Developing Judicial Dialogue Between EU Courts: The Role of EU Banking Legislation†

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ABSTRACT

In the EU legal system, the relationship between European and National law has always been a fruitful and challenging terrain for discussion and analysis. The expression “judicial dialogue” usually refers to different channels, both formal and informal. These channels are in place in the interchange between European Courts, including, most importantly, Constitutional Courts and the Court of Justice of the European Union. While the scholarly debate on judicial dialogue in the EU context is by now quite extensive, new, interesting strands are recently developing in the specific context of EU Banking and Financial Legislation. Going beyond technicalities of EU Banking Law, this paper aims to show that the high degree of innovation and experimentation of EU Banking Law is a fruitful laboratory for the development of forms of judicial dialogue that go well beyond preliminary reference and that offer food for thought at a broader political and institutional level.

I. INTRODUCTION: COMPLEXITIES OF THE EU ARCHITECTURE AND THE NEED FOR JUDICIAL DIALOGUE

In the European Union (“EU”) legal system, the relationship between European Law and the law of each Member State has always been a fruitful and challenging area of discussion and analysis. The unique structure of the EU, its constitutional variety\(^1\) and complexity,\(^2\) and its distinguished features vis-à-vis federal structures raise complex issues. One crucial issue

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1. For a comprehensive overview of the notion and its interpretation overtime, see GIUSEPPE MARTINICO & ORESTE POLLICINO, THE INTERACTION BETWEEN EUROPE’S LEGAL SYSTEMS: JUDICIAL DIALOGUE AND THE CREATION OF SUPRANATIONAL LAWS 18 (2012) [hereinafter MARTINICO & POLLICINO] (providing a wide assessment of how the relationship between EU and National Law is understood within Member States by discussing common values and different approaches taken); see also JUAN A. MAYORAL & MARLENE WIND, NATIONAL COURTS AND EU LAW: NEW ISSUES, THEORIES AND METHODS 5 (Bruno de Witte et al. eds., 2019); FILIPPO FONTANELLI ET AL., SHAPING RULE OF LAW THROUGH DIALOGUE: INTERNATIONAL AND SUPRANATIONAL EXPERIENCES (2010) [hereinafter FONTANELLI].

concerns the hierarchy between EU Law and National Constitutions: the issue arises when the ultimate guardians of the respective legal orders—the Court of Justice of the European Union (“CJEU”) and the National Constitutional Courts (“NCCs”)—have conflicting views as to which system should prevail. The supremacy of EU Law is one of the guiding principles of the European legal order; but when EU Law comes at odds with fundamental rules enshrined in the Constitutions of the Member States, the EU edifice shows signs of instability. In this particular case, there is a risk of short-circuiting the system. A way out of this legal maze needs to be found, and the solution may be increased dialogue between the CJEU and NCCs.

Over time there has been an increase in the “dialogue” between the CJEU and NCCs. Until a few years ago, the expression “dialogue between Courts” may have seemed obscure and in need of clarification amongst scholars involved in the International and EU legal debate on the relationship between Courts and jurisdiction. Nowadays the notion is commonly used in legal discourse, but the idea of dialogue has been expressed in different ways by different authors (formally/informally, directly/indirectly, silently/explicitly) and criticized by others.

3. The principle, codified by the CJEU in the 1960s-1970s, has undergone its own evolution, that reflects that of the Treaties, particularly after Maastricht. See generally MARTINICO & POLICINO, supra note 1, at 148.


7. See Monica Claes & Maartje de Visser, Are You Networked Yet? On Dialogues in European Judicial Networks, 8 Utrechtl. Rev. 100, 112–13 (2012); see generally FONTANELLI, supra note 1 (explaining the expression “dialogue” is naturally employed in a vast array of areas, including, most significantly, international law); see also Anthony
Looking at the EU environment, the expression “judicial dialogue” usually refers to different channels, both formal and informal, between European Courts, including, most importantly, Constitutional Courts and the CJEU. While the scholarly debate on judicial dialogue in the EU context is by now quite extensive, new and interesting forms of dialogue have recently begun developing, specifically in the context of EU Banking and Financial Legislation enacted as a response to the 2007-2008 financial crisis. These new forms of dialogue have begun forming because this area of European Legislation is a huge laboratory of new experiences that go well beyond its (sometimes overwhelming) technicalities.

This legislation introduces new legal concepts, re-organizes the system of Financial supervision, and moves towards an increasing level of centralization of supervision and enforcement at the European level. It builds a new system of Financial Supervision in the EU, sets up new agencies (EBA, ESMA, EIOPA), and centralizes banking supervision in the Euro area in the hands of the European Central Bank. The legislation also touches upon fundamental rights at times, for example, when it introduces new, pervasive sanction regimes, or when it reshapes the way banking crises and their effects on different stakeholders are handled. New legislation governing EU Financial Supervision and Banking resolution has stirred a significant volume of litigation and case-law in a relatively short time span, leading to a number of relevant precedents by the CJEU rich in new developments. The role of the European Central Bank (“ECB”) in discharging its monetary policy function is another area for these developments where the main issue was the discretion and the powers that the ECB may discharge and the limits between monetary and economic policy, the latter reserved to Member States. These cases and their impacts will be discussed in further detail in Section III.

In all of these areas of the ECB’s intervention—banking supervision and resolution and monetary policy—EU Legislation operates as a catalyst for innovation of EU Law. New channels for dialogue among courts are being explored and new ways of sharing and agreeing upon common principles are being developed, but, at the same time, new conflicts are opening up. The impact this phenomenon might have on the debate on judicial dialogue is clearly visible in the already burgeoning scholarly literature surrounding these developments.

This contribution will first provide a very concise overview of how the debate on the dialogue between EU Courts developed overtime, paying


particular attention to its most “formal” and (at least until recently) innovative strand, represented by using the proceedings for preliminary reference to the CJEU initiated by NCCs (Section I). It will then expose in greater detail how judicial dialogue recently evolved specifically, and with singularities, in the area of the new EU Banking legislation, by considering some relevant, seminal cases (Section II). Finally, it will draw some preliminary conclusions (Section III).

II. PRELIMINARY REFERENCE BY NCCS: FROM INNOVATION TO CONSOLIDATION

Over the past few years, the “dialogue” between EU Constitutional Courts and the CJEU has increasingly relied upon the reference for preliminary ruling mechanism laid out in Article 267 of the Treaty on the Functioning of the European Union (“TFEU”).9 As will be discussed in Section III, the use of the preliminary reference in the context of EU Banking legislation has generated unique judicial precedents, including Gauweiler and Weiss, that are contributing innovative solutions to the legal debate surrounding judicial dialogue.

Preliminary references allow National Courts of all jurisdictions to submit questions to the CJEU regarding the interpretation of EU legislation that may arise from cases under their scrutiny.10 As mandated by the guiding principle of supremacy of EU Law, National Courts are subject to CJEU’s authority and, thus, expected to comply with its decisions which hold the force of res judicata.11 In the context of EU Banking legislation, preliminary reference may serve as an important tool to clarify the extreme complexities and technicalities of the law, providing innovative approaches that raise unprecedented interpretative issues. The preliminary ruling mechanism may offer a straightforward and simple way of handling possible conflicts between EU and National law, but it has several drawbacks including its limited scope and the fact that if National Courts may address the CJEU and submit to it a question concerning the interpretation or the validity of EU Law, the CJEU may not submit to National Courts questions involving the interpretation or

11. Id.
validity of National Law. Another evident of these drawbacks emerged in the Weiss case where the court found that National Courts must be, in principle, ready to abide to and comply with the principle of supremacy.  

Resorting to preliminary references by NCCs is a recent practice that has gradually spread, and ultimately, found new terrain for development in the context of EU Banking legislation. There is extensive literature on the evolution of preliminary reference usage by NCCs, so for our purposes it therefore suffices to sketch out only some its fundamental traits. During a period of EU Law which spanned largely from 1964 to the early 1980s, tensions between NCCs and the CJEU arose as the former sought to impose limits to the supremacy of EU Law and the binding value of the CJEU’s judgments. The Italian and German systems initially found that decisions issued by the CJEU that infringe fundamental principles protected under National constitutional law, or exceed the powers transferred to it by the Treaties, would not be applicable in their domestic legal order despite the superiority of the CJEU. These ideas came into play at an EU judicial level with the Frontini decision of the Italian Corte Costituzionale in 1973 and with the famous Solange I (1974) and Solange II (1986) decisions of the German Bundesverfassungsgericht “BVerfG” which forged the “counter-limits doctrines.” Other cases where National Courts made similar decisions include the Granital decision by the Italian Corte Costituzionale (1984), the Grogan decision of the Irish Supreme Court (1989) and the Carlsen decision of the Danish Supreme Court (1998). More recently, further decisions of the French Conseil Constitutionel, the Spanish

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16. Ancora su diritto comunitario e diritto interno, in Studi per il XX anniversario dell’Assemblea costituente. Autonomie e garanzie costituzionali 45 (1969) (discussing, in Italian, “controlimiti;” this term was introduced by P. Barile).
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Tribunal Constitucional\textsuperscript{21} and of Czech\textsuperscript{22} and Polish\textsuperscript{23} courts reflect the gradual diffusion of the doctrine across Europe. In such decisions, National Courts tried to challenge the principle of supremacy of EU Law when it involved measures that could collide with basic principles of their internal constitutional system.

The results achieved in the cases cited above may provide a broad account for the fact that NCCs originally refrained from directly using the preliminary reference procedure under Article 267 of the TFEU, refraining from referring any questions to the CJEU. Notwithstanding these resistances towards the principle of supremacy of EU Law in the earlier years of the EU legal order, dialogues between National and European courts became increasingly frequent and generally favorable to the development of a common institutional and legal framework. As a consequence, it was only during the last decade that the posture of NCCs towards the use of preliminary references became more and more customary by Supreme Courts of the Union, thus gradually opening up a new formal channel of EU inter-judicial constitutional dialogue.

In the context of the new architecture of EU Banking and Financial Legislation, which was redrafted and applied after the financial crisis of 2007-08, preliminary reference was tested soon after enactment as a consequence of the procedural and substantial law complexities of the legislation. Gauweiler, in 2014, was the first attempt by the German Constitutional Court to resort to preliminary reference.\textsuperscript{24} Not by chance, Gauweiler was a case that involved complex issues of interpretation of the mandate of the European Central Bank in discharging its monetary policy functions.\textsuperscript{25}

\textbf{A. New Approaches to the Use of Preliminary Reference}

Within the EU, there are currently seventeen Member States with established Constitutional Courts responsible for carrying out \textit{ad hoc} constitutional review of legislation and broadly structured out of the

\begin{itemize}
  \item \textsuperscript{21} S.T.C. Declaración 1/2004, Dec. 13, 2004 (Spain).
  \item \textsuperscript{22} Ústavni Soud, Pl. (ÚS) [Decision of the Constitutional Court of May 3, 2006], sp.zn., US 66/04 (Czech).
  \item \textsuperscript{23} No 0 1/05, Judgment, ¶ 2 (Trybunal konstytucyjny Apr. 27, 2005).
  \item \textsuperscript{24} See Case C-62/14, Gauweiler and others v. Deutscher Bundestag, ECLI:EU:C:2015:400, ¶ 127 (June 16, 2016).
  \item \textsuperscript{25} \textit{id}.
\end{itemize}
judicial branch. Only roughly half of such courts have so far submitted preliminary references to the CJEU, namely those from Austria, Belgium, France, Germany, Italy, Lithuania, Poland, Slovenia, and Spain. Moreover, supreme courts that have jurisdiction to conduct constitutional review, or to substantially perform a similar review; the Irish High Court, the Danish Hojesteret, the Estonian Riigikohus, the Romanian Constitutional Court, and the Dutch Hoge Raad all hold the tradition of making use of the preliminary reference mechanism addressed to the CJEU.

In this development of preliminary reference usage, the Italian and the German Courts stand out for their “activism” in this field. For most of its history, the Italian Corte Costituzionale’s involvement in EU matters was limited to the context of incidenter proceedings, under which the court is called by an ordinary judge to incidentally rule on the constitutional compatibility of the legislation relevant to a certain case, without the need to formally address the CJEU. The Court referred its first request

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28. See, e.g., Case C-409/99, Metropol Treuhand WirtschaftsstreuhandgmbH, 2002 E.C.R. I-00081. Austria first referred a preliminary question in 1999 and is the second most active constitutional court in relation to this instrument.
29. See, e.g., Case C-93/97, Fédération Belge des Chambres Syndicales de Médecins ASBL 1998 E.R.C. I-4855. The Belgian Cour d’arbitrage, which acts as a constitutional court, was the first court to make reference to the CJEU and is until today the most regular user of the procedure. Its first case was submitted in 1997, with Case C-93/97.
33. See, e.g., Case C-526/14, Ktontnik and others v. Državni zbor Republike Slovenije ECLI:EU:C:2016:102 (Feb. 18, 2016).
34. See, e.g., Case C-399/11, Stefano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107 (Feb. 26, 2013).
35. See, e.g., Case C-673/16, Relu Adrian Coman v. Inspectorul General pentru Imigrări, Ministerul Afacerilor Interne, ECLI:EU:C:2018:385 (June 5, 2018) (concerning freedom of movement and same-sex marriages in the EU, raised by the Romanian Court in front of the CJEU).
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for a preliminary ruling to the CJEU in 2008.\(^{38}\) Cases 102/2008 and 103/2008 mark the first time that the Corte Costituzionale referred a question to the CJEU.\(^ {39}\) These two cases originated from a principaliter proceeding which consisted of an action before the court seeking judicial review of governmental acts vis-à-vis Constitutional principles.\(^ {40}\) Apart from constitutional law claims, the challenges in these cases were based on various Treaty provisions, yet still quite timidly, the Court only submitted questions not covered for what was understood as already falling under the acte clair doctrine which states that when a certain provision is clear, there is no duty for a member state to refer a question for preliminary ruling.\(^ {41}\) Preliminary reference was once again used by the Corte Costituzionale in the Mascolo case,\(^ {42}\) in Taricco I,\(^ {43}\) and in M.A.S. e M.B. (known as Taricco II).\(^ {44}\) These did not involve the application of EU Banking or Financial legislation, however, they provide the background for further developments, especially concerning the relationship between EU Law and National Constitutional Law that, as will be discussed, are particularly relevant for some of the last ground-breaking developments in Germany by the BVerfG.

The impact of EU Banking and Financial Legislation on the attitude of the German Constitutional Court towards preliminary reference has proven to be paramount. In the past, the German Court showed its general uneasiness with European treaties through its rulings, such as in the Solange\(^ {45}\) judgments, and in the famous Maastricht\(^ {46}\) and Lisbon\(^ {47}\) cases. In these cases, there emerged the increasing relevance of National

\(^ {38}\) Id.
\(^ {39}\) Id.
\(^ {40}\) Id.
\(^ {41}\) Case C-283/81 Srl CILFIT v. Ministry of Health, ECLI:EU:C:1982:335 (Oct. 6, 1982).
\(^ {43}\) Case C-105/14, In re Taricco and Others, ECLI:EU:C:2015:555, (Sept. 8, 2015).
\(^ {45}\) Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 29, 1974, Entscheidungen des Bundesverfassungsgerichts 37, 271 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 22, 1986, Entscheidungen des Bundesverfassungsgerichts 37, 271 (Ger.).
\(^ {46}\) Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 12, 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155 (Ger.).
\(^ {47}\) Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 30, 2009, 123 Entscheidungen Des Bundesverfassungsgerichts [BVerfGE] 267 (Ger.).
Constitutional principles as limits to the full expansion of the principle of supremacy of EU Law. Since the European Union is grounded and rooted in the Constitution of Member States, EU Law may not entirely overrule their Constitutional identity. These decisions were made by the BVerfG without any recourse to the CJEU’s preliminary judgement and they gradually showed that the principle of supremacy of EU Law over the law of the Member States is not without exceptions when it comes to confronting National Constitutions and their fundamental principles.

The German Court’s first reference under Article 267 of the TFEU occurred only in 2014 in the Gauweiler case, when the court deviated from its historically dialectic attitude towards the CJEU. A similar approach towards preliminary references can be seen by the Polish Constitutional Court, which stated in 2005 that if it eventually decided to refer a question to the CJEU, it would do so only in cases where the application of EU Law would be strictly necessary. The posture of the court changed significantly ten years later with Case C-390/15 (RPO), when the Polish Constitutional Court submitted its first preliminary reference. All of such cases seem to indicate a trend that has gained strength in the beginning of the last decade, bringing NCCs to a closer dialogue with the CJEU by resorting to preliminary references.

Despite the relatively recent history of the use of preliminary references by NCCs, its evolution is underpinned almost from its beginning by the counter-limits doctrine, most recently marking its apex in the Weiss case concerning the European Central Bank. This is also seen in the Carlsen decision of the Danish Supreme Court, wherein the Court stated that, if there is a doubt on the compatibility of a European Act with the Danish Constitution, it may raise the question to the CJEU and request for clarification. Should the CJEU fail to convince the national judges of the compatibility, the National Court would be authorized to apply the counter-limits doctrine. In other words, although the Danish court accepted the preliminary reference mechanism, it introduced a carve-out so as to be

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52. Carlsen and others v. Prime Minister Poul Nyrup Rasmussen (Danish Supreme Court), 3 C.M.L.R. 854 (Apr. 6, 1998).
53. Id.
able to keep the final word. A similar approach was followed by the Danish Constitutional Court in 2017 in the Ajos case. The German BVerfG also resorted to the same logic already in its first preliminary reference case Gauweiler. The Italian Constitutional Court resorted to a similar approach in Taricco II, raising explicit questions to the CJEU on the applicability of the counter-limits doctrine in the event of clash between national and EU provisions. These examples illustrate a certain fragility in the relationship between the CJEU and NCCs when it comes to the dynamics of EU Law and preliminary references.

Recent developments in the EU Banking and Legislation field, represented by the Weiss case, are a clear demonstration of the clash between the preliminary reference mechanism and the counter-limits doctrine. In effect, the success of preliminary ruling as a tool for an effective judicial coordination will ultimately depend on the willingness of NCCs to elaborate the counter-limits doctrines and to openly engage in dialogue with the CJEU. To this extent, other high-level courts (i.e., non-constitutional in nature but highly ranked in their domestic system) have proved to be much more active and collaborative in the EU institutional dialogue than NCCs; some of the most important cases in this area concern certain aspects of EU Banking and Financial Legislation. Reference can be made to a significant number of preliminary rulings filed by superior courts of different Member States, that testify to a large and increasing number of cases before the CJEU. Within the field of banking and financial law, the number is far from inexpressive.

Interestingly, the advent of EU banking legislation coincides with the period of intensification of the use of preliminary reference procedures by

54. Id.
National Courts. Only over the last few years, the French Conseil d’État,\textsuperscript{60} the Italian Consiglio di Stato,\textsuperscript{61} the Austrian Bundesverwaltungsgericht\textsuperscript{62} and the German Budesverwaltungsgericht\textsuperscript{63} have referred questions to the CJEU concerning matters of interpretation and validity of EU banking legislation. Case C-911/19 (FBF v. ACPR), for example, was a request for a preliminary ruling referred by the Conseil d’État concerning guidelines on product oversight and governance arrangements for retail banking products, issued by the European Banking Authority (“EBA”).\textsuperscript{64} The judgment rendered by the Court on July 15, 2021 is destined to attract academic interest for its questions involving the nature of soft law issued by EU Authorities (guidelines, Q&As), and limits as to the powers vested upon the EBA on grounds of the ultra vires doctrine, a theory already invoked by NCCs in earlier cases.\textsuperscript{65} It will have spill-over effects in other fields of EU legislation, well beyond the boundaries of banking or financial regulation and supervision.\textsuperscript{66}

Case 686/18 (Adusbef and Others) involves a request for a preliminary ruling, which is still pending, from the Italian Consiglio di Stato.\textsuperscript{67} The questions submitted by the Italian court concern the preclusion of national provisions on prudential matters, in light of the pre-existing EU regulations on such topics. In a previous case recently submitted by the Consiglio di Stato, Case C-594/16 (Bucconii), regarding professional secrecy, the CJEU’s judgment offered a holistic approach to financial services supervision, carrying out a parallel interpretation of the Markets in Financial Instruments Directive I (“MiFID I”) and the Capital Requirements Directive IV (“CRD

\textsuperscript{60} \ See, e.g., Case C-911/19, FBF v. ACPR, ECLI:EU:C:2021:294, ¶ 2 (July 15, 2021).


\textsuperscript{63} \ See, e.g., Case C-15/16, Bundesanstalt für Finanzdienstleistungsaufsicht v. Baumeister, ECLI:EU:C:2018:464, ¶ 1 (June 19, 2018).

\textsuperscript{64} \ Case C-911/19, FBF v. ACPR, ECLI:EU:C:2021:294, ¶ 2 (July 15, 2021).


\textsuperscript{66} \ On the expanding force of soft law in the EU and on its National application, see Emilia Korkea-aho et al., EU Soft Law in the Member States (Mariolina Eliantoni et al. eds., vol. 8 2021).

\textsuperscript{67} \ Case C-686/18, Adusbef and Others v. Banca d’Italia and Others, ECLI:EU:C:2020:567, ¶ 67, 69 (July 16, 2020).
IV”) on the treatment and access to confidential information.68 This case drew upon recently developed case law, including Altmann.69 As a result, in Buccioni, the CJEU granted significant discretionary powers to both supervisory authorities and National Courts in balancing the complex network of interests involved in the disclosure of information by financial supervisors.70 New opportunities for dialogue between the Italian Consiglio di Stato and the CJEU have arisen from the famous Case C-219/17 (Silvio Berlusconi and Fininvest v. Banca d’Italia), a milestone case that defined the concept of “single judicial review” for national draft decisions preceding a final ECB decision within the framework of the SSM.71 In conjunction with the abovementioned Austrian VTB Bank case, the Berlusconi case marks the second preliminary reference on the sensitive issue of the delimitation of the ECB’s competence vis-à-vis those invested upon national authorities,72 whose aftermaths also prompted an official statement by the ECB in a letter sent to all supervised banks.73

B. Reactions by the CJEU

Several hints can be gathered by considering the CJEU’s reactions to the tensions that result from the process described above. The CJEU has indeed refined a wide array of techniques and methods to address the preliminary ruling mechanism to obtain what, from its perspective, is the most effective result.74 Especially towards NCCs, the CJEU often takes an open dialogue attitude, designing its answers and tone to avoid direct confrontation and opposition. This is clear in the Taricco saga where the

Court masterfully reformulated the terms set forth by the Italian Constitutional Court’s questions on the application of counter-limits so as to discuss, conversely, “common constitutional values,” in a nitid attempt for a fraternal rapprochement between courts.

Another technique used to address the preliminary ruling mechanism, also seen in Taricco but common to other cases, is to refrain from explicitly answering questions referred by NCCs, either by bluntly ignoring them or by arguing their answer is unnecessary. By limiting its analysis to the most unavoidable questions, the CJEU frequently dribbles polemic points that could cause frictions with NCCs, as can be seen in the judgments on Gauweiler and Weiss.

Finally, the disseminations of suggestions or hints by the CJEU throughout its judgments are used to induce National Courts to find a solution that avoids direct clashes between EU Law and National Law, namely its fundamental Constitutional principles. Once again, matters involving EU Banking and Financial Legislation provide quite interesting examples of the dialectic approach of the Court. For example, in Gauweiler and Weiss, the CJEU sought to hand over arguments to the BVerfG to allow it to come to a positive and constructive conclusion, offering certain “hooks” that the National Court could then take into its hands to reach a non-conflicting decision while at the same time avoiding its own debacle.

Through these techniques, the CJEU is providing a sort of pedagogical function in favor of NCCs that it is then in the hands of the NCCs to further develop and apply within their own system. The masterful use of the supremacy doctrine by the CJEU, by way of flexibility, re-interpretation, and proper wording of the judgement rendered, is one of the most fascinating aspects of the way through which the Court is conducting the formal dialogue with NCCs and other courts in the context of preliminary reference. EU Banking Legislation is providing some striking examples of how the system is evolving in these respects.

III. THE PECULIAR PATHS OF EU BANKING LEGISLATION

In the context of EU Legislation that touches upon the role of the ECB, the dialogue between the CJEU and National Courts is evolving in multiple different ways, some of which are quite unique, notwithstanding the fact that most of the relevant EU Banking legislation is less than ten years old.

75. Case C-105/14, Ivo Taricco and Others, ECLI:EU:C:2015:293, ¶ 113 (Apr. 30, 2015).
76. See, e.g., Case C-418/13, Mascolo v. Ministero dell’Istruzione, dell’Università e della Ricerca and Comune di Napoli, ECLI:EU:C:2014:240, ¶ 46 (Nov. 26, 2014).
There is already a high level of judicial activity in this area which is producing a comprehensive and quickly growing body of jurisprudence. Considering dialogue among EU Courts, four basic strands can be observed: (1) the first, which is common to other areas of EU Law, is the recourse to the procedure of preliminary reference by NCCs, with a constructive approach (Gauweiler); (2) the second is the recourse to preliminary reference, with an unexpected and unprecedented de-constructive approach (Weiss); (3) the third is the development of informal dialogues between Courts, with some new, peculiar features (Landeskreditbank and Banking Union); (4) the fourth is the dialogue that might specifically develop in the context of the application of Article 4(3) of EU Regulation 1024/2013 ("SSMR") which will be truly innovative a quite problematic area of EU Banking Legislation.

The majority of the details of these cases have already been the object of extensive commentaries and doctrinal contributions, so this article will focus on the points most relevant to present the current state of the legal discourse, and the contribution that this fast-developing body of jurisprudence can provide to the scholarly and legal debate on judicial dialogue among EU Courts.

A. Preliminary Reference as a Form of Constructive Dialogue: Gauweiler

In the context of EU Banking Legislation, particularly in relation to the ECB’s monetary functions, Gauweiler was the first case where the BVerfG

78. For a regularly updated catalogue of EU Jurisprudence in this field reference organized by the European Banking Institute and under the direction of René Smits, see The Banking Union and Union Courts: Overview of Cases, EUROPEAN BANKING INST., https://ebi.europa.eu/publications/eu-cases-or-jurisprudence/ [https://perma.cc/E9CD-29PS]; see also The Tangled Complexity of the EU Constitutional Process, supra note 4, at 193.


filed a request to the CJEU for a preliminary judgement.\textsuperscript{81} For the BVerfG, this was the first attempt ever to resort to preliminary reference.\textsuperscript{82} The case originated from the announcement released on September 6, 2012, with which the ECB declared its intention to start the so-called “OMT programme” in the midst of the global financial crisis.\textsuperscript{83} Such an announcement was marked by Mario Draghi’s famous words “whatever it takes” which was stated in defense of the euro currency.\textsuperscript{84} The aim of the programme, which was never actually implemented, was to respond to the worsening of the sovereign debt crisis, characterized by strong volatility of interest rates and obstacles that the ECB was facing in the proper transmission of its monetary policy impulses.\textsuperscript{85}

In Germany, a group of people led by Peter Gauweiler shared the opinion that the ECB’s decision (\textit{recte}, the ECB’s announcement of the forthcoming decision) went beyond the powers conferred upon it by the Treaty.\textsuperscript{86} According to this group, the OMT programme would likely produce effects in the realm of economic policy well beyond the boundaries of monetary policy.\textsuperscript{87} A further concern was that the OMT programme might result in a breach of the prohibition on monetary financing of the budget of Member States.\textsuperscript{88} They worried these issues would ultimately result in a violation of a number of fundamental principles of the German Constitution, which Germany implemented and confirmed upon joining the European

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\textsuperscript{85} The essential features of these conditions can be summarized as follows: the purchases had to keep the monetary base unchanged; the purchases were to be limited to medium-short term securities (one to three years); the purchases remained subordinated to the accession of the Member State affected from time to time by purchases to a “macroeconomic stabilization” plan within the framework of the ESM. See Case C-62/14, Gauweiler and Others v. Deutscher Bundestag, ECLI:EU:C:2015:400 (June 16, 2015).


\textsuperscript{87} \textit{Id.}

\textsuperscript{88} Case C-62/14, Gauweiler and Others v. Deutscher Bundestag, ECLI:EU:C:2015:400 (June 16, 2015).
Union. The issues recalled similar concerns of the protection of National Constitutional identity already discussed in previous preliminary references cases raised by other NCCs including the famous Italian case Taricco, albeit in different areas of EU Legislation. Gauweiler was also noteworthy because what the CJEU reviewed was a mere press release from the ECB, and not an actual decision of the ECB itself, differentiating it from the renewed decision of the later Weiss case on the Public Sector Purchase Program ("PSPP"). The CJEU rendered its judgement in favor of the ECB, upholding its independence in pursuing the monetary policy objectives assigned by the Treaty, and acknowledging, at the same time, wide flexibility regarding the instruments that can be used to attain these purposes. After the ruling of the CJEU, the matter of the OMT programme returned to the BVerfG which finally rejected the appeals against the programme.

The decision of the BVerfG in Gauweiler marked an important chapter in the long evolution of the jurisprudence of the judges of Karlsruhe regarding the relationship between EU Law and the cornerstones of the German Constitution; Gauweiler soon became a leading case, stimulating conspicuous commentaries and an impressive amount of scholarly literature. In its decision, the BVerfG started from the express recognition of the primacy of EU Law, to which National Law is subordinated in all respects, including, in principle, constitutional law. However, following a line of reasoning inaugurated long before the Court in Karlsruhe with Solange I, the supremacy of EU Law is valid only to the extent that its application entails a transfer of sovereignty in accordance with the principle of conferral and internal laws providing the authorization for the ratification of the EU Treaties, and is within the limits of what would not compromise

89. On Taricco and the counter-limits doctrine as interpreted and applied in Italy, see MARTINICO & POLLICINO, supra note 1, at 87.
90. BVerfG, Dec. 11, 2018, Case C-493/17, Curia (Ger.) [https://perma.cc/5N4U-J8LT].
91. Case C-62/14, Gauweiler and Others v. Deutscher Bundestag, ECLI:EU:C:2015:400 (June 16, 2015); see Tridimas & Xanthoulis, supra note 82; Hinarejos, supra note 81.
93. See, Tridimas & Xanthoulis, supra note 82.
the German constitutional identity (the “counter-limits doctrine”).\textsuperscript{95} Both the proper application of the principle of conferral envisaged by Article 5 of the Treaty on the European Union (“TEU”), and compliance with internal constitutional counter-limits, function as barriers to the full, unconditional unfolding of the principle of supremacy of EU Law.\textsuperscript{96} The result is that the EU order ends up supporting itself in the Constitutional order of the Member States, where it finds its roots, but also its limits.\textsuperscript{97}

Because these are fundamental constitutional safeguards, against which EU Law should be set back, it is up to the BVerfG to ensure compliance with them insofar as the German State is concerned.\textsuperscript{98} To this end, the BVerfG has two tools: (1) the “constitutional identity” control, and (2) the \textit{ultra-vires} control. Both are based on the so-called “eternity clause” carved into Article 79, Section III of the German Constitution (\textit{Grundgesetz} – GG)\textsuperscript{99} even though the tools are not identical in nature. The first of these

\begin{itemize}
\item \textsuperscript{95} \textit{Id.} For a definition of the counter-limits doctrine, see Giuseppe Martinico, \textit{Is the European Convention Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law Before National Courts}, 23 EUR. J. INT’L. L. 401, 419 (2012) (“By ‘counter-limits’ (contro-limiti) I mean those national fundamental principles raised by Constitutional Courts—like impenetrable barriers—against the infiltration of EU Law. The counter-limits are conceived as a form of ‘contrepoids au pouvoir communautaire’, an ultimate wall in the way of the full application of EU law, an intangible core of national constitutional sovereignty”); see also Theodore Georgopoulos, \textit{The ‘Checks and Balances’ Doctrine in Member States as a Rule of EC Law: The cases of France and Germany}, 9 EUR. L.J. 530 (2003) (providing further details on the application of the counter-limits doctrine by National Courts).
\item \textsuperscript{96} All of these arguments reflect a long evolution of the BVerfG’s case law: the constitutional identity of the German State set out by the \textit{Grundgesetz} (Article 79, Section III) acts as a limit to EU Law as expressly referred to in Article 23. Article 23 refers back to Article 20, which establishes the democratic principle as the fundamental principle of the German legal system. In turn, the democratic principle is to be read in close relation with the right to vote, guaranteed by Article 38; ultimately, this is aimed at preserving the “individual right to democracy,” which is anchored to the protection of human dignity (the ultimate reason for the principle of democracy). For access to German Basic Law see Grundgesetz [GG] [Basic Law], translation at http://www.gesetze-im-internet.de/englisch_gg/index.html.
\item \textsuperscript{97} For further reflections, see Luis Arroyo Jiménez, \textit{Constitutional Empathy and Judicial Dialogue in the European Union}, 24 EUR. PUB. L. 57 (2018).
\item \textsuperscript{98} This approach calls for a reading of the Constitution strongly focused on a vision of nation-state which, in certain aspects, recalls critical moments of the history of North American federalism such as that of the constitutional conflict of 1828 with South Carolina. See \textit{The South Carolina Nullification Controversy}, US HISTORY.ORG, https://www.ushistory.org/us/24c.asp [https://perma.cc/R8X3-6WGE].
\item \textsuperscript{99} According to the “eternity clause,” no amendments to the Constitution that affect the division of the State into Länder, nor the fundamental participation of the Länder to the legislative power or the principles laid down in Articles 1 and 20 of the \textit{Grundgesetz}, shall be admissible. See Ondrej Preuss, \textit{The Eternity Clause as a Smart Investment-Lessons from the Czech Case Law}, 57 HUNGARIAN J. LEGAL STUD. 289, 291 (2016).
\end{itemize}
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compliance tools is concerned with the respect of national constitutional traits, which represents a constraint for the European Union. The second, ultra vires, is instead used as a criterion to ensure compliance with the integration program and the principle of conferral, both of which prerequisites for the law originally authorizing the ratification of the European Treaties by Germany. Should an act of an EU institution be at odds with ultra vires, it would not bind any public power and would be considered inapplicable within the German legal system.

Considering the above background that the CJEU was very aware of, the decision of the CJEU in Gauweiler proved to be authoritative and flexible at the same time: while leaving no space for a reductionist view of the principle of supremacy, it allowed the BVerfG to carve out its own position which was in line with its own principles. Gauweiler thus became an example of a firm, but evolutionary, dialogue. As it has been rightly observed, in its decision the CJEU was indeed smart enough to “accept the challenge but not the provocation” raised by the BVerfG. It did not question the national rules governing the judicial review of the OMT measures, nor the organization of the domestic judicial proceedings. It did not express any views on the BVerfG’s power, merely confining itself to a simple statement that preliminary rulings are binding on National Courts. It wisely provided its answers without discussing in detail the BVerfG’s analysis, in opposition to the opinion provided by Advocate General Crus Villalón who had presented a long examination of


102. As to the flexibility allowed by the conclusions reached in Gauweiler, see Matthias Goldmann, Constitutional Pluralism as Mutually Assured Discretion: The CJEU, the BVerfG, and the ECB, 23 MAASTRICT J. EUR. & COMP. 119 (2016); see also Darius Adamanski, Economic Constitution of the Euro Area After the Gauweiler Preliminary Ruling, 52 COMMON MKT. L. REV. 1485 (2015).

103. Tridimas & Xanthoulis, supra note 82, at 35.

104. Tridimas & Xanthoulis, supra note 82, at 35.

105. Tridimas & Xanthoulis, supra note 82, at 35.
the alleged impact of the OMT programme on Germany’s constitutional principles.\textsuperscript{106}

\textit{Gauweiler} may be rightly considered an example of a constructive dialogue between Courts, similar to that tested, albeit more articulately, in \textit{Taricco}.\textsuperscript{107} Despite the first impression of judicial confrontation, in \textit{Gauweiler} the Courts operated in a cooperative way, found a way to cut edges, and paved the way to what some authors have labelled an example of “cooperative constitutionalism” between the CJEU and the German Constitutional Court.\textsuperscript{108}

\textbf{B. Preliminary Reference with a De-Constructive Result: Weiss (2020)}

The path of \textit{Weiss}, culminating in the BVerfG’s judgment in May 2020, is similar to that of \textit{Gauweiler}: it began with an appeal filed to the BVerfG followed by the BVerfG’s suspension of its decision by raising a preliminary reference to the CJEU and ended with a decision from the judges of Karlsruhe.\textsuperscript{109} In \textit{Weiss}, however, the BVerfG refused to follow the decision rendered by the CJEU.\textsuperscript{110} Like \textit{Gauweiler}, the controversy in \textit{Weiss} concerned a non-conventional stimulus measure adopted by the ECB in 2015: the Public Sector Purchase Program (“PSPP”).\textsuperscript{111} Despite the differences between the PSPP and the OMT programme (the most evident of which is that the PSPP was effectively implemented), issues

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\textsuperscript{107} Although the epilogue of the \textit{Gauweiler} case was in line with the position of the CJEU (and, therefore, with that of the ECB), the judgment of the BVerfG is not devoid of complexities. These points of disagreements could already be detected by looking at the judgement of the CJEU, but they do not change the ultimate assessment of the case: rather, they confirm the fact that the dialogue can be, at times, problematic, and that it can be quite interactive. See, Craig & Markakis, supra note 106, at 21 (discussing the ambiguities of Gauweiler); Federico Fabbrini, \textit{After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States}, 16 GER. L.J. 1005 (2015); Carsten Gerner-Beuerle, Esin Küçük & Edmund-Philipp, \textit{Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial}, 15 GER. L.J. 282 (2014).

\textsuperscript{108} Martino & Pollarino, supra note 1, at 17. Other Authors have described this situation as showing “circumspection” in the attitude of the CJEU and of the BVerfG, see, e.g., Neil MacCormick, \textit{Questioning Sovereignty: Law, State, and Nation in the European Commonwealth} 119 (1999); see, e.g., Arnull, supra note 7, at 112.

\textsuperscript{109} See BVerGE, 2 BvR 2728/13, Jan. 14, 2010 [https://perma.cc/CAN4-W6V3].

\textsuperscript{110} Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000, ¶¶ 13–15 (Dec. 11, 2018).

\textsuperscript{111} See Klaus Tuori, \textit{The ECB’s Quantitative Easing Programme as a Constitutional Game Changer}, 23 MAASTRICT J. EUR. & COMP. 94, 101 (2019).
\end{flushleft}
raised before the BVerfG in Gauweiler and Weiss were similar. Once again, in Weiss the discussion was whether the decisions with which the PSPP was launched were in conflict: (1) with Article 123 of the TFEU (ultra vires); (2) with the principle of conferral, enshrined in Article 5, paragraph 1 of the TEU, to be read in conjunction with Articles 119 and 127 of the TFEU; or (3) with the fundamental principles established by the German Constitution that were already under review in Gauweiler.

On all of these topics, the CJEU’s responses in the preliminary ruling were in clear favor of the ECB: The PSPP was not a manifestly disproportionate measure to achieve the objective of price stability; the ECB had no other means available to achieve similar objectives; the measure was not selective; it was subject to a quantitative limit and to a specific duration; it provided for an obligation upon national central banks to purchase eligible securities from issuers in their country; and it laid down criteria for the distribution of losses compliant with the principles of the Treaty.

In accordance with Gauweiler, the CJEU pointed out in Weiss that, in order to determine whether a measure falls within the sphere of monetary policy, it is necessary to refer mainly to the objectives of this measure and to the means that such measure puts in place to achieve its objectives.


113. Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000 (Dec. 11, 2018). To be precise, the CJEU analyzed the PSP programme in three main aspects: the duty to state reasons; the nature of the decision itself (economic policy vs. monetary policy); its compliance with Article 119, Article 123 paragraph 1, and Article 127, paragraphs 1 and 2 of the TFEU. The Court’s judgment was rendered on December 11, 2018 and upheld the ECB decision by arguing that the ECB’s decision was sufficiently motivated, and that the PSPP could not be assimilated to an economic policy measure.

114. Id. at ¶ 81–96.

115. Id. at ¶ 53 (citing Case C-62/14, Gauweiler and Others, ECLI:EU:C:2015:400, ¶ 46 (June 16, 2015)).
The objectives pursued are, therefore, prevalent upon the means employed; this is a central point of disagreement between the CJEU and the BVerfG that already emerged in Gauweiler even though ultimately the edges were cut down there, and that now explodes in Weiss II.116

As one of the core issues in both Gauweiler and Weiss was the kind and level of judicial review of the decisions of the ECB, the CJEU confirmed that, in order to “make ‘technical choices and make complex forecasts and assessments,’” such as those relating to “open market” transactions, the ECB enjoys “broad discretion;” judicial control is aimed at verifying whether, with respect to monetary policy objectives, the ECB made a ‘manifest’ error of assessment.117 The Court in Weiss clearly said that it did not intend to limit itself to verifying the material accuracy, reliability, or consistency of the evidence adduced, but that it should ascertain whether these elements constitute the set of relevant data that must be taken into consideration in assessing a complex situation and whether they are such as to corroborate the conclusions that have been drawn.118

While Gauweiler provided a happy ending because the BVerfG accepted the decision of the CJEU, the opposite is true for Weiss. In the following judgment on May 5, 2020 (hereinafter referred to as Weiss II),119 the BVerfG harshly disagreed with the conclusions reached by the CJEU. This was new and quite unexpected. The conclusion of the ruling is also atypical: the BVerfG, while addressing its command to the German constitutional bodies, ordered that additional reasons be provided in support of the legitimacy of the PSPP by the ECB within three months from the decision.120

117. Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000 (Dec. 11, 2018), at ¶ 24. Article 35.1 of the Statute of the ECB and the ESCB expressly provide that the acts or omissions of the ECB are subject to examination or interpretation by the Court of Justice in the cases and conditions established by the Treaty. See Grainger and others v. United Kingdom, App. No. 34940/10, ¶ 36 (July 10, 2012), http://hudoc.echr.coe.int/eng/?i=001-112312 [https://perma.cc/3MMB-KUMF], see also Mamatas and others v. Greece, App. No. 63066/14, 64297/14, and 66106/14, ¶¶ 88–89 (July 21, 2016), http://hudoc.echr.coe.int/eng/?i=001-164969 [https://perma.cc/CEF8-ZSNG] (for discussion of the need to ensure wide margins of discretion to the authorities in charge of conducting economic and social policies); see also Matthias Goldmann, Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review, 15 Gen. L.J. 265, 271–80 (2014) (providing a doctrinal point of view).

118. Similar principles have emerged in the field of competition law. See Andriani Kalintiri, What’s in a Name? The Marginal Standard of Review of ‘Complex Economic Assessments’ in EU Competition Enforcement, 53 Common Mkt. L. Rev. 1283 (2016).

120. Id. at ¶ 235.
Otherwise, the German Bundesbank would no longer be allowed to participate in the ECB’s support programme, despite its being part of the European System of Central Banks (and the related independence requirement, under Article 130 of the TFEU).  

Weiss is therefore an astonishing example of dialogue turned to conflict in the context of EU Banking and Financial legislation. It ended with a solution that disregards the outcome of the preliminary judgment and also clearly undermines the principle of supremacy of EU Law.

The ground-breaking decision of the BVerfG in Weiss is articulated along points of reference similar to the ones developed in Gauweiler: ultra vires, conferral, and proportionality. The core of the decision, where the dialogue between the two Courts turns into dissent, hinges on proportionality and the duty to state reasons. According to the BVerfG, the ECB did not properly carry out or explain its proportionality assessment, and, as to the CJEU, the proportionality point was not properly reviewed by the Court in Luxembourg in its Weiss I judgment. Without too many circumlocutions, and with a shockingly harsh tone, the BVerfG labeled the judgement of the CJEU as “not comprehensible”126 and devoid of any effect (neither binding nor persuasive) within the German legal system. Since the starting point and the basic assumptions in Weiss are not so different from those in Gauweiler, one may wonder what went wrong, and how a constructive dialogue could turn into open confrontation.

121. See Dieter Grimm, A long Time Coming, 21 GER. L.J. 944 (2020); see also Stanislav Biernat, How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland, 21 GER. L.J. 1104 (2020) (discussing how the decision has been hailed in some EU countries, including Poland, where it sparked some Nationalist reactions).
123. Conferral and the ultra vires doctrine are linked: an act that exceeds the competences that member states have consciously intended to transfer to the Union is ultra vires. The (poisonous) shade of the BVerfG’s judgment concerns the fact that the principle of conferral could be violated due to the effects produced by two elements: the wide discretion that the Treaty recognizes to the ECB, and the “limited standard of review” that the CJEU carries out with regard to its decisions, especially those relating to monetary policy functions. See BVerfG, 2 BvR 859/15, May 5, 2020, ¶ 156, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html [https://perma.cc/E9K8-TCQ4].
124. Id.
125. Id.
The answer lies in the fact that, in Weiss II, the BVerfG believed that insufficient elements were provided to assess compliance with those same principles asserted in Gauweiler. In short, one is not faced with a revision of the principles previously applied by the BVerfG, nor with a re-foundation of the theories on the counter-limits of the Grundgesetz. The issue in Weiss II instead revolved around motivation, clarity, and statements of reason. According to the BVerfG, insufficient justification and statement of reasons were provided to support that the PSPP was limited to the scope of pursuing mere monetary policy objectives, and did not, instead, turn into a measure compromising the exclusive reserve upon the Member States in terms of economic policy. Unlike Gauweiler, in Weiss, the reaction of the BVerfG to this alleged default of the ECB’s decision (and of the judgment rendered by the CJEU) turned out to be excessive, and actually became an improper invocation of the principles of ultra vires, conferral, and ultimately infringement of German constitutional counter-limits. The dialogue became in some way hysterical and whimsical; accordingly, the outcome in Weiss II was also the consequence of the ambiguities of the architecture of the Treaties concerning the ECB’s power and role that ultimately came into light.

The possible future consequences of the Weiss II judgement are unclear. On the one hand, the CJEU hastily issued an (unprecedented) press release in which it stressed that the ECB is subject to the exclusive judicial review of the Court in Luxembourg and that National Courts must give full effect to EU Law. On the other hand, the ECB made available additional documentation supporting its decision, but this apparently was not.


129. Id.

130. Id.

131. This point is set out by Amtenbrink & Repasi, supra note 112, at 757–78.

132. For a comprehensive analysis of the press release where the Court raised the issue of equality among Member States as one of the foundational reasons for the need to ensure full effect, see Justine Lindeboom, Is the Primacy of EU Law Based on the Equality of the Member States?, 21 GER. L.J. 1032 (2020).
sufficient, as the media has reported that a new claim has been filed to the BVerfG by the promoters of the case in Germany asking for the judgment to be enforced.  

Recent news indicates that the EU Commission opened an infringement procedure against Germany, but it is doubtful whether this would be feasible or even useful at all. It also sparked discussions regarding the structure of the Court of Justice, so as to allow it to better handle this kind of discourse (or confrontation). Some commentators believe that new formal venues of dialogue among EU Courts should be implemented, including the setting up of special chambers where NCCs and the CJEU might convene when high-level issues are discussed, including Constitutional law and fundamental rights. If this idea was indeed implemented, there would be an official arena for judicial dialogue between Courts of the highest order in the EU, which would provide a solution to at least some of the problems that are inevitably linked to the structure of the preliminary reference procedure.

The decision of the BVerfG in Weiss has been severely criticized on a number of grounds, as it clearly goes against the principle of supremacy.

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137. In absolute terms, this was not the very first time that a NCC challenged the decisions of the CJEU. Two other precedents may be recalled: the Polish case Ústavní soud České republiky nalez ze dne 31.1.2012 (ÚSn) [Judgment of the Constitutional Court of January 31, 2012], sp.zn Pl. ÚS 5/12 (Czech) and the Danish case Højesteret, 1. Afdeling [1st Chamber of the Supreme Court], arrêt 06/12/2016 [judgment of June 12, 2016] (Sag 15/2014) (Den.). These were, however, cases that looked like the result of a politically biased approach. More importantly, they were different from Weiss in terms of the influential role played by the relevant CC and also by the State involved which, in Weiss, is the most powerful and influential State among Member States.

138. See generally Niels Petersen, Karlsruhe’s Lochner Moment? A Rational Choice Perspective on the German Federal Constitutional Court’s Relationship to the CJEU After the PSPP Decision, 21 GER. L.J. 995 (2020) (stressing that, probably not by chance, shortly after the decision, Germany and France rapidly found their agreement on the EU Recovery Plan).

139. Cf. Schneider, supra note 122, at 968–78.


141. Raising the point most effectively is Tridimas & Xanthoulis, supra note 82, at 17.

A few remarks on the substance and history of the cases are necessary, albeit by truly simplifying the many technical and complex issues of these cases. Topics discussed in these cases concern, among others, the exercise of the supervisory functions attributed to the ECB by the SSMR. The cases developed in parallel in front of the BVerfG (Banking Union) and of the CJEU (Landeskreditbank). For the BVerfG, similar to Gauweiler and Weiss, the controversy was initiated by a group of German citizens that challenged certain provisions of EU Banking Law (this time, secondary EU Legislation) in the context of German Constitutional principles. As to the CJEU, the case started from an appeal lodged to the Court by a German bank, the Landeskreditbank Baden-Württemberg – Förderbank, against a decision made by the ECB in its supervisory functions. The contested decision concerned the request of Landeskreditbank to be considered, by way of derogation, as a less significant credit institution, and therefore supervised by National Competent Authorities (“NCAs”), instead of the ECB, based on the provisions of Article 70(4) of Regulation 468/2014 (the so-called “Framework Regulation”). Since the ECB did not accept the bank’s request, the Landeskreditbank addressed the Court to challenge the ECB’s decision (after, however, having submitted the issue to the internal ECB’s Administrative Board of Review). The dispute with the ECB ended with a ruling of the CJEU. The most significant finding of the Court’s judgment resulted in the statement (which technically is a mere “obiter dictum”) that, in the SSM founding regulation, the ECB is conferred exclusive power to exercise prudential supervision over all the banks included in the related area of operations (regardless of their relevance or size), whereas NCAs fulfil their functions on a decentralized basis with respect to the ECB.


145. The chronology of the two events is as follows: Landeskreditbank’s appeal before the CJEU was introduced on March 12, 2015; the appeal of the members of Europolis to the BVerfG was presented in 2014. See id. at 15, note 17.

146. Id. at 13.


148. Cf. Stefano Montemaggi, Case-study: Judgments of the General Court and of the CJEU on the Landeskreditbank, in LAW AND PRACTICE OF THE BANKING UNION AND
In _Landeskreditbank_, the CJEU did not directly address the compatibility of the SSM founding Regulation with the principles of subsidiarity and proportionality of the Treaty, as these issues were not pleaded in the appeal presented by the Bank.\(^{149}\) Instead, those were the main themes developed in the appeal presented to the BVerfG regarding the compatibility of the SSMR with the Treaties and with the constitutional counter-limits posed by the German _Grundgesetz_. Ultimately, the BVerfG declared inadmissible, and/or rejected all claims.\(^{150}\) However, this happy ending came at a price: that of reinterpreting the “parallels” of the CJEU’s decision in regard to the allocation of competences between the ECB and NCAs to the point of a clear-cut reversal of the findings of the CJEU in _Landeskreditbank_.\(^{151}\) Indeed, among the various issues addressed in the BVerfG ruling in the _Banking Union_ case, the most important is the division of competences recognized by the SSM Regulation, as treated by the CJEU in _Landeskreditbank_.\(^{152}\) The BVerfG concluded that the adoption of the SSM Regulation does not significantly and manifestly

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\(^{149}\) _Annunziata, Lamandini & Munoz, supra note 144, at 15_.

\(^{150}\) As for the SRM, the BVerfG notes that the tasks assigned to the SRB comply with the standards established by the CJEU on the application of Article 114 of the TFEU. Furthermore, the competences of the SRB are well defined (paragraphs 255-258 of the judgement) do not concern fundamental issues regulated by the SRMR itself (paragraph 260 of the judgement) and are limited to what is necessary from the point of view of the Union legislator (paragraph 261 of the judgement). _Id._ at 16.

\(^{151}\) In the case of the BVerfG’s judgment on the Banking Union, the German Court did not deem it necessary to make a preliminary reference to the ECJ. The interpretation of TFEU Article 127(6) in relation to the SSMR would be easy, as the SMM does not constitute a sufficiently significant violation of the Union’s membership programme. Entscheidungen des Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] May 16, 2017, Entscheidungen des Bundesverfassungsgerichts 1, 8 (Ger.).

\(^{152}\) In the case of the BVerfG’s judgment on the Banking Union, the German Court did not deem it necessary to make a preliminary reference to the ECJ. The interpretation of TFEU Article 127(6) in relation to the SSMR would be easy, as the SMM does not constitute a sufficiently significant violation of the Union’s membership programme. Entscheidungen des Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] May 16, 2017, Entscheidungen des Bundesverfassungsgerichts 1, 8 (Ger.).
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exceed the powers conferred on the European Union by the Treaties.\textsuperscript{153} Therefore, it does not constitute an \textit{ultra vires} act according to the constitutionality control criteria established by the BVerfG, as long as the provisions of the SSM Regulation are interpreted restrictively.\textsuperscript{154}

How does the BVerfG’s decision in the \textit{Banking Union} case compare with the CJEU’s decision in \textit{Landeskreditbank}? The BVerfG believes the Luxembourg court’s statements regarding the role of the ECB in terms of division of competences between the ECB and NCAs is little more than an \textit{obiter dictum} given that the dispute decided by the CJEU only concerned the interpretation of Article 6, paragraph 4, subsection 2 of the SSMR and Article 70(4) of the Framework Regulation.\textsuperscript{155} According to its own corrective reading, the BVerfG points out that in \textit{Landeskreditbank} the CJEU had, with binding effect, only ascertained that the exclusive competence of the ECB is limited to determining the definition of “special circumstances.”\textsuperscript{156}

According to the BVerfG, the CJEU did not actually rule on the compatibility of the SSMR with the fundamental principles of the Treaty, including proportionality and subsidiarity.\textsuperscript{157} Thus, the CJEU left to the BVerfG full capacity of checking that the Regulation (and other related provisions of EU Banking Law) does not violate fundamental principles of the German Constitution.\textsuperscript{158} On this point, which stands at the core of the controversy raised in front of the BVerfG, the Court can therefore provide its own interpretation by stating that the SSM Regulation is in line with those principles, as long as it is interpreted on a restrictive basis.\textsuperscript{159} In doing so, the BVerfG manages to bypass the obstacle of one of the most relevant parts of the CJEU judgment: the part where, albeit in a form which is effectively that of \textit{obiter dictum}, the Court argues that the ECB is entrusted with the task of carrying out prudential supervision on all credit institutions falling within the scope of the SSM Regulation, regardless of their dimensions and/or relevance, whereas NCAs perform those same tasks on a decentralized basis.\textsuperscript{160}

\textsuperscript{153} \textit{Id.} at 3.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} at 8.
\textsuperscript{156} \textit{Id.} at 9.
\textsuperscript{157} \textit{Id.} at 7.
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.} at 12–13.
In this form of dialogue, where Courts proceed on parallel grounds, omissions and silences may be more important than open discourse or confrontation. Apart from its technicalities, the Landeskreditbank/Banking Union decisions offer an example of an innovative path of discourse among Courts that is likely to develop in the future, especially in the context of the novelties and complexities of the new EU banking and financial legislation. It is a path that, while not being formal (such as in the context of a preliminary reference), is more overt than what can be found in other “informal” discourses as it explicitly and openly conducts a discourse with the other Court’s position, focused on the re-reading and re-elaborating of the latter’s judgement in a connected or related case. It is not, therefore, a silent form of dialogue; it is an open discourse, but one that follows mostly unprecedented paths, rendered possible by the peculiarities of EU Banking Legislation.

D. The Innovative Provision of Article 4(3) of the SSM Regulation: New Kinds of Dialogues and New Issues

According to Article 4(3) of the SSMR: “For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives.” Article 4(3) clarifies that, where relevant European Union law consists of Regulations, and these Regulations explicitly grant options to Member States, the ECB shall also apply National Law that exercises such options. It follows that the ECB’s scope of action is not limited to EU Law, but also includes National Law, to the extent that the National Law is the outcome of the transposition of Directives, or results from the options and discretions left to Member States by EU Regulations.

Article 4(3) has rightly been indicated as one of the most innovative rules of the entire system introduced by the Banking Union. In fact, it has no equivalent in any other area of EU Law. The novelty of the provision appears in all its clarity and problematic nature if one considers that, in

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161. 2013 O.J. (L 287) 74.
162. Id.
163. Id.
the event of judicial review, the CJEU must deal with Article 4(3) and, thereby, apply National legislation. This happens when a decision from the ECB based on that provision is challenged in front of the Court. The application of the principle *iura novit curia*, with regards to (at least) nineteen different legislations (these being those that, at present, fall within the scope of the SSM Regulation) is a daunting challenge for the otherwise, well-equipped judges in Luxembourg.\(^{165}\)

It must be said that, apart from Article 4(3) of the SSMR, the CJEU frequently investigates National Law, such as in the context of preliminary references.\(^{166}\) Moreover, it is from the legal traditions of the Member States that the CJEU has drawn some of the most important general principles of EU Law; the comparative method (that clearly implies continuous references to EU Law and that of the Member States) has been rightly singled out as one of the most important principles used by the CJEU.\(^{167}\) However, in all of these circumstances, the Court’s approach to National Law is not aimed at applying National Law in itself, but at applying EU Law. This is precisely where the novelty and potentially subversive nature of Article 4(3) of the SSMR becomes evident. Resorting to Article 4(3) results in a true reversal of perspective, producing a similar effect to turning the vision of a telescope upside down. Because the ECB (and the CJEU, in the event of a dispute) must apply domestic law resulting from the transposition of EU Law, a double reversal occurs. In the (broadly speaking) “legislative” phase, supranational law (EU Law) is implemented and transposed at the internal level and, therefore, “drops” down from top to bottom. In the subsequent phase, where Article 4(3) comes into play, domestic law is applied at the supranational level and, therefore, “rises” from the bottom to the top.\(^{168}\)

The application of Article 4(3) and of judicial review thereunder, invites the development of new strands of dialogue between EU Courts, including that between Constitutional Courts and the CJEU. The situation is unique: the CJEU, in its review of an ECB’s decision taken pursuant to Article 4(3) of the SSMR, must apply EU Law as well as National Law (which at

\(^{165}\) 2013 O.J. (L 287) 74.

\(^{166}\) *Id.*

\(^{167}\) MARTINICO & POLICINO, *supra* note 1, at 9; No 0 1/05, Judgment, ¶ 2 (Trybunal konstytucyjny Apr. 27, 2005).

least formally, is “foreign” for the CJEU).\textsuperscript{169} However, the National law
in question results from the implementation of EU Law, and is conditioned
by EU Law and its (binding) interpretation by the CJEU. All of this gives
rise to a unique kind of interaction between courts placed in different legal
systems.\textsuperscript{170}

Another peculiar aspect stemming from Article 4(3) is that the decision
made by the CJEU will inevitably influence the future interpretation of
National Law by National Courts, not only as a consequence of the principles
of supremacy and effective cooperation, but also as a persuasive precedent.
In particular, the persuasive force of the interpretation provided by the
CJEU might become relevant in relation to elements of National Law that
the CJEU must apply, but that do not depend upon the interpretation of
EU Law, such as, for instance, matters that the Directive clearly leaves in
the hands of Member States. Singling out certain scenarios exemplifies
some of these issues.

The first of these scenarios is if the ECB must apply (and the CJEU
must review) National Law transposing a Directive, when the two perfectly
align. In this situation, the application of either National or European law
produces the same result, and therefore the ECB, in applying National
Law, ensures the application, and respect, of EU Law. If there was space
developed to challenge the ECB’s interpretation and/or application of
domestic law, the CJEU would resolve these questions in accordance with
European law. Because, according to the principle of consistent interpretation,
National and European law would not conflict, there would be no room
for further discussion.

However, there might be potential flaws. Even when National and EU
Law are aligned the ECB may nonetheless misapply National Law. The
defect would not lie in National Law, but in ECB’s application of it. In
this event, the ECB’s measure should be regarded as vitiated: the affected
persons should be positioned to request to the CJEU the annulment of the
decision of the ECB, as being contrary (inter alia) to Article 4(3) of the

\textsuperscript{169} The point may be controversial as it might be questioned whether, under Article 4(3)
of the ECB, and the CJEU in case of judicial review, are effectively applying National law, or
EU Law, or treating National law simply as an element of fact, or whether a combination
of the above is actually taking place.

\textsuperscript{170} See Antonios Tzanakopoulos, \textit{Judicial Dialogue as a Means of Interpretation, in
The Interpretation of International Law By Domestic Courts: Uniformity, Diversity, Convergence} 72–95 (Helmut Philip Aust & Georg Nolte eds., 2016), for a
summary of a process in which a similar, but not identical phenomena of contamination
between different layers happen in international law. However, in the context of Article
4(3) of the SSMR, the peculiarity of the EU legal system together with the principle of
supremacy of EU Law produces a unique blend of issues.
SSMR. In its attempt to understand how National Law should effectively be applied and interpreted, the CJEU might activate different levels of dialogue with National Courts. For example, the Court might look for and consider precedents in similar cases decided by National Courts and cite them explicitly or implicitly or develop other more informal dialogues.

A second scenario might occur if the ECB is confronted with the application of a rule of domestic law that conflicts with EU Law; for example, a provision of National Law resulting from the incorrect transposition of a Directive. The peculiar structure of Article 4(3) of the SSMR raises complex issues. There is uncertainty regarding which criteria the ECB should follow, as well as the position of the CJEU in the event of judicial review of the decision adopted by the ECB. One might think the ECB has limited mobility as Article 4(3) SSMR seems to dictate that the ECB applies National Law anyway, even if it is in contrast with EU Law.

However, this conclusion is unsatisfactory. The ECB, as an EU institution, has the duty to apply and comply with EU Law; while the suggested solution appears to be formally in line with the provision of Article 4(3) of the SSMR, it is incompatible with the general principles of EU Law.

It cannot be denied that the ECB itself is subject to the principle of supremacy of European law, as clearly specified by Recital 34 of the SSMR which should be taken into account and states:

For the carrying out of its tasks and the exercise of its supervisory powers, the ECB should apply the material rules relating to the prudential supervision of credit institutions. Those rules are composed of the relevant Union law, in particular directly applicable Regulations or Directives, such as those on capital requirements for credit institutions and on financial conglomerates. Where the material rules relating to the prudential supervision of credit institutions are laid down in Directives, the ECB should apply the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and in areas where, on the date of entry into force of these Regulations, those Regulations explicitly grant options for Member States, the ECB should also apply the national legislation exercising such options. Such options should be construed as excluding options available only to competent or designated authorities. This is without prejudice to the principle of the primacy of Union law. It follows that the ECB should, when

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171. See 2012 O.J. (C 326) 162.
172. MARTINICO & POLLICINO, supra note 1 at 9; No 0 1/05, Judgment, ¶ 2 (Trybunal konstytucyjny Apr. 27, 2005).
173. See 2013 O.J. (L 287) 74.
174. See id.
To solve this puzzle, different options should be considered. A first route could be the one that leads the ECB not to apply anything, to suspend its decision, and eventually take action at an institutional and political level, including trying to trigger an infringement procedure against the Member State. Provided that this solution can be accepted, its complexity would inevitably risk compromising the effectiveness and timeliness of the ECB’s intervention and the efficiency of the SSM’s overall system. Supervisory measures, in most cases are time sensitive; the protection of the stability of the system must be assured in a timely and effective manner.

A second option might be to provide the ECB with the power to disapply domestic law to ensure compliance with the principle of primacy of Union law. Essentially, in doing so, the ECB would not apply Article 4(3) or, better yet, it would apply it in a context where primacy of European law is ensured. This second alternative would, according to most scholars, clash with the literal formulation of Article 4(3) and presents the issue of its compatibility with the well-known principles concerning the relationship between domestic law and Union law: a relationship that, insofar, should exclude any direct vertical effects to EU Directives.

Notwithstanding the above, it is even unclear how, and to what extent, the CJEU can effectively carry out a full, comprehensive review of National Law in the context of Article 4(3) of the SSMR. This is because Article 4(3) has not been properly coordinated with the procedural rules governing the CJEU. In fact, on the basis of the current provisions, the CJEU can rule on the interpretation of EU Law in the context of a dispute that touches upon National legislation only in the course of a preliminary ruling under Article 267 of the TFEU. Preliminary ruling is limited to cases of disputes before a National Court; in the context of the SSM, this would typically be a dispute over a decision taken by a NCA against a

175.  Id. at 66.
176.  See Amtenbrink & Repasi, supra note 112, at 158.
177.  At the current state, there are doubts as to the extension of the review that the CJEU might carry out when considering the application of national law by the ECB. Amtenbrink & Repasi, supra note 112, at 162. Another situation involves the contestation of ECB’s decisions that entail the application of national legislation transposing directives or exercising member states’ options allegedly in breach of relevant EU Law. A decision of such a type may be considered a breach of the ECB’s duty under Article 4(3) of the SSM Regulation to act in compliance with relevant EU Law, and thus can be challenged before the General Court. In practice, this would involve the review of the compliance of national legislation with EU Law in the context of a direct action before the General Court.
credit institution. Similarly, the plea of illegality under Article 277 of the TFEU, which allows incidental review of acts of general application adopted by EU institutions, bodies, offices, or agencies, does not apply to the review of acts of general application adopted by Member States.\footnote{180}{Id. at 149.}

Considering the above, some have questioned whether the CJEU can effectively carry out a full legal review of the ECB’s decision taken in application of National Law.\footnote{181}{See id. at 167.} The conclusion that it can, however, produces unsatisfactory and discriminatory results. In fact, a less significant institution, supervised by NCAs, can instead challenge an act of the competent authority before a competent national Court and avail itself of the preliminary ruling procedure.\footnote{182}{Dominique Ritleng, The ECB’s Power Over Non-Euro Countries in the Banking Union, SWED. INST. FOR EUR. POL’y STUD. 12 (Feb. 2020).} There are therefore clear and serious issues of compliance with the overriding principles of effective judicial review, as stated by the CJEU and recognized by Article 47 of the CFR. Therefore, solely for the purpose of judicial review, relevant national legislation applied by a contested ECB decision should indeed be considered an integral part of the legal framework that must be considered to assess the legality of the national legislation; some ground for this interpretation might be found in a combined reading of Articles 263 and 277 of the TFEU.\footnote{183}{See 2016 O.J. (202) 149, 157.}

In opposition to this solution, some have argued that a clear division of tasks between EU and National Courts should be maintained and that the CJEU should refrain from authoritatively interpreting National Law.\footnote{184}{Bundesverfassungsgericht, [BVerfGE] [Federal Constitutional Court], Sept. 12, 2012, 2 BvR 1390/12 [BvR] (Ger.).} They argue the CJEU should instead, “liaise closely with the National Courts with a view to establishing the correct meaning of the national rules relevant for assessing the legality of the ECB’s decision.”\footnote{185}{Id.} Only future case law might provide further clarification on this crucial point. However, it is evident that, in either case, dialogue with National Courts would be essential and of paramount importance to the CJEU.

A third and more radical scenario in which a Member State has not transposed a Directive within the prescribed deadlines might also be envisaged. This situation is far from being merely theoretical. For example, this is precisely what concerned, at least until December 2020, the Italian

\begin{footnotesize}
\footnote{180}{Id. at 149.}
\footnote{181}{See id. at 167.}
\footnote{182}{Dominique Ritleng, The ECB’s Power Over Non-Euro Countries in the Banking Union, SWED. INST. FOR EUR. POL’y STUD. 12 (Feb. 2020).}
\footnote{183}{See 2016 O.J. (202) 149, 157.}
\footnote{184}{Bundesverfassungsgericht, [BVerfGE] [Federal Constitutional Court], Sept. 12, 2012, 2 BvR 1390/12 [BvR] (Ger.).}
\footnote{185}{Id.}
\end{footnotesize}
legal system as to the provisions laid down by CRD IV regarding the “fit
and proper test” of the management body and of qualifying shareholders
of credit institutions. Similar situations have occurred and might occur
again in the future again in Italy or in another Member State. In this
situation, which is characterized by the absence of domestic law that
implements the provisions of a certain Directive, there might be pre-
existing national rules relating to the same subject; if this is the case, it
might therefore be acceptable for the ECB to apply whatever National
Law it finds on the basis of prevailing Union Law (i.e., by interpreting it
in context of EU Law). However, in an even more extreme case, National
Law on a certain topic covered by a Directive might not even
exist and therefore Article 4(3) of the SSMR would not be applicable.
Because domestic law on a given matter would simply not be there, the
ECB would have nothing to apply considering National legislation.
Notwithstanding the fact that the ECB may use its powers of persuasion
and/or that of stimulating the intervention of the Commission against the
alleged default of the Member State, the question remains whether, absent
National Legislation, the ECB may adopt a decision simply based on a
provision of a non-transposed Directive according to the interpretation
that it would itself give. This is also taking into account positions expressed
by other authorities, specifically the EBA which may provide a particularly
authoritative interpretation, but in any event, is still a “mere” interpretation.

The current prevailing opinion is that this course of action would not be
permissible, as it would be contrary to the jurisprudence of the CJEU by
admitting the direct application of a Directive which has not been transposed,
though sufficiently detailed, only to entrench rights to be invoked by
individuals and not to be exercised by a public authority. The decision
made by the ECB would therefore be illegal; it would have no legal basis
according to EU Law and it would stand in contrast with the limitations
as to the possible vertical effects of EU Directives. It would also be in
contrast with National Legislation, and with Article 4(3) of the SSMR.
No dialogue between Courts could solve the issue.

186. Is the Current “Fit and Proper” Regime Appropriate for the Banking Union?,
187. Id. at 18.
188. Id. at 19–20.
Tasks on the European Central Bank Concerning Policies Relating to the Prudential
Supervision of Credit Institutions, ch. 1, art. 4, ¶ 3, Oct. 15, 2013, 2016 O.J. (L 287/63),
190. Id.
191. Id.
If the above situations clearly show how problematic Article 4(3) SSMR may be, the apex of the problems is reached when the relevant National Law that the ECB applied in its decision is challenged as being unconstitutional. Because this issue would be raised in the context of the judicial review of the ECB’s decision in front of the CJEU, there seems to be no way out of the maze. On one hand, the CJEU is not competent to review the constitutionality of National Law; on the other hand, at least at the current stage of the debate, no provision allows the CJEU to raise a question of unconstitutionality in front of the National competent bodies. The puzzle cannot be solved by shifting the question at the National level for the simple reason that the forum for discussion is the CJEU, not a National Court or body. The CJEU might even consider itself incompetent and decide not to take up the case at all. The complexities of the situation would indeed suggest opening informal channels of dialogue with NCCs: this might help the CJEU to understand whether the issue of unconstitutionality is well-founded or not, and eventually how it might be solved. However, the procedural issues in this situation seem to be overwhelming; the question is not about interpreting or applying National Law, but rather about deciding whether the CJEU is competent to resolve issues of National Law or not.

This brief excursus on some of the most important issues raised by Article 4(3) of the SSMR might provide useful hints that show how varied and complex judicial dialogue may develop in the area of EU Banking legislation. The first precedents indeed show how innovative and interesting this judicial dialogue might be. In Crédit Agricole, a first case where the General Court was confronted with Article 4(3) of the SSMR, the Court was in some way lucky as the case had already been decided upon at National level, ending with a decision by the French Conseil d’Etat. The General Court based its conclusion on the precedent of the National Court, however, this was done not by way of a particular interpretation of French law or the Conseil d’Etat’s decision, but by directly citing and incorporating the latter into its own decision; a true “cut-and-paste”

192. See id. at ch. 3, § 1, art. 13, ¶ 2.
195. What can be gathered from Crédit Agricole reinforces the doubts as to whether National Law, in the context of the review by the CJEU of a decision by the ECB pursuant
exercise, that goes well beyond traditional forms of judicial borrowing, and even of a mere “deferential” approach towards national law. In Crédit Agricole, the scrutiny of the CJEU also resulted de facto in an indirect, but formal confirmation of the decision of the Conseil d’État by the General Court, although in a context that had nothing to do with a proper appeal decision or preliminary reference judgement.\footnote{See id. at ¶¶ 92–93.}

Crédit Agricole is quite unique because the case had previously been deferred to National Courts. When the CJEU does not find a precedent on the same case already decided by a National Court, it would be in a position to consider similar cases decided by other Courts, and, as it enjoys full jurisdiction, might use those cases as precedents for the correct interpretation and application of National Law. The dialogue between the CJEU and National Courts would then become more dynamic and be part of the interpretive exercise that judges typically are required to carry out such as silent dialogue or judicial borrowing. This would, however, occur with the peculiarity that, in these circumstances, the CJEU would be interpreting judicial precedents of National Courts, in order to apply not EU Law, but National Law.

Without casting shadows on the alleged infallibility of the CJEU, getting to know and understand a foreign legal system is always a complex exercise. Due to the extremely high level of knowledge of the judges sitting in Luxembourg, one may imagine that, most of the time, the exercise carried forward by the Court will produce results perfectly in line with the position that National Courts would have reached. However, at least theoretically, one cannot exclude that the CJEU might get it wrong and end up with a decision that National Courts would not have followed. It should be pointed out that, in resorting to Article 4(3), the CJEU is applying National legislation, which results as implementation of EU Directives, but does not apply EU Legislation itself.\footnote{The Court of Justice of the European Union, https://curia.europa.eu/jcms/jcms/j_6/en/ (last visited Sept. 2, 2021) [https://perma.cc/EXW9-MR7W].} There are therefore margins of interpretation that simply depend upon National Law and require a proper understanding of the National Law.\footnote{Id.} Those margins naturally become wider when Directives leave significant autonomy to Member States and may also vary depending on the solution that one reaches in terms of how the CJEU should effectively consider National Law, as explained, but nonetheless the margins cannot be eliminated. The

to Article 4(3), should be considered as a mere factual element. The answer to this question should be negative, as the CJEU enjoys full and complete jurisdiction in applying National Law that cannot be reduced to a mere factual element. See id. at ¶ 88.

\footnote{See id. at ¶ 92–93.}

\footnote{Id.}
decision of the CJEU might, therefore, be questionable because of the difficulties in solving these issues. However, no redress might be available in front of National Courts with the CJEU being the exclusive judge of the matter, and because the decision of the Court of Luxembourg would be definite and ultimate. Constructive dialogue, therefore, becomes essential in the context of Article 4(3) to avoid ultimate fractures between EU and National levels that might prove difficult, if not impossible, to compose.

In the context of the application of Article 4(3) of the SSMR, dialogue between Courts does not necessarily stop when the CJEU adopts its own decision. Should a similar case arise in front of National Courts after the decision of the CJEU Court, the complexities embedded in Article 4(3) of the SSMR raise unprecedented issues. On one hand, there would be a precedent of the CJEU applying and interpreting a certain provision of National Law under Article 4(3); on the other hand, National Courts might need to apply that same provision in a similar case. For example, this peculiar situation might occur if a less-significant credit institution challenges, in front of domestic Courts, a decision made by its own NCA on the basis of a provision of National Law that, if applied to a significant institution, would instead be applied by the ECB and consequently reviewed by the CJEU. Divergences should, most of the time, narrow down because the National Law relevant for the purpose of Article 4(3) is that which results from the implementation of EU Directives; this should prevent some, if not most, risk of misalignment. There may, however, be situation when the divergence between the CJEU and the National Court does not depend upon a different interpretation or application of the corresponding EU Directive, but upon matters left to National Legislation which are

199. A simple example might clarify this statement. Reference can be made to the fit and proper requirements for the management of credit institutions. For significant credit institutions, this is an exclusive competence of the ECB; it would therefore be the latter that applies National Legislation implementing EU Directives (CRD IV). For less significant credit institutions, NCAs would instead be competent, and National Courts would be competent in reviewing their decisions. Due to the complexities associated with the interpretation and application of those requirements, there might well be divergences between the approach taken, in a similar case, by the CJEU (in relation to a case raised by a significant credit institution in front of the Court), or by National Courts is a case raised by a less-significant institution. Naturally, these differences and risks of divergences disappear when the ECB has exclusive competence in a certain matter regardless of the relevance of the credit institution. For example, in assessing the requirements for qualified shareholders, as extensively discussed in the Berlusconi case.
relevant for the solution of a certain controversy. If the divergence between the CJEU and National Courts only concerns National Law, and does not imply any contrast as to the interpretation of EU Law, National Courts should be free to apply and interpret National Law in their own way, thus disregarding the decision of the CJEU. In these circumstances, if a similar case later arises in another Member State, the Courts of the Member States may even try to reject the CJEU’s interpretation by arguing that the interpretation given must be distinguished, as driven by merely domestic law considerations. Notwithstanding the above, it might be difficult to ascertain whether what is being effectively applied and interpreted is merely National Law, or EU Law, or a combination of the two. In most of these scenarios, multiple types of exchanges and discourses among courts might indeed develop (not necessarily involving Constitutional or High-Level Courts), including those between National Courts of different Member States.

IV. SOME PROVISIONAL CONCLUSIONS. FROM PRELIMINARY REFERENCE TO OTHER FORMS OF DIALOGUE: A FIRST BALANCE

Preliminary reference has gradually become an important way to develop formal dialogue among Constitutional Courts and the CJEU. EU Banking

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200. Once again, a good example of this might be the maze of the fit-and-proper requirements for members of the managing body of credit institutions. Since CRD IV leaves a lot of discretion to Member States in implementing its provisions, National legislations implementing the Directive might diverge significantly. The ECB might therefore need to apply a certain provision of National Law that is perfectly aligned with the Directive, but that the ECB wrongly interprets based on National Law. If the decision of the ECB is challenged in front of the CJEU, the CJEU should apply National Law. However, there might be divergences with National Courts insofar as its interpretation according to National Rules or criteria. These divergences would not affect the interpretation or application of EU Law.

201. On this point, the similar issues arising in the context of international law when domestic courts try to refer to the interpretation of international law by courts of other States. Cf. Tzanakopoulos, supra note 170, at 43.

202. VAN GESTEL & DE POORTER, COOPERATION, COORDINATION AND COLLABORATION BETWEEN THE ECJ AND SUPREME ADMINISTRATIVE COURTS (2019). The Authors conclude, at the end of their extensive research, that preliminary reference is far from being a true dialogue because the CJEU is not prepared: (a) to share power and responsibility with supreme administrative courts with regard to decisions concerning the validity and correct interpretation of EU Law; (b) to enable National Courts to talk back at the Court to inform it about the consequences of possible preliminary rulings for the national legal order; (c) to show accountability towards National Courts regarding the way in which it has taken into account their views of how EU Law should be interpreted, applied and enforced. The Authors, however, acknowledge that the Court devotes extensive efforts in other forms of informal dialogue outside the preliminary reference procedure.
legislation has become a fertile ground for these developments, providing new insights as to the outcome of the procedure its impact on judicial dialogue. As Gauweiler and Weiss clearly show, preliminary reference is not the cure for all diseases; it has advantages and disadvantages. Certain shortfalls of the procedure, and possible areas of improvement, had been repeatedly singled out before Gauweiler and Weiss in other areas of EU Law; some of these elements have been previously sketched out. To further understand the preliminary reference in a new context, it is beneficial to draw some general remarks regarding the recent developments in the context of EU Banking Legislation.

There are several advantages of trying to develop judicial dialogue by way of preliminary reference including its simplicity and directness. For example, National Courts define the perimeter and scope of the question for the CJEU and procedural prerequisites are fairly easy to satisfy: there are no particular procedural conditions that must be complied to and the referring body must be classified as a Court or Tribunal. Substantial requisites are also quite easy to comply with: the question raised before the Court must be related to the facts pending before the national court, it should not be merely hypothetical, and the CJEU should be provided with sufficient material to be able to provide a “useful answer.” At a broader level, beyond Constitutional Courts, access to preliminary reference is also open to lower Courts with no limitation as to the scope of the question; lower Courts may also refer to the CJEU questions that have an impact on, or are related to, internal Constitutional Law. This is a positive

205. On the basis of the long-standing case law of the CJEU from Simmenthal (Case C-106/77, Amm. delle finanze dello Stato v. Simmenthal, 1978 E.C.R 106/77); later confirmed in Mecanarte (Case C-348/89, Mecanarte - Metalúrgica da Lagoa Ldª v. Chefe do Serviço da Conferência Final da Alfândega do Porto, 1991 E.C.R I-03277), and restated in Melki and Abdeli (Joined cases C-188/10 and C-189/10, Aziz Melki and Sélim Abdeli, 2010 E.C.R 363). Domestic courts may refer preliminary references to the CJEU at any step throughout the proceedings.
feature of preliminary reference, but it also has some drawbacks if one considers that NCCs cannot intervene in the relative judgment in front of the CJEU, nor can they play the role of amicus curiae.207 The result is that important constitutional issues may be discussed by the CJEU without NCCs playing any role or having their say in the matter. Notwithstanding the fact that the CJEU is usually well informed on the position of NCCs, informal dialogue might ultimately need to develop.

One of the most evident limits of preliminary reference is that it gives way to a somehow limited form of dialogue which is not a true “dialogue,” a concept that would require at least some on-going form of interlocution.208 After NCCs raise their question(s) to the CJEU, they cannot intervene before the CJEU, suggest possible answers, and cannot formally intervene, even when Constitutional issues are at stake.209 At this stage, there is only space for informal dialogues; that National governments may intervene in front of the CJEU is not a sufficient surrogate. The effects of these limits may become more evident after the decision; the judgment of the CJEU should be implemented in the National system in compliance with the principle of sincere cooperation. Weiss II clearly shows how hazardous this “black or white” situation can become; this is precisely why Weiss II is so instructive.210 The issue in Weiss II was linked to lack of sufficient evidence and statement of reason; one might therefore wonder whether the outcome of the case would have been the same if there had been the chance for the BVerfG to develop and discuss its arguments in front of the Court through a truly dialogical confrontation. Some proposals for a possible reform of the preliminary judgement procedure indeed point in this direction.211 Despite its flaws, Weiss II is significant because the judgment of the BVerfG tried to repair, albeit a bit too roughly, what it thought had been broken. This might explain why the court ultimately “orders” the ECB to provide additional clarification on its internal assessment.212 While the atypical contents of this order may not be seriously questioned, it clearly reflects a lack of sufficient dialogue. Interaction did not sufficiently develop among the

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207. No 0 1/05, Judgment, ¶ 2 (Trybunal konstytucyjny Apr. 27, 2005).
209. EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS (Emmanuel Ughirasebuja et al. eds., 2017).
211. VAN GESTEL & DE POORTOER, supra note 202.
courts, and a dangerous escalation took place. Insufficient dialogue turned into a row, and the issue in Weiss became violation of ultra vires, conferral, proportionality, and counter-limits.\textsuperscript{213} As in a family row, old tensions came back to the surface, and the storm in a teacup turned into a tsunami.

Another limitation of preliminary references is that they may be a double-edged sword, especially when used by a NCC. When reverting to it, the National Court must, at least in principle, fully recognize and accept its mechanism and thereby be ready to abide by the principle of the superior value of the CJEU’s judgment.\textsuperscript{214} If it does not do so, as the BVerfG did in Weiss II, the referring Court would breach the rules of the games that it is playing and thus place itself outside the game itself.\textsuperscript{215} A further weak spot of the procedure is that National Courts are not obliged to, nor do they always willingly, notify the CJEU about the decision made internally after the preliminary judgement. While this may be considered simply laziness, it might also hide the fact that National Courts are not always willing to openly show that they do not fully align their position to that of the CJEU, or rather disregard them. This is also a weak point embedded in Article 4(3) of the SSMR, as application of National Law by the CJEU on one side and by National Courts on the other may give rise to a divergent and uncoordinated body of jurisprudence.\textsuperscript{216}

However, there are margins of flexibility in the preliminary reference procedure that could be used more extensively. For example, considering the case of preliminary references by lower Courts, if the CJEU reaches a

\textsuperscript{213} Weiss II does not automatically imply a conflict between the German and the EU Legal orders, which include many other institutions besides their Superior Courts. This profile was already caught by two authors who acknowledged that the interactions among law-applying legal institutions in the European Union involve “dialogue” and “compromise” between similarly situated, potentially conflicting legal institutions, not reference to a chain of authority to determine which legal institution holds greater authority. See Keith Culver & Michael Giudice, Legality’s Borders: An Essay in General Jurisprudence 161 (2010).

\textsuperscript{214} See Franz C. Mayer, To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court’s ultra vires d’Decision of May 5, 2020, 21 GER. L.J. 1116, 1125 (2020), [https://perma.cc/K89N-LDKX] (rightly observing that in the decision it was the BVerfG itself that ultimately proved to be ultra vires, by violating Articles 267(3) and 19 of the TEU).

conclusion that is at odds with National Constitutional principles. Article 267 of the TFEU does not exclude for further references, as seen in Taricco II where a NCC raised a new preliminary question after the one raised by another National Court.217 Considering the Weiss saga, some argue that the BVerfG might have raised a second preliminary ruling on the judgment of the CJEU before declaring it inapplicable.218 It however shows that, even within the same case, dialogue may be an on-going feature and not a “one-off” tool; preliminary judgement might in fact turn out to be less static than what might appear at first glance.219

What the Weiss case shows, however, is that the shortcomings of the preliminary ruling procedure cannot be entirely solved solely by stressing the authority of the CJEU’s judgments and by reaffirming the principle of supremacy sculpted in cases such as Costa v/Enel220 and Simmenthal,221 but rather by improving dialogue and discourse.222 In this respect, EU Banking Law may indeed become one of the many faces of what some have called the “polemical” spirit of European Constitutional Law.223

A. Dialogue, Constitutional Pluralism, and the Future

Due to its degree of innovation and already high engagement with judicial review and litigation, EU Banking Legislation is providing interesting new developments that touch upon many aspects of European Law. It is also offers food for thought at a broader, political level; it shows that judicial discourse can effectively stimulate wider forms of dialogue. The decision of the BVerfG in the Weiss case, while being fiercely criticized

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218. Sven & Rathke, supra note 126, at 955.
219. Sven & Rathke, supra note 126, at 955.
by many,224 has been hailed by others, especially from those countries of the eastern bloc that are currently looked upon as champions of authoritarianism.225 For the critics, the case might also show that Constitutional pluralism,226 a value that has long been singled out as a salient feature of the EU legal order fostering democracy and pluralism, might slip out of its own hands leaving space for reaffirming National primacy over EU Law. This danger becomes concrete if one reasons in terms of the juxtaposition between the EU and the National legal orders. However, Constitutional pluralism should continue to be one of the core values of the Union and should serve as a common basis for the development and re-affirmation of fundamental, common values between the Member States.227 Constitutional pluralism should therefore be understood as an open area for dialogue and confrontation between the multiple and different legal traditions that contribute to the backbone of the Union which represents its uniqueness in its diversity.228

The decision of the BVerfG in Weiss II may become an opportunity for further developments. For example, it might serve to stimulate the CJEU to conduct a more in-depth review of the decisions of the ECB229 without

224. The decision also sparked some collective commentaries, where multiple jurists joined forces in their disappointments. See, e.g., R. Daniel Kelemen et al., National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order, VERFASSUNGSBLOG (May 26, 2020), https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/ (The decision also sparked some collective commentaries, where multiple jurists joined forces in their disappointments).


229. According to some, the CJEU might learn a lesson from Weiss. Some authors note that the case-law of the Court of Justice only sets a straightforward rule: in case of doubt, the competence is of the EU to ensure the effet utile of EU Law, and the dialogue stops there. This might be an approach that raises the concern of National Courts, especially those that have a more “acute sense of federalism.” See Vlad Perju, Against Bidimensional Supremacy in EU Constitutionalism, 21 GER. L.J. 1006 (2020).
necessarily compromising its independence. It might serve as a stimulus for improving certain rules of procedure, for imagining new institutional arenas for judicial dialogue, or for wider reforms on substantive aspects of EU Legislation. Going beyond technicalities of EU Banking Law, the precedents that have been discussed may provide stimulus for broader evolutions, initiating circuits for dialogue between the judiciary, the executive, and the legislative.

Other case law similarly points in this direction. When the BVerfG questioned the primacy of EU Law in the Solange saga, the “dialogue” ultimately led to the improvement of the protection of human rights in the EU. The criticism that the BVerfG moved to the Treaties of Maastricht and Lisbon in terms of deficiency in democracy ultimately led to the improvement of the democratic potential of the EU by building on the potentials of EU citizenship, increased competences of the European Parliament, and clearer prescriptions as to the exercise of the powers of EU Institutions. Even the Danish Court, in its resistance against the CJEU in the Ajos case, is pushing EU institutions to achieve a statutory legal basis for the prohibition against discrimination on the ground of age.

Another stimulus may come from the necessity to reconsider the structure of the CJEU’s judgement. Well before Weiss, it was suggested that the quality of the CJEU’s judgments, and the dialogue with National Courts, might improve if dissenting opinions were permitted. In theory, this would reduce the pressure on the CJEU to accommodate points of view which are essentially irreconcilable within its judgments. However, the prevailing opinion is that dissenting opinions would severely compromise

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230. See Martinico, supra note 6.
231. Cf. Kent Roach, Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures, 80 CAN. B. REV. 481, 485 (2001). Roach identified three types of what he calls “dialogic judicial review.” Under the first type, courts and legislatures have an equal right to interpret rules of the constitution. The second type emphasizes the ultimate accountability of the courts to legislatures and society. The third type sees the courts and legislatures “playing distinctive yet complementary roles in resolving questions that involve rights and freedoms.” Roach makes it clear that his preference is for the third type. His rationale is based on the advantages claimed for a dialogic model of judicial review. According to Roach, the third type of such review is preferable because it can produce the most constructive partnership between courts and legislatures. See also Jeremy Waldron, Some Models of Dialogue Between Judges and Legislators, 23 SUP. CT. L. REV. (2d) 7 (2004).
233. The Czech Landtova decision seems instead to be, at the moment, immune from this capacity to support positive development, likely due to its national particularity. See Avbelj, supra note 228, at 102; see also Tridimas, supra note 5, at 418.
234. See Arnell, supra note 7, at 132–33 (provides examples of suggestions, re-interpreted in the light of Weiss II).
the secrecy of the CJEU’s deliberations and might encourage judges to dissent for political reasons. In references for preliminary rulings, dissenting opinions might also compromise the clarity of the CJEU’s answers to the questions referred to it. Other suggestions point instead at the style in which judgments of the CJEU are written, as they were originally modelled on those of the French Conseil d’Etat and Cour de Cassation, leaving virtually no space for extensive interpretive or policy analysis. The Court’s judgments may also be difficult to understand by non-specialists and may look self-referential.

Furthermore, the Landeskreditbank and the Banking Union cases may provide useful contributions in this direction by indicating new forms of dialogue among Courts. These cases also provide useful contributions by setting out and clarifying the standards for the future development of legislation in that area (i.e., compliance with the principle of proportionality). The cases might even support the idea of considering, in the future, to upgrade the topic of Banking supervision and legislation among those that are in the exclusive competence of the Union, rather than leaving them simply within the scope of Article 114 of the TFUE. Those decisions also show how far the dialogue can stretch before turning into confrontation if the doors are kept, so-to-say, open. In the Banking Union decision, it was the BVerfG that prompted an alternative, corrective reading of the decision of the CJEU in a clear attempt to avoid open dissent. In other cases, such as Gauweiler, it might instead be the CJEU that disseminates, within its judgements, one or more “hooks” that the National Court may pick up and develop to keep the dialogue open and adjust its interpretation of National Constitutional Law.

Additionally, in relation to the developments in EU-Banking Law related jurisprudence, the importance of dialogue goes well beyond the relationship between Courts. If there is an objective limit in the Weiss case, then this is insufficient dialogue at all levels including that of, or with, the ECB.

235. See Arnull, supra note 7, at 132–33.
236. See Arnull, supra note 7, at 132–33.
237. See Arnull, supra note 7, at 132–33.
239. Id.
Because the core of the case was insufficient statement of reason and of its review by the CJEU, Weiss clearly provides a key to avoid similar incidents in the future. Ultimately, the solution to Weiss II cannot simply be reinstating the supremacy of the jurisprudence of the CJEU and the autonomy and discretion of the ECB’s action in the field of monetary policy. While supremacy is not questioned, it is becoming evident that dialogue is essential to prevent that principle from coming at odds with the Legal systems of core countries within the EU. As to the ECB, its independence in pursuing its mandate in the field of monetary policy is not being questioned, as it is directly enshrined in the Treaty. However, the unclear boundary between monetary and economic policy and the imperfect institutional foundation of the ECB’s powers in the field of Banking Supervision produced a potentially explosive mixture. This mixture would be better kept under control if adequate intelligibility, transparency, and accountability are constantly achieved and complied with. Notwithstanding that no reasonable party is willing to challenge the fundamental values and mission of the ECB, there remains the fact that the ECB’s determinations must be, at all times, sufficiently transparent and “readable” from outside. It is a delicate equilibrium to be achieved as it calls into question the issue of finding the appropriate level of external review and accountability acceptable in relation to the ECB. Ultimately, the role of the ECB might be reinforced by a more open discursive dialogue, as this would deprive its critics of their own arguments and would prevent the unbearable risk of rendering the ECB and, more generally, EU Institutions into giants with feet of clay (i.e., institutions whose decisions, in very sensitive areas, may be easily challenged). One of the few virtues of Weiss points in this direction.

V. CONCLUDING REMARKS

The high degree of innovation and experimentation of EU Banking Law is a fruitful laboratory for the development of forms of judicial dialogue that go well beyond preliminary reference. Different kinds of dialogue are concretely in place, some of which have already been applied in other areas of EU Legislation; other forms of dialogue are more innovative, and others are unprecedented. The evolution of the rapidly expanding body of case law in this field offers a privileged point of observation of the fascinating, controversial topic of judicial dialogue in the European Union.

Recent case law shows signs of formal, constructive, open dialogues, where courts struggle to cut edges and converge on common grounds, such as in Gauweiler. There are cases where the dialogue stops and misunderstandings escalate into issues larger than anyone can handle, as seen in Weiss. There are cases where informal, parallel dialogues are being conducted, leading to corrective re-readings of other Court’s decisions, such as in Landeskreditbank and Banking Union. There are cases where one is faced with the blunt, non-critical incorporation of another Court’s decision, that would otherwise not be formally binding, as seen in Crédit Agricole.

Future developments in areas such as Article 4(3) of the SSMR can only be envisioned today, but it is certain that reality will be able to transcend imagination. In regard to EU Banking Legislation, the preliminary reference procedure initiated by NCCs is far from ruling out other forms of judicial dialogue, including informal and hidden ones, some of which are unprecedented. After all, EU Law has always been a huge, immense laboratory for innovation, and, thanks to this, the EU edifice has survived immense difficulties to progress and evolve, against all odds.

244. The concerns set out in this respect by some Authors have therefore proven to be unfounded. See GIUSEPPE MARTINICO, L’ INTEGRAZIONE SILENTE: LA FUNZIONE INTERPRETATIVA DELLA CORTE DI GIUSTIZIA E IL DIRITTO COSTITUZIONALE EUROPEO 221 (2008).