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by

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Aspects of Constitutional Pluralism in Light of the *Gauweiler* Saga

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Administration of justice; Constitutional law; EU law; European Court of Justice; Germany; National courts; Supremacy of EU law

Abstract

Despite the increased interaction between the highest national courts of Member States and the European Court of Justice, and the sophisticated literature on constitutional pluralism which conceptualises it, the relationship between these courts remains difficult. The first-ever preliminary reference by the Federal Constitutional Court of Germany is a good example of this. The Gauweiler *saga offers an opportunity to address three constitutional issues underlying this difficult relationship. First,* Gauweiler *is yet another example of how the German court in particular is in a privileged position vis-à-vis other national courts when it comes to interacting with the Court of Justice but also affecting the European-level political process. Secondly, the conceptual distinction between primacy and supremacy of EU law is relevant and may further the protection of individual rights within the Union. Thirdly, "judicial dialogues" may be useful in furthering rights protection, but constitutional pluralists are wrong to assert that such dialogues can settle the inevitable competition between national courts and the Court of Justice.*

Introduction

In the wake of the financial and debt crisis, the EU and the Member States have adopted several crisis response mechanisms.[1] The mechanisms created a wealth of case law. These cases can be divided into three main categories: (1) cases before national courts that concerned the ratification of mechanisms based on international law and the amendment to art.136 TFEU[2]; (2) the impacts of these mechanisms at national level[3]; (3) cases where the Court of Justice (ECJ) has been called to address the constitutionality of these measures.[4]

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[1] See R. Smits, "The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments" (2015) 38 *Fordham International Law Journal* 1135.

[2] See J. Reestman, "Legitimacy through Adjudication: the ESM Treaty and the Fiscal Compact before the National Courts" in T. Beukers, B. de Witte and C. Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge: Cambridge University Press, 2017).

[3] See A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford: Oxford University Press, 2015), pp.131–136; N. Xanthoulis, "ESM, Union Institutions and EU Treaties: A Symbiotic Relation" (2017) *Revue internationale des services financiers* 21.

[4] See *Pringle v Ireland* (C-370/12) EU:C:2012:756; [2013] 2 C.M.L.R. 2; *Gauweiler v Deutscher Bundestag* (C-62/14) EU:C:2015:400; [2016] 1 C.M.L.R. 1.

This article concerns the *Gauweiler* saga,[5] which falls somewhere between the first and third categories. The crisis response mechanism at hand—the European Central Bank's (ECB) programme for Outright Monetary Actions (OMT)—is based on a press release.[6] Although it is an EU measure, the measure does not require ratification, implementation or even application at the national level. Nevertheless, the OMT programme came before the ECJ as a preliminary reference by the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG). The BVerfG has a broad jurisdiction and tends to review the constitutionality of EU law from the perspective of the German Basic Law (Grundgesetz, GG). The reference is of particular interest as it is the first of its kind from this German court.[7] The initial decision to send a referral, the reply by the ECJ, and the final decision in the national proceedings all received considerable attention[8] thanks to the German court's previous pronouncements on the relationship between the GG and EU law.[9]

The division of labour between the national courts and the ECJ as it is expressed in art.267 TFEU is clear. The Court of Justice interprets EU law. National courts are the guardians of national constitutions. They can reach different substantive outcomes based on different rules. Clashes between national courts and the ECJ or between national law and EU law can be divided into three categories.[10] The first category consists of cases that concern a difference in the level of fundamental rights protection accorded by the two systems.[11] A second category is comprised of ultra vires review cases. In these cases, national courts assess whether EU law or the actions of the ECJ are within the competences conferred onto them by the Member States.[12] The third category is composed of cases where national courts review EU law from the perspective of "national identity".[13] This categorisation is derived from the doctrine of the BVerfG. However, cases from other courts also seem to fit into this categorisation. These categories all share a common theme: they all concern the primacy and/or supremacy of EU law. More specifically, they concern the role of the ECJ as the guarantor of primacy and, conversely, the role of national courts in applying or contesting primacy.

[5] BVerfG 2 BvR 2728/13 of 14 January 2014 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)*; *Gauweiler* (C-62/14) EU:C:2015:400; BVerfG 2 BvR 2728/13 of 21 June 2016 DE:BVerfG:2016:rs20160621.2bvr272813 *(OMT judgment)*.

[6] See ECB, "Technical features of Outright Monetary Transactions", Press Release (6 September 2012), *http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html* [Accessed 17 February 2018].

[7] See I. Pernice, "A Difficult Partnership between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU" (2014) 21 *Maastricht Journal of European and Comparative Law* 3.

[8] See e.g. the special issues: "Special Issue—The OMT Decision of the German Federal Constitutional Court" (2015) 15 *German Law Journal*; "The European Court of Justice, the European Central Bank, and the Supremacy of European Law" (2016) 24 *Maastricht Journal of European and Comparative Law*.

[9] See P. Huber, "The Federal Constitutional Court and European Integration" (2015) 21 *European Public Law* 83.

[10] See M. Claes, "Negotiating Constitutional Identity or Whose Identity is it Anyway?" in M. Claes, M. de Visser, P. Popelier and C. van de Heyning (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Cambridge: Intersentia Publishing, 2012), pp.205–233 at pp.208–229.

[11] E.g. *Melloni v Ministerio Fiscal* (C-399/11) EU:C:2013:107; [2013] 2 C.M.L.R. 43, and the Spanish Constitutional Court's (*Tribunal Constitucional de España*) follow-up judgment from 13 February 2014 (No.26). See M. Rodríguez-Izquierdo Serrano, "The Spanish Constitutional Court and Fundamental Rights Adjudication after the First Preliminary Reference" (2016) 16 *German Law Journal* 1509.

[12] E.g. how the Constitutional Court of the Czech Republic (*Ústavni Soud*) declared the Court of Justice judgment in *Landtová v Česká správa socialního zabezpečení* (C-399/09) EU:C:2011:415 (22 June 2011) as ultra vires in its judgment of 31 January 2012, Pl. ÚS 5/12 (*Slovak Pensions*). See J. Komárek, "Playing With Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires" (2012) 8 *European Constitutional Law Review* 323.

[13] See e.g. *Criminal Proceedings against Taricco* (C-105/14) EU:C:2015:555 [2016] 1 C.M.L.R. 21, and the follow-up judgment by the Constitutional Court of the Italian Republic (*Corte costituzionale della Repubblica italiana*) from 26 January 2017 (No.24).

This article is not concerned with the substantive issues involved in OMT.[14] Instead, it discusses the constitutional debates in EU law that are brought into relief in the *Gauweiler saga*. Three issues related to the interaction between national courts and the ECJ are addressed following a brief summary of the proceedings. The first I shall refer to as the inequality thesis. Some national courts are in a better position to affect the European-level political process than others are.[15] The BVerfG is one example of an influential court. The inequality between the levels of influence of the courts of Member States calls into question the legitimacy of these national courts' actions.

Secondly, I revisit the primacy-supremacy debate in light of the saga. Some argue that primacy and supremacy have been wrongly conflated and that we should instead only refer to primacy, just as the ECJ has done throughout the years. They are in principle correct. However, I argue that in this specific case it is more appropriate to refer to "supremacy". The distinction between the two and the specific choice to frame the *Gauweiler* saga in terms of supremacy is justified by the facts of the case and what was truly at stake. The functioning of the EU legal order can only be secured by the unity and uniformity provided by an arbiter with a hermeneutic monopoly.

Thirdly, I assess the reference, the ECJ judgment, and its application by the national court as "judicial dialogue" between the two courts. As the first preliminary reference to come from the BVerfG—"one of the most powerful jurisdictions in Europe",[16] a central actor in such a play—the saga provides the perfect laboratory for examining the concept of dialogue and its potential for European constitutionalism. I argue that the constitutional pluralists' claim, that this dialogue is useful to European constitutionalism, is misplaced. In this specific case, European constitutional monism trumped nation-state constitutional monism and European constitutional pluralism.[17]

All of the three arguments pertain to constitutional pluralism. In the context of the EU, constitutional pluralism maintains three claims. First, the national and European sites are both legally relevant to the EU. Both have unique claims to constitutional authority. Secondly, there is no hierarchy according to which we could settle these claims. Each claim to authority is plausible in its own context and stands independently of the other claims. Thirdly, to sustain this complex each site must acknowledge and accommodate the claims of the other, and thus, the absence of a single dominant authoritative framework is ensured.[18]

The *Gauweiler* saga

The OMT came before the BVerfG for similar reasons as the other crisis response mechanisms.[19] The complainants asked why Germany should underwrite the profligate spending of other Member States.[20] That the BVerfG sent a request to Luxembourg raised much speculation. It was not compelled to do so,

[14] See V. Borger, "Outright Monetary Transactions and the stability mandate of the ECB: Gauweiler" (2016) 53 C.M.L. Rev. 139.

[15] This argument is further elaborated in T. Tuominen, *The European Constitution and the Eurozone Crisis: A Critique of European Constitutional Pluralism* (LL.D. dissertation defended at the University of Lapland in 2017).

[16] L. Garlick, "Constitutional Courts versus Supreme Courts" (2007) 5 *International Journal of Constitutional Law* 44, 53–54.

[17] On the distinction between these three terms, see K. Jaklic, *Constitutional Pluralism in the EU* (Oxford: Oxford University Press, 2014), pp.20–21.

[18] See N. Walker, "Constitutional Pluralism Revisited" (2016) 22 E.L.J. 333–334.

[19] See P. Huber, "The Rescue of the Euro and Its Constitutionality" in W.-G. Ringe and P. Huber (eds), *Legal Challenges in the Global Financial Crisis: Bail-outs, the Euro and Regulation* (Oxford: Hart Publishing, 2014), pp.9–26.

[20] S. Dahan, O. Fuchs and M.-L. Lays, "Whatever it Takes? Regarding the OMT Ruling of the German Federal Constitutional Court" (2015) 18 *Journal of International Economic Law* 137, 138.

as it had two other options. First, it could have found the case inadmissible.[21] Secondly, it could have decided the case purely on the basis of its own analysis. This would follow its established role as "the Dog that Barks but does not Bite".[22]

OMT purchases are not limited in quantity. The Member States are ultimately responsible for the liabilities of the ECB. Therefore, where the State receiving assistance defaults, Member States can be subjected to liabilities that are not determined in advance. This scenario was expressed in the German reference as questions concerning the right to vote and the constitutional requirement that state authority must derive from the people (art.20 GG). Where the recipient of aid defaulted,

> "the German *Bundestag* would not remain the 'master of its decisions' and could no longer exercise its budgetary autonomy under its own responsibility."[23]

The BVerfG considered that the OMT was contrary to both the ECB's strict monetary policy mandate (art.127 TFEU) and the prohibition on monetary financing (art.123 TFEU).[24] The BVerfG submitted a referral to the ECJ because it acknowledged the ECJ's role in interpreting EU law. Nevertheless, it thought that only its own interpretation of the OMT was valid.[25] Finally, the BVerfG reserved the right to declare the OMT ultra vires on the basis of the German constitution regardless of the outcome of the ECJ's decision.[26]

Gauweiler signals a change in the BVerfG's attitude towards EU law. It has historically always found that the EU act in question conforms to the German Basic Law "so long as…" certain requirements are met. In this instance, it reversed the presumption: the OMT was ultra vires unless shown otherwise by the ECJ.[27] This anti-*Solange* can be reformulated rather bluntly—the OMT is incompatible with EU law and the German constitution. However, it may be compatible "so long as" certain conditions are fulfilled. This formulation required the ECJ to examine two issues before considering the substantive question.

First, does the request for a preliminary reference conform to the requirements in art.267 TFEU and the established ECJ jurisprudence on preliminary rulings?[28] Is it a genuine request which the referring court will follow in its subsequent judgment? If not, then the request should be declared inadmissible. Following a restatement of its established doctrine on the nature of the preliminary reference procedure and on the obligation of national courts to follow its rulings, the ECJ saw no objections to admitting the reference.[29]

Secondly, are the main proceedings contrived and artificial because the applicants have no legal rights that have been violated, therefore rendering submitted questions abstract and hypothetical? According to the ECJ, the referring court decides based on its national law when and what types of requests they need to make in the cases pending before them. According to its own case law, the ECJ is in principle bound

[21] See Editorial, "Gauweiler: Some Institutional Aspects" (2015) 40 E.L. Rev. 133.

[22] J. Weiler, "The 'Lisbon Urteil' and the Fast Food Culture" (2009) 20 *European Journal of International Law* 505, 505.

[23] BVerfG 2 BvR 2728/13 of 14 January 2014 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)* at [102].

[24] See BVerfG 2 BvR 2728/13 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)* at [55].

[25] See BVerfG 2 BvR 2728/13 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)* at [100].

[26] See BVerfG 2 BvR 2728/13 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)* at [102]–[103].

[27] Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (2015), pp.149–150.

[28] See *Kleinwort Benson Ltd v City of Glasgow District Council* (C-346/93) EU:C:1995:85; [1996] Q.B. 57 at [23]-[24]; *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)* (C-364/92) EU:C:1994:7; [1994] 5 C.M.L.R. 208 at [9]; *Agricola Tabacchi Bonavicina Snc di Mercati Federica (ATB) v Ministero per le Politiche Agricole, Azienda di Stato per gli interventi nel mercato agricolo (AIMA) and Mario Pittaro* (C-402/98) EU:C:2000:366 at [29].

[29] *Gauweiler* (C-62/14) EU:C:2015:400 at [11]–[17].

to give a ruling on a preliminary reference that concerns the validity of EU law.[30] It is entirely up to the national court to decide, under the conditions set by national law, whether or not the case is admissible in the first place.[31] The ECJ should not intervene in this matter. When the ECJ states that "under German law preventive legal protection may be granted in such a situation if certain conditions are met",[32] the ECJ acknowledges how differences in national legal orders affect the interaction between courts. This statement from the ECJ recognises how such a case might not have been admissible in some other national court.

In its final ruling the BVerfG found the individual constitutional complaints (*Verfassungsbeschwerden*) under art.93(1)(4a) GG directly challenging the action of the ECB as inadmissible, but assessed the challenges brought against German state organs (*Organstreitverfahren festzustellen*) under art.93(I)(I) GG. The court deemed these complaints as unfounded.[33] The BVerfG considered, inter alia, that if interpreted in accordance with the ECJ's judgment, the OMT programme does not "manifestly" exceed the competences attributed to the ECB. Consequently, there is no breach of the BVerfG's *Honeywell* doctrine.[34] Thus, despite its original threat to deem the OMT programme as ultra vires, the BVerfG acknowledges the interpretive supremacy of the ECJ over EU law. In its application of the *Honeywell* doctrine, the German court implied that there had been a lesser overreaching of competence than the manifest standard. As this threshold was not met, the ultra vires doctrine could not apply.

The inequality thesis—peculiarities of the German system?

Interaction between the highest national courts and the ECJ has increased gradually over time. The extent to which national courts accept the primacy of EU law has also increased.[35] The main forum for this interaction has been the preliminary reference procedure.[36] Another context in which national courts engage with European integration involves the amendments to the EU Treaties. These amendments typically require national ratification. Courts have therefore been empowered to assess the constitutionality of national ratification.[37] Both contexts have created a wealth of case law during the Eurozone crisis.[38]

From an analysis of these cases I have deduced a descriptive argument which I call the inequality thesis. Certain national courts are in a privileged position vis-à-vis other national courts. Their potential to

[30] See *Melloni* (C-399/11) EU:C:2013:107 at [28] and the case law cited therein.

[31] See *Ministero dell'Industria del Commercio e dell'Artigianato v Lucchini SpA* (C-119/05) EU:C:2007:434; [2009] 1 C.M.L.R. 18 at [43].

[32] *Gauweiler* (C-62/14) EU:C:2015:400 at [27].

[33] BVerfG 2 BvR 2728/13 of 21 June 2016 DE:BVerfG:2016:rs20160621.2bvr272813 *(OMT judgment)*.

[34] BVerfG 2 BvR 2661/06 of 6 July 2010 DE:BVerfG:2010:rs20100706.2bvr266106 (*Honeywell*).

[35] See T. Tridimas, "The ECJ and the National Courts: Dialogue, Cooperation, and Instability" in A. Arnull and D. Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), pp.403–430; B. de Witte, "Direct Effect, Primacy, and the Nature of the Legal Order" in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), pp.323–362 at pp.346–357.

[36] The input of national courts through the preliminary reference procedure was central to the constitutionalisation of the EU. See K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001).

[37] See e.g. M. Wendel, "Lisbon before the Courts: Comparative Perspectives" (2011) 7 *European Constitutional Law Review* 96; P. Castillo Ortiz, "'Playing the Judicial Card': Litigation Strategies during the Process of Ratification of the Lisbon Treaty" (2014) 20 E.L.J. 630.

[38] These cases have been discussed in detail in e.g. F. Amtenbrink, "New Economic Governance in the European Union: Another Constitutional Battleground?" in K. Purnhagen and P. Rott (eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Cham: Springer, 2014), pp.207–234; F. Fabbrini, "The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective" (2014) 31 *Berkeley Journal of International Law* 64. See also the country reports for the Constitutional Change through Euro Crisis Law project, available at *http://eurocrisislaw.eui.eu/* [Accessed 17 February 2018].

participate and affect the European-level political process is greater than that of other national courts. This is a consequence of the national legal systems rather than those of the EU.

Inequality and the Eurozone crisis have also been assessed in other aspects. Fabbrini has pointed out that recourse to the intergovernmental method in crisis resolution has made it possible for larger Member States to dominate the smaller ones and that this development challenges the anti-hegemonic nature of the integration project.[39] Fabbrini has also argued that the solution sought by the BVerfG in the *Gauweiler* saga would have contravened the supremacy of EU law. This solution would have privileged that court in relation to other national courts vis-à-vis EU law and thus created inequality between them.[40] In a similar fashion, Wilkinson has maintained that the substantive principle of equality of Member States in art.4(2) TEU should mean that all States are equal vis-à-vis EU law, but that larger Member States are able to dominate regardless. The BVerfG holds a central position in the German political-constitutional system.[41] As Germany is the largest Member State of the Union, the BVerfG is also influential on the EU level. The domestic constitutional power used by the BVerfG tests the limits of Europe's constitutional architecture.

The inequality thesis presented here differs as it begins as a descriptive account. This thesis can be assessed through three factors. The first factor concerns the phase during which the national court is able to participate. A chronological reconstruction of the processes leading up to the enactment and national ratification of the crisis response mechanisms shows that some courts, or court-like institutions,[42] have been able to participate in the process at an earlier stage than others. Some have perhaps been able to take part even before the final decision on the content of the legal measure has been taken. Other courts have been able to participate only after the legal measures have already entered into force. The later the national court is able to participate, the more difficult its predicament. It can no longer influence the content of the measure but must only decide whether it is constitutional from the national perspective.[43] The earlier a court is able to participate, the more freely it can formulate its position and the more likely that its ruling can affect the European-level political process. Courts participating at the very late stages of such a process are not able to influence the form or content of the contested measure. They can, however, affect similar instruments in the future through a phenomenon called "autolimitation".[44]

The second factor concerns how these actors can participate. The jurisdiction and rules of procedure of a court dictate its possibilities for reviewing European-level measures. The BVerfG's broad ambit of review is a perfect example of this.[45] In the German system, individual complaints (*Verfassungsbeschwerde*) seem to result in "every anti-government paranoid fantasy that any citizen can dream up" being brought before the BVerfG. In the Kelsenian model of constitutional courts, individual complaints were supposed

[39] See F. Fabbrini, "States' Equality v States' Power: the Euro-crisis, Inter-state Relations and the Paradox of Domination" (2015) 17 *Cambridge Yearbook of European Legal Studies* 3.

[40] See F. Fabbrini, "After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States" (2015) 16 *German Law Journal* 1003.

[41] M. Wilkinson, "Economic Messianism and Constitutional Power in a 'German Europe': All Courts are Equal, but Some Courts are More Equal than Others", LSE Law, Society and Economy Working Papers 26/2014 (2014). Similarly, see J. Baquero Cruz, "Another Look at Constitutional Pluralism in the European Union" (2016) 22 E.L.J. 356, 368–373.

[42] Especially the Finnish Parliament's Constitutional Law Committee stands out. See K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2014).

[43] Here my argument is analogous to that presented against the Court of Justice ruling in *Pringle* (C-370/12) EU:C:2012:756. See V. Borger, "The ESM and the European Court's Predicament in Pringle" (2013) 14 *German Law Journal* 113. Reestman has made a similar observation regarding the national cases, although he does not take it into consideration in his argument. See Reestman, "Legitimacy Through Adjudication" in *Constitutional Change through Euro-Crisis Law* (2017).

[44] See A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), p.75. This idea is deduced from the *Solange* jurisprudence and its wider implications.

[45] For a comparison of the review powers of different European courts, see M. de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Oxford: Hart Publishing, 2014).

to be the last instance of redress in concrete cases, "but they were not meant to provide yet another means of attacking the constitutionality of statutes". Where abstract review and individual complaints coexist, "many of the most politically important complaints are, in fact if not in theory, completely abstract".[46]

In *Gauweiler*, the intervening Member States alluded to the abstract nature of the BVerfG's review. The ECJ responded by stating that national divergences in the way that judicial review is facilitated in the different Member States does not constitute an obstacle to the functioning of the preliminary reference procedure in art.267 TFEU, or to the admissibility of this specific case.[47] The ECJ was of course correct in its conclusion, but this is not the point that I wish to make here. Although the Court must treat all preliminary references alike despite the differences in the national systems from which they originate, this divergence between the different systems for judicial review—or the complete lack thereof—is the main factor contributing to the inequality thesis.

The third factor concerns national courts and their degree of activism, despite the differences or similarities in their jurisdiction and rules of procedure. By this I mean to say that even though the constitutional courts of two Member States might have similar jurisdictions and rules of procedure, differences in their national legal cultures may result in diverse levels of engagement with EU law and the ECJ. This third factor does not create inequality per se. It may instead explain why some courts seem to be more activist than others are.

The *Gauweiler* saga prompts the question: could it have originated from any other Member State? The three factors outlined above suggest it could not.[48] The first two factors work together. All of the five national applications to the BVerfG sought to challenge the press release regarding the OMT programme issued by the ECB on 6 September 2012.[49] Whether or not this was a "decision" at all, and whether or not it can be challenged before the ECJ,[50] or better yet, before the BVerfG, has been debated at length in the literature.[51] Although there are good arguments in favour of both answers, this debate in itself reveals that there is at least a small kernel of truth in the tendency, discussed above, to express every "anti-government paranoid fantasy" into a constitutional complaint before the BVerfG and the tendency to actually have the complaint heard. In relation to the first factor, the BVerfG's jurisdiction and rules of procedure enabled the lodging of the complaint before the OMT programme had ever been used and before the national central banks, which are members of the European System of Central Banks (ESCB), had taken any actual decisions on the operation of that programme. As it transpired, the programme was never used and has since then been replaced by other programmes.[52] The third factor is more difficult to assess. Owing to its

[46] See M. Shapiro and A. Stone Sweet (eds), *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), p.368.

[47] *Gauweiler* (C-62/14) EU:C:2015:400 at [27]–[29].

[48] However, see the Court of Justice's reference to its previous case law on the admissibility of requests for a preliminary ruling concerning the validity of secondary legislation which have been made in judicial review proceedings brought under UK law. The persons concerned were according to national law able to apply for judicial review of the legality of the intention or obligation of the UK Government to comply with EU legislation: *Gauweiler* (C-62/14) EU:C:2015:400 at [29].

[49] See BVerfG 2 BvR 2728/13 of 14 January 2014 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)*.

[50] The General Court had already previously found admissible an annulment procedure against the ECB's Eurosystem Oversight Policy Framework, on the basis of it being published on their website. See *United Kingdom v European Central Bank (ECB)* (T-496/11) EU:T:2015:133; [2015] 3 C.M.L.R. 8.

[51] On whether both courts could have, or should have dismissed the case as inadmissible, see Editorial, "*Gauweiler*: Some Institutional Aspects" (2015) 40 E.L. Rev.133; G. Anagnostaras, "In ECB we trust … the FCC we dare! The OMT preliminary ruling" (2015) 40 E.L. Rev.744, 759–761; D. Adamski, "Economic Constitution of the Euro Area after the Gauweiler Preliminary Ruling" (2015) 52 C.M.L. Rev.1451; Borger, "Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler*" (2016) 53 C.M.L. Rev. 139, 166–169.

[52] One of these being the Public Sector Purchase Programme (PSPP), which the ECB initiated on 4 March 2015. See Decision 2015/774 of the ECB of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) [2015] OJ L121/20. On the significance of the PSPP, see S. Grund, "The European Central Bank's

cultural-hermeneutical nature it falls beyond the scope of this article. Let me just state that all but one of the different crisis response mechanisms have been challenged before the BVerfG.[53] In the one case where the BVerfG decided to refer a question to the ECJ, it worded its request in a conflict-seeking manner.[54]

The inequality thesis has certain consequences. Judicial review is usually seen as a legitimising factor in the political process,[55] but can this claim also be made in the context of the EU's political process? Can we extrapolate this national constitutional institution and doctrine to the post-national constellation of the EU? If so, will it function in a similar manner in this new context?

First, as part of my descriptive argument, the unequal possibilities of national courts as such lead to a conclusion that participation by only a few select courts does not increase the legitimacy of the overall process in a similar manner as might be the case in purely national settings with just a single designated court which participates. We can arrive at this conclusion also by considering the clear delineation of competences established by the EU Treaties between the ECJ and national courts. According to art.263 TFEU, the ECJ has jurisdiction to review the legality of acts of the ECB, whereas national courts do not.

Secondly, a more substantive reading of the situation also speaks towards this conclusion. The activism of the BVerfG has long been criticised.[56] Its judgments on the Euro crisis also appear in a different light when contrasted with the political debates of the German Bundestag.[57] Furthermore, under the logic assumed by the BVerfG, the views of four counter-majoritarian institutions are pitted against each other: the ECJ, the ECB, the BVerfG and the German Bundesbank.[58] This is unlike a national setting where judicial review pits a counter-majoritarian institution against a democratically elected legislator. Thus, both structurally and in substance, it seems that the BVerfG's actions are not able to infuse more legitimacy into European-level political process. On the contrary, they usurp the European-level political process.

Furthermore, Germany has led the group of Member States that called for strict austerity measures in Greece. The BVerfG's own case law suggests that imposing similar measures on Germany would violate the German constitution.[59] In other words, the BVerfG is trying to impose on the crisis states measures

public sector purchase programme (PSPP), the prohibition of monetary financing and sovereign debt restructuring scenarios" (2016) 41 E.L. Rev. 781.

[53] See 2 BvR 987/10 of 7 September 2011 DE:BVerfG:2011:rs20110907.2bvr098710 (*Euro rescue package*); 2 BvE 8/11 of 28 February 2012 DE:BVerfG:2012:es20120228.2bve000811 (*Government guarantees*); 2 BvE 4/11 of 19 June 2012 DE:BVerfG:2012:es20120619.2bve000411 (*ESM and Euro Plus Pact*); 2 BvR 1390/12 of 12 September 2012 DE:BVerfG:2012:rs20120912.2bvr139012 (*ESM interim ruling*); 2 BvR 1390/12 of 18 March 2014 DE:BVerfG:2014:rs20140318.2bvr139012 (*ESM final judgment*).

[54] See BVerfG 2 BvR 2728/13 of 14 January 2014 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)* at [55]: "Subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision incompatible with art.119 and art. 127 sec. 1 and 2 TFEU and art.17 et seq. of the ESCB Statute because it exceeds the mandate of the European Central Bank that is regulated in these provisions and encroaches upon the responsibility of the Member States for economic policy (1.). It also appears to be incompatible with the prohibition of monetary financing of the budget enshrined in art.123 TFEU (2.). The European Central Bank's reference to a "disruption to the monetary policy transmission mechanism" is not likely to change the assessment of these two points (3.). Accordingly, the applications would probably be successful. Another assessment could, however, be warranted if the OMT Decision could be interpreted in conformity with primary law (4.)."

[55] This seems to be the case in Europe and in relation to Kelsenian constitutional courts, whereas the more critical tones seem to originate from the US. For an assessment of both aspects, see K. Tuori, *Ratio and Voluntas: The Tension between Reason and Will in Law* (Burlington, VT: Ashgate, 2010), Ch.8.

[56] See U. Haltern, "High Time for a Check-Up: Progressivism, Populism, and Constitutional Review in Germany", Jean Monnet Working Paper No.5/1996 (1996), *http://www.jeanmonnetprogram.org/archive/papers/96/9605ind.html* [Accessed 17 February 2018].

[57] N. de Boer, "Judging the Crisis: Democracy, Politics and the German Constitutional Court", presentation on 29 March 2017 at the Robert Schuman Centre for Advanced Studies, European University Institute.

[58] See Wilkinson, "Economic Messianism and Constitutional Power in a 'German Europe'" (2014), p.25.

[59] See L. Besselink, "Parameters of Constitutional Development: The Fiscal Compact In Between EU and Member State Constitutions" in L.S. Rossi and F. Casolari (eds), *The EU After Lisbon: Amending or Coping with the Existing*

that it would not allow to be imposed on Germany. If we broaden the time frame, we can see how the underlying rationale already began with the BVerfG's Maastricht decision. There, the BVerfG ruled that the Maastricht Treaty was compatible with the German Basic Law precisely because it adopted the German-inspired stability concept. The BVerfG is still following the path laid down in the Maastricht decision in its judgments concerning the Euro crisis. This imposition of the domestic German stability concept on the Euro area is, however, highly questionable, as "[d]isembedded ordo-liberalism, applied outside its German context, cannot but perpetuate the torture of peripheral Eurozone states".[60] According to Joerges, it "is precisely this kind of external effect of national decision-making that has to be avoided in a Union of equals".[61]

One could of course say, that in addition to being merely descriptive, my argument is also purely hypothetical: because the ECJ had already taken a permissive stance towards the rescue mechanisms in *Pringle*, it was highly unlikely that it would have ruled against the OMT in *Gauweiler*. While such a reading is of course plausible, there are also recent judgments in significant cases where the ECJ has ruled against the wishes of the Community legislator. For example, in *Schrems*[62] the ECJ invalidated the Safe Harbor agreement on data transfers between the EU and the US. In *Aranyosi*,[63] it effectively prevented the execution of European Arrest Warrants issued by certain Member States. These cases concerned the rights of individuals whereas *Gauweiler* was about the EMU. The distinction between primacy and supremacy, discussed next, is a corollary to the distinction between individual rights and institutional constitutional law.

Primacy and/or supremacy—reconceptualising the debate

The term "primacy" is not mentioned at all in the ECJ judgment in *Gauweiler*. However, it does appear once in the referral[64] and on multiple occasions in the form of "precedence of application of Union law" (*Anwendungsvorrang*) both in the referral and the final decision of the BVerfG.[65] This disparity is rather revealing. Instead of analysing the *Gauweiler* saga's significance for the BVerfG's ultra vires review

Treaties (Cham: Springer, 2014), pp.21–35 at p.29; Wilkinson, "Economic Messianism and Constitutional Power in a 'German Europe'" (2014), p.32.

[60] M. Everson, "The Fault of (European) Law in (Political and Social) Economic Crisis" (2013) 24 *Law Critique* 107, 127. On the economic effects of the recent austerity politics, see M. Blyth, *Austerity: The History of a Dangerous Idea* (New York: Oxford University Press, 2013), pp.1–7.

[61] C. Joerges, "Constitutionalism and the Law of the European Economy" in M. Dawson, H. Enderlein and C. Joerges (eds), *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation* (Oxford: Oxford University Press, 2015), pp.216–232 at p.221.

[62] *Schrems v Data Protection Commissioner* (C-362/14) EU:C:2015:650; [2016] 2 C.M.L.R. 2.

[63] *Criminal Proceedings against Aranyosi* (C-404/15) EU:C:2016:198; [2016] 3 C.M.L.R. 13.

[64] See BVerfG 2 BvR 2728/13 of 14 January 2014 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)* at [24], where the BVerfG is citing its earlier decision BVerfG 2 BvR 2661/06 of 6 July 2010 DE:BVerfG:2010:rs20100706.2bvr266106 (*Honeywell*).

[65] See BVerfG 2 BvR 2728/13 of 14 January 2014 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)* at [24]–[26]; BVerfG 2 BvR 2728/13 of 21 June 2016 DE:BVerfG:2016:rs20160621.2bvr272813 *(OMT judgment)* at [115]–[120], [146] and [162]. The BVerfG even cites *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* (6/64) EU:C:1964:66; [1964] C.M.L.R. 425 in this part of its final judgment.

doctrine,[66] I will use this disparity to revisit the primacy-supremacy debate which remains ongoing in EU constitutional law literature.[67]

This section serves two purposes. The distinction between primacy and supremacy is usually perceived as a conceptual distinction and therefore only an academic debate. However, this distinction is in fact the reason why national courts have not unreservedly accepted the primacy of EU law and have, in fact, contested primacy. Conversely, the case at hand can illustrate the difference between primacy and supremacy: why such a distinction should be maintained in the literature and why it might be appropriate for also the ECJ to adopt this distinction.

From primacy to supremacy

After having established the principle of direct effect in *Van Gend en Loos*,[68] the ECJ then proclaimed the primacy of EU law over national law in *Costa*.[69] Later, in *Simmenthal*,[70] it declared that primacy also applies to national constitutional law. Rights stemming from EU law would become irrelevant without such primacy. In *Internationale Handelsgesellschaft* the ECJ affirmed that the direct effect of EU law prevails even over national fundamental rights.[71] The far-reaching and absolute nature of primacy[72] may explain why some commentators refer to it as the principle of supremacy.

The conflation of primacy and supremacy has been criticised. According to the critics, primacy has been misunderstood. It should be seen as a rule of conflict resolution and does not as such infer any form of hierarchy between the legal orders from which the conflicting rules originate.[73] Besselink has proposed that conceptualising the relationship between direct effect and primacy through a narrow and broad definition of primacy would be the adequate way to avoid this conflation.[74] The narrow view of primacy, expounded in *Costa* and *Simmenthal*, entails the duty to set aside national law where it conflicts with EU law. The broader view of primacy, as expressed in *Von Colson* and *Pfeiffer*,[75] entails both the duty to disapply national law and the duty to interpret and apply national law consistently with EU law. The broad definition is also known as indirect effect or conforming interpretation. The logic behind the distinction between these two forms is that:

[66] This seems to be the main focus in the literature. See M. Wendel, "Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference" (2014) 10 *European Constitutional Law Review* 263; M. Claes, "The Validity and Primacy of EU Law and the 'Cooperative Relationship' Between National Constitutional Courts and the Court of Justice of the European Union" (2016) 23 *Maastricht Journal of European and Comparative Law* 151; A. Pliakos and G. Anagnostaras, "Saving Face? The German Federal Constitutional Court Decides Gauweiler" (2017) 18 *German Law Journal* 213.

[67] For a recent explanation of this debate and an attempt to come to terms with it by turning to constitutional pluralism, see M. Avbelj, "Supremacy or Primacy of EU Law—(Why) Does it Matter?" (2011) 17 E.L.J. 744.

[68] *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) EU:C:1963:1; [1963] C.M.L.R. 105.

[69] *Costa v ENEL* (6/64) EU:C:1964:66.

[70] *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (106/77) EU:C:1978:49; [1978] 3 C.M.L.R. 263.

[71] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* (11/70) EU:C:1970:114; [1972] C.M.L.R. 255.

[72] *Costa v ENEL* (6/64) EU:C:1964:66: "The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law without the legal basis of the Community itself being called into question." *Internationale Handelsgesellschaft* (11/70) EU:C:1970:114 at [3]: "Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure."

[73] See L. Besselink, *A Composite European Constitution* (Groningen: Europa Law Publishing, 2007), pp.7–12.

[74] See L. Besselink, "The Parameters of Constitutional Conflict after Melloni" (2014) 39 E.L. Rev. 531, 542–543.

[75] *Von Colson v Land Nordrhein-Westfahlen* (C-14/83) EU:C:1984:153; [1986] 2 C.M.L.R. 430; *Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV* (C-397/01) EU:C:2004:584; [2005] 1 C.M.L.R. 44.

> "The narrower notion of primacy would seem to be conditional on the relevant EU law being directly effective, whereas the broader notion might also apply to EU law that is not directly effective."[76]

When explained in this way, Besselink's critique of transforming primacy into supremacy seems correct. However, this view seems to disregard an important feature of EU law. EU law requires hierarchy. It must handle disputes between the two different legislative spheres. Here, the principle of pre-emption comes into play. As explained by Schütze, the principle of pre-emption determines *when* there is a conflict between EU law and national law. The principle of supremacy—if *Costa* and *Internationale Handelsgesellschaft* are considered to constitute such a principle—defines *how* such conflicts are to be resolved.[77] Under this view, supremacy gives EU law the capacity to pre-empt national law, whereas the doctrine of pre-emption defines to what degree national law will be set aside. Direct effect concerns the application of EU law, whereas supremacy concerns the disapplication of national law that conflicts with EU law.

The criticisms expressed by Besselink and Schütze are both equally correct. However, they focus on different issues. Primacy is appropriate in the context of direct effect and the rights granted to individuals by EU law. It need not be conflated with the hierarchical rule of supremacy. The federal principle of pre-emption suggests that EU law has supremacy over national law in areas where Member States may not act.

It is often suggested that constitutional pluralism offers a way out of the primacy-supremacy debate.[78] Choosing the concept of supremacy as the paradigm requires consideration of hierarchy and leads to a discussion on constitutional pluralism. This was evident already in how MacCormick conceptualised the issue.[79] Does the principle of supremacy of EU law require a theory about interaction between the national and European legal systems or is national law subordinate to EU law? MacCormick chose interaction instead of subordination, which then led to constitutional pluralism. I find it difficult to accept constitutional pluralism as the answer to this debate. Constitutional pluralism essentially tries to settle the issue by sweeping it under the rug—that is, by explaining conflict without actually settling it.[80] As the *Gauweiler* saga itself testifies, constitutional pluralism is not how either court sees the situation. We will return to this in the section on judicial dialogue.

Untangling the debate

I propose that the distinction between individual rights and institutional constitutional law is one possible solution to resolving the primacy-supremacy debate. The *Gauweiler* saga was not a conflict between two norms, one originating from the EU's legal order and the other from a Member State's legal order. The case did not concern rights granted to individuals by EU law. The case was about the German concept of

[76] Besselink, "The Parameters of Constitutional Conflict after Melloni" (2014) 39 E.L. Rev. 531, 543.

[77] See R. Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012), Ch.10.

[78] The classical text being N. Walker, "The Idea of Constitutional Pluralism" (2002) 65 *Modern Law Review* 317. For a thorough analysis of the scholarship, see Jaklic, *Constitutional Pluralism in the EU* (2014).

[79] See N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), pp.116–117.

[80] Because constitutional pluralism means different things to its various proponents, its criticism has also taken a variety of forms. See J. Baquero Cruz, "The Legacy of the Maastricht-Urteil and the Pluralist Movement" (2008) 14 E.L.J. 389; R. Schütze, "Federalism as Constitutional Pluralism: 'Letter from America'" in M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012), pp.185–211; M. Loughlin, "Constitutional Pluralism: An Oxymoron?" (2014) 3 *Global Constitutionalism* 9; F. Fabbrini, "After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States" (2015) 16 *German Law Journal* 1003; J. Baquero Cruz, "Another Look at Constitutional Pluralism in the European Union" (2016) 22 E.L.J. 356; D. Kelemen, "On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone" (2016) 23 *Maastricht Journal of European and Comparative Law* 136.

democracy and the right to vote as enshrined in art.20 GG. As Wilkinson explains, the use of art.20 GG to these ends by the BVerfG "undermines the authority of the Bundestag and the separation of powers between legislature and court".[81] *Gauweiler* involves a conflict between institutions and not between rights.

Since there was no conflict between two norms, the ECJ did not have to resort to its primacy doctrine. The conflict concerned the competences of the EU, more specifically the ECB's strict monetary policy mandate, and the effects of those actions on the Member States. Although in practical terms we are dealing with ultra vires review by the BVerfG, my purpose is to here look behind that doctrine to see what is truly at stake. The Advocate General phrased this conflict well in his opinion, when he outlined the "functional difficulty" underlying the reference:

> "The first is that it seems to me an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity'. That is particularly the case if that 'constitutional identity' is stated to be different from the 'national identity' referred to in Article 4(2) TEU."[82]

It seems appropriate to conceptualise *Gauweiler* in terms of supremacy. First, the very purpose of the BVerfG's ultra vires review is to assess the validity national transfers of competence to the EU on the basis of the German constitution. Thus, the Basic Law is the *Grundnorm* that dictates the validity of transfers of competence to the EU and, owing to national constitutional structures, what types of effects EU law can have in Germany.[83] Therefore, EU law is subordinate to the German constitution. Secondly, the form of words in the BVerfG referral contested the role of the ECJ as the interpreter of EU law.[84] The ECJ, however, made it very clear that its "ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question".[85]

Conversely, then, it seems that the doctrine of primacy is adequate to conceptualise conflicts between EU law and national legal norms which grant rights to individuals. *Melloni* is a perfect illustration of this.[86] In that case, the ECJ seems to have taken the absolute nature of primacy, as established *Internationale Handelsgesellschaft*,[87] to its logical, yet rather perverse conclusion: the primacy of EU law precludes national measures that would grant a higher level of protection of individual rights than that offered by EU law. This outcome has been criticised. The ECJ's demand that "rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State", and that "the primacy, unity and effectiveness of EU law are not … compromised [by national implementing measures]"[88] actually lead to a "downwards" interpretation of rights.[89]

[81] Wilkinson "Economic Messianism and Constitutional Power in a 'German Europe'" (2014), p.16.

[82] Opinion of AG Cruz Villalón in *Gauweiler* (C-62/14) EU:C:2015:400 at [59] (emphasis in the original).

[83] In other words, the BVerfG is captive of the German Constitution, although this also applies to the Court of Justice and the EU Treaties. See K. Tuori, *European Constitutionalism* (Cambridge: Cambridge University Press, 2015), p.103: "EU law and national constitutional orders, both subject to their respective *Grundnorm* and both claiming interpretive autonomy, inevitably arrive at opposite positions in the *Kompetenz-Kompetenz* issue."

[84] This was evident already from how the two aspects of the question referred were formulated: "Does a transgression of the European Central Bank's mandate follow …" and "Is the compatibility with Article 123 of the Treaty on the Functioning of the European Union precluded in particular by the fact …", both of which were followed by three conditions that according to the BVerfG imply that its assumption would be correct. See BVerfG 2 BvR 2728/13 of 14 January 2014 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)* at [1].

[85] *Gauweiler* (C-62/14) EU:C:2015:400 at [16].

[86] *Melloni* (C-399/11) EU:C:2013:107.

[87] *Internationale Handelsgesellschaft* (11/70) EU:C:1970:114.

[88] *Melloni* (C-399/11) EU:C:2013:107 at [59]–[60].

[89] See Besselink, "The Parameters of Constitutional Conflict after Melloni" (2014) 39 E.L. Rev. 531, 533.

The ECJ is the ultimate umpire of the EU's new legal order. Its view on primacy seems natural in the light of continuing challenges to that position by national courts, but how could the ECJ avoid such downwards interpretation of rights while maintaining its position as this ultimate umpire? In the internal market context, the ECJ has allowed important national interests as justifications for breaching free movement rights. In *Omega* national public policy were also public policy derogations in EU law; and in *Sayn-Wittgenstein* it accepted the pleaded national interest as elements of national constitutional identity under art.4(2) TEU.[90] In both cases the judgment is based on concepts of EU law rather than national law, and the ECJ remains the ultimate umpire.

The literature suggests that the position adopted in *Melloni* should be refined.[91] This could be achieved by following the approach in *Omega* and *Sayn-Wittgenstein*. First, as art.4(2) TEU was not considered in *Melloni*, this leaves open the possibility of referring to it in a future case to allow for higher national standards and thus depart from absolute primacy.[92] Secondly, as De Boer has explained, in both *Omega* and *Sayn-Wittgenstein* the aim of the national law served a goal that is compatible with EU law.[93] This was surely also the case in *Melloni*.

Utilising art.4(2) TEU and national constitutional identity to deal with the issue brought up by *Melloni* would not result in the ECJ relinquishing its position as the ultimate umpire nor jeopardise the efficacy of the EU's new legal order. There is some disagreement on this point in the literature.[94] However, under EU law it is the ECJ that decides when national constitutional identity can be pleaded and to what effect.[95] The *Sayn-Wittgenstein* judgment demonstrates that the application of art.4(2) TEU is essentially a proportionality analysis, performed by the ECJ. It therefore retains its position as "the Supreme Constitutional Court of Europe".[96]

The consequence of resorting to art.4(2) TEU to resolve latent conflicts between EU law and national law can be conceptualised in two different ways. As the breach is based on EU law and established by the ECJ, it does not create a derogation as such. Primacy therefore remains unaffected.[97] However, even if this would be taken to constitute a derogation from primacy, a rule developed by the ECJ itself would not affect the supremacy of EU law. Such a distinction might seem purely semantic. Nevertheless, conceptualising the difference between primacy and supremacy in this manner enables the ECJ to revisit the doctrine in *Melloni*.

The significance of this mitigation of the absolute primacy of EU law to further rights protection can be analysed through the distinction between individual (private) and public (political) autonomy. In national settings, individual autonomy is seen as a constraint on public autonomy. The role of constitutional courts is to mediate a balance between the two. As Komárek has explained, in the EU context the roles are

[90] *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (C-36/02) [2004] E.C.R. I-9609; [2005] 1 C.M.L.R. 5; *Sayn-Wittgenstein v Landeshauptmann von Wien* (C-208/09) [2010] E.C.R. I-13693; [2011] 2 C.M.L.R. 28.

[91] See M. de Visser, "Dealing with Divergences in Fundamental Rights Standards" (2013) 20 *Maastricht Journal of European and Comparative Law* 576; A. Pliakos and G. Anagnostaras, "Fundamental Rights and the New Battle over Legal and Judicial Supremacy: Lessons from Melloni" (2015) 34 *Yearbook of European Law* 97.

[92] Besselink, "The Parameters of Constitutional Conflict after Melloni" (2014) 39 E.L. Rev. 531, 549.

[93] N. de Boer, "Addressing Rights Divergences under the Charter: Melloni" (2013) 50 C.M.L. Rev. 1083, 1098.

[94] See A. von Bogdandy and S. Schill, "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty" (2011) 48 C.M.L. Rev. 1417, 1447–1452; M. Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty" (2005) 11 E.L.J. 262, 302–304.

[95] See e.g. M. Claes, "The Primacy of EU Law in European and National Law" in *The Oxford Handbook of European Union Law* (2015), pp.178–211, pp.204–206; Pliakos and Anagnostaras, "Fundamental Rights and the New Battle over Legal and Judicial Supremacy" (2015) 34 *Yearbook of European Law* 97, 118; A. Torres Pérez, "*Melloni* in Three Acts: From Dialogue to Monologue" (2014) 10 *European Constitutional Law Review* 308, 328.

[96] L. Besselink, "Respecting Constitutional Identity in the EU" (2012) 49 C.M.L. Rev. 671, 692.

[97] See De Boer, "Addressing Rights Divergences under the Charter" (2013) 50 C.M.L. Rev. 1083, 1098.

reversed. The realisation of individual autonomy requires effective free movement rules since free movement rules extend individual autonomy and enable rather than constrain it. Individual autonomy, thus, becomes Europeanised. Komárek argues that in such a system the role of national constitutional courts, by opposing EU law and the ECJ, is to defend "the rights of those who do not benefit from integration and whose voice can be structurally undermined by it".[98] Such a description seems accurate in the context of *Melloni* or the more recent case of *Aranyosi and Căldăraru*.[99]

On the other hand, national constitutional courts can also, according to Komárek's argument, have a role in strengthening public autonomy. Intensive international co-operation is needed as national democracies are unable to independently counter the effects of globalisation. Globalisation and neoliberal politics in Europe have led to important decisions being removed from democratic processes[100] and have given national constitutional courts cause to be cautious of the implementation of such EU policies. Thus, public autonomy too has become Europeanised.[101] This seems like a reasonable conclusion. However, I do not agree with the consequent argument that Komárek draws from this.

As public autonomy has become Europeanised, the role of national constitutional courts in the European constitutional democracy is,

> "not as guarantors of certain rights and freedoms, but as important parts of communicative arrangements which generate decisions that remain open to further revision, and are subject to communicatively generated legitimacy."

Thus, Komárek praises the BVerfG's confrontational actions for trying to "preserve space for meaningful political debate concerning European issues". The role of national constitutional courts should be to express those interests that are systematically ignored by the EU. Conversely, the ECJ should be seen as representing the interests of the EU. While a certain level of deference on part of the national courts towards the ECJ is necessary in order to retain the coherence of EU law, "absolute obedience" towards the ECJ judgments is not required due to the reasons discussed above.[102]

Such an argument reverts to pluralism. It does not define when and on what terms national courts should refuse to apply EU law and refuse to follow the interpretations of the ECJ. This relativises the EU's legal order as such. I also see value in national courts acting as agenda setters, but for there to be a legal *order* there needs to be one umpire—and what about equality? What if the issues raised by one national constitutional court are not shared by the courts of other Member States, or better yet, the democratically legitimised parliaments of other Member States? The problems of constitutional pluralism are thus revealed. Mediation between individual and public autonomy within the EU does not need to result in relativism. It can be achieved by the ECJ whilst taking into account the national interests raised in the preliminary references it receives.

Returning to *Gauweiler*, such institutional conflicts are better conceptualised through supremacy. Unlike in the case of individual rights and primacy, strict adherence to the principle of supremacy seems the only correct solution. Departing from it would merely reinforce the problem of inequality described above. Thus, the ECJ should remain firm on questions of supremacy, whereas it might be acceptable to depart

[98] J. Komárek, "National Constitutional Courts in the European Constitutional Democracy" (2014) 12 *International Journal of Constitutional Law* 525, 537–539.

[99] *Criminal proceedings against Aranyosi and Căldăraru* (C-404/15 PPU) EU:C:2016:198; [2016] 3 C.M.L.R. 13.

[100] In relation to developments following the Eurozone crisis, see J. Snell, "The Trilemma of European Economic and Monetary Integration, and Its Consequences" (2016) 22 E.L.J. 157, 164–169.

[101] Komárek, "National Constitutional Courts in the European Constitutional Democracy" (2014) 12 *International Journal of Constitutional Law* 525, 539–541.

[102] Komárek, "National Constitutional Courts in the European Constitutional Democracy" (2014) 12 *International Journal of Constitutional Law* 525, 541–543.

occasionally from absolute primacy. For this reason, it might be useful if the ECJ were to reclaim the term supremacy after a half-century's abeyance.[103]

A true dialogue?

Although the BVerfG has addressed European integration in a long line of cases,[104] it has until now refrained from direct dialogue with the ECJ. In fact, it was the last major European constitutional court to request a preliminary ruling.[105] The ECJ has had difficulties in wording its answers to some high-profile requests in a manner that would be acceptable to the referring courts. This is because it wants to articulate its doctrine on primacy and the role of national courts clearly, but at the same time wishes to avoid causing unnecessary confrontations between the courts and avoid making it more difficult for the national courts to accepts its doctrine. With this in mind, it is interesting to see how the two courts saw their roles in the *Gauweiler* saga.

Locating the dialogue

In the BVerfG's referral, two things are interesting when it comes to dialogue. First, the "cooperative relationship" between the two courts empowers the ECJ to interpret the contested act. The BVerfG must accept this interpretation. However,

> "it is for the Federal Constitutional Court to determine the inviolable core content of the constitutional identity, and to review whether the act (in the interpretation determined by the Court of Justice) interferes with this core."[106]

Secondly, the BVerfG seemed to presume that the OMT programme violates this core, but suggests an interpretation by the ECJ that might not do so:

> "Subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision incompatible with Art. 119 and Art. 127 sec. 1 and 2 TFEU and Art. 17 et seq. of the ESCB Statute because … ".[107]

The first issue concerned institutional roles and the second substantive reasoning.

The ECJ used a rather neutral wording in its judgment. It restated how "Article 267 TFEU establishes a procedure for direct cooperation between the Court and the courts of the Member States". This procedure "is based on a clear separation of functions between the national courts and the Court".[108] Furthermore, "a preliminary ruling is binding on the national court".[109] None of this is novel.[110] The ECJ also clarified how far its own role reaches in this dialogue:

[103] See *Wilhelm v Bundeskartellamt* (14/68) EU:C:1969:4; [1969] C.M.L.R. 100 at [5]: "Article 87(2)(e) [art.103 (2)(e) TFEU], in conferring on a Community institution the power to determine the relationship between national laws and the community rules on competition, confirm the supremacy of Community law."

[104] See Huber, "The Federal Constitutional Court and European Integration" (2015) 21 *European Public Law* 83.

[105] The French Conseil constitutionnel made its first referral in the case *Jeremy F v Premier ministre*, Decision No.2013-314P QPC, 4 April 2013; the Italian Corte Costituzionale with its judgment No.207, 18 July 2013; and the Spanish Tribunal Constitucional de España in the aforementioned *Melloni* case.

[106] BVerfG 2 BvR 2728/13 of 14 January 2014 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)* at [27].

[107] BVerfG 2 BvR 2728/13 of 14 January 2014 DE:BVerfG:2014:rs20140114.2bvr272813 *(OMT Reference)* at [55].

[108] *Gauweiler* (C-62/14) EU:C:2015:400 at [15].

[109] *Gauweiler* (C-62/14) EU:C:2015:400 at [16].

[110] See *Firma Foto Frost v Hauptzollamt Lubeck-Ost* (314/85) EU:C:1987:452; [1988] 3 C.M.L.R. 57 at [17]: "Since Article 173 [art.263 TFEU] gives the Court exclusive jurisdiction to declare void an act of a Community institution,

> "It is not, however, for the Court to call that assessment into question since it falls, in the framework of these proceedings, within the jurisdiction of the national court and 'the interpretation of national law falls exclusively to the referring court.'"[111]

Thus, building on a functional division of tasks, the ECJ saw itself as the ultimate umpire. This role does not encroach on the tasks that the German constitution bestows upon the BVerfG.

In its final ruling the BVerfG explained how the ECJ's analysis of the OMT programme and thus its answer to the question relates to its ultra vires review doctrine. According to the BVerfG, the ECJ's interpretation is acceptable under that doctrine if its "interpretation of the Treaties is [not] manifestly utterly incomprehensible and thus objectively arbitrary".[112] However, even if the ECJ judgment contained "a careful and meticulously reasoned interpretation", it could still exceed the threshold of a manifest breach.[113] According to the BVerfG, the "methods of judicial specification of the law (*richterliche Rechtskonkretisierung*)" that the ECJ uses as the basis of its own interpretation do not need to completely correspond to those used by national courts, but they cannot simply override them.[114] These can be seen as substantive criteria that should, according to the BVerfG, guide dialogue between itself and the ECJ. In essence, this is the standard that the ECJ's ruling should reach for the BVerfG to consider its institutional speech acts as genuine, worthwhile dialogue. The remainder of the BVerfG's final ruling is an exegesis of the ECJ's judgment in which it is difficult to identify how the BVerfG employs the criteria described above.

Analysing the dialogue

Sincere co-operation

The ECJ did not directly address the real issue underlying the referral. This was, however, evident from the form of words employed by the BverfG. The Advocate General called this aspect of the referral its "functional difficulty".[115] As he stated, this,

> "ambivalence runs all through the request for a preliminary ruling, so that it is extremely difficult to disregard it entirely when analysing the case."[116]

I want to focus on one element of his opinion that relates to our topic.

The Advocate General found a connection between judicial dialogue and the principle of sincere co-operation in art.4(3) TEU.[117] According to AG Cruz Villalón, "the principle of sincere cooperation requires a particular effort on the part of the Court of Justice to provide an answer on the substance to the questions referred", despite the way the BVerfG formulated the question and how it is situated in relation to its ultra vires review doctrine as outlined in *Honeywell*.[118] In other words, he considered that the principle obliges the ECJ to provide a reasoned substantive ruling and to disregard the possibility that the national court might not accept it. Article 4(3) TEU thus necessitates taking dialogue seriously.

the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice."

[111] *Gauweiler* (C-62/14) EU:C:2015:400 at [26] and [28] respectively.

[112] BVerfG 2 BvR 2728/13 of 21 June 2016 DE:BVerfG:2016:rs20160621.2bvr272813 *(OMT judgment)* at [149].

[113] BVerfG 2 BvR 2728/13 DE:BVerfG:2016:rs20160621.2bvr272813 *(OMT judgment)* at [150].

[114] BVerfG 2 BvR 2728/13 DE:BVerfG:2016:rs20160621.2bvr272813 *(OMT judgment)* at [159]–[160].

[115] See Opinion of AG Cruz Villalón in *Gauweiler* (C-62/14) EU:C:2015:400 at [30]–[69].

[116] Opinion of AG Cruz Villalón in *Gauweiler* (C-62/14) EU:C:2015:400 at [49].

[117] See Opinion of AG Cruz Villalón in *Gauweiler* (C-62/14) EU:C:2015:400 at [48] and [62]–[67].

[118] Opinion of AG Cruz Villalón in *Gauweiler* (C-62/14) EU:C:2015:400 at [66].

In my opinion, such a reading of the principle of sincere co-operation seems rather unorthodox. The principle was already enshrined in the Treaty of Rome. It first became significant thanks to *Von Colson*, which established the principle of consistent interpretation, sometimes also known as indirect effect.[119] According to the ECJ, the principle of sincere co-operation,

> "involves an obligation, for Member States, to take all measures necessary to guarantee the application and effectiveness of EU law and imposes on the institutions of the European Union duties of mutual respect and assistance with regard to the Member States in carrying out the tasks flowing from the Treaties."[120]

What do these duties imposed on the EU entail? Based on the ECJ's case law, this "reverse vertical loyalty"[121] seems to oblige all Union institutions other than the ECJ itself.[122] In *Zwartveld*, an older case, the ECJ did, however, rule specifically on how such a duty (loyalty) affects its own actions.[123] There, the ECJ accepted a request for mutual assistance from a Dutch *Rechter-commissaris*, even though on a literal reading of art.267 TFEU the national body was not an institution with a right to request a ruling. The rationale for this judgment seemed to be the protection of individual rights.[124]

The distinction between individual rights and institutional constitutional law seems significant here just as in the context of the primacy-supremacy debate. The ECJ should interpret the EU Treaties in a manner that enables the protection of individual rights—but if the EU Treaties are clear about the functional division of tasks between the ECJ and national courts, why should the principle of sincere co-operation be needed to interpret how the ECJ should react to requests formulated in terms like those used by the BVerfG in *Gauweiler*?

"Acceptance"

The BVerfG invited the ECJ to participate in a dialogue, but under its own terms. As we now know, in its final ruling the BVerfG did not find a violation of the core of constitutional identity. Should this be read to signify that the BVerfG "accepted" the ECJ's interpretation of the OMT?[125] There are two possible readings. First, the negative answer: as was already pointed out, the BVerfG's starting point was an acknowledgement of the independent functions of the two courts, but a reservation as to what its own finding would be on the issue falling within its own jurisdiction. Under this view, the BVerfG's institutional role is such that it is not able to "decline" the interpretation given by the ECJ. Therefore, *a contrario*, it also cannot "accept" an interpretation. The functional division of competences dictates this position.

Secondly, the affirmative answer. The BVerfG started its reference by acknowledging the position of the ECJ as the ultimate interpreter of EU law. However, the confrontational way the reference was worded suggested that the BVerfG would have found a violation of national identity in any case where the ECJ found the OMT to fall within the ECB's strict monetary policy mandate, regardless of the way in which

[119] See *Von Colson v Land Nordrhein-Westfahlen* (C-14/83) EU:C:1984:153; A. Rosas and L. Armati, *EU Constitutional Law: An Introduction* (Oxford: Hart Publishing, 2012), p.72.

[120] *Nikolaou v Court of Auditors of the European Union* (C-220/13 P) EU:C:2014:2057 at [51].

[121] See M. Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014), pp.25–28.

[122] "Sincere cooperation" is mentioned in the title of nine rulings by the Court of Justice, the oldest one being *UPC Nederland BV v Gemeente Hilversum* (C-518/11) EU:C:2013:709 7 November 2013. My argument is based on these cases.

[123] *Re Zwartveld* (C2/88 Imm) EU:C:1990:315; [1990] 3 C.M.L.R. 457 at [15]–[16] and [23].

[124] Klamert, *The Principle of Loyalty in EU Law* (2014), p.26.

[125] See e.g. how according to the Advocate General the Court of Justice could "expect" the BVerfG to "accept" its answer. Opinion of AG Cruz Villalón in *Gauweiler* (C-62/14) EU:C:2015:400 at [67]. Similarly on "acceptance", see Anagnostaras, "In ECB we trust … the FCC we dare!" (2015) 40 E.L. Rev.744, 761; P. Craig and M. Markakis, "Gauweiler and the Legality of Outright Monetary Transactions" (2016) 41 E.L. Rev. 4, 21–23.

the ECJ were to reason this outcome. Under this view, the BVerfG's final ruling would seem as a retreat from its initial threat, and thus as an acceptance of both the ECJ's position as the ultimate arbiter and its ruling in this case. This reading would also suggest that the BVerfG's actions affirm the legitimacy of the ECJ: acknowledgement and acceptance would not have taken place otherwise.

Outcome of the dialogue

The ECJ had a good reason for not engaging in more depth with the functional difficulty. It was aware of the tension between the two courts and the possibly devastating practical significance of this ruling for the Eurozone. Perhaps the ECJ considered that the easiest way to make the BVerfG accept its role (the "clear separation of functions between the national courts and the Court") in the preliminary reference procedure as a mere recipient of its ruling and to also accept the substance of that ruling would be to not overstress its interpretive authority and the supremacy of EU law. Deciding the case at hand without further elaborating on its doctrines would be more effective. This would offer the BVerfG a way out of the confrontation without losing face,[126] as the real issue at play would not be so clearly overemphasised.

For something to constitute a dialogue, both participants should communicate something to the other. Based on the above analysis, this was perhaps the case here. However, should we also conclude from this, as the constitutional pluralist literature seems to,[127] that dialogue is essential and useful? Or is dialogue "simply an arm-wrestle between the Court of Justice and national constitutional courts, each seeking to delimit the other's respective powers"?[128]

Individual (fundamental) rights have been the main substantive issue prompting dialogue. "European constitutional balance urges a plural constitutional dialogue" concerning these rights.[129] A functioning system of rights and their protection requires some degree of pluralism. Dialogue may contribute to this as is evidenced by *Melloni*[130]—but is this also the case concerning institutional constitutional law? If the functional division of tasks between the ECJ and national courts is clear, what is the dialogue supposed to contribute? Is it merely an arm-wrestle? It is difficult to conclude anything else from an interpretation of the EU Treaties and their underlying rationale. They signal a choice in favour of European constitutional monism as opposed to European constitutional pluralism or nation-state constitutional monism. As guardians of their own constitutions, national courts are of course arguing for nation-state constitutional monism. However, understanding the functional division of tasks between these courts and the proposed solution to resolving the primacy-supremacy debate leads to the conclusion that one is not achieved at the expense of the other. Consequently, then, in this case neither court was actually arguing for European constitutional pluralism.

[126] On other aspects of face-saving, see J. Bast, "Don't Act beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review" (2014) 15 *German Law Journal* 167, 179–180; A. Steinbach, "All's Well that Ends Well? Crisis Policy after the German Constitutional Court's Ruling in *Gauweiler*" (2017) 24 *Maastricht Journal of European and Comparative Law* 140, 143–144.

[127] See A. Stone Sweet, "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe" (2011) 1 *Global Constitutionalism* 53; M. Poiares Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism" (2007) 1 *European Journal of Legal Studies* 1; N. Walker, "Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe" in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford: Hart Publishing, 2000), pp.9–30.

[128] Castillo Ortiz, "'Playing the Judicial Card'" (2014) 20 E.L.J. 630, 639.

[129] M. Cartabia, "Europe and Rights: Taking Dialogue Seriously" (2009) 5 *European Constitutional Law Review* 5, 7.

[130] See Torres Pérez, "*Melloni* in Three Acts" (2014) 10 *European Constitutional Law Review* 308.

Conclusion

I accept the first claim of constitutional pluralism: both national courts and the ECJ make relevant constitutional claims.[131] The *Gauweiler* saga is an example of this. However, I have difficulty in accepting the second and third claims of constitutional pluralism. The standard according to which the claims can be settled is provided by the EU Treaties. Thus, there is a hierarchy between the EU Treaties and the national constitutions. Acknowledgment and accommodation of each other can be useful in fine-tuning one's argumentation, but it cannot nor need not be the starting point to managing the EU system.

To this end, this article presented three arguments derived from the *Gauweiler* saga. First, differences in national constitutional frameworks result in differences in the degrees to which national courts can participate in the European-level political process. This inherent inequality calls into question the legitimacy of acts of individual national courts. Secondly, establishing an analytical distinction between primacy and supremacy in the proposed manner could be useful for furthering rights protection within the Union and for reconciling the clash between national constitutions and courts vis-à-vis the EU Treaties and the ECJ. This would be a more fruitful way than the method proposed by pluralists. At the least, it could bring clarity into the academic discussion.[132] Thirdly, the distinction between primacy and supremacy is a better way of coming to terms with the underlying issue than building on a conceptualisation of judicial dialogues. This is the case especially because the *Gauweiler* saga suggests that neither court was arguing for European constitutional pluralism, but rather for their own constitution as the *Grundnorm*.

The proposed distinction between primacy and supremacy, operationalised through individual rights and institutional constitutional law, does not mean reverting to constitutional pluralism. Recourse to art.4(2) TEU in the manner proposed above does not create inequality between the Member States, as the recognition of national issues within the structures of EU law furthers individual rights rather than the interests of institutions as such. Furthermore, as the ECJ would remain influential in interpreting the content of art.4(2) TEU, its use would not jeopardise the rule of law in the EU. However, the answer that pluralists propose does seem to lead to there being no clear order. Moreover, even if interpreted by the ECJ, art.4(2) TEU actually empowers the national courts as it facilitates a deeper engagement between national law and EU law.[133]

[131] See Walker, "Constitutional Pluralism Revisited" (2016) 22 E.L.J. 333–334.

[132] Many contributions use the term supremacy when discussing *Melloni*, yet without acknowledging the difference between the terms primacy and supremacy; e.g. see Pliakos and Anagnostaras, "Fundamental Rights and the New Battle over Legal and Judicial Supremacy" (2015) 34 *Yearbook of European Law* 97; De Visser, "Dealing with Divergences in Fundamental Rights Standards" (2013) 20 *Maastricht Journal of European and Comparative Law* 576; Torres Pérez, "*Melloni* in Three Acts" (2014) 10 *European Constitutional Law Review* 308.

[133] See Claes, "Negotiating Constitutional Identity or Whose Identity is it Anyway?" in *Constitutional Conversations in Europe* (2012), pp.229–230.