It is not helpful to have an additional level of competences, even if it is only limited to comparable cases.[187] In the end, only long-term cooperation can help; an additional decision of a higher instance that is located at European level is not helpful. Grabenwarter et al. also presented the concept a reversed preliminary reference procedure. If national constitutional principles are at stake, the CJEU shall ask the respective national constitutional court for an interpretation of the constitutional provision.[188] The applicational scope of this mechanism would be arguably limited since it would be only triggered if the Member State's national identity is potentially touched upon and the CJEU would have discretion to trigger this mechanism. The CDM is supposed to go beyond the issue of national identities but instead initiates a broad discussion on European constitutionalism. Furthermore, the reversed preliminary reference will not lead to an interactive exchange of views but rather to two separate "one-way-

[184] Grabenwarter, Huber, Knez, Ziemele 2021, p. 49. This article was written by multiple judges of national constitutional courts and one CJEU judge. Among them is Huber, the judge rapporteur responsible for the *PSPP* judgment at the BVerfG.
[185] Komárek 2013, p. 443
[186] Sarmiento, Weiler 2020
[187] Höpner 2021, p. 16
[188] Grabenwarter, Huber, Knez, Ziemele 2021, p. 58

streets".[189] The CDM shall initiate vivid discussions on constitutional matters that expressly do not take the form of over-formalised procedures such as the Art. 267 TFEU (or a reverse form of it). On the one hand, the mechanism should present a compromise concerning the determination of the final authority in European Law and on the other hand it should serve as a framework for preventing constitutional conflicts.

The CDM is not supposed to be the solution to all the problems related to European constitutionalism. It does not present a full-fledged and clearly defined concept of European constitutionalism either. On the contrary, it only intends to establish a formal channel that in the long run should contribute to fruitful inter-institutional cooperation and could also contribute to develop a coherent concept of the European legal order. It is only a minor institutional add-on to the existing legal framework within the European Union and therefore only a small cog in the wheel on the way to a proper European constitutionalism. It is wishful thinking to expect national constitutional courts to give up their primacy-critical case law right after the mechanism would be introduced. But on the long run, national constitutional courts shall become essential part of the European jurisprudence and thereby their positions could become less critical. Otherwise the national constitutional courts continue to be the stumbling block to the evolvement of the European project. Furthermore, the argument could be made that the CDM primarily focuses on prevention and does not present a concrete solution to existing constitutional conflicts – as it was argued with regard to Maduro's contrapunctual principles.[190] Although it is doubtable whether a present conflict can be resolved within the proposed fora, the CDM goes further than the contrapunctual principles since it proposes a concrete institutionalisation and not only principles to be adhered to.

There is hardly a comparable framework that is used among constitutional courts and therefore, it is difficult to properly determine the potential and chances of success of this mechanism that go beyond abstract considerations as presented above. In addition, the quantification of the (non)-success or a qualitative evaluation is challenging, too, due to the multiple perspectives and influences on the project of European constitutionalism. Therefore, one should not exaggerate the expectations on such a dialogue-based mechanism as they are usually constructed on a long-term and low-threshold basis. Due to its structure, the focus of the CDM lies on issues that is common among multiple constitutional courts and therefore makes it harder for national constitutional courts to voice concerns that are unique to its respective jurisdiction. This indeed can be seen as a shortcoming but nonetheless it is argued that the long-term dialogue can lead to a more constructive relationship among the courts that makes it easier in any case to voice individual concerns also via other channels.

[189] Grabenwarter et al. have criticised that the current judicial dialogue is rather a one-way street and should become a two-way-street (Grabenwarter, Huber, Knez, Ziemele 2021, p. 59)
[190] Komárek 2007, p. 33

Another potential problem is the recentralisation of control over the cooperation with the CJEU. In the past, in some Member States such as Germany lower courts have been using the preliminary references very actively. Thereby, they, too, have considerably contributed to the evolvement of the European legal order.[191] If the CJEU and the national constitutional courts would draw the big lines in the constitutional fora, the lower courts as a consequence would be rather excluded from the process of European legal integration. Additionally, this re-centralised dialogue framework could be more susceptible to political capture.[192] Although this risk certainly exists, an inclusion of any court into the proposed mechanism would render it completely ineffective and impossible to implement from a practical point of view. Furthermore, constitutional courts are designed to have the capacity to interpret the respective constitution and its relation to the Treaties of the EU.

7. CONCLUSION

This thesis aimed at explaining the *PSPP* judgment of the BVerfG within the context of constitutional pluralism. The judgment caused massive waves and although it is debatable to what extent the BVerfG's opinion is representative within the judicial sphere of the EU, the 'primacy v. sovereignty' issue will remain on the agenda. And since the EU's constitutional order is currently not able to compound all the conflicts with national constitutional courts and their constitutional orders, the BVerfG rubbed salt into that wound. This thesis elaborated on how the judgment has affected the state of constitutional pluralism and what the judgment has once again illustrated in that regard. On the one hand, it made apparent that constitutional pluralism remains an important concept due to the mere existence of multiple competing legal orders. On the other hand, the judgment of the BVerfG has demonstrated that the descriptive dimension of constitutional pluralism is only valid to a certain extent and that the current legal framework does not suffice in order for national constitutional courts to properly present their views on an equal footing with the CJEU. The whole *ultra vires* procedure of the BVerfG including the language chosen certainly does not fit the idea of constitutional pluralism. This thesis argues that the BVerfG was compelled to use this provocative language and procedure in order for its opinion to be heard and considered.

In order to live up to the principle of primacy, constitutional pluralism can only be applied to a limited extent though. The CJEU must remain the final arbiter and interpreter of European law, but simultaneously the CJEU should adopt a more communicative and cooperative attitude in the sense of constitutional pluralism. To attain this goal, the idea of constitutional pluralism must be further institutionalised. The current status quo is regarded

[191] Pavone, Kelemen 2019, p. 355
[192] Pavone, Kelemen 2019, p. 355

as being insufficient. The preliminary reference procedure pursuant to Art. 267 TFEU provides only for a one-sided dialogue that does not establish a proper dialogue among the highest European courts. Therefore, a mechanism called Constitutional Dialogue Mechanism is introduced that should close this gap. Based on the idea of the Early Warning Mechanism, the CDM should be similarly triggered. But instead of national parliaments, national constitutional courts should be the core institutions of this mechanism. National constitutional courts shall be enabled to call the CJEU to convene a constitutional forum in which issues of constitutional relevance can be discussed in a productive and cooperative manner. Constitutional pluralism as applied by this thesis could therefore be institutionalised and further enhanced. Potentially it could reduce the possibility of *PSPP*-like judgments in the future.

The judgment itself but also constitutional pluralism in connection with the constitutional order was extensively discussed by the academic field. Therefore, this thesis with its limited scope could hardly incorporate all the interesting thoughts that were already presented on this topic. The proposed mechanism is only one option how to tackle this open question that was put back on the agenda by the BVerfG. This thesis was not able to go into depth with regards to a concrete implementation of this proposal and could only hardly estimate the success chances of the CDM. The important aspect remains the following: the current legal framework requires improvement in terms of cooperation in the legal and constitutional sphere - as clearly demonstrated by the judgment. Constitutional pluralism could be an option to put this conflict into a broader context and the CDM could be a possibility to further enhance this constitutional dialogue. In the end, it remains a mere proposal that should serve as a cause for thought for future discussions on the European constitutional order.

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