

## Report on the Evening Lecture: Prof. em. Dr. Dr. h.c. mult. Dieter Grimm, LL.M. (Harvard) „The Ultra-Vires Doctrine of the German Federal Constitutional Court – Crisis or Opportunity for Europe?”

On Wednesday, October 13, 2021, the first event of the series “Evening Lectures” in the winter semester 2021/2022, again hosted and moderated by **Prof. Dr. Susanne Augenhöfer, LL.M. (Yale)** took place at the University of Innsbruck as a hybrid event (online and in presence). The renowned constitutional law expert **Prof. em. Dr. Dr. h.c. mult. Dieter Grimm, LL.M. (Harvard)** from the Humboldt University of Berlin gave a lecture on the highly relevant subject “The Ultra Vires Doctrine of the German Federal Constitutional Court – crisis or opportunity for Europe?”. The lecture was commented by Univ.-Prof. Dr. Walter Obwexer, Dean of the Faculty of Law of the University of Innsbruck and Professor of European Law.

First of all, Prof. Grimm stated that the long-standing conflict of competence between the German Federal Constitutional Court and the ECJ, which recently culminated in the so-called *PSPP ruling*<sup>1</sup> of the German Federal Constitutional Court, was not only the result of a hierarchical power struggle between two supreme courts. Rather, it was about the fundamental legal dogmatic question of whether, in addition to the ECJ, a national supreme court could also declare the actions of EU institutions to be invalid and whether it had the competence to determine that an EU institution had acted *ultra vires*.



Prof. Grimm pointed out that the German Federal Constitutional Court - unlike the Polish Constitutional Court recently - did not fundamentally question the primacy of application of European law, but argues that the Union can only be responsible for those measures that are assigned to it according to the principle of conferral (Art. 5 TEU). The unauthorized assumption of nation-state sovereignty, however, is protected by the principle of democracy (Article 20 (1), (2) of the German Constitution) and thus also by the guarantee of perpetuity (Article 79 (3) of the German Constitution). The *ultra vires*

<sup>1</sup> BVerfG, 2 BvR 859/15.

review must therefore also be available to the Federal Constitutional Court and is necessary to protect against an unauthorized assumption of competences by the Union. .

In contrast, the ECJ takes the view in this context that European law has emancipated itself from the will of the Member States and finds its basis of validity in a sui generis source of law which has its foundation directly in the treaties. From this point of view, the ECJ also derived its sole declaratory competence with regard to possible excesses of competence by EU institutions. Furthermore, Prof. Grimm noted that in the past decades, the ECJ has also actively promoted pan-European integration efforts in and with its case law and, as a result of this circumstance, has, for example, applied the *principle of proportionality* more strictly to the national law of the Member States than to the European law.



According to Prof. Grimm, the solution of the competence dispute cannot be reached on the level of European law, since both supreme courts would rely on the treaties but draw different conclusions from them. Since both courts justify their competence to find *ultra vires* acts by EU Institutions in a dogmatically defensible way, infringement proceedings against Germany would cause more harm than good. In this respect, the only viable solution would be to signal a mutual willingness to engage in a dialogue both in Karlsruhe and in Luxembourg.

The exciting and passionate lecture by Prof. Grimm was followed by a no less passionate commentary by Prof. Obwexer, who, as a habilitated professor of European law, unsurprisingly expressed a view on the subject that differed in certain nuances. This was followed by a lively discussion with the participants on, among other things, the idea of a European competence court and the significance of the supranational character of European law and the implications of the recent ruling of the Polish Constitutional Court, which denies the primacy of European law per se.

(Julian Nigg)