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A CRISIS OF AUTHORITY?

RECENT CHALLENGES IN THE EUROPEAN UNION'S LEGAL SYSTEM

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(*forthcoming in the Irish Jurist*)

Abstract:

The European Union has witnessed a number of crises in recent years: the Eurocrisis, the war in Ukraine, COVID-19 and a rule of law crisis. In addition to these economic, geopolitical and health crises, the European Union's legal system and in particular the Court of Justice has also faced a crisis of authority, linked to but separate from the rule of law crisis. Authority constitutes a social relation among a superior, a subject and a range of action whereby the commands of the superior provide content independent reasons for action on the part of the subject. The proposed paper will analyse the authority of the Court of Justice in light of this definition, arguing that its authority flows from its role as the definitive (or authoritative) interpreter of Union law, amplified by a series of judgments on the nature of the Union legal order and underpinned by a vision of the Union legal order as autonomous, effective and integrated. Its position of authority rests on national constitutional and supreme courts sharing this vision of the Union legal order and its pre-emptive character vis-à-vis their own constitutional orders. This paper will analyse the authority of the Court of Justice vis-à-vis national Supreme and Constitutional Courts in light of recent challenges posed by the German Constitutional Court and the Polish Constitutional Tribunal amongst others.

Keywords: *Weiss* – judicial dialogue – authority – constitutional pluralism – primacy – Court of Justice of the EU

INTRODUCTION

When one speaks of the law and crisis, one normally has in mind the manner in which the law manages an external challenge which has acquired such gravity that it may be properly termed a 'crisis'. This normally involves some link with emergency and the manner in which normal legality is suspended, the dangers inherent in such a moment and consideration of how those dangers may be managed and minimised.[1] European Union law is no stranger to such situations; indeed the term 'polycrisis' has been used to characterise the situation the European Union has found itself in since 2008 with the Eurocrisis, the migration crisis, Brexit, the initial and more recent invasions of Ukraine in 2014 and 2022 respectively and finally the COVID-

[1] See David Dyzenhaus, 'States of Emergency' in Michel Rosenfeld and András Sajó (eds), *The Oxford Hanbook of Constitutional Law* (OUP 2012) for a discussion of the matter from the perspective of comparative constitutional law.

19 crisis all having major implications for the Union and calling for a Union-wide response. This has in turn lead to a burgeoning of literature on the nature of crisis and the EU, with some pointing out the dangers that these situations pose while others note the onward march of integration, not despite but perhaps because of the crisis situation.[2] In the legal domain, questions have been raised concerning the ability of the Union's legal system to react to crises and the problems this may cause for the principle of legality. This concern was particularly acute in the context of the Eurocrisis, with allegations of 'the stretching of legality' but issues around the lawfulness of actions also arise in the context of the migration crisis and the response to COVID-19.

This article does not concern the manner in which Union law deals with crisis but rather concerns a potential crisis within the law itself,[3] namely in the authority of the Court of Justice of the EU (CJEU). The EU's legal system, taken as a whole and including national jurisdictions, appears to be going through a period of turmoil centred around the relationship between the CJEU and national apex courts. Recent years have seen a series of national constitutional and supreme courts (so called 'apex courts') refuse to implement judgments of the Court of Justice of the EU and even go so far as to declare central provisions of the EU treaties contrary to their constitution. This process culminated in two high profile decisions in 2020 and 2021, of the German Federal Constitutional Court (GFCC) and of the Polish Constitutional Tribunal (PCT) respectively, rejecting certain judgments of the CJEU and challenging its authority.

We are not yet in a situation of crisis. Occasional tensions between national apex courts and the CJEU are a normal part of a pluralistic legal order where these institutions are not related in a hierarchical manner. Nonetheless, analysing the question of crisis does lead to a useful inquiry into the nature of the CJEU's authority and the conditions for its existence. It is argued that the CJEU's authority, unlike that of classic apex courts, is not based on a hierachical relationship, institutionalised within a constitutional order. Rather its authority must be voluntarily accepted by its interlocutors, here national apex courts, who must therefore accept the reasons for its authority and share those reasons, recognising that only by deferring to the authority of the CJEU can those reasons be acted upon and associated goals met. The reason for the CJEU's authority, a reason shared with the national apex courts, is nothing short of the goal of a uniform and effective transnational legal order, a necessary condition of which is a single authoritative interpreter which determines not just the content of legal provisions of that legal order but also their scope and effect. So long as national apex courts accept the broad goal of European legal integration as a constitutional imperative and the necessary role the CJEU has in achieving that, then occasional challenges to specific decisions of the CJEU on particular issues, should not amount to a crisis. What is key is the acceptance of the authority *en gros* of

[2] See Luuk van Middelaar, *Alarums and Excursions: Improvising Politics on the European Stage* (Liz Waters tr, Agenda Publishing 2019) who sees an emergence of a more political and historically situated European Union in the light of recent crises.

[3] In this it follows a recent contribution of Roger Cotterrell in which he identifies three potential sources of crisis within the law: sovereignty, standing and jurisdiction. This article relates to the second of these, namely the problem of sovereignty and final authority in a world increasingly influenced by transnational legal processes. See also Roger Cotterrell, 'Spectres of Transnationalism: Changing Terrains of Sociology of Law' 36 Journal of Law and Society 481.

the CJEU and of the various principles and values of Union law which go with that authority. Challenges to the CJEU's authority can be loyal or disloyal, to use the language of Flynn,[4] or constructive or destructive, to borrow from Bobic.[5] The decisions of the German Federal Constitutional Court in *PSPP* [6] and the Polish Constitutional Tribunal in *Decision K-3/21* [7] illustrate the difference between these two categories.

The remainder of this article will be structured as follows. The next section will give a brief overview of the recent challenges to the authority of the CJEU by national apex courts. Section II will discuss the nature of the CJEU's authority and in particular the fact that it is based on an acceptance by the national courts of its key role and the principles which flow from that role. Finally, section III will address some of the recent challenge to the CJEU's authority, in particular that of the German Federal Constitutional Court in *PSPP* and the Polish Constitutional Tribunal in *K-3/21*, and whether they can be said to constitute a true crisis.

I. SETTING THE SCENE: CHALLENGES IN THE EUROPEAN UNION LEGAL ORDER

The European Union's legal system in the form we know it today was constructed by an alliance of legal entrepreneurs. These consisted of a number of key individuals working within the Union institutions at the inception of what was then the Community. These legal entrepreneurs, with a clear vision in mind, developed novel legal ideas to construct a transnational legal system that went beyond traditional forms of international law and created opportunities to place these ideas before the Court of Justice of the European Union.[8] Later, academics - particularly those involved with the 'Integration through Law' movement based at the European University Institute in Florence [9] - played a key role in developing and disseminating these ideas to the extent that, at least amongst the epistemic community of 'Euro-lawyers' (academic

[4] Tom Flynn, 'Constitutional pluralism and loyal opposition' (2021) 19 iCon 241.

[5] Anna Bobic, 'Constructive versus Destructive Conflict: taking stock of the recent constitutional jurisprudence in the EU' (2020) 20 CYELS 60.

[6] *Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15,* Judgment of 5 May 2020 (PSPP) DE:BVerfG:2020:rs202005052bvr085915.

[7] K-3/21 *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union (Press Release)* available at https://trybunalgovpl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej (accessed 17 April 2023) and K-3/21 *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union - Oral Proceedings* (translation by Roman Wojtasz, ruleoflawpl). The official press release largely mirrors the oral reasons and, in the absence of an English version of the full judgment, this article will rely on the official press release.

[8] See Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (CUP 2015). See also the recent work by Tomasso Pavone on the role of lawyers in private litigation before national courts who prompted and framed preliminary references to the Court of Justice. See Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (CUP 2022).

[9] See Rebekka Byberg, 'The History of the Integration through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) 18 GLJ 1531.

and practising) the tenets of primacy and direct effect and the unique characteristics of the Union legal order, enjoy a form of conceptual hegemony.

Central to bringing this constitutional construction into reality was the cooperative relationship between the Court of Justice of the European Union and national courts. In the early years of European legal integration this meant lower-level national courts. The direct relationship created between these courts and the Court of Justice through the preliminary reference procedure now found in Article 267 of the Treaty on the Functioning of the EU (TFEU) allowed the Court of Justice to bypass national apex courts and national governments and to enter into a direct dialogue with lower national courts, including courts of first instance. These courts in turn accepted principles of primacy and direct effect, applying them directly within national legal systems, leveraging the authority of national courts, and creating a remarkably effective transnational legal system. Scholars have generally assumed this enthusiasm of certain lower level courts was due to the empowering effects of these doctrines: lower courts, relying on their status as Union law courts, could challenge superior courts and even set aside legislation, powers they did not have under domestic law.[10] Superior courts were generally more reluctant to accept the constitutional jurisprudence of the Court of Justice and constitutional courts particularly so.[11] Nonetheless, one could say that by the 1990s or 2000s, for functional purposes the doctrines of primacy and direct effect were accepted by the national courts and the Court of Justice had succeeded in constructing a unique transnational legal order.

The concerns of significant constitutional courts regarding core principles of Union law, especially primacy, are well known.[12] In particular the German Federal Constitutional Court, in a series of judgments on various revision treaties, beginning with the Maastricht judgment [13] and culminating in the Lisbon judgment,[14] established a series of tests and limits to the application of Union law in Germany.[15] Other national apex courts were reluctant to accept unconditionally the constitutional doctrines of primacy and direct effect. The Italian Constitutional Court established *contralimiti* whereas the French *Conseil d'État* (supreme administrative court) was famously reluctant to acknowledge the primacy of Union law.[16] Even the generally Europhile Irish Supreme Court did not uncritically accept the logic of the Court of Justice that it alone would determine the effect of Union law, with Finlay CJ in *SPUC v Grogan* finding that constitutionally guaranteed rights must be fully and effectively protected by the courts: '[i]f and when a decision of the Court of Justice of the European Communities

[10] Karen Alter, Establishing the Supremacy of European Law: the Making of an International Rule of Law in Europe (OUP 2003).

[11] Jan Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9 EuConst 420.

[12] For an overview see Takis Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation and Instability' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

[13] BverfG Judgment of 12 October 1993 Cases 2 BvR 2134/92, 2 BvR 2159/92 In re: Treaty of Maastricht.

[14] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 (Treaty of LIsbon) DE:BVerfG:2009:es200906302bve000208.

[15] For a good overview of the German Federal Constitutional Court's jurisprudence over the decades see Gavin Barrett, 'Don't you know they're talkin' 'bout a revolution? (It sounds like a whisper)' in Martin Belov (ed) *Peace, Discontent and Constitutional law* (Routledge, 2021).

[16] See Araceli Turmo, 'National security as an exception to EU data protection standards: the judgment of the Conseil d'État in French Data Network and others' (2022) 59 CML Rev 203.

rules that some aspect of European Community law affects the activities of the defendants impugned in this case, the consequences of that decision on these constitutionally guaranteed rights and their protection by the courts will then fall to be considered by *these* courts.' (emphasis added)[17]

However, while national apex courts expressed their misgivings about some of the claims of Union law and sometimes laid down tests to police the application of Union law within their respective domestic legal systems, they did not trigger these tests in practice and never went so far as to actually refuse to apply Union law or a judgment of the Court of Justice:[19] there were frequent barks, but never bites. More recently, however there have been direct challenges to the jurisprudence of the Court of Justice by such courts. In 2012, the Czech Constitutional Court (*Ústavní soud*) found a judgment of the Court of Justice on the principle of non-discrimination on the grounds of nationality as it applied to pensions[20] to be *ultra vires*.[21] In 2016, in the judgment of *Ajos*,[22] the Danish Supreme Court refused to apply a ruling of the Court of Justice [23] handed down following a preliminary reference. In *Decision 22/2016* the Hungarian Constitutional Court (*Alkotmánybíróság*), in response to an application by the Government on the issue of asylum seeker reallocations, declared itself competent to review Union acts as *ultra vires* the sovereignty delegated to the Union under the Hungarian constitution, although it should be noted the decision was one of 'abstract' review. More seriously, in 2020 the German Federal Constitutional Court finally made good a threat it had been making for many years and applied its *ultra vires* test to the judgment of the Court of Justice in *Weiss*.[24] In *Weiss* the European Court of Justice found the public sector asset purchase programme (PSPP) of the ECB to be compatible with the EU Treaties and in particular compatible with the ECB's role in monetary policy. The German Federal Constitutional Court judgment in response declared the CJEU's judgment *ultra vires* and adopted what some viewed as an aggressive tone, finding that the CJEU's reasoning was 'not comprehensible from a methodological perspective'.[25] The judgment caused much consternation.[26] The possible

[17] *SPUC v Grogan et al* [1989] IR 753 at 765.

[19] Frequently, national apex courts took an avoidance approach, preferring to (sometimes disingenuously) find that Union law did not apply or that it applied in such a way that did not raise any difficult issues with respect to national law, all the while refusing to make references to the Court of Justice on the matter.

[20] Case C-399/09 Marie Landtová v Česká správa socialního zabezpečení EU:C:2011:415.

[21] For a commentary see Jan Komárek, 'Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*' 8 EuConst 323 and Robert Zbíral, 'A legal revolution or negligible episode? Court of Justice decision proclaimed *ultra vires: Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12.* ' (2012) 49 CMLRev 1475.

[22] Case 15/2014 Dansk Industri (DI) acting for Ajos A/S v The estate left by A.

[23] Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* EU:C:2016:278. For a comment on both the CJEU's judgment and the response of the Danish Supreme Court see Rass Holdgaard, Daniella Elkan and Gustav Krohn Schaldemose, 'From Cooperation to Collision: the ECJ's *Ajos* ruling and the Danish Supreme Court's refusal to comply' (2018) 55 CML Rev 17.

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

[25] *PSPP* (n 6), para 153.

[26] See for example the special issue of the International Journal of Constitutional Law (iCon) in 2021. See the introduction: Joseph Weiler, 'Why Weiss? The I.Con symposium preface' (2021) 19 iCon 179. For a measured but systematic critique see Barrett (n 15)

significant direct financial consequences no doubt contributed to this anxiety but commentators were also concerned that the rejection by such an influential court of the authority of the Court of Justice would lend support to other, perhaps less well intentioned judicial actors, to likewise reject the judgments of the CJEU.[27] That eventuality appeared to come to pass in 2021 when the Polish Constitutional Tribunal, pursuant to an application of the Polish Government, declared certain key provisions of the EU Treaties incompatible with the Polish constitution and the Act of Accession and threatened to declare recent judgments of the Court of Justice on judicial independence to be outside the competence of the Union.[28] Finally, while not explicitly rejecting a judgment of the Court of Justice and in fact resisting calls to do so by the *Rapporteur Public*, the French *Conseil d'État* (Supreme Administrative Court) *de facto* refused to follow the Court of Justice's judgment in in *La Quadrature du Net*[29] and developed its doctrine to allow the setting aside of Union law where certain constitutional objectives – here public security – were at stake.[30] In light of these challenges, can we speak of a crisis in the authority of the Court of Justice of the EU?

II. THE AUTHORITY OF THE COURT OF JUSTICE OF THE EU AND THE EU LEGAL SYSTEM

Authority may be usefully defined as a social relation between a superior, a subject and a range of action whereby the commands of the superior provide content independent reasons for the action on the part of the subject.[31] In a relationship of authority, the subject foregoes his or her own decision-making in a particular area in deference to the decisions of the authority: the authority's determinations replace those of the subject. In the context of European Union law, national courts forego their decision-making capacity with respect to Union law, including not just the substantive content of its provisions but also its scope and effect. Thus, it can be said that the Court of Justice enjoys authority over national courts with respect to the interpretation of Union law, including its scope and effects.

However, this authority is not institutionally guaranteed. Certainly, the Court of Justice is granted authority under Article 19(1) TEU to interpret Union law. However, this does not settle the question. Two related points in particular need to be highlighted. Article 19(1) TEU provides that the CJEU is competent in interpreting Union law. However, it is silent as to whether this includes the scope and effect of Union law or simply the meaning of the substantive provisions of Union law. Secondly, and related to the previous point, there is no rule in the treaties for resolve a conflict between national law and Union law. Both of these

[27] For similar concerns see R Daniel Keleman and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the name of Constitutional Identity in Hungary and Poland' (2019) 21 CYELS 59.

[28] *Decision K-3/21 (Press Release)* (n 7).

[29] Joined Cases C-511/18, C-512/18 and C-520/18 La Quadrature du Net and Others v Premier ministre and Others EU:C:2020:791.

[30] For an overview and critique see Turmo (n 16).

[31] Nick Barber, *The Constitutional State* (OUP 2010) at 19-20 quoting Leslie Green.

questions were resolved simultaneously by the Court of Justice in its early foundational jurisprudence: Union law (and therefore the Court) will determine its scope and effects and one of those effects is primacy over national law. As noted above, these claims were largely - but not unconditionally - accepted by national judiciaries, despite the absence of a textual basis.

The CJEU's authority is therefore based on its acceptance by the national courts: the submission to the CJEU's authority is voluntary. However, that acceptance is not unreasoned or without foundation. Rather, the authority of the CJEU - the fact that its decisions with regard to the content, scope and effect of Union law pre-empt those of national courts - is justified by the fact that that authority is necessary for the achievement of a particular goal, shared by both the CJEU and national apex courts, namely the construction of a uniform, effective, transnational legal order. In brief, the same justification for the primacy and direct effect of Union, applies to the role of the Court of Justice as the authoritative interpreter of the content, scope and effect of Union law. National apex courts accept that European legal integration in its current form is a goal to which their constitution is committed, that this goal requires the acceptance of the broad principles and values of a shared Union legal system and acceptance of the authority of the CJEU in preserving that legal system in its current form. That is not to say that acceptance is unconditional or may not be set aside in certain circumstances, when other constitutional goals or imperatives arise. Nonetheless, so long as national apex courts remain largely committed to the current form of European legal integration they have good reason to accept the authority of the CJEU. In the event that national apex courts reject European legal integration in its current form or see a fundamental contradiction between it and their national constitutions, they will no longer have reason (or not have overriding reasons) to accept either the broad principles of EU law, including its values, or the authority of the CJEU. To date, we have seen only one judgment which reflects anything approaching such an attitude on the part of a national apex court, namely *Decision K-3/21* of the Polish Constitutional Tribunal, discussed further below. And one judgment, while a matter of concern, does not amount to a systemic crisis.

The Court of Justice has leveraged its role as the authoritative interpreter of Union law, accorded it by the Treaties, in a remarkable and far-reaching way,[32] in effect constitutionalising the Treaties. This has been achieved not only by asserting authority to interpret the substantive content of Union law - something uncontroversial and common to courts of international treaty regimes - but also and crucially the scope and effect of Union law. The real innovation in both *van Gend en Loos* [33] and *Costa v ENEL* [34] was not that (then) Community law was capable of enjoying direct effect and primacy over national law. It was that Union law would *itself* determine its own effects rather than deferring to the various rules contained in national

[32] Some would argue in an illegitimate way, with the Court of Justice itself going beyond the authority afforded it by the Treaties. See Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (CUP 2018). For an early critique, see Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff 1986).

[33] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, [1963] ECR 3.

[34] Case 6/64 *Flaminio Costa v ENEL* EU:C:1964:66.

constitutions for the reception of international law. The question in *van Gend en Loos* as to whether Article 12 of the Treaty establishing the European Economic Community enjoyed direct effect was on its face perplexing, for the question of whether an international treaty enjoyed direct effect or not was something to be regulated by national law rather than the Treaty itself. Indeed, this gave rise to a question of admissibility- as to whether it was appropriate for the Court of Justice to even entertain the question, given it was a question of national law - which occupied most of the attention of Advocate General Roemer in his opinion.[35] The Court of Justice, in a move that would become familiar, simply avoided this prior question, implicitly assuming that Community law (and hence the Court itself) would determine its own effect and in particular that it was capable of having direct effect if certain conditions (again to be determined by Union law) were fulfilled.[36]

The justification for the claim that its role was not just to interpret the substance of Union law but also its scope and effect becomes clear in *Costa v ENEL*.[37] The doctrine of primacy is not, as some Eurosceptic politicians may believe, a naked power grab whereby the Court of Justice seeks to arrogate power to itself for power's sake. Rather it is to ensure the uniformity and effectiveness of Union law and ultimately the effectiveness of a legal system which operates across multiple jurisdictions. The Court held that 'by contrast with ordinary international treaties, the EEC Treaty has created *its own legal system* which, on entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply' (emphasis added).[38] Rejecting the possibility that a subsequent national measure could override Union law, the Court found that

> the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty...The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories...It follows from all these observations that the law stemming from the Treaty, an *independent source of law*, could not, because of its special and *original* nature, be overriden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question' (emphasis added).[39]

The Union legal order is therefore an *independent* and *original* legal system and has its own source of legitimacy and authority. It in turn defines its own scope and effects, in this case

[35] Advocate General Roemer ultimately found that it was a question to be regulated by national law but, given that Netherlands law allowed for international treaties to be directly effective if they were capable of being self-executing, opined in favour of admitting the question and giving a useful answer to the national court. See Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (Opinion of AG Roemer) EU:C:1962:42.

[36] *van Gend en Loos* (n 33) at pp. 12-13 in particular.

[37] *Costa* (n 34).

[38] Ibid at 593.

[39] Ibid at 594.

primacy over any national legal provision. Both the substantive rule decided here - that in the event of a conflict between national and Union law, Union law must prevail - and the secondary rule - that Union law, as an independent source of law, will define its own effects, are justified by the same consideration: to prevent variation of the executive force of Union law between Member States. Uniformity of Union law is important not simply for its own sake, but in order to maintain equality between states with respect to compliance with their obligations under Union law. This in turn is essential to maintain the mutual trust between Member States which ultimately guarantees the continuing effectiveness of the Union legal order. The relationship between mutual trust and a uniformly applicable and effective legal system is mutually re-enforcing: the more Member States trust that other Member States will comply with their obligations under the Treaties, the more likely they will in turn comply with their obligations, making other Member States more likely to comply and so on leading to a virtuous circle of compliance. Indeed, Phelan has demonstrated that the establishment of a constitutionalised, autonomous legal order enjoying direct effect and primacy was motivated by a desire to move away from the 'self-help' enforcement regimes of traditional international law, prone to breakdown of trust and fragmentation, into a system whereby the application of Union law was guaranteed by domestic courts themselves and could not be circumvented by national governments. This in turn established trust between Member States, ensuring a much more robust legal system.[40] The same logic lies behind more recent developments on the values of the Union, mentioned in more detail below.

The entire Union legal system as an effective transnational legal order therefore depends on uniformity and effectiveness. This same imperative dictates that there should be a single authoritative interpreter of Union law *and* of its scope and effects. Ultimately the authority of the Court of Justice rests upon and is justified by the same goal as the principles of primacy, direct effect, uniformity, effectiveness etc. In order to ensure the uniform application of Union law, Union law must itself determine its own effects and this in turn requires a single authoritative interpreter not just of the substantive rules of Union law but of its scope and effect. Member State courts acting alone, even if they did wish to ensure the uniform and effective application of Union law, quite simply would not be in a position to do so. As individual actors facing a collective action problem, they need an authoritative institution to determine a set of common rules. Their decision-making capacity in this context is replaced by that of the Court of Justice, which is able, because of this authority, to achieve a common objective - an effective transnational legal order - which national courts are committed to but cannot achieve acting independently.[41] This is why the Court of Justice's authority is legitimate.

However, to return to the point made earlier, this authority is not grounded in any constitutional position which places the Court of Justice in a hierarchically superior position to national apex

[40] William Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (CUP 2019).

[41] The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him...if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.Joseph Raz, *The Morality of Freedom* (OUP 1986) at 53.

courts in the event of conflict. Its authority must rest on its acceptance by the national apex courts which must be convinced both of the reasons which are served by the Court's constitutional jurisprudence (namely, ensuring a uniform and hence effective transnational legal order grounding mutual trust between Member States - in Raz's terms 'dependent reasons') [42] but also of the fact that those reasons are best achieved by granting a single institution interpretative authority over the meaning, effect and scope of Union law. Member State apex courts agree that a transnational, constitutionalised, uniform and effective legal order should be achieved as an objective to which their states are constitutionally committed and that in order to do this there must be a single authoritative interpreter not just of the meaning but of the scope and effect of that legal order. They should therefore, in order to serve this broader goal, subject themselves to its rulings and consider them binding. It is a relationship of authority in the sense that individual national apex courts agree that their decisions and determinations on questions of the scope and effect of Union law in their legal systems should be replaced by those of another body ie the CJEU. It is justified by the fact that that authority is better able to serve interests and act on reasons which are shared by the bodies subject to that authority (ie the national courts), here, to secure a uniform and effective, transnational legal order.[43] National apex courts accept that justification and submit themselves voluntarily to the authority of the CJEU. That acceptance is made easier by, or even contingent upon, two factors. First, on broad convergence and acceptance of key constitutional parameters, including the underlying principles of the Union's legal order and of its values and secondly, on a process of communication and dialogue, both in articulating convincing reasons for those key constitutional parameters in general and in managing specific instances of tension. So long as national apex courts as a whole see themselves as agents in this common constitutional project and (voluntarily) submit themselves to the authority of the Court of Justice, then the legal system can be said to function and talk of crisis avoided.

However, while ensuring the ongoing existence of a uniform and effective EU legal order and hence subjecting themselves to the authority of the Court of Justice, is one constitutional objective for national apex courts, there are others, whether these be ensuring the coherence and integrity of their own legal systems or guaranteeing certain fundamental rights or constitutional principles. While national courts have *largely* accepted the role of the Court of Justice in interpreting the scope and effects of Union law, they have not entirely accepted this and have maintained at the margins the right to disapply Union law in certain circumstances, particularly where it conflicts with competing constitutional imperatives. However, given the pluralist character of the Union's legal system, the absence of any hierarchical institutionalised relationship between the CJEU and national apex courts and the competing demands on national apex courts between their role in the Union legal order and their responsibilities to the

[42] ibid 57-59.

[43] Thus complying with what Raz terms the normal justification for authority:

> the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him...if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than trying to follow the reasons which apply to him directly.

(ibid 53).

national legal system, tensions and indeed incompatibilities will necessarily emerge. If these however are minimised and remain within acceptable bounds then it is an exaggeration to say that the Union's legal system and the authority of the CJEU is in crisis. It would be a fragile system if (very) occasional instances of disobedience gave rise to an existential crisis. Indeed, given the fact that the Union is an incomplete legal order, based on a system of conferral and with limited democratic credentials, it is arguable that the possibility of contestation on the part of national apex courts *vis-à-vis* the Court of Justice may be no bad thing.[44]

III. A CRISIS IN THE AUTHORITY OF THE COURT OF JUSTICE? *PSPP* AND *K-3/21* COMPARED

As is evident from the previous section, the authority of the CJEU and hence the functioning of the legal order would not be existentially threatened if challenges remained within acceptable bounds and if the national apex courts accepted the role of the CJEU as the authoritative interpreter of Union law (including its scope and effect), accepting that this role is necessary in order to ensure a uniform and effective transnational legal order. This is especially the case when Member State apex courts engage in mutually respectful dialogue with the CJEU. This does not preclude occasional challenges on specific issues, particularly those which focus on particular and limited concerns. However, if the challenge is more general, to the foundations of the legal order of the Union and its necessary conditions, including or especially the role of the CJEU, then the matter is more serious. A series of challenges of this second type would constitute a crisis. We are not yet however at that stage.

A comparison between the judgment of the German Federal Constitutional Court in the *PSPP* case and the Polish Constitutional Tribunal Decision in *K-3/21* is illustrative of the difference between these two approaches. There are superficial similarities between the two judgments. Both are based on an *ultra vires* doctrine[45] and a somewhat similar understanding of the relationship between the Union legal order and domestic, particularly constitutional, law.[46] For both, Union law gains authority within their respective jurisdictions via the national act of accession and on the basis of the national constitution. For both therefore, the constitution is a potential limit on the application of Union law in their jurisdiction and as authoritative interpreters their respective constitution, it falls to the German Federal Constitutional Court and the Polish Constitutional Tribunal to determine those ultimate limits.[47] One of those limits is the notion of *ultra vires*: as an organisation based on conferred competences, the Union may only exercise those powers conferred to it based on the acts of accession. Ultimately national apex courts may be called upon to police those competences in the event that the Court of Justice fails in that task; the institutions of the Union, including the Court of Justice, should

[44] See Gareth Davies, 'Does the Court of Justice own the Treaties? Interpretative pluralism as a solution to over-constitutionalisation' (2018) 24 ELJ 358.

[45] *Decision K-3/21 (Press Release)* (n 7), paras 6-7 and *PSPP* (n 6), paras 102ff.

[46] *Decision K-3/21 (Press Release)* (n 7), para 1 and *PSPP* (n 6), para 111.

[47] *PSPP* (n 6), para 111.

not, in the final instance be at liberty to determine their own competences.[48] Both decisions also accept the role of the Court of Justice in interpreting Union law.[49] Finally, both courts also note the importance of dialogue between them and the CJEU in resolving possible tensions.[50]

There, however, the similarities end. The judgment of the German Federal Constitutional Courtin *PSPP* was extensively criticised. Indeed, it is a problematic judgment in many respects. However, the problems with the judgment lie more with the tone and with the substantive reasoning and outcome than with the approach and the attitude displayed towards EU law and the authority of the CJEU. The tone of the judgment is problematic, combative and none too respectful to the Court of Justice and its decision in *Weiss*.[51] The German Federal Constitutional Court *PSPP* judgment is a review of the CJEU *Weiss* judgment, declaring part of the reasoning in that latter judgment 'not comprehensible'.[52] Even the part of *Weiss* which the German Federal Constitutional Court does not find manifestly wrong, is subject to quite damning critique.[53] This is unfair to the CJEU. Whether or not one believes that the CJEU adequately responded to the concerns of the German Federal Constitutional Court as expressed in *Weiss* and previous judgments on the same issue (in particular its *OMT* judgment),[54] the CJEU judgment in *Weiss does* engage in detailed reasoning and assessment of the ECB's position and adopts a reasonable, if contestable, position on the appropriate level of scrutiny of an institution such as the ECB. In fact, it is arguable that it is the review of the German Federal Constitutional Court which is problematic in subjecting a judgment of the CJEU to an inappropriate standard of review, imposing its preferred solution on the substantive issue rather than simply assessing the reasonableness or acceptability of the CJEU's approach. In short, on the substance, there is much to criticise in the German Federal Constitutional Court judgment.[55]

However, in terms of the general approach, tools and concepts used to address the issue, the judgment in *PSPP* does not constitute a full assault on the authority of the CJEU. On the contrary, within (considerable but long established) limits,[56] the German Federal Constitutional Court accepts the role of the Court of Justice as the authoritative interpreter of EU law *and* importantly displays an understanding as to why this is necessary:

> the Treaties confer upon the CJEU the mandate to interpret and apply the Treaties and to ensure uniformity and coherence of EU law...If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this

[48] Ibid, paras 101-102.

[49] Ibid, para 102 and *Decision K-3/21 (Press Release)* (n 7), para 3.

[50] *PSPP* (n 6), para 111, *Decision K-3/21 (Press Release)* (n 7), para 21.

[51] *Weiss* (n 24).

[52] *PSPP* (n 6) para 116.

[53] See the discussion on the compliance of the PSPP with Article 123(1) TFEU (the so-called 'no-bailout clause'), ibid

[54] BvfG, Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13 (OMT Reference) DE:BVerfG:2014:rs201401142bvr272813.

[55] See Weiler on this point. See also Anna Bobic and Mark Dawson, 'Making sense of the 'incomprehensible': the *PSPP* Judgment of the German Constitutional Court' (2020) 57 CML Rev 1953 for a general critique.

[56] For a good overview see Damian Chalmers, Gareth Davies and Georgio Monti, *European Union Law* (4 edn, CUP 2019), ch 5.

> could undermine the precedence of application accorded to EU law and jeopardise its uniform application.[57]

Accordingly, its role in conducting an *ultra vires* review is 'limited and any such review must be exercised with restraint, giving effect to the Constitution's openness to European integration' [58]. The German Federal Constitutional Court also accepts that the CJEU develops its own legal concepts and its own standards of review for the purposes of EU law and that these cannot correspond perfectly to those used in particular Member States. When conducting its review, the German Federal Constitutional Court is not seeking to replace the decision of the CJEU but rather to assess whether it is 'not arbitrary from an objective perspective' [59]

Finally, the German Federal Constitutional Court does engage in a process of dialogue, in making the initial reference to the CJEU. We should also note that there has been a previous exchange between the CJEU and the German Federal Constitutional Court on this issue in *Gauweiler*[60] and *OMT*,[61] so there is an ongoing dialogue on this issue, which appears of some concern to the German Federal Constitutional Court. One could raise doubts as to whether that dialogue in this particular judgment is in fact good faith, given the response and the fact that the point which came to most concern the German Federal Constitutional Court and on which it rejected the judgment of the CJEU (ie the extent to which the ECB had demonstrated the proportionality of the PSPP) was not stressed by the German Federal Constitutional Court in its reference.[62] Nonetheless, on balance the German Federal Constitutional Court is engaging in dialogue (albeit of a testy kind) on a particular issue over which it had previously expressed doubts.[63] Its approach is consistent with a basic respect of the CJEU's role and the need for that role and it tailors its review accordingly. Finally, the fundamentals of the Union's legal order are not called into question. This is a problematic judgment in many respects and perhaps it was intended as a signal to the CJEU of the German Federal Constitutional Court's willingness to disapply CJEU judgments in certain circumstances. Nonetheless, it does not reach such a level of seriousness or display such a fundamentally objectionable attitude as to call into question the authority of the CJEU itself.

The decision in *K-3/21*[64] on the other hand is more serious and if operationalised by the Polish Constitutional Tribunal more extensively and replicated by other national apex courts, would

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[57] *PSPP* (n 6), para 111.

[58] ibid para 112.

[59] ibid, para 112. To quote from this in more detail:

> it is not for the FCC to substitute the CJEU's interpretation with its own when faced with questions of interpreting EU law, even if the application of accepted methodology, within the established bounds of legal debate, would allow for different views. Rather, as long as the CJEU applies recognised methodological principles and the decision it renders is not arbitrary from an objective perspective.

[60] Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag EU:C:2015:400.

[61] *OMT Reference* (n 54).

[62] See Bobic and Dawson (n 55).

[63] Indeed, the German Federal Constitutional Court gives a good indication of its underlying concerns with the actions of the ECB as raising questions of democratic legitimacy. See *PSPP* (n 6) paras 157-159.

[64] Unfortunately only a press release, which is largely similar to the transcript of the oral reasons are available in English. It does appear however, that the fundamentals of the decision are reflected in these documents. See

indeed result in a crisis of the Union's legal order. As noted above it does make some gestures at conciliation, noting the role of the Court of Justice as an interpreter of Union law [65] and also referencing the need for dialogue.[66] Nonetheless, these references are superficial and a closer reading of the judgment reveals a much more confrontational approach.

Most fundamentally, the judgment is resolutely sovereigntist in approach and in particular challenges quite openly the primacy of Union law. Placing Union law in a traditional hierarchy of norms, the Polish Constitutional Tribunal subordinates it to the national constitution:

> the system of the sources of law in the Republic of Poland has a hierarchical structure. International agreements ratified with prior consent granted by statute such as the Treaty on European Union are placed in that hierarchy below the Constitution, which is the supreme law of the Polish system of sources of law...Thus, in the hierarchy of the sources of law, the TEU, occupies a position that is lower than that of the Constitution. [67]

Of course, no national apex court, including a constitutional court, would accept that the Treaties occupy a position superior to the constitution in some sense.[68] However, in a pluralist system it is not appropriate or helpful to characterise the relationship between Union law and the national constitution in terms of hierarchy. The point is that it is a relationship is of co-existence and mutual adjustment.

This sets up the second, more serious, move of the Polish Constitutional Tribunal which distinguishes it clearly from the *PSPP* judgment and indeed other judgments, such as *Ajos*,[69] namely the fact that it is concerned, not with a particular judgment of the CJEU on a particular issue which causes particular problems but rather with the more general process of European integration and in particular provisions of primary law, as they have been interpreted by the CJEU. Hence, for example, it is not concerned with equal treatment in pensions,[70] the horizontal applicability of a directive,[71] the accessibility of personal data for law enforcement purposes[72] or judicial review of the ECB.[73] Important though these issues are, they are discrete and concerned with provisions of secondary law. It is Article 1 TEU, a programmatic provision of the Union containing the goal of achieving 'ever closer Union between the peoples of Europe' and Article 4(3) TEU on loyal cooperation - a central provision in the good functioning of the Union and constituting the basis of many of the Member States obligations under Union law - which may be incompatible with the Polish constitution according to the Polish Constitutional Tribunal. While this may be a clumsy way of arriving at the question of competences and their

comments in Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, 'Is it Polexit yet? Comment on Case K3/21 of 7 October 2021 by the Constitutional Tribunal of Poland' (2023) 19 EuConst 163.

[65] *PSPP* (n 6), para 4.

[66] Ibid, para 21.

[67] *Decision K-3/21* (Press Release) (n 7) para 1.

[68] Even in Ireland, one of as one of the more open constitutional systems to EU law, the treaties and all EU law gain primacy by virtue of Article 29 Bunreacht na hEireann

[69] *Ajos (DNSC)* (n 22).

[70] *Landtová* (n 20).

[71] *DI (acting on behalf of Ajos A/S) v A* [2017] 2 CMLR 14.

[72] *Conseil d'Etat*, 21 Avril 2021 No 393099 (*French Data Networks*) FR:CEASS:2021:39309920210421.

[73] *PSPP* (n 6).

limits, it does signal a potentially much more fundamental break with the *telos* of the European integration project and the general but centrally important obligation of sincere cooperation incumbent on a Member State of the European Union. More worryingly still, later in its decision, the Polish Constitutional Tribunal takes aim at the values contained in Article 2 TEU, declaring them 'merely of axiological significance' and not 'legal principles'.[74] While not explicitly claiming they are in conflict with the Polish constitution, the Polish Constitutional Tribunal is claiming they are void of legal significance and cannot have legal effect, including as an interpretative aid. This puts the Polish Constitutional Tribunal in direct conflict with the developing jurisprudence of the CJEU on Article 2 TEU values.[75]

Aside from alluding to a direct conflict between the political (see Article 1 TEU) and the normative (see Article 2 TEU) basis of the European Union's legal order, the Polish Constitutional Tribunal also appears to undermine the role of the Court of Justice as the authoritative interpreter of Union law. Recall the approach of the German Federal Constitutional Court. While one can certainly note the limits of this approach, which ultimately shaded into a substantive review of Union provisions and interpretation of Union law, the German Federal Constitutional Court nonetheless fundamentally does accept the role of the CJEU in the interpretation of Union law and limits itself in the first instance to reviewing its judgments not on the basis of the German Federal Constitutional Court's understanding of Union law and the German Federal Constitutional Court's own legal principles and concepts but on those concepts as developed by the CJEU itself and on the basis of broad methodological principles. And when conducting its review, it engages in detail with the reasoning of the CJEU on the matter. The Polish Constitutional Tribunal on the other hand, despite noting the role of the CJEU in the interpretation of Union law, proceeds to give its own interpretation of key provisions of EU law without reference to extant CJEU jurisprudence on the matter and without making a preliminary reference.

As pointed out by Gliszczyńska-Grabias and Sadurski,[76] the Polish Constitutional Tribunal makes a seemingly contradictory claim that while it 'respects the exclusive jurisdiction of the CJEU' and 'does not provide an autonomous interpretation of EU law' it nonetheless will determine 'the substance of those norms'.[77] Despite this supposed self-restraint, the Polish Constitutional Tribunal proceeds to engage in precisely the activity of interpreting those norms, particularly with regard to the implications of Article 19(1) TEU for Member States and the organisation of their judiciary. Article 19(1) TEU, providing that 'the Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', has in conjunction with the values contained in Article 2 TEU (in particular the rule of law) and Article 47 of the Charter of Fundamental Rights, formed the basis of the CJEU's jurisprudence on the rule of law, obliging Member States to guarantee the independence of any jurisdiction applying Union law and declaring certain domestic practices relating to the organisation of the judiciary in Poland to be contrary to this requirement.

[74] *Decision K-3/21* (Press Release) (n 7), para 19.

[75] In particular Case C-156/21 *Hungary v Council and Parliament* EU:C:2022:97, paras 126-127.

[76] Gliszczyńska-Grabias and Sadurski (n 64).

[77] *Decision K-3/21* (Press Release) (n 7), para 3.

The Polish Constitutional Tribunal is clearly taking issue with certain judgments of the CJEU, and indeed the decision in K-3/21 was triggered by an application by the Polish Government after one such judgment.[78] However, in contrast to the judgment of the German Federal Constitutional Court in *PSPP* with respect to the CJEU judgments in *Weiss* [79] and *Gauweiler* [80] on the standard of review of European Central Bank acts, the Polish Constitutional Tribunal fails to engage at all with the judgments of the Court of Justice in this area or its reasoning with respect to the requirements of Article 19(1) TEU, which at this stage has been the subject of considerable judicial development.[81] Rather, the Polish Constitutional Tribunal replaces the interpretation of the CJEU of Article 19(1) TEU, with its own (flawed) interpretation,[82] declaring that it cannot form the basis of a Union competence, including concrete requirements as to the independence of the judiciary.[83] As noted above, the Polish Constitutional Tribunal also gives a particular interpretation to Article 2 TEU and its legal effects (or lack thereof), again with no engagement with the CJEU's caselaw on the matter. The Polish Constitutional Tribunal, while professing the need for a 'mutual, sincere dialogue'[84] and arriving at an interpretation of Union provisions at odds with that given by the CJEU, fails to see the need for a preliminary reference.[85] Finally, in the closing paragraphs of the press release, the Polish Constitutional Tribunal makes a thinly veiled threat to the CJEU, questioning the latter's independence, pointing out again that EU law is 'hierarchically subordinate', condemning its 'progressive activism' and finally threatening to subject its judgments to 'elimination from the Polish legal order.'[86]

The difference between the two Court's approaches on the two points outlined above are clear. While the manner of its review of the CJEU decision in *Weiss* [87] is problematic, the German Federal Constitutional Court in *PSPP* recognises the broad principles of Union law and does not take aim (beyond what it had already stated in previous decisions) at the core goals of

[78] Ibid para 15.
[79] *Weiss* (n 24).
[80] *Gauweiler* (n 60).
[81] For an overview and summary of the numerous judgments in the area see Laurent Pech and Dimitry Kochenov, *Respect for the Rule of law in the Case Law of the European Court of Justice - A Casebook overview of the key judgments since Portuguese Judges case* (SIEPS 2021:3, 2021). Available at https://www.sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/ (accessed 17 April 2023).
[82] The reasoning of the Polish Constitutional Tribunal on this point appears to be based on a flawed understanding of the manner in which competences function in the Union. The CJEU is not claiming that the Union has competence to regulate the national judiciary. Rather, it is relying on a well-established formulation relating to so-called 'retained competences' of the Member States. While certainly remaining with the Member States, retained competences must be exercised in a manner compatible with the requirements of Union law. On this point see Lena Boucon, 'EU Law and Retained Powers of Member State' in Loïc Azoulai (ed), *The Question of Competences in the EU* (Hart 2014). It is possible that the Polish Constitutional Tribunal recognises this when it mentions the 'negative' conferral of competences. However, this is not clear from the reasoning which most appears to conflate the allocation of competences with their exercise.
[83] *Decision K-3/21 (*Press Release*)* (n 7), para 18.
[84] ibid para 21.
[85] ibid para 4.H
[86] ibid para 22.
[87] *Weiss* (n 24).

European integration, its values or the principles of the Union legal order. Its concern is limited to a specific issue on which it has previously displayed concerns. Moreover, it is engaging in an ongoing dialogue with the Court of Justice on this issue. Certainly, the manner in which that dialogue has been conducted is not ideal but refusal to accept a single decision of the Court of Justice does not amount to a full-scale rejection of its authority in general. It should also be noted that its rejection of the CJEU's judgment was limited to a specific, procedural issue (that of demonstrating the proportionality of the PSPP), which was relatively easily rectified. *Decision K-3/21* on the other hand, while professing loyalty to the Union legal order and the role of the CJEU, in fact rejects as potentially incompatible with its constitution, foundational provisions of primary law reflecting key political goals and normative values. Moreover, it also fails to respect the role of the Court of Justice, engaging in interpretations of the Treaties contrary to those already elaborated by the CJEU. Finally, despite its concerns, it fails to engage in a dialogue with the CJEU, either directly through the preliminary reference procedure or through engagement with the CJEU's reasoning.

CONCLUSION

There certainly is a rise in the number of direct challenges to judgments issued by the Court of Justice. However, this must be placed in the broader context of the Union's plural legal order. The Union's legal system is pluralist. This is not a normative but a descriptive claim. The authority of Union law is ambiguous, falling between the autonomous source of the treaties and - for the manner in which they take effect within national legal systems - national constitutions. This in turn sets up an institutional pluralism between the various courts responsible for these heterarchically related legal orders: the CJEU on the one hand and the national constitutional and apex courts on the other.

As a result of that institutional pluralism and heterarchical relationship, the CJEU's authority cannot rest on an institutionally guaranteed position within a hierarchically ordered constitutional system of courts. Rather, its authority must rest on acceptance by the other actors, namely national apex courts, of the reasons for its authority. It is argued here that those reasons relate to nothing more and nothing less than the need to secure a uniform, effective transnational legal order which in turn underpins mutual trust between member states and compliance. A single authoritative interpreter of Union law, both as to its content but also as to its scope and effects, is an essential condition, alongside the principles of primacy and direct effect, of securing that overall goal. By committing to the specific form of European legal integration as this has been elaborated by the CJEU over many decades, national apex courts must necessarily accept the authority of the CJEU as a key component of that form of European legal integration. Once this basic understanding of the need for the role of the CJEU, alongside the need for a shared common legal principles and values, is not challenged outright, then we cannot speak of a crisis.

Securing European integration is one constitutional goal, and perhaps an important one, for national apex courts. It is not however the only one and must sit alongside other constitutional imperatives relating to, for example, democracy, fundamental rights or the integrity of key

elements of their legal systems. Tensions can arise when these goals compete with the goal of facilitating European integration and challenges can be expected. When managing these challenges, national apex courts must be mindful of the damage that wholesale, continuous refusal to follow judgments of the Court of Justice will do to the overall system and of their responsibilities as key actors in that system. They must therefore approach the issue with care and within certain parameters, recognising the specific features of Union law, the fact it is a transnational law and the need for dialogue with the CJEU in order to potentially influence the CJEU and minimise instances of outright conflict. However, situations may occasionally arise where avoidance of conflict is not possible. So long as these situations are minimal, both in terms of number and impact, and the overall approach of the national apex courts is not one of outright confrontation then, given the pluralist character of the system, we are not in a situation of crisis.

Certainly, there have been some refusals to give effect to rulings of the CJEU but no court systematically refuses to apply judgments of the Court of Justice or takes aim at the fundamentals of the Union legal order of the CJEU's authority. Rather, these are challenges on specific issues, often of particular concern to the national courts and with specific contexts. The *Landtova* decision of the Czech Constitutional Court could be attributed to a long-standing institutional rivalry with the Supreme Administrative Court.[88] The *Ajos* judgment similarly is more understandable when placed within the traditional Danish understanding of the separation of powers and the limited role of the judiciary.[89] The attitude of the French *Conseil d'État* in *French Data Networks* [90] is more problematic but again is limited to a specific issue and does not amount to a full frontal rejection of the CJEU.

The judgment of the German Federal Constitutional Court in *PSPP* falls within this category. Certainly, the German Federal Constitutional Court has a longstanding tradition of issuing warnings to the CJEU and its attitude towards European legal integration is nuanced. Nonetheless, while the outcome may be problematic, the German Federal Constitutional Court in *PSPP* is focused on a particular issue, which is of particular concern to it, rather than a wholesale questioning of core aspects of the Union legal order. Moreover, it remains within a framework of analysis which leaves considerable place for the CJEU and its acknowledgement of the CJEU's role, and an understanding of its role, seems genuine, on the whole. The decision in *K-3/21* is the exception which proves the rule and provides a good illustration of what Flynn would call 'disloyal opposition' to the CJEU,[91] or Bobic 'destructive conflict.'[92] It takes aim at core elements of European legal integration, appears to question the role of the CJEU as the authoritative interpreter of Union law (or at least offers radically alternative interpretations of Union law) and finally refuses to engage in good faith dialogue. Finally, its almost naked threat

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[88] Komárek, 'Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*' (n 21).

[89] Urška Šadl and Sabine Mair, 'Mutual Disempowerment: C-441/14 Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v The estate left by A' (2017) 13 EuConst 347.

[90] *French Data Networks* (n 72).

[91] Flynn (n 4).

[92] Bobic (n 5).

directed towards the CJEU does not bode well for the future relationship between these two bodies. The Polish Constitutional Tribunal is at this stage the outlier in these developments. It certainly is a cause for concern and justifies entirely the Commission's subsequent infringement action against Poland.[93] As a development it is not welcome and adds to the already serious concerns about legal and political developments in certain Member States. If its attitude in *K-3/21* is maintained by the Polish Constitutional Tribunal and/or other courts in Poland and/or is replicated in other Member States, a crisis may well take place. Thankfully we are not yet at that stage.

[93] European Commission, Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal IP/21/7070 (available at https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_21_7070/IP_21_7070_EN.pdf) (accessed 17 April 2023).