ON THE COMPETENCE CONFLICTS BETWEEN THE CONSTITUTIONAL COURTS OF THE EU MEMBER STATES AND THE COURT OF JUSTICE OF THE EU

RICHARD KRÁL[1]

Abstract: The article is aimed as a contribution to academic discourse on how to solve possible competence conflicts between constitutional or other highest courts of the EU Member States and the Court of Justice of the EU (CJEU). This discourse has rather recently received an extraordinary impetus when Federal Constitutional Court of Germany (FCC) handed down its judgment in *Weiss*. For the first time in its history, the FCC invoked the *ultra vires* doctrine against an EU act and a CJEU judgment. It is argued in the article that the final say in dealing with such competence conflicts should not and cannot rest with either the CJEU or individual national apex courts. The article supports the idea of establishing an EU-competence super-arbiter. However, it is stressed in this respect that the component members of whatever EU-competence super-arbiter to be established should always include the representatives of all EU Member States (although not necessarily only them) and the voting of such EU-competence super-arbiter should be based on the (absolute) majority of those of its component members that are the representatives of Member States. Otherwise, the collective *competence-competence* monopoly of the EU Member States in the EU would be breached too strongly.

Keywords: EU-competence super-arbiter; competence conflict; CJ EU; *ultra vires* doctrine; *competence-competence* in the EU

DOI: 10.14712/23366478.2023.1

INTRODUCTION

Academic discourse on how to solve possible competence conflicts between constitutional or other highest courts of the EU Member States (hereinafter "national apex courts") and the Court of Justice of the EU (CJEU) has received an extraordinary impetus on 5 May 2020, when the Federal Constitutional Court of Germany (FCC) handed down its judgment in *Weiss*.[2] For the first time in its history, the

[1] Professor, Department of European Law, Faculty of Law, Charles University in Prague, Member of the Legislative Council of the Czech Government. The article is based on and builds on the author's analysis presented in KRÁL, R. K řešení kompetenčních střetů mezi ústavními soudy členských států EU a Soudním dvorem EU. *Jurisprudence*. 2022, No. 5, pp. 26–33.

[2] BVerfG, 2 BvR 859/15. For fifteen various reflections and reactions to this judgment, see The German Federal Constitutional Court's PSPP Judgment. *German Law Review*. 2020, Vol. 21, No. 5, Special Section. See also SARMIENTO, D. – WEILER, J. H. H. The EU Judiciary After Weiss – Proposing a New Mixed

FCC invoked the *ultra vires* doctrine against an EU act and a CJEU judgment. The FCC ruled that both the European Central Bank (ECB) and the CJEU acted beyond the powers conferred on them by the EU Treaties, that is, *ultra vires*. According to the FCC, the ECB decision on the Public Sector Purchase Programme (PSPP)[3] was *ultra vires* on the grounds that the ECB failed to justify its proportionality. Likewise, the CJEU judgment[4] which had confirmed the legality of the ECB decision was found by the FCC to be *ultra vires* on the grounds that the CJEU had confirmed the legality of the ECB decision without subjecting it to strong proportionality review. It deserves to be recalled that it was the Czech Constitutional Court (CCC) that – for the first time in the EU's history – invoked the *ultra vires* doctrine against a CJEU judgment. In a decision of 14 February 2012 concerning the so-called Slovak pensions,[5] the CCC made an *ultra vires* finding against the CJEU judgment in *Landtová*.[6] According to the CCC, the CJEU inadmissibly extended the scope of application of Regulation (EEC) No 1408/71[7] from pension situations between states to pension situations lacking a foreign element, namely to situations that arose within the former Czechoslovak Federation, that is, to situations the regulation of which is outside the scope of the powers transferred by the Czech Republic to the EU.[8]

The CJEU and both the German and Czech Constitutional Courts have thus reached diverging opinions as to what is still within and what is already outside the limits of the competences conferred upon the EU by the Member States. Open competence conflicts between national apex courts and the CJEU have thus become a reality.[9]

Finding and devising a workable solution for such a type of competence conflict – that is, a solution that would be acceptable for both the CJEU and national apex courts – is crucial for ensuring the proper and uniform operation of EU law generally, and the principle of primacy of EU law in the EU specifically. The point is that only those EU acts that have been adopted within the competences conferred on the EU can claim primacy over the laws of the Member States.[10] Therefore, if the CJEU and national apex

---

Chamber of the Court of Justice. *EU Law Live* [online]. 1.6.2020 [cit. 2022-06-05]. Available at: eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler/#.

3 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme, as amended by Decision (EU) 2017/100 of the European Central Bank of 11 January 2017.

4 Case C493/17 *Weiss and Others*, ECLI:EU:C:2018:1000.

5 Pl. ÚS 5/12, judgment of 14 February 2012. The English translation of the full wording of the judgment is available at: www.concourt.cz/view/6342.

6 Case C-399/09 *Landtová*, ECLI:EU:C:2011:415.

7 Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

8 For a detailed analysis, see KRÁL, R. Questioning the recent challenge of the Czech Constitutional Court to the ECJ. *European Public Law*. 2013, Vol. 19, No. 2, pp. 271–280.

9 For a comprehensive survey of other case law concerning competence conflicts and for an analysis of this case law in the context of the theory of constitutional pluralism, see BOBIĆ, A. *The Jurisprudence of Constitutional Conflict in the European Union*. Oxford: Oxford University Press, 2022.

10 See also Art. I-6 of the failed Treaty establishing a Constitution for Europe, which explicitly laid down that "The Constitution and law adopted by the institutions of the Union *in exercising competences conferred on it* shall have primacy over the law of the Member States" (emphasis added).

courts reach opposing solutions as to whether a certain EU act is within the competences conferred upon the EU, there is an impediment to the uniform operation of the principle of primacy of EU law with respect to the EU act concerned.

The main objective of this paper is to contribute to the academic discourse on how to solve possible competence conflicts between the CJEU and national apex courts by proposing original solution. Any possible considerations in this respect inevitably boil down to the question of who should have the final say in delimiting what is still within the limits of the competences conferred upon the EU by the Member States (where the principle of primacy of EU law must operate) and what is already outside the limits of these competences, that is, *ultra vires* (where the principle of primacy of EU law cannot operate).[11]

1. FACTORS TO BE CONSIDERED

When considering how to solve possible competence conflicts between the CJEU and national apex courts, one should take into account at least three important factors.

The first one is that the *competence-competence* in the EU, that is the competence to increase or reduce the list of EU competences, belongs solely to the EU Member States acting collectively and unanimously. The EU Member States as the Masters of the Treaties can increase the competences conferred on the EU only in accordance with the ordinary revision procedure as defined by the Treaties.[12] The reduction of the competences conferred on the EU is possible in accordance with the ordinary as well as simplified revision procedures as defined by the Treaties.[13] Neither the EU nor the CJEU nor individual national apex courts have *competence-competence* in the EU. Furthermore, it will be discussed below that if the CJEU, or national apex courts were to be given the right of final say in solving the competence conflicts discussed here, this would in both cases amount to a significant breach of the collective *competence-competence* monopoly of the EU Member States in the EU.

The second factor is that the CJEU has a certain inclination to "competence creep".[14] There are cases where it is at least arguable that the CJEU interpreted the limits of EU competences too much in the EU's favour. Two controversial judgments in *Metock*[15] and *Tele2 Sverige*[16] can be recalled in this respect.

---

[11] For the limited relevance of this question within the theory of constitutional pluralism, see KUMM, M. Who Is the Final Arbiter of Constitutionality in Europe: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice. *Common Market Law Review*. 1999, Vol. 36, No. 2, p. 351.

[12] See Art. 48 paras 2 and 6 of the Treaty on European Union.

[13] See ibid.

[14] For more on competence creep. see GARBEN, S. Competence Creep Revisited. *Journal of Common Market Studies*. 2017, Vol. 57, No. 2, pp. 1–18.

[15] Case C-127/08 *Metock and Others*, ECLI:EU:C:2008:449.

[16] Case C203/15 *Tele2 Sverige*, ECLI:EU:C:2016:970.

In *Metock*, the CJEU reconsidered its previous *Akrich*[17] judgment concerning the right of third-country nationals who are family members of migrating EU citizens (hereinafter "the TCNs concerned") to reside with them in the EU countries into which the EU citizens have migrated and of which those EU citizens are not nationals. In *Akrich*, the CJEU seems to have based its decision on the premise that the EU has a competence to regulate the movement of the TCNs concerned *within* the EU, but not *into* the EU.[18] In that judgment, the CJEU thus made the above-mentioned EU-law based residence right of the TCNs concerned conditional on their prior lawful residence in the EU. In other words, their right to movement within the EU was conditional upon their pre-existing right of residence in an EU Member State in accordance with its own (national) immigration laws. In *Metock*, the CJEU abolished the prior lawful residence condition. In doing so, the CJEU effectively said that the EU has sufficient competence to regulate the movement of the TCNs concerned not only *within* the EU, but also *into* the EU. It needs to be noted that the CJEU proceeded to this kind of competence creep despite the urgent warnings of several Member States that argued that the abolition of the prior lawful residence condition would undermine their ability to control immigration at their external borders and it would have serious consequences for them by bringing about a great increase in the number of persons able to benefit from a right of residence in the EU.[19]

In *Tele2 Sverige*, the CJEU extensively interpreted Article 15(1) of the Directive on privacy and electronic communication[20] by including in the scope of that Directive the activities of the State in specified fields, including in the areas of criminal law, public security, defence and State security, even though Article 1(3) of the Directive explicitly excludes such activities from its scope. According to Fennelly, the CJEU's expansive interpretation of Article 15(1) of the Directive, at the expense of its Article 1(3), emphasises the fragility of the principle of conferral in an era of increasing judicial activism in Luxembourg.[21]

The third factor to be taken into account when considering how to solve possible competence conflicts between national apex courts and the CJEU are the fatal consequences for the integrity and autonomy of EU law which would be caused by any national apex court having the final say in dealing with the competence conflicts discussed here. In such a case, the national apex court in question would be able to block the

---

17 Case C109/01 *Hacene Akrich*, ECLI:EU:C:2003:491.

18 See para. 49 of the Judgment.

19 See paras 71 and 72 of the Judgment. From among a great number of very critical articles, comments and analyses regarding the *Metock* judgment, see CURRIE, S. Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in Metock. *European Law review*. 2009, No. 2, pp. 310–326; or KRÁL, R. Rozsudek SDEU Metock v kontextu brexitu. In: KYSELOVSKÁ, T. – SEHNÁLEK, D. – ROZEHNALOVÁ, N. (eds.). *IN VARIETATE CONCORDIA: soubor vědeckých prací k poctě prof. Vladimíra Týče*. Brno: Masarykova univerzita, 2019, pp. 121–130.

20 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

21 See FENNELLY, D. Data retention: the life, death and afterlife of a directive. *ERA Forum*. 2018, Vol. 19, No. 4, pp. 673–692. Very critical concerning the *Tele2 Sverige* judgment is also SERDULA, O. K rozšiřování věcné působnosti unijních pravidel na ochranu osobních údajů ze strany SDEU. *Právník*. 2020, Vol. 159, No. 8, pp. 641–660.

effects in the Member State of any EU act or any CJEU judgment which it finds to be *ultra vires*. EU law would cease to be a fully autonomous system with uniform effects throughout the EU. EU law would become only a relatively autonomous system whose full and uniform effects in the EU would be at the will of any national apex court. The uniform operation of the principle of primacy of EU law would not be ensured. For Weiler and Sarmiento, this would spell the end of the EU as an integrated legal space of justice and rule of law and would fatally damage the single market.[22]

It is submitted that the three above-mentioned factors logically lead to one conclusion. The final say in dealing with the competence conflicts discussed here cannot rest with either the CJEU or any individual national apex court. The latter courts cannot have such a final say given that this would shatter the autonomy, integrity and coherent effects of EU law. Moreover, it would breach the collective *competence-competence* monopoly of the EU Member States in the EU. This is because in such a case, the *competence-competence* would be in the hands of the individual national apex court, even if only with respect to its territorial jurisdiction. The CJEU cannot have such a final say because this would open up the floodgates to competence creep for which it has shown a certain inclination. It should be noted that the only way for the EU Member States to stop the CJEU from proceeding with "competence creeps" would be to unanimously revise the Treaties with the aim to clarify that a given competence which the CJEU previously tried to usurp for the EU has in fact not been conferred on the EU. Thus, if the CJEU were to have the final say in dealing with the competence conflicts discussed here, this would involve conferring the *competence-competence* on the CJEU supported by at least one collaborating Member State who would veto a such potential "anti-competence creep" revision of the Treaties. Thus, giving the CJEU the final say in ruling on competence conflicts would significantly breach the collective *competence-competence* monopoly of the EU Member States in the EU. *Competence-competence* in the EU would be not only in the collective hands of all Member States, but also in the hands of the competence creep-prone CJEU supported by at least one collaborating Member State.

In sum, for the sake of preserving the integrity of EU law and preventing a breach of the collective *competence-competence* monopoly of the EU Member States in the EU in either a too disintegrating (in the case of national apex courts having the final say), or a too federalizing (in the case of the CJEU having the final say) fashion, it is not possible to accord the final say in solving the competence conflicts discussed here either to the CJEU or to individual national apex courts.

How, then, to resolve such competence conflicts? Two principal approaches can be considered. The first one – and presently the only one that can be employed – is an effective mutual dialogue between the CJEU and the national apex court concerned. The second one – which could only be put in place based on a revision of the Treaties, is an EU-competence super-arbiter.

---

[22] See SARMIENTO – WEILER, *c. d.*

2. SOLVING COMPETENCE CONFLICTS THROUGH PROPER JUDICIAL DIALOGUE

Given that judicial dialogue between the CJEU and a national apex court is at present the only appropriate way of solving competence conflicts between those two courts, such dialogue should be duly carried out by both actors. Within such dialog, they should act in the spirit of mutual respect, cooperation and utmost restraint, without giving any ultimatums. From the point of view of the national apex court concerned, this especially entails that it should never invoke the *ultra vires* doctrine without a prior (possibly even repeated) reference to the CJEU for a "competence" preliminary ruling. From the point of view of the CJEU, this especially entails that when dealing with the referred "competence" question, it should show flexibility and a maximum sensibility and empathy to the arguments of the national apex court concerned.

For an illustration of the use of proper judicial dialogue to solve a competence conflict between the CJEU and a national apex court, one can refer to the *Taricco II* case.[23] In this case, the Italian Constitutional Court (ICC) used the preliminary ruling procedure to (re-)enter into a dialogue with the CJEU. This dialogue resulted in a modification by the CJEU of its previous interpretation of Article 325(1) and (2) of the TFEU that it gave in the *Taricco I* case.[24] While the ICC was ready to find the previous interpretation to be unconstitutional and thus *ultra vires* on the grounds that it entailed a breach of the constitutional principle that offences and penalties must be defined by law, the modified interpretation extinguished the looming competence conflict.[25]

For an illustrative example of an improper use (a lack of use) of judicial dialogue to solve a competence conflict between the CJEU and a national apex court, one can refer to the questionable approaches of the Czech Constitutional Court (CCC) and the CJEU in the cases concerning the so-called Slovak pensions. As already mentioned, the CCC[26] made an *ultra vires* finding against the CJEU judgment in *Landtová*.[27] According to the CCC, the CJEU inadmissibly extended the scope of application of Regulation (EEC) No 1408/71[28] to pension situations lacking a foreign element, namely to situations that arose within the former Czechoslovak Federation, that is, to situations the regulation of which is outside the scope of the powers transferred by the Czech Republic to the EU.[29]

Unfortunately, the CCC invoked the *ultra vires* doctrine without a prior reference to the CJEU for a "competence" preliminary ruling. However, it needs to be added that

---

23 Case C-42/17 *M.A.S. and M.B.*, ECLI:EU:C:2017:936.

24 Case C105/14 *Taricco and Others*, ECLI:EU:C:2015:555.

25 For a comprehensive analysis of the *Taricco* saga, see RAUCHEGGER, C. National Constitutional Rights and the Primacy of EU Law: M.A.S. *Common Market Law Review*. 2018, Vol. 55, No. 5, pp. 1521–1547; or MATĚJEC, M. Přednost unijního práva a doktrína controlimiti ve světle rozsudku Taricco. *Jurisprudence*. 2018, No. 3, pp. 19–25.

26 Supra note 5.

27 Supra note 6.

28 Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

29 For a detailed analysis, see KRÁL, *Questioning the recent challenge of the Czech Constitutional Court to the ECJ*.

this unfriendly approach to judicial dialogue on the part of the CCC might have been provoked by the previous unfriendly approach to judicial dialogue of the CJEU towards the CCC. During the *Landtová* case, the CJEU very insensitively, by a letter of its administrative official, refused to take into account the CCC's explanatory submissions, with a rather impolite comment that *"pursuant to the established customs, the members of the ECJ do not correspond with third persons regarding cases that have been submitted to the EC"*.[30] This even provoked the CCC to state in its *ultra vires* judgment that there were *"deficiencies concerning the safeguards of a fair trial in the proceeding before the ECJ in case C-399/09"*,[31] and that to consider the CCC in the case at hand as a mere third party *"cannot be regarded as anything other than an abandonment of the principle audiatur et altera pars"*.[32]

The author is convinced, that if the CJEU and the CCC entered into a proper formal as well as informal judicial dialogue instead of taking a mutually unfriendly stance to such dialogue, the questionable escalation of the competence conflict between the two Courts could have been avoided.[33]

Judicial dialogue between the CJEU and the national apex court concerned – if pursued in the spirit of mutual respect, cooperation and utmost restraint, without giving any ultimatums (that is, in the *Taricco II* way, not in the *Landtová* and *Slovak pensions* way) – is surely capable of solving the vast majority of potential competence conflicts between those courts. That said, it does not offer an absolute guarantee that all possible competence conflicts can be solved in this manner. Thus, if the invocation of the *ultra vires* doctrine becomes more common in the future, either because of an improper use of judicial dialogue or because even a proper dialogue still fails to solve competence conflicts, the idea to establish an EU-competence super-arbiter is increasingly going to make sense.

3. SOLVING COMPETENCE CONFLICTS THROUGH AN EU-COMPETENCE SUPER-ARBITER

The idea to establish an EU-competence super-arbiter for solving the competence conflicts between the CJEU and national apex courts is certainly not new. It has been resonating in the academic literature for some time.[34] The idea has, however, newly received a strong boost thanks to the above-mentioned invocation of the *ultra vires* doctrine by the FCC in the *Weiss* case.[35]

---

30 Pl. ÚS 5/12 at part VII of the judgment.
31 Ibid.
32 Ibid.
33 For a detailed justification of this view, see KRÁL, *Questioning the recent challenge of the Czech Constitutional Court to the ECJ*.
34 See, e.g., WEILER, J. H. H. The European Union Belongs to Its Citizens: Three Immodest Proposals. *European Law Review*. 1997, Vol. 22, No. 2, pp. 150–156.
35 See, e.g., GRIMM, D. Eine neue Superinstanz in der EU? *Zeitschrift für Rechtspolitik*. 2020, No. 5, pp. 129–30.

The proposals on what the EU-competence super-arbiter could look like and how it could reach its decisions[36] include proposals for a special EU judicial body composed solely of the representatives of national apex courts, and proposals for a mixed/composite EU judicial body composed of CJEU judges as well as judges of national apex courts. Among the former type of proposals, there is, for example, the idea of the EU Competence Court proposed by Herzog and Gerken,[37] or the idea of the EU Constitutional Council proposed by Weiler.[38] Among the latter type of proposals, there is, for example, the idea of the Joint Council of the Highest Courts of the EU (*Gemeinsamen Rat der obersten Gerichtshofe der EU*) proposed by Hatje,[39] or the idea of the Mixed Grand Chamber of the CJEU jointly proposed by Sarmiento and Weiler.[40] According to Sarmiento and Weiler, such a Grand Chamber should be composed of six CJEU judges and six judges from national apex courts in a predetermined order. The Mixed Grand Chamber would be presided by the president of the CJEU. It would only rule on the distribution of competences between the EU and its Member States. It would have jurisdiction to declare null and void an EU act – reversing a prior decision of the CJEU validating such an act – that entails a serious breach of the principle of conferral. A decision validating the contested EU measure should be supported by at least eight and perhaps even nine judges. This means that the votes of only three or four judges would be sufficient for the annulment of the contested EU act on the grounds of a serious breach of the principle of conferral, that is, on *ultra vires* grounds.

All the above-mentioned proposals concerning the establishment of an EU-competence super-arbiter conceive the super-arbiter as a body or mechanism of a judicial nature. However, it is argued that it is also worth giving some thought to the idea of conceiving the EU-competence super-arbiter as a body or mechanism of a primarily political nature.

The EU already has a well-established extra-judicial mechanism of the so-called "yellow and orange cards" enabling parliaments of the Member States to check, *ex ante*, whether a proposal of an EU legislative act complies with the EU principle of subsidiarity.[41] Under this mechanism, if national parliaments, by a simple majority of votes allocated to them, find the proposed EU legislative act to be incompatible with the principle of subsidiarity, and if the Commission chooses to maintain the proposal in spite of such a finding, it is up to the European Parliament and the Council to review the compatibility of the legislative proposal before concluding the first reading. If, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible

---

36 For an overview of a number of such proposals, see HÖPNER, M. *Proportionality and Karlsruhe's ultra vires verdict: ways out of constitutional pluralism?* MPIfG Discussion Paper No. 21/1. Cologne: Max Planck Institute for the Study of Societies, 2021.

37 HERZOG, R. – GERKEN, L. Stoppt den Europäischen Gerichtshof. *Frankfurter Allgemeine Zeitung*. 8.9.2008.

38 WEILER, J. H. H. *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*. Cambridge: Cambridge University Press, 1999, p. 322.

39 HATJE, A. Gemeinsam aus der Ultra-vires-Falle: Plädoyer für einen "Gemeinsamen Rat der obersten Gerichtshöfe der Europäischen Union". *Verfassungsblog*. 4.6.2020.

40 SARMIENTO – WEILER, *c. d.*

41 Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

with the principle of subsidiarity, the legislative proposal shall not be given further consideration.[42]

In an analogy to the extra-judicial "subsidiarity check" mechanism, a "conferral check" mechanism could be established. Such a mechanism would primarily enable national parliaments – as the authorities that, as a rule, approved the conferral of national competencies upon the EU – to review whether the EU act that is contested on *ultra vires* grounds[43] by any national apex court is in breach of the principle of conferral. This extra-judicial mechanism for reviewing the compliance with the principle of conferral (and thus playing the role of an EU extra-judicial competence super-arbiter mechanism) could possibly be conceived along the following lines.

1) If any national apex court that finds itself to be in a competence conflict with the CJEU declares, contrary to a CJEU preliminary ruling on the matter, an EU act and the corresponding judgment of the CJEU to be unconstitutional on *ultra vires* grounds, national parliaments would have six months to express their opinion on the compatibility of the contested EU act with the principle of conferral. Where a national parliament does not deliver any opinion on the issue, it would be assumed that it does not consider the contested EU act to be *ultra vires*.

2) Only where national parliaments, by a simple majority of votes allocated to them (in the same way as under the subsidiarity check mechanism), find the contested EU legislative act to be *ultra vires*, the final decision on its incompatibility with the principle of conferral would be upon the European Council. This implies that where such a simple majority is not reached, the contested EU act is to be considered as compatible with the principle of conferral, that is, as valid and as not being *ultra vires*.

3) The European Council would decide on the incompatibility of the contested EU act with the principle of conferral by a majority of its members. It is argued that the qualified majority system, be it for the validation, or the annulment of the contested EU act, would amount to a very questionable breach of the collective *competence-competence* monopoly of the EU Member States in the EU in favour of a blocking minority of Member States. If a decision validating the contested EU act required a qualified majority of European Council members, the *competence-competence* in the EU would, in effect, be as well in the hands of a blocking minority of the Member States supporting the view of the national apex court that invoked the *ultra vires* doctrine. And logically, if a decision annulling the contested EU act required a qualified majority of European Council members, the *competence-competence* in the EU would rest with (besides all the EU Member States acting unanimously) a blocking minority of the Member States supporting the view of the CJEU that the EU act concerned is compatible with the principle of conferral and therefore not *ultra vires*. Therefore, in order to avoid a breach of the collective *competence-competence* monopoly of the EU Member States in the EU

---

[42] See Art. 7 of the Protocol.

[43] *Ultra vires* grounds are understood here in a broader sense as covering also national constitutional identity grounds. This means that national constitutional identity check is understood here as a subcategory of *ultra vires* review. The logical point is that EU Member States have not conferred upon the EU the competence to enact acts that would infringe the inviolable material core of their constitutional identity. For a nuanced distinction between *ultra vires* review, identity review and human rights review, see BOBIĆ, *c. d.*, part II.

in favour of a blocking minority of the Member States, it is essential that the European Council decides on the (in)compatibility of the contested EU act with the principle of conferral by an (absolute) majority of its members. Of course, voting by such a majority still represents a breach of the collective *competence-competence* monopoly of the EU Member States in the EU; however, such a breach is undeniably the least questionable one, because it is a breach **in favour of the majority of the Member States**, and not a minority of the Member States, let alone a single Member State.

It is argued that this voting requirement can logically be extrapolated to the decision-making of any other possible EU-competence super-arbiter, even a judicial one such as those mentioned above. Its members should be the representatives of all Member States (although not necessarily only them), and its decisions would need to be backed by a majority of those of its component members that represent the Member States, since a different system would breach the collective *competence-competence* monopoly of the EU Member States in the EU in favour of a different actor or in favour of a blocking minority of Member States.

4) If the European Council decided that the contested EU act was incompatible with the principle of conferral and was therefore *ultra vires*, this would lead to its automatic annulment. If the European Council (or possibly national parliaments according to point 2) above) decided that the contested EU act was compatible with the principle of conferral and therefore was not *ultra vires*, the Member State whose apex court invoked the *ultra vires* doctrine would have to take whatever measures necessary to ensure the full effect of the EU act concerned in its territory. Such measures could include, for example, an amendment of the Constitution, a revocation of the judgment of the apex court concerned on the basis of an application for its revision or a negotiation of a permanent opt-out from the EU act concerned. Failing to take such measures would result in the obligation of the Commission to initiate an infringement procedure against the Member State concerned.

5) Clearly, the establishment of any judicial or extra-judicial EU-competence super-arbiter would require a revision of the Treaties. In the case of an extra-judicial competence super-arbiter proposed in this paper, there would be a need to amend both Article 5 of the Treaty on the EU and Protocol (No 2) on the application of the principles of subsidiarity and proportionality. The Protocol should entail a new mechanism for checking compliance with the principle of conferral along the four general lines set out above. Furthermore, it could be laid down in Article 5(2) of the Treaty on the EU, for example, that national parliaments and the European Council ensure compliance with the principle of conferral in accordance with the procedure set out in the Protocol on the application of the principles of subsidiarity and proportionality and on the compliance with the principle of conferral.

CONCLUSIONS

The cases of the invocation of the *ultra vires* doctrine by some national apex courts inevitably raise the issue of how to solve such competence conflicts between national apex courts and the CJEU. The final say in dealing with such competence conflicts should not and cannot rest with either the CJEU or individual national apex courts. As explained in this paper, if the CJEU had such a final say, this would lead to a flagrant breach of the collective *competence-competence* monopoly of all the EU Member States in the EU in favour of the CJEU supported by at least one collaborating Member State. If such a final say rested with national apex courts, this would lead not only to a geographically limited breach of the collective *competence-competence* monopoly of all the EU Member States in the EU, but also to a fatal shattering of the autonomy, integrity and coherent effects of EU law in the EU.

Without a revision of the Treaties, the only feasible way of solving the competence conflicts discussed here is the judicial dialogue between the CJEU and the national apex court concerned, pursued in the spirit of mutual respect, cooperation and utmost restraint, without giving any ultimatums (that is, in the *Taricco II* way, not in the *Landtová* and *Slovak pensions* way).

If the invocation of the *ultra vires* doctrine becomes more common in the future, either because of an improper use of judicial dialogue or because even a proper dialogue still fails to solve competence conflicts, the idea to establish an EU-competence super-arbiter is increasingly going to make sense.

EU-competence super-arbiter can be established as a body or mechanism of either a judicial or an extra-judicial nature. However, in order to avoid a very questionable breach of the collective *competence-competence* monopoly of all EU Member States in the EU in favour of a blocking minority of Member States (or another, even less representative actor), the component members of whatever EU-competence super-arbiter to be established should always include the representatives of all EU Member States. Also, for the super-arbiter to be able to take a binding decision on the competence issue presented to it, a majority of these Member State representatives would have to be in favour. Even though the voting of whatever EU-competence super-arbiter based on the (absolute) majority of those of its component members that are the representatives of Member States still breaches the collective *competence-competence* monopoly of the EU Member States in the EU, such a breach is undeniably the least questionable one, because it is a breach in favour of the majority of Member States, and not a minority of those Member States or a single Member State, let alone a different actor altogether such as the CJEU.

Prof. JUDr. Richard Král, DrSc.
Charles University, Faculty of Law
Legislative Council of the Czech Government
kral@prf.cuni.cz
ORCID: 0000-0003-4078-8392