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Facts & Findings

KONRAD ADENAUER STIFTUNG

Between dialogue and resistance

The conflict on the final word in the European judicial order[1]

By Narin Nosrati

- National supreme courts and the European Court of Justice (ECJ) are in conflict regarding the final word in EU law related questions.
- A solution-oriented dialogue between the courts is necessary for conflict resolution, de-escalation and ultimately strengthening the legal order.
- A reverse preliminary reference, in which the ECJ refers questions sensitive to national identity to supreme courts and the obligation to hear affected EU institutions in national proceedings are conceivable options to strengthen the dialogue normatively.
- The case law of the Federal Constitutional Court of Germany (FCC) was selectively taken out of context in Poland and Hungary to give their euro-critical approaches more legitimacy.
- The FCC's latest ruling on the ratification act regarding *NextGenerationEU* is fortunate in view of its impact on euro-critical supreme courts, as it counteracts a weakening of the European legal order.

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Introduction

The ECJ was founded 71 years ago and thus laid a foundation for the European legal order. It shaped the evolution of European law with fundamental decisions, which had an impact on the national of the member states and raised new questions about the relationship between the two legal orders.[2] Since then, legal scholars have grappled with the question of supremacy of the legal orders and the courts' right of final decision.[3] It is generally recognized that EU law takes precedence to ensure uniform application of the law in all Member States.[4] However, the question of whether and to what extent exceptions — which national supreme courts of most Member States reserve — exist, still has potential for dispute. This results from the dualistic nature of EU member states' legal systems: The supreme courts argue that the Constitutions, which grant EU law entry into the national legal order, simultaneously limit its effect.[5]

The European legal orders and the question on the final word

According to the FCC, three categories of integration limits and associated constitutional review are to be distinguished:

The integration limits according to the FCC

- The fundamental rights review: The FCC reserves the right to review legal acts of the EU in view of constitutional fundamental rights if an equivalent protection of fundamental rights is no longer guaranteed at EU level.[6]

- The ultra vires review: If a measure exceeds the transferred competences "resulting in a structurally significant shift in the division of competences to the detriment of the Member States", it will be assessed *ultra vires*[7] by the FCC. Those measures would not be democratically legitimized and would thus not be legally binding within the Federal Republic of Germany.[8]

- The identity review: The FCC ensures that measures of EU institutions preserve the "inviolable core of the constitutional identity".[9] According to Article 79 (3) of the German Basic Law, certain contents of the constitutional order, such as respect for human dignity according to Article 1 of the Basic Law, are unchangeable.

In the jurisprudence of other Member States, these partly overlap: For example, constitutional identity and exceeding competence are sometimes spoken of simultaneously, which suggests that the violation of constitutional identity is understood as a special kind of exceeding competence.[10] Therefore, different kinds of supreme court conflicts will be discussed in the following to provide an overview of judicial conflicts between national supreme courts and the ECJ.

The Ultra Vires decisions: *Holubec and Ajos*

Holubec: Non-applicability of an EU directive in the Czech Republic

In 2012, the Czech Constitutional Court handed down an ultra vires decision for the first time.[11] It rejected the applicability of an EU directive due to overriding contractual agreements and historical peculiarities based on the division of former Czechoslovakia. It thus defied the ECJ, which had previously found the relevant national provision to be contrary to EU law.[12] The Constitutional Court's approach is interesting: it asked the ECJ to be heard in the preliminary ruling proceeding initiated by the Czech Supreme Administrative Court through an *amicus curiae letter*.[13] The ECJ refused this request with reference to non-participation of third parties according to the ECJ Statute. In its decision, the Constitutional Court criticised the rejection by the ECJ, thereby giving rise to the presumption that as a result it was less willing to compromise in the *Holubec* case, leading to the confrontational ultra vires decision.[14]

Ajos: Non-applicability of the principle of equal treatment in civil relations in Denmark

A few years later in 2016, the Danish Supreme Court issued a ruling in which it rejected the applicability of the principle of equal treatment in EU law in civil relations.[15] It thus did not recognise the third-party effect of the principle which follows from ECJ case law.[16] According to the Danish Supreme Court, the third-party effect of the principle of equal treatment is not being directly inferred from the Treaties and leads to it not being covered by Denmark's Act of Accession. It could therefore not have binding effect over constitutional law.[17]

Denying legal effect to an ECJ decision may constitute a violation of the primacy of EU law. The Commission can react with an infringement proceeding against the Member State under Article 258 TFEU. If the conflict is not settled, the ECJ can order the Member State to pay a penalty.[18] In both cases mentioned, however, no such proceedings have taken place.[19]

The successful dialogue: *Melloni and Tarrico*

Melloni: Uniform Fundamental Rights Standard in the framework of the European Arrest Warrant

The Spanish Constitutional Court avoided a similar confrontation in the Melloni case.[20] The Spanish Constitution precluded the extradition of a person convicted in absentia, providing a higher standard of protection than the European Arrest Warrant Directive and the EU Charter of Fundamental Rights. The ECJ ruled that divergent standards were inadmissible for the sake of legal certainty and the uniform application of EU law.[21] Therefore, the Constitutional Court ultimately followed the ECJ's guidelines and interpreted its constitutional values in accordance with EU law.[22]

Taricco: Conflict resolution through second referral to the ECJ

Another prominent example of a positive conflict outcome is the Italian *Taricco* saga.[23] Italy's constitutional values were opposed to the ECJ's interpretation of criminal prosecution in tax matters. Although the court did not follow the ECJ's guidance, it turned to it a second time and made its concerns clear.[24] In doing so, it gave the ECJ the opportunity to address the constitutional issues and find a compromise that took into account Italian constitutional values without causing a rift between the courts.

These two cases are the results of successful judicial dialogue, mutual respect, and the willingness to compromise, which is necessary to resolve conflicts. They are thus examples of respect for the principle of loyal cooperation as laid down in the treaties.[25]

Recent resistance tendencies

The conflict with the Polish Constitutional Tribunal

The most prominent conflict in recent times occurred between the Polish Constitutional Tribunal and the ECJ. The Constitutional Tribunal ruled in October 2021 that EU law was partly inconsistent with the Polish constitution.[26] This ruling is a reaction to the ECJ case law on the rule-of-law crisis regarding the Polish judicial reforms since 2017.[27] According to the Constitutional Tribunal, Article 4 (3) and Article 19 (1) TEU are inconsistent with the Polish Constitution insofar as their interpretation by the ECJ "enters a new stage"[28] of European integration, endangering Poland's sovereignty.[29] By calling the ECJ's rulings an attack on sovereignty and "progressive activism" the Tribunal takes a strongly confrontational stance.[30] It might not be the first court to oppose an ECJ decision. However, the reasoning in this case seems to be politically motivated.

The cross-border impact of the FCC

Constitutional courts often refer to each other when it comes to the limits of the influence of Union law. This is problematic, however, when statements are adopted selectively and without context.

The identity jurisprudence in Hungary and Germany

As an example, the Hungarian Constitutional Court has adopted statements by the FCC on constitutional identity, without placing them in their own national context.[31] The Hungarian Constitution does not contain an eternity clause comparable to Article 79 (3) of the German Basic Law, which makes the derivation of constitutional identity difficult to understand due to the lack of a link to the wording of the constitution.[32] Moreover, the new Hungarian constitution only came into force in 2011 and thus after Hungary's accession to the EU.[33]

No referral obligation to the ECJ in Czech ultra vires jurisprudence

The Czech Constitutional Court also referred to the FCC in its ultra vires decision. But it disregarded the limitations from the FCC's *Honeywell* decision, according to which the ECJ must be given the opportunity to make a statement before ruling an ultra vires decision[34] It consequently did not refer the *Holubec* case to the ECJ in a preliminary ruling procedure.[35]

Furthermore, the Polish Constitutional Tribunal referred to the FCC's ultra vires decision of May 2020.[36] In its decision the FCC stated that the ECJ had exceeded the limits of its mandate in the Weiss case, which concerned the European Central Bank's *public sector purchase programme* and its compatibility with EU law.[37] According to the FCC, the ECJ's control and interpretation in this regard was "not comprehensible and must thus be considered arbitrary".[38] The FCC was accused of having set a dangerous precedent, which could be followed by Eurosceptic courts in the time of the rule-of-law crisis.[39]

Lack of comparability between Poland and Germany

However, the German and the Polish case are not comparable due to the following points:

- The FCC emphasises that the cooperative relationship between the ECJ and the national courts must be preserved, especially via the dialogue in the preliminary ruling procedure.[40] However, the Polish Constitutional Tribunal took a confrontational course and threatened the ECJ to not cooperate in the future.[41]
- While the German integration limits can be traced back to principles of democracy, it seems that the Polish Constitutional Tribunal's reasoning regarding sovereignty is self-serving.
- Due to the intertwining of the judiciary and the government in Poland because of the judicial reforms, it cannot be excluded that the Constitutional Tribunal pursues a political agenda and acts as an extended arm of the Minister in Justice.[42]

Nevertheless, it was not surprising that the FCC's ruling was used by Eurosceptic courts. The courts have become a site of conflict for Eurosceptic politics over the years. Moreover, the international influence of the FCC and the ruling's cross-border impact, was already known after the *Solange* and *Lisbon* decisions.[43] It is therefore positive that the FCC restrained itself in the exercise of another ultra vires review in its decision regarding *NextGenerationEU*.[44] It limited itself to the examination of the obviousness of exceeding powers, which averted a further conflict and the weakening of the European legal order.

Classification and outlook

The Czech and the Danish rulings dealt with the accusation of exceeding competences but did not have a focus on questions of identity or sovereignty. Nor does the impression arise that they resulted from a process of a political secession.

Identity and sovereignty considerations as part of political separation

A different perception arises when looking at the recent rulings in Poland and Hungary. Especially in recent years, it seems as if the FCC's case law is being seen as a shield to lend more legitimacy to Euro-critical statements. Furthermore, the reasoning regarding constitutional identity is used to declare national jurisprudence and legislation untouchable. Sometimes it is questionable whether it is a matter of identity – as in Hungary, where the Constitutional Court ruled that EU law requirements for the admission of migrants, conflicts with human dignity and thus Hungary's constitutional identity.[45]

Conflict resolution through judicial dialogue

Looking at the various conflicts, solution-oriented judicial dialogue has proven to be the only means of conflict resolution, de-escalation and ultimately strengthening the legal order. The ECJ could proactively seek dialogue by introducing a reverse preliminary reference procedure to the national supreme courts when questions of national identity according to Article 4 (2) TEU arise.[46] National supreme courts could be offered an opportunity to be heard as an uninvolved party by amending the ECJ Statute.[47] This could have prevented the first ultra vires ruling *Holubec*. It would signalise that it respects the national courts' concerns. On the other hand, national procedures should be supplemented with the obligation to hear affected EU institutions.[48] To prevent future conflicts, the judicial dialogue should thus be concretised and normatively established.[49] In addition, national supreme courts must refer remaining questions to the ECJ in another preliminary ruling procedure, if necessary, to work towards an agreement. This follows from Article 267 TFEU and has proven itself in the *Taricco* case, which other courts should follow, too.[50]

To counteract mistrust,[51] the ECJ is advised to be show sensitivity towards the concerns of national supreme courts on questions of competence and national identity.[52] However, national supreme courts should refrain from weakening the ECJ's authority. Besides Poland and Hungary, Romania has also recently attracted attention with their constitutional court's euro-critical stances.[53] Yet, Eurocritical nationalist aspirations have proven themselves to be damaging to the European community and the country itself. The Polish rule-of-law crisis had a side effect on inter-state judicial cooperation as extraditions under the European Arrest Warrant to Poland have been partially suspended due to rule of law concerns.[54] Ultimately, the ECJ should be seen less as a threat to sovereignty than as another supporting pillar for legal certainty within the legal orders.

1 This paper is based on a presentation given at the 16th Berlin Legal Policy Conference under the title „Resistance from the Member States – Conflicts of Jurisdiction in a European Comparison“ in October 2022.

2 ECJ, C-26/62; C-6/64.

3 Eberhard Grabitz, *Gemeinschaftsrecht bricht nationales Recht* (1966); Maurice Lagrange, 'La primauté du droit communautaire sur le droit national', in Collège d'Europe (ed.), *Droit Communautaire et Droit National, Community Law and National Law* (1965) 21; Vassilios Skouris, 'Vorrang des Europarechts: Verfassungsrechtliche und verfassungsgerichtliche Aspekte', in Winfried Kluth (ed.), *Europäische Integration und nationales Verfassungsrecht, Eine Analyse der Einwirkungen der Europäischen Integration auf die mitgliedsstaatlichen Verfassungssysteme und ein Vergleich ihrer Reaktionsmodelle* (2007) 31.

4 ECJ, C-6/64; BVerfGE 126, 286, at 52, 57; 154, 17, at 111.

5 Ústavní soud, Pl. ÚS. 50/04; Conseil Constitutionnel, n° 2006-540 DC; Corte Costituzionale, Sentenza N. 183/1973; Tribunal Constitucional, STC 79/1992; except for: Hoge Raad, 00156/04 E.

6 BVerfGE 37, 271; 73, 339.

7 *Ultra vires* (Latin for „beyond the powers“) refers to a legal act that exceeds the sphere of competence of the enacting body.

8 BVerfGE 89, 155; 126, 286.

9 BVerfGE 123, 267.

10 Magyarország Alkotmánybírósága, 22/2016 (XII. 5.); Beáta Bakó, 'The Zauberlehrling Unchained?: The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review in Hungary', 78 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2018) 863.

11 Ústavní soud, Pl. ÚS 5/12.

12 ECJ, C-399/09.

13 An *amicus curiae letter* allows a third party to comment on legal issues.

14 Martin Faix, 'Genesis eines mehrpoligen Justizkonflikts - Das Verfassungsgericht der Tschechischen Republik wertet ein EuGH-Urteil als Ultra-vires-Akt' *Europäische Grundrechte Zeitschrift* (2012) 597, at 603; Attila Vincze, 'Das tschechische Verfassungsgericht stoppt den EuGH' Europarecht (2013) 194, at 203.

15 Højesteret, 15/2014.

16 ECJ, C-441/14.

17 Højesteret, 15/2014, para. 6.5.

18 Article 260 TFEU.

19 Christian Calliess, 'Vorrang des Unionsrechts und Kompetenzkontrolle im europäischen Verfassungsgerichtsverbund: Zuständigkeiten und Reformen zwischen BVerfG und EuGH im Lichte des Vertragsverletzungsverfahrens der EU-Kommission' *Neue Juristische Wochenzeitschrift* (2021) 2845, at 2846.

20 Tribunal Constitucional, ATC 86/2011.

21 ECJ, C-399/11.

22 Tribunal Constitucional, STC 26/2014.

23 ECJ, C-105/14; C-42/17.

24 Corte Costituzionale, Ordinanza no. 24/2017.

25 Article 4 (3) TEU.

26 Trybunał Konstytucyjny, K 3/21, 1.

27 ECJ, C-619/18; C-192/18; C-791/19.

28 Trybunał Konstytucyjny, K 3/21, 1.

29 Trybunał Konstytucyjny, K 3/21, Press Release, II. 9.

30 Trybunał Konstytucyjny, K 3/21, Press Release, IV. 22

31 BVerfGE 123, 267; Magyarország Alkotmánybírósága, 22/2016 (XII. 5.); Ágoston Mohay and Norbert Tóth, 'Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law', 111 American Journal of International Law (2017) 468, at 473.

32 Bakó, supra note 10, at 897; Mohay and Tóth, supra note 31, at 473.

33 Kriszta Kovács and Gábor Attila Tóth, 'Hungary's Constitutional Transformation', 7 European Constitutional Law Review (2011) 183.

34 BVerfGE 126, 286.

35 Faix, supra note 14, at 602.

36 Trybunał Konstytucyjny, K 3/21, Press Release, II. 8.

37 ECJ, C-493/17; BVerfGE 154, 17.

38 BVerfGE 154, 17.

39 Johannes Masing, '§ 2 Verfassung im internationalen Mehrebenensystem', in Matthias Herdegen *et al.* (eds.), *Handbuch des Verfassungsrechts, Darstellung in transnationaler Perspektive* (2021) 61, at 115; Franz C. Mayer, 'Auf dem Weg zum Richterfaustrecht?' *Verfassungsblog* (2020); Ingolf Pernice, 'Sollte die EU-Kommission Deutschland wegen des Karlsruher Ultra-Vires-Urteils verklagen?: PRO' *Verfassungsblog* (2020).

40 BVerfGE 126, 286.

41 Trybunał Konstytucyjny, K 3/21, Press Release, IV. 22.

42 Commission Recommendation (EU) 2017/1520 of 26 July 2017 on the rule of law in Poland, complementing Recommendations (EU) 2016/1374 and EU 2017/146, OJ L 228/19.

43 BVerfGE 37, 271; 73, 339; 123, 267; Mayer, supra note 39.

44 BVerfG, 6.12.2022 - 2 BvR 547/21, 2 BvR 798/21.

45 Magyarország Alkotmánybírósága, 32/2021 (XII. 20); Attila Vincze, 'Unsere Gedanken sind Sprengstoff - Zum Vorrang des Europarechts in der Rechtsprechung des ungarischen Verfassungsgerichts' *Europäische Grundrechte Zeitschrift* (2022) 13, at 14.

46 Calliess, *'Vorrang des Unionsrechts und Kompetenzkontrolle im europäischen Verfassungsgerichtsverbund', supra* note 19, at 2850.

47 The extension of Article 23 (1) of the ECJ Statute to include the participation of the supreme courts is possible under Article 281 (2) TFEU.

48 ibid., at 2850; Ulrich Karpenstein and Maximilian Steinbeis, *'Die Stunde des Gesetzgebers' Verfassungsblog* (2021).

49 Ulrich Karpenstein and Maximilian Steinbeis, 'Die Stunde des Gesetzgebers' Verfassungsblog (2021).

50 Christian Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH?: Zu den Folgen des Karlsruher PSPP-Urteils', 2020 *Neue Zeitschrift für Verwaltungsrecht* 897, at 901; Vassilios Skouris, 'Der Vorrang des Europäischen Unionsrechts vor dem nationalen Recht. Unionsrecht bricht nationales Recht' *Europarecht* (2021) 3, at 26.

51 Günter Krings, 'Die Kompetenzkontrolle der EU - einer muss es ja machen' *Zeitschrift für Rechtspolitik* (2020) 160.

52 Wolfgang Kahl, 'Optimierungspotenzial im „Kooperationsverhältnis" zwischen EuGH und BVerfG' *Neue Zeitschrift für Verwaltungsrecht* (2020) 824, at 827.

53 Curtea Constituțională a României, Press release, 23.12.2023.

54 Refusal of extradition OLG Karlsruhe, order of 17.2.2020 - 301 AR 156/19, in line with ECJ, C-216/18.

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