

Fiscal Union – or the legally impossible task to stabilize the Euro

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Abstract:

The European financial and sovereign debt crisis (the Eurocrisis) challenges the continuation of the Economic and Monetary Union, and thereby the continuation of the single currency Euro. At the moment, the crisis remains largely unsolved. EU leaders put forward in the Five Presidents' Report the idea of establishing Fiscal Union. However, the project of Fiscal Union raises severe legal concerns on both the EU as well as the national constitutional level. This contribution illustrates a selection of legal challenges that Fiscal Union appears to face and subsequently relates them to legitimacy considerations as well as recent developments, including Brexit and the proposed multi-speeded Europe in context of EMU.

Keywords: Fiscal Union – Fiscal Integration – National Constitutional Identity – Brexit – Multi-speeded EMU

I. Introduction – The Dilemma Fiscal Union Faces

The European financial and sovereign debt crisis, also referred to as the Eurocrisis, can be clearly classified as major – maybe even the most existential – challenge to the European integration process since its formal initiation by the Treaty of Rome.¹ For almost a full decade now, the continuation of the single currency Euro – and with it the future of the Economic and Monetary Union (EMU) – remains largely insecure. Despite an abundance of specific crisis-measures, the asymmetric structural deficiencies underpinning the EMU framework are unsolved and continue to threaten the stability of the single currency.² Therefore, more structured reforms appear unavoidable in order to establish a thriving single currency and to equip the EMU against potential future crises.

At the EU level, the most authoritative proposal envisages the creation of Fiscal Union in order to complement the existing EMU framework, including the establishment of a ‘financial stabilization function’ and an enhanced supervision of national budgetary policies by instituting *inter alia* an advisory European Fiscal Board.³ In other words, the proposal suggests the creation of a common Eurozone budget in order to enable EU action *vis-à-vis* macroeconomic shocks experienced by members of the Euroarea, the possibility to generate revenues for such budget, potentially entailing some sort of EU taxation power, and finally the set-up of an EU executive institution administering the common budget as well as supervising the national budgetary planning. Thus, the proposed Fiscal Union represents a far-reaching project, which would reshape the relationship between national and EU legal order by encroaching on national fiscal prerogatives.

¹ Cf. D Chalmers, D Jachtenfuchs and C Joerges, 'The Retransformation of Europe' in D Chalmers, D Jachtenfuchs and C Joerges (eds) *The End of the Eurocrats' dream - Adjusting to European Diversity* (Cambridge University Press, Cambridge 2016) 1; B Eichengreen, 'European Monetary Integration with Benefit of Hindsight'(2012) 50 *Journal of Common Market Studies* 123, 133; B Ritterberger and F Schimmelpfennig, 'Kontinuität und Divergenz. Die Eurokrise und die Entwicklung europäischer Integration in der Europaforschung'(2015) 56 *Politische Vierteljahresschrift* 389; M Ruffert, 'The European Debt Crisis and European Union Law'(2011) 48 *Common Market Law Review* 1777.

² Broad academic consensus that further (reform) steps are required, cf. *inter alia*: M Dawson, H Enderlein and C Joerges, 'Introduction: The Governance of the Transformation of Europe's Economic, Political, and Constitutional Constellation since the Euro-Crisis ' in M Dawson, H Enderlein and C Joerges (eds) *Beyond the Crisis - The Governance of Europe's Economic, Political, and Legal Transformation* (Oxford University Press, Oxford 2015) 3; A Hinarejos, 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration '(2012) 14 *Cambridge Yearbook of European Legal Studies* 243, 244; FW Scharpf, 'The Costs of Non-Disintegration: The Case of the European Monetary Union' in D Chalmers, D Jachtenfuchs and C Joerges (eds) *The End of the Eurocrats' dream - Adjusting to European Diversity* (Cambridge University Press, Cambridge 2016) 37-39; S Van den Bogaert and A Cuyvers, 'Of Carrots and Sticks - What Direction to Take for Economic and Monetary Union?' in B Steunenbergh, W Voermans and S Van den Bogaert (eds) *Fit for the Future? Reflections from Leiden on the Functioning of the EU* (Eleven International Publishing, The Hague 2016) 133.

³ J-C Juncker and others, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* (2015).

In light of the on-going European crises – including rising anti-European movements in many European capitals, the commencing Brexit-negotiations, and the internal EU division on fundamental questions⁴ – such far reaching proposal appears unrealistic. Indeed, Fiscal Union would integrate the Union even further moving towards Political Union in times when EU integration is being challenged on all different fronts.⁵

Despite severe political challenges, the prospect of Fiscal Union is confronted with a major legal dilemma: Engaging in Fiscal Union, as envisaged by the Five Presidents' Report, and thereby building a deeper fiscally integrated EMU, appears to be both necessary to stabilize the Euro and legally impossible to achieve considering EU law as well as national constitutional objections to EU integration.

On the one hand, Fiscal Union has the potential to address fundamental structural deficiencies which the Eurocrisis unveiled. Fiscal Union would establish strong EU supervision over the national budgetary process, combined with significant EU financial capacities to address arising macroeconomic shocks, thereby preventing potentially harmful contagious effects.⁶

On the other hand, the EU legal framework appears increasingly limited for accommodating further integration, which is illustrated by the apparent need of amending the Treaties to establish fiscal competences (principle of conferral). At the same time, national constitutional actors oppose the idea of further EU integration for the sake of preserving national constitutional identity, and with it domestic sovereignty as well as the democratic process.⁷

This contribution outlines and assesses a selection of relevant legal limits to fiscal integration imposed by EU and national legal order. This assessment includes the contextualization of such limits in times of Brexit and proposed multi-speeded integration,⁸ questioning equally the legitimacy of EU fiscal integration.

⁴ Including the refugee question, Crimea conflict, as well as situation in Syria, cf. L Van Middelaar, 'Taking Decisions or Setting Norms? EU Presidencies between Executive and Legislative Power in a Crisis-Driven Union' in B Steunenberg, W Voermans and S Van den Bogaert (eds) *Fit for the Future? Reflections from Leiden on the Functioning of the EU* (Eleven International Publishing, The Hague 2016) 11-12.

⁵ Cf. MP Maduro, 'Foreword: Fiscal Capacity and Constitutional Reform in the EMU' in M Adams, F Fabbrini and P Larouche (eds) *The Constitutionalization of European Budgetary Constraints* (Hart Publishing Oxford 2014) x.

⁶ A Nicoll, 'Fiscal Union by Force'(2011) 53 *Survival* 17, 19.

⁷ Prominently expressed by the German federal constitutional court: 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 - *Financial Support for Greece* BVerfG; 2 BvE 6/12 - *ESM and Fiscal Compact-judgment* BVerfG; 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 - *OMT-reference* BVerfG.

⁸ As recently envisaged within the Commission White Paper as one potential future scenario, E Commission White Paper on the Future of Europe - Reflections and Scenarios for the EU27 by 2025 (2017).

II. EU Law Limits to Fiscal Union

Fiscal Union appears to expand the competences conferred upon the EU in a highly sensitive area to a considerable extent. From an EU legal point of view, such fiscal integration collides *inter alia* with the principle of conferral, and raises questions on the adequacy of the (existing) institutional framework.

1. Principle of Conferral

It is well known that the principle of conferral limits the Union's potential scope of action to competences and areas that are attributed to it, as enshrined in Articles 4 and 5 TEU.⁹ Directly deriving from this principle, the Union may not empower itself unilaterally to expand its field of action.¹⁰ Expanding the existing catalogue of competences requires a direct empowerment by the Member States, which have to limit their own sovereign competences in order to render Union action legally possible. Thus, in case the Union wants to attain and exercise competences that are not covered by the existing Treaty framework, such increase in power would require Treaty amendment.¹¹

Considering the existing legal Treaty framework, the Union is exclusively competent in monetary matters of the Eurozone;¹² economic matters are coordinated at the Union level, however, Member States retain ultimate responsibility and liability for economic policies.¹³ The competence catalogue itself does not contain any explicit reference to fiscal policies. Furthermore, it is questionable whether the existing EMU framework, in particular Articles 119-138 TFEU, could be interpreted in a manner that would allow the creation of Fiscal Union.¹⁴ This reluctance towards too readily accepting Union competence in fiscal matters finds its confirmation when reflecting the implication of Fiscal Union: Member States would lose control over essential political powers, namely the budgetary planning which forms the

⁹ P Craig and G de Búrca, *EU Law Text, Cases, and Materials* (6th edn, Oxford University Press, Oxford 2015) 74-75.

¹⁰ Following the jurisprudence of national constitutional courts such empowerment would amount to an *ultra vires* act: 2 BvR 2661/06 - *Honeywell-judgment* BVerfG, paras. 54-61.

¹¹ B Guastaferrò, 'The European Union as a *Staatenverbund*? The endorsement of the principle of conferral in the Treaty of Lisbon' in M Trybus and L Rubini (eds) *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar Publishing Limited, Cheltenham 2012) 123-124.

¹² Article 3 (1) (c) TFEU establishes this exclusive competence.

¹³ Article 5 (1) TFEU; on the asymmetric construction of exclusive monetary powers and decentralized economic policies, RM Lastra and J-V Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' (2013) 32 *Yearbook of European Law* 57, 62-65.

¹⁴ It was already argued that the existing legal framework was extensively used during the Eurocrisis, which reduces the potential of further exploitation: Ruffert, 1785-1789; K Tuori and K Tuori, *The Eurozone Crisis - A Constitutional Analysis* (Cambridge University Press, Cambridge 2014) 255.

essence of democratic decision-making, a claim that is forcefully made by national constitutional courts.¹⁵ Stretching the existing legal framework does, consequently, not provide a satisfying option due to the sensitivity of such competences. Therefore, the proposed Fiscal Union would – most likely – require a direct mandate from the Member States, meaning Treaty amendment which must attribute fiscal powers to the Union. Yet, such Treaty change is exposed to legitimacy challenges as well as the ‘*Brexit*’-challenge.

Legitimate Exercise of Fiscal Competences at EU Level?

Firstly, fiscal competences form part of a catalogue of highly sensitive domestic competences. In particular, the power to decide upon revenue and expenditure constitutes the nucleus of national democratic decision-making.¹⁶ Citizens have the possibility to scrutinize political decisions taken by (national) political actors through regular elections. Whether or not the Union is able to guarantee a comparable degree of democratic control is highly contested.¹⁷ The resulting question has to be whether the Union is in a legitimate position to attain fiscal competences, in case the prevailing democratic deficiencies remains in place.

Given the outlined centrality of fiscal decision-making for the democratic process, it appears that Union action can only be legitimate in case democratic safeguards are established, securing significant citizen scrutiny over such decisions.¹⁸ Following this argument, Fiscal Union would necessitate the prior fixing of the existing democratic deficit, before any fiscal integration could be realized. By the same token, establishing democratic safeguards would diminish the pronounced national constitutional objections to a certain extent given that the citizens’ scrutiny may be secured at the EU level, allowing for democratic control.

Yet, empowering the Union in fiscal matters appears to have strong pro-integrative, continuous tendencies. This means that attributing fiscal competences to the Union level appears to be only the first step towards an ever-more competent Union. Hence, if one were to accept this logic, such finding would conflict with the established principle of conferral, given that Union action would *de facto* become hardly controllable through the Member States.

¹⁵ The sensitivity of fiscal competences for national sovereignty and the democratic process is forcefully expressed in the mentioned national jurisprudence, cf. *supra* n. 7.

¹⁶ Partly even called the “crown-jewels” of the national parliaments, cf. S Puntischer Riekmann and D Wydra, ‘Representation in the European State of Emergency: Parliaments against Governments?’(2013) 35 *Journal of European Integration* 565, 567.

¹⁷ Debate on the democratic deficit of the Union, overview provided by: Craig and de Búrca, *supra* n. 9, 151-159.

¹⁸ This is the line of arguments presented in the German national constitutional judgments: cf. *supra* n. 7.

Treaty Amendment and Brexit

Secondly, in case one was to accept that Treaty amendments are compulsory and that such amendments are equally necessary to stabilize the EMU as fast as simply possible to prevent a newly eruption of the Eurocrisis, two risks should be mentioned.

In the first place, Treaty reforms, especially such far-reaching reforms allowing for the envisaged Fiscal Union, are difficult to achieve and risk to fail throughout the negotiation process. This potential risk of failed Treaty reform is incalculable and would certainly reduce the credibility of European unity as well as the stability – and even the continuation – of the Euro. In particular, the financial markets might be likely to punish failed Treaty reforms, which would potentially increase the pressure on the Eurozone.¹⁹ Thus, any Treaty amendment seems only desirable in case of high success likelihood, which must be at least questioned in the current climate of on-going challenges to the European integration on all fronts.²⁰

Additionally, any Treaty reform following Article 48 TEU requires unanimity.²¹ Hence, in times of Brexit, and before such exit from the European Union is finally concluded, the United Kingdom remains member to the Treaty and retains its voting rights. Thus, Treaty amendments based on Article 48 TEU would provide the British government with a *de facto* veto power, given that the Treaties continue to apply during the negotiations following Article 50 (3) TEU. Therefore, potential Treaty reforms during the Brexit negotiations would require British approval and could make such vote dependent upon the process of negotiations. The British government could simply exploit their required vote as a bargaining power to achieve own, national interests. Although it is not apparent for the moment that the EU envisages drastic Treaty change during the next two (or more) years, it seems nevertheless relevant to hint towards such potential bargaining power, also in case the Eurocrisis forces the EU to take immediate and unexpected measures – which might equally require expanding the existing Treaty mandate. In such a scenario, Brexit has a highly disruptive potential. Therefore, the required Treaty change could only happen after Brexit is finalized.

¹⁹ The failed reform to establish the Constitutional Treaty exemplified this risk, cf. N Scicluna, 'EU Constitutionalism in Flux: Is the Eurozone Crisis Precipitating Centralisation or Diffusion?' (2012) 18 *European Law Journal* 489, 489-490; more generally: L Cohen-Tanugi, 'The End of Europe?' (2005) 84 *Foreign Affairs* 55.

²⁰ B Steunenberg, W Voermans and S Van den Bogaert, 'Introduction - The Dutch Presidency: Coping with a Union in Flux' in B Steunenberg, W Voermans and S Van den Bogaert (eds) *Fit for the Future? Reflections from Leiden on the Functioning of the EU* (Eleven International Publishing, The Hague 2016).

²¹ Both, the ordinary revision procedure and the simplified revision procedure require unanimity.

2. Reverse Majority Vote – Fixing the Institutional Framework?

The Eurocrisis equally illustrated that the enforcement of the existing legal framework, especially the Stability and Growth Pact (SGP), was ineffective given that Member States were able to easily oppose recommended sanctions by the Commission at the Council level.²² One explanation for the Member States' reluctance to impose such sanctions might be the potential fear that such sanctions could easily turn against any Member State. In the ultimate consequence, not imposing sanctions reduces the threat for each Member State to be sanctioned at the EU level for a violation of EU deficit rules.

The "Six-Pack" addressed this issue by introducing the so-called reverse majority vote for the SGP-deficit procedure, meaning that the Council has to vote with a qualified majority against recommended Commission sanctions. Thus, it requires the Council to take positive actions in order to prevent such sanctions. Despite severe legal doubts considering the compatibility of reverse majority vote with the existing legal framework,²³ the effectiveness of the changed procedure should be shortly addressed.

At the outset, it is apparent that the Commission did not yet employ the reverse majority vote in the outlined context, although it had sufficient opportunities to recommend sanctions and to challenge the Council. One explanation for this omission is the lacking legitimacy of the Commission to enforce the existing framework: The Commission would directly sanction the domestic democratic decision-making process in the Member States on budgetary spending. Hence, it is questionable whether the Commission is in a legitimate position to oppose national parliaments and governments – that reached the budgetary planning via democratic debate – by imposing sanctions.

In sum, the question must be whether the European Commission is, indeed, the appropriate institution to enforce the SGP framework, and connected to this, whether the reverse majority vote improved the Commission's position in that regard. Currently, imposing sanctions against individual Member States appears unlikely, given that the Commission would expose itself to potentially harsh opposition from the Member State concerned, and subsequently even to opposition from the citizens of that Member State. Thus, enforcing the SGP through reverse majority vote has the potential to increase the prevailing Euroscepticism.

²² Partly described as the failure of peer-pressure, Lastra and Louis, *supra* n. 13, 5-6.

²³ R Palmstorfer, 'The Reverse Majority Voting under the 'Six Pack': A Bad Turn for the Union'(2014) 20 European Law Journal 186, 187-188.

With regard to the difficult enforcement of the SGP sanctions, which can be partly explained by the outlined missing legitimacy of the Commission to scrutinize the domestic democratic decision-making process, the question arises which institution possess the required legitimacy to do so. As it stands, establishing the proposed fiscal governing board, some sort of Eurozone government, must – after all – face the same legitimacy challenge. Therefore, it appears that enforcement of the SGP, but also the creation of Fiscal Union, requires a legitimate institution to secure the enforcement of the legal framework.

3. The Resulting Legitimacy Challenge

Fiscal Union is confronted to severe legitimacy concerns. Firstly, the principle of conferral requires a direct mandate for exercising fiscal competences at the Union level, with the inevitable risk that such competences would be detached from direct democratic control. At the same time, a potentially required Treaty reform might expose the Union to additional risk, particularly in the course of Brexit negotiations. Subsequently, the introduced reverse majority vote illustrates the difficult position of the European Commission, which apparently lacks the necessary legitimacy to exploit the new voting arrangement and to enforce the sanctions-possibility against the Member States. Consequently, Fiscal Union seemingly requires the creation of a solid institution with a legitimate mandate.

Considered together, the outline legitimacy concerns are directly connected to the sensitivity of fiscal competences: Such competences form the very nucleus of democratic decision-making. The European Union is therefore confronted to the claim that it – or at least the existing framework – does not provide the required democratic safeguards necessary for exercising fiscal competences. This challenge is powerfully pronounced on the national constitutional level.

III. National Constitutional Law Challenging EU Fiscal Integration

National constitutional courts (or related constitutional actors) contest increasing EU competences through a growing body of national constitutional limitations, which opposes in general the prospect of further EU integration and more precisely fiscal integration, particularly fearing the erosion of constitutional identity, sovereignty and democracy.²⁴

²⁴ Extensive comparative analysis in the context of *OMT*-reference by the *Bundesverfassungsgericht*, M Claes and J-H Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler Case*'(2015) 16 German Law Journal 917, 941-967; on the relationship between national constitutional courts and the CJEU, M Dicosola, C Fasone and I Spigno, 'Foreword: Constitutional

Although these limits are embedded within their respective national constitutional context and therefore related to constitutional specificities, certain conceptual similarities can be detected.²⁵

Given the limited scope of this contribution, the assessment of national constitutional limits will be limited to the *Bundesverfassungsgericht*, as court with extensive jurisprudence on this issue, the Polish constitutional tribunal in light of Poland's obligation to join the EMU, as well as the Finnish constitutional committee, which appears to provide a rather flexible approach towards European integration.

1. Bundesverfassungsgericht

The German federal constitutional court (*Bundesverfassungsgericht*) has a particularly well developed jurisprudence on the interaction of EU law with the national constitutional framework. The extensive jurisprudence on this relationship results from the position of the *Bundesverfassungsgericht* as ultimate guardian of the German constitution.²⁶ Its task is, *inter alia*, to ensure compliance with the German eternity clause (Article 79 (3) *Basic Law*), which protects certain overarching values indefinitely, such as democracy, federalism, and human dignity.²⁷ Stemming from its historic responsibility, the court is keen to preserve German principles and values against an increasingly competent European Union.

One specific example of this jurisprudence is the introduced parliamentary budgetary responsibility concept, a special application of the identity review introduced during the emergence of the Eurocrisis.²⁸ According to the court, the German parliament is prevented from surrendering its budgetary competences to the supranational level, establishing that doing so would violate the principle of democracy and more precisely erode the right to vote

Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis'(2015) 16 German Law Journal 1317.

²⁵ These claimed conceptual similarities are directly recognized by the national constitutional courts, which interestingly refer to the respective case-law in order to support national opposition against EU measures, cf. OMT reference, para. 30.

²⁶ Which is particularly important from a historical perspective, cf. U Preuss, 'The implications of 'Eternity clauses': the German experience'(2012) 44 Israel Law Review 429, 439-440.

²⁷ Article 79(3) *Basic Law* in conjunction with Articles 1 and 20 *Basic Law*.

²⁸ The *Bundesverfassungsgericht* established already in its Lisbon-judgment that 'particularly sensitive areas, such as 'fundamental fiscal decisions on public revenues and public expenditure' had to remain under the control of the German parliament, cf. 2 BvE 2/08 - *Lisbon-judgment* BVerfG, paras. 167, 250, 252; Budgetary responsibility stems from Article 38 (1) *Basic Law* read in conjunction with Articles 79 (3), 20 (1) and (2) *Basic Law*, cf. the relevant jurisprudence: 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 - *Financial Support for Greece* , para. 120; 2 BvE 6/12 - *ESM and Fiscal Compact-judgment* , para. 122; 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 - *OMT-reference* , para. 77.

enshrined in Article 38 (1) *Basic Law*.²⁹ Hence, all fundamental and central decisions on fiscal matters have to be taken by the *Bundestag*, requiring equally that this prerogative is preserved for future German parliaments.³⁰

Considering this constitutional limitation, the substantive requirement appears to be that all budgetary decisions, which have a major impact on the German budget – primarily resulting from the comparison of the budgetary decision with the overall federal budget – remain under the control of the *Bundestag* and are not transferable to the Union level. Applying budgetary responsibility carefully to the proposed Fiscal Union, major concerns as to the compatibility with the German constitutional order are apparent.

Firstly, the German legislature would only be allowed to transfer a very limited part of fiscal competences to the Union level (requiring equally that such transfer is reversible).³¹ On the basis of this limit, the creation of direct EU taxation and a considerable common EU budget appears difficult, given that the German parliament would suffer a significant loss of control in fiscal matters. This, however, would directly conflict with the illustrated jurisprudence of the *Bundesverfassungsgericht*.

Hence, the budgetary responsibility concept seems to suggest that Fiscal Union is in conflict with the principle of German democracy protected in Article 79 (3) *Basic Law*. Ultimately, this supposed conflict may only be resolved by abolishing the eternity clause, and with it the German constitution in its current form,³² a highly unlikely development.

2. Polish Constitutional Tribunal

As current non-Eurozone country, Poland has nevertheless the formal obligation to become a member of the single currency and the EMU, once the convergence criteria are met.³³ However, the Polish constitutional tribunal ruled already in its first judgment with significant EU dimension that any transfer of sovereign competences from the Polish to the supranational

²⁹ Cf. 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 - *Financial Support for Greece* BVerfG, para. 121.

³⁰ Although, the court establishes an apparently harsh limit, the application to the concrete cases remains rather 'soft', cf. A von Ungern-Sternberg, 'Parliaments - Fig Leaf or Heartbeat of Democracy? German Constitutional Court - Judgment of 7 September 2011 - Euro Rescue Package'(2012) 8 *European Constitutional Law Review* 304, 315.

³¹ Questionable in that regard whether the option of leaving the EU following Article 50 TEU is sufficient to claim that fiscal integration is reversible.

³² Following the prescribed procedure in Article 146 *Basic Law*, T Herbst, 'Legale Abschaffung des Grundgesetzes nach Art. 146 GG'(2012) 45 *Zeitschrift für Rechtspolitik* 33.

³³ Only Denmark and the United Kingdom retain a formal opt-out from the single currency.

EU level would be limited in its material scope.³⁴ The tribunal subsequently added that the Polish constitution required a clear-cut conferral. Hence, EU membership may not result in eroding the Polish status as sovereign state.³⁵

Conceptually, this limit shows considerable overlap with the above mentioned identity review exercised by the *Bundesverfassungsgericht*. In contrast to the German constitutional jurisprudence, however, the Polish constitutional tribunal establishes a highly abstract limit to European integration by insisting that a – not (yet) precisely determined – substantive core has to remain at the domestic level in order to preserve national constitutional identity, and more precisely the sovereignty of the Polish state.

Carefully extending this constitutional review to the envisaged Fiscal Union, serious doubts as to the compatibility of fiscal integration with the Polish constitution must arise. Indeed, the realization of Fiscal Union could constitute a major obstacle for Polish membership within the EMU, given that the transfer of fiscal competences to the supranational level might fall within the matters that must remain at the national level to preserve Polish sovereignty. Thus, the creation of Fiscal Union might constitute a major obstacle to (or even exclude) Polish Eurozone membership.

3. Finnish Constitutional Committee

Finally, Finland provides a somewhat different picture in contrast to the outlined strict constitutional scrutiny established by the German federal constitutional court and the Polish constitutional tribunal. Finland has a constitutional committee, attached to the national parliament (*Eduskunta*), which is *inter alia* in charge of assessing the compatibility of proposed EU measures with the Finnish constitutional framework. Interestingly, this constitutional framework is explicitly open towards new developments. This open approach is exemplified by the re-conceptualization of the principle of Finnish sovereignty after accession to the EU.³⁶ The existing constitutional framework provides a considerable amount of

³⁴ Transfer only possible ‘in relation to certain matters’, cf. *K 18/04 - Poland’s Membership in the EU* Trybunał Konstytucyjny, para. 7.

³⁵ *K 32/09 - Treaty of Lisbon* Trybunał Konstytucyjny, para. 2.5.

³⁶ T Ojanen, ‘The Eu at the Finnish Constitutional Arena’(2013) *Tijdschrift voor Constitutioneel Recht* 242, 245-247.

flexibility, given the fact that the parliament can even approve a constitutional change in case of identified constitutional conflicts.³⁷

Hence, Fiscal Union would be, at least theoretically, achievable, given that the constitution-amending legislature appears to be entitled to change the constitutional provisions in order to allow for the transfer of fiscal competences to the supranational level. Thus, the Finnish constitutional framework suggests the (theoretical) possibility of fiscal integration.

4. Interim Conclusion

The three highlighted examples illustrate different constitutional developments. Although an increasing amount of constitutional limits opposes the idea of a deeper integrated Union, the Finnish example shows that the constitutional framework – at least in some Member States – provides considerable margin for fiscal integration. At the same time, the German federal constitutional court and the Polish constitutional tribunal established some sort of red-line, which renders Fiscal Union virtually impossible.

Considering this diversified picture, the question arises whether there is a way forward towards Fiscal Union despite national constitutional opposition within some Member States.

VI. Conclusions and Wider Implications – What Future for the EMU?

The discussion on legal limits to fiscal integration illustrates the challenges that Fiscal Union, as envisaged by the Five Presidents' Report, faces. Such limits are imposed by the national constitutional order or inherent in the EU legal framework. Considering the overall legal framework, the question has to be what future the project of fiscal integration has, indeed. One option would be to advance a Europe of different speeds, as proposed by the Commission's recent White Paper.³⁸

Fiscal Union by Choice – Fiscal Integration With(out) Future?

The legal constitutional assessment illustrated clearly that some domestic constitutional actors established severe limits to Fiscal Union, whereas other actors indicated constitutional flexibility regarding European fiscal integration. Hence, one idea could be to propose an EMU of different speeds, allowing those Member States that are willing and constitutionally able to

³⁷ LFM Besselink and others National Constitutional Avenues for Further EU Integration 2014, 85; T Ojanen, 'Eu Law and the Response of the Constitutional Law Committee of the Finnish Parliament'(2007) 52 Scandinavian Studies in Law 203, 216-218.

³⁸ E Commission, *supra* n. 8.

establish Fiscal Union to proceed, excluding Member States with strict constitutional limits from this project. From a formalistic legal point of view, such optional Fiscal Union membership renders the outline constitutional clash inapplicable, given that Member States are not obliged to integrate fiscally, enabling them to protect national sovereignty and democracy.

However, besides such legal advantages, it is questionable whether it is indeed possible to make Fiscal Union an elective part of the EMU, given that the prospect of fiscal integration aims to address some of the most fundamental flaws inherent in the EMU structure, as exemplified by the Eurocrisis. Hence, the crucial question is whether a multi-speeded EMU is feasible. Considering the Eurocrisis, it appears that precisely the insufficient overview over national budgetary processes, combined with *inter alia* weak EU financial capacity, were specific root-causes for the severe troubles experienced. Therefore, it seems highly questionable whether Fiscal Union could become a non-compulsory element of EMU in light of its necessity for a stable Euro. Establishing Fiscal Union by choice would preserve the EMU deficiencies for those Member States that are not participating, exposing the Eurozone at large to the risk of a repetition of the Eurocrisis.

Moreover, it seems that Germany would be currently prevented from joining Fiscal Union given that the jurisprudence of the *Bundesverfassungsgericht* imposes strict limits to fiscal integration. However, the benefit of Fiscal Union without the biggest Eurozone economy has to be at least questioned, especially in light of further Member States which might be prevented from integrating fiscally due to the existing constitutional framework, including Poland. Therefore, introducing optional fiscal integration – a Fiscal Union by choice – is inefficient and no real option.

Overall, Fiscal Union seems to be stuck in the outlined dilemma of necessity and legal impossibility of fiscal integration. The national constitutional actors continue to question the legitimacy of EU action, particularly in the highly sensitive area of EMU policy. Therefore, it appears that the future of Fiscal Union – and with it the future of the Euro – remains (legally) uncertain.