

European Integration Perspectives in Times of Global Crises



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Preface

The history of European integration is characterized by a multitude of achievements, but also by challenges and crises. The construction of the European Union as a supranational organization has often raised complex legal questions, especially about the scope of the Union's competences and the remaining competences of the member states. There have also often been controversial discussions about the core of national constitutions, most recently, for example, in connection with the judicial reforms in Poland.

With the White Paper on the Future of Europe, the European Commission had launched a debate on fundamental reforms of the Union structures in 2017. A total of five reform scenarios ranged from a reduction and focusing of the Union's competences to increased integration in the sense of a United States of Europe. However, the White Paper did not have any consequences; none of the reform scenarios presented was implemented. However, current global challenges in the areas of health, climate change and energy resources as well as the shift in the global balance of power and related security issues demonstrate the increasing importance of a strong and united Europe. The idea of an "ever closer union", as laid down in the preamble of the 1992 EU Treaty, could experience a renaissance.

Against this background, the 13th Network Europe Conference addressed the importance of the integration project in times of global crises and the challenges in various policy areas, as well as the EU's relations with its eastern and southern neighbors and its role vis-à-vis global actors such as China and Russia. This publication contains the conference contributions.

Zurich, 20 February 2023

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“Ever closer Union” or flexible Union? Integration Scenarios after Constitutional Court Decisions in Germany and Poland

Peter Christian Müller-Graff

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“‘Ever Closer Union’ or Flexible Union? Integration Scenarios after Constitutional Court Decisions in Germany and Poland?”¹ This wording of the question assigned to me by the organizers of the 13th Network Europe Conference on the general topic “European integration perspectives in times of global crises” sounds like an alternative between “an ever closer union among the peoples of Europe” as attributed to the Treaty on European Union by its Article 1 para. 2 as “a new stage in the process of creating” it and an undefined “flexible union” (without the objective of an “ever closer union”, as David Cameron renegotiated it away in 2016 for Britain² in the futile hope to win the referendum). This alternative “closer” or “flexible” is not a new issue, but the subject of a

¹ Text of the author’s lecture at the 13th Network Europe Conference in Athens on 20 June 2022.

² European Council, Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, 2 February 2016.

permanent debate.³ Whether, however, the recent decisions of the constitutional courts in Germany⁴ and Poland⁵ give new practical impetus for pondering on prospective integration scenarios, is the subject of the following observations. They are structured along four questions: first, the Treaty's formulation of "the process of creating an ever closer union between the peoples of Europe" deserves closer attention – what is meant with it? (in German: "eine immer engere Union der Völker Europas"; in French: "une union sans cesse plus étroite entre les peuples de l'Europe" (I); second, does the PSPP-judgment of the German Federal Constitutional Court's 2nd Senate (FCC) of 5 May 2020 constitutionally jeopardize this process? (II); third, does the Polish Con-

³ See, e.g., Thym, Einheit in Vielfalt: Binnendifferenzierung der EU-Integration, in: Hatje/Müller-Graff (eds.), *Europäisches Organisations- und Verfassungsrecht* (Enzyklopädie Europarecht Band 1), 2022, § 22 (p. 1173 et seq.); Deutscher Bundestag Fachbereich Europa, Differenzierte Integration in Europa, PE 6 - 3000 - 090/20; Schimmelfennig/Winzen, Grand Theories, Differentiated Integration, *Journal of European Public Policy* (JEPP) 2019, p. 1172 et seq.; Eppler, Flexible Integration zwischen integrativem Fort- und Rückschritt, *integration* 2017, p. 207 et seq.; Riedeberger, Die EU zwischen einheitlicher und differenzierter Integration, 2016; Schimmelfennig/Leuffen/Rittberger, The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation, *Institute for Advanced Studies: Political Science Series Working Paper* 137/2014, p. 8 et seq.; Busch, Differenzierte Integration als Modell für die Zukunft der Europäischen Union? *IW Policy Paper* 14/2014; Leuffen et al., Differentiated Integration. Explaining Variation in the European Union, 2013; von Ondarza, Auf dem Weg zur Union in der Union. Institutionelle Auswirkungen der differenzierten Integration in der Eurozone auf die EU, *integration* 2013, p. 17 et seq.; Müller-Graff, Modelle differenzierter Integration im Gemeinschaftsprivatrecht, in: Jung/Baldus (eds.), *Differenzierte Integration im Gemeinschaftsprivatrecht*, 2007, p. 109 et seq.; John, Differenzierte Integration im Spannungsfeld von Erwartung und politischer Realität: Eine Bewertung ihrer Auswirkungen auf den europäischen Integrationsprozess, *integration* 2006, p. 172 et seq.; Thym, Supranationale Ungleichzeitigkeit im Recht der europäischen Integration, *Europarecht* 2006, p. 637 et seq.; Grieser, Flexible Integration in der Europäischen Union: Neue Dynamik oder Gefährdung der Rechtseinheit? 2003; Thun-Hohenstein, Die Möglichkeit einer „verstärkten Zusammenarbeit“ zwischen EU-Mitgliedstaaten. Chancen und Gefahren der „Flexibilität“, in: Hummer (eds.), *Die Europäische Union nach dem Vertrag von Amsterdam*, 1998, p. 125 et seq.; Wessels/Jantz, *Flexibilisierung*, 1997; Stubb, A Categorization of Differentiated Integration, *Journal of Common Market Studies* 1996, p. 283 et seq.

⁴ Bundesverfassungsgericht (Federal Constitutional Court), Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, paras 1-237, BVerfGE 154, pp. 17-152.

⁵ Trybunał Konstytucyjny, decision K 3/21, 7 October 2021, available at: <<https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>>.

stitutional Tribunal's (PCT) decision of 7 October 2021 constitutionally block this perspective? (III); and fourth, do these decisions require a new debate on integration scenarios? (IV).

I. The Content of the Treaty's Formulation of "the process of creating an ever closer union among the peoples of Europe"

What is the content of the Treaty's formulation of "the process of creating an ever closer union among the peoples of Europe", in which the Lisbon Treaty on European Union (quote) "marks a new stage"?

1. First of all, it has to be emphasized that this wording does not talk about a specific organisational structure such as, e.g. a federal European state, or, in particular, about the European Union, but about a "union between the peoples of Europe" (the "union" in French and English not written with an initial capital letter as it is the case in German). Hence, one has to distinguish between the "European Union" as an organisational structure and "a ... union between the peoples of Europe" as the substantive destination of the "process of creating" (in German: "bei der Verwirklichung"; in French: "processus créant").
2. Second, obviously, in this formulation the term "Europe" is not identical with the Union, but a territorially related⁶ yet open political definitional concept.
3. Third, the wording of "the peoples of Europe" is not addressing the "states" in Europe but sounds – at first sight – ethnically oriented.
4. But fourth, the phrasing "union of the peoples" has to be understood as uttering the political will to establish an "inner connectedness" between the peoples ("innere Verbundenheit"⁷) as the very basis for a common European well-being. This aim of "inner connectedness" in a sense of commonality addresses the millions of individuals in Europe and their respective social networks. If they (realistically their majority in the respective peoples) do not develop such a transnational "inner connectedness", all organisational devices such as the European Union will remain without a stable foundation.⁸ Hence, the individuals and societies should converge in their mutual understanding, respect and appreciation.

⁶ The EU Member State Cyprus is geographically part of Asia.

⁷ Pechstein, in: Streinz (eds.), EUV/AEUV, 2018, Art. 1 EUV, para. 19.

⁸ Id.

To these ends the primary law of the Union offers individuals subjective rights to transnationally connect at their own private initiative and in their own interest, be it physically or (if possible) telecommunicationally: those rights are, in particular, the transnational access freedoms of the internal market for workers and business people, self-employed persons and artists, service providers and service recipients, sellers and buyers, lenders and borrowers, investors and companies (Articles 28 et seq. TFEU);⁹ and also the rights of the citizens of the Union (Article 20 TFEU),¹⁰ among them the right to move and reside freely within the territory of the Member States and the political rights in other Member States such as the right to vote and to stand as candidates in municipal elections (e.g.: successfully the Dane Claus Ruhe Madsen as Lord Mayor in Rostock). In addition, the secondary law of the Union unfolds and furthers these rights in a great variety of ways, and it also adds the absence of internal border controls for persons (Schengen Borders Code) as a directly applicable provision.¹¹ But whether an individual makes use of these rights to connect is up to her or him. It can be assumed that in fact this happens hundreds of thousands of times every day within the Union.

A further question is whether an “inner connectedness” of the individuals and societies that realize the standards of living in their daily life should develop in a certain substantive direction. This is up to them, since the Union is founded on (among others) the value of freedom (Article 2 s. 1 TEU). However, the primary law of the Union offers some points of orientation for a thriving togetherness. Article 2 s. 2 TEU contains a vision. It envisages “a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. And this is politically overarched by six values common to the Member States and the Union itself: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights,

⁹ Müller-Graff, Die europäische Privatrechtsgesellschaft in der Verfassung der Europäischen Union, in: Müller-Graff/Roth, Recht und Rechtswissenschaft. Signaturen und Herausforderungen zum Jahrtausendbeginn, 2000, p. 271, 281 et seq.; Müller-Graff, Basic Freedoms – Extending Party Autonomy Across Borders, in: Grundmann/Kerber/Weatherill (eds.), Party Autonomy and the Role of Information in the Internal Market, 2001, p. 133, 137 et seq.

¹⁰ Müller-Graff, „Nous ne coalisons pas des États, nous unissons des hommes“ – Variationen zu Jean Monnet, in: Hanschel et al. (eds.), Mensch und Recht. Festschrift für Eibe Riedel, 2013, p. 429, 436; Schönberger, Stiften die Unionsbürgerschaft europäische Identität? in: Müller-Graff (eds.), Der Zusammenhalt Europas – In Vielfalt geeint, 2009, p. 55 et seq.; Maas, Creating European Citizens, 2007; Schönberger, Unionsbürger, 2006; O’Leary, The Evolving Concept of Community Citizenship, 1996.

¹¹ Article 22 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, 23.3.2016, p. 1–52.

including the rights of persons belonging to minorities”. Seen all together, this is the vision of an enlightened way of life in the developed sense of *Immanuel Kant*.¹² At the same time it may be understood as an indication of the European way of life already achieved to a considerable degree in the course of European integration for a considerable part of national societies since the end of the Second World War. This vision can be considered as the “ever closer union of the peoples of Europe” – at least within the European Union that gives the stabilizing legal and institutional frame¹³ and direction for this development.

II. Endangerment of the Process of “an ever closer union among the peoples of Europe” by the FCC’s PSPP-Ruling?

The question of whether the FCC’s PSPP-judgment jeopardizes or even puts an end to the process described by Article 1 s. 2 TEU as “an ever closer union among the peoples of Europe” on the track of the European Union, may find a first answer in the text of the ruling. The formula of Art. 1 par. 2 TEU is not explicitly dealt with by that judgment on the ECB’s competence to adopt the financially huge Public Sector Purchase Programme. However, this does not yet give a final answer to the question of whether its shocking violation of procedural Union law¹⁴, its disobedience to the CJEU (and, by that, to the primacy of Union law), and its sharp language towards the CJEU’s preliminary ruling on the interpretation of Union law (“simply not comprehensible and thus objectively arbitrary”¹⁵) signal a break-up and rejection of the Union’s community of law, and hence a destruction of the mentioned legal and institutional backbone of an ever closer union between the peoples. To answer this question, a close look must be taken at the two legal dimensions of the judgment (Union law and constitutional law).

1. As far as the FCC’s ruling interprets substantive primary Union law provisions on the competence of the ECB (Article 127 par. 1 TFEU – monetary policy – and Article 5 par. 4 TEU – the principle of proportionality) and on the competence of the ECJ (Article 19 TEU – ensuring that in the inter-

¹² As an application to international relations *Kant*, Zum ewigen Frieden, 1795.

¹³ *Pechstein* (*supra* note 7), Art. 1 EUV, para. 19.

¹⁴ See, e.g., *Tilmann*, Verfassungsgericht verletzt das Unionsrecht, IWRZ 2020, p. 166; *Müller-Graff*, Schockwellen im Unionsrechtsraum: Das PSPP-Urteil des Bundesverfassungsgerichts, EuZ 2020, p. 154 (155); *Pernice*, Machtspruch aus Karlsruhe „Nicht verhältnismäßig? – Nicht verbindlich? Nicht zu fassen...“. Zum PSPP-Urteil des BVerfG vom 5. Mai 2020, EuZW 2020, p. 508 (511, 518); *Meier-Beck*, De iudicando ultra vires, EuZW 2020, p. 519 (522).

¹⁵ Bundesverfassungsgericht (*supra* note 4), para. 118.

pretation and application of the Treaties the law is observed), the FCC's critical review of the ECB's reasoning and of the CJEU's review and reasoning are legitimate and in terms of content not without "a grain of salt". The CJEU's preliminary judgment in this matter,¹⁶ regardless of the justifiable result, did not rise to the expected standards of scrutiny and substantive reasoning on this grave issue.¹⁷ Moreover, there is a widely held understanding, that the PSPP does not aim at raising inflation to around 2%, as articulated by the ECB,¹⁸ but at helping certain Euro-States by mitigating their budget induced problems of access to the capital market.¹⁹ Hence, the review of the persuasiveness of the CJEU's ruling by the FCC falls within the basic responsibility of national courts for the interpretation and authority of Union law.

However, the FCC violated procedural Union law (as part of the primacy of Union law). While the 2nd Senate was legitimized for an in-depth reflection on the completeness and persuasiveness of the CJEU's interpretation of the relevant Union law, it is also evident that the effectiveness and the uniform applicability of Union law across the Union would be jeopardized, if the ultimately binding answer to such questions would be left with national courts or tribunals against whose decisions there is no remedy under national law. In order to avoid this danger, the Member States have wisely agreed on an elementary procedural rule and ratified it in accordance with their respective constitutional requirements: namely the obligation of such national courts and tribunals "to bring the matter before the Court", in other words to refer the question to the CJEU (Article 267 par. 3 TFEU).

While the 2nd Senate had initially respected this obligation in the PSPP-procedure,²⁰ it ignored the further procedural obligations after the CJEU's preliminary ruling in this matter. First, it disregarded its obligation to fol-

¹⁶ CJEU, Judgement of 11 December 2018, Weiss et al., C-493/17, ECLI:EU:C:2018:1000.

¹⁷ See, e.g., the general concerns in the annotation *Müller-Graff*, EuZW 2019, p. 172.

¹⁸ Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L 121, 14. May 2015, p. 20–24, para. 2–4 and 7.

¹⁹ E.g.: Ökonom Sinn schilt die EZB, available at: <<https://www.faz.net/aktuell/wirtschaft/konjunktur/hans-werner-sinn-kritisiert-das-ezb-programm-13472298.html>>; Haltern, Ultra-vires-Kontrolle im Dienst europäischer Demokratie, NVwZ 2020, p. 817 (822); see also Bundesverfassungsgericht (*supra* 4), para. 134, 137.

²⁰ Bundesverfassungsgericht, Order of the Second Senate of 18 July 2017, BvR 859/17, paras. 1–137, BVerfGE 146, 216–293.

low the CJEU's interpretation²¹ and, second, in view of the new extensive reasoning of its own interpretation of Union law (in particular on the CJEU's competence) it also violated its new obligation to refer the matter again to the CJEU.²²

2. But why did the FCC violate this clear obligation under Union law? This leads to the most problematic constitutional self-empowerment of the FCC articulated for the first time in the Maastricht-judgment of 1993²³ and practiced for the first time in the PSPP-judgment,²⁴ namely the self-empowerment of the FCC to declare measures of Union institutions as non-binding or inapplicable in Germany.²⁵ One has to ask for the substantive root of this position. That is already alluded to in the reasoning of granting German citizens standing for activating the FCC to review the question of whether a concrete measure of the Union was beyond its power. The PSPP-ruling of the FCC was prompted by constitutional complaints of German citizens that their constitutional right to vote for the Bundestag (Article 38 of the Basic Law) had been violated by the Federal Government's and the Bundestag's failure to take appropriate measures to repeal or not to implement the PSPP-decisions of the ECB, which were alleged to exceed its competences under Union law. This connection between the right to vote and an "ultra vires"-measure of institutions of the Union is not found in the text of the Basic Law. It had been established by the 2nd Senate's Maastricht-judgment on the grounds that this right of the individual's democratic influence was to be safeguarded against the erosion of its substance ("Substanzverlust")²⁶ either by transferring too many competences from the Bundestag to the Union²⁷, or by Union measures that are not covered by a transferred competence.²⁸ Hence, at the basis of the FCC's self-empowerment lays the idea of judicially guarding the democratic principle of the German constitution²⁹ against "over-

²¹ E.g.: *Kelemen et al.*, National Courts Cannot Override CJEU Judgments. A Joint Statement in Defense of the EU Legal Order, in: *Verfassungsblog*, 26 May 2020.

²² E.g.: *Tilmann* (*supra* note 14); *Müller-Graff*, *Höchstgerichte ultra vires?*, *GPR* 2020, p. 167; *Pernice* (*supra*) 518.

²³ Bundesverfassungsgericht, Judgment of the Second Senate of 12 October 1993, 2 BvR 2134, 2159/62, BVerfGE 89, 155.

²⁴ Bundesverfassungsgericht (*supra* note 4), para 235.

²⁵ Bundesverfassungsgericht (*supra* note 23), C I 3; Bundesverfassungsgericht, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 241 (Lissabon).

²⁶ Bundesverfassungsgericht (*supra* note 25 - Lissabon), para. 174 et seq.

²⁷ Bundesverfassungsgericht (*supra* note 25 - Lissabon), para. 264.

²⁸ Bundesverfassungsgericht (*supra* note 4), para. 234.

²⁹ Bundesverfassungsgericht (*supra* note 25 - Lissabon), paras. 213, 216, 218, 250.

empowerments” or self-empowerments of the Union. The FCC’s understanding of democracy centres in the understanding of the Member States as the “constituted political primary area of their respective polities”.³⁰ In the (very wordy) Lisbon-judgment this is linked to understanding “European unification on the basis of a treaty union of sovereign states” that “may ... not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions”.³¹

3. This leads back to the initial question of whether this approach jeopardises the process of “an ever closer union between the peoples of Europe”? This could perhaps be the case if one speculatively assumes that this judgment reinforces a sceptical mood towards the ECB’s monetary policy in the German public and can, by that, promote a sceptical perception of the single currency by a considerable part of the population. However, first, the basic approach of the FCC addresses competence issues in the applicable law (including an interjurisdictional power question), but not the socio-empirical process referred to in Article 1 par. 2 TEU. Second, the latter may prove to be more decisive for the political European togetherness. Third, the PSPP-judgment required only a more thorough judicial review (“höhere Prüfungsdichte”) of the ECB’s programme by the CJEU, as well as a comprehensible reasoning of the CJEU. Fourth, the *relevant* political reaction in Germany to the PSPP-judgment as the first realization of this FCC’s self-empowerment was distant and critical, as was particularly evident in the subsequent infringement proceedings initiated by the European Commission against Germany. There, the Federal Government (which – together with the Bundestag – was held by the FCC to have violated the Basic Law for failing to take suitable steps challenging that the Governing Council of the ECB neither assessed nor substantiated that the PSPP satisfies the principle of subsidiarity) declared that it will use all its capabilities to ensure that such a disrespect of the CJEU will not happen again.³²

³⁰ Bundesverfassungsgericht (*supra* note 25 – Lissabon), para. 301.

³¹ Bundesverfassungsgericht (*supra* note 25 – Lissabon), para. 249.

³² Mitteilung der Regierung der Bundesrepublik Deutschland an die Europäische Union vom 3. August 2021 zum Vertragsverletzungsverfahren gegen die Bundesrepublik Deutschland gemäss Artikel 258 AEUV – Urteil des Bundesverfassungsgerichts vom 5. Mai 2020 – Verfahren Nr. 2021/2114, Ziff. 3.

III. Endangerment of the Process of “an ever closer union between the peoples of Europe” by the PCT’s judgment of October 7th, 2021?

The same question arises for the PCT’s judgment of October 7th, 2021: Does it jeopardize or even put an end to the process envisaged by Article 1 par. 2 TEU as “an ever closer union among the peoples of Europe?” on the track of the European Union? What is the ruling’s content and impact?

1. Concerning the content, the PCT’s judgment differs from the FCC’s PSPP-judgment in view of the “ever closer union”-provision of Article 1 par 2 TEU already insofar as it explicitly addresses this formula. According to the PTC’s English press release it adjudicated under point 1: “Article 1, first and second paragraphs, in conjunction with Article 4 (3) ... is inconsistent with Article 2, Article 8 and Article 90 (1) of the Constitution of the Republic of Poland” – “insofar as the European Union ... creates ‘an ever closer union among the peoples of Europe’, the integration of whom – happening on the basis of EU law and through the interpretation of EU law by the Court of Justice of the European Union – enters ‘a new stage’ in which: a) European authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties; b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application; c) the Republic of Poland may not function as a sovereign and democratic state.”³³ A further explanation details this statement by saying: “that Article 1, first and second paragraphs of the TEU remains consistent with the Constitution of the Republic of Poland. However, if the new stage of ever closer cooperation entails that the norms of EU law, especially those derived by the CJEU, happen to be situated outside the scope of the competences conferred by the Republic of Poland as well as above the Constitution ..., thus causing the loss of sovereignty, then the stage of ‘an ever closer union’ infringes the Constitution...”³⁴

These statements were triggered in reaction to the CJEU’s finding that certain measures of the Polish judiciary reform were contrary to the Union law obligation to ensure effective legal protection in the areas covered by EU law (Art. 19 TEU).³⁵ The PCT denied competences of the Union

³³ Trybunał Konstytucyjny (*supra* note 5), 1.

³⁴ Trybunał Konstytucyjny (*supra* note 5), II 9 (3).

³⁵ See, in particular CJEU, Judgement of 15 July 2021, *Commission v. Poland*, C-791/19, ECLI:EU:C:2021:596, para. 235.

for the functioning of the national judicial system and the organisational structure thereof and hence constitutionally fenced off the national judiciary from certain applications of Article 19 TEU by holding that its interpretation is unconstitutional insofar as it grants domestic courts the competences to “bypass the Constitution ... [or] adjudicate on the basis of provisions which are not binding [because of having been revoked by the Sejm and/or found to be unconstitutional by the PCT] ... [or] review the legality of the procedure for appointing a judge ... [or] review the legality of the National Council of the Judiciary’s resolution to refer a request to the President of the Republic to appoint a judge ... [or] determine the defectiveness of the process of appointing a judge.”³⁶

2. Concerning the impact of this ruling on the objective “an ever closer union between the peoples” the broad abstract relativisation of the Union’s community of law seems to put a massive roadblock to Poland’s participation in the development of the EU. However, it is unclear how serious the abstract wording must be taken. First: The constitutional legitimacy of the PCT’s composition and its character as an independent and impartial judicial institution is not beyond any doubt. The European Court of Human Rights (ECHR) in its judgment of 7 May 2021 found the PCT as not being a “tribunal established by law” in the sense of Article 6 § 1 of the European Convention on Human Rights.³⁷ Besides that, second, these positions, if taken seriously, would diminish or even devastate Poland’s political posture in and its financial benefits from the Union. This is due to three serious deviations of the PCT’s position from the very basics of Union law: (a.) The question of “ultra vires” implies the interpretation of Union law and is already a topic of Articles 263, 267 and 277 TFEU. If the PCT sees itself and not the ECJ as the ultimate arbiter, it clearly violates Union law. (b.) The assumption of the supremacy of the constitution after ratification of the Union Treaties is a clear violation of the principle of “pacta sunt servanda”, as contained in Articles 26 and 27 of the Vienna Treaty Convention and a clear contradiction to basic requirements of the EU as expressed in several judgments of the ECJ (Case 11/70 – Internationale Handelsgesellschaft;³⁸ Case C-409/06 – Winner Wetten³⁹). (c.) The wording “sovereign state” uses a sweeping abstract term which does not take into account that all Member States have limited their sovereignty (Case

³⁶ Trybunał Konstytucyjny (*supra* note 5), 2.

³⁷ ECHR, Judgement of 7 August 2021, Xero Flor, Application no. 4907/18.

³⁸ CJEU, Judgement of 17 December 1970, Internationale Handelsgesellschaft, Case 11/70, ECLI:EU:C:1970:114, para. 3.

³⁹ CJEU, Judgement of 8 September 2010, Winner Wetten, C-409/06, ECLI:EU:C:2010:503, para. 61.