

ERG Brief: Can a domestic Sovereignty safeguard based on the “German Constitutional Court” work?

- The German Constitutional Court has never dis-applied an EU law, provides no practical protection from EU law and even if it did, a similar system in the UK would be impossible due to the lack of a rigid UK constitution.
- Parliament has already reserved the right to repeal EU laws, but if it did so would create a conflict with the ECJ.
- Giving the UK Supreme Court the power to judge EU laws *ultra vires* the EU Treaties would either be a symbolic gesture (such as referring cases to the ECJ) or cause an unwinnable standoff between the UK and ECJ.
- Ultimately if the UK believes the ECJ has allowed the EU to expand its competencies beyond the treaties it can only be resolved politically.
- The only way to end the de facto primacy of EU law is to leave the EU.

Political background

David Cameron’s speech on 4 November 2009 post the ratification of the Lisbon Treaty pledged:

*“A United Kingdom Sovereignty Bill, to ensure the ultimate sovereignty of the UK Parliament. Unlike many other European countries Britain does not have a written constitution. Given the increasing amount of EU law with which we have to deal we would amend the law to insert a sovereignty clause, to make it explicit that ultimately Britain’s Parliament is sovereign and cannot be overruled by the EU against its will. **This is similar in principle to the situation in Germany whereby the German constitution (the basic Law) is ultimately supreme.** This would not mean striking down individual items of EU legislation but would provide ultimate constitutional safeguards against any attempts by EU judges to erode our sovereignty.”¹*

Speculation on the creation of something “similar to the German constitutional court”, Tim Shipman in Sunday Times, 17 January 2016:

*“Johnson used an interview with The Sunday Times last year to call for changes to the 1972 European Communities Act to make clear that parliament can override European law if it wants to. No 10 originally dismissed the plan. **But Cameron has told Gove to create something in Britain similar to the German constitutional court, which rejects the primacy of the European court.** He plans to announce that as “the icing on the cake” after he returns from Brussels.*

“A senior Conservative said: “Michael has been tasked with pulling a rabbit out of the hat with some combination of changing primary legislation and neutering the Charter of Fundamental Rights. One option is amending the 1972 European Communities Act as Boris suggested. By getting Michael to deliver the key rabbit you bind him and Boris in to the PM’s camp.”²

Boris Johnson MP in PMQs asks about plans “change the treaties so as to assert the sovereignty of this House of Commons” 3 February 2016:

¹ David Cameron speech 4 November 2009 (since deleted from Conservatives.com) <http://conservative-speeches.sayit.mysociety.org/speech/601249>

² Sunday Times 17 January; www.thesundaytimes.co.uk/news/Politics/article1657492.html

“Boris Johnson (Uxbridge and South Ruislip) (Con): Since you have been so kind as to call me, Mr Speaker, perhaps I may ask the Prime Minister how the changes resulting from the negotiation will restrict the volume of legislation coming from Brussels and change the treaties so as to assert the sovereignty of this House of Commons and these Houses of Parliament.

*“The Prime Minister: Let me take those issues in turn, because my hon. Friend is absolutely right to raise them. First, asserting the sovereignty of this House is something that we did by introducing the European Union Act 2011. **I am keen to do even more to put it beyond doubt that this House of Commons is sovereign. We will look to do that at the same time as concluding the negotiations.**”³*

The Current situation: The European Union Act 2011

The European Union Act 2011 section 18 states:

“Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.”⁴

The official note observes: “This section does not alter the existing relationship between EU law and UK domestic law; in particular, the principle of the primacy of EU law.”⁵

How does the German Constitutional Court rule on EU law?

- **The German Constitutional Court has never dis-applied an EU law.**

The German Constitutional Court, the Bundesverfassungsgericht (*Bundes Fer-Fassung Gerickt*) (GCC) in Karlsruhe has the role of interpreting the German Basic Law and has the theoretical power to rule that an EU law is incompatible with it and should be dis-applied in Germany. The German Basic Law specifically allows for European integration and transfers of power to the EU as long as it is done in accordance with the rule of law, therefore if the EU acts outside of the EU treaties the GCC could judge it to be incompatible with the Basic Law.

“With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law...etc” Art 23⁶

This sets up a conflict (as far as Germany is concerned) as to which Court is responsible for policing EU Competence creep GCC or ECJ. Who has competence to judge the limits of EU Competence - *Kompetenz-kompetenz* - giving a Court or Institution the power to define its

³ Hansard, 3 February (column 935);

<http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm160203/debtext/160203-0001.htm>

⁴ Gov.uk European Union Act 2011; <http://www.legislation.gov.uk/ukpga/2011/12/section/18/enacted>

⁵ Gov.uk Official note for a longer discussion of the issue:

<http://www.legislation.gov.uk/ukpga/2011/12/notes/division/6/3/1/1>

⁶ German Basic Law or ‘Grundgesetz’, Bundestag, At 23, German Basic Law; <https://www.btg-bestellservice.de/pdf/80201000.pdf>

own powers obviously raises Constitutional and Sovereignty issues - *Quis custodiet ipsos custodes?*⁷

In the 1970 *International Handelsgesellschaft* case⁸ the GCC first explicitly said it would look at the transfer of powers to the EU to see if they conflicted with the German Constitution, this was later watered down in *Sollange I*⁹ and then again in its 2010 *Honeywell* decision¹⁰, where the German Court limited its scope again to cases where the

“act of authority of the European Union must be manifestly in violation of powers, and that the challenged act entails a structurally significant shift in the allocation of powers to the detriment of the Member States.”

Despite this GCC's protestations that it **Could** dis-apply EU laws in Germany it **never has**, so far it has backed down from any confrontation.

Test case for the GCC: Was the ECB's OMT policy compatible with Art 123

The main test cases have been brought by CSU politician Peter Gauweiler. The first case related to whether the ECB's Outright Monetary Transactions bond-buying programme (OMT)¹¹ is compatible with the EU's Article 123 state financing.¹² On 7 February 2014 the GCC ruled there was a theoretical breach of the Treaties and referred it to the ECJ which unsurprisingly ruled that OMT was in line with the EU Treaties, this case is now back with the GCC but is unlikely to rule prior to the Referendum.

A new case, also brought by Gauweiler seeks to argue that the ECB's Quantitative Easing (QE) policy is *Ultra Vires* the EU Treaties.¹³ Despite being based on strong legal grounds, given the political nature of the ECJ, it is thought this also has little chance of success.

Useful Quotes:

Quote 1: Anthony Speaight QC, a member of the Commission on a Bill of Rights in the last Government, told The Daily Telegraph:

*“Every time there has been a challenge on an actual EU instrument the German Federal Constitutional Court has said ‘oh no, that’s all right’.”*¹⁴

Quote 2: Dr Gunnar Beck EU reader of Law at SOAS : With regards to the German ratification of the Lisbon Treaty the GCC:

“decided, subject to minor qualifications and insistence on partial amendment of the German ratification act, the Lisbon Treaty was compatible with the German

⁷ “Who guards the guardians?” Juvenal, (Satire VI, lines 347–8)

⁸ The ‘International Handelsgesellschaft’ case [C-11/70, [1970] ECR 1125] / Solange I in the German litigation.

⁹ Re Wünsche Handelsgesellschaft [1987] 3 CMLR 225

¹⁰ (BVerfGE 126, 286);

<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-009.html>

¹¹ The ECB's OMT policy never came into action.

¹² Art 123; <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-viii-economic-and-monetary-policy/chapter-1-economic-policy/391-article-123.html>

¹³ FT, 22 January 2015; <http://www.ft.com/cms/s/0/235bc330-a219-11e4-bbb8-00144feab7de.html#axzz3zgmKXIHn>

¹⁴ *Telegraph*, 4 February 2016; <http://www.telegraph.co.uk/news/newstoppers/eureferendum/12141230/Michael-Goves-new-constitutional-court-will-not-veto-any-EU-laws-says-leading-Tory-QC.html>

Constitution. Once more the FCC (GCC) asserted its own jurisdiction and the primacy of the German Basic Law in principle, whilst it submitted in practice.”¹⁵

Could a German Constitutional Court arrangement help the UK?

- The UK does not have a ridged constitution against which to judge EU laws, and in as much as it does the 1972 Act is a part of it.
- Allowing the UK Supreme Court to rule on whether the EU is acting within the Treaties will not reverse an EU law if the ECJ does not agree.

Unlike Germany the UK does not have a single rigid written Constitution therefore giving the Supreme Court the power to judge on the “UK constitution” could have unknown and possibly harmful effects.

If the proposal is to judge whether EU law conflicts with UK law, unless the 1972 Act is amended it is difficult to see in what situation it would be able to judge there has been a conflict. Parliament already has the power to expressly overrule EU law, and is unlikely to want to devolve that responsibility to a Court.

It is also unclear what would happen if a UK Court did decide that either an EU law conflicted with a UK constitutional practice or was ultra vires the EU Treaties. In both cases unless the UK wished to engage in conflict with the ECJ, it would either be forced to drop its reservations, legislate domestically to change the convention or decide to leave the EU. Lastly, restating or codifying Parliamentary Sovereignty runs the risk of creating a problem where none exists. Parliament is Sovereign restating it numerous times may cast doubt on this fundamental concept.

Useful Quotes:

Quote 3: Anthony Speaight QC, a member of the Commission on a Bill of Rights in the last Government, told The Daily Telegraph:

“The arguments for and against are the same as for Trident – there is a value in a nuclear deterrent because it might deter EU institutions from overstepping the mark. To exercise such a power puts the state involved in conflict with its international obligations under the EU treaties to give effect to all EU law.”¹⁶

Quote 3: Sir Francis Jacobs, a former advocate general at the European Court of Justice, said EU law will ‘always prevail’ as long as Britain remains in the 28-state bloc.

“If the 28 member states are each taking a different view of what European Union law should mean then it would be impossible for the European Union to function so it does require that European law should be recognised as prevailing over national law.”¹⁷

¹⁵ *EUtopialaw*, 24 October 2011; Dr Gunnar Beck; “The German Constitutional Court versus the EU: self assertion in theory and submission in practice”; <http://eutopialaw.com/2011/10/25/the-german-constitutional-court-versus-the-eu-self-assertion-in-theory-and-submission-in-practice-%e2%80%93-euro-aid-and-financial-guarantees-part-2/>

¹⁶ *Telegraph*, 4 February 2016; <http://www.telegraph.co.uk/news/newstoppers/eureferendum/12141230/Michael-Goves-new-constitutional-court-will-not-veto-any-EU-laws-says-leading-Tory-QC.html>

¹⁷ *Daily Mail*, 5 February 2016; <http://www.dailymail.co.uk/news/article-3433469/Top-law-officer-dismisses-David-Cameron-s-plans-win-British-sovereignty.html>

Quote 4: Professor Dougan and Dr Gordon Liverpool European Law Unit, University of Liverpool:

“the doctrine of parliamentary sovereignty suggests that such a power—for the unilateral disapplication of EU law in a specified area—exists already as a matter of UK constitutional law, whether it is given formal effect through some explicit mechanism or not (and considerations of realpolitik might suggest that there is little to be gained by altering this position).”¹⁸

How can both the ECJ and the GCC believe they have ‘Kompetenz-kompetenz’ the power to decide the boundaries of EU law?

- Who has ultimate power over EU law depends on which end of the telescope you are looking down. Both the ECJ and National Courts/Parliaments have primacy.

From the ECJ’s point of view its role is to ensure that one uniform EU law is enforced on 28 EU member states. From its point of view it must have primacy and has ruled that it cannot take into account other factors, such as national constitutions. Further to this it believes it has the power to decide if an EU law is within the Treaties.

The EU member states see it differently. They predate the EU, have transferred their powers to the EU and remain the ultimate guardians of what powers the EU should have. Looking from a German point of view, the Basic Law and the GCC are Sovereign and the GCC retains the power to decide if an EU law is in order and if not strike it out. This is akin to UK Parliamentary Sovereignty, the UK Parliament, like the GCC, could strike out an EU law. The problem is that would resolve a matter legally but then create a political problem at the EU level, disputes with the ECJ, the Commission, infraction proceedings etc.

So far the GCC (like the UK Parliament) has not used its primacy in national law to overrule an EU law and seems unlikely to start doing so any time soon.

Conclusion:

It is hard to see that “something in Britain similar to the German constitutional court, which rejects the primacy of the European court” could ever be more than the restatement of Parliamentary Sovereignty already present in the 2011 EU Act.

¹⁸ *European Scrutiny Committee*: European Scrutiny Committee report: UK Government’s renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny Fourteenth Report of Session 2015–16
<http://www.publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/458/45802.htm>