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The state of the judicial dialogue after the PSPP judgement

1. Introduction

The issue of the relations between the European Court of Justice (hereinafter, ECJ) and the constitutional courts of the Member States is closely linked to the issue of the relations between two types of the legal system – the European and national ones[2]. Answer to the latter would also determine the mutual positions of the ECJ and the constitutional courts and lead to answering the question of the ultimate arbiter[3]. The importance of this topic has been growing over the years, as the process of integration has been getting more complex. On the one hand, the constitutional courts find it hard to accept the primacy of the EU law – even if they do, they set some constitutional limits to the European integration and formulate some constitutional standards of control of the EU law[4]. But there is also the ECJ's stance, according to which the ECJ is the only one to assess the validity of the EU law[5]. Both sides have their arguments, based on the positive law and the case-law. These different perspectives have led to several disputes between

[1] The Author would like to thank prof. Mirosław Wyrzykowski for all his helpful remarks.
[2] P. Craig, *The ECJ...*, p. 36.
[3] A. Thiele, *Friendly...*, p. 242.
[4] A. Voβkuhle, *Multilevel...*, p. 190.
[5] J. Bast, *Don't Act...*, p. 171.

the ECJ and the constitutional courts. The PSPP judgement of the German Constitutional Court[6] (hereinafter, GCC or Karlsruhe) was the latest episode of this dispute. The GCC did not follow the ECJ's preliminary judgement and declared it *ultra vires.* Such decision has immediately sparked a debate about consequences for the relations between constitutional courts and the ECJ. With that being said, it might be worth to take a comprehensive look at this issue. The paper is structured as follows: section 2 contains the presentation of the *ultra vires* concept. Section 3 focuses on the PSPP judgement, while section 4 – on the judgement's implications for the judicial dialogue. Finally, section 5 contains conclusive remarks.

2. *Ultra vires* review

According to the art. 5 (1) TEU[7], „the limits of Union competences are governed by the principle of conferral". Article 5 (2) TEU *in fine* adds that „competences not conferred upon the Union in the Treaties remain with the Member States". Therefore, all of the EU institutions, bodies and agencies must act within the competences emerging from the Treaties. If they exceed their powers, their actions shall be declared invalid[8]. This can be done by the ECJ. In opinion of constitutional courts that is not enough. They see a danger in the possibility that the ECJ would be more lenient when it comes to assessing the actions of the EU institutions, etc.[9] Furthermore, there is no one to control the ECJ and react if the latter is acting beyond its powers. These are the two main arguments for the development of the *ultra vires* review. According to this concept, the constitutional courts are able to review if the EU institutions, bodies or agencies have exceeded their competences, which would mean they act beyond their powers (Latin *ultra vires*). If such exceedance is confirmed, the constitutional courts may declare those measures unbinding in their respective Member States[10].

The *ultra vires* review was first invoked by the GCC in its landmark *Maastricht* judgement[11], where it has confirmed the compatibility of the Maastricht Treaty with the German Basic Law (*Grundgesetz*). However, Karlsruhe

6 Judgment of the GCC of 5 May 2020, 2 BvR 859/15, *PSPP*.
7 Consolidated Version of the Treaty on European Union, OJ C 2012, 326/01 (hereinafter, TEU).
8 C. Schönberger, *Lisbon...*, p. 1204.
9 P. Dermine, *The Ruling...*, p. 546.
10 C. Wohlfahrt, *The Lisbon...*, p. 1282.
11 Judgment of the GCC of 12 October 1993, 2 BvR 2134, 2159/92, *Maastricht*.

has stated that it has the power to assess whether the EU institutions etc. have acted beyond the powers granted to them by the Treaties. If such a situation occurs, the GCC will declare the assessed measures inapplicable in Germany[12]. The next step in the development of *ultra vires* review was taken by the GCC in its *Lissabon* judgement[13]. Apart from repeating the provisions from the *Maastricht* judgement, the GCC has proclaimed itself the only German court capable of doing an *ultra vires* review[14]. Moreover, the GCC noted that it will use this type of review only if the legal protection cannot be achieved at the EU level as well as if the transgression of powers by the EU is obvious[15]. The final (at least by now) conditions for the *ultra vires* review have been set in the *Honeywell* judgement[16], which can be described as the GCC's answer to the landmark *Mangold* judgement of the ECJ[17]. The latter is one of the greatest examples of the judicial activism (the ECJ derived the principle of non-discrimination on the grounds of age from the general principles of the EU law) and therefore has sparked calls to declare it *ultra vires*[18], which did not finally happen. In *Honeywell*, the GCC has stated that in order to apply the *ultra vires* review, the contested measure must constitute a manifest and structurally significant transgression of competences[19]. Moreover, the GCC decided to involve the ECJ in preliminary reference procedure in the *ultra vires* review. Before declaring an EU law act *ultra vires*, the GCC will raise the question to the ECJ, allowing it to speak on the matter first[20]. The GCC may or may not follow the ECJ's reasoning. Whatever the case might be, the GCC clearly sees itself as the ultimate arbiter here. The first *ultra vires* review under the *Honeywell* conditions took place because of the *Gauweiler* case, when the GCC has raised its very first question to the ECJ. The rhetoric of the reference was quite harsh – the GCC did not really ask the question but rather listed the arguments which (in the GCC's opinion) the ECJ has to follow[21]. If the latter does not do that, the GCC will declare the contested EBC's OMT decision *ultra vires.* The GCC was heavily criticized

12 F. Mayer, *Rebels...*, p. 116.
13 Judgment of the GCC of 30 June 2009, 2 BvE 2/08 et al., *Lisbon.*
14 E. Vranes, *German...*, p. 109.
15 L. Orešković, *Clash...*, p. 253.
16 K. Gärditz, *Beyond Symbolism...*, p. 184.
17 Judgment of the ECJ of 22 November 2008, C-144/04, *Mangold.*
18 M. Fichera, O. Pollicino, *The Dialectics...*, p. 1105.
19 S. Simon, H. Rathke, *"Simply not comprehensible"...*, p. 954.
20 M. Claes, J. Reestman, *The Protection...*, p. 929.
21 A. Pliakos, G. Anagnostaras, *Blind...*, p. 375.

by the scholars for the tone of the reference. Some have even suggested that the ECJ should dismiss the case[22]. Neither did that happen nor did the ECJ bow to GCC's suggestions. Finally, the GCC decided to follow the ECJ's arguments and did not declare the OMT decision *ultra vires*[23]. On the side note, one may notice that if the GCC decided conversely, its decision would not have met the conditions set in the *Honeywell* judgement, as two GCC's judges wrote their dissenting opinions to the preliminary reference. Therefore, if there were different stances on the matter, the suspected transgression of powers could not be described as obvious[24]. The *ultra vires* review was conducted once again in the PSPP case, this time with different results. The PSPP judgement of the GCC will be analysed in the further part of the paper.

The *ultra vires* review was described by the scholars as the concept which allows the constitutional courts „to bark, but not to bite"[25]. However, there have been three „bites" by now, which have proved that *ultra vires* review exists not only in theory. The first one to use it was the Czech Constitutional Court (hereinafter CCC) in its famous *Slovak Pensions* judgement[26]. The background of the story goes to the dispute between the CCC and Czech Supreme Administrative Court (hereinafter SAC), which have argued over the pension system[27]. The ECJ became involved when the SAC raised the preliminary question. The ECJ's judgement was not in line with the CCC's reasoning. Therefore, the latter declared the ECJ's judgement *ultra vires.* In the CCC's opinion, the ECJ missed the fact that because of the uniqueness of the Czechoslovakia's dissolution, the cross-border element of the case was the absolute condition for the provisions to be applicable[28]. The outcome of the *Slovak Pensions* judgement was surprising and sparked a debate among scholars. Nevertheless, it wasn't a turning point in history, mainly because of the fact that the ECJ was *de facto* the victim of the dispute between the two national courts[29]. The second one to „bite" was the Danish Supreme Court (hereinafter DSC) in its *Ajos* judgement[30]. This case has its deep source in the *Mangold* judgement of the ECJ, where the principle of non-discrimination

22 *On Courts...*, p. 228.
23 A. Pliakos, G. Anagnostaras, *Saving...*, p. 214.
24 M. Mahlmann, *The Politics...*, p. 1413.
25 F. Mayer, *To Boldly...*, p. 1120.
26 Judgment of the CCC of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions.*
27 K. Kovács, *The Rise...*, p. 1711.
28 G. Anagnostaras, *Activation...*, p. 961.
29 J. Komárek, *Playing...*
30 Judgement of the DSC of 6 December 2016, 15/2014, *DI, acting on behalf of Ajos A/S v. Estate of A.*

on the grounds of age was developed. When a similar case appeared before the DSC, it raised the preliminary question to the ECJ, asking if the principle mentioned above also has the horizontal effect[31]. This was confirmed by the ECJ. However, the DSC was not satisfied with the given answer and decided not to follow ECJ's reasoning. In the DSC's opinion, the non-written principle of the EU law cannot take precedence over Danish law[32]. The *Ajos* judgement also was broadly commented but did not cause any big change in the relations between the ECJ and the constitutional courts, just like the *Slovak Pensions* judgement. This is mainly because the CCC and the DSC are not considered as the most influential courts in Europe. The third „bite" by GCC has had much greater impact[33].

3. PSPP and its consequences

On May 5th, 2020, the GCC handed down the judgement on European Central Bank's Public Sector Purchase Programme (PSPP)[34]. Judges decided not to follow the *Weiss* judgement of ECJ[35], which was rendered in the preliminary ruling procedure started by Karlsruhe. In the opinion of the GCC, ECJ's assessment of PSPP was „simply not comprehensive and thus objectively arbitrary"[36]. Therefore, ECJ's *Weiss* judgment was declared *ultra vires* by GCC, who has also decided to conduct its own proportionality test of the PSPP. As the result of this test, ECB's decision was also declared *ultra vires*, because (in the opinion of the GCC) EBC has manifestly exceeded its mandate[37]. Therefore, the PSPP decision cannot have the legally binding effect on Germany. The *Bundesbank* (Germany's central bank) was given

[31] S. Haket, *The Danish...*, p. 13.

[32] M.R. Madsen, H.P. Olsen, U. Šadl, *Legal...*

[33] It may be worth noting that the Polish Constitutional Court has also invoked the ultra vires concept in its recent judgements concerning the rulings of the ECJ (judgment of the the Polish Constitutional Court of 14 July 2021, P 7/20; see also judgment of the the Polish Constitutional Court of 7 October 2021, K 3/21) and the European Court of Human Rights (judgment of the the Polish Constitutional Court of 24 November 2021, K 6/21). However, due to the controversial status of the Polish Constitutional Court after 2015 (in that regard see e.g. E. Łętowska, *The Honest...*), these judgements cannot be analysed on the same level as the judgements invoked in the paper.

[34] Judgment of the GCC of 5 May 2020, 2 BvR 859/15, *PSPP*.

[35] Judgment of the ECJ of 11 December 2018, C-493/17, *Heinrich Weiss and Others.*

[36] Judgment of the GCC of 5 May 2020, 2 BvR 859/15, *PSPP,* par. 118.

[37] A. Viterbo, *The PSPP...*, p. 680.

3 months to ensure the PSPP meets the requirements set by the GCC. Unless that is done, the *Bundesbank* cannot take part in the programme anymore.

The PSPP judgement is yet another element in the process of judicialization of the EU's economic and monetary union (EMU), which has started after the Euro crisis has emerged[38]. Following the famous words of Mario Draghi (EBC's then-president) that EBC must „do whatever it takes to preserve the Euro"[39], EBC has launched several programmes which have led to the accomplishment of that goal. Nevertheless, those programmes sparked concern among some, mainly because of the possibility of the EBC purchasing the government's bonds. Of course, it was not the initiative of the courts themselves to decide on the legality of EBC's actions. In Germany, the whole procedure started by submitting the constitutional complaints. As one can see, the GCC has developed very broad interpretation of actions, which can be the subjects of such complaints[40]. Well-known judgments of the GCC concerning EMU-related issues, such as *Gauweiler*[41] have been delivered as a result of the complaints. In the preliminary reference to the ECJ in the PSPP case, Karlsruhe asked the ECJ to assess if the PSPP decision concerned not only monetary policy, but also economic policy (which would mean ECB exceeded its mandate). The GCC also wanted to know if the PSPP passes the proportionality test. The *Weiss* judgement of ECJ was delivered on 11 December 2018. ECJ ruled that EBC's decision was legal under EU law. In ECJ's opinion, in order to determine programme's nature, „it is appropriate to refer principally to the objectives" of that programme[42]. Therefore, PSPP concerns monetary policy. The ECB's decision meets the proportionality requirements as well.

The PSPP judgement of the GCC has immediately sparked a debate among scholars. Most of the comments and analysis are highly critical of the decision. First of all, it was pointed out that by declaring ECJ's proportionality test incorrect and conducting its own one, Karlsruhe seemed to forget that ECJ's test is by definition different from the German one, because it has to take into consideration various interests and perspectives[43]. Therefore, the GCC cannot impose their own understanding of the test on the whole EU. Moreover, the GCC has been accused of not following their own *ultra vires*

38 N. Petersen, *Karlsruhe's...*, p. 1004.
39 D. Grimm, *A Long...*, p. 947.
40 F. Mayer, *Rebels...*, p. 136.
41 A. Pliakos, G. Anagnostaras, *Saving...*, p. 228.
42 Judgment of the ECJ of 11 December 2018, C-493/17, *Heinrich Weiss and Others,* par. 53.
43 P. Dermine, *The Ruling...*, p. 538.

procedure doctrine[44]. In the previous judgements (*Lissabon*, *Honeywell*) the GCC has stated, that before declaring any EU act *ultra vires,* it will give the ECJ the opportunity to rule on the contested matter first. But in the PSPP case, only the part about EBC's actions has met that criterion. When it comes to ECJ's judgement, it was declared *ultra vires* without sending another preliminary reference to the ECJ[45]. It was also noticed that the tone of the preliminary reference suggested Karlsruhe doesn't really want the answers to submitted questions, but rather it wants ECJ to support the GCC's views on the matter[46] – just like by the previous preliminary reference in the *Gauweiler* case[47]. It was also stated that, by measuring PSPP-like decisions, the GCC seems to act more like a political actor, and not like the court[48]. Finally, as some scholars have pointed out, Karlsruhe's judgement can possibly be instrumentally used in the countries suffering from the rule of law crisis to justify ignoring the judgements of the ECJ[49], especially since it was very applauded by the Polish and Hungarian government's officials[50].

The Author shares the critical views on the PSPP judgement. Nevertheless, it might be worth to point out that Karlsruhe is not the only one to blame. One can notice that ECJ has some sort of double standards when it comes to the proportionality assessment[51]. Luxembourg has developed very restrictive standards of the proportionality test for the Member States' legislation. At the same time ECJ's requirements for the acts of EU institutions are far more lenient. Some symptoms of such an approach are visible even in the *Weiss* judgement, where ECJ lacks its own assessment and uncritically accepts EBC's positions[52]. It thus can be understandable, why Karlsruhe was not satisfied with the judgement. GCC has one additional reason to be upset with *Weiss* – answers given by the ECJ are very similar to those given after the GCC submitted the preliminary reference in the *Gauweiler* case[53]. In the latter, Karlsruhe decided not to activate *ultra vires* doctrine. But it has expected that next time it will ask for the preliminary ruling, the ECJ

44 M. Wendel, *Paradoxes...*, p. 984.
45 M. Höpner, *Proportionality...*, p. 15.
46 A. Pliakos, G. Anagnostaras, *Blind...*, p. 378.
47 M. Höpner, *Proportionality...*, p. 14.
48 M. Wendel, *Paradoxes...*, p. 983.
49 M. Avbelj, *Constitutional...*, p. 1029.
50 S. Biernat, *How Far...*, p. 1105.
51 M. Avbelj, *The Right...*
52 P. Dermine, *The Ruling...*, p. 532.
53 F. Mayer, *To Boldly...*, p. 1125.

will show more empathy. Their expectations were not met. Nevertheless, it must be clearly stated that none of the arguments given above was the legitimate reason to declare ECJ's judgment and ECB's PSPP decision *ultra vires*. And when it comes to the instrumental use of the PSPP judgement, one has to remember that the Hungarian Constitutional Court used the *ultra vires* doctrine even before its German counterpart to declare European Council's decision on the refugee quota system invalid[54]. Hence it doesn't seem that PSPP judgement is the long-awaited signal for those governments to ignore EU institutions' decisions. Of course, it will play some role in the argumentation, but it has to be pointed out that actions against the rule of law and the EU would have been taken regardless of Karlsruhe's position.

After the PSPP judgement had been released, ECJ issued a press statement[55]. It has stated that the court which requests a preliminary ruling is bound by ECJ's decision. Moreover, only ECJ has the competence to declare acts of EU institutions invalid. Otherwise, the EU law would be highly ineffective and therefore it could not ensure the equality of the Member States. ECJ was not the only one to release the statement – similar actions were taken by the European Commission[56], but also by president of the *Bundesbank* and Federal Minister of Finance[57]. The statements of Germany's national authorities have confirmed PSPP's proportionality. The *Bundestag* did the same by holding a vote on this matter[58]. Those were the actions to ensure PSPP meets criteria set in the judgement of the GCC. In the opinion of the complainants, it was not enough. Hence, they decided to submit another constitutional complaint[59]. The scholars also discussed the possibility of launching an infringement procedure against Germany. There are cases in EU's history when such procedure was initiated because of the actions of the Member States' highest courts[60]. The European Commission decided

54 K. Kovács, *The Rise...*, p. 1715.

55 ECJ, *Press release following the judgement of the German Constitutional Court of 5 May 2020*, 8 May 2020, no. 58/20, < https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf >, accessed: 1 July 2021.

56 European Commission, *Statement by President Von der Leyen*, 10 May 2020, Statement/20/846, < https://ec.europa.eu/commission/presscorner/detail/en/statement_20_846 >, accessed: 1 July 2021.

57 P. Dermine, *The Ruling...*, p. 534.

58 M. Höpner, *Proportionality...*, p. 1.

59 S. Poli, R. Cisotta, *The German...*, p. 1081.

60 H.T. Nguyen, M. Chamon, *The ultra vires...*, p. 15.

to take such step also in this case[61], but it happened one year after the PSPP judgement and one month after Karlsruhe's judgement ending the entire saga[62]. Before these events, the Commission was rather silent on the matter[63].

4. Lesson for both sides

Although the GCC was the one to start the fight with the ECJ, the ball seems to remain in Karlsruhe's court. The meaning of the PSPP judgement in the long-term perspective depends on the next actions taken by the GCC, especially on the rulings on the EU Recovery Fund and ECB's Pandemic Emergency Purchase Programme (PEPP), as they will be the signal of Karlsruhe's general attitude towards further European integration and (possibly) relations with the ECJ. There are a couple of positive signs, though. On 15 April 2021, the GCC rejected an application for preliminary injunction directed against the German act ratifying the EU Recovery Fund[64] and couple of days later (29 April) rejected application for an order of execution relating to the PSPP judgement[65] (in the applicants' view, the government did not take sufficient steps to ensure proportionality of the PSPP programme), ending the entire PSPP saga. Nevertheless, one must have in mind that the most crucial judgements (Recovery Fund, PEPP) are yet to come. There is also a risk that since the GCC disobeyed ECJ's rulings once, it will do the same thing again in the future. From this point of view, every case appearing before Karlsruhe may be potential conflict trigger. There is of course hope that after being heavily criticized after the PSPP judgement, the GCC will back up and adopt a more EU-friendly approach. But one has to remember that there were also a lot of disapproving comments after previous Karlsruhe's judgements on EU-related issues (*Lissabon*, *Gauweiler*) and the GCC did not seem to be very touched by it[66]. But if, despite all dangers, the GCC will adopt more

61 European Commission, information about infringement procedure against Germany, < https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743 >, accessed: 7 June 2021.

62 Judgment of the GCC of 29 April 2021, 2 BvR 1651/15, 2 BvR 2006/15.

63 In December 2021, the EC has decided to close the procedure because of the Germany's satisfying reply to the EC's letter of formal notice. See EC's press release: < https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201?fbclid=IwAR1w6wbHhdcA5vxlqXTohUjxcgF7mJbpSBxTXjxaNWXpMJ0MIzb9Zyuwv7I%20(3%20Dec.%202021 >, accessed: 1 July 2021.

64 Judgment of the GCC of 15 April 2021, 2 BvR 547/21.

65 Judgment of the GCC of 29 April 2021, 2 BvR 1651/15, 2 BvR 2006/15.

66 F. Mayer, *Rebels...*, p. 140.

ECJ-friendly approach, the PSPP judgement might be remembered quite differently. It has to be stated that Karlsruhe doesn't have to unconditionally agree with everything ECJ says. But the dialogue between these two institutions must be maintained and developed, especially when there is a difference of opinions. If that is achieved, the PSPP judgement in the long-term perspective might be an inspiration, not a problem. The same applies to the other constitutional courts in Europe. In that regard, the judgement of the French Conseil d'Etat handed down on 21 April 2021[67] gives reasons to be optimistic as the court has refused to conduct the *ultra vires* review of the ECJ's judgement[68].

The ECJ also has some lessons to learn from the entire PSPP saga. Although all national courts have the same legal status before the EU law and use the same procedure to engage with the ECJ, there is actual difference between ordinary courts and constitutional and supreme courts. The latter ones, because of their legal position and authority, have significant influence also on the lower instance courts. Therefore, the ECJ must pay special attention to the preliminary ruling requests coming from the highest courts as they also have an indirect effect on other courts as well[69]. Regardless of that, and Karlsruhe's future rulings, it seems that it will be hard for ECJ to release another ruling like *Mangold*[70] – perfect example of court's judicial activism, which have been met with calls to declare it *ultra vires*[71]. Now, knowing that *ultra vires* is not only a theoretical concept and can be used by Europe's most influential constitutional court, ECJ may not be so self-confident. If, as a result, ECJ will try to be more precise in its judgements (this is what the GCC is *de facto* asking for), there could also be a few positive things resulting from the PSPP judgement indeed[72].

And what if the GCC will choose confrontation instead of the dialogue – and will be followed by other constitutional courts?[73] In this scenario not only the ECJ is the one endangered, but it also would mean a heavy blow for the entire EU law and its effectiveness, which the ECJ is the guardian of. The PSPP judgement was another occasion to raise the idea of establish-

67 Judgment of the Conseil d'Etat of 21 April 2021, *French Data Network et al.*

68 J. Ziller, *The Conseil...*

69 M. Bonelli, *The Taricco...*, p. 369.

70 Judgment of the ECJ of 22 November 2005, C-144/04, *Werner Mangold v Rüdiger Helm.*

71 R. Herzog, L. Gerken, *Stop...*

72 M. Avbelj, *Constitutional...*, p. 1030.

73 In that regard, the recent dispute between the ECJ and the Romanian Constitutional Court may be interesting to follow. See: B. Selejan-Gutan, *Who's Afraid...*

ing a new European court, which would consist of ECJ's and constitutional courts' judges[74]. Its task would be to rule on the dispute between ECJ and constitutional courts. Therefore, it would have the role of an ultimate arbiter[75]. Another idea may be to state *expressis verbis* in the treaties that EU law will have primacy over the law of the Member States, just like it was done in the Treaty establishing a Constitution for Europe[76]. However, the further development of the judicial dialogue would be the most sufficient measure in that regard.

5. Conclusion: The report on the death of the judicial dialogue was an exaggeration

The issue discussed in this paper is so problematic, because the ECJ and the constitutional courts do not operate on the same level. The ECJ bases its claims on the Treaties, while the constitutional courts derive their right to review ECJ's actions from the national constitutions. Therefore, this problem cannot be definitely solved through the judicial dialog. It is impossible to say that the arguments of the constitutional courts are undoubtedly more important than ECJ's arguments – and *vice versa*. It may seem that the only way to end discussions on that matter is an institutional change – either by stating *expressis verbis* the primacy of the EU law in the Treaties or by creating another court (Court of Appeal?[77]), which would be resolving possible disagreements between ECJ and the constitutional courts. But even these steps do not guarantee that there will not be any future disputes anymore. What if, despite the Treaty provisions, the constitutional courts will invent new constitutional limits to the primacy of the EU law, or still will be using the concept of the national identity or sovereignty?[78] And how can we be so sure that the constitutional courts will not ignore the judgements of the new court or even declare its actions *ultra vires*?

It seems that one is left with no other option than maintaining and developing the judicial dialogue – and it doesn't have to be a pessimistic conclusion. Both ECJ and the constitutional courts have to realise that the potential

74 D. Sarmiento, J.H.H. Weiler, *The EU Judiciary...*
75 M. Höpner, *Proportionality...*, p. 4.
76 E. Delaney, *Managing...*, p. 235.
77 D. Sarmiento, J.H.H. Weiler, *The EU Judiciary...*
78 P. Faraguna, *Constitutional...*, p. 1637.

escalation of conflict between them would lead to losses on both sides[79]. For instance, if the constitutional courts started questioning every judgement of the ECJ because of violation of the national identities, the entire acquis of the EU law would be put into question. This would raise questions about the constitutional courts' legitimation to *de facto* shape the process of the European integration and could possibly lead to some repercussions (rather of the political nature)[80]. To avoid such situations, more mutual trust and respect are needed. Each case must be treated individually, without taking other side's mistakes for granted. Not all of the ECJ's decisions are perfect – but if the constitutional court has some doubts, it should refer a question to the ECJ (maybe even more than once if necessary). On the other hand, the ECJ has to understand that the constitutional courts have special positions within the states' institutional systems and pay more attention to their opinions, especially those included in the preliminary references[81]. Last but not least, is has to be remembered that the sincere cooperation principle applies to both EU (including ECJ) and the Member States (including constitutional courts). To conclude, let's quote the Czech Constitutional Court opinion on the desirable state of the relations between constitutional court and the ECJ: „it should continue to be a dialog of equal partners, who will respect and supplement each other's activities, not compete with each other"[82]. If that is really achieved the current crisis resulting from the PSPP judgement will be remembered not as a failure, but rather as inspiration[83] – a bit like *Solange I*.

Abstract

The issue of the relations between the European Court of Justice and the constitutional courts of the Member States is a topic of great importance. The latest proof of that is the PSPP judgement of the German Constitutional Court. It has also shown what might happen if judicial dialogue is abandoned. The aim of the paper is to consider the consequences of the PSPP judgement as well as to analyse the conditions for the restoration and development of trust between the courts. The author presents the concept of *ultra vires* which has been used by the German Constitutional Court. In subsequent parts of the paper, the discussion focuses on the PSPP

79 A. Bobić, *Constitutional...*, p. 1425.
80 K. Gärditz, *Beyond Symbolism...*, p. 199.
81 S. Simon, H. Rathke, *"Simply not comprehensible"...*, p. 955.
82 Judgment of the CCC of 26 November 2008, Case Pl. ÚS 19/08, *Treaty of Lisbon I*, par. 197.
83 P. Dermine, *The Ruling...*, p. 548.

judgement and the surrounding scholarly debate and points out the consequences for both sides of the dispute. In the author's opinion, the PSPP saga may, under some conditions, have positive implications for judicial dialogue.

Keywords: European Court of Justice, constitutional courts, *ultra vires*, PSPP, judicial dialogue

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