Ultra Vires Control and European Democracy

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On 9 June 2021, the European Commission filed infringement proceedings against the Federal Republic of Germany. The allegation: Germany has not only violated fundamental principles of EU law, in particular autonomy, primacy of application, effectiveness, and uniform applicability of EU law. It has also interfered with the judicial mandate of the European Court of Justice (ECJ). The allegations are a direct response to the judgment on 5 May 2020 by the Federal Constitutional Court (FCC) concerning the Public Sector Asset Purchase Programme (PSPP).

Though the infringement procedure has been welcomed by some scholars as a necessary reaction of the Commission, I argue that initiating the infringement procedure is politically unwise, legally questionable, and ultimately unfounded. However, the proceedings have also the potential to establish domestic ultra vires review as a permitted procedure under EU law.

The European Commission's accusation

According to the Commission, the FCC violated fundamental principles of EU law in its May 2020 *PSPP* ruling. The specific point of criticism is that the FCC declared both the European Central Bank's PSPP and the ECJ's preliminary ruling confirming the programme (*Weiss*) to be ultra vires acts – without referring the matter back to the ECJ. By declaring actions of EU institutions invalid in Germany, the FCC had violated the primacy of EU law. This is not changed by the fact that the FCC granted the European Central Bank an opportunity to correct the situation by carrying out a proportionality test and that it only recently (on 29 April 2021) rejected applications for an enforcement order. In the eyes of the European Commission, the PSPP ruling marks a 'serious precedent' for the constitutional and supreme courts of the other Member States and for future rulings of the FCC itself.

Politically unwise: Serious interference in the independence of a Member State's court

Politically, the procedure seems unwise in several respects:

1. First, the ultra vires decision in the PSPP ruling did not damage the European legal community. By requiring only an ex-post proportionality test, the FCC provided an opportunity for the European Central Bank to act within its competences again. The refusal to grant the enforcement requests shows that the FCC is not concerned with close-meshed legality checks but with a wider legitimacy check in the ultra vires review.
2. The PSPP ruling does not set a negative example for the Hungarian or Polish constitutional courts. In its ultra vires jurisprudence, the FCC has consistently advocated for stronger judicial control, more democratic oversight and strengthening the rule of law. Comparing this with the constitutional situation in Poland and Hungary ignores those different contexts and is rather driven by narrow self-interests.
3. Finally, the infringement procedure appears somewhat troubling from the perspective of separation of powers. Naturally, it would be too simple to state that the executive body of the European Union acts against an independent court because it simply does not like the court to have jurisdiction. After all, the European Commission bases its arguments on law. However, if the ECJ follows the Commission, this could open the doors for a legal dilemma. On the one side, the Federal Republic of Germany would have to pay a penalty. On the other side, the FCC could not simply drop its

ultra vires review since it has grounded its ultra vires case law in the eternity clause of the German Basic Law (Article 79 (3)).

It remains to be seen if this assessment is too pessimistic. Perhaps, the infringement proceedings against Germany will turn out to be the right step. After all, the proceedings will allow the ECJ both to decide the question whether the PSPP judgment violates EU law and, more generally, on the function and legality of domestic ultra vires control in the EU.

The ECJ as a judge in its own cause

Yet, it is not unlikely that the infringement proceedings themselves violate EU law. By deciding who can claim the final word on ultra vires matters, the ECJ would be a judge in its own cause – a violation of basic procedural principles and the rule of law. If the ECJ decides on the legality of the PSPP judgment, the court would also have to decide incidentally whether the ECJ itself violated EU law with its Weiss judgment. Moreover, even the infringement proceedings themselves can be regarded as ultra vires. Declaring the constitutional identity of a Member State (in Germany Article 79 (3) of the Basic Law) irrelevant finds no legal basis in the Union Treaties. Acting in such a matter is thus far beyond the competences of EU institutions.

Unfounded: Why the PSPP judgment does not violate EU law

So how could the legal dilemma between the Union legal order and the Member States' constitutional orders be addressed? At least if conducted in a manner friendly to EU law, the ultra vires review by a Member State's constitutional court in cooperation with the ECJ is already permissible.

1. Wording: Ultra vires control pursuant Art. 4 (2) TEU

An exception to the primacy of EU law is formulated in Article 4 (2) TEU, which in para. 1 Alt. 2 requires the European Union to respect the national identity of Member States. National identity includes, among others, the Member States' constitutional identity. In Germany, constitutional identity is grounded in Article 79 (3) of the Basic Law. The FCC has developed its ultra vires control (set out in Article 23 (1) sentences 2 and 3, read in conjunction with Article 79 (3) GG and Article 20 (1) and (2) GG) out of the idea of an unalterable constitutional identity established by the Basic Law. Ultra vires control is thus a special form of identity control resting on the idea of popular sovereignty. As such, the ultra vires control is an unalterable part of German constitutional identity and thus falls into the range of Article 4 (2) TEU.

Of course, it could be objected that Art. 4 (2) TEU must be interpreted autonomously under EU law and that it is therefore the task of the ECJ to give specific meaning to the term of national identity. Though this objection might be correct in principle, it is not convincing at this point. It is already difficult to imagine that the ECJ is able to determine what belongs to the national identity of a Member State. Just as, in principle, the ECJ has a monopoly on the interpretation of EU law, the constitutional courts of the Member States have a monopoly on the interpretation of their constitutions. Consequently, it is only the domestic courts who can legally determine what matters are relevant to their constitutional identity. In this regard, the ECJ has only a limited jurisdiction which amounts to an arbitrariness review or abuse review. This ensures that the constitutional court of a Member State does not simply invent a component of constitutional identity to avoid applying EU law.

Here, the function of Article 4 (2) TEU becomes clear once again. It is a point of entry for national constitutional law into EU law. In this respect, it has, in a certain sense, a complementary function to the openness of domestic Member States' law to EU law (such as in Article 23 (1) of the Basic Law). Just as the FCC and other Member States' constitutional courts review possible transgressions of competence only in light of obviousness or arbitrariness, the ECJ must exercise the same judicial restraint in relation to Article 4 (2) TEU.

2. Systematics: Member States as masters of the treaties

The ECJ's autonomy argument can be countered with the argument that it is the Member States who are the "masters of the treaties".

The ECJ developed the concept of the autonomy of EU law in its *Costa/ENEL* decision. At that time, the concept only served to justify the primacy of EU law. However, most Member States' constitutional courts stick to their jurisdiction with regard to EU law when it comes to issues of domestic constitutional law. So far, no constitutional court has accepted the ECJ's reasoning that the primacy of EU law flows solely from autonomy itself (cf. paragraph 140 *OMT* judgment; even in Belgium: Decision of 28.04.2016, No. 62/2016, B.8.7). All Member State constitutions and constitutional or supreme courts provide for primacy of application by virtue of the Member States' order to apply the law. In addition, the ECJ has recently further extended the concept of autonomy, perhaps even in abusive ways. Good examples of this are the ECJ opinions on the *European Patent Court*, the *European Convention on Human Rights accession* and the *Achmea* case. In these cases, the concept of autonomy served to ward off courts that were considered to be alien to the European legal order by the ECJ. As important and legally convincing the fundamental primacy of EU law is for the functioning of the European legal order, it would be wrong to say that the Union order is completely autonomous from the will of the Member States.

Moreover, when arguing with abstractions like "autonomy" or "Member States as masters of the treaties", it must be noted that the systematic interpretation of the Union Treaties clearly speaks in favour of the latter. It is clear from the treaties that the existence and further development of the European legal order relies on the will of the Member States. This is evidenced by a wide variety of norms: According to Article 48 TEU, the Member States are essential actors in every treaty amendment in the ordinary amendment procedure. Article 50 TEU makes it clear that any Member State may withdraw from the Union. As discussed above, the European Union is obliged to pay particular attention to the national identity of the Member States. In addition, due to a lack of competence, the European Union may, according to the principle of conferral pursuant to Article 5 (1) and (2) TEU, only exercise those competences which have been transferred to it by the Member States. The frequent references in the Union Treaties to the legal systems of the Member States also speak to the Member-driven structure of the European Union. And finally, state practice speaks the same language: amendments to the treaties have often enough failed because of the will of Member States. Indeed, the Union legal order has never been autonomous.

3. Telos: Two-track European democracy

It is well known that the FCC rests its ultra vires review jurisdiction directly on the principle of democracy, more precisely on the principle of popular sovereignty. However, allowing Member States to conduct ultra vires control in cooperation with the ECJ would also follow from the principle of democracy under EU law itself. EU law recognises the principle of two-track democratic legitimacy according to Articles 2, 10 (1), 14 (2) and 12 TEU.

According to Article 10 (1) TEU, the functioning of the European Union is based on representative democracy. It follows from Article 14 (2) TEU that the European Parliament comprises representatives of the citizens of the Union with seats allocated based on degressive proportionality. Article 12 TEU explicitly states that national parliaments actively contribute to the functioning of the European Union. The two-track democratic legitimacy of the European Union follows from this. In other words, the principle of democracy under EU law stands on two pillars: democracy under EU law and democracy under Member State law. As long as national parliaments are the central organ of the parliamentary democracy of the Member States, they must have a substantial influence on the decisions of the European Union. Failing to respect their powers and competences would equally damage a pillar of European democracy, and as such no longer guarantee the democratic legitimacy of the European Union as a whole. Ultra vires control ensures that the

Member State pillar of European democracy remains in place.

Ultra vires control is a control of legitimacy. It checks whether the Union's actions in individual cases are grounded in the democratic will of the Member States and thus in the individual citizens of the Union. The blanket refusal of ultra vires control in individual cases would interrupt this chain of democratic legitimacy. It is thus a violation of the democratic principle under EU law.

Prerequisite: EU law friendliness

All in all, it remains to be said that ultra vires control can only be permissible under EU law under two conditions. First, it must be an expression of the constitutional identity of the Member States, otherwise it would be impermissible under Article 4 (2) TEU. Second, it must be exercised in a manner that is friendly to EU law. This goes along with several things: that there is no abuse, that national interests are not played off against Union interests, that there is doctrinal grounding in Member State case law, that a broad standard of review (democratic review and no review of legality) is observed, and finally, that there is close cooperation with the ECJ.

Conclusion: Permissibility of ultra vires control under EU law

As this analysis suggests, the standard arguments against the permissibility of ultra vires control under EU law – autonomy, uniformity, effectiveness, primacy – are not convincing. On closer examination, the Union Treaties do not exclude ultra vires control. On the contrary, the interpretation of the treaties shows that ultra vires control is permissible if it is an outflow of the constitutional identity of the particular Member State and is not applied abusively but in a way friendly to EU law. In this case, ultra vires control does not contribute to weakening but to strengthening and legitimising the Union legal order.

Hopefully the ECJ will agree to such an interpretation of its treaties in its judgement. The ECJ could thereby contribute to the cooperative spirit in the network of European constitutional courts. The PSPP ruling has met the requirements for an ultra vires review conducted in a manner friendly to EU law and thus does not violate EU law.

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