The Comeback of the Mixed Chamber

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Three years ago, in the wake of the Weiss judgment of the German Federal Constitutional Court, we proposed the creation of a "Mixed Chamber" in the Court of Justice of the European Union, to rule in last instance on judicial disputes on points of Union competence. The rationale of a Chamber so composed is not obvious. After all, in a Union in which EU Law has primacy over national law, in which the autonomy of EU law is all-pervasive and where the Court of Justice is the ultimate interpreter of EU law, why should a Mixed Chamber be needed?

The proposal generated a lively debate including in political circles. If there was merit to this idea back in 2020, it is, we believe, still necessary at present, and it will be even more so in the years to come. Now we are pleased to see, in anticipation of the upcoming Granada Summit in which institutional reform will be discussed by EU leaders, that the group of twelve French and German experts appointed by the governments of both countries, in their recent Report on Reform and Enlargement (available here), have embraced this idea.

But first, a quick reminder of what the Mixed Chamber is. What we proposed is the creation of a chamber within the Court of Justice, loosely inspired by its Grand Chamber, but composed of thirteen judges, seven rotating judges of the Court of Justice (including its President in all cases) and six judges from among the twenty-seven highest courts of the Member States, on a rotating basis too. The Mixed Chamber would act only after the Court of Justice has delivered a ruling on a point of Union competence, upon a request from a national high court or a Member State. The Mixed Chamber would make decisions in accordance with voting rules that require the support of both the sitting judges of the Court of Justice and of the national high courts, so that the judges of the Court of Justice will always need the vote of other judges to declare an EU act within the Union's competence. We proposed that the rulings of the Mixed Chamber would be binding as all other decisions of the CJEU, their legal authority deriving from the Treaty itself. The moral and political gravitas of decisions in the delicate and at times controversial area of EU competences, we argued, would be enhanced by the highly representative composition of its members. Our proposal related specifically to cases involving the jurisdictional limits of the Union. But it could perhaps be fruitful in other sensitive domains.

The full text of our proposal is available here, as is the reply that we wrote in response to the critics who disagreed with us. In this Post, we will not repeat all the detailed analysis found therein.

One of the most frequent criticisms pointed to the fact that a Member State or a national court could still, irrespective of the ruling of the Mixed Chamber, continue to unilaterally go solo and reject its findings. That is indeed a possibility, a rather extreme one and less likely one, but it is obvious that, in such a case, the legal,

moral and political high ground would stand with the Union and its Mixed Chamber. Competence disputes will be definitively resolved by the Mixed Chamber, and rogue Member States will need to seriously consider the consequences of denying the Mixed Chamber's authority. In such a scenario of continuous rebellion, strictly speaking, withdrawal from the Union, or acceptance of the Mixed Chamber's decision, would be the only two viable options for the rebellious Member State.

Why is this proposal more necessary than ever at this juncture in the history of the European Union?

First, the Mixed Chamber gives a workable alternative to the unworkable alternatives that try to fix the current crisis of EU law's primacy. We all know that the principle of primacy is a fragile entity, unrecognized formally in primary law, rejected in its current form by all constitutional courts, and only visible in the case-law of the Court of Justice. A possible way to overcome this limitation is to introduce a primacy clause in the Treaties, but that would hardly fix the problem. The judgment in Weiss would have been delivered anyway and in the same terms, whether the principle was enshrined in the Treaty or in the case-law. Other options, like enshrining a primacy clause in the Constitutions of all the Member States, a strategy already explored (only partly successful) in the Fiscal Compact, is we believe politically naïve and full of perils on the way. In fact, in some countries such a reform could be declared unconstitutional by their constitutional courts (particularly in those Member States whose courts have asserted exceptional powers of review of constitutional reforms).

So what is there to do?

In a Union which is not a State, the only viable and realistic solution is to find a *procedural route* that provides legitimacy and robust representativeness to a final decision on the matter, as does the proposed Mixed Chamber. We must assume once and for all that the Court of Justice as currently composed, when facing a serious, continuous and insistent call from a Member State or a constitutional court challenging the Union's competence, will never be recognized as an authoritative arbiter in the eyes of that Member State. In contrast, the Mixed Chamber provides exactly the legitimacy that the dispute requires, allowing the Member State to receive a decision in which not only the Court of Justice, but also a representative number of constitutional courts, rule on the matter. So long as the Union refrains from becoming a unified State, we must settle the primacy conundrum through procedural means, and the Mixed Chamber, though not a foolproof solution, delivers the goods better than all the alternatives with which we are familiar.

Second, in the years and decades to come competence conflicts are not going to decrease, but rather the opposite. NextGenerationEU, supporting the war in Ukraine, EU windfall taxes, the Green New Deal, and a long list of transformative EU policies (to name only a few approved in the recent past) will not appease those concerned with jurisdictional overreach. In fact, litigation and contestation over the Union's ability to carry on acting with the current Treaties, but in a fashion and ambition that has never been seen to date, will only bolster competence contestation and, eventually, litigation. Is the Court of Justice ready to assume the role of appeaser in the eyes of the critics, of the Member States and of the constitutional

courts concerned, in a context in which the Union is assuming fundamental tasks traditionally performed by the Member States? To put it bluntly, the Court of Justice will lack such credibility in the eyes of too many constitutional stakeholders, including apex courts of the Member States.

And third, we must be realistic about the prospects of enlargement, and that means that the number of constitutional courts is going to grow in the years to come. The profile of the candidate countries does not indicate that their integration will be an easy one. Identity conflicts will ensue, as well as competence disputes, but in a context in which new constitutional courts will have a say in a Union with a fragile principle of primacy. How are we to tame the fears of these new courts, together with those of the more veteran jurisdictions who already share those same concerns? Once again, the Mixed Chamber comes to the rescue, providing representation to all the constitutional and/or supreme courts, and yet, critically, it will be *a chamber of the Court of Justice*, albeit differently composed. It would thus preserve the principle that the Court of Justice of the European Union is the final arbiter in such matters.

One may add one additional consideration: Independently as a means of solving constitutional "tricky" cases, the very fact of establishing such a chamber would be, in our view, of huge symbolic value in giving credence to the notion of unity in diversity.

The French and German experts who have authored the recent Report on Reform and Enlargement seem to agree. They propose the creation of a "Joint Chamber of the Highest Courts and Tribunals of the EU", but with no binding jurisdiction. We believe that this last feature, depriving the chamber of the power to deliver binding rulings, is a mistake. For a jurisdiction to take itself seriously (and incite its sitting judges to take their tasks seriously too), it must be in a position to rule definitively on a point of law. Non-binding decisions are the domain of mediation, not adjudication, and the Mixed Chamber is destined to handle a crucial, verging on the existential, task for the Union: the final determination on the attribution of competence between the Union and the Member States. This task cannot be left in the hands of a mediating body, or otherwise the principle of primacy and the autonomy of Union law, so dearly protected and treasured by Union law, would become seriously undermined.

In sum, the issues which the proposal of a Mixed Chamber attempts to resolve, is more alive than ever. For the Member States to prepare for a viable and workable Union of thirty or thirty-three Member States, including possibly the Ukraine or the Balkan countries, we should not only focus on decision-making in the Council and in the European Parliament. Eventually all political disputes can turn into legal quarrels, particularly about competence and over who has the power to do what. After Weiss, Landtovà, Ajos, the *Conseil d'État's* reaction to La Quadrature du Net, the Polish and Romanian primacy crisis, etc., it is obvious that the *status quo* does not provide a stable and robust framework for an enlarged and reinvigorated Union. In fact, the *status quo* cannot even provide for a robust principle of primacy to protect the sacrosanct autonomy of EU Law. That is why, we believe, the Mixed Chamber is "as good as it gets". As long as the Union refrains from putting on the hat of a State, primacy and competence will be a matter in the ultimate hands of the Member

States. But a Mixed Chamber can turn this logic around, providing the stability and legitimacy that the current framework simply cannot deliver.
