



# Squaring the PSPP Circle: How a 'declaration of incompatibility' can reconcile the supremacy of EU law with respect for national constitutional identity

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The German Constitutional Court's [PSPP](#) judgment held that the Court of Justice of the European Union's [Weiss](#) judgment on the legality of Decisions of the European Central Bank (ECB) did not have legal effect within Germany because it lacks the 'minimum of democratic legitimacy' necessary under the Basic Law. The merits of the judgment have been [debated extensively](#). This contribution proposes a novel mechanism to resolve the exposed [fault-line](#) between the supremacy of EU law and the fundamental political and constitutional structures of a Member State. Drawing inspiration from the United Kingdom's Human Rights Act 1998, I argue that national apex courts could be empowered to issue 'declarations of incompatibility' under [Article 4\(2\) TEU](#) as an alternative to the disapplication of EU law.

A modest form of this proposal prescribes that national courts should issue such declarations under the [Article 267 TFEU](#) preliminary reference procedure. This would complement the [duty](#) of apex courts to preliminary references on the interpretation and validity of EU law in order to preserve the uniformity of EU law. A more radical reform would create new Treaty mechanisms for these declarations of incompatibility. These mechanisms would create a direct pathway to the political resolution of disputes between the national and supranational constitutional orders through amendment of EU law. Although such a mechanism may be abused by national actors resistant to European integration, it is preferable that such resistance occurs within the framework of the EU legal system rather than through direct disapplication of EU law following the example of *PSPP*.

## An alternative to the German Constitutional Court's approach

The *PSPP* judgment has torn a hole in the fabric of the uniformity of EU law. The German Constitutional Court (GCC) has declared that the *Weiss* judgment of the Court of Justice of the European Union (CJEU) 'has no binding force in Germany' (para 163). The foundations for the application of *ultra vires* and identity review were laid in the '[Solange](#)', *Maastricht*, *Lisbon*, and [Gauweiler](#) judgments. The CJEU judgment was a response to the preliminary reference questions of the GCC as to whether [Decision 2015/774](#) of the ECB infringed [Article 123 TFEU](#). Other contributions have pointed out that both the [Danish Supreme Court](#) and the [Czech Constitutional Court](#) have previously declared CJEU judgments *ultra vires*. Less discussed in this context has been the alternative approach pursued by the Italian Constitutional Court in the *Taricco* saga.

In *Taricco I*, the Court of Justice determined that the Italian statutes of limitations on VAT fraud must be disapplied because it undermined the Member State obligations to counter fraud affecting the financial interests of the Union under [Article 325 TFEU](#). The Italian Constitutional Court could have applied the '*controlimiti*' doctrine to declare the judgment *ultra vires* in the same manner as the GCC in *PSPP*. Instead, the Italian Constitutional Court decided to issue a [further preliminary reference](#) to the CJEU. The national court asked whether disapplication must occur even if this would 'contrast with the supreme principles of the constitutional order of the Member State or with the inalienable human rights recognised under the Constitution of the Member

State'. In *Taricco II*, the CJEU responded to the questions by holding that the national court should not disapply the statute of limitations if this 'entails a breach of the principle that offences and penalties must be defined by law...or because the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed'. The CJEU adjusted the fault-lines of EU law to ensure that supremacy would not undermine fundamental characteristics of the Italian constitutional order.

## Operationalising Article 4(2) TEU under Article 267 TFEU

The double preliminary reference in *Taricco* was an exception that actually provided a more fitting example of 'judicial dialogue' than the normal interaction between the CJEU and national apex courts in which national disputes are resolved once a preliminary reference is answered. The CJEU justified this revisitation of the interpretation of EU law by arguing that the Italian Constitutional Court had not presented all the relevant facts, including the requirements that are part of the fundamental constitutional structure of Italy, in its initial preliminary reference. Operationalising Article 4(2) TEU under the preliminary reference procedure would provide the basis for the CJEU to revisit its judgments without the need to identify any omissions in the initial preliminary reference procedure.

The analogue is section 3 and section 4 of the UK's Human Rights Act 1998. Section 3 obliges UK courts to interpret legislation in a manner consistent with the European Convention of Human Rights (ECHR), insofar as possible. If, however, this is not possible, the court may make a 'declaration of incompatibility' under section 4. This preserves Parliamentary Sovereignty as it does not invalidate the legislation in question. The interpretative duty for Member State courts to apply national law in conformity with EU law is analogous to section 3. The *Dansk Industri* case provides an analogy to section 4, albeit one that was not authorised by EU law: the Danish Supreme Court felt that an interpretation of the national law that accommodated the EU general principle of non-discrimination on the basis of age was not possible.

National courts could utilise the preliminary reference procedure to issue such declarations in order to preserve the supremacy of EU law. The CJEU would be asked to confirm that its answer to the initial questions still stands although the application would violate 'fundamental structures, political and constitutional' of the Member State under Article 4(2). If such an approach had been followed in *PSPP*, the GCC could have informed the CJEU that the ECB Decisions were incompatible with the principle of democratic legitimation under Article 23(1), Article 20(1) and (2), and Article 79(3) of the German Basic Law. Rather than concluding that the application of proportionality by the CJEU in *Weiss* was manifestly inadequate, the GCC could have followed the example of the Italian Constitutional Court in asking the CJEU whether a stricter application of proportionality was necessary in light of the incompatibility with the German constitutional order.

The CJEU would be justified to revisit its interpretation of EU law in light of such declarations due to the fact that it would be improper for the supranational court to make such determinations during an initial preliminary reference; the national apex courts are the legitimate body to determine the content and consequences of the structures referred to in Article 4(2). This approach would operationalise 'respect' for national identity under Article 4(2). The CJEU could establish compliance with Article 4(2) as a relevant condition for the validity of EU law. Supremacy would be preserved because the previous application of EU law that had been declared incompatible with a national constitutional order would thereby also be incompatible with the Treaties. If action is regarded as necessary to ensure compliance with national constitutional structures, such as the review of the justifications for the ECB Decisions prescribed in *PSPP*, the CJEU retains the final jurisdiction to make such an order, with the national court free to suggest what action should be taken to remedy the incompatibility.

## New Treaty mechanisms for 'declarations of incompatibility'

The problem with instituting declarations of incompatibility as a judicial doctrine under Article 267 TFEU is the lack of a clear

mechanism for the political resolution of disputes. [Schedule 2](#) of the Human Rights Act creates the power to amend UK legislation through 'Remedial Orders' after a section 4 declaration of incompatibility. This squares the circle of Parliamentary Sovereignty and human rights protection. A similar mechanism in the EU Treaties could square the circle of the supremacy of EU law and respect for national constitutional identity. If the CJEU is unable to adjust its interpretation of EU law in the light of incompatibility, the declaration could trigger a fast-track ordinary legislative procedure under [Article 288 TFEU](#) or the fast-track amendment procedures under [Article 48 TEU](#) .

The government of the declaring Member State would be compelled to make a principled argument for why the incompatibility with the national constitutional order is a concern for all Member States and should be remedied through amendment. If the incompatibility derives from the specificities of that particular state, the amendment procedure could be used instead to provide a derogation for that Member State. A secondary law precedent is Belgium's derogation from the [Directive on EU citizens' voting rights in municipal elections](#) , and a primary law precedent is [Protocol \(No 32\) on the acquisition of property in Denmark](#) . If the political process fails to find a solution, and national actors persist in the disapplication of the relevant EU law, the Member State will be open to [infringement proceedings](#) under Article 258 TFEU unless and until it amends domestic law. If such amendment is legally impossible or perceived as politically untenable, the [ultimate option](#) to resolve the conflict is for the Member State in question to consider a decision to withdraw from the EU under [Article 50 TEU](#) .

The regime of declarations of incompatibility and consequent amendment procedures could be created through additions to existing provisions of the Treaties. This could broaden the scope for their issuance beyond judicial disputes. A sub-paragraph could be added to [Article 4\(2\) TEU](#) stating that if the executive, legislature or judiciary of a Member State believes that EU law threatens a fundamental structure, they may issue a declaration of incompatibility. Similarly, [Article 267 TFEU](#) could be supplemented to provide competence for national courts to send a declaration of incompatibility alongside questions of reference.

A further provision could be added to [Article 263 TFEU](#) providing the CJEU with the jurisdiction to review the compatibility of Union legislative acts and acts of the institutions with Article 4(2). The 'privileged' position of Member State governments would provide them with standing to bring such challenges. Finally, an analogous provision could be added to [Protocol \(No 1\) on the role of national parliaments](#) . Article 3's provision for national parliaments to issue a reasoned opinion on non-compliance of a draft legislation action with the principles of subsidiarity and proportionality could be directly connected to Article 4(2), and claims by the national government under Article 263 TFEU.

## Conclusion

The *Taricco* judgments demonstrate that the GCC could have sought an alternative means to resolve the perceived incompatibility between the German Basic Law and the acts of the ECB and the CJEU. Framing preliminary references as declarations of incompatibility is an option open to national apex courts. If there were sufficient political will, the formal creation of mechanisms in the Treaties for declarations of incompatibility would prevent the creation of lacunae in EU law. The mechanisms would also formalise within the Treaties a means to [check](#) the extensive authority of the CJEU. A further benefit is that the EU Treaties, subject to the accusation of '[over-constitutionalisation](#)', would be more responsive to bottom-up calls for change from the national level. The mechanisms could create the [risk of abuse](#) by recalcitrant Member States unwilling to fulfil their EU law obligations. However, those who endorse supranational integration should welcome such open challenges being aired and debated through the political process, rather than being ventilated through the backdoor of [vexatious claims](#) before courts.

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