ARTICLES

REASONING, INTERPRETATION, AUTHORITY, PLURALISM, AND THE *WEISS/PSPP* SAGA

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ABSTRACT: This *Article* deals with the question of the quality of legal reasoning of the Court of Justice of the EU. It first introduces the German Constitutional Court's decision in *PSPP* (ECLI:DE:BVerfG:2020:rs20200505.2bvr085915), which brought an unprecedent challenge to the authority of the Court of Justice regarding interpretation of EU law. Then it discusses how national courts, when exercising the constitutionality review domestically, engage in interpretation of EU law. As an example, recent case law of the German Constitutional Court is analysed. Specific focus is placed on the PSPP decision, in which the German court took issue with the Court of Justice's interpretive reasoning in *Weiss* (case C-493/17 ECLI:EU:C:2018:1000), thereby contesting the latter's monopoly in saying definitively not only what the EU law is, but also how to determine what the EU law is. One of the key takeaways was that if a judgment of the Court of Justice suffers from gross "methodological" deficiencies, that makes it inapplicable in domestic legal system. However, this suggestion does not change much regarding judicial interpretations and dynamic development of EU law, as will be proposed in this *Article*, and for several reasons. First, what makes interpretive arguments admissible is in general widely shared among the courts in the EU. Second, national courts have already on several occasions provoked the Court of Justice to improve its reasoning. Finally, the concept of interpretive pluralism explains the national courts' ever-greater engagement with the matters of interpretation of EU law.

KEYWORDS: German Federal Constitutional Court – Court of Justice of the European Union – legal reasoning and interpretation – institutional authority – interpretive pluralism – *Weiss* and *PSPP*.

I. INTRODUCTION

In the European Union, many hold these truths to be self-evident: that the Court of Justice of the EU (CJEU) has the final say on both the meaning of provisions of EU law and the

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acceptable ways of interpreting those provisions. That the judgments of the Court have the status of de facto precedents with an *erga omnes* effect, binding all courts in all Member States. That the art. 267 TFEU preliminary ruling procedure structures a hierarchical relationship between the courts in Member States and the CJEU, the latter sitting on the top of that hierarchy and enjoying the interpretive monopoly. That national courts that refer preliminary questions to the CJEU in principle accept to abide by the responses they receive. That national courts are in charge of a decentralised application of EU law and have nothing to do with the authoritative interpretation of EU law.

The CJEU's supreme authority in the matters of interpretation of EU law as sketched above for a long time received no serious challenges. Until very recently, that is, when *Weiss* met *PSPP*.

The story is already well-known:[1] in the *PSPP* decision,[2] the German Federal Constitutional Court (GFCC) refused to accept the CJEU's judgment in *Weiss* that came in response to its own preliminary reference for interpretation of EU law.[3] The Karlsruhe court held the judgment of the Court of Justice to suffer from a flawed interpretive reasoning,[4] which made it *ultra vires* and hence inadmissible not only from the perspective of the German Basic Law but, in the German court's view, from the perspective of EU law as well.

With this, the GFCC openly contested the CJEU's interpretive monopoly and its authority to say definitively not only *what* the EU law is, but also *how to determine* what the EU law is. The German court thus concluded that it intends to accept the Court of Justice's interpretations of EU law only as long as they stay in accordance with "the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States".[5]

The immediate verdict, just short of unanimity (at least in the English-speaking – or better, outside-of-Germany – world), seemed to be: the Karlsruhe court got it "profoundly" wrong. So, the *PSPP* decision was quickly dismissed in those corners of the blogosphere populated by EU constitutional law/judicial politics *aficionados* as

- a "profound threat" to the EU legal order;[6]

[1] See more than a dozen of contributions to the September 2020 issue of German Law Journal, 'Special Section: "The German Federal Constitutional Court's PSPP Judgment"'.

[2] Federal Constitutional Court judgment of the Second Senate of 5 May 2020 2 BvR 859/15 (*PSPP*) ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

[3] Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

[4] The GFCC thus repeatedly treated the Luxembourg court's reasoning with words like "objectively arbitrary", "untenable", "meaningless", and "incomprehensible". See *PSPP* cit. paras 118-119, 127 and 153, respectively.

[5] *Ibid.* para. 112.

[6] DR Kelemen, P Eeckhout, F Fabbrini, L Pech and R Uitz, 'National Courts Cannot Override CJEU Judgments. A Joint Statement in Defense of the EU Legal Order' (26 May 2020) Verfassungsblog verfassungsblog.de.

- an "unfortunate decision" that causes "the profound damage to the integrity of the EU's legal order and its rule of law";[7]

- "a bad decision, at a bad time, and with worse consequences";[8]

- "a wrong decision at the wrong moment";[9]

- "a disproportionate reaction [...] an irresponsible act that only a very vain and arrogant court can afford".[10]

Some felt – in a manner evocative of Joseph Conrad's Mr. Kurtz[11] – profound "horror"[12] upon reading this "unprecedented act of legal vandalism" committed by the "Germany's failing court".[13] Harsh words, indeed. Then, arguably vindicating some of them, the European Commission in June 2021 decided to initiate the infringement proceedings against Germany, claiming that the *PSPP* decision breaches "fundamental principles of EU law, in particular the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the respect of the jurisdiction of the European Court of Justice under Article 267 TFEU".[14]

The biggest problem for the GFCC seemed to be a mismatch between its stated intentions and the way it went after them in practice. Given that it has arguably failed to deliver on the latter, the former was disregarded as well. Here I will not repeat extensively the well-founded criticism of the German court's decision.[15] Suffice it to mention several missteps it took while bashing the CJEU's standard of proportionality review. It was noted that the GFCC's proportionality assessment was likewise flawed, "simply not comprehensible [...] parochial, misguided and reductive".[16] The Karlsruhe court, it was added, clumsily and illegitimately "painted in German" the EU's conception of proportionality, surpris-

[7] D Sarmiento and JHH Weiler, 'The EU Judiciary After Weiss. Proposing A New Mixed Chamber of the Court of Justice' (2 June 2020) Verfassungsblog verfassungsblog.de.

[8] F Fabbrini, 'Eurozone auf Wiedersehen?' (5 May 2020) BRIDGE Blog: Brexit Research and Interchange on Differentiated Governance in Europe bridgenetwork.eu.

[9] MP Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' (6 May 2020) Verfassungsblog verfassungsblog.de.

[10] D Sarmiento, 'Requiem for Judicial Dialogue – The German Federal Constitutional Court's judgment in the Weiss case and its European implications' (9 May 2020) EU Law Live eulawlive.com.

[11] J Conrad, *Heart of Darkness* (Coyote Canyon Press 2007).

[12] P Meier-Beck, 'Ultra Vires?' (11 May 2020) D'Kart Antitrust Blog www.d-kart.de.

[13] P Eleftheriadis, 'Germany's Failing Court' (18 May 2020) Verfassungsblog verfassungsblog.de.

[14] European Commission, June Infringements Package: Key Decisions (9 June 2021) ec.europa.eu.

[15] For a recent take, see J Basedow, J Dietze, S Griller, M Kellerbauer, M Klamert, L Malferrari, T Scharf, D Schnichels, D Thym and J Tomkin, 'European integration: Quo Vadis? A Critical Commentary on the PSPP Judgment of the German Federal Constitutional Court of May 5, 2020' (2021) ICON 188.

[16] T Marzal, 'Is the BVerfG PSPP Decision "Simply not Comprehensible"? A Critique of the Judgment's Reasoning on Proportionality' (9 May 2020) Verfassungsblog verfassungsblog.de. See also, more generally, F Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's *Ultra Vires* Decision of May 5, 2020' (2020) German Law Journal 1116, 1122-1124.

ingly ignorant about the differences between the two conceptions (national and supranational) of the same concept.[17] But not only that: its proportionality assessment was not only more expansive than the EU version, but also impossible to perform in practice and contradictory on its own terms.[18]

Interestingly, both courts were defended as just minding their business as usual. On the one hand, the Court of Justice in *Weiss* stayed within the formal boundaries of the text of the Treaties and its earlier jurisprudence on the review of EU acts.[19] Had it done what its German counterpart seemed to suggest in its request for preliminary ruling, it would have gone against the Treaties and the well-established case law. On the other hand, the Karlsruhe court's decision was a similarly unsurprising continuation of its earlier jurisprudence on the matters of economic and monetary union and a "no brainer" application of the consistently articulated criteria.[20] Had it done differently, it would have engaged in "legal acrobatics".[21] For sticking to its guns in this way, the GFCC was accused of "dogmatism".[22] This accusation, however, cuts both ways: for clinging to EU law's own dogmas – on absolute and unconditional supremacy of the Union law and the infallibility of divinations coming out of the Luxembourg benches – does not seem much better.[23]

Now, the question remains whether we should get rid of the spirit together with the body? Whether we should bury the underlying spirit of the *PSPP* decision, whose premises might be sound despite being unorthodox from the perspective of EU legal "*dogma*", because its body was made of bad material, substantive and argumentative, by the German court?

Few commentators resisted this temptation and instead tried to look for a silver lining. One "more hopeful reading" of the *PSPP* decision thus saw "nothing scandalous about a national court demanding more coherence and accountability" from the EU's institutions, including their Court.[24] Other wondered whether this might be read as just another of

[17] D-U Galetta, 'Karlsruhe Uber alles? The Reasoning on the Principle of Proportionality in the Judgment of 5 May 2020 of the German BVerfG and Its Consequences' (8 May 2020) CERIDAP ceridap.eu.

[18] P Nicolaides, 'An Assessment of the Judgment of the Federal Constitutional Court of Germany On the Public Sector Asset Purchase Programme of the European Central Bank' (2020) LIEI 267.

[19] F Bignami, 'Law or Politics? The BVerfG's PSPP Judgment' (21 May 2020) Verfassungsblog verfassungsblog.de.

[20] U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them: The Relationship Between the Court of Justice of the European Union and the German Federal Constitutional Court' (2021) ICON 208, 212 ff.

[21] A Bobić and M Dawson, 'What Did the German Constitutional Court Get Right in Weiss II?' (12 May 2020) EU Law Live eulawlive.com. Similarly, D Grimm, 'A Long Time Coming' (2020) German Law Journal 944.

[22] J Ziller, 'The Unbearable Heaviness of the German Constitutional Judge. On the Judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 Concerning the European Central Bank's PSPP Programme' (7 May 2020) CERIDAP ceridap.eu.

[23] A Bobić and M Dawson, 'What Did the German Constitutional Court Get Right in Weiss II?' cit.; M Baranski, F Brito Bastos and M van den Brink, 'Unquestioned Supremacy Still Begs the Question' (29 May 2020) Verfassungsblog verfassungsblog.de.

[24] A Bobić and M Dawson, 'What Did the German Constitutional Court Get Right in Weiss II?' cit.

many national courts "desperate[ly] cry[ing] for more methodological integrity" from the CJEU.[25] In a similar fashion, in this *Article* I deal with the question of the quality of legal reasoning of an apex court operating in the pluralist environment alongside the multiplicity of judicial actors, some of which hold top positions within their respective jurisdictions.

To get there, the discussion will proceed in the following way. After the introduction, I will first discuss how national courts, when exercising the constitutionality review, inevitably engage in interpretation of EU law. When doing so, they adopt as a relevant standard of review not only domestic constitution but also EU law. With this, national courts claim great ownership in the matters of interpretation of EU law. To see how this plays out in practice, I then analyse recent case law of the GFCC. Specific focus will be on the *PSPP* decision, in which the German court took issue with the CJEU's reasoning in *Weiss*. The suggestion was that if the Court's judgment suffers from gross "methodological" deficiencies, that makes it inapplicable in domestic legal system. However, as I will argue, this pronouncement does not change a lot the things regarding judicial interpretations as they currently exist in the EU. There are several reasons. First, the admissibility of interpretive arguments is in general widely shared among the courts in the EU. Second, national courts have already on several occasions provoked the Court of Justice to improve its reasoning. And third, the concept of interpretive pluralism explains the national courts' claim in the matters of interpretation of EU law. Final section then briefly concludes.

II. National courts interpret EU law

Let us first break down the interpretive steps of the *PSPP* decision in which the GFCC for the first time declared EU law *ultra vires*, hence unconstitutional.

The Karlsruhe court held the ECB's decision and the CJEU's judgment endorsing it are violating the German Basic Law. Why? Because both transgressed the limits of EU competences as defined in the Treaties, thus violating EU law itself. Therefore, the GFCC declared EU law unconstitutional under the German constitution because it was unconstitutional under EU primary law.[26] The first part is unproblematic; that is what the German court is supposed to (be able to) do. But what about the second part?

Recall that there is a number of doctrines established by the CJEU that presume the ability of national courts to interpret appropriately and arrive at the "correct" meaning of a provision of EU law on their own.[27] This could be called "no application without interpretation" thesis: to apply EU law, national courts must be able to cognise the meaning

[25] U Šadl, 'When Is a Court a Court?' (20 May 2020) Verfassungsblog verfassungsblog.de.

[26] Cf. M Wendel, 'Paradoxes of Ultra-vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) German Law Journal 979, 984.

[27] For an early recognition, see H Rasmussen, 'Towards a Normative Theory of Interpretation of Community Law' (1992) University of Chicago Legal Forum 135, 148.

of that law.[28] These familiar situations involve national courts exercising their "European mandate" through giving effect to EU law in their domestic legal systems.[29]

Now, what goes for EU law doctrines that presume such ability on the part of national courts – direct effect, interpretive obligation, and so on – works the same when national courts domestically exercise the review of constitutionality of EU law. To know that an act of EU law violates human rights guaranteed under the national constitution, oversteps the boundaries of competences that have been transferred to the Union via domestic constitutional arrangements, or threatens the national constitutional identity, high national courts must understand what that act means. And to know that, they must interpret it, at least to some extent.

This is what (high) national courts have been doing all the time, no matter how unnoticedly. Discussing the Karlsruhe court's jurisprudence, Franz Mayer recognises this, yet considers it to be a cunning "trick":

> "[The GFCC] argues that it is just interpreting German constitutional law, the reach of the powers transferred and transferrable to the EU under the German constitution. But this constitutes a legal backdoor, the Court gets to interpret EU law itself through – a task which is reserved to the CJEU in its final sense – and in doing so, it creates a kind of parallel version of EU law, a Karlsruhe version, so to speak".[30]

For this very reason, the GFCC has been criticised for what it did in the *PSPP* decision. When reaching their decision, the Karlsruhe judges were accused of seriously misreading EU law against which they assessed the ECB's decision and the Luxembourg court's judgment reviewing it.[31] Notably, they failed to interpret appropriately arts 5 (on the proportionality principle) and 19 (on the CJEU's mandate to "ensure that in the interpretation and application of the Treaties the law is observed") TEU. Several points are worth noting here.

As explained above, there were two distinctive interpretive steps employed in the GFCC's reasoning. The first step is less controversial: the *ultra vires* review was based in part in the German Basic Law. The second step, however, was much more problematic: the *ultra vires* review was also based in EU law – as *interpreted* by the German court itself. What nonetheless differed from the GFCC's earlier jurisprudence was that this time there were no "tricks" about it. The Karlsruhe court was frank and open about it interpreting EU law. So, as Gareth Davies noted, this was "less an attempt to keep the EU out, than to shape it in a certain image. That may be why it is so controversial; in a club of many

[28] Cf. case 283/81 *CILFIT v Ministero della Sanità* ECLI:EU:C:1982:267, opinion of AG Capotorti, para. 4.

[29] M Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006).

[30] F Mayer, 'To Boldly Go Where No Court Has Gone Before' cit. 1117.

[31] T Marzal, 'Is the BVerfG PSPP Decision "Simply not Comprehensible"?' cit.; Editorial, 'Not Mastering the Treaties: The German Federal Constitutional Court's PSPP Judgment' (2020) CMLRev 965.

members, it is more offensive for one to tell the others how it should be run, than for that member to simply turn their back".[32]

In other words, what the German court did was lecturing not only its peers but the chairman of the club on how the club rules should be understood and followed. And in doing so, the GFCC abandoned previous constitutional-limits-based approach to the question of relationship between EU and national law, entertained by the CJEU and high national courts alike.[33] So far, this approach has been: our constitution, our business; your Treaties, your business; and vice versa. When conflicts occur, courts simply cancel each other out. If a judgment of the Luxembourg court seems odd to a national judge from the perspective of her domestic constitution, under this approach she will simply disregard and not apply it.[34] The options are: take it or leave it. But, by doing so, national courts

> "endorse the view that EU law is whatever the Court of Justice says it is. They take a passive, hand-off, approach to shaping that law, in which their role is not to interpret the Treaty – to participate in its interpretation – but merely to apply the interpretations of the Court, or, in extremis, not apply them. Within the sphere of EU law, the national supreme courts have self-defined themselves not as judges, but as clerks with a conscience".[35]

The GFCC is now changing this course. Now, it is more like: our Treaties, our business. EU law is a shared, common affair, not something foreign. So, when judicial conflicts occur, they occur not because legal texts are by their nature irreconcilable, or because legal orders are inherently incompatible. Rather, they occur because the meanings of those texts conflict – meanings that have been imposed on them by the courts. So, if a judgment of the Luxembourg court seems odd to a national judge – and not only from the perspective of her domestic constitution, but also from the perspective of her understanding of what EU law is – under this approach she will contest it and express her disagreement by

[32] G Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (21 May 2020) European Law Blog europeanlawblog.eu.

[33] G Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' (2018) ELJ 358, 361 ff.

[34] For two recent and widely discussed examples, see Supreme Court of Denmark judgment of 6 December 2016 case 15/2014 *DI, acting on behalf of Ajos A/S v Estate of A* (*Ajos*), and commentary by M Rask Madsen, H Palmer Olsen and U Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' (2017) ELJ 140; and Czech Constitutional Court judgment of 31 January 2012 Pl. ÚS 5/12 *Slovak Pensions*, and commentary by Z Kühn, 'Ultra Vires Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts' Defiance of EU Law' (2016) Maastricht Journal of European and Comparative Law 185. As this *Article* was finalised, other high national courts delivered judgments with a similar tenor. See Romanian Constitutional Court, Decision 390/2021 of 8 June 2021, discussed in B Selejan-Gutan, 'A Tale of Primacy Part II: The Romanian Constitutional Court on a Slippery Slope' (18 June 2021) Verfassungsblog verfassungsblog.de; Polish Constitutional Tribunal, Decision 7/20 of 14 July 2021 (declaring the CJEU's interim measures on the Polish judicial system to be incompatible with the Polish constitution).

[35] G Davies, 'Does the Court of Justice Own the Treaties?' cit. 361.

putting forward different interpretation. The options now are: take it or make it. And if a national judge can make it right, she may get her way. "And the truth shall set you free" (John 8:32). With things being framed this way, it indeed may turn out that "national supreme courts will emerge as interpreters of EU law, and these are their first steps".[36]

When a national court rejects a judgment of the CJEU with which it disagrees and adopts a different interpretation of EU law, it contests the CJEU's final say on matters of interpretation of EU law. However, where the GFCC disagreed with the CJEU was not a substantive meaning of EU law in question, but rather (and more formally) the reasoning employed in interpretation of that law. The CJEU's judgment was ultimately deemed *ultra vires* due to its "methodological" shortcomings. To this point I will return later. For now, let us turn our attention to the recent case law of the Karlsruhe court that suggests its increased engagement with interpretation of EU law, to see how the *PSPP* decision follows in those footsteps.

III. German Constitutional Court interprets EU law

One of the central parts of the *PSPP* decision opened with the acknowledgment (as did many other GFCC's landmark decisions before) that the art. 19 TEU mandate – to ensure that in the interpretation and application of EU law *the law* is observed – primarily refers to the Luxembourg court.[37] *Primarily*, but does that mean *exclusively*?

It seems that the GFCC's Second Senate would respond: "It does not". This (unexpected) reading of art. 19 TEU would obviously go beyond the text of that provision.[38] And it would also be difficult to reconcile with the CJEU's established case law, albeit some recent developments might lend more support to it. Consider the Court of Justice's pronouncement in *ASJP*, which emphasized that the EU court and national courts have a joint duty in carrying out this mandate:

> "Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. [...] Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed".[39]

Now, pushing this *dictum* to its limit – and arguably against any conceivable intention on the CJEU's part to allow national courts to go past or against its rulings – the GFCC has

[36] *Ibid*. 371-372.

[37] *PSPP* cit. para. 112.

[38] Art. 19 TEU explicitly uses the subject pronoun "it", referring to the Court of Justice ("It shall ensure that in the interpretation and application of the Treaties the law is observed"). From where could have national courts possibly borrowed this habit of extra-textual reading of a Treaty provision? (Asking rhetorically).

[39] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 paras 32-33.

recently made a couple of unguided high-profile excursions into the field of authoritative interpretation of EU law. The following examples are indicative of the Karlsruhe court taking ever-greater ownership in interpretation of EU law (with its application being confined to the territory of Germany, obviously), to the detriment of the Court of Justice's interpretive monopoly and its exclusive institutional position and division of labour with national courts under the art. 267 TFEU preliminary ruling procedure.

III.1. Surrendering

In late 2015, the Karlsruhe court's Second Senate issued an order on the European Arrest Warrant, in which it declared its intention to review the application of EU law in Germany for its compliance with human dignity from art. 1 of the Basic Law.[40] At the same time, however, in the case at hand the Second Senate managed to interpret away the conflict between EU law and human dignity guarantees under the German constitution. In doing so, it tried hard to present the matters of EU law to be, in vocabulary of *CILFIT*,[41] "so obvious as to leave no scope for any reasonable doubt" – in other words, "*acte clair*" – in order to exonerate itself from the obligation to refer preliminary question to Luxembourg.[42]

To support this finding, the GFCC first assessed three language versions (German, English, French) of a relevant provision of the EAW Framework Decision.[43] Then, it confirmed its conclusion arrived at on linguistic terms with the intent of the EU legislator expressed in recitals of the EAW Framework Decision,[44] as well as with the legislative history[45] and "teleological considerations".[46] In the end, it placed everything in a wider regulatory context – a multilevel framework for human rights protection in Europe (comprised of the EU Charter of Fundamental Rights, case law of the CJEU and of the European Court of Human Rights),[47] and the scheme of the Treaties against which all EU secondary law must be constructed.[48] The analysis looked neat and convincing.

[40] Federal Constitutional Court order 2 BvR 2735/14 of the Second Senate of 15 December 2015 ECLI:DE:BVerfG:2015:rs20151215.2bvr273514 (*EAW*). For discussion, see M Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi' (2016) EuConst 549; J Nowag, 'EU Law, Constitutional Identity, and Human Dignity: A Toxic Mix? Bundesverfassungsgericht: Mr R' (2016) CMLRev 1441; F Meyer, '"From Solange II to Forever I" the German Federal Constitutional Court and the European Arrest Warrant (and How the CJEU Responded)' (2016) New Journal of European Criminal Law 277.

[41] Case 283/81 *CILFIT v Ministero della Sanità* ECLI:EU:C:1982:335 para. 16.

[42] *EAW* cit. para. 125.

[43] *Ibid*. paras 85-88.

[44] *Ibid*. para. 89.

[45] *Ibid*. para. 95.

[46] *Ibid*. para. 90.

[47] *Ibid*. paras 91-92.

[48] *Ibid*. paras 92-93.

Nonetheless, how "*clair*" the things indeed were remained highly doubtful.[49] In any event, subsequently the CJEU itself, in a conciliatory tone, seemed to endorse the German court for getting the right interpretation of EU law that time.[50] (Note how this would presumably fulfil *ex post facto* (one part of) the first *CILFIT* requirement of a national court being "convinced that the matter is equally obvious [...] to the Court of Justice").[51]

III.2. Forgetting

In a more recent case from 2019, the Karlsruhe court's First Senate dealt with a constitutional complaint by applying, for the first time ever, the EU Charter of Fundamental Rights as the relevant standard of review of domestic application of harmonized EU law.[52] So, here, the matter is somewhat different from what we have seen previously. In the *PSPP* and *EAW* decisions, the German court reviewed EU law for its compliance with the domestic constitution. In the *Right to be forgotten II* decision, on the contrary, the German court reviewed national law for its compliance with EU law. However, to make sense of either review, the GFCC must necessarily purport to understand the meaning of EU law on its own, no matter how the latter is being taken (as the object of review or the benchmark for review).

Asserting a novel jurisdiction in this way, the GFCC promoted itself to a role of "co-curator of the EU Charter, alongside the CJEU".[53] By doing so, in its own view, the Karlsruhe court is discharging the responsibility the Basic Law lays upon it to develop and give effect to EU integration. In a way, it arrogated the competence to authoritatively interpret the Charter rights in internal situations where the Court of Justice, due to procedural reasons – for example, where lower domestic courts do not refer preliminary questions – remains uninvolved.

Moreover, the GFCC tried to explain how this new competence will be exercised by differentiating between interpretation and application of law.[54] For the CJEU, it acknowledges the final say regarding the matters of interpretation of EU law. For itself, it claims

[49] T Reinbacher and M Wendel, 'The Bundesverfassungsgericht's European Arrest Warrant II Decision' (2016) Maastricht Journal of European Criminal Law 702, 712; D Petrić, 'Dignity, Exceptionality, Trust. EU, Me, Us' (2019) European Public Law 451, 466-467.

[50] See joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198. See also K Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) CMLRev 805; N Petersen, 'Karlsruhe's *Lochner* Moment? A Rational Choice Perspective on the German Federal Constitutional Court's Relationship to the CJEU After the PSPP Decision' (2020) German Law Journal 995, 1000; U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them' cit. 213-214.

[51] *CILFIT* cit. para. 16.

[52] Federal Constitutional Court decision of the First Senate of 6 November 2019 1 BvR 276/17 ECLI:DE:BVerfG:2019:rs20191106.1bvr027617 (*Right to be forgotten II*). For extensive commentary, see the March 2020 special issue of German Law Journal, entirely devoted to 'Right to be forgotten BVerfG judgment'.

[53] J Mathews, 'Some Kind of Right' (2020) German Law Journal 40, 43.

[54] *Right to be forgotten II* cit. para. 69.

the authority regarding the matters of (correct) application of EU law.[55] However, this purported difference between the two juristic operations – interpretation and application of (EU) law – is hardly tenable. To apply law, court must know what it means. To know what law means, court must interpret that law. To "interpret" means either determining one meaning (of several possible and competing) of a normative text or determining which normative text (of several available) controls given factual situation. So, as Karsten Schneider puts it: "If 'interpretation of fundamental rights' was indeed different from 'application of fundamental rights', this mode of cooperation [between the GFCC and the CJEU] could be seen as a flash of genius. [...] But the seemingly qualitative difference between (higher courts') 'interpretation' and (lower courts') 'application' is a fallacy".[56]

Albeit expressing its fidelity to close cooperation with Luxembourg via art. 267 TFEU in such circumstances,[57] the Karlsruhe judges here again dared to conclude that the matter of interpretation of EU law is sufficiently "*clair*".[58] Or better – "*éclairé*", since the Court of Justice has through its case law allegedly clarified the matter. Therefore, the GFCC argued that "[i]n the present case, the application of the EU fundamental rights does not raise any questions of interpretation to which the answer is not already clear from the outset nor questions that have not been sufficiently clarified in the case-law of the CJEU (as read in light of the case-law of the European Court of Human Rights, which serves as a supplementary source of interpretation in this regard)".[59]

Yet again, it remained unclear whether the *CILFIT* criteria on what makes an issue "*clair*" or "*éclairé*" were misinterpreted.[60] On a more general note, commentators have for a long time discussed how difficult it is for a national court to make sense of a vast and intricate (or vastly intricate?) case law of the CJEU, whose pronouncements are often deemed terse and cryptic.[61] So, the bar for concluding that something is reasonably clear from the case law of the Court of Justice is set pretty high.

[55] K Schneider, 'The Constitutional Status of Karlsruhe's Novel "Jurisdiction" in EU Fundamental Rights Matters: Self-inflicted Institutional Vulnerabilities' (2020) German Law Journal 19, 23.

[56] *Ibid*.

[57] *Right to be forgotten II* cit. paras 68-70.

[58] *Ibid*. paras 137-141.

[59] *Ibid*. para 137.

[60] A Bobić, 'Developments in the EU-German Judicial Love Story: The Right to Be Forgotten II' (2020) German Law Journal 31, 38-39. See also J Mathews, 'Some Kind of Right' cit. 43.

[61] Of many notable works, see PJ Wattel, 'Kobler, Cilfit and Welthgrove: We Can't Go on Meeting Like This' (2004) CMLRev 177; A Somek, 'Inexplicable Law: Legality's Adventure in Europe' (2006) University of Iowa Legal Studies Research Paper No 05-41 papers.ssrn.com; A Somek, 'The Emancipation of Legal Dissonance' (2010) University of Iowa Legal Studies Research Paper No 09-02 papers.ssrn.com; JHH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in M Adams, H de Waele, J Meeusen and G Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 235, 237-238.

For that reason, this judgment was described as "an instance of resistance" and pushback against the expansion of the Luxembourg court's fundamental rights jurisprudence, through which the Karlsruhe court "seeks to actively influence the fundamental rights jurisprudence of the CJEU in substance".[62] Although, others have noted that the First Senate's commitment to cooperation with the Luxembourg court demonstrated in *Right to be forgotten II* still seems more genuine than the Second Senate's.[63]

III.3. Rejecting

The Second Senate was quick to confirm this last remark when the opportunity came along with the *PSPP* decision. But it went one step further with grabbing the chunks of authority to interpret EU law. As previously mentioned, the GFCC disagreed not with the substantive meaning of EU law determined by the CJEU in Weiss, but rather with the legal reasoning or "methodology" employed in justifying that meaning. How did it get there?

There are four key steps the Second Senate took in the *PSPP* decision.

Step number one was about *judicial authority*. The GFCC is obviously unimpressed with the CJEU's institutional authority: the latter's self-asserted position of the final interpreter of EU law.[64] The Karlsruhe judges choose not to be submissive towards the Court of Justice, blindly and at all cost. This is the usual point of discontent for the critics of the *PSPP* decision, the red line not to be crossed: how can anyone dare to disobey the Court of Justice?[65] Although the Karlsruhe judges do acknowledge that the matters of interpretation of EU law are *in principle* for the Court to decide on. And that the art. 19 TEU mandate covers "the methodological standards for the judicial development of the law".[66] So, they acknowledge that there is an EU "method" of interpretation that is by and large constructed in Luxembourg. In other words, when determining the meaning of a provision of EU law, there are certain interpretive arguments that can be invoked in support of that

[62] D Burchardt, 'Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review' (2020) German Law Journal 1, 17.

[63] T Violante, 'Bring Back the Politics: The PSPP Ruling in its Institutional Context' (2020) German Law Journal 1045, 1056; M Wendel, 'The Two-Faced Guardian – Or How One Half of the German Federal Constitutional Court Became a European Fundamental Rights Court' (2020) CMLRev 1383.

[64] Cf G Davies, 'Does the Court of Justice Own the Treaties?' cit. 360-361 and 364-367, who writes how the mainstream scholarship seems consensual to a high degree in this respect: that both its friends and foes accept without questioning the Court's claim that it "owns" the interpretation of EU law, albeit the reasoning behind this assertion – relying on the text of the Treaties, effectiveness and uniformity of EU law – is far from bulletproof. Only recently, some stronger objections have been raised against this circular self-assertion: "The CJEU is the ultimate authority on interpretation of EU law. Says who? Says the CJEU".

[65] JL da Cruz Vilaça, 'The Judgment of the German Federal Constitutional Court and the Court of Justice of the European Union – Judicial Cooperation or Dialogue of the Deaf?' (3 August 2020) CERIDAP ceridap.eu. See also case C-824/18 *A.B. and Others (Nomination des juges à la Cour suprême - Recours)* ECLI:EU:C:2020:1053, opinion of AG Tanchev, paras 80-84.

[66] *PSPP* cit. para. 112.

meaning, that are in turn considered admissible. Their admissibility is determined by the CJEU. But the latter determines this with an eye on the common constitutional traditions of the Member States and jurisprudence of the highest European courts.[67] Hence, there is a kind of external check or validation on what makes an interpretive reasoning valid.

Step number two was about *judicial "priors"*. This one is simple. The GFCC cares not about the background political or ideological or any other motivation that made the CJEU decide one way instead of another; to adopt one interpretation of law over the competing one(s). Where the Luxembourg court is coming from is not what they are interested in nor something they want to second guess.[68]

Step number three was about *interpretive outcomes*. The GFCC cares not about the policy or any other substantive outcome that the CJEU arrives at in their decision either, or so it says.[69] They might not like it, but nonetheless will refrain from imposing their own value judgments. The reason is the following: what makes an admissible interpretive argument in EU law does not have to correspond to national jurisprudential traditions in a one-to-one manner. After all, "the particularities of EU law give rise to considerable differences with regard to the importance and weight accorded to the various means of interpretation".[70] For this reason, national courts ought not to substitute the CJEU's interpretations of substantive EU law with their own, when a given interpretation stays within the boundaries of acceptable interpretive arguments. When the law is indeterminate and open for several reasonable interpretations,[71] the Karlsruhe judges do not reject the Luxembourg court's interpretation simply because they favour a different one. Furthermore, they are even willing to accept errors of a smaller magnitude. Because the Luxembourg court surely can make a mistake here and there, and the Karlsruhe court grants it "a certain margin of error".[72] Because judges are humans, and even Luxembourg judges are

[67] The same as the Court does regarding the general principles of EU law; see art. 6(3) TEU.

[68] If, in general, it could ever be possible to read out of the judgment the background motivational reasons, "hunches" or psychological processes that drove the deciding judges. Unlike the justificatory arguments offered in support of a particular decision, which are written down and publicly available as part of the court's reasoning.

[69] Some have suggested otherwise, though, arguing that it is precisely for its dislike of the outcome(s) in the controversy surrounding the EU monetary policy and the ECB's mandate that the GFCC launched the methodology-informed attack on the CJEU. See U Šadl, 'When is a Court a Court?' cit.

[70] *PSPP* cit. para. 112.

[71] To be precise, (EU) law is indeterminate on two levels: the "first order" indeterminacy concerns the multiple possible meanings of a legal text and the judicial choice of one of them, whereas the "second order" indeterminacy concerns the multiple available interpretive arguments and the choice of them by the Court of Justice. See G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012) 6 ff.

[72] *PSPP* cit. para. 112.

humans, and humans make mistakes.[73] And a fair share of ill-reasoned judgments did come out of the Luxembourg benches.[74]

Yet the situation is quite different when the CJEU's interpretation (in the sense of the outcome of the interpretive process) does not square with a reasonable interpretation (in the sense of the interpretive process itself). Granted, what makes an EU law interpretive argument appropriate or reasonable is decided in principle by the Luxembourg court. But – and this is a big "but" – in doing so, it cannot "simply disregard" the national jurisprudential traditions, says the Second Senate. These are arguably themselves a part of the EU primary law.[75] And they bind the CJEU too: the Court stands inside, not outside EU law.[76] The Court of Justice would most certainly accept this proposition. Otherwise, with the Court unbound, what would stand to prevent judicial arbitrariness?

So, the Court of Justice cannot construct the meaning of an EU norm out of thin air or on a whim. It cannot commit "manifest error" in interpretation. That much the German court cannot grant to the CJEU. In that sense, the art. 19 TEU mandate "is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded".[77]

This is, then, the threshold that makes the CJEU's judgments acceptable to the Karlsruhe court in terms of their formal pedigree, that is, quality of legal reasoning. What followed from it was the "Methodological *Solange*":[78] "as long as the CJEU applies recognized methodological principles and the decision it renders is not objectively arbitrary from an objective perspective, the Federal Constitutional Court must respect the decision of the CJEU even when it adopts a view against which weighty arguments could be made".[79]

Step number four, hence, was about *interpretive reasoning*. Now there is something the Karlsruhe court seems to care about. The CJEU has to respect and cherish the traditional

[73] D Sarmiento, 'An Infringement Action against Germany After Its Constitutional Court's Ruling in Weiss? The Long Term and the Short Term' (12 May 2020) EU Law Live eulawlive.com.

[74] As Daniel Sarmiento said, everyone could probably name their own "Top 5". See D Sarmiento, 'Requiem for Judicial Dialogue' cit.

[75] Think of arts 4-6 TEU (national identity clause, principle of conferral, general principles of EU law).

[76] G Davies, 'Interpretative Pluralism Within EU Law' in M Avbelj and G Davies (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 323, 325. Cf. K Lenaerts, 'No Member State Is More Equal than Others: The Primacy of EU Law and the Principle of the Equality of the Member States Before the Treaties' (8 October 2020) Verfassungsblog verfassungsblog.de ("[T]he EU seeks to establish a government not of men but of laws. Both the Member States and the European institutions must respect the 'rules of the game' as interpreted by the [CJEU], since no one is above the law").

[77] *PSPP* cit. para. 112.

[78] Jacques Ziller similarly noticed this "new [...] extension of the *Solange* reservation to methods of legal interpretation". See J Ziller, 'The Unbearable Heaviness of the German Constitutional Judge' cit.

[79] *PSPP* cit. para. 112.

European way of arguing about law and justifying judicial decisions. No reasoning or exceptionally bad reasoning is from this perspective unacceptable.[80] Therefore, the Luxembourg court has to respect its interlocutors by not treating them with arbitrary and capricious rulings. As long as it respects that, the respect will be reciprocated by high national courts.

What all this means is that what the CJEU got wrong in *Weiss* is not that it failed to honour German constitutional standards of what makes an appropriate interpretive argument. Rather, it failed its own standards. And this is the "manifest error" in reasoning that made it *ultra vires*. It failed the EU standards – as the Karlsruhe court understands them. As if the German court is saying to its EU counterpart: "You are not yourself. I know you better than you".

With the *PSPP* decision, the Karlsruhe court takes ever greater ownership in the matters of interpretation of EU law; much greater than what appeared to be the case following its earlier decisions discussed above. This time, not only at the level of substantive rules of law. Rather, the German court takes ownership over (in HLA Hart's parlance) the secondary rules too – "the rules about rules"; here, the rules of interpretation.[81] For this, the challenge in *PSPP* is much greater than, say, in *Right to be forgotten II*. It not only contests the "judicial autonomy" of the Luxembourg court in the EU constitutional realm, that is "the sole power to state the right answer to a specific case".[82] Now it contests the "methodological autonomy" of the Luxembourg court, which ensures that "the means to arrive to such answer cannot be contested".[83] As such, the *PSPP* decision seems to cause a more serious shift in the EU constitutional order. Unlike a one-off thing where a national court dismisses a single

[80] S Simon and H Rathke, '"Simply not Comprehensible." Why?' (2020) German Law Journal 950, 954-955: "[I]n a constitutional state an unsubstantiated judgment is not a judgment but an arbitrary statement [...] [T]he way considerations are weighed up can also produce different results. However, the limit has been reached when there is no weighing up at all, when no reasons whatsoever are given. That was what happened – intentionally or unintentionally – with the CJEU judgment [in *Weiss*]".

[81] HLA Hart, *The Concept of Law* (Oxford University Press 2012), especially chapters V and VI. Although I doubt whether, as a conceptual matter, these rules of interpretation are really "rules" in the sense that they determine ex ante substantive outcomes of the process of legal interpretation. Rather, I understand these "rules" more as ex post justifications of judicial choices, that is, choices of the meaning of a normative text and/or of the normative texts applicable to facts of a dispute. For that reason, I have referred to them throughout this *Article* as "interpretive arguments". Cf. N MacCormick, 'Argumentation and Interpretation in Law' (1995) Argumentation 467; N MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1997); L Burazin and G Ratti, 'Rule(s) of Recognition and Canons of Interpretation' in P Chiassoni and B Spaić (eds), *Judges and Judicial Interpretation in Constitutional Democracies: A View from Legal Realism* (Springer 2021) 123.

[82] F de Abreu Duarte and M Mota Delgado, 'It's the Autonomy (Again, Again and Again), Stupid! Autonomy Between Constitutional Orders and the Definition of a Judicial Last Word' (6 June 2020) Verfassungsblog verfassungsblog.de.

[83] *Ibid*.

judgment of the Court of Justice, here the GFCC is putting a check on the competences and jurisdiction of what is supposed to be the supreme court of the (EU) land.[84]

IV. Interpretation, contestation, pluralism

Suppose we accept in principle the GFCC's basic premises in the *PSPP* decision. The questions that immediately follow are: how could the EU "interpretive community" structured along those lines ever function? Could we in that case still consider EU law to have maintained the quality of an organised and meaningful *order*?

I believe yes, and for several reasons that I spell out more concretely below. First, I will show that what makes an admissible interpretive argument as a general matter is widely shared among the courts in the EU. Then, I will describe how in some previous occasions the national courts' concerns regarding the interpretive arguments relied on by the Court of Justice have led the latter to gradually improve its reasoning. Finally, there exists a solid normative foundation for the GFCC's radical claim to interpretation of EU law, that is, for the national courts' ownership in these matters. So, seen in this light, the *PSPP* decision comes out as not so preposterous after all. Rather, it brings no dramatic change. At most, it unearths and recalibrates a bit what we already had in the EU, what was there all along.

IV.1. I hear, but I cannot understand

It seems difficult to deny that interpretive arguments employed by the Luxembourg court are essentially the same as those known and used by national courts.[85] Where they might differ, however, is in the way they are used. This only gets exacerbated in pluralist legal contexts, where the kind of law the courts ought to interpret (supranational *vs* national) differs at face value. In truth, different judges – within a single Member State, or even within a single court – may differ in their preferred approaches to legal interpretation. For instance, the pragmatic, functional interpretation the CJEU champions, with the effectiveness of EU rules at the centre stage,[86] as opposed to doctrinal or "dogmatic" (in a non-

[84] Cf JL da Cruz Vilaça, 'The Judgment of the German Federal Constitutional Court and the Court of Justice of the European Union' cit.: "One thing is sure: an exclusive competence conferred to a court of law does not cease to exist simply because another court of law with territorially limited powers does not agree with a judgment which it asked for. But refusing recognition of such exclusive competence is bound to have a destabilising impact on the integrity and the functioning of the EU legal order".

[85] G Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) German Law Journal 537, 538; S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (Mohr Siebeck Verlag 2001) (providing in-depth comparative overview of the interpretive practices in different European legal systems, including Germany, France, England, and the EU, and highlighting their commonalities). For one general overview of typical interpretive arguments, see A Jakab, 'Constitutional Reasoning. A European Perspective on Judicial Reasoning in Constitutional Courts' (2013) German Law Journal 1215.

[86] D Sarmiento, 'Requiem for Judicial Dialogue' cit.

pejorative sense) interpretation often followed by the GFCC.[87] Moreover, it is sometimes noted how a bit more "open-textured" character of EU law favours the systemic and purposive interpretive arguments at the expense of the textualist,[88] although some have pointed out how in practice the CJEU frequently stays with the textualist arguments.[89]

Obviously, these differences may cause serious frictions between the opposing approaches. Because in EU law there are no hard and fast rules that would determine the use of interpretive arguments when interpreting EU law. Granted, different interpretive arguments may have different weight in different circumstances. In part, this is reflected in different values that are usually associated with different arguments. For example, textual arguments tend to reflect the values of legal certainty, democratic legitimacy and deferral to the legislator. Systemic arguments preserve unity and coherence of the legal system. Purposive arguments can be employed with an aim of enforcing the background moral values or adjusting the legal system to the societal and technological developments of time. So, not only do courts have to justify their choice of one of several possible meanings of a normative text with interpretive arguments, which ought to convince and persuade the relevant audience that the judicial choices made are weightier and sounder than the competing ones. But also, the choice of the interpretive arguments themselves sometimes has to be justified by meta-arguments, such as democracy, rule of law, separation of powers, human dignity, and the like.[90]

However, none of this amounts to more than a "rule of thumb" when encountering an interpretive dilemma in EU law. Which is why no court is completely unbiased and impartial when it comes to its preference. And this may lead them to distrust each other. After all, no judicial choice of a particular interpretive approach is ever apolitical,[91] especially when it comes to high courts.

Nevertheless, sharing a basic understanding of what makes an admissible interpretive argument in the first place implies that at least the judicial interlocutors speak the same language. The situation is different when one side engages in whimsical and out-of-nowhere interpretive moves. Then the language is not shared anymore. And for this the CJEU has been long accused, sometimes fairly and at other times not quite. Remember Roman Herzog and Lüder Gerken's "Stop the European Court of Justice" and their (in)famous criticism of the Luxembourg court's flawed reasoning in cases like *Mangold*?[92]

[87] J Ziller, 'The Unbearable Heaviness of the German Constitutional Judge' cit.

[88] A Arnull, *The European Union and Its Court of Justice* (Oxford University Press 2006) 612.

[89] See, for example, CJW Baaij, 'Fifty Years of Multilingual Interpretation in the European Union' in L Solan and P Tiersma, *Oxford Handbook of Language and Law* (Oxford University Press 2012) 217.

[90] Cf. N MacCormick and R Summers, 'Interpretation and Justification' in N MacCormick and R Summers (eds), *Interpreting Statutes: A Comparative Study* (Ashgate 1991) 511.

[91] U Šadl, 'When is a Court a Court?' cit.

[92] Case C-144/04 *Mangold* ECLI:EU:C:2005:709.

"[The CJEU] deliberately and systematically ignores fundamental principles of the Western interpretation of law, its decisions are based on sloppy argumentation, it ignores the will of the legislator, or even turns it into its opposite, and invents legal principles serving as grounds for later judgements".[93]

With its *PSPP* decision, the Karlsruhe court can be read as making a similar claim not to understand the Luxembourg court anymore. It expressed concerns already in *Gauweiler*,[94] albeit it stopped short of pulling the trigger. In parallel, the entire strand of the CJEU's case law regarding the euro-crisis, as it developed, has been considered by some as over-stretching the admissible interpretive arguments and being unprincipled on the matters of principle.[95] And after the preliminary reference in *PSPP* showed that the Luxembourg court intends no change, the Karlsruhe court reacted in a "if the mountain will not come to Muhammad, then Muhammad must go to the mountain" manner.[96]

A related and more general point is: if the CJEU depends on national courts in order to uphold a workable and efficient system, and it itself emphasizes this regularly,[97] then national courts accepting its interpretations of what the EU law means is essential. To have them accept those interpretations hinges, in big part, on the quality and persuasiveness of the reasoning behind those interpretations. On this, one may say, depends the very authority of the EU apex court.[98] Unfortunately, a discontent with poor reasoning of the Luxembourg court has been boiling for a while now. Simple, self-referential, and wannabe-authoritative "because I say so" reasoning is not (and probably never was) enough. Similar "Mangold means Mangold"[99] response to the Danish Supreme Court's preliminary question in *Ajos* led the latter to reject the unwritten EU general principle of non-discrimination on the grounds of age, which was in a "fuzzy and questionabl[e] (methodology-wise) [manner] deduced from the spirit of the Treaties".[100]

The Karlsruhe court in the *PSPP* decision suggested further that the judicial "language" is mutually constructed by the courts in the EU.[101] This echoes the classic idea

[93] R Herzog and L Gerken, 'Stop the European Court of Justice' (10 September 2008) EUobserver euobserver.com.

[94] Federal Constitutional Court, judgment of the Second Senate of 21 June 2016 2 BvR 2728/13 ECLI:DE:BVerfG:2016:rs20160621.2bvr272813.

[95] For one critique, see G Beck, 'The Court of Justice of the EU and the Vienna Convention on the Law of Treaties' (2016) Yearbook of European Law 484.

[96] Cf. U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them' cit. 218 and 227.

[97] See, illustratively, *Associação Sindical dos Juízes Portugueses* cit.

[98] V Perju, 'Reason and Authority in the European Court of Justice' (2009) Virginia Journal of International Law 307, especially 322-327.

[99] D Sarmiento, 'An Instruction Manual to Stop a Judicial Rebellion (Before It Is Too Late, of Course)' (2 February 2017) Verfassungsblog verfassungsblog.de.

[100] U Šadl, 'When is a Court a Court?' cit.

[101] Of course, there always remains a question (empirical?) whether any of the GFCC's positions really represent the view of all (or most) national high courts. Perhaps they think the same as their most vocal German representative, as the Karlsruhe court often likes to suggest and as it perhaps might be inferred

expressed already by Alexander Hamilton in his *Federalist No. 78*: "[t]he rules of legal interpretation are *rules of common sense, adopted by the courts* in the construction of the laws".[102] The same could be inferred from HLA Hart's account of "rules of adjudication" (under which the rules of interpretation would arguably fall) as being of customary nature, that is a matter of social convention. Therefore, their status would depend on them being accepted by legal officials, most importantly judges. So, if the "rules of interpretation" in the EU indeed reflect the shared constitutional traditions, national courts have their share in constructing them. They make the primary legal audience that has to be convinced and persuaded by the CJEU that its choices of interpretive arguments are weightier and sounder than the possible alternative ones. For these unexpressed "meta-rules", in this view, the art. 19 TEU mandate is a shared task. A similar idea – that in a discursive development of unexpressed general principles of EU law – both structural, like proportionality, and substantive, like fundamental rights – the task is shared between the EU court and national courts – appeared long ago,[103] but somehow got lost. After *PSPP* decision, it might be picked up again.

IV.2. That's just the way it is

To have national courts contesting interpretive argumentation and reasoning of the Luxembourg judgments is nothing new or unique, I believe. This seems to be the way EU law has always been developing. Textbook examples of classical doctrines on general principles of EU law may illustrate the point.

Recall the (structural) principle of (vertical) direct effect of directives. When introducing it, the CJEU initially offered only a couple of not very convincing arguments. One was the argument from effectiveness (*effet utile*). The other was a mixed textual-contextual argument: on the one hand was the assertion that since art. 267 TFEU empowers national courts to refer questions of interpretation of *all* acts of EU law, without explicitly excluding directives, it is implied that individuals may invoke all those acts, including directives, in

from the undeniable influence of the GFCC on other constitutional adjudicators in the EU when it comes to the spill-over of judicial doctrines; perhaps not. In this respect, see, among many others, discussions in F Mayer, 'Constitutional Comparativism in Action. The Example of General Principles of EU Law and How They are Made – A German Perspective' (2013) ICON 1003, especially 1010-1014; and 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) Maastricht Journal of European and Comparative Law 151.

[102] A Hamilton, J Madison and J Jay, *The Federalist, with Letters of 'Brutus'* (Cambridge University Press 2003) 405 (italics added).

[103] See contributions of Matthias Herdegen and Hjalte Rasmussen to a seminal volume edited by Ulf Bernitz and Joakim Nergelius on general principles of EU law: M Herdegen, 'The Origins and Development of the General Principles of Community Law' in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* (Kluwer Law International 2000) 3; and H Rasmussen, 'On Legal Normative Dynamics and Jurisdictional Dialogue in the Field of Community General Principles of Law' in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* cit. 35.

disputes before national courts; on the other hand was the assertion that the fact that art. 288 TFEU provides that regulations can have direct effect does not imply that other legal acts, including directives, mentioned in that article cannot have similar effects, provided such effects are not expressly excluded.[104]

However, faced with unimpressed national courts, some of which (in France, for instance) resisted from applying this doctrine, the Court subsequently introduced another argument, which is a combination of consequentialist argument[105] and argument from general principles: the estoppel principle. It held that Member States that failed to implement a directive cannot rely on that failure to defend themselves against individuals who invoke the same directive in their favour.[106] This seemed to solidify the doctrine of vertical direct effect of directives, which to date remains uncontroversial.[107]

Note, however, that this is not to say that a mere development of interpretive argumentation in favour of direct effect of directives carried the day on its own, absent other political or institutional developments. Still, the point is that national courts objected to the Luxembourg court's ambitious doctrine. The Court responded with offering more (and more convincing) arguments when the opportunity came. And the matter eventually got settled.

Another famous example concerns the (substantive) principle of fundamental rights protection as developed originally in the 1970s. In the earliest judgments that marked a turn from the period of "negation" into the period of "revision",[108] the CJEU clung to the "aprioristic" approach of merely "discovering" pre-existing fundamental-rights-as-general-principles-of-law, without a need for much justification.[109] However, soon facing the challenges from national constitutional courts, including the GFCC in *Solange I*,[110] the Court of Justice changed its approach in interpreting EU fundamental rights as general principles to a more "positivist" one, whereby it exercises discretion in "carving" general principles out of

[104] Case 41/74 *van Duyn v Home Office* ECLI:EU:C:1974:133 para. 12.

[105] By this I mean one type of teleological interpretive argument used by the Court of Justice, as discussed notably by Joxerramon Bengoetxea. See J Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993), who differentiated between *i)* functional arguments that aim to ensure the effectiveness (*effet utile*) of law; *ii) stricto sensu* teleological arguments that pursue the stated aims and objectives of law; and *iii)* consequentialist arguments that account for the consequences (be it economic, social, policy, legal or the like) of giving a particular meaning to normative text.

[106] Case 148/78 *Ratti* ECLI:EU:C:1979:110 para. 22.

[107] For a full account of this development, see P Craig and G de Búrca, *EU Law. Text, Cases, and Materials* (Oxford University Press 2020) 235-236.

[108] JL da Cruz Vilaça, 'The Judgment of the German Federal Constitutional Court and the Court of Justice of the European Union' cit.

[109] Case 29-69 *Stauder v Stadt Ulm* ECLI:EU:C:1969:57 para. 7.

[110] German Federal Constitutional Court judgment of the Second Senate of 29 May 1974 BvL 52/71 (*Solange I*) para. 56.

sources of EU law and thereby fills the legal gaps.[111] So, the Court gradually introduced and refined the sources out of which EU rights have been constructed: first "the constitutional traditions common to the Member States",[112] and then "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories",[113] in particular the European Convention on Human Rights (ECHR).[114]

It was primarily after these developments in the CJEU's interpretive argumentation that the GFCC stepped back in *Solange II* with a familiar outro:[115] as long as the EU generally retains an effective protection of human rights, substantively similar or comparable to German constitutional standards – "effective" and "similar" as interpreted and understood by the Karlsruhe court itself – we yield.

The same would go under the "Methodological *Solange*" in the *PSPP* decision: as long as the CJEU relies on appropriate interpretive reasoning and argumentation – "appropriate" as interpreted and understood by the GFCC itself – we yield. Perhaps the German court will in the future be celebrated for this, as it deservedly was for its *Solange I & II* push *against* the unbridled supremacy of EU law and *in favour of* an increased standard of fundamental rights protection in the Union. As Ana Bobić and Mark Dawson have remarked, "Sometime in the future we may well yet recognize this decision, from a constitutionalist perspective, as forming part of the jurisprudence of national courts of permanent contestation of the primacy of EU law, that the academic community has often praised as an impetus for the incremental development of EU law".[116]

So, the GFCC's objection to the CJEU's reasoning in the matters of economic and monetary union might lead the latter to solidify and improve its interpretive approach when new opportunities come, similarly to what happened a number of times before. Whether that will settle the whole thing remains to be seen. But importantly, we should be on the watch for the following: whether any change in the CJEU's interpretive reasoning will be

[111] C Semmelmann, 'General Principles in EU Law Between a Compensatory Role and an Intrinsic Value' (2013) ELJ 457, 462-463.

[112] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114 para. 4.

[113] Case 4/73 *Nold KG v Commission* ECLI:EU:C:1974:51 para. 13.

[114] Case 44/79 *Hauer v Land Rheinland-Pfalz* ECLI:EU:C:1979:290 paras 14-15. Note how a similar "switch" in the interpretive approach – from "aprioristic" (discovered as "inherent") in *Francovich* to "positivist" (initially developed based on comparative legal reasoning and the scheme of the Treaties) in *Brasserie du Pêcheur/Factortame* and afterwards – happened later regarding another general principle: the principle of state liability for breaches of EU law. Cf. case C-6/90 *Francovich and Bonifaci v Italy* ECLI:EU:C:1991:428 paras 31-37 and joined cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* ECLI:EU:C:1996:79 paras 16-36. See also C Semmelmann 'General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification' (2013) Pittsburgh Papers on the European Union 1, 19; and D Petrić, 'Game of Courts: A Tale of Principles and Institutions' (2019) European Law Journal 273, 284-295.

[115] German Federal Constitutional Court, judgment of the Second Senate of 22 October 1986, 2 BvR 197/83 (*Solange II*) para. 105.

[116] A Bobić and M Dawson, 'What Did the German Constitutional Court Get Right in Weiss II?' cit.

followed by a change in the substantive outcomes of adjudication? Because in *Solange I & II*, developments in the CJEU's interpretive approach led to an increased standard of EU fundamental rights protection, in a satisfactory manner judged from the GFCC's perspective. Here, it is possible that any development in the CJEU's interpretive approach would change nothing in practice regarding the judicial review of the ECB's mandate, which might not be a satisfactory outcome for the GFCC. Only in this last situation the Karlsruhe court would not be able to hide behind the alleged flaws in interpretive reasoning of the Luxembourg court. In that situation, the German court would have to come out and openly state its dislike of the substantive outcome(s) of the CJEU's jurisprudence. How convincing would that be is a different ball game, discussion of which exceeds the limits and intentions of the present *Article*.

IV.3. Enter interpretive pluralism

The idea that the EU legal order is mature enough to allow national courts greater ownership in the matters of interpretation of EU law – to allow them more freedom in interpreting EU law independently in some circumstances – has been entertained for a while now. In different variations, it came from both inside and outside the Luxembourg court's ranks.

Of the former, the prominent examples include several opinions of Advocates General. But they have merely suggested that in the areas of EU law where the existing case law of the Court of Justice is sufficiently well developed and clearly articulated ("*éclairé*"), national courts should have more discretion in the matters of "factual" interpretation; that is, in deciding whether and how that law applies to the specific circumstances of the disputes they are deciding.[117]

Of the latter, some authors similarly criticised the Court's "factual jurisprudence" that tends to intrude into the domain of application of EU law. As Gareth Davies argued, such practice marginalises national courts as EU actors, emasculating and infantilising them.[118] Put differently, the Court's centralisation of the fact-appraisal leaves little (if anything) for the national courts to interpret. With matters being organised this way, "[n]ational courts have no intelligent part to play in [EU] law".[119] The solution, in Davies'

[117] Case C-338/95 *Wiener v Hauptzollamt Emmerich* ECLI:EU:C:1997:352, opinion of AG Jacobs, especially paras 10-21; case C-461/03 *Gaston Schul Douane-expediteur* ECLI:EU:C:2005:415, opinion of AG Ruiz-Jarabo Colomer, paras 44-59 and 80-90. Cf. case C-561/19 *Consorzio Italian Management and Catania Multiservizi* ECLI:EU:C:2021:291, opinion of AG Bobek. See also M Bobek, 'National Courts and the Enforcement of EU Law – Institutional Report' in M Botman and J Langer (eds), *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order. The XXIX FIDE Congress in The Hague, Congress Publications Vol. 1* (Eleven International 2020) 61, 87-89.

[118] G Davies, 'The Division of Powers Between the European Court of Justice and National Courts' (2004) *ConWEB – Webpapers on Constitutionalism and Governance beyond the State* 1.

[119] *Ibid*. 26.

view, is to embed the "interpretive pluralism" within the EU judicial architecture.[120] Under this view, national courts would have more involvement in and "part-own" the matters of interpretation of EU law.

Despite the elaborate criticism and some bold proposals for the reform of the art. 267 TFEU preliminary ruling procedure, none of these voices argued in favour of national courts contesting the CJEU's last say in the matters of interpretation of EU law as strongly as the GFCC did in its *PSPP* decision. Granted, they saw no problem in allowing national courts to issue rulings in certain instances in which they would adopt a particular understanding of EU law that reflects cultural peculiarities and diversity of their municipal legal orders. But in my understanding, none went as far as suggesting that in case possible divergences between the Member States in interpretation and application of EU law would occur and would jeopardise functioning of the internal market or enforcement of EU rights of individuals, the CJEU would not have the *unconditional* authority to step in and resolve the matter once and for all. The Luxembourg courts' power to decide on general and important questions of interpretation of EU law would remain in its hands. Likewise, the power to decide on the admissibility of interpretive arguments when interpreting EU law. Both tenets of such a power, in this view, would be subject to no limitations – or better, subject to no external challenges.

Another thing indicative of these arguments is that their justification is in essence consequentialist. Here is a rough estimate of the most frequent justifications offered in favour of national courts enjoying more freedom in interpreting EU law on their own, at least on some occasions: enhancing the quality of communication and the level of mutual trust between the EU court and national courts; minimising the opportunities for their jurisdictional conflicts and ensuring proper balance of institutional powers; increasing acceptance and internalisation and ultimately effectiveness of EU law within national legal orders, contributing to quality of its rules in terms of diversity, substantive equality and inclusiveness; enhancing the legitimacy of EU governance in general, and legitimacy and democratic credentials of EU judicial decision-making in particular; putting a check on the CJEU's tyranny and the EU's creeping competences; catching up with the achieved level of political developments in the Union; or relieving the CJEU of its caseload, recently skyrocketing concerning the number of preliminary references received.

But the idea of "interpretive pluralism" in the EU can provide a solid non-consequentialist justification for the national courts' greater intervention in the matters of interpretation of EU law. The normative ground for the proposition that "national courts should get greater 'ownership' over interpretation of EU law from the CJEU" would not be that "it will bring many good". Rather, the normative ground for that proposition would be that that arrangement is simply inherent in the design of the EU legal order. In what follows, I will attempt to briefly sketch how that argument would look like.

[120] G Davies, 'Does the Court of Justice Own the Treaties?' cit.; G Davies, 'Interpretative Pluralism Within EU Law' cit.

It should be noted first that many who frown upon any notion of "pluralism" share a particular understanding of constitutionalism, and not only of the EU's version of it. Their "monist" vision is that of a state-centred constitutionalism characterised by oneness, consolidation, closure, hierarchy, and settlement.[121] As Daniel Halberstam points out, these characteristics manifest themselves in two dimensions, normative and institutional. "The first is the primacy of the Constitution's legal system and legal norms over all other claims of public authority. The second is the primacy within the constitutional system of a single institution, such as a constitutional court, to serve as final arbiter of constitutional meaning".[122] This neat vision, however, has recently been confronted with an alternative one that conceptualises non-traditional constitutional practices and redefines constitutionalism in a "pluralist" manner.[123] The practice of legal and constitutional pluralism may appear in two variations that differently conceptualise normative and institutional elements of constitutionalism.[124]

The first is "systems pluralism". Its characteristic is *the plurality of legal systems*, all of which produce their own claim of legal authority. The EU constitutional order is often theorised based on the premises of systems pluralism.

The second is "institutional pluralism". Its characteristic is the plurality of institutional actors, legal sources, or norms within *a single legal system* that lacks normative hierarchy or division of institutional competences, all of which may produce their own claim of legal authority. In a setting like this, the central feature becomes the act of interpretation of a shared normative framework.[125]

An example of institutional pluralism is the United States. There, institutional actors other than the Supreme Court have a legitimate say in determining what the law of the land means.[126] Through either offering or acting upon competing interpretations, they may try to induce the Supreme Court to change the course and adopt different interpretation. In some instances, the "interpretive stalemates" that arose were resolved in favour of different actors, without the conflict of claims of interpretive authority being resolved for good.

[121] D Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance' (University of Michigan Law School Working Paper 229-2011) 1, 4-11.

[122] *Ibid*. 8.

[123] *Ibid*. 12.

[124] *Ibid*.

[125] *Ibid*. 29-30.

[126] *Ibid*. 32: "The United States Constitution does not grant the Supreme Court exclusive authority to determine constitutional meaning. [...] [T]he basic claim was a rather traditional – if largely forgotten – one: that each department, that is, the Executive, the Legislature, and the Judiciary, can determine the meaning of the Constitution for itself. [...] The claim that each co-ordinate branch of the federal government has the incidental power to interpret the Constitution with 'coequal status' goes back to the American Founders. One might even say that this was Madison's key innovation in the idea of checks and balances over that of Montesquieu's functional separation of powers". Cf. Gareth Davies's take on the US doctrine of "departmentalism" or "co-interpretation of the constitution", in G Davies, 'Does the Court of Justice Own the Treaties?' cit. 362 ff.

Now, this Madisonian institutional-interpretive pluralism is not merely a US peculiarity. It is relevant for other constitutional orders, especially those European subscribed to Kelsenian postulates with one constitutional court absolutely controlling the meaning of the law. Perhaps it will seem counterintuitive, but plurality of claims to final interpretive authority may coexist "even [in] systems following the general Kelsenian mould".[127] And the reason is simple: "if constitutionalism means limited government" – and it seems uncontroversial to claim that it does – "then the idea of constitutionalism ought to be opposed, in principle, to monopolies of authority – even those held by Kelsenian constitutional courts".[128]

What about the EU? As mentioned above, in the EU constitutional order elements of systems pluralism have regularly been noticed and discussed. But elements of institutional–interpretive pluralism not so much.[129] However, the elements of the two pluralisms often exist side by side in a given legal system.[130] We can see them ever so clearly in the EU as well.

In other words, the national courts' concurrent claim of interpretive authority as recently expressed in the *PSPP* decision can be explained in the light of institutional–interpretive pluralism. When constitutional conflicts occur, they are being framed not exclusively as conflicts between different systems – our constitution versus your Treaties. Rather, they are being framed as conflicts between institutional equals over the meaning of one shared constitutional charter – our understanding of the Treaties versus your understanding of the Treaties. National courts put forward their own claims of interpretive authority in EU law while simultaneously accepting the authority of the CJEU, at least until they feel the Luxembourg court's understanding of the Treaties is manifestly wrong for

[127] D Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law' cit. 39.

[128] *Ibid*.

[129] Some authors differentiate between "interpretive pluralism" and "constitutional pluralism". But under the latter, if my reading of them is fair, they consider only "system pluralism", and not "institutional pluralism". See, for example, G Davies, 'Does the Court of Justice Own the Treaties?' cit. 370-371: "Interpretative pluralism is an alternative to constitutional pluralism. Constitutional pluralism seeks to mediate and explain the relationship between EU law and national constitutional orders. However, in seeking to bridge the void, it proclaims the void: constitutional pluralism theories are premised on the separateness of the two legal orders, on their ability to self-define: that degree of autonomy is what makes the theories necessary. Consistent with this perspective, theories of constitutional pluralism contain nothing which questions the Court's view of EU law as a form of applicable foreign law – to be used and applied nationally, but whose nature and content is, for the national judge, an externally imposed given. Constitutional pluralism focuses on how each court should approach its own legal order in the light of the other – using ideas such as tolerance, openness and constitutionalism – but does not rethink that concept of 'own'" (references omitted). Note, however, that there is a multitude of notions (not always coherent) ascribed to the term "constitutional pluralism". So, Gareth Davies might be after a particular one, which is in his view closed for features of interpretive pluralism, contrary to Daniel Halberstam's account espoused here. For these different understandings of constitutional pluralism – or, indeed, "pluralisms" – see M Avbelj and J Komárek (eds), *Four Visions of Constitutional Pluralism* (EUI Working Paper LAW 2008-21); and K Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014).

[130] D Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law' cit. 44.

failing the shared standards of interpretative argumentation. In those situations, rare and exceptional, national courts compete with the EU apex court.

Moreover, the "structural connections" between different claims of interpretive authority are also visible.[131] National courts are openly engaging in interpretation of the same legal texts as the CJEU. They try to ground their authority within the same legal system as the CJEU through, for instance, references to the EU concept of "common constitutional traditions". And they are talking to the same audience – the EU institutions, national institutions, courts in all Member States – as the CJEU. In short, national courts are "inhabiting" (or starting to inhabit) the same "interpretive space"[132] as the CJEU. And as members of the EU interpretive community, the way they express their claims of interpretive authority commits them even strongly to the shared project of constitutional governance and demands that their actions further "the basic values of constitutionalism: voice, rights, and expertise".[133] "Voice" as in furthering the political legitimacy and democratic will; "expertise" as in furthering the knowledge and capacities to conduct common business; "rights" as in safeguarding individual rights.[134] The *PSPP* decision can perhaps be similarly read as furthering "voice" though demanding more legitimacy from the EU economic and monetary governance – often understood to involve depoliticised, crisis-management-oriented hence uncontested decision-making processes – that better reflects democratic will of the EU *demoi*;[135] not contesting "expertise" of the ECB to make complex technical decisions but requiring stricter and more substantive judicial scrutiny of justifications offered in favour of the ECB's actions, while enjoining national institutions with more expertise (German federal government) and political legitimacy (Bundestag) to decide whether the newly provided proportionality assessment of the PSPP package is acceptable;[136] and safeguarding "rights" and interests of individuals against possible illegitimate intrusions from the supranational level.

The bottom line is that adding layers of institutional-interpretive pluralism over the foundations of systems pluralism in the EU, with an increased influence of national courts over the matters of interpretation of EU law, is not something that we should accept because it will bring some distinct good. It may bring no good at all.[137] Nevertheless, we

[131] *Ibid*. 35-36.

[132] *Ibid*.

[133] *Ibid*. 37.

[134] D Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009) 326.

[135] Cf. U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them' cit. 220-221.

[136] See T Violante, 'Bring Back the Politics' cit. 1052-1053. For a comment on how this played out in practice, see J Basedow, J Dietze, S Griller, M Kellerbauer, M Klamert, L Malferrari, T Scharf, D Schnichels, D Thym and J Tomkin, 'European Integration' cit. 205-206.

[137] Or worse, it could bring a lot of bad. That is why for the many such a view is unthinkable, even blasphemous, having the integrity and uniform application of EU law in mind. See K Lenaerts, 'No Member

could accept it simply because it is a reflection of the EU's pluralist character. It is an inbuilt feature,[138] not a bug (that will do damage to the system), nor a patch (that will fix of improve the system). It just is.[139]

V. Conclusion

In this *Article*, I followed those rare commentators who tried to look for some positive takeaways from the GFCC's *PSPP* decision. In unearthing the spirit of this decision, I looked whether and how national courts engage in interpretation of EU law in general, using the recent case law of the Karlsruhe court as *Vorspann*. For what this spirit stands, I took the idea that in a pluralist legal environment the quality of legal reasoning of an apex court is essential. Also, that other judicial actors that inhabit the same "interpretive space" necessarily have a say in the matters of interpretation of law. To my mind, this has been always the case in EU law. Through dynamic interactions among the multiplicity of courts developed not only many substantive rules of EU law but also the ways in which those rules ought to be interpreted. The occasional conflicts between the multiplicity of claims of interpretive authority have been resolved differently, usually in favour of the Luxembourg court, but at times in favour of national courts. Importantly, these "interpretive stalemates" always led the actors involved to accommodate the views of the other and to adjust their own interpretive approaches. No side kept doing the same thing repeatedly while expecting different results.

The same goes for the *PSPP* decision. It remains to be seen who will eventually be able to suggest that this time the stalemate worked for them. However, again that will not solve the conflict of claims of interpretive authority for good. So, what will be more interesting is how and at what point, in this case the CJEU and the GFCC, will adjust and accommodate. Before, they always did. Going forward, what could be the alternative?

State Is More Equal than Others' cit. But, for some others, "less uniformity does not necessarily entail complete disintegration". See M Baranski, F Brito Bastos and M van den Brink, 'Unquestioned Supremacy Still Begs the Question' cit. And there are many ways to safeguard the integrity and uniformity of EU law. Some of them involve national courts having more freedom regarding interpretation and application of that law. For discussion, see G Davies, 'Does the Court of Justice Own the Treaties?' cit. 360 and 370-374. So, interpretive pluralism does not automatically exclude the possibility of achieving uniformity of law. Nor do arguments from uniformity conclusively undermine the case for interpretive pluralism in EU law.

[138] G Davies, 'Does the Court of Justice Own the Treaties?' cit. 374-375.

[139] It is also worth noting that some might see more institutional-interpretive pluralism in EU law as a development contingent on the progress of the EU integration. In a slightly different context, Advocate General Ruiz-Jarabo Colomer a while ago similarly predicted that "[o]ne day things will return to normal and the national courts will reclaim the leading role which it is intended that they share with the Court of Justice [...] thereby relinquishing the role of supporting actors to which they have been relegated as a result of the protective zeal of the Court of Justice". See *Gaston Schul Douane-expediteur*, opinion of AG Ruiz-Jarabo Colomer, cit. para. 81.

For these reasons, we should not seek to quickly dump the spirit of the *PSPP* decision, no matter how great a damage the German constitutional court did to its body. If the reading of that spirit as offered in this *Article* is plausible, then demanding more from those in the position of authority and calling them to order when defaulting should not be so outrageous. Even if many may think otherwise,[140] the rule of law is hardly breached when a check on arbitrary judicial decision-making is introduced by a greater demand for justification.[141] This is what the rule of law – in contrast with the rule of courts or men – means in a pluralist, democratic, constitutional community of values.

[140] D Sarmiento and JHH Weiler, 'The EU Judiciary After Weiss' cit.

[141] Cf N Bačić Selanec and T Ćapeta, 'The Rule of Law and Adjudication of the Court of Justice of the EU' in T Ćapeta, I Goldner Lang and T Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart forthcoming).