SYEUL
SLOVAK YEARBOOK OF EUROPEAN UNION LAW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

ISSN (print): 2729-8574
ISSN (online): 2729-9988

AN OVERVIEW OF THE DOCTRINE OF ULTRA VIRES REVIEW FROM THE PERSPECTIVE OF THE GERMAN FEDERAL CONSTITUTIONAL COURT AND THE POLISH CONSTITUTIONAL COURT / Sára Kiššová

JUDr. Sára Kiššová
PhD. Candidate
Institute of European Law
Comenius University Bratislava
Faculty of Law
Šafárikovo nám. 6
810 00 Bratislava, Slovakia
sara.kissova@flaw.uniba.sk
ORCID: 0000-0003-2834-8853

Abstract: *European Union law is based on a number of principles of application, such as the principle of primacy or the principle of conferral. Over the years of this project's existence, we have witnessed Member States being excessively cautious on the subject of the primacy of European Union law. Among these Member States is Germany, which has for years shown its vigilance towards the proceedings and acts of the European Union, whether through the well-known Solange judgement or the recent judgment in the PSPP case. The Federal Constitutional Court has thus created a controlling competence vis-à-vis the bodies and institutions of the European Union by which it seeks to ensure that its standard of constitutional protection is maintained. The present article focuses on the development of the ultra vires review competence and it analyses the manner in which it has been exercised. It also focuses on the use of the ultra vires review by Poland in the K 3/21 case, which has resonated with both the professional and non-professional public. The article also aims to compare the judgment in the PSPP case and the judgment in K 3/21 and to assess whether the ultra vires review was properly activated by the Polish Constitutional Court.*

Key words: *Ultra Vires; Review; PSPP; K 3/21; Germany; Poland; Primacy of EU Law*

Suggested citation:
Kiššová, S. (2022). An Overview of the Doctrine of Ultra Vires from the Perspective of the German Federal Constitutional Court and the Polish Constitutional Court. *Slovak Yearbook of European Union Law*, vol. 2, 33-48. https://doi.org/10.54869/syeul.2022.2.330

Published : 31 December 2022

1. INTRODUCTION: THE SUPERMACY OF THE EU LAW

The Treaty establishing the European Community (EEC Treaty) did not contain provisions on the effects and characteristics of Community law. The question of the primacy of Community law over national law arose relatively soon after the adoption of the Treaties of Rome and has been addressed by the Court of Justice of the European Union (CJEU) in two major cases. The CJEU first outlined its view of the issue in the *Van Gend en Loos* case, where the Court held that the Community represented the creation of a new legal order of international law in favour of which states had limited their sovereign rights.[1] However, the Van Gen en Loos proceedings were more concerned with the

[1] CJEU, judgement of 14 August 1962, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1.

question of direct effect, and it was not until *Costa v. ENEL* that the CJEU commented on the question of the principle of the primacy of Community law, in which the principle of the primacy of Community law over national law was *de facto* created.[2] Here, the CJEU relied on three main arguments: first, the primacy of EU law derives from the agreement concluded by the Member States when they joined the European Union (EU); second, it derives from the fact that the objectives of the founding treaties would not have been realisable without the primacy of EU law and, therefore, the founding treaties themselves would have had no value; the third argument is based on equality, which would not have been respected if national law were unilaterally given primacy over EU law, which would have led to discrimination in the application of EU law between the Member States (Craig and de Búrca, 2020, p. 841). This doctrine has been developed and shaped by further case law into the current form of the principle of the primacy of EU law,[3] which can be simply defined as follows: If a national law norm comes into conflict with EU law, the national norm must be set aside and EU law must be applied.

The doctrine of the primacy of EU law thus constitutes an obligation of uniform application of EU law by the Member States, which entails the need for a uniform interpretation of EU law, which, among other things, includes the assessment of the validity of individual EU acts. The rule here is that national courts interpret and apply EU law and the CJEU is the primary interpreting authority of the founding treaties, which means that when the validity of an EU act is at issue, the exclusive jurisdiction lies with the CJEU. It, therefore, follows that national courts do not have jurisdiction to rule on the validity of Union acts,[4] and this requires the existence of certain safeguards and restraints which limit the European Union's action and thus ensure that the principle of primacy of EU law is maintained only within a defined range of scope.

Hence, first of all, there is the fundamental principle of EU law, which is about the distribution of powers between the EU and the Member States. The principle of conferral (Article 5(1,2) TEU) limits the Union to act only on matters which have been delegated to it exclusively or partially by the Member States. The remaining competences are left in the hands of the Member States. It can therefore be concluded that the principle of the primacy of EU law applies only to the range of competences that the Member States have delegated to the Union, and that action outside those delegated competences shall be invalid. However, it should be added here, as already mentioned above, that the invalidity of such act is to be decided exclusively by the EU itself, more precisely by the CJEU (Article 267(1) TFEU).

Secondly, there is the concept of national identity contained in Article 4(2) TEU, which obliges the Union to respect the national identity of the Member States as inherent in their fundamental political and constitutional structures. The concept thus protects the defined national identity of a Member State in case it comes into conflict with EU law or EU action. However, this concept is perceived by the authors as vague, unclear and surrounded by worrying practice of some Member States (see Kiššová, 2022). The assessment of whether the national identity of a Member State has been interfered with and whether EU law or action is thus invalid is again a matter for the EU, as Article 4(2) TEU is silent on the specific process for challenging this concept.

[2] CJEU, judgement of 21 January 1964, *Costa v. ENEL*, C-6/67, ECLI:EU:C:1964:66.
[3] See: CJEU, judgement of 17 December 1970, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, ECLI:EU:C:1970:114; CJEU, judgement of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, ECLI:EU:C:1978:49.
[4] See: CJEU, judgement of 22 October 1987, *Foto-Frost v. Hauptzollamt Lübeck-Os*t, C-314/85, ECLI:EU:C:1987:452.

It can be seen from the above-mentioned that the principle of the primacy of EU law has set certain limits that control the Union's powers. However, we will point to the issue of jurisdiction in the case of deciding whether the Union has exceeded its powers and whether the resulting act of the Union is thus invalid or contrary to the national identity of a Member State. The EU has, as already mentioned, retained jurisdiction over this matter, and so it is for the CJEU to rule on the invalidity of EU acts and on the excess of competence. In this respect, the CJEU applies the so-called *Kompetenz-Kompetenz* doctrine, which means that although the EU's powers are limited by their nature, it is for the CJEU alone to determine whether a particular case falls within the scope of EU law (Lindeboom, 2018, p. 334). In other words, Member States must respect EU norms even if they appear to be invalid, and also the very interference with their national identity is conditional on the Union's confirmation of the interference.

However, the *Kompetenz-Kompetenz* doctrine also has its opponents, such is Germany, which has been presenting its opposition to the absolute primacy of EU law since 1974, or the current issue of respect for the rule of law by Poland, which undermined the primacy principle to its advantage in various ways. One of the ways in which these Member States express their opposition to the absoluteness of the principle of the primacy of EU law and the *Kompetenz-Kompetenz* doctrine is the so-called *ultra vires* review. *Ultra vires* review became the doctrine by which Germany began to exercise its control competence over the Union. This doctrine later inspired other Member States' constitutional courts, which opted to activate such a procedure as an *ultima ratio* remedy in the event of a violation of the principle of conferral by the Union's institutions.[5] The Czech Constitutional Court even overturned a decision of the CJEU in a preliminary ruling in the Slovak pensions case on the grounds that it was unlawful[6] and the Danish Supreme Court refused to defer to the outcome of the preliminary ruling procedure on the grounds that principles of EU law created by a judge cannot take precedence over national law.[7] It is evident that some national constitutional courts boldly use *ultra vires* review for relevant reasons. However, what happens if a similar procedure is activated by a Member State which cannot justify it on any legitimate grounds and, in principle, undermines the primacy of Union law and European Union law to no meaningful extent? Is this a threat to the European Union and its functioning, or is such a Member State essentially behaving in a self-destructive manner?

The aim of this article is to focus on the creation and use of *ultra vires* review by the Federal Constitutional Court, i.e. to analyse its use to date through selected national case law. Due to the use of a similar review procedure by other Member States, in the third part of the article we will analyse the judgment in Case *K 3/21*, where the Polish Constitutional Court declared as *ultra vires* some parts of EU primary law. Finally, the article will proceed to a comparison in the approach of the Federal Constitutional Court and the Polish Constitutional Court in assessing *ultra vires* against the European Union.

[5] See: Polish Constitutional Tribunal judgement of 11 May 2005, K 18/04 Accession Treaty; Czech Constitutional Court decision of 26 November 2008, Pl. ÚS 19/08, Treaty of Lisbon I; Spanish Constitutional Court declaration of 12 December 2004, 1/2004.

[6] Czech Constitutional Court decision of 31 January 2012, Pl. ÚS 5/12, Slovak pensions.

[7] Danish Supreme Court judgement of 6 December 2015, Case 15/2014, Dansk Industri acting on behalf of Ajos v. The estate left by A, Ajos.

DOI: 10.54869/syeul.2022.2.330

2. CREATING ULTRA VIRES REVIEW: THE GERMAN FEDERAL CONSTITUTIONAL COURT

Of the twenty-seven jurisdictions within the EU, we can identify one jurisdiction that has been cautious and openly critical about the principle of the primacy of EU law and the application of the *Kompetenz-Kompetenz* by the CJEU. As mentioned above, it is Germany that has been speaking out against the principle of the primacy of EU law for years, or has been in dialogue with the CJEU about the EU's overreach. The Federal Constitutional Court (FFC) has dealt with the question of *ultra vires* of certain EU acts on several occasions, and three types of review mechanisms have emerged from these proceedings. The first kind of review mechanism stems from the *Solange I* ruling, called the Solange reservation, where the FCC proceeded to review human rights standards. The second mechanism of review is closely tied to the Solange reservation, called *ultra vires* review, which the Federal Constitutional Court first mentions and applies in Maastricht and later develops in Honeywell. A third control mechanism is also mentioned in the Maastricht judgment and more clearly developed by the Federal Constitutional Court in the Lisbon judgment, the so-called constitutional identity review. In the following sections, we will focus on the *ultra vires* review mechanism by analysing the most important judgments of the Federal Constitutional Court.

2.1 Solange I and Solange II

For the first time, the Federal Constitutional Court of Germany (FCC) expressed its position on the question of the primacy of EU law *in Solange I* (1974)[8] and *Solange II* (1986). In the *Solange I* decision, the FFC found that human rights were insufficiently protected by EU law as opposed to the protection afforded by fundamental rights stemming from the German Constitution (Basic Law). The FCC argued that since fundamental human rights are part of the Basic Law, the delegation of competence to the EU cannot result in a weakening of these rights.[9] Therefore, the FFC submits that in the event of a conflict between Community law and a part of national constitutional law or, more specifically, the fundamental rights guarantees in the Basic Law, the fundamental rights guarantee in the Basic Law prevails, unless the relevant Community authorities have eliminated the conflict of norms in accordance with the mechanism of the Treaty.[10]

In the context of this judgement, two facts could be seen. First, the Federal Constitutional Court here directly confronted and challenged the absoluteness of the principle of the primacy of EU law and thus created an exception to the Court's case law. Secondly, the Federal Constitutional Court has created and granted itself competence or jurisdiction to review EU law and declare it invalid in relation to national constitutional law and the protection of human rights. We note here that it is not appropriate to confuse the Solange reservation with *ultra vires* review because of their use by the Federal Constitutional Court in different subject matter jurisdictions. While the Federal Constitutional Court in this proceeding reserved review of the human rights standard in the Act of Union, in later proceedings it extends its jurisdiction to all acts of the Union.

In the *Solange II* decision, the Federal Constitutional Court merely noted the improvement of the protection of fundamental human rights by EU law and added that it

[8] BVerfG, Judgement of the Federal Constitutional Court of 29 May 1974 - case 2 BvL 52/71, BVerfGE 37, 271, 278-285, [*Solange*].
[9] *Ibid*., §280.
[10] *Ibid*., §281.

will not exercise jurisdiction to review EU legislation as long as the level of rights is sufficiently guaranteed by the EU.

2.2 Maastricht

The activation and *de facto* creation of the *ultra vires* review has occurred in connection with its accession to the Maastricht Treaty, that is to say, in connection with German's accession to the newly formed European Union. On 2 December 1992, the Bundestag passed the law approving the Maastricht Treaty at its last reading, which was subsequently approved unanimously by the Bundesrat on 18 December 1992, with effect from 31 December 1992.

Subsequently, two constitutional complaints were lodged with the German Constitutional Court concerning the approval of the ratification of the Maastricht Treaty and the law amending the Basic Law. The complaints were lodged by four Members of the European Parliament, members of the political party Die Grünen and a former high-ranking official of the European Commission, Manfred Brunner. What is interesting in these proceedings is that almost all of the applicants' claims were dismissed as inadmissible for lack of standing, since the applicants failed to convince the Federal Constitutional Court that one of their fundamental rights or one of their rights under Articles 20(4), 33, 38, 101, 103 and 104 of the Basic Law had been violated, with the exception of one of the claims made by the applicant Brunner (Wieland, 1994, p. 260). The Federal Constitutional Court found that the impugned law may violate the complainant's right under Article 38(1) of the Basic Law, according to which the Bundestag, as Parliament, retains as many rights and powers as the principle of democracy requires.

However, despite the rejection of most of the applicants' arguments, there are many interesting arguments in the reasoning of the FCC's judgment in the admissibility section dealing with the *ultra vires* review and the competences of the European Union. The Federal Constitutional Court reiterated its jurisdiction to maintain an effective level of protection of the fundamental rights of German citizens as declared in *Solange I and II*,[11] i.e. to review situations in which the challenged EU law has been applied by a German institution. However, the Federal Constitutional Court modified the scope of that jurisdiction by extending it to any situation in which the application of EU law has infringed EU fundamental rights.[12] Thus, all acts of the Union come under the scrutiny of the Federal Constitutional Court by the Maastricht decision, and the challenge to the authority of the EU by the Federal German Court can be argued. Boom even hinted at the possibility that this expansion of jurisdiction might lead the FCC to use jurisdiction not only when protection falls below German constitutional standards, but to challenge individual decisions of the CJEU in general (Boom, 1995, p. 181).

2.3 Honeywell/ Mangold

Seventeen years passed after the Maastricht decision before another *ultra vires* review by the German Constitutional Court. This time it was in the area of labour law and fixed-term employment, which was the subject of litigation before the Federal Labour Court. In the original proceedings, the applicant had challenged the ineffectiveness of the fixed-term employment contract against the applicant in the present proceedings before the FCC, arguing that it was not possible to apply the exception under which it was possible to derogate from the principle that objective reasons were required for the

[11] BVerfG, Judgement of the Second Senate of 12 December 1993 - 2 BvR 2134/920, BverfGE 89, 155.
[12] *Ibid*., pp.174-175.

creation of a fixed-term employment relationship if the employee had already reached the age of 52 at the time of the creation of the employment relationship.[13,14] However, the Federal Labour Court held that this derogation could not be applied because, in its words, it was bound by the case-law of the CJEU in the Mangold case.[15] On the basis of the *Mangold* judgment, the Federal Labour Court refused to apply the aforementioned Section 14(3)(4) of the Act on part-time work and fixed-term employment contracts, as it was incompatible with the anti-discrimination Directive 2000/78/EC and the general principle of non-discrimination on grounds of age. In particular, the applicant alleged an infringement of his freedom of contract and his right to a lawful judge. For the purposes of this section, however, we will focus only on his allegations in respect of the breach of freedom of contract, as there are allegations that the EU proceedings were *ultra vires*. The remaining claims and the parts of the judgment dealing with them will be omitted from this section

As regards the claim that there has been a breach of freedom of contract, the applicant considers that the Federal Labour Court used the judgment of the CJEU in Mangold as the material basis for its decision, by which the CJEU exceeded its competence in a number of respects.[16] The Applicant adds that the Federal Labour Court infringed the principle of the protection of legitimate expectations by its action. However, the Second Chamber of the Federal Constitutional Court found that this constitutional complaint was unfounded and held that the *Mangold* judgment had not been used by the Federal Labour Court as an *ultra vires* act.

We will mention an important statement of the Federal Constitutional Court, which was also made in the *Lisbon* judgment (the so-called identity review judgment),[17] which goes that *ultra vires* review can only be carried out by the Federal Constitutional Court against EU bodies and institutions in a way that is open to European law.[18,19] The FCC added that its duty to deal with reasoned complaints against EU bodies and institutions through *ultra vires* review should be coordinated with the role conferred on the Court of Justice by the Treaties to interpret and apply the Treaties and thereby safeguard the unity and coherence of Union law.[20] Thus, while the Federal Constitutional Court fully respects the primacy of EU law, it reserves to itself powers of review over it and declares that it will exercise them only in a manner reserved by law and open towards the EU law.[21]

Moreover, this judgment provides some guidance on how and when the Federal Constitutional Court can declare an act of the Union to be *ultra vires*. First and foremost, the FCC notes that for an *ultra vires* review, there must first be an opportunity for the

[13] § 14(3) sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz - TzBfG).
[14] BVerfG, Order of the Second Senate of 6 July 2010-2 BvR 2661/06, paras. 1-116. Available at: http://www.bverfg.de/e/rs20100706_2bvr266106en.html (accessed on 29.12.2022); hereinafter referred to as the "Honeywell".
[15] CJEU, judgment of 22 November 2005 (Grand Chamber), *Werner Mangold v. Rüdiger Helm*, Case C-144/04, ECLI:EU:C:2005:709.
[16] As a final argument, he submitted that the Federal Labour Court should have referred to the CJEU the question whether the principles of the protection of legitimate expectations under Community or national law require that the Mangold judgment be subject to a time limit.
[17] BVerfG, Judgment of the Second Senate of 30 June 2009-2 BvE 2/08, paras. 1-421, Lisbon judgement. Available at: http://www.bverfg.de/e/es20090630_2bve000208en.html (accessed on 29.12.2022).
[18] *Honeywell*, §58.
[19] In the *Lisbon judgment*, the Federal Constitutional Court referred several times to "openness to European law" as a fundamental principle that must be respected, the so-called Europarechtsfreundlichkeit.
[20] *Honeywell*, §56.
[21] *Honeywell*, §59.

CJEU to express its legal opinion with respect to the challenged act/action by way of a preliminary ruling. The possibility of initiating an *ultra vires* review by the Federal Constitutional Court can only be then considered if it is clear that the acts of the EU organs and institutions have been carried out outside the delegated powers. An act outside the delegated powers can only be found to have been carried out in a manner that explicitly violates the principle of delegated powers and the violation of the powers is sufficiently qualified.[22]

2.4 OMT/ Gauweiler

Another case before the Federal Constitutional Court dealt with the question of whether Germany can participate in one of the mechanisms designed to contain the European financial crisis. In particular, the OMT (Outright Monetary Transactions) mechanism, under which sovereign bonds of selected Member States can be purchased up to an unlimited amount under certain conditions, such as participation in a reform programme agreed by the European Financial Stability Facility or the European Stability Mechanism (for more on the subject of the dispute see: Mayer, 2014). The question that arose in this case concerned the consent of the Federal Constitutional Court to Germany's participation in this mechanism, which was granted in a similar case in 2012 in connection with Germany's participation in the European Stability Mechanism. Indeed, agreeing to participate meant that the German Parliament would retain extensive control over the mechanism's activities (Dingfelder Stone, 2016, p. 147). It thus became disputed that the parliamentary checks necessary for German participation in the *OMT* were absent. Several citizens and some members of the Bundestag lodged constitutional complaints against the OMT decision. The complainants argued that the programme exceeded the ECB's legal mandate and violated the prohibition on monetary financing of Member States under the Treaty on the Functioning of the European Union (TFEU). There were also claims that these violations of the TFEU contravened the constitutional principle of democracy and undermined the national constitutional identity. We analyse the approach of the Federal Constitutional Court to *ultra vires* review in this case through three documents: the first is the order initiating the preliminary ruling by the Federal Constitutional Court,[23] the second is the judgment of the preliminary ruling before the CJEU[24] and the third is the judgment of the Federal Constitutional Court on the merits of the case.[25]

With regard to the initiation of the preliminary ruling procedure before the CJEU, it can be stated that this case is the first time that the procedures that the FCC itself defined as mandatory in activating *ultra vires* review in the *Honeywell* judgment have been applied. Thus, in addition to (1) the general requirement to conduct *ultra vires* review in accordance with the principle of openness towards EU law, (2) the EU act in question must manifestly exceed the EU's competences, which constitutes a structural change in the balance of powers between the EU level and the level of the Member States, and (3) the CJEU must be able to review the EU act in question. The Federal Constitutional Court

[22] See more: §60 et seq.

[23] BVerfG, Order of the Second Senate of 14 January 2014-2 BvR 2728/13, paras. 1-24. Available at: http://www.bverfg.de/e/rs20140114_2bvr272813en.html (accessed on 29.12.2022); hereinafter referred to as the "OMT Resolution".

[24] CJEU, judgement of 16 June 2015 (Grand Chamber), *Gauweiler and Others v. Deutscher Bundestag*, C-62/14, EU:C:2015:400.

[25] BVerfG, Judgment of the Second Senate of 21 June 2016-2 BvR 2728/13, paras. 1-220. Available at: http://www.bverfg.de/e/rs20160621_2bvr272813en.html (accessed on 29.12.2022); hereinafter referred to as the "*OMT Judgment*".

DOI: 10.54869/syeul.2022.2.330

thus respected the procedure in this case and initiated preliminary proceedings for the first time ever (see reference 23).

The Federal Constitutional Court supplemented the preliminary question order with a comprehensive text and reasoning as to why it sees the *OMT* decision as being outside the ECB's mandate and going beyond the realm of monetary policy.[26] In doing so, the Federal Constitutional Court was essentially indicating answers to the preliminary questions it had asked. The Federal Constitutional Court has also commented on the possibility of an interpretation in accordance with EU law, suggesting that concerns about the validity of the *OMT* decision could be resolved by an interpretation in accordance with EU law. In the view of the Federal Constitutional Court, the *OMT*'s decision *"might not be open to challenge if it could... interpreted or limited its validity in such a way that it would not undermine the conditionality of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism and would only be supportive in relation to economic policies in the Union"*.[27] However, according to the Federal Constitutional Court, this requires the exclusion of the possibility of debt reduction, in order not to buy up to an unlimited amount of government bonds of selected Member States and to avoid, as far as possible, interference in market pricing.[28]

The outcome of the preliminary ruling procedure before the CJEU can be seen in the judgment in *Gauweiler and Others v German Parliament*. The content of the judgment and the CJEU's legal opinion on the subject matter of the case have been discussed elsewhere (Craig and Markakis, 2016; Hinarejos, 2015; Baroncelli, 2016) while more interesting is the reaction of the Federal Constitutional Court to the *Gauweiler* judgment, in which the CJEU disagreed with the assessment of the Federal Constitutional Court and evaluated the *OMT* decision as being fully within the Union's competences.

The reaction can be found in a judgment of 21 June 2016, where a surprising reversal against the *OMT* programme was made by the Federal Constitutional Court. In fact, the Federal Constitutional Court pointed out that the CJEU, in its preliminary ruling, had imposed further restrictive requirements on the *OMT* scheme, which thus prevented its unrestricted extension and could therefore now be considered to be compatible with EU law. The Federal Constitutional Court thus finds that the form in which the *OMT* decision was presented by the European Central Bank was perceived as *ultra vires*, but the additional addition of parameters or the required restrictive interpretation by the CJEU changed the situation.[29] However, Pliakos and Anagnostaras argue that a closer analysis of the judgment in question suggests that the Federal Constitutional Court deliberately misinterpreted the content of the preliminary ruling in order to conceal the fact that the Court of Justice had in fact rejected its request to impose additional restrictions on the bond purchase programme. They attribute this attitude of the Federal Constitutional Court to an attempt to avoid declaring the *OMT* programme *ultra vires* (2017, pp. 216 and 226).

In conclusion, however, the position of the Federal Constitutional Court in activating the *ultra vires* review was in line with the principle of openness to the EU legal order and respectful of the role and competences of the CJEU.

2.5 PSPP/Weiss

The Federal Constitutional Court first resorted to declaring an act of an EU institution *ultra vires* in its judgment of 5 May 2020, sparking a wave of controversy in the

[26] *OMT Resolution*, §§55-100.
[27] *Ibid*., §100.
[28] *Ibid*.
[29] *OMT Judgment*, §190-197.

EU, both in the academy and in the media. Wendel even characterises the *PSPP* judgment as creating *"a debate on different aspects at different levels, conducted in different languages - both linguistically and professionally - and involving actors from different fields, actors who not infrequently talk to each other, whether they are lawyers, scientists, economists, journalists or politicians"* (2020, p. 979).

The subject of the constitutional complaints concerned the 2015 Public Sector Purchase Programme (*PSPP*) and the related subsequent decision of the European Central Bank and the actions of the Bundestag and the Federal Government. The *PSPP* is a programme under which Eurosystem central banks may purchase eligible marketable debt securities under specific conditions on the secondary market and from eligible counterparties, as determined by ECB decisions. The reason for initiating the preliminary ruling procedure was that the Federal Constitutional Court was not sure whether the *PSPP* constituted a monetary policy measure at all. The Federal Constitutional Court had doubts as to the compatibility of the *PSPP* with the principle of proportionality and thus asked the CJEU to carry out a proportionality test, the results of which would determine the validity of the *PSPP*.

At the end of 2018, the CJEU ruled in Weiss that the measure complies with the principle of proportionality and is also within the ECB's competence in the area of eligible marketable debt securities, thus confirming the validity of the decision and the programme it sets out.[30] The CJEU carried out an analysis of the *PSPP*'s compliance with the proportionality principle in §79 et seq. In principle, the CJEU found that the ESCB had no other effective instrument at its disposal to reduce the inflation rate and, given the predictable effects of the *PSPP* and the fact that the ESCB's objective did not appear to be achieved by any other type of monetary policy measure that would imply more limited ESCB action, it must be concluded that the *PSPP*, in its basic principle, does not appear to go beyond what is necessary to achieve that objective. As regards the implementation of the *PSPP*, the Court finds that the way in which the programme is set up helps to ensure that its effects are limited to what is necessary to achieve the objective in question and that the programme, by virtue of its application only for the period necessary to achieve the objective pursued, is of a temporary nature.[31]

The reaction of the Federal Constitutional Court to the CJEU's judgment came on 5 May 2020 and, as mentioned above, with this judgment the Federal Constitutional Court declared for the first time an act of an EU institution being *ultra vires*. First of all, the Federal Constitutional Court finds a violation of fundamental law by the Federal Parliament and the Federal Government due to the failure to take appropriate measures against the Governing Council of the ECB, which neither assessed nor demonstrated that the measure taken was in accordance with EU law.[32] Secondly, the Federal Constitutional Court has dealt with the Court of Justice's examination of compliance with the principle of proportionality and has in principle proceeded to the next step in the *ultra vires* review by declaring that the Decision of the Governing Council of the ECB of 4 March 2015 (EU) 2015/774 and the subsequent Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 must be qualified as *ultra vires* acts.[33]

In this part of the section, we will take a closer look at the analysis of the arguments and statements of the Federal Constitutional Court in the part of the judgment where it discusses the necessity of declaring the above-mentioned decisions as *ultra*

[30] CJEU, judgement of 11 December 2018, *Weiss and others v. Bundestag*, C-493/17, ECLI:EU:C:2018:1000.
[31] *Ibid*., §§79-84 and §116.
[32] BVerfG, Judgment of the Second Senate of 5 May 2020-2 BvR 859/15, paras. 1-237. Available at: http://www.bverfg.de/e/rs20200505_2bvr085915en.html (accessed on 29.12.2022); [PSPP], §§ 97-105.
[33] *Ibid*., §117.

vires. In doing so, we will focus again on the manner of communication of the Federal Constitutional Court. Although most of the Constitutional Court's reasoning is centred around the principle of proportionality, it is noticeable that the emphasis is in fact on the principle of conferral and the dispute over the correct methodological approach that should guide its application (Anagnostaras, 2021, p. 813).

In essence, the Federal Constitutional Court submits that the procedure followed by the CJEU in its review does not take into account the actual effects of the *PSPP* for the purposes of assessing the appropriateness of the measure, and also that the abandonment of an overall assessment and evaluation in this respect does not meet the requirements for a comprehensible examination of whether the ESCB and the ECB have complied with the limits of their competence in the field of monetary policy.[34] The FCC also adds that the way in which the CJEU applies the principle of proportionality in the present case renders that principle irrelevant for the purposes of distinguishing between monetary and economic policy in relation to the *PSPP*[35] and that, in doing so, the CJEU completely ignores the impact of the *PSPP* on economic policy.[36] And since the CJEU did not take into account the effects of the *PSPP* on economic policy, its exercise of proportionality review cannot fulfil its objective, as there is an absence of a key element, namely the balancing of competing interests. For these reasons, the Federal Constitutional Court declares the CJEU's proportionality review to be irrelevant and also states that the consequence of such an omission is that the EU does not effectively review whether the ECB exceeds its powers.[37] In the light of these facts, the Federal Constitutional Court finds that a review of the principle of proportionality such as that carried out by the CJEU in the present case clearly exceeds the judicial mandate conferred on the CJEU by Article 19(1) TEU, resulting in a structurally significant change in the order of competence to the detriment of the Member States.

In this respect, therefore, according to the Federal Constitutional Court, the *Weiss* judgment constitutes an *ultra vires* act,[38] with the consequence that the constitutional authorities must use the means at their disposal to take active steps to ensure that the European integration programme is respected and that its limits are observed. This is because this *ultra vires* act does not share the principle of the primacy of EU law.[39] The Federal Constitutional Court points to a solution through (1) the delegation of sovereign powers for the purpose of rectifying the lack of EU competence, and if this is not possible or there is no will, the constitutional authorities are obliged to (2) resort to legal or political means within the authorities' powers in order to repeal acts that do not fall under the EU integration programme.[40] On this basis, the Federal Constitutional Court finds that the Federal Government and the Federal Parliament must, as part of their responsibility for European integration, take steps to ensure that the ECB carries out an assessment of the adequacy of the *PSPP*. On the basis of the assessment carried out, the Federal Constitutional Court thus prohibited the Federal Parliament from participating in the implementation and enforcement of Decision (EU) 2015/774, the amending Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 and the Decision of

[34] *Ibid*., §123.
[35] Ibid., §12; i.e., the distinction between the exclusive competence in the field of monetary policy conferred on the EU (Article 3(1)(c) TFEU) and the limited competence conferred on the EU to coordinate general economic policies, with Member States retaining competence in the field of economic policy in general (Article 4(1) TEU; Article 4(2) TFEU). 5 ODS. 1 TFEU).
[36] *Ibid*., §133.
[37] *Ibid*., §135 and §141.
[38] *Ibid*., §154.
[39] *Ibid*., §234.
[40] *Ibid*., §231.

12. September 2019, and to carry out further bond purchases, and to contribute to a further increase in the monthly volume of purchases, unless the Governing Council of the ECB adopts a new decision demonstrating in a clear and reasoned manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme.[41]

3. THE ULTRA VIRES REVIEW BY THE POLISH CONSTITUIONAL COURT

In the previous chapter, we focused on the origins and application of *ultra vires* review by the Federal Constitutional Court, which has applied the doctrine several times in the thirty years of the European Union's existence. However, it was not only the Federal Constitutional Court that reserved itself against an action or act of an institution or body of the EU during these three decades. As already mentioned in the text of this article, *ultra vires* review has been carried out by several Member States such as Italy, the Czech Republic, France or Denmark. Another Member State that proceeded to carry out *ultra vires* review was also Poland, in the context of the national proceedings before the Constitutional Court in case K 3/21. It can be stated that the K 3/21 procedure is one of the results of the heated conflict between Poland and the EU, which strongly criticises Poland for violating the rule of law (Máčaj, 2021), and it can also be seen as a reaction to the CJEU's judgment in case C-824/18.[42] The subject of the constitutional complaint concerned the issue of the appointment of judges of the Polish Supreme Court addressed in the above-mentioned CJEU judgment and was initiated by the Polish Prime Minister Mateusz Morawiecki. In the petition, he asked the Polish Constitutional Court to interpret Articles 1, 2 and 19 TEU, more specifically to examine whether the Treaty on European Union authorises the EU institutions to derogate from the application of the Polish Constitution or to apply provisions which have ceased to apply, following a decision of the Constitutional Court, on the grounds of their conflict with the Polish Constitution, and whether the European Court of Justice is entitled to examine the impartiality of national judges.

The Polish Constitutional Court developed its arguments and reasoning on almost 900 paragraphs of the judgment, including several dissents, focusing primarily on the jurisdiction of the CJEU and the principle of the primacy of EU law. The Polish Constitutional Court recalls that the Republic of Poland did not agree with the unconditional operation of the principle of the primacy of EU law in the Polish legal system, and certainly not with the unrestricted creation of legal rules by the CJEU which have primacy of application over the Polish Constitution. It further adds that Poland does not regard the obligation to be bound by the provisions of the founding Treaties and by acts adopted by the institutions of the Communities and the European Central Bank as a general agreement to be bound by such law-making by the EU bodies and institutions which goes beyond the competences conferred on the EU.[43] The Polish Constitutional Court points to the limits of the CJEU's powers, noting the distinction between interpreting the law and making law, whereas the latter constitutes an overreach of the CJEU's powers.[44] Subsequently, the PCC refers to the Federal Constitutional Court and its creation of *ultra vires* review and states its alignment with the position of the Federal Constitutional Court. The PCC therefore concludes on the first point of the proposal by

[41] *Ibid*., §235.
[42] CJEU, judgement of 2 March 2021 (Grand Chamber), *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, C-824/18, ECLI:EU:C:2021:153.
[43] Polish Constitutional Tribunal judgement of 7 October 2021, K 3/21, §228.
[44] *Ibid*., §§231-236.

DOI: 10.54869/syeul.2022.2.330

stating that the norms created through the interpretation of the Treaties by the CJEU cannot override the Constitution and that Article 1 TEU is compatible with constitutional norms only provided that the Polish Constitution retains its supremacy over all other norms. It adds that '...if the CJEU, by interpreting the treaties, shapes a "stage of ever closer cooperation" in which the norms of EU law created by the interpretation of the treaties outside the scope of the CJEU's delegated powers override the constitution, resulting in a loss of state and nation sovereignty, then to that extent the "ever closer union between the peoples of Europe" will be incompatible with constitutional standards of control".[45] Concluding on the second point of the proposal, which dealt with the EU's competences in the field of judicial power, the Polish Constitutional Court held that such a power interfering with the judicial system of a Member State, whereby rules are created which allow or authorise the disregard of the Constitution and national legislation, to rule on the basis of provisions which are not valid, is considered to be *ultra vires* conduct. This is because "...the Republic of Poland has not delegated to the EU the competence to set standards in the field of the judicial system" and the only one who is competent to assess the incompatibility of national legislation with the principles is the Constitutional Court.[46] The Polish Constitutional Court has thus ruled that three articles of the European Union's founding treaties, which have been the subject of interpretation, are incompatible with the Polish constitution. Article 1 TEU, which provides for the existence of the European Union and the transfer of powers from the Member States, is incompatible with Articles 2 and 8 of the Polish Constitution on the ground that it creates a new stage of integration whereby the powers of the CJEU exceed those conferred on the EU, causing a loss of sovereignty of the Polish State. Article 2 TEU, which provides for the existence of the European Union and the delegation of powers from the Member States, and Article 19(1) TEU, which states that the CJEU's mission is to ensure compliance with EU law throughout the Union, are incompatible on the grounds that they create a new competence for the CJEU and allow the lower national courts and the Polish Supreme Court not to apply the Constitution, to overrule the decisions of the Constitutional Court and to review the legality of the procedure for appointing judges, which, according to the CJEU, does not fall within the EU's competence.[47]

3.1. Copycatting the FCC gone wrong?

In the text below, we focus on the major differences we perceive in the activation of *ultra vires* review by the Federal Constitutional Court and the activation of *ultra vires* review by the Polish Constitutional Court in the case K 3/21. We make the comparison of these judgments on the grounds that both judgments declare a certain act of the EU to be *ultra vires*.

First, we will focus on the subject matter of each judgment. The judgment in the *PSPP* case deals with the ECB's decisions and the assessment of the *PSPP*'s compliance with the principle of proportionality. Judgment K 3/21 deals with the provisions of primary EU law, i.e. Articles 1, 2 and 19(1) TEU and their compatibility with the Polish Constitution. From the point of view of the nature of the legal provisions dealt with in the proceedings, there is a significant difference, because while the Federal Constitutional Court subjected an act of EU secondary law to *ultra vires* review in the *PSPP* judgment, the Polish Constitutional Court in the present proceedings declares *ultra vires* the provisions of one of the founding treaties, i.e., primary law. The fact that these are fundamental provisions of primary law brings the K 3/21 judgment the label "controversial". The controversy of

[45] *Ibid*., §§258-263.
[46] *Ibid*., §380.
[47] *Ibid*., §§384-393.

this judgment is underlined by the Polish Constitutional Court's attitude towards the principle of the primacy of EU law, which clearly indicates a rejection of the primacy of EU law over the Polish Constitution. We do not detect such a rejection in the text of the *PSPP* judgment of the Federal Constitutional Court, nor in any of the judgments analysed above. Moreover, the Polish Constitutional Court makes the primacy of the Constitution over EU law absolute and does not limit it to certain parts of the Constitution, such as elements of national identity, as the Federal Constitutional Court does.

Second, we will point out on what grounds *ultra vires* review occurs in individual cases. In the case of the *PSPP*, these were individual constitutional complaints, brought by individuals outside the political sphere. Individual constitutional complaints were also at issue in earlier *ultra vires* review cases such as Honeywell and *OMT*. On the other hand, in the case of constitutional proposal K 3/21, the petitioner is a politically engaged person, namely the Polish Prime Minister Mateusz Morawiecki, and the *ultra vires* review was carried out against such EU acts with which several Polish actions were incompatible. The incompatibility of the Polish acts at issue with EU law was found by the CJEU in Case C-824/18 and K 3/21 was a response to the breaches found therein.

In particular, the Honeywell judgment brought with it a procedure which the Federal Constitutional Court has defined as obligatory for a proper *ultra vires* review, which must respect the principle of openness towards EU law and respect the competences of the CJEU.[48] To reiterate, the Federal Constitutional Court notes the need to initiate a preliminary ruling procedure and thus give the CJEU the opportunity to express its views, thereby respecting its role in the interpretation of EU law. This was ultimately respected in the *PSPP* case and the CJEU was given the opportunity to express its opinion on the question of whether the scheme was in line with the proportionality principle. However, such a step is absent in the case K 3/21, where we observe that the *ultra vires* finding is made without the opportunity for the CJEU to be heard and in response to the CJEU's judgment in another case. For this reason, the Polish Constitutional Court did not proceed in the same way as the Federal Constitutional Court.

Last, we look at the approach of the two constitutional courts to the legal problem in the respective cases. In the case of the approach of the Federal Constitutional Court, one can see in its statements an overall effort to harmonise and align the problematic EU act, while in the text of the judgement it tasks the ECB with the possibility of reconsidering the contradictory programme. On the other hand, such an approach is absent in the case of the Polish Constitutional Court, and the whole judgment can be seen as rather offensive towards the EU project and its basic provisions. In its arguments against the primacy of primary law, Poland seems to have forgotten that it became a member of the EU voluntarily and, upon accession, accepted the principles of application that had been set by CJEU case law years before.

4. CONCLUSION

The article aimed to analyse the development of *ultra vires* review and its application by selected Member States. From the analysis carried out, we know that the creator of *ultra vires* review was the Federal Constitutional Court, which showed its vigilance against the powers and acts of the European Union long before the establishment of the EU project in 1992. In the 30 years since the signing of the Maastricht Treaty, we can note the progressive integration of the EU but, at the same time, the increasing scepticism of the Member States towards it. As a precaution against

[48] *Honeywell*, §60 et seq.

DOI: 10.54869/syeul.2022.2.330

unwarranted EU interference in areas that do not fall within its competence, we have identified three 'brakes' on integration that have so far been applied by the Member States, with the *ultra vires* review doctrine becoming the subject of scrutiny. We thus examined *ultra vires* review through the case law of the Federal Constitutional Court and analysed its approach to EU law while conducting the review.

It can be concluded that, of the case law analysed herein, the Federal Constitutional Court appears to use *ultra vires* review with respect towards EU law and the primacy of EU law. The reasoning provided within the text of the judgments does not show a deliberate attempt to undermine the EU legal order, but rather an attempt to control EU actions and EU acts. In contrast, Poland was selected as the second Member State for the comparison of the use of *ultra vires* review, as it has been known in recent years for its rejection of certain EU principles and procedures. The aim of the analysis of the judgment K 3/21 was to look at the text of the reasoning of the Polish Constitutional Court and to examine how the court expresses itself towards EU law and the principle of the primacy of EU law.

From the analysis carried out by us, we have to conclude that there is a significant difference between the dialogue conducted by the Federal Constitutional Court towards the CJEU and this rather monologue of the Polish Constitutional Court. The most striking differences have been presented in the text above and one may question whether Poland has even tried to follow the set procedure as defined by the Federal Constitutional Court and whether it is correct to speak of the activation of *ultra vires* review. Such action by Poland rather hurts the doctrine and puts it in a position where it is being disputed as threatening the principle of the primacy of EU law.

However, it must be stated at this point that *ultra vires* review is an excellent tool for scrutinising EU actions, however, there is a need to carry out such scrutiny within a framework of respect for the EU legal order, to which each Member State has adhered with full knowledge of its obligations.

BIBLIOGRAPHY:

Anagnostaras, G. (2021). Activating *Ultra Vires* Review: The German Federal Constitutional Court Decides Weiss. *European Papers*, 6(1), 801-829.

Baroncelli, S. (2016). The *Gauweiler* Judgment in View of the Case Law of the European Court of Justice on European Central Bank Independence. *Maastricht Journal of European and Comparative Law*, 23(1), 79-98. DOI: https://doi.org/10.1177/1023263X1602300105

Boom, S. (1995). The European Union After the Maastricht Decision: Will Germany Be the "Virginia of Europe?" *American Journal of Comparative Law*, 43(2), 177-226.

Craig, P., and de Búrca, G. (2020). *EU law: text, cases, and materials* (7th ed.). Oxford University Press.

Craig, P., and Markakis, M. (2016). Gauweiler and the Legality of Outright Monetary Transactions. *European Law Review*, 40(1), 4-24.

Dingfelder Stone, H. J. (2016). Agreeing to Disagree: The Primacy Debate between the German Federal Constitutional Court and the European Court of Justice. *Minnesota Journal of International Law*, 25, 127-165.

Hinarejos, A. (2015). Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union. *European Constitutional Law Review*, 11(3), 563-576. DOI: https://doi.org/10.1017/S1574019615000346

Kiššová, S. (2022). Thirty Years of the Concept of National Identity in the Primary Law of the European Union. *Balkan Social Science Review*, 20, 137-157.
Lindeboom, J. (2018). Why EU Law Claims Supremacy. *Oxford Journal of Legal Studies*, 38(2), 328-356. DOI: https://doi.org/10.1093/ojls/gqy008
Máčaj, A. (2021). Torpedoing v. Carpet Bombing: Mutual Trust and the Rule of Law. *Slovak Yearbook of European Union Law*, 1, 9-22. DOI: https://doi.org/10.54869/syeul.2021.1.268
Mayer, F. C. (2014). Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's *OMT* Reference. *German Law Journal*, 15(2), 111-146. DOI: https://doi.org/10.1017/S207183220000287X
Pliakos, A., and Anagnostaras, G. (2017). Saving Face? The German Federal Constitutional Court Decides Gauweiler. *German Law Journal*, 18(1), 213-232. DOI: https://doi.org/10.1017/S207183220002191X
Wendel, M. (2020). Paradoxes of Ultra-Vires Review: A Critical Review of the *PSPP* Decision and Its Initial Reception. *German Law Journal*, 21(5), 979-994. DOI: https://doi.org/10.1017/glj.2020.62
Wieland, J. (1994). Germany in the European Union - The Maastricht Decision of the Bundesverfassungsgericht. *European Journal of International Law*, 5(2), 259-266. DOI: https://doi.org/10.1093/oxfordjournals.ejil.a035870

Court Decisions
BVerfG, Judgement of the Federal Constitutional Court of 29. May 1974, case 2 BvL 52/71, BVerfGE 37, 271, 278-285.
BVerfG, Judgement of the Second Senate of 12 December 1993, 2 BvR 2134/920, BverfGE 89, 155.
BVerfG, Judgment of the Second Senate of 30 June 2009-2 BvE 2/08, paras. 1-421, Lisbon judgement. Available at: http://www.bverfg.de/e/es20090630_2bve000208en.html (accessed on 29.12.2022).
BVerfG, Order of the Second Senate of 6 July 2010-2 BvR 2661/06, paras. 1-116 Available at: http://www.bverfg.de/e/rs20100706_2bvr266106en.html (accessed on 29.12.2022).
BVerfG, Order of the Second Senate of 14 January 2014-2 BvR 2728/13, paras. 1-24. Available at: http://www.bverfg.de/e/rs20140114_2bvr272813en.html (accessed on 29.12.2022).
BVerfG, Judgment of the Second Senate of 21 June 2016-2 BvR 2728/13, paras. 1-220. Available at: http://www.bverfg.de/e/rs20160621_2bvr272813en.html (accessed on 29.12.2022).
BVerfG, Judgment of the Second Senate of 5 May 2020-2 BvR 859/15, paras. 1-237. Available at: http://www.bverfg.de/e/rs20200505_2bvr085915en.html (accessed on 29.12.2022).
CJEU, judgement of 14 August 1962, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1
CJEU, judgement of 21 January 1964, *Costa v. ENEL*, C-6/67, ECLI:EU:C:1964:66
CJEU, judgement of 17 December 1970, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, ECLI:EU:C:1970:114
CJEU, judgement of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, ECLI:EU:C:1978:49
CJEU, judgement of 22 October 1987, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, C-314/85, ECLI:EU:C:1987:452

CJEU, judgment of 22 November 2005 (Grand Chamber), *Werner Mangold v. Rüdiger Helm*, Case C-144/04, ECLI:EU:C:2005:709.
CJEU, judgement of 16 June 2015 (Grand Chamber), *Gauweiler and Others v. Deutscher Bundestag*, C-62/14, EU:C:2015:400
CJEU, judgement of 11 December 2018, *Weiss and others v. Bundestag*, C-493/17, ECLI:EU:C:2018:1000.
CJEU, judgement of 2 March 2021 (Grand Chamber), *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, C-824/18, ECLI:EU:C:2021:153
Czech Constitutional Court decision of 26 November 2008, Pl. ÚS 19/08, Treaty of Lisbon I.
Czech Constitutional Court decision of 31 January 2012, Pl.ÚS 5/12, Slovak pensions.
Danish Supreme Court judgement of 6 December 2015, Case 15/2014, Dansk Industri acting on behalf of Ajos v. The estate left by A, Ajos.
Polish Constitutional Tribunal judgement of 11 May 2005, K 18/04, Accession Treaty.
Polish Constitutional Tribunal judgement of 7 October 2021, K 3/21.
Spanish Constitutional Court declaration of 12 December 2004, 1/2004.