

Ultra Vires Review and the Shift of Legal Orders

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By the famous judgment of the German Federal Constitutional Court (BVerfG) of 5 May 2020 it was held, first, that the ECB and the European System of Central Banks acted beyond the limits of their legal powers and capacities (*ultra vires*) by setting up and implementing intensively and for a long period of time the quantitative easing program (APP/PSPP), through which it is not (or it is no longer) monetary but economic policy that is pursued, and, secondly, that the CJEU, by refusing to review in depth the relevant ECB/ESCB acts, also exceeded its jurisdiction by omission (*ultra vires*).² This judgment fueled an extremely interesting debate.³ Other cases in which supreme or constitutional courts of Member States carried out similar *ultra vires* reviews were sought and highlighted once more.⁴ Review of EU *ultra vires* action was also linked to

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2. BVerfG, 5 May 2020, *Weiss* (2 BvR 859/15, 1651/15, 2006/15 and 980/16).

3. *Ex multis*, F. Amtenbrink & R. Repasi, "The German Federal Constitutional Court's decision in *Weiss*: A contextual analysis" *European Law Review* 2020, p. 757; N. de Boer and J. van Klooster, "The ECB, the Courts and the issue of democratic legitimacy after *Weiss*" *CMLR* 2020, p. 1689; A. Bobić & M. Dawson, "Making sense of the "incomprehensible": The PSPP judgment of the German Federal Constitutional Court", *CMLR* 2020, p. 1953; J. H. H. Weiler, "Why *Weiss*? The ICON Symposium: Preface", *ICON* 2021, p. 1, and further references there; T. Flynn, "Constitutional pluralism and loyal opposition", *ICON* 2021, p. 241.

4. See Pl. ÚS, 31 Jan 2012, *Slovak Pensions* (5/12), in relation to CJEU, 22 Jun 2011, *Landtová* (Case C-399/09) (ECLI:EU:C:2011:415); R. Zbiral, "A legal revolution or negligible episode? Court of Justice decision proclaimed *ultra vires*", *CMLR* 2012, p. 1475. See also SC DK, 6 Dec 2016, *Dansk Industri (DI) acting for Ajos AIS vs. The*

invoking the limit of national constitutional identity,⁵ which, in the case of the BVerfG judgment, was done subsequently the *ultra vires* review, while in other cases (such as in the recent judgment of the French Council of State on telecoms protection data)⁶ it was considered to have been done *instead* of performing an *ultra vires* review, as a more friendly choice towards the EU legal order, its bodies and institutions and the CJEU, in particular.

It is not the intention of the present paper to provide one additional review of this ongoing debate. This study focuses on looking at the shift of legal orders brought about by the judgment of a national court (supreme or constitutional, in any case of a national court that rules irrevocably) that EU bodies or institutions, by their acts or omissions, acted in an *ultra vires* manner, beyond the competences conferred to the Union. I will try to show that the question is first raised in the domain of the EU legal order by the national court referring a request for a preliminary ruling to the CJEU, which interprets the relevant provisions of primary Union law; thereafter, it is raised in the domain of the national legal order by the national court that disagrees with the CJEU's ruling, and, finally, it is raised in the domain of the international legal order, whereat the Member States and the EU, as subjects of international law, are represented not by their courts, but by bodies empowered to represent them at the international level, in accordance with the national Constitution and the Treaties, respectively.

I. The original question

The original question is whether the national judge, when conducting an *ultra vires* review, acts within the scope of the EU or of the national legal order. The answer I would give is that the national judge reviews the limits of the EU legal order according to its internal logic and, therefore, to begin with, *she/he* acts as an EU judge within the frame of article 267 TFEU; on the other hand, if *she/he* disagrees with the CJEU position, *she/he* protects the scope of the national legal order by ultimately acting within it as a national judge and it is reasonable

estate left by A (15/2014), in relation to CJEU, 19 Apr. 2014, *DI* (Case C-441/14) (ECLI:EU:C:2014:278); M. R. Madsen, H. P. Olsen and U. Sadl, "Competing supremacies and clashing institutional rationalities: The Danish Supreme Court's decision in the Ajos Case and the national limits of judicial cooperation", *European Law Review* 2017, p. 140; H. Krunke and S. Klinge, "The Danish *Ajos* case: The missing case from *Maastricht* and *Lisbon*", *European Papers* 2018, p. 157.

5. See footnotes 22-23 and references there.

6. CE, 21 Apr. 2021, *Connection Data*, in relation to CJEU, 6 Oct 2020, *Privacy International* (Case C-623/17) (ECLI:EU:C:2020:790); CJEU, 6 Oct 2020, *La Quadrature du net and others* (Joined Cases C-511/18, C-512/18 and C-520/18) (ECLI:EU:C:2020:791).

to accept that *her/his* primary concern is to protect the hard core of the Member State's sovereignty.

This is how I perceive the format of the well-known BVerfG judgment: the German Federal Constitutional Court, having long prepared the ground by its case law,⁷ begins its operation in the field of the EU legal order, acting first as an EU judge. For this reason, it initially confirms the EU competence and the CJEU's jurisdiction and appears to be seeking a solution in the self-referential field of the EU legal order. Through a request for a preliminary ruling, the national judge "converses" with the CJEU, whose decision he/she awaits as the ultimate position of the EU legal order, while retaining the procedural right to submit the CJEU's answer to the preliminary ruling request to his/her own review, beyond the bounds and logic of the EU legal order. In my opinion, such review develops in two stages. In the first stage, the national judge interprets the EU primary and/or secondary law (more specifically, the rules of the Treaties setting out the Union's competencies and, conversely, the competencies remaining with the Member States), according to the national Constitution, moving on the borderline between the EU and the national legal order. In the second stage, if his/her own interpretation of EU primary law differs from that of the CJEU and he/she wishes to insist on disagreeing with the CJEU ruling, the national judge moves clearly into the area of the national legal order, which it demarcates as an area over which the Member State has sovereignty.

II. Ramifications in the spheres of the EU and the national legal order

The latter stage has different ramifications in the sphere of each of the above two legal orders—that of the Union and the national one. The CJEU has the final say in the field of the EU legal order and, in the context of the uniform interpretation of EU law, national courts, i.e., ultimately, the Member States' supreme or constitutional courts, are called to comply with its ruling. On the contrary, a national court has the final say in the field of the national legal order. To begin with, it calls on its own interpretation of EU primary law, which is in line with the national Constitution, in order to determine which powers have been delegated to the EU, its bodies and institutions, in accordance with national constitutional provisions, while the rest have been retained by the Member State. At the end, however, it finds that the Union's competences have been exceeded, shifting onto the field of the national legal order which it demarcates. Thus, a

7. BVerfG, 12 Oct 1993, *Maastricht* (2 BvR 2134/1992, 2 BvR 2159/92); BVerfG, 30 Jun 2009, *Lisbon decision* (2 be 2/08); BVerfG, 6 Jul 2010, *Honeywell* (2 BvR 2661/06); BVerfG, 21 Jun 2016, *OMT*s (2 BvR 2728/13, 2829/13, 2730/13 and 2731/13, 2 BvE 13/13).

judicial conflict over the allocation of powers ensues, in the context of which it is reasonable for the CJEU to have the tendency to broaden the circle of the Union's conferred powers and to save the choices made by Union's bodies and institutions. At the same time, it is reasonable for the national court to seek to guard the, already limited and shared, sovereignty of the Member State.⁸

Having said that, a conflict of such nature does not evolve exclusively or chiefly between the courts having last degree jurisdiction in each of the two legal orders. Before any further consideration, in the sphere of the EU legal order, issuance of an irrevocable national court judgment refusing to comply with a CJEU pronouncement, by which an answer was given to questions for a preliminary ruling out by the national court, because the latter finds that the EU has acted, via its bodies or institutions and, ultimately, via the CJEU, beyond its competences (*ultra vires*), amounts to a breach of EU law. *A fortiori*, there is such a breach when the Member State complies with (or, at least, does not deviate from) the relevant irrevocable judgment of its supreme or constitutional court by means of acts or omissions of its legislative and executive bodies or independent institutions thereof, such as its central bank. Obviously, in such cases, the Commission may initiate an infringement procedure and ultimately bring the case before the CJEU against the Member State for failure to comply with EU law. After all, in accordance with the logic of the EU legal order and Article 4(3) TEU, the Member State is under an obligation to cooperate in good faith and to respect the EU legal order, subject to judicial review by the CJEU. The Member States' courts and, at any rate, its governmental bodies and independent authorities are also under this obligation,⁹ which they breach by officially stating that they are obliged to comply with a judgment of the national court that the EU bodies consider to be violating EU law. This is the case even when the legal framework for the Member State's government bodies' compliance with the judgment of their national court is relaxed; all the more so when such compliance has direct legal consequences affecting the implementation of EU law as a legal expression of E.U. decisions and policy.

In light of the above, it is not surprising that, nearly one year later, the Commission initiated an infringement procedure against Germany¹⁰ over the

8. On this issue, see B. de Witte, "Sovereignty and European Integration: The Weight of Legal Tradition", *Maastricht Journal of European & Comparative Law* 1995, p. 145; E. Venizelos, "State transformation and the European integration project: Lessons from the financial crisis and the Greek paradigm", *CEPS Special Report No 130*, 2016, p. 2 and further references there; J. B. Cruz, *What's left of the law of integration? Decay and resistance in European Union law*, OUP, 2018, p. 27 *seq.*

9. *Ex multis*, see CJEU, 6 Dec 1990, *IMM-Zwartveld and Others* (Case C-2/88) (ECLI:EU:C:1990:440); M. Klamert, "Article 4 TEU", in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, OUP, 2019, p. 47 *seq.*

10. By sending a letter of formal notice to Germany on 9 June 2021; see the Commission's Press Release, available at <<https://ec.europa.eu/commission/presscorner/detail/en/>

BVerfG judgment of 5 May 2020, in spite of the fact that meanwhile, the general clause of escape from the Stability Pact was activated, the colossal pandemic quantitative easing program (PEPP) was decided upon and is in under way, and the so-called New Generation Recovery Fund, which is partly financed by the issuance of a joint debt instrument by the EU, was set up. Yet, even this gave rise to a constitutional appeal before the German Federal Constitutional Court, which, however, at the level of preliminary judicial protection, did not obstruct the relevant agreement's approval and implementation.¹¹

On 2 December 2021 the European Commission announced that it was closing the relevant procedure for three reasons: « First, in its reply to the letter of formal notice, Germany has provided very strong commitments. In particular, Germany has formally declared that it affirms and recognises the principles of autonomy, primacy, effectiveness and uniform application of Union law as well as the values laid down in Article 2 TEU, including in particular the rule of law. Second, Germany explicitly recognises the authority of the Court of Justice of the European Union, whose decisions are final and binding. It also considers that the legality of acts of Union institutions cannot be made subject to the examination of constitutional complaints before German courts but can only be reviewed by the Court of Justice. Third, the German government, explicitly referring to its duty of loyal cooperation enshrined in the Treaties, commits to use all the means at its disposal to avoid, in the future, a repetition of an “ultra vires” finding, and take an active role in that regard ».

This development is of great institutional interest. In my view and in line with the argument I try to develop in the present paper the Commission accepts that each Member State is represented internationally and within the European Union by its government and not by its supreme or constitutional court. This is particularly important when the question arises as to the limits of the Union's competences (Ultra Vires review) as these limits are determined by the multilateral international treaties which constitute the primary law of the EU without ceasing to be part of the International Law domain.¹²

inf_21_2743>; see also N. Pietersen and K. Chatziathanasiou, “Primacy's twilight: On the legal consequences of the ruling of the Federal Constitutional Court of 5 May for the primacy of EU law”, *Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies* 2021.

11. BVerfG, 15 Apr. 2021, *EU Recovery Package* (Order) (2 BvR 547/21).

12. As regards the Commission's initial decision, see Thu Nguyen, “A Matter of Principle. The Commission's Decision to Bring an Infringement Procedure against Germany” (VerfBlog, 11 June 2021) <https://verfassungsblog.de/a-matter-of-principle/>. Regarding the final decision of the Commission and the statement made on 2 December 2021 see “EU Commission closes infringement procedure against Germany on primacy of EU law and authority of the EU Court of Justice” INSIGHT EU MONITORING – EU and global regulatory monitoring (2.12.2021) <<https://portal.iieu-monitoring.com/editorial/eu-commission-closes-infringement-procedure-after-germany-recognising-the->

III. In the field of which legal order will the solution be sought?

Once we are confronted with such a conflict evolving on different terms in the fields of two distinct legal orders, how can it be resolved? Speaking on political terms and dealing with it at a practical level, obviously by mutual concessions and compromises.

Nevertheless, this political / practical approach cannot influence, at least directly and officially, the stance of the courts involved in this difficult “dialogue”. Both the CJEU judgment, as well as that of the national supreme or constitutional court on the distribution of competencies between the Union and the Member States continue to exist and to have legal consequences in each legal order’s field –the European and the national one.

The EU is always an open field of an ongoing intergovernmental negotiation among Member States on all critical issues (economic governance and financial arrangements, foreign, security and defense policy, etc.). However, this process, which lies at the core of European integration, takes place among the political institutions of the Member States or inside the EU institutional bodies, whereat the Member States are represented at the level of either Heads of State and Governments or of the relevant ministers; i.e. primarily at the European Council and the Council, including the Eurogroup with its institutional peculiarities. The judiciary’s involvement in this process is indirect, procedurally complex, and slow.

Moreover, when the question of *ultra vires* arises, i.e. the question of division of competences between the Union and the Member States, and, as such, a question of sovereignty, it no longer concerns one Member State and its own national supreme or constitutional court that has identified such an issue and stated its disagreement with the CJEU, but *all* Member States within the frame of their institutional equality, as the BVerfG pointed out in the press release regarding its decision of 5.5.2020. The division between the powers conferred to the Union and the sovereign powers retained by the Member States may not be different for each Member State. It is uniform, even if the national courts of one or only a few Member States have raised the issue, clashing with EU bodies or institutions and ultimately with the CJEU.

In practice, it is difficult for the supreme or constitutional courts of the other Member States to take part in this “dialogue” within the framework of the procedural rules which govern the functioning of the CJEU and allow the institutions of the Union and the Member States to take part in judicial proceedings before it. The views of a Member State’s supreme or constitutional court may be brought before the CJEU on behalf of the Member State concerned, i.e., by the political organs of the State representing it in the proceedings of the Union

[primacy-of-eu-law-and-authority-of-the-eu-court-of-justice?utm_source=ieu&utm_medium=web&utm_campaign=portal>](#)

and internationally. *A fortiori* there is no procedural mechanism for resolving the conflict over the list of the Union's competences between the CJEU and one or more national supreme or constitutional courts. Besides, even if this mechanism had been established in the field of the EU legal order, it could not have deprived a national court of the possibility to raise its own objections in the field of national law, in the name of the Member State's sovereignty and powers; it would practically reduce the possibility of such a thing happening, but would not eliminate it.

The following legal / institutional question is therefore raised: in the field of which legal order can and should the solution be sought? The two legal orders involved, the national and the EU one, each follows, in a self-referential way, its internal legal and judicial logic. They have been "detached" and each of the involved courts claims to have the final word in its field. However, since there is a question of division of competencies and establishment of jurisdiction, in other words a question of sovereignty, this phenomenon of the two legal orders in conflict does not evolve without one common legal denominator, which is a twofold matter: on one hand, the legal foundation of the EU, which has enabled it to establish its own autonomous and self-referential legal order, and, on the other hand, the legal foundation of limiting state sovereignty, which each State that wished to become a Member State of an international organization (that, thereafter, developed the EU's hybrid features and acquired its integrating potential) accepted by giving international undertakings, in accordance with the relevant provisions of its national Constitution and international law.¹³

IV. Which are the Member States' and EU competent bodies in the domain of the international legal order?

In the domain of the international legal order, states (that are contracting parties to a multilateral treaty and member states of an international organization, as the EU was in the beginning, before acquiring the dynamics of an autonomous legal order) are bound by or challenge their commitments and generally articulate their position in case of disagreement via the bodies which represent them at an international level, in accordance with their national constitutional rules and the rules of general international law. These bodies are political: they are the State's Head and its Government; basically, the Head of the Executive and the Foreign Affairs Minister –not the State courts.¹⁴ Correspondingly, the EU, as a subject of

13. J. Klabbers, "Straddling the fence: the EU and international law", in D. Chalmers and A. Arnall (eds.), *The Oxford handbook of European Union law*, OUP, 2015, p. 59; P. Eleftheriadis, *A union of peoples*, OUP, 2020, p. 82-83; see also A. Peters, "The competition between legal orders", *International Law Research* 2014, p. 45.

14. *Ex multis*, see J. Crawford, *Brownlie's principles of public international law*, 9th ed., OUP, 2019, p. 141.

international law, is represented by the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, and not by the CJEU.¹⁵ After all, the masters of the treaties¹⁶ which constitute the primary law of the EU are always the Member States, as the German Federal Constitutional Court made sure to stress in its judgment of 5.5.2020.

Thus, a critical issue of division of competencies which, through the *ultra vires* review, leads to a conflict between the CJEU and one or more national supreme or constitutional courts, further leads on to a shift from both the fields of the EU and the national legal order onto the domain of the international legal order. It then leads onto a transfer from the jurisdiction of the judicial bodies on both sides to the powers of the political bodies which represent the States –Contracting Parties to the founding multilateral treaties that have become EU Member States, as provided by their national constitution and international law. Of course, in the domain of the national legal order and based on the provisions of the national Constitution, the acts or omissions of the State’s political bodies that are authorized to represent it internationally may be subject to judicial review, as long as there are no provisions excluding or restricting judicial review of the so-called “government acts”¹⁷ or limitations related to the political question doctrine.¹⁸ This mainly concerns the Member State whose national supreme or constitutional court has carried out an *ultra vires* review and has come up with an interpretation of the Treaties as regards the Union’s competencies, which conflicts with that of the CJEU. Respective issues in the domain of the international legal order are regulated by the combined interpretation and application of Articles 27 and 46 of the Vienna Convention on the Law of Treaties,¹⁹ with which the successive references in Articles 48 (4) and (6), 49 and 50(1) TEU on the need to respect the constitutional rules in force in the Member States are in line.²⁰ We can very briefly say that the States –Contracting Parties to a treaty cannot invoke their national law

15. *Ex multis*, see P. Eeckhout, *EU external relations law*, 2nd ed., OUP, 2011, p. 195.

16. *Weiss*, *op. cit.*, 1, paras 111, 157; *Lisbon*, *op. cit.*, 6, para 229.

17. *Ex multis*, see P. Daly, *A theory of deference in administrative law*, CUP, 2012, p. 267 *seq.*

18. *Ex multis*, see M. Sitorius, “The political question doctrine: A thin black line between judicial deference and judicial review”, *Nebraska Law Review* 2009, p. 793, 796; also N. Mourtada-Sabbah and B. Cain (eds.), *The political question doctrine and the Supreme Court of the United States*, Lexington, 2007.

19. K. Schmalenbach, “Article 27”, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2018, 2nd edn, p. 493 *seq.*; T. Rensman, “Article 46”, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2018, 2nd edn, p. 837 *seq.*

20. M. Klamert, « Article 48 TEU », in M. Kellerbauer, M. Klamert and J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, OUP, 2019, p. 302 *seq.*; F. Erlbacher, « Article 49 TEU », in M. Kellerbauer, M. Klamert and J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, OUP, 2019, p. 311, 314-315; F. Erlbacher, « Article 50 TEU », in M. Kellerbauer,

in order to be released of international obligations they have undertaken; at the same time, the States— Contracting Parties and international organizations must be aware of the constitutional rules of the Contracting States relating to international representation and the undertaking of international obligations because observance of the national constitutional rules is also, under international law, a precondition for the valid undertaking of an international obligation.

A question of excess of the Union's powers raised by a Member State's supreme or constitutional court, when it does not concern some specific issue of limited scope (such as a pension category in the Czech Republic), but a key monetary policy mechanism that obviously affects all Member States' economic policy (such as the quantitative easing program), or even a non-discrimination issue that may come up in any Member State (the Danish case), cannot be settled solely between the Member State that raised the question and the Union's institutional structure. The political bodies of the EU and of the involved (and potentially all) Member States, cannot follow as observers a conflict of such a degree between courts, as observed, nor limit themselves to the Commission's procedural initiatives in the field of the EU legal order. The procedural capacity of Member States to intervene in proceedings before the CJEU is not sufficient when it comes to matters of great political and institutional importance concerning the Union's own competences. It would certainly be relieving for the political bodies of the Member State that raised the issue to have it resolved by mutual concessions between the courts, even if judicial reasoning that does not allow for the issue to be legally settled has been set out. Yet, the issues that may lead national (supreme or constitutional) courts to conduct an *ultra vires* review are obviously political issues in terms of their nature and, moreover, issues of great technical complexity. This does not apply only in respect of monetary policy issues and quantitative easing mechanisms that have been extended since the onset of the pandemic to address the economic crisis this has caused, but also to any issue that is considered so important at national level (I am obviously referring to the examples of the Czech Republic and Denmark, without forgetting, of course, the dynamics that are always included in the cases of Poland and Hungary) as to lead the national supreme or constitutional court to the extreme choice of performing an *ultra vires* review. Besides, if the issue is of minor importance and there does not seem to be any possibility of "transplanting" the relevant case law to other Member States, the CJEU and the entire EU institutional edifice may not follow it up. Critical are those issues which carry major political importance and perpetuate the dispute between certain national or supreme courts and the CJEU, or which trigger the reactions of other Member States and EU bodies (the Commission, in particular, which obviously takes into account political information and the correlation of powers inside the Union). Placing these important

M. Klamert and J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, OUP, 2019, p. 319 *seq.*

issues in the domain of international law essentially brings back to the field of the Member States' and the Union's political bodies issues which, although may be the subject-matter of a vivid dialogue between the supreme courts of the EU and the national legal order, are primarily political issues.

After all, although the CJEU considers that similar issues are admissibly put before it, in essence, it takes the political choices of the Union's bodies and institutions (such as all decisions for managing the previous decade's economic crisis and the ECB and Eurosystem decisions on quantitative easing)²¹ to be in accordance with EU law. This choice of judicial self-restraint is obviously not made by national courts when, through the *ultra vires* review process, they seek to defend the sovereignty and competences of the given Member State, in the name not only of its external sovereignty vis-à-vis the Union, but also of its democratically organized and legitimized internal sovereignty.

The shift on to the domain of the international legal order does not have to be solemn and formal. In the context of the functioning of the EU institutions, and, in particular, of the Council and the European Council, processes of an interstate / intergovernmental character which surpass the EU institutional framework and change the very rules of EU primary law, or move alongside the Union's institutional structure, are set up with ease and flexibility, provided, of course, that each Member State respects the provisions of its national Constitution and the rules of general International Law, contractual and customary.

The paradox and interesting in this shift of legal orders is that the CJEU, in the context of the famous *Pringle* case,²² brought under its own scrutiny the issue of fulfillment of the conditions for the simplified process of revising the Treaties. Judging by the outcome, it found that fulfillment of the substantive and procedural conditions for revising the Treaties by the simplified procedure of Article 48(6) TEU is an issue raised and decided upon with the flexibility wished and agreed by the High Contracting Parties, not in the domain of the International Law but within the scope of the EU legal order; thus changing the very EU primary law and, by extent, the terms of reference by which the CJEU itself rules on the observance of the EU legal order. On the other hand, over the same period of the economic crisis, major changes in the institutional structure of the EU economic governance, such as the ESM Treaty and the Treaty on Stability, Coordination, and Governance, took place in the form of multilateral treaties in the field of International Economic Law, beyond the framework of the EU legal order and alongside it.²³

21. See CJEU, 27 Nov 2012, *Pringle* (Case C-370/12) (ECLI:EU:C:2012:756); CJEU, 16 Jun 2015, *Gauweiler and others* (Case C-62/14) (ECLI:EU:C:2015:400).

22. *Pringle*, *op. cit.*, 20.

23. B. de Witte and T. Martinelli, "Treaties between EU Member States as quasi-instruments of EU law", in M. Cremona and C. Kilpatrick (eds.), *EU legal acts: Challenges and transformations*, OUP, 2018, p. 157.

We can perhaps see that an interesting contradiction is noted. The EU legal order wants to emphasize its self-referential character and its distinction from the international legal order. In times of crisis, however, it is forced to use side legal schemes that move outside its scope, in the field of international law. And in the context of conflict with national supreme or constitutional courts which, by means of *ultra vires* review, challenge the Union's competences, obviously the first choice for the EU legal order is to rule on this issue in its own field. But the last resort for challenging the jurisdiction of national supreme or constitutional courts to exercise such *ultra vires* review is by placing the conflict in the field of international law and scope of application of the rules of international law concerning multilateral treaties and the representation of the High Contracting Parties.

V. The shift of legal orders and the choice of legal arguments by either side: the difference between *ultra vires* review and invoking the national constitutional identity

The comparison between the two approaches taken by the national courts of the Member States in reviewing acts or omissions of the Union –on one hand, performing an *ultra vires* review and, on the other hand, invoking the national (constitutional) identity,²⁴ in order to be exacting with the national identity inherent in the fundamental political and constitutional structure of each Member State or the need to respect the essential state functions of each Member State (Article 4(2) TEU) –helps us, I think, to highlight the link between the legal argument which a national court chooses to adopt and the shift of legal orders in the fields of which we find ourselves each time.

A finding by the supreme or constitutional court of a Member State that EU bodies and institutions have acted beyond the limit of their powers (*ultra vires*) concerns all Member States and the functioning of the Union in accordance with its primary law. As already stated, such a finding is made by a national court which, deciding to disagree with the CJEU, has now shifted onto the field of the national legal order. A judgment of this kind, though, calls into question the validity of the Union's acts or omissions. It does not ask for a national particularity of the Member State concerned to be taken into account, i.e., for an exception

24. V. Skouris, "L'identité nationale: qui détermine son contenu et selon quels critères?", in: *Liber Amicorum in Onore Di Antonio Tizzano*, Giappichelli, 2018, p. 912; X. Groussot, "Constitutional dialogues, pluralism and conflicting identities", in M. Avbelj and J. Komárek (eds.), *Constitutional pluralism in the European Union and beyond*, Hart Publishing, 2012, p. 331 *seq.*; E. Cloots, "National identity, constitutional identity and sovereignty in the EU", *Netherlands Journal of Legal Philosophy*, 2016, p. 82; Klamert, *loc. cit* 8, p. 43 *seq.*

or deviation linked to the national (constitutional) identity of that Member State or to its essential functions (safeguarding territorial integrity, maintaining public order and, above all, protecting national security) to be recognized. As already pointed out, by the *ultra vires* review, the very limits and scope of the EU legal order are disputed by a national court, which initially operates within the boundaries of the EU legal order, but ultimately shifts onto the field of the national legal order, insisting on respect for the Member States' powers and sovereignty.

On the contrary, the raising of a national identity or of a fundamental political and constitutional structure issue, or of an issue regarding essential functions of the Member State by its national (supreme or constitutional) court, does not amount to a challenge of the EU bodies' and institutions' legal foundation. The national court does not raise an issue of the Union exceeding its powers. It simply asks for the special constitutional / institutional identity of the given Member State or for the hard core of its essential functions in relation to the issue in question to be recognized, without blocking the action of the Union as such and the relationship of supremacy that it claims vis-à-vis the legal orders of all other Member States. The two issues—excess of powers by the Union and national constitutional identity or essential State functions—may certainly be put forward in a successive way. In such case, highlighting the significance of the field of the legal order wherefrom we operate, is even more critical.

Raising the *ultra vires* argument is the harshest approach, because, as we have seen, it makes the national court to shift: the Union judge turns into a national one, operating in the field of the national legal order. It separates the fields of the two legal orders, that of the EU and the national one, with the CJEU operating in the first and the national court in the second, and is ultimately led to the field of the international legal order; namely, to the multilateral international treaties that lie at the legal foundations of the EU.

On the contrary, invoking the national identity and the political and constitutional structure inherent in it, or the essential functions of the state instead of raising the issue of *ultra vires*, is a more moderate and EU-friendly choice. In the beginning, all of the above concepts (national identity, etc.), as they are integrated in the body of EU primary law (Article 4(2) TEU), acquire the regulatory content which the CJEU attributes to them through its interpretation, in order for their application to be uniform. When the competent national court brings up the “national (constitutional) identity” or the “essential functions” of the state argument, it draws largely from the national Constitution, although the relevant process takes place in the field of the EU legal order. Neither legal or institutional reasons, leading a national court to entrench itself within the ambit of the national legal order, nor legal and institutional conditions for shifting onto the domain of the international legal order and of general International Law exist in the first place. However, if the idea of national (constitutional) identity or the assertion that there is a question of essential functions of the state is not accepted by the EU bodies and ultimately by the CJEU, there is always an

underlying suggestion that a question of excess of powers by the Union may be raised, i.e. an *ultra vires* review to be performed, if nothing else, with regard to an excess the powers in interpreting the regulatory content of Article 4(2) TEU in a manner cohesive with all TEU and TFEU provisions, particularly with the set of Articles 1-7 of the TEU. It is therefore essential to render clear that herein we do not refer to using the “national constitutional identity” in the sense of the national Constitution’s self-referential supremacy vis-à-vis EU law,²⁵ but to having recourse to the national identity inherent to the fundamental constitutional structure, as is stated in Article 4(2) TEU.

VI. Final remarks – *Ultra vires* review and the shift of legal orders in an environment of international uncertainty

The shift of legal orders that results the national supreme or constitutional court of a Member State conducting a review over a potential excess of the Union’s powers, reminds us of the dynamic, though incomplete and sometimes regressive nature of European integration. It reminds us that the ongoing intergovernmental negotiation, which politically lies at the heart of the EU phenomenon, must always be taken into account. Although a state of limited or shared sovereignty, a Member State seeks to confirm and shield the sovereignty left to it in various ways. Obviously, the real economic and political power or the institutional and political peculiarity of each Member State and its general attitude towards the European phenomenon, influences the attitude of the national (supreme or constitutional) courts, too, and the way in which these perceive their role as both European and national judicial bodies.

National courts, just as the CJEU, take part in shaping the correlations, as well as the perceptions inside the EU and each of the Member States. Behind the judicial arguments and the conflict over EU competences and over national identity and core state functions, are hiding the institutional, political and economic disparities that exist among the Member States and different strategic approaches as to the pace and ultimate goal of the European integration. As pointed out in the beginning, the discussion on the *ultra vires* review, as well as on the national constitutional identity and the core of the essential functions of the state, intensified during the period following the judgment of 5.5.2020 of the BVerfG. This is a period marked by the aftermath of last decade’s economic crisis, Brexit, the pandemic and the multiple crises it causes (health, institutional, economic), the introduction of new solidarity mechanisms among the Member States and new mechanisms that are necessary to halt the economic crisis caused by the pandemic, the intensification of the climate change challenges, the changes taking place

25. See B. de Witte, “Direct effect, primacy and the nature of the legal order”, in P. Craig and G. de Búrca (eds.), *The evolution of EU law*, 2nd edn, OUP, 2011, 352 *seq.*

in the structure of the international economy and globalization, the start of the institutional and wider public debate on the future of Europe.

This international environment of a multiple, continuous and shifting crisis highlights again the role of the state as a crisis manager, but also the importance of the European solidarity mechanisms. There are not many certainties; on the contrary, doubts and fears about the future increase. In this complex and uncertain landscape, with the EU's special weight shrinking internationally, it is natural to refer more often to the fundamental: to the Union's intergovernmental foundations, to the division of competencies between the Union and the Member States, to the need for protecting both the national, as well as the European identity, to the disparities among the Member States, to the Union's own resources and budget, to the financial instruments and the joint debt, to the persistent distinction between net payers and net recipients, to the EU-US relations in the context of a redefinition of the West as strategic entity, to the EU's relations with China, Russia and other major international players.

It is in this environment that the legal approach to issues and particularly to the phenomenon of the shift of legal orders, on the occasion of a review performed by national courts regarding a potential excess of the Union's powers, must be always set.