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Proportionality principle as A basis for Ultra Vires Review and the relationship between FCC and CJEU

Bachelor's thesis

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ABSTRACT

The German Federal Constitutional Court's (FCC) Ultra Vires decision on the Public Sector Purchase Program (PSPP) has created a conflict of competence arising from different interpretations of the proportionality principle, uniform application of the European Union law (EU), and the understanding of democracy. According to the Treaty on the Functioning of the EU, while the principle of conferral sets the limit for competencies arising from the EU law, the principle of proportionality and subsidiarity limit the use of those competencies. Basing an Ultra Vires ruling on the principle of proportionality §presents a legal paradox. Finding a judgment of the Court Justice of the European Union (CJEU) ultra vires is a clear breach of the uniform application of the EU law. The tension between the Federal Constitutional Court and the CJEU has existed for more than three decades. Ever since the landmark decision of Costa V. Enel, the Federal Court of Germany has resisted the EU law's primacy over the National Law. The underlying principle is that EU institutions lack democratic competence and lack the competence to rule on constitutionally significant matters. Dismissing decisions from the CJEU through ultra vires has a significant effect on the cohesion of the EU law.

The Purpose of the thesis is to examine the application of the proportionality principle as a delimiting instrument, the effect that the ruling has on the uniform application of the EU law, and how the CJEU and FCC understand democracy differently. Resolving the impasse created by the conflict of competencies is quite significant. This represents an advancement in the understanding of the traditional standard for judicial review.

The two main contributions of the research will be highlighting the advantages and drawbacks of applying the principle of proportionality as a delimiting instrument and its consequences for the future of the EU and recommending regulatory proposals and alternative resolutions to resolve the conflict competencies.

Keywords: Ultra Vires, German Federal Constitutional Court (FCC), Court Justice of the EU (CJEU) Principle of proportionality, Principle of Subsidiarity, Principle of Conferral, Uniform application of EU law, Conflict of competence.

INTRODUCTION

The relationship between the CJEU and the FCC has been filled with conflict.[1] These conflicts arose from the fundamental question of who is the ultimate arbiter in legal matters related to EU law.[2] Article 19 of the Treaty on European Union states in its subsection 3b grants the CJEU the right to "give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of EU law or the validity of acts adopted by the institutions."[3] In contrast to this, the FCC has reserved for itself the right to review the legality of an EU institution from the German constitutional aspect. The FCC in ts Solange I reserved itself the right to review whether an EU institution is compatible with the fundamental rights enshrined in the German Constitution.[4] In its Maastricht ruling, the Court subsequently reserved itself the right to review whether an action taken by an EU institution is within the scope set for that institution. When an institution exceeds the limits set by law, the Constitutional Court has the right to declare the act Ultra Vires and, therefore, not applicable in Germany.[5] In its Lisbon ruling, the Constitutional Court reserved itself the right to review whether an act of an EU institution is compatible with the identity of the German Constitution.[6] The Constitutional Court has developed different functions for these review mechanisms.

The thesis will first examine the development of the review mechanisms and their effect on EU Law. The examination will be conducted by applying traditional legal research methodology with theoretical contributions in view and using hermeneutic techniques such as legal analogy and historical-comparative interpretation. This methodology is appropriate for

[1] Mehrdad Payandeh (2011). Constitutional Review of the EU Law after Honeywell: Contextualising the relationship between the German Constitutional Court and the EU Court of Justice: *Common market Law Review 48: 9-38*

[2] Mattias, Kumm (1999). 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 36: 351-386*

[3] Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of thre European Union (2016/C 202/01) Article 19

[4] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß, 29 May 1974 (translated in english: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588)

[5] Bundesverfassungsgericht (BverfG) (Federal Constitutional Court), October 12, 1993 Case No. BverfGE 89, 155

[6] Bundesverfassungsgericht (BverfG) (Federal Constitutional Court), June 30, 2009, Case No. BverfGE 123, 267

the research understudy as it requires t interpreting and understanding legal texts.[7] In order to establish the aim of the research understudy, the author will specifically apply the comparative law method. This method highlights the differences in legal cultures at the national level and supranational levels.[8] This helps to understand the differences between the two Courts and how they develop criteria to achieve goals set for them by LawLaw. By applying this method, the author will examine legal materials published by the two Courts, the historical development of the relationship between the Courts through case laws, differences in the application of legal philosophy.[9] Understanding the current status and the effect of the Ultra Vires ruling involves analyzing the three landmark cases that have led to this ruling and other relevant case laws, academic literature, primary and secondary EU legislation, academic writings in the form of books and articles to compare the legal doctrine of the Courts.

Furthermore, the thesis will incorporate the Praesumptio Similitudinis principle to reveal the underlying philosophical differences, although both Courts aim the unified application of the EU Law.[10] The application of the Praesumptio Similitudinis principle allows the author to focus on legal problems arising from the unified application of EU Law and legal solutions for the Courts.[11] This method covers the aim of the research understudy by allowing the author to examine the two separate jurisdictions to determine any viable solutions to the impasse between the Courts.

The paper is divided into four chapters to guide the reader through in a coherent manner. The first covers the historical background and the interrelations between the Courts through the landmark cases. The chapter also aims to familiarize the reader with the use of the proportionality principle in the Ultra Vires context. Furthermore, the chapter will discuss the implications of the rulings of the CJEU and its effect on the European Integration Project. Chapter two makes an overview of the Ultra Vires doctrine and examines the requirement for its application. Chapter three addresses the proportionality principle as a delimiting instrument and whether disproportionality could or should be equated to a lack of

[7] Leavy, P. (2014). The Oxford Handbook of Qualitative Research (eds) New York: Oxford University Press pg 20
[8] Lenaerts, K., & Guttman, K. (2016). The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic, *The American Journal of Comparative Law*, Volume 64, Issue 4, Pages 841–864
[9] Wendel, M. (2020). Paradoxes of Ultra Vires Review: A critical Review of the PSPP Decision and its Initial Reception, *German Law Journa*l, 21 pp. 979-994
[10] Ralf, M. (2005). The Functional Methot of Comparative Law. *Duke Law School Legal Research Paper Series No. 87 pg. 31*
[11] Ibid

competence. The final chapter proposes a new take in solving the legal conflict between the Courts and the concluding chapter.

1. Historical Background and the Relationship of the CJEU and FCC through the Landmark Cases

1.1 Solange I: Fundamental Rights Review

In Solange I, the Court examined whether the level of fundamental rights protected by the EU institutions was adequate. At the time, there was no EU-level chapter of fundamental rights comparable to the one guaranteed by the German Constitution (Basic Law). The case concerned the import-export undertaking of Internationale Handelsgesellschaft mbH that had received a license to export 20 000 metric tons of maize meal.[12] According to the EEC Regulation 120/67 article 12, any product imported or exported to the Community listed in article 1 is subjected to license. The license can give the right to export or import those products mentioned above. The license is issued by any Member State and irrespective of whether the applicant's establishment is in the Community. However, the applicant must ensure that there is an affected transaction, whether imported or exported, by paying a deposit to the issuing agency. The applicant would have to forfeit either partially or fully if there was no affected transaction in the period that the license was valid.[13]

The company lodged and received a license to export 20 000 metric tons of maize meal.[14] The license was valid from August 7 until December 31 of 1967. Furthermore, the license was granted under the condition that the company would submit a monetary deposit subject to forfeiture if it fails to deliver during the validity period.[15] The company delivered 11 400 metric tons of maize meal during that time. Therefore, Einfuhrund Vorratsstelle für Getreide und Futtermittel declared that the company had forfeited the deposit partially for the undelivered

[12] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß
[13] Council Regulation 120/67, art. 12, 1967
[14] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß
[15] Tridimas, P. T. (2016). A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict. *Maastricht Journal of European & Comparative Law 1,* , 17-39

part under the Regulation No 473/67/EEC.[16] The company disputed the declaration of Einfuhrund Vorratsstelle für Getreide und Futtermittel and brought an action against it before the Frankfurt's administrative Court (Verwaltungsgericht). The Verwaltungsgericht was concerned whether the Regulation was in accordance with the fundamental right's enshrined in the Basic Law and made a preliminary reference to the CJEU asking the legality of the export obligation set out in article 12 (3) of Regulation No 120/67/EEC in lodging a deposit and the conditions in where the applicant would be forced partially or fully to forfeit the deposit due to lack of affect during the validity period of the export license

In the event of the Court is confirming the legal validity of the provision, in Article 9 of Regulation No 473/67/EEC of the Commission of August 21, 1967, adopted in implementation of Regulation No 120/67, legal in that it excludes forfeiture of the deposit only in cases of force majeure?[17] The CJEU (ECJ at that time) affirmed its already set position in Costa v.Enel of the supremacy of EU Law over the national Law of member states.[18] The CJEU argued in its response that uniformity of EU law would be adversely affected if a Member State Supreme Court could review in the light of domestic constitution and would create a situation in where every Supreme Court would interpret legal orders differently. To establish effective and functioning Community law, the validity of measures taken by an EU institution could only be reviewed in the light of Treaty regulations. The establishment of Costa V. Enel ensures that Community law is independent, separate from International Treaties, and is superior to any domestic legal rules. Furthermore, any attempt to call a Community law into question by recourse to a Constitutional order goes against the very nature and spirit of the Community law. The validity of acts taken by an institution of the Community and its effect on the Member States cannot be reversed with arguments that it violates fundamental rights guaranteed by a Member State Constitution or any principle derived from it.[19]

The CJEU upheld the legality of the deposit and forfeiture system.[20] The Verwaltungsgericht was not satisfied with the ruling of the CJEU and appealed the ruling to the Federal

[16] Counsil Regulation 473/67
[17] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß
[18] Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L.. - Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64.
[19] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß
[20] Ibid

Constitutional Court of Germany.[21] The Verwaltungsgericht was especially unsatisfied with the approval of the deposit system.[22] The approval and the lack of a written bill of rights are viewed as a significant indication of the existence of a legal vacuum with regards to fundamental rights.[23] The Verwaltungsgericht asked the Constitutional Court the admissibility of the case and whether the deposit-forfeiture system was justified under the Basic Law.[24]

On the first question, the FCC argued that established Community law has a dual dimension. It is binding all Member States, including the Federal Republic of Germany, and it also binds the Community itself. Counter arguments to this would go against the spirit of the Treaties and the intentions of establishing the Community. The establishment of the Community was an attempt to create a system that would be compatible with the Constitutional order of Member States. Contesting a Community legal order would not constitute a violation of the Treaties but rather highlights the conflict and therefore seeks through institutional procedures to resolve the conflict. Furthermore, an act of a Community law that is implemented by an agency of the Federal Republic of Germany or handled through the German legal system is an exercise of the sovereign powers of Germany. The exercise of such power is limited by the Constitutional of the Federal Republic of Germany.[25]

The FCC, therefore, upheld the long-standing legal precedence of Costa V. Enel. Moreover, it argued that the CJEU could rule matters that are under its scope of jurisdiction based on the Community treaties. More significantly, the Court argued that an expansion of the competence might depend on International agreements, therefore the CJEU does not have any competence to expand its jurisdictional scope. [26] The FCC argued that ultimate sovereignty lies with the German Constitution and at the Member state level in contrast to sovereignty being transferred to the supranational level.[27]

In addition, the FCC argued that article 24 cannot be interpreted in a way that it authorizes the transfer of sovereign power but should be interpreted in a way that it legitimizes a

[21] Case 2 BvL 52/71, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle ffir Getreide und Futtermittel, 2 C.M.L.R. 540 (1974 BVerfGE) (F.R.G.).
[22] Ibid
[23] Marcoux, L, Jr. (1983). The Concept of Fundamental Rights in European Economic Community Law. *GA. J. INT'L & COMP. L. 667, pg 686*
[24] Hartley, T.C. (1988). The Foundation of European Community Law pg. 224
[25] Case 2 BvL 52/71, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle ffir Getreide und Futtermittel, 2 C.M.L.R. 540 (1974 BVerfGE) (F.R.G.).
[26] Ibid
[27] Ibid

Community legal order to have a binding direct and indirect effect on Germany in addition to already existing constitutional legal order. The validity of a Community legal order in constrained by the Federal Republic of Germany's constitution and can only operate in the sphere that is given by the constitution. Therefore, there is a co-existing claim to rule in Germany although one is constrained by the other.[28]

The CJEU has an existing jurisdiction enshrined in the Treaties to rule whether a Community action is legally valid which includes the unwritten actions of the Community. The Court, however, does not have the competence to rule over the binding effect of a Community action on the Member States. A Member State Supreme Court has the powers to deems such action to be incompatible in its recourse to the constitutional order and any contrary statement from the CJEU can only be deemed as obiter dicta.[29]

Although the FCC recognized the jurisdiction of the CJEU and primacy of the EU law in the area where member states have transferred their through treaty agreements, it limited the competence of the CJEU in two ways. First, the competence of the CJEU was derived from the German Constitution, and the CJEU had to respect it and not transgress its competence. Secondly, any failure to respect the Basic Law would result in Ultra Vires and not have any biding effect on German institutions.[30] Furthermore, the Court held that it was the ultimate protector of fundamental rights guaranteed in the German Constitution, and this duty only rested with the FCC. [31]

In conclusion, the FCC, in its ruling, partially limited the application of Costa V. Enel. The Court argued since there were no existing written provisions that protected fundamental rights, any action by an Institution is subjected to review by the FCC. The Court challenged ECJ's interpretation of EU provisions. However, the significance of the case is the application of the National Law of the EU when there is no explicit transformation of powers through treaty agreement.

1.2 Solange II: Partial acceptance of the competence of EU institutions

[28] Ibid
[29] Ibid
[30] ibid
[31] Ibid

A German Company, Wunsche Handelsgesellschaft, who imported processed food, applied for an importing license to bring 1000 tons of canned mushrooms from Taiwan. The Federal Office of Food and Forestry, after review, it rejected the application on the of the basis of existing EEC Regulations. [32]

The company filed a complaint before A Frankfurt's Administrative Court claiming that the rejection of its license application was based on invalid rules. According to the Company, the validity of the Regulation was conditioned to provide a protective measure since the market conditions were weak at the time. Market conditions had since recovered at the time that dispute was brought before the Court and therefore the Regulation lost its basis in Law and was no longer valid.[33]

The Administrative Court argued in its dismissal of the case that the Regulations used for the rejection of the application were consistent with the objectives laid down in article 39 of the Rome Treaty. [34] Furthermore, the Court stated that import restrictions imposed by the Commission were within the limits afforded to the Commission by the Regulations.

The complainant subsequently appealed to the Federal Administrative Court. In its review, the Court argued that the Regulation used for the rejection of the license application[35] had an authoritative base in the Council Regulations Nos. 1927/75 and 1928/75.[36] The Court took note that Commission was restricted by the Regulation" only to the extent and for a length of time that is strictly necessary "in accordance with article 2 of the Council Regulation No. 1928/75. Furthermore, the Court stated that the Regulations were to be repealed after their purpose, in fact, was no longer existent. The Federal Administrative Court referred for a preliminary ruling from the CJEU with regards to the validity of the Commission's Regulation.

The CJEU ruled that the Commission's Regulation was valid. The CJEU agreed with the Commission's assessment it had a wide discretion when analyzing economic events and factors outside of those mentioned in article 1 of the Council Regulation No. 1928/75.

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[32] Wiinsche Handelsgesellschaft v. Federal Republic of Germany.
[33] Ibid
[34] Treaty of Rome: https://ec.europa.eu/romania/sites/default/files/tratatul_de_la_roma.pdf
[35] Commission Regulation No. 2107/74
[36] Council Regulation No. 1927/75: https://eur-lex.europa.eu/legal-content/EN/ TXT/HTML/?uri= CELEX:6 198 1CJ0126&from=EN and Council Regulation No. 1928/75: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31975R1928&from=SV

The Federal Administrative Court ruled that the CJEU had jurisdiction when interpreting secondary Law of the Community and the Claimant made his argument based on the invalidity of the Commission's Regulation; therefore, the preliminary ruling of the CJEU covered the issue.[37] The Federal Administrative Court rejected the Claimant's claims. The Court did not give the claimant right to direct review by the FCC.

The Claimant filed a constitutional complaint with the FCC against the Federal Administrative Court. In its complaint, the company alleged a violation of the German Constitution by the Federal Administrative Court by not submitting a direct review to the FCC to examine whether Community Regulations were in violation of the fundamental rights guaranteed under the German Constitution.[38]

The Federal Constitutional Court, in its ruling, argued that the State of the Community had changed since the Solange I ruling. The Community institutions had developed an adequate level of protection for fundamental rights guaranteed in the German Constitution, and therefore, there was no need to maintain reservations in Solange I.[39] Furthermore, the democratization of the Community institutions and the commitment by the institutions to uphold the rule of law convinced the Court to accept that the CJEU could adjudicate in conflict of law situations.[40]

This shift from the Solange I stance of the Court constituted a seismic shift from its previously held position of being the ultimate protector of the fundamental rights. In its Solange II ruling, it conceded and accepted the CJEU to have jurisdiction when German Constitution is in conflict with Community's secondary laws. The CJEU has incorporated in its jurisprudence the principle of proportionality and numerous principles that guarantee individuals freedom of liberty.[41]

1.3 Maastricht ruling: Ultra Vires Review

[37] BVerfGE 72, 339, 2 BvR 197/83 Solange II
[38] Lanier, ER.(1988). Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge. *Boston College International and Comparative Law Review.* Vol 11 Issue 1
[39] Ibid, 21
[40] Lanier, ER. (1988). Supra nota. pg. 22
[41] Lanier, ER.(1988). Supra nota. pg. 22

The Federal Constitutional Court gave itself the right to review whether actions taken by EU institution exceed their competence. A constitutional complaint was brought before the Court challenging the ratification of the Maastricht Treaty and its compatibility with article 38 of the Basic Law.[42] The article guarantees every citizen who has attained the age of eighteen a right to vote and take part in electing members to the German parliament.[43] The FCC has interpreted the article to have extensive protection of individuals' right to democracy that includes legitimizing the authority of German institutions through elections by the people and therefore authoritative power lying with the people. Furthermore, any act of an institution must be traceable back to the constituencies. Any transfer of power to an EU institution must be in accordance with the principle of democracy.[44] Limiting democratically elected parliamentarian's authority by transferring their power to EU institutions would constitute a breach of the democratic principle and article 38 of the Basic Law.

The complainant argued that Maastricht Treaty gives substantial power to the EU and consequently weakens the democratically elected German parliament,[45] which would constitute a violation of article 20 subparagraph 2 of the Basic Law which stablishes: “All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies."[46] The complainant argued also that Maastricht Treaty would extend existing powers of the EU (competence-competence).[47] In addition, the complainant objected to the lack of democracy at the EU level as he argued that the actual legislator at the Community level was the Council.[48] The European Parliament was argued to have no legislative function but rather served as an advisory body. The Council, in contrary to the democratic principle, makes the laws and also enforces them.[49] The complainant also mentioned the Council was not working together with the Member States parliament’ enough to compensate for the lack of democratic legitimacy.

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[42] Bundesverfassungsgericht (BverfG) (Federal Constitutional Court), October 12, 1993 Case No. BverfGE 89, 155
[43] German Basic law: https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510
[44] Feichtner, Isabel. (2020). The German Constitrutional Court’s PSPP Judgement: Impediment and Impetus fo the Democratization of Europe. *German Law Journal*, 21 pp, 1090-1103
[45] Wieland, J. (1994). Germany in the European Union- The Maastricht Decision of the Bundesverfassungsgericht. *European Journal of International Law*. Vol. 5 Issue, 2. Pg 262
[46] German Basic law: https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510
[47] Bundesverfassungsgericht (BverfG) (Federal Constitutional Court), October 12, 1993 Case No. BverfGE 89, 155
[48] Ibid
[49] ibid

The FCC, in its ruling, argued the German Constitution guarantees democratic legitimacy in state agencies to ensure their action are accountable.[50] In addition, the Constitution also promotes the integration of the EU by transferring powers to the EU.[51] Excessive transfer of powers to the EU however, it would create a situation where actions were taken by the EU institutions would not be traceable directly back to the people. The Court took note that article 38 did not only guarantee the right to vote but went beyond this right. The Court argued that to ensure the democratic content of article 38 is satisfied, "any German Citizen with the right to vote is guaranteed the individual right to participate in the election of the German Federal Parliament, and thereby to co-operate in the legitimation of state power by the people at a federal level, and to influence the implementation thereof. In this respect, such a right requires a more detailed explanation, which, however, is only necessary insofar as the exercise of sovereign power by supranational organizations within the scope of the realization of a united Europe. "[52]

The Court also stated despite article 23 of the Constitution ensuring that the Community has limited competence in Germany, violations of the Constitution could still occur if article 79(3), in conjunction with principles laid down in article 20, were violated. Any amendment violating the above-mentioned article would infringe Constitutional principles and therefore become inadmissible.[53] Although the Court in its Solange II ruling conceded the protection of fundamental rights were under the jurisdiction of the CJEU, it reserved itself for the protection of "general guarantee of indispensable basic rights standards. "[54]

The Court's main argument on democratic legitimacy was considering the Community to be a "compound of states, "and any steps towards creating a European State must be taken by national parliaments which are authorized by voters. The voters must have a direct influence in what powers are transferred to the Community, and the authorizing legislation of such transfer must state the aim and objectives of the transfer with sufficient certainty.[55] However,

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[50] Ibid, 11
[51] Feichtner, (2020), supra nota 1, 1091
[52] Bundesverfassungsgericht (BverfG) (Federal Constitutional Court), October 12, 1993 Case No. BverfGE 89,
[53] German Basic law: https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510
[54] Bundesverfassungsgericht (BverfG) (Federal Constitutional Court), October 12, 1993 Case No. BverfGE 89, 155
[55] Wiegandt, Manfred H. (1995). Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops. *American University International Law Review 10, No. 2. 889-916 Pg. 893*

this excludes Constitution's eternity clause in article 79(3) of the Basic Law. Furthermore, the democratic principles dictate every Member State's citizens to have an input in exercising powers of the Community by electing EU parliament and the Council through domestic elections. Each Member State voluntarily by the will of its people whom the Court describes as a homogeneous spiritual, social and political unit and whom through parliaments legitimize democracy at the Community level.[56] The Community, therefore, lacks its own people as a basis to form European State in where the authority is derived.[57] The Court proposed legal instruments to review whether Community institutions have transgressed their powers transferred to them through the Treaties and in situations where the Community transgresses to declare Ultra Vires.[58]

1.4 Lisbon ruling: Constitutional Identity Review

The FCC had to evaluate whether the Lisbon treaty was compatible with the German Constitution.[59] The Court upheld the constitutionality of the Treaty. The Court looked at the relationship between the system of democracy written down in the Basic Law in comparison to the level of federalism and integration process of the EU. The FCC reviewed whether the Lisbon Treaty would jeopardize the democratic principle by reviewing the powers transferred to the EU by the Treaty.[60] It found that there was no substantial breach of the democratic principle.[61]

The ruling emphasizes the structural challenges that EU faces in comparison to a traditional federal state. The EU has received an expanded level of competence through Treaties in numerous different fields but remains as an International organization that lacks its own homogenous European people. [62]The responsibility to control the level of integration, the aims, and objective of conveyance of power lies with the constitutional institutions of

[56] Ibid, 896
[57] Ibid
[58] CRAIG, P. (2011). THE ECJ AND ULTRA VIRES ACTION: A CONCEPTUAL ANALYSIS. *Common Market Law Review 48:*, 395-437.

[59] Judgement on 30 June 2009, *Bundesverfassungsgericht*, BVerfG, 2 BvE 2/08
[60] Steinbach, A. (2019) The Lisbon Judgement of the German Federal Constitutional Court – New Guidance on the limits of European Integration. *German Law Journal*, Volume 11, Issue 4, pp, 367-390
[61] Ibid
[62] Ibid, pg. 385

Member states. Expansion of competence for the EU decreases the authority of national institutions, and there is a requirement for safeguards that check whether the EU's institutions respect their set mandate and the principles of proportionality and conferral and exercised in their intended manner. [63]

Subsequently, the Court states that state agencies of Germany cannot transfer powers that are essential to the State. Such powers form the constitutional identity of the German Constitution, which is an inalienable component of the Constitution and the self-determination of the German people.[64] Furthermore, the Court stated that to ensure the constitutional identity of the Basic Law is respected, the Court, within its judicial competence, has to observe the use of power at the EU level. The increase of competence by the Lisbon Treaty obliges the Court to exercise an Ultra Vires and constitutional identity review to check whether the EU institutions have infringed the Basic Law.[65]

Subsequently, the Court, in upholding the Lisbon judgment, evaluated the parliamentary legislation approving the Lisbon Treaty against the voting right enshrined in article 38 of the Basic Law. The right to vote is a core element of the Basic Law, and it entails the exercise of state powers by institutions through democratic legitimization by the people. The Basic Law also promotes peaceful cooperation of Member States towards deepened integration of the EU. However, the integration is limited, and issues core to the Basic Law that forms constitutional identity are excluded from the integration process. The EU is seen as an International organization in where states peacefully co-operate to strengthen their positions in International forums and have more influence.[66] According to the Court, article 23 of the Basic Law grants the German parliamentary institution the right to convey powers to the EU under the condition that excludes core principles that form the constitutional identity of the Basic Law. The transfer of power should not have an effect on parliament fulfilling its duty to affect the living conditions of the German people.

The Court also evaluated the competence-competence issue. It stated that a transfer of competence by a constitutional body to the EU could not create a circumstance in where the

[63] Thym, D. (2009). In the name of sovereign statehood: A critical introduction to the Lisbon judgement of the German Constitutional Court. *Common Market Law Review 46 (6)* , 1795-1822.

[64] Article 23(1) and article 79 (3) of the Basic Law.
[65] Steinbach (2019), supra nota 1, 370
[66] Augsberg, I. (2011). Democratic Theory and the Nation State: Some remarks on the Concept of Democracy in the German Federal Constitutional Court's Judgement on the Lisbon Treaty. *Ritsumeikan Law Review*. No. 28 pp. 247-257

EU can independently, through its own legislation, establish other competencies for itself. Therefore, the principle of conferral in article 5 of the Treaty on European Union obliges the EU institutions to operate within the limit set for them by the Member States. According to article 5(1), "the limits of EU competences are governed by the principle of conferral "and 5(2) "Under the principle of conferral, the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the EU in the Treaties remain with the Member States. "Furthermore, any legislation that expands the competence of the EU must be explicit on what rights it is conveying to the EU and their intended use to exclude any competence-competence problem.

The Court found no obstacles that would stop the approval of the Lisbon Treaty. It argued that the Basic Law's core principle would be unaffected, and therefore, the German State will maintain its sovereign powers. Furthermore, the principle of conferral limits the EU's competence as stated in the Treaty and the transfer of power through the Lisbon Treaty to the EU was therefore in accordance with the Basic Law. The transition from unanimity in the decision-making process of the EU to qualified majority procedure under article 48 of the Treaty on European Union must also be evaluated in the light of Article 23(1) of the Basic Law. Amendment of the Treaty provisions is subject to ratification by the German parliament, and members of the Council can only consent to an amendment that is approved by the parliament.[67] In addition, the Court stated that the adoption of the Lisbon Treaty does not affect its review mechanism. The transfer of power to the EU through the Lisbon treaty could only happen in accordance with the Basic Law, and the primacy of the EU law established in the Treaty does not have an effect on its review obligations.

2. Ultra Vires: Overview and application in the PSPP ruling

2.1 The Weiss judgment by CJEU

In the PSPP ruling, the main question under evaluation by the Court was whether ECB had exceeded its limits set significantly by the Treaties and therefore acted in Ultra Vires

[67] Steinbach (2019), supra nota II, 372

manner.[68] The Court, in its ruling, states, "In the exercise of their powers, the constitutional organs can only discharge their lasting responsibility with regard to European integration (Integrationsverantwortung) if they continuously monitor the execution of the European integration agenda."[69] The constitutional bodies have to monitor actions taken by the EU institutions; otherwise, they might potentially violate core principles of the Basic Law, namely the individual right to democracy.[70]

The FCC submitted a reference for a preliminary ruling to the CJEU to determine whether the ECB has violated its limits on monetary policy.[71] In its judgment, the CJEU replied to the two main concerns submitted by the FCC. The first question referred to the balance between monetary and economic policy and whether the ECB has fulfilled its obligation to state the reason for the action taken by an institution arising from article 296 of the Treaty of the Functioning of the European Union (TFEU).[72] The CJEU stated that the ECB "must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and Law. "[73] Subsequently, the CJEU evaluated numerous supporting documents submitted by the ECB and found them to be satisfactory in fulfilling the reasoning requirement.[74]

The second question concerned the violation of articles 119 and 127 of TFEU. Article 119 states that Member states exercise economic policy to the exclusion of the ECB. Article 127 sets out the primary objective of the ECB. According to article 127(1) that the main purpose and objective of the European System of Central Banks is to establish and maintain price stability. The secondary objective of the ESCB is to carry out policies that support general economic growth of the EU and therefore contributing the Community objective laid down in article 3 of TEU. Furthermore, the ESCB must act with the principles of open market

[68] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, paras. 1-237,(hereinafter PSPP)
[69] PSPP, para 108
[70] Christoph Möllers (2010) German Federal Constitutional Court: Constitutional *Ultra Vires* Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*
[71] Case C-493/17 Weiss and others, EU:C:2018:1000
[72] Zilioli, C. (2016). THE ECB's Powers and Institutional Role in the Financial Crisis: A Confirmation from the Court of Justice of the European Union. *Maastricht Journal of European and Comparative Law*, 171-184.

[73] Case C-493/17 Weiss and others, EU:C:2018:1000. Para 31
[74] Ibid, at para 36

economy in there is a competition which is not been distorted by market manipulation. The ESCB must allocate its recourses efficiently and in compliance with principles in article 119.

Although there is no set definition for monetary policy, the CJEU defined it as "measures as are necessary to carry out its tasks in accordance with Articles 127 to 133 and Article 138 TFEU, as well as with the conditions laid down in the Statute of the ESCB and of the ECB. "[75] The CJEU took note that the Treaty was has written in an abstract manner to give wider room for appreciation to the ESCB to achieve its goals.[76] The CJEU also stated the separation of economic and monetary policy by the Treaty was not intended to an absolute separation.[77] In reply to the second question, the CJEU concluded the PSPP is within limits set for the ESCB by article 127(1) TFEU. Furthermore, the indirect effects of the PSPP were foreseeable and the "in the context of an economic crisis entailing a risk of deflation — represent an insurmountable obstacle to its accomplishing the task assigned to it by primary Law. "[78]

The CJEU then evaluated whether the action taken by ESCB was proportionate. The CJEU argued that ESCB was weighing numerous different factors to analyze and to prevent measures that might cause the action taken to be disproportionate.[79] The CJEU took note of the level of deflation and its longevity and the inflation level in the EU when evaluating whether actions of the ESCB were proportionate and concluded that "the PSPP does not manifestly go beyond what is necessary to achieve that objective. "[80] The CJEU also mentions that the program is only for short-term and therefore is aimed at solving the monetary question at hand.[81] Furthermore, there was a purchase limit set in advance, and they were monitored and adjusted according to the impact they had.[82]Therefore, on the issue of proportionality, the CJEU concluded that the ECB did not make a manifest error in taking action with regards to the PSPP.[83]

The second question related to the violation of article 123 of TFEU. According to the article Any financial instrument that enables the European Central Bank or Member State Central

[75] Ibid, at para 48
[76] Ibid, at para 55
[77] Ibid, at para 60
[78] Ibid, at para 67
[79] Ibid, at para 73
[80] Ibid, at para 81
[81] Ibid, at para 84
[82] Ibid, at para 90
[83] Ibid, at para 91

Banks to purchase directly from the primary market is strictly prohibited. Furthermore, any purchase that that is in favor of any agency whether regional or central to the Member State and its bodies and offices or has any affiliation with a Member State or is governed by Public law is strictly prohibited. However, publicly owned financial institution that supplies reserves to the Member State's Central bank is exempted and it should be treated similar to the Central Banks as as private credit institutions.[84]

The CJEU states that the ECB is not prohibited from buying the secondary bond market.[85] For a violation of the article to occur, two conditions must be fulfilled that is established in the Gauweiler case.[86] First, the measure taken by ECB must have an equivalent effect to direct purchase. Secondly, the PSPP must not have an effect on the Member States' budgetary plans, namely, to have a well-thought budgetary policy.[87] In contrast to the FCC, the CJEU argued that none of the conditions mentioned above were fulfilled, and there was no certainty as to for private operators to predict the purchasing patterns of the ECB through the PSPP.[88] In conclusion, the CJEU held the view that the action of the ECB was valid and returned the case to the FCC.

2.2 The PSPP judgment by FCC

The PSPP ruling of the Court is a continuous ruling concerning the development of European integration.[89] The FCC argued in its European Central Bank's (ECB) Public Sector Purchase Program (PSPP) was Ultra Vires. FCC, in its ruling, issued for the first time that an act of an EU institution exceeded the mandate set for that institution by stating that the ECB exceeded its powers in initiating the program to purchase Member States bonds to raise the inflation rate of the Eurozone.[90] The main question was whether, by its action, the ECB supports the

[84] Article 123 TFEU
[85] Mooij, AM A. (2019). The Weiss Judgement: The Court's further clarification of the ECB's legal framework. *Maastricht Journal of European Comparative Law*. Vol. 26(3) 449-465
[86] Case C-62/14 Gauweiler and others v. Deutscher Bundestag
[87] Mooij, AM A. (2019), supra nota 1, 458
[88] Case C-493/17 Weiss and others, EU:C:2018:1000. Para 117
[89] Poli, S.,& Cisotta, R. (2020). The German Federal Constitutional Court's Exercise of Ultra Vires Review and the possibility to Open an Infringement Action for the Commission. *German Law Journal*, 21(5), 1078-1089.
[90] Bundesverfassungsgericht (BverfG) (Federal Constitutional Court), May 5, 2020, Case No. 2 BvR 859/15

Member States and therefore deprives them of the incentive of having well thought budgetary policy.[91]

The FCC reviewed the Weiss judgment and came to the conclusion that the actions of the ECB were Ultra Vires. According to the Court, the bond purchasing program exceeded the limit set for the ECB, and there is not binding in Germany. The Court, in its ruling, argued that CJEU's analysis on the proportionality principle is unsatisfactory. Furthermore, by not making a comprehensive analysis on the proportionality principle, the CJEU failed to uphold the principle of conferral.[92] The Court further argued that lack of comprehensive analysis resulting in a reduction in the competence of the Member States in an area that is outside of the EU institutions competence. The Court states that announcing in advance the purchase volume and how the ECB is going about distributing it in the Member State central banks undermines the uncertainty principle for the private operators and thus creates relative certainty.[93]

The FCC was not satisfied with the reasoning in the Weiss ruling and the CJEU's steps to ensure that art. 123 of the TFEU was not breached. [94] The Court established its own assessment on the proportionality principle. It argued that the review of the CJEU did not give any consideration to "the economic and social policy effects of the PSPP. "[95] The CJEU should have evaluated the suitability of the PSPP in addition to the necessity of projecting against its effect of Economic policy of the Member States. Furthermore, any disadvantages arising from effects of the PSPP in projecting against the advantageous effects of the program.[96] Lack of evaluation resulted a significant shift in transferring power to the EU to the detriment of Member States. The FCC concluded that the European Central Bank did nor provide reasoned arguments on whether the PSPP was proportionate and therefore found the bank to have manifestly disregarded the proportionality principle.

2.3 Critical Review of the PSPP ruling

[91] Poli, S. (2020). The German Federal Court and its Ultra Vires review: a critique and a preliminary assessment of its consequences. *Fascicolo n.* 2 – 2020. ISSN 2384-9169
[92] Ibid, 230
[93] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, paras. 1-237,(hereinafter PSPP), para 185.
[94] Ibid, para 185
[95] Ibid, para 139
[96] Ibid, para 133

The FCC argues that the proportionality principle should be used in a corrective manner. It states that in order to establish whether the ECB has acted within its powers should be determined through a balancing process. If the PSPP leans towards a monetary policy, it falls Under the ECB competence and therefore it has the powers to enact the programm. In contrast, if it leans towards economic policy the ECB does not have any competence.

Using proportionality as a delimiting competence is unprecedented. According to the Treaties the principle of conferral in article 5 of the TEU is the basis for limiting transferral of power to a supranational institution. The approach of the FCC in its use of proportionality principle deviates from the approach of the CJEU. The standard approach of the CJEU is the principle of proportionality to govern the use of pre-existing competence established by the principle of conferral and therefore not have a delimiting competence in itself.[97] In contrast to the CJEU interpretation, if the proportionality principle applied to the limitation of competence it would create a scenario in where Member States would acquire competence if a supranational institution acted disproportionally.[98] This would create an unstable situation where competence would shift between the Member States and supranational institutions frequently. Furthermore, this loose application of the principle would go against the spirit of the EU Law. It would create a situation in where the application of the principle would interfene the core exclusive areas of EU Law and transfer the competence to the Member States. The FCC in its use of proportionality principle as a delimiting instrument deviated from its own case precedent. In its referral to the CJEU in Outright Monetary Transaction case refrained from using proportionality as a basis for delimiting competence.[99] The FCC did not mention in its referral to the CJEU the proportionality principle.

In addition, the FCC held that the Weiss ruling intervened with the independence of the ECB. According to the Court the margin of appreciation granted to the ECB by CJEU threatens the independence of the Bank by being potentially subjected to political pressure from interested parties.[100] The Court did not consider threats posed by its own ruling. The CJEU has long held the view that ECB is required to make in-depth assessment when it undertakes choices that are of technical nature. The Court is therefore limited to assess whether the action taken

[97] Paul, C. (2009) Competence and Member State autonomy: Causality, Consequence and Legitimacy. *Oxford Legal Studies Research Paper* No. 57/2009, Pg. 11
[98] Wendell, M. (2012) Supra Nota 1, 986
[99] Mayer, F. (2019) Rebels Without a Cause? A critical Analysis of the German Constitutional Court's OMT Reference. *German Law Journal*. Vol. 15 No. 02 Pg. 111
[100] PSPP ruling, para 161

by ECB had manifestly disregarded limits set for it by Treaties. By carrying a full-scale review of the ECB's actions the FCC has overstepped its powers especially when it lacks expert knowledge in this area.[101] The FCC should have followed the rationality review standard set by CJEU in where it assesses the rationality of the actions taken by the ECB.[102] Full-scale review on an action taken by ECB would result in limiting the available tools to achieve price stability. The aim is to achieve medium term 2% inflation rate for the Eurozone. By applying full-scale review, the FCC limits and complicates available instruments for the ECB to conduct and achieve price stability.

Full-scale review affects the independence of the ECB. The assessment that ECB exceeded its powers can be called into question since the FCC lacks the expert knowledge to conduct such review. Furthermore, limiting the powers of the ECB will have the consequence of risking price stability in the Eurozone. Separating monetary policy and economic policy creates simplistic way of assessing the interrelation of the policies. Assessing policies separately from each other would distort its original aim. In contrast, assessing the interrelations of the policies would create more holistic approach and understanding of the ECB price stability mechanisms. According to article 127(1) TFEU "the primary objective of the ESCB shall be to maintain price stability". There is no definition in the article as to what price stability is, but mainly as a goal to be achieved. Therefore, price stability in the medium term has a overlapping effect with economic policy. As long as the policy enactment of the ECB and ESCB are assessed in depth by the Bank itself, a Court should assess it through the rationality assessment approach.

3. Policy Recommendation

3.1 Infringement procedure

The relationship between the Courts has not been one with full of difficulties as demonstrated above. The struggle of who is the ultimate arbiter of EU law has been at the heart of the

[101] Goldmann, M. (2014). Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review. *German Law Journal*. Vol 15. No. 02 Pg 279
[102] Ibid, pg. 266

problem. This culminated in the ruling of the PSPP and the Ultra Vires decision. There are therefore several options on how to solve this stalemate. First, possible infringement procedures against Germany under the Treaties by the Commission is one possible option.

According to article 258 of TFEU The Commission has the powers to start infringement procedures if it deems that a Member State has violated its obligations set out in the Treaties. To start the infringement procedure, it must inquire the Member State In question an opportunity to submit an explanation on its observations. If the Commission is not satisfied with the submitted observation, it must deliver a reasoned opinion on the matter in question. Furthermore, if the Member State fails to fulfill the obligations stated in the reasoned opinion, the Commission can bring the contested matter before the CJEU.

The infringement procedure starts with the Commission giving its opinion on the infringement on EU Law by the FCC to the German State after giving the State concerned the opportunity to submit its observations. State has to comply with the Commissions reasoning otherwise it risks escalating the matter forward. If the Member State in question does not comply with the Commission reasoned opinion, the matter is brought before CJEU. However, in Commission has not started infringement procedures in similar cases. In the Landtová ruling of the Czech Republic's Constitutional Court in where it considered Ultra Vires after the CJEU had submitted its preliminary ruling.[103] This makes the infringement procedure quite unlikely, however there is important reason on why the Commission should start such procedure.

Opening infringement procedure will demonstrate that violating or defying EU law has its consequences. Furthermore, if there is no action taken by the Commission, it will give rise to more Member State Supreme Court ruling that contradict and defy the interpretation of the EU Law by the CJEU. Lack of action would constitute as a new paradigm shift and call into question the CJEU's role as the ultimate interpreter of EU Law. Independency of the judicial system in a democratic state is vital however it does not constitute an above the law institution which can defy set legal system. As established above the CJEU is superior in interpreting EU law and deviation from its interpretation should be seen as unlawful conduct.

[103] Bobek, M. (2014). Landtová,Holubec, and the problem of an Uncooperative Court: Implications for the preliminary rulings procedure. *Cambridge University press*. pg 6

3.2 Proposed New Chamber

Daniel Sarmiento and Joseph H.H Weiler proposed in their op-ed a new mixed chamber that is a mixture of judges from the CJEU and Member State Supreme Courts.[104] Their analysis is based on CJEU being a Court of first and last instance without any chance on appeal on its decisions. Furthermore, they made analogical comparison to the European Court of Human Rights in where case is ruled on a smaller chamber and if the interested parties are not satisfied to be appealed to a grand chamber. In addition, the CJEU does not interpret EU Law in strict way rather it understands EU Law to have broad coverage in order to ensure that the law is utilized effectively. In a situation where there is no clear set competence for either Member State or for the supranational, EU law has the superiority. This approach has raised in the Supreme Courts of the Member States the question of how far-reaching EU Law is and the federalism program.

To solve this dilemma, they propose establishment of a new appeal Court. This appeal Court would be composed of judges from Member State Supreme Court and judges from the CJEU. It will also be established as a part of the CJEU institution rather than creating a new institution.[105] The principle behind this is that judges of different level ruling on the contested issue would give legitimacy and valid authority as a final interpreter of the EU Law and therefore finding a ruling of such Court as Ultra Vires would be difficult. They go on to say that the appeal Court should have 12 judges, six from Member States Supreme Courts and the other six from the CJEU also, this mixed chamber would rule only on competence questions in where there is no clear established competence one way or another. It would have powers to void a ruling of the CJEU if there is serious infringement of the powers conferred to it by Treaties. Furthermore, this review will be limited to only serious violation of the principle of conferral and therefore a margin of appreciation given to the CJEU.

In addition, to legitimize and validate a ruling of the mixed appeal chamber, at least eight of the twelve judges should on affirming side. This would counter a situation in where sitting Member State judges would find the ruling Ultra vires and would include at least two of the

[104] Sarmiento, D., & Weiler, H.H.J. (2020). The EU Judiciary After Weiss- Proposing A New Mixed Chamber of the Court of Justice. EU Law live blog

[105] Capeta, T. (2020) The Weiss/PSPP Case and the Future of Constitutional Pluralism in the EU. Exploring the social dimension of Europe. Available at: Available at:
SSRN: https://ssrn.com/abstract=3719419 or http://dx.doi.org/10.2139/ssrn.3719419

twelve on the affirming side. The establishment of the mixed chamber would happen within a year of a ruling of the CJEU that has been further contested by Member State supreme Court. A that has requested establishment of the mixed chamber should also be part of the composition. Furthermore, other EU institutions and Member states should have the possibility to intervene on the proceedings of the mixed chamber. The authors state also that proceedings should be made as transparent as possible. This includes streaming any oral pleadings before the mixed chamber and making public written submissions to the chamber. However, an opinion of dissent should not be established as it would risk the independence of the judges of the CJEU.

This proposal has a few problematic aspects. First, there is no guarantee that A Member State Court that has contested A ruling of CJEU will accept a ruling of the mixed chamber. There are no procedures to stop a Member State Supreme Court from finding a ruling of the CJEU Ultra Vires. Therefore, the competence problem remains unsolved. This proposed mixed chamber tries solving a competence-competence problem which seems unsolvable. The authors of the proposal try to clarify it by stating it would reaffirm the European Court as the ultimate interpreter of the EU law.[106] Furthermore, by ruling on eight-majority rule it would allow Member State Constitutional Court's to participate in the interpretation of the EU law rather than just accepting. In contrast a ruling from the CJEU is seen top-down and therefore does not give as significant voice the Member State Supreme Courts on contested areas of the EU law.

The argument for the mixed chamber is that it would reduce the likelihood of finding its ruling Ultra Vires would reduce significantly. By mandating at least two of the six sitting Member State Supreme Court judges to affirm, it would collapse the scenario in where institutions of different level in Supreme Court-CJEU clash. The confrontation of these institutions would be limited to minimum since they are mandated to find a solution to the existing problem together in the mixed chamber.

In addition, the mixed chamber has the potential to reduce the influence of the CJEU' preliminary reference by altering the composition of the CJEU. The solution to this problem

[106] Sarmiento, D., & Weiler, H.H.J. (2020). The EU Judiciary After Weiss- Proposing A New Mixed Chamber of the Court of Justice: A reply to Our Critics. *European Journal of International Law*

has been that the CJEU will continue to have its interpretative power and the mixed chamber will only rule on cases that exceptional in nature. The bar for appeal to the mixed chamber is therefore set high. The mixed chamber would be an extension of the CJEU and would only have strict jurisdictional mandate. Furthermore, the exceptionality principle would also limit and restrict the possibility of opening floodgates to appeal Court. The CJEU rules quite regularly on the competence issues in cases where a Member state Supreme Court has contested further the validity and legitimacy of a ruling by CJEU is limited. Furthermore, if a Member State Supreme Court would further contest such ruling, they can request a second preliminary ruling before the CJEU.[107]

Secondly, the proposed mixed chamber can only void a ruling of the CJEU. It does not examine a ruling of A Member State Supreme Court. The idea behind this is it would create a balanced situation and once a case is brought before the mixed chamber, it should have a broader examining capability. The argument against this approach is it would become an infringement procedure if a Member State Supreme Court ruling would be voided by the mixed chamber.[108] Furthermore, this would make the CJEU a less powerful Court and all the powers would rest with the mixed chamber. The mixed chamber proposal has more advantages in comparison to infringement procedures of the Commission. It allows the Member State Supreme Court judges to contribute and therefore limit any drawbacks that may arise from such ruling. It also eases the pressure put to the CJEU in questions of competence. Furthermore, by not allowing any dissenting opinion it presents a unified Court so a Court that would be willing to contest a ruling of the mixed chamber would have ammunitions provided by the mixed chamber itself. However, the proposal is incomplete.

A determined Member State Supreme Court would not be stopped by a ruling of the mixed chamber. A Court that has made preliminary reference request and is still not satisfied with the outcome would most likely not be satisfied with affirmative ruling of the mixed chamber to uphold the same ruling of the CJEU. therefore, a modification to the proposal is required. The arguments against giving the mixed chamber having powers to void a ruling of Member State Supreme Court are not convincing. By allowing the mixed chamber to nullify and void a ruling of a Member State Court that violates EU law would make such Court to consider its

[107] Ibid, pg 7
[108] Ibid

reasoning deeper. There are no existing EU laws that would allow creation of such appeal Court.

The mixed chamber should not be a temporary one in where it is called to gather only when there is contested issue between the Courts. In here the recommended proposal is a permanent mixed chamber composed of at least twelve judges from the CJEU and similar number from Member State Supreme Court judges. There should be an annual rotation of the judges to ensure the constant dialogue between different level of Courts is maintained on a sufficient level. The advantage of such system is to prevent any deeply rooted competence issue that could not be solved. Furthermore, the high number of judges guarantees significant level of legitimacy and validity. In addition, permanent mixed chamber would have broader powers than the CJEU in that it can reverse a ruling taken by a Supreme Court with regards to EU law. This would also establish in the Treaties firmly the supremacy of the EU law above the national one.

CONCLUSION

The aim of this thesis was to analyze the relationship between the FCC and CJEU and the effects of using proportionality principle as a basis for Ultra Vires review. The use of proportionality principle as a delimiting instrument for the EU competences has brought about a new paradigm shift and created a deviation of the CJEU's use of the principle.

Resolving the stalemate between the Courts has over time, become increasingly difficult. Through qualitative analysis, there can be said that FCC has breached the EU law in its PSPP ruling, and infringement procedures could legally be brought against Germany. Although short-term reconciliation between the Bundesbank and the FCC has been reached, the consequences of the PSPP ruling still have far-reaching effects.

Although this is the first time a German Court finds a ruling of the CJEU Ultra Vires, it is not the first time CJEU faces such a ruling. As demonstrated by the Landtová ruling, CJEU does not have instruments in its use to handle such situations. The current system does not have adequate steps to interact with a determined Member State Supreme Court that wants to get its point of view across with any means necessary.

There are two viable pathways when it comes to solving this stalemate conundrum. First infringement procedures against Germany by the Commission as it would provide a clear pathway and would have erga omnes effect towards all Constitutional Courts who might potentially attempt finding a ruling from the CJEU Ultra Vires. However, the European Commission deems starting infringement procedures against a Supreme Court politically sensitive issue as demonstrated by the Landtová case. Furthermore, the FCC has argued on the basis of the eternity clause of the Basic law, which cannot be modified, and therefore, a constitutional amendment would not help to reverse the PSPP ruling. The outcome of an infringement procedure would require amending legislation that a contested ruling of a Supreme Court is based on.

Secondly, the more viable pathway is to create a permanent mixed chamber through Treaty revisal. The creation of this permanent mixed chamber would pose the threat of a Supreme Court confronting the CJEU on the interpretation of EU law. There should be at least twelve judges from Member State Supreme Courts in a rotating manner. This high number would ensure the constant dialogue between the Courts and CJEU and a dialogue between Member

State Courts which would soften and have a preventative effect on attempts to declare a CJEU ruling Ultra Vires. There should also be twelve judges from the CJEU which would create balanced Court where no one is superior to another.

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