Who is the judicial boss in the EU? The European Court of Justice or the highest courts in the Member States?

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Will a legal power struggle lead to the end of the EU?

by Leo Klinkers |

In April 2021, the Institute for International and Comparative Public Law of the University of Münster published the study 'Primacy's Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law'.[1] The European Parliament's Constitutional Affairs Committee, which is concerned inter alia with the functioning of the EU's system of treaty law, had commissioned the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs to analyse the consequences of the German Federal Constitutional Court's ruling of 5 May 2020. The study itself was carried out by the University of Münster. It deals with the question of who is the judicial boss in the European Union: the European Court of Justice or the highest courts of the EU Member States? This conflict of competences is explosive and could mean the end of the EU. And also of the ECB, because the German judgment of 5 May 2020 concerns the ECB's monetary policy. Such a conflictual development is in line with the analysis of the Federal Alliance of European Federalists (FAEF) in the 'Constitutional and Institutional Toolkit of Establishing the Federal United States of Europe'[2] which indicates that an increasing accumulation of tensions and conflicts inevitably leads to a comprehensive systemic crisis with an implosion of the EU treaty system as a consequence.

1. What is going on in the EU judicial domain?

On 5 May 2020, the German Federal Constitutional Court (Bundesverfassungsgericht) ruled that the European Central Bank, with its 'Public Sector Purchases Program' (PSPP), was partly violating European treaties and was guilty of prohibited monetary state financing. With the PSPP, the ECB has, since 1 November 2019, been buying up government bonds on a monthly basis – not from the states themselves but on the secondary market – in order to stimulate the European economy and keep inflation below 2%. Some member states were very critical of that policy. The European Court of Justice, however, ruled that the PSPP fell within the competence of the ECB and did not violate the prohibition on monetary financing.

The German Federal Constitutional Court disagreed and ruled that the European Court had gone beyond its judicial mandate – *ultra vires* – of Article 19 of the EU Treaty with incomprehensible reasoning. And that therefore the judgment of the European Court was not binding in Germany. It gave the ECB three months to bring its buy-back policy in line with monetary policy.

This conflict again raised the question: who decides what is legally valid in the EU? Is it the European Court of Justice or can the highest courts of member states determine on their own authority that EU policies violate EU treaties? Just five days after the German ruling, European Commission President Ursula von der Leyen gave some hard answers to that question. She stated that the European Commission was sticking to three basic principles: (a) that EU monetary policy is an exclusive competence of the EU; (b) that EU law takes precedence over national law; and (c) that judgments of the European Court of Justice are binding on all national courts. The last word on EU law, she said, is always spoken in Luxembourg. Nowhere else.

What happened next behind closed doors is still not clear, but in early August 2020 the German Court found that PSPP had been sufficiently substantiated. The ECB was allowed to continue with the buy-back programme. But the question of the competence of the European Court versus that of national courts remained. Hence this study by Münster University, commissioned by the European Parliament's Committee on Constitutional Affairs.

It is remarkable that this question of competence should be raised again. Ursula von der Leyen's words of power on 10 May 2020 did not make it clear who is the highest judicial authority in the EU. This study, commissioned by the European Parliament, must now clarify this.

2. The position of the authors of the study

The study begins with an analysis of the supremacy doctrine, one of the cornerstones of the EU legal order. According to this doctrine, EU law takes absolute precedence over the internal legal order of the Member States, including their constitutions. And that this gives the European Court of Justice supremacy over the highest courts of the Member States.

First, the authors analyse the development of the doctrine in the jurisprudence of the European Court of Justice. This shows that, in practice, this Court, while adhering to the absolute primacy of EU law over the national law of the Member States, nevertheless shows considerable flexibility in considering the interests of the Member States. In other words, this primacy of EU law – and with it the primacy of the European Court of Justice as the highest court – is not applied in practice by that Court as an absolute.

Next, the authors examine the positions of the highest courts of the Member States with respect to this priority doctrine. This shows that the courts of the Member States have mostly accepted the primacy of EU law, but that some of them nevertheless found it necessary to contradict and disregard a judgment of the European Court in some cases.

In short, practice shows that both the European Court of Justice and highest courts in some Member States do not give absolute priority to EU law and thus also to the primacy of the European Court.

Without giving this practice a place in the ever tense relations between the EU authority and that of the Member States, the authors continue with a critical, normative assessment of the German Federal Constitutional Court's ruling on the PSPP. They argue that the judgment is plainly contrary to EU law. They underline that it has several potential negative long-term consequences. In their view, it creates uncertainty for the ECB's monetary policy and threatens to undermine the coherent application of EU law in all Member States. They argue that the EU institutions should seek to take measures to mitigate the conflict between the Federal Constitutional Court and the Court of Justice and facilitate a return of these courts to respectful dialogue.

Their first recommendation is that the EU Commission starts infringement proceedings against Germany before the Court of Justice on the basis of Article 258 TFEU (= the Treaty on the Functioning of the EU). This would bring the German violation of EU law to the political attention and put pressure on the Bundesverfassungsgericht to stop its illegal behaviour.

At the same time, they recommend that the ECB improve its justification for monetary policy, as suggested by the Bundesverfassungsgericht. This would help to reduce tensions and would only require the ECB to communicate which factors it takes into account when making monetary policy decisions in a slightly different way.

Finally, they suggest an institutional reform of the EU legal system in the long term. Following the lead of some academic commentators, they advocate the establishment of a separate Chamber of the Court of Justice, composed equally of judges from the Court of Justice and from the highest courts of the Member States, to deal exclusively with the interpretation of EU competences. Such a chamber would eliminate the feeling, whether justified or not, that the European Court of Justice is biased against European integration and does not sufficiently protect the autonomy of the Member States.

With regard to the first recommendation, it is important to take note of the text of Article 258 TFEU. It reads:

"If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union. "

It apparently escapes the authors of the study that the last sentence of this article – if actually applied by the European Commission – hands Germany back to the European Court which it has just defied.

3. Further substantiation of the claim of primacy of EU law

Although, according to the authors, the European Court of Justice has never explicitly renounced the absolute nature of the primacy of EU law, a closer analysis shows that it has applied considerable flexibility in considering the interests of the Member States. The Court

- recognised that fundamental principles of national constitutions must be taken into account in the justification analysis in the context of EU fundamental freedoms,
- left the courts of the Member States with a margin of appreciation in the application of abstract norms of EU law to concrete cases,
- and has even modified its jurisprudence to respond to the concerns of the highest courts of the Member States.

This corresponds to the fact that the highest courts of Member States have generally accepted the primacy of EU law, but some courts have expressed significant reservations in their actual jurisprudence. The authors of this study consider this situation undesirable and are in favour of fully upholding the primacy doctrine of EU law and the primacy of the European Court of Justice.

4. What are the negative consequences of the PSPP judgment?

According to the authors, the German PSPP judgment has several negative consequences for the EU's monetary policy and legal order. Especially in the longer term. The longer-term dangers concern both monetary policy and the coherence of the EU legal order. Given the vague standards – according to the authors – developed by the German Federal Constitutional Court in its PSPP judgment, monetary policy risks being under constant review by the Bundesverfassungsgericht and could prohibit the Bundesbank from participating in ECB monetary policy measures. Currently, the ECB's PEPP programme, which was designed to combat the negative effects of the COVID-19 pandemic, is the subject of proceedings. This could create considerable uncertainty for the implementation of the ECB's monetary policy.

According to the authors, the threat to the cohesion of the EU legal order could be even more serious. The relationship between the EU Court of Justice and the German Federal Constitutional Court has long been characterized by conflict. If the Bundesverfassungsgericht considers that it does not have to continue to respect the jurisprudence of the European Court of Justice, this could endanger the uniform application of EU law in the Member States. This does not only concern Germany, as the judgment may serve as an example for the courts of other Member States to defy the Court of Justice. The German judgment thus poses a serious threat to the primacy of EU law, which is one of the cornerstones of the EU legal order and guarantees the equal application of EU law within the European Union. So say the authors of this study.

5. What reactions can we expect from Member States?

It is obvious that Member States will react to these policy recommendations. They are all aimed at reaffirming the absolute primacy of EU law over that of the Member States. By recommending infringement proceedings against Germany (soon without Angela Merkel) and (again) a change in the EU treaty system, they send a signal to the other member states that the EU should not be afraid to take tough – hierarchical – action.

Whether the Member States will be impressed by this and will abandon from now on their claim to rule on their own constitutional authority remains to be seen. The following Member States have previously, in one or more cases, defied the precedence doctrine by passing their own judgement. It is an open question whether they accept that the established practice – namely a relative and not an absolute priority of EU law and the European Court – is taken away from them.

Except from Germany, opposition to the three recommendations of this study is to be expected from the following Member States.

Czech Republic

In general, the jurisprudence of the Czech Constitutional Court is considered 'integration-friendly'. Nevertheless, the Czech Constitutional Court was the first national court of a Member State to declare an EU legal act *ultra vires*. Furthermore, the Czech Republic has been one of the EU member states since 2004, but still uses the Czech Crown despite the treaty mandate to accept the Euro as its currency. According to a poll conducted in April 2019, 20% of Czechs were in favour of adopting the euro, while 75% were against and 5% were undecided. The government has not yet set a target date for joining the Eurozone and introducing the Euro.

Here we see one of the European Union's serious shortcomings: Member States that have their own reasons for not complying with EU treaty obligations do so with impunity. Even though the Treaty of Lisbon has the obligation under the name 'pacta sunt servanda': treaties must be respected. When it suits them for national interests, they shrug their shoulders, knowing that pressure to comply can easily be blocked by threatening to veto important decisions in the European Council. This administrative culture of 'EU treaties can be ignored with impunity' is so deeply rooted in the EU system that any reinforcement of the top-down hierarchical EU decision-making system organises its own resistance. When push comes to shove, the EU is not the master of anything and nobody.

Denmark

The Danish Supreme Court also belongs to the group of national courts that have defied the supremacy of EU law. In one particular judgment, it ruled that a judgment of the EU Court of Justice did not apply. As in the other cases where a national judge defies the position of the European Court, the case has its own peculiarities. In the Danish legal system, the Danish Supreme Court takes a principled stand in relation to parliament and government, trying to avoid any impression of judicial activism.

France

Traditionally, the jurisprudence of the French Conseil constitutionnel has been considered complementary to EU law and to the Court of Justice. The absence of conflicts is usually explained by the limited competence of the Conseil constitutionnel. But not always. The Conseil constitutionnel limits the primacy of EU law when it comes to a so-called constitutional identity test. In such cases, the Conseil constitutionnel reserves the right to reach a judgment itself.

The Conseil constitutionnel is not the only French court to deal with the delimitation of the applicability of EU law. In the Cohn-Bendit judgment, the Conseil d'Etat had excluded recourse to EU directives in administrative proceedings, despite the contrary case-law of the European Court. Although the Conseil d'Etat has since abandoned this line of case-law, it is an example of a Member State that found it necessary to challenge the absolute primacy of EU law.

Belgium

Belgium is also traditionally regarded as a legal system open to European integration, but the Belgian Constitutional Court has indicated that it is prepared to test EU policy against its own constitutional identity.

Hungary

The Hungarian Constitutional Court initially opted for the primacy of EU law. However, this jurisprudence abolished in 2013. Since then, the relationship between EU law and national law can be considered antagonistic. In particular, the Hungarian Constitutional Court introduced an identity check and gave itself the power to review EU law by *ultra vires* review.

This change in the jurisprudence of the Hungarian Constitutional Court is related to the political context. The institutional framework in which the Court operates has changed fundamentally since 2010. Given the political background to the decision, the Hungarian case illustrates how the doctrinal tools developed by the German Court can be used to shield a national legal order from EU law in order to preserve political power. This is a breeding ground for considerable conflict. It is expected that the Hungarian Constitutional Court will not shy away from openly defying the European Court of Justice.

Italy

Generally speaking, the Italian Constitution is considered open to international cooperation and the concomitant restrictions on national sovereignty. But the Italian Constitutional Court also developed its famous doctrine of 'counter-borders' in relation to restrictions on national sovereignty.

Initially, the Constitutional Court did not accept the primacy of EU law. Then it did, but with the reservation that the EU institutions had no right to violate the fundamental principles of Italian constitutional order or inviolable human rights. In its subsequent jurisprudence, the Constitutional Court ruled that if national law is not in line with EC law, the ordinary court can disapply it, maintaining its above-mentioned reservation.

Poland

The Polish constitution assumes the primacy of EU law. But in recent years a new political context – as in Hungary – has determined a not insignificant opposition to the EU. This reinforces the fact that this primacy of EU law is supposed to apply only to ordinary laws, not to the Constitution. This conception of the relationship between national law and EU law has been developed by the Polish Constitutional Court in a number of landmark rulings. In light of the sanctions that the EU was planning to impose on Poland and Hungary for their undermining of the independence of the judiciary, the position of the authors of this study – namely, absolute primacy of EU law and the European Court – provides a breeding ground for escalating conflicts with the EU.

6. What now?

With extensive analyses of judgments versus provisions of EU law, the authors create the impression that the observed deviations from the priority doctrine can be traced back to differences in interpretation of the rules of EU law versus the rules of the member states' own law. With the three recommendations they think it is possible that the Member States will (have to) recognise the priority doctrine for good.

In practice, the primacy of EU law under the Treaties clashes with the constitutional identity of Member States when they feel that it has been encroached upon. That is why the primacy doctrine is not applied in an absolute sense in practice. The view indirectly taken by the authors that the collision is merely a matter of difference in interpretation is not correct. In reality, it is a clash between two legal systems that are not compatible with each other. EU law and the related precedence mandate of the European Court are based on treaties. Member State law and the mandate of their supreme courts are based on constitutions. That explains the clash.

Treaty law is politically-driven law. It is instrumental to the goals of administrators. It is volatile, comes and goes with the political issues of the day. Hence the third recommendation of this study: 'let's change the treaties again'. As soon as it suits them better, administrators are eager to adapt the law by changing the treaties. In this way, EU law is not a quiet and reliable possession of the peoples but a malleable instrument of those in power who use adjustments in the law for their purposes. Constitutional law on the other hand is democracy-driven law. It is instrumental to the goals of the people. It is the foundation of a society and determines the identity of that society. Constitutional law is a quiet and reliable possession of peoples because it is rarely changed.

The EU demands the uniform application of EU law and stipulates that only the European Court of Justice may determine what is lawful. And if, in practice, the EU does not get its way, it simply changes the treaties. This relationship between intergovernmental treaty law and the constitutional law of the Member States is completely skewed. In this way, an inferior legal system of a treaty nature dictates to superior legal systems of a constitutional nature that the latter must give way to the former. That does not work. To suppose that this can be solved with the three recommendations of this study is vain. We are dealing with one of the serious systemic errors of the European Union.

Since the creation of the intergovernmental operating system with the establishment of the European Coal and Steel Community in 1951, this has come to be known as 'European integration'. In reality, the doctrine of precedence is hierarchically enforced 'assimilation': all Member States must become similar. With this doctrine of precedence, the EU strives for 'unity' imposed from above, and not for 'unity in diversity', i.e., with respect for the Member States' own sovereignty and cultural identity.

Continuing along this path will only increase the number of conflicts between Member States and the EU. The intergovernmental operating system is not suitable for imposing EU law uniformly from above – with ever-changing administrative insights – on Member States that will, in any case, continue to retain their own constitutional identity. Only a federal state form – like the United States of Europe – is the appropriate state structure. It provides, on the one hand, for law that is accepted by the Member States for the promotion of common interests and, on the other hand, for law that is the property of the Member States themselves; in other words, law over which a federal body has no say. For the motivation of this position, I refer briefly to the Constitutional Toolkit, mentioned in note 2.

The first recommendation makes a new conflict between the German Federal Court and the European Commission, or the European Court, predictable. The recommended application of article 258 of the Treaty on the Functioning of the European Union will degenerate into a showdown of which the outcome is not known in advance but will increase the distance between the EU and Germany.

The authors are aware that such an infringement procedure could escalate. But they are of the opinion that the advantages outweigh the disadvantages. By exerting pressure with such a procedure, they assume that the Federal Constitutional Court of Germany will restore the dialogue with the European Court and will neatly fall into line with EU law. They also think that such an action would be a good signal to the other member states to stop defying the primacy of the EU Court. Furthermore, this first recommendation seems to stem from the need to apply a 'preemptive strike'. Indeed, there are several cases pending before the German Federal Constitutional Court that raise questions about possible *ultra vires* action by EU institutions. The Article 258 action should nip this in the bud.

In the second recommendation, they ask the European Commission to request the ECB to adjust the PSPP's buy-back policy in line with monetary policy requirements. They see such an adjustment of ECB policy as a de-escalation of the conflict with Germany. How the authors can claim that this will de-escalate while the European Commission subjects Germany to infringement proceedings is beyond me. Moreover, the ECB has such a status of independence that it will check every request from the European Commission against its own objectives.

The third recommendation is to amend the EU Treaties in order to establish a special chamber of the Court of Justice to deal with the delimitation of EU competences. This chamber should be composed in equal parts of judges of the Court of Justice and judges of the highest courts of the Member States. Such a chamber has, according to the authors, a clear advantage. The European Court of Justice is often regarded as a 'motor' of European integration (read 'assimilation'). This implies a certain partiality in favour of the EU institutions. Partisan in the sense that the Court may not be a neutral actor when it decides on the extent of EU competences. It may then side with the EU institutions. A separate chamber deciding on questions of competence could remove such an impression.

Those who have studied the history of the European Union since 1951 see an agony of constantly amending treaties in order to briefly resolve conflicts with deep-seated causes. At least to buy a few months of peace, until the underlying causes bubble up again like a working volcano and spit out a load of destructive lava. For detailed information I refer for the sake of brevity to chapter 2 of the 'Constitutional and Institutional Toolkit for Establishing the Federal United States of Europe' mentioned in note 2.

Whether Ursula von der Leyen dares to follow up on these three recommendations is an open question. Defying Germany and the ECB carries a high risk of political failure. If she does it as a signal to other member states to conform to the precedence doctrine, she will undoubtedly realise a boomerang effect: "If the Commission even tries to bring Germany to its knees, where does that leave our own sovereign identity?"

Yet another aspect casts doubt on whether Von der Leyen would dare to set up another change to the treaty system. Last April, a group of twelve member states in the EU-General Affairs Council discussed some priorities for the Conference on the Future of Europe. They explicitly excluded the reform of the existing legislative process and the possible amendment of EU treaties: "The conference should not create legal obligations". Apart from the fact that this statement of 12 Member States weakens the conference in advance, it should be a clear signal to Von der Leyen to at least ignore the third recommendation of this study.

I would like to add that Ursula von der Leyen would be wise to cancel the Conference on the Future of Europe after all. Instead, she should give the go-ahead to replace the undemocratic and brain-dead EU with the democratic and effectively functioning United States of Europe.

[1] See for this study by the University of Münster: https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2021)692276

[2] See for the Toolkit: https://www.faef.eu/request-for-toolkit/.

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