National Courts Cannot Override CJEU Judgments

A Joint Statement in Defense of the EU Legal Order

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The European Union is a community based on the rule of law. The EU legal order is the backbone that holds the EU together, and the German Federal Constitutional Court's ruling in *Weiss* poses a profound threat to that legal order. This threat goes far beyond the potential consequences of the *Weiss* ruling for European monetary policy. We write this statement to express our shared view that the German Court's (*Bundesverfassungsgericht – BVerfG*) assertion that it can declare that a CJEU judgment "has no binding force in Germany" is untenable and must be forcefully rejected. We also write to challenge those versions of scholarship on constitutional pluralism and constitutional identity that would defend the authority of the *BVerfG* or any national court to make such a ruling and that helped (even if unintentionally) encourage it to do so.

In recent decades, scholars developed the concept of constitutional pluralism as a way to resolve the impasse between the Court of Justice of the European Union (CJEU) and national constitutional courts, such as the *BVerfG*, over questions of legal supremacy (*Kompetenz-Kompetenz)*. The central question in that long standing dispute concerns which court should have the final say in resolving conflicts between EU law and national constitutional law. Scholars of constitutional pluralism maintain that there is no need for a definitive answer as to which court would have the final say, as tensions over rival claims of superiority could be resolved through judicial dialogue and norms of tolerance and accommodation.

The *BVerfG* ruling in *Weiss* – and the immediate reaction to that ruling by the autocratic regimes in Hungary and Poland – demonstrates the inherent limits of this optimistic vision. Let's face it: constitutionalism pluralism can't provide a practical, ultimate answer to the question at the heart of the *Kompetenz-Kompetenz* conundrum, as sometimes direct conflicts over who has the final say on disputes over conflicts between EU and national law are unavoidable.

Those signing this statement agree with constitutional pluralists that judicial dialogue is valuable – indeed it is integral to the functioning of the EU legal order. The Court of Justice itself has recognised that 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. We also agree that the CJEU and national constitutional courts should be guided by norms of mutual tolerance, forbearance, and accommodation wherever possible, striving to reconcile tensions between their legal orders on the basis of norms of comity.

In short, we are all sympathetic to constitutional pluralists' desire to accommodate the legitimate concerns that some national constitutional courts may have about conflicts between EU law and inviolable aspects of their domestic constitutional orders. In fact, such concerns are enshrined in the founding treaties of the EU (esp. Articles 4 and 6, TEU). While there have been proposals to create new bodies that might arbitrate constitutional conflicts between the CJEU and national courts in the future, the law as it stands today is clear: no national court can overrule a CJEU judgment. Though we do not agree on all aspects of the constitutional pluralism debate, on one point we are unambiguously and emphatically united: it is unacceptable for a national court to declare that a CJEU ruling is not binding in its jurisdiction.

As the Court of Justice has explained repeatedly since *Costa*, if national courts could override the Court of Justice, EU law would not be applied equally or

effectively across all Member States and the entire legal basis of the EU would be called into question. Indeed, as the CJEU emphasized in its recent press release, the supremacy of EU law "is the only way of ensuring the equality of Member States in the Union they created." States have delegated part of their sovereignty to the EU on conditions of reciprocity. If one of them could decide what EU law is for itself, it would be more equal than the others, and the EU legal order would quickly unravel as a result.

National constitutional courts, like the *BVerfG*, remain the sole guardians of their countries' constitutional orders, including the safeguarding of inviolable, "eternal" elements of national constitutional identity. The *BVerfG* is perfectly correct about this, but it is entirely wrong about the remedy it should apply if it deems that the CJEU has made a ruling that violates its constitutional identity or is simply ultra vires. By historical analogy, the *BVerfG*'s ruling is reminiscent of the nullification doctrine invoked by the likes of Calhoun in the antebellum US, which would in essence allow member state courts to "pick and choose" which EU laws to respect – and which ones to disregard.

If a national constitutional court deems that an EU act or CJEU judgment clashes with its constitution, it cannot simply deem the act or ruling inapplicable in its jurisdiction. Rather, the court might seek to remedy the situation by "compelling their government either to amend their constitution, to seek to change the EU legal norm involved by working through the EU political process, or, if necessary, to withdraw from the Union altogether." Those might seem like dramatic steps, but they are consistent with the EU's status as a union of sovereign states, who have agreed – *voluntarily* – to be bound by EU law and to respect rulings of its Court of Justice so long as they remain members.

Of course, most constitutional pluralists didn't have in mind that national courts would engage in such brazen disregard for the authority of the CJEU. They assumed that head-to-head conflicts could be avoided or worked out through dialogue and accommodation. The crisis created by the *BVerfG's Weiss* judgment reminds us of a painful truth that many constitutional pluralists tried to wish away – that sometimes direct conflicts will occur.

Finally, the reactions of the autocratic regimes in Hungary and Poland to the BVerfG's judgment underscore another problem with constitutional pluralism – a point several of us have been making for some time – namely that constitutional pluralism and constitutional identity arguments are prone to abuse by autocrats and their captured courts. No one should be surprised by the fact that the governments of Hungary and Poland quickly seized on the *BVerfG's* ruling as a basis for arguing that their (captured) constitutional courts could override the CJEU. This was entirely predictable and indeed predicted.

Our focus in this statement is not on the risks the *BVerfG*'s ruling poses for the ECB monetary policy. Rather, we want to emphasize that whatever one thinks of the ECB's quantitative easing programs, or of the CJEU's or *BVerfG*'s assessment of those programs, the notion that a national court can simply override a CJEU judgment is inadmissible. Allowing national courts to declare that CJEU judgments they deem unacceptable are inapplicable in their countries would destroy the EU legal order. This is true whether the national court in question is a respected, independent court in a healthy national democracy or the captured "court" of an autocratic member state (which may not even meet the standards to qualify as a court under EU law). Therefore the *BVerfG*'s assertion that the CJEU's earlier ruling in *Weiss* was *ultra vires* and has no binding effect in Germany must be firmly rejected.

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