DOI: 10.52694/LES.I/2025.10

Jarosław Szymanek
Akademia Wymiaru Sprawiedliwości
ORCID 0000-0002-0590-5218
jaroslawszymanek@o2.pl

Extra-treaty changes to treaties: *ultra vires* actions, creeping competences and decision-making outside the state

Pozatraktatowe zmiany traktatów: działania ultra vires, pełzające kompetencje i decydowanie poza państwem

Abstract: The European Union, as any other organisation, has been evolving. It is a natural need of necessary adjustment of a given organisation to current challenges which are never constant. However, in the case of the European Union, this evolution has been intensifying for some time and, moreover, it has been more frequently observed in practice, while treaties have remained relatively stable (the last interference in the primary law was, in fact, in 2009, in the Treaty of Lisbon). In effect, it is not an overstatement to say that the European Union, despite its strong, since treaty-based, framework for operations, is, in a way, an underspecified, *in status nascendi*, structure. The procedural essence of the Union consists in the pending process of 'becoming', which means that in terms of epistemology the Union has not yet been described fully, and the definition and explanation of Union decision making processes fall behind the process of changes happening in the EU. The latter always precede legal regulations, which – as experience suggests – register changes that have occurred in the practice of Union institutions' operations with a significant delay. In fact, a lot of Union functioning mechanisms are first established in practice and then 'inserted' in treaty regulations, taking on the form of binding *de lege lata* solutions. Therefore, it can be safely said that while analysing the phenomenon of the European Union,

each researcher faces a kind of 'epistemological chasing of the Union', the actual operating mechanisms of which precede formal grounds of operations. It generates searching for new terms, new concepts that would best reflect the sense of changes and primarily, would balance the functioning of the Union with what is set in book and what is seen in action. Therefore, measures undertaken by Union institutions, which show the dissonance between what the Union can do and what the EU actually does, have been professionally defined as 'competence creep' and 'state bypassing'. Both concepts are, obviously, not reflected in the treaties, yet, they paradoxically precisely describe the functioning of Union institutions by showing the disproportion between formal and actual sides of their operations. In addition, a topic constantly raised in discussions about European Union law is the so-called ultra vires actions. They are also, as indicated, an element shaping the Union as an accommodating structure. This article is devoted to these issues.

Keywords: European Union, ultra vires actions, competence creep, state bypassing

Streszczenie: Unia Europejska, jak każda organizacja ewoluuje. Jest to naturalną potrzebą koniecznego dostosowywania danej organizacji do aktualnych wyzwań, które nigdy nie są stałe. Jednak w przypadku Unii ewolucja ta od dłuższego czasu przybrała na sile, co więcej, coraz mocniej jest ona obserwowana w praktyce, przy względnej stabilności traktatów (ostatnia ingerencja w prawo pierwotne to przecież 2009 r. i traktat z Lizbony). W efekcie nie jest przesadą stwierdzenie, że Unia Europejska, mimo istnienia silnych, bo traktatowych podstaw jej działania, jest w jakimś sensie strukturą niedookreśloną. Procesualną istotą Unii jest dziejący się tu i teraz proces „stawania się", co oznacza, że epistemologicznie Unia jest ciągle nie do końca opisana, że deskrypcja i eksplanacja unijnych procesów decyzyjnych pozostaje ciągle w tyle za procesem zmian przebiegających w UE. Te ostatnie zawsze wyprzedzają regulacje prawne, które – jak podpowiada doświadczenie – z dużym opóźnieniem rejestrują zmiany, które zaszły w praktyce działania instytucji unijnych. W rzeczywistości bowiem bardzo dużo mechanizmów funkcjonowania Unii najpierw wykuwa się w praktyce, a dopiero później jest „wkładana" do regulacji traktatowych, przybierając postać obowiązujących de *lege lata* rozwiązań. Dlatego można śmiało powiedzieć, że analizując fenomen Unii Europejskiej każdy badacz ma do czynienia ze swoistym „epistemologicznym ściganiem Unii", której

realne mechanizmy działania wyprzedzają formalne podstawy działania. Generuje to szukanie nowych określeń, nowych pojęć, które najlepiej oddawałyby sens zachodzących przemian, a przede wszystkim harmonizowałyby funkcjonowanie Unii z tym co jest *in book* i tym, co widać *in action*. Z tych też powodów działania instytucji unijnych, które pokazują rozdźwięk między tym co Unii wolno, a tym co UE faktycznie robi znalazło fachowe określenie w pojęciu „kompetencji pełzających" (*competence creep*) oraz w pojęciu pomijania państwa (*state bypassing*). Oba pojęcia nie mają, co oczywiste, swojego traktatowego odzwierciedlenia, ale paradoksalnie oba trafiają w punkt przy deskrypcji instytucji unijnych, pokazując rozziew między formalną a faktyczną stroną jej działań. Obok tego, tematem ciągle podnoszonym w dyskusjach na temat prawa Unii Europejskiej są tzw. działania ultra vires. One także, jak się wskazuje, są elementem kształtującym Unię jako strukturę akomodującą się. Tym zagadnieniem poświęcony jest niniejszy artykuł.

Słowa kluczowe: Unia Europejska, działania *ultra vires*, pełzające kompetencje, decydowanie poza państwem

Introduction

The European Union, like any other organization, is constantly evolving. This is a natural necessity for any entity to adapt to current challenges, which are never static. However, in the case of the European Union, this evolution has accelerated in recent times and is increasingly evident in practice, despite the relative stability of the Treaties (after all, the last amendment to the primary law dates back to the Treaty of Lisbon in 2009). As a result, it is not an exaggeration to state that, despite the existence of strong, Treaty-based foundations governing its functioning, the European Union is, in a sense, an indeterminate structure – a structure *in statu nascendi*. The EU's inherently procedural nature means that it is, at any given moment, engaged in an ongoing process of "becoming," which implies that, epistemologically, the European Union has not yet been fully described, and that the description and explanation of EU decision-making processes consistently lag behind the pace of changes occurring within the EU itself[1]. These practical developments consistently

[1] Cf. J. Szymanek, *Downplaying of the role of Member State: competence creep and state bypassing in decision making in the European Union*, [w:] *Between State Sovereignty and a European Federation*, ed. J. Szymanek, Warsaw 2023, p. 71.

precede legal regulations, which – as experience demonstrates – register changes in the functioning of the EU institutions with a significant delay. In practice, many of the operational mechanisms of the Union are initially forged through practice and only subsequently "incorporated" into the Treaty framework, thereby acquiring the status of binding *de lege lata* solutions. Consequently, it can be confidently stated that any scholar analyzing the phenomenon of the European Union is confronted with a kind of "epistemological race" with the Union, whose real operational mechanisms invariably precede the formal legal foundations governing its functioning. These legal foundations merely culminate the process of legal institutionalization of the Union, which occurs *ex post*—that is, after certain solutions have first been forged through various mechanisms and only then are experimentally implemented[2].

All of this frequently leads to the conclusion that the actions of the European Union's institutions are *ultra vires*—that is, conducted beyond the competences formally conferred upon them, competences that have not been expressly provided for by the Treaties, namely, the Treaty on European Union and the Treaty on the Functioning of the European Union[3].Actions of this kind are typically first tested to assess whether they will meet with open resistance. If no significant opposition emerges, they are then proposed and evaluated to gauge the reactions of the Member States. Thereafter, such measures are cautiously implemented in practice. Once they have become established in fact, intensive lobbying efforts are usually undertaken to secure their *expressis verbis* legalization—most often by way of treaty amendments. These amendments are typically framed not as the introduction of new elements but rather as the petrification of the *status quo* and the formal expression of solutions that, in practice, have already been implemented. In this manner, the phenomenon of registering changes in the Treaties occurs: by the time they are incorporated into the text of the binding Treaties, they have generally already been well-tested and operational in practice. Actions of this nature – namely, *ultra vires* actions – are met with widely varying evaluations. Some commentators assert outright that such actions constitute

[2] This also results from the fact that the Union is a reactive structure that adapts and modernizes itself depending on its environment. Cf. T. Alberts, *The Future of Sovereignty in Multilevel Governance Europe – A Constructivist Reading*, „Journal of Common Market Studies" 2004, nr. 1, p. 23-46.

[3] Such actions, however, generate corresponding reactions on the part of the Member States, which do not necessarily conform to a single model. Cf. L. Bober, *Doktryna ultra vires – odwrócenie integracji czy gwarancja jej trwałości?*, „Paragraf. Studia z Prawa i Administracji" 2024, nr 4, p. 15ff.

a violation of the Treaties, especially given that the Treaties explicitly establish the principle of conferral of competences, which by definition requires adherence to the division of competences between the European Union and the Member States, whether shared or exclusive. Others, however, argue that what is often labeled as *ultra vires* conduct is not so much the creation of new competences as it is a creative interpretation of the Treaties, deepening and elaborating them. They contend, therefore, that such actions do not breach the Treaties' division of competences but rather supplement and enhance it – while always remaining within the boundaries of the competences allocated by the Treaties. On this view, such actions cannot be characterized as prohibited or, a fortiori, as illegal. Finally, there are those who maintain that what is often described as *ultra vires* conduct is merely a matter of applying the Treaties in a manner consistent with their fundamental objective of effective implementation—a duty that binds both the Union's institutions and the Member States. Accordingly, such actions are neither *praeter legem* nor, understandably, *contra legem* but rather *lege artis*, as they give effect to the Treaty provisions, both in their letter and in their spirit[4].

However, disputes concerning *ultra vires* actions do not exhaust the discussion on extra-treaty changes or modifications which, in practice, alter the Treaty provisions. These do not necessarily require *de lege lata* amendment, as it is often noted that the European Union is a structure characterized by permanent adaptation[5]. It is therefore observed that the European Union—as a structure that is never truly complete—possesses an entire arsenal of instruments that serve to ensure the enforcement of its Treaty obligations, whose *telos* is defined by the idea of a more effective, deeper, and better integration. In practice, what is described as *ultra vires* conduct takes various forms. The clearest manifestation consists of the creation or transformation of new competences, which often leads to the somewhat sarcastic observation that, instead of referring to the competences conferred by the Treaties, one should speak of so-called "trampled" or even "wrested" competences (from the Member States). Another, exceptionally frequent example comprises

[4] For a more detailed discussion, see: J. W. Ochmański, *Spory o działania ultra vires w Unii Europejskiej*, Warszawa 2023, p. 167ff.

[5] Cf. Z. Czachór, *Od Traktatu o Unii Europejskiej z Maastricht do Konferencji w sprawie przyszłości Europy. Analiza procesu ciągłości i zmiany*, [w:] *Unia Europejska w turbulentnym świecie. 30 lat traktatu z Maastricht*, red. J.M. Fiszer, T. Stępniewski, Lublin – Warszawa 2022, p. 59ff.

actions that are not so much formal as they are de facto in nature, which aim to reshape the relationships between the Union, the Member States, and other entities operating either at the sub-state level (*downloading*) or at the supranational level (*uploading*)[6].

For obvious reasons, this generates the search for new terms and concepts that best capture the essence of the ongoing transformations, and, above all, that harmonize the functioning of the Union with both what is *in book* and what is observed *in action*. For these reasons, the actions of the EU institutions – actions that reveal the discrepancy between what the Union is formally permitted to do and what it actually does – have acquired a technical description in the concept of "competence creep" [7] as well as in the notion of "state bypassing"[8]. Neither concept, of course, has any direct reflection in the Treaties; yet, paradoxically, both concepts aptly capture the phenomenon by highlighting the gap between the formal and the actual dimensions of the Union's activities[9].

Competence Creep

Let us begin with the phenomenon that was identified first: competence creep. It has long been observed, and its essence lies in the possibility, nonetheless, of legislating or otherwise taking effective action in areas where no competences have been conferred upon the European Union[10]. In other words, competence creep refers to the phenomenon of establishing the rules of the Union's game – rules binding both the European Union and the Member States (in the form of law or political decisions) – through the backdoor, without any formal legal basis for action (*appearing through the backdoor in this way*). It is noted that this phenomenon proceeds along two parallel tracks. On the one hand, it encompasses positive actions directed towards the Union and its institutions. On the other hand, it encompasses negative actions targeting the

[6] Cf. J. Ruszkowski, *Pomijanie państw (states bypassing) w systemie wielopoziomowego zarządzania Unią Europejską*, [w:] *Państwo w Unii Europejskiej*, red. J. Ruszkowski, R. Podgórzańska, Szczecin 2017, p. 115ff.

[7] Cf. S. Weatherill, *Competence Creep and Competence Control*, „Yearbook of European Law" 2004, nr 1, p. 1–55.

[8] Cf. M. Keating, L. Hooghe, M. Tatham, *Bypassing the nation-state? Regions and the EU policy process*, [in:] *European Union: Power and policy-making*, ed. J. Richardson, S. Mazey, New York 2015, p. 445-466.

[9] Cf. M. Kleine, *Informal Governance in the European Union: How Governments Make International Organizations Work*, London 2013, p. 36ff.

[10] Cf. S. Garben, *Competence Creep*, „Journal of Common Market Studies" 2017, nr 1, p. 1-18.

Member States. The former are positive in the sense that they usually, if not always, involve the addition of new competences to the European Union and its various institutions. The latter, in turn, are negative in the sense that they aim to diminish the sovereign powers of the Member States.

In practice, positive actions thus amount to the gradual expansion of Union competences, which frequently takes the form of *ultra vires* action – that is, action beyond the competences conferred upon the Union or, at the very least, at the outer limits of those competences. Negative actions, on the other hand, are aimed at constraining the capacity of the Member States to act. The positive method therefore amounts to a maximization of the competences of the Union and its organs, whereas the negative method amounts to a minimization of the role of the Member States.

Of course, it is not the case that the European Union applies these methods alternately. Their distinction is, to some extent, academic, since in practice every positive method also – *nolens volens* – unctions as a negative method. Thus, the issue is not so much whether, within the framework of a particular instance of competence creep, the Union is adding competences to itself or rather subtracting them from the Member States, but rather whether the net effect is an *in plus* expansion of Union action or an *in minus* contraction of the Member States' capacity to act (bearing in mind that in this balance the *pouvoir* of the State as such is what ultimately matters)[11].

In the case of competence creep, it therefore involves the gradual shrinking of areas which, from a formal legal standpoint, remain either within the exclusive competence of the Member States or – at best – belong to the category of shared competences. In both cases, this leads to the emergence of what is referred to as an "occupied field" which, once occupied by the EU institutions, is not relinquished even if the Treaties do not expressly reserve that field to the Union. It is worth noting that the phenomenon of competence creep has existed in the Union—and earlier in the Communities – from the outset. On the one hand, it is a natural element of the internal institutionalization of any organization whose *telos* is the strengthening and consolidation of its own structures and operational capacities. On the other hand, it is a process that is

[11] Naturally, there are numerous additional indicators of the so-called strength of a state within the European Union. For further discussion, see: M. Klejnowski, *Siła państw w Unii Europejskiej. Formalnoprawne wyznaczniki siły państw w Radzie UE i Radzie Europejskiej*, Toruń 2014, *passim*.

particularly characteristic (and intensified) in the context of European integration. Indeed, this integration process has long been moving in a very clear direction – that is, from the Member States towards supranational structures, which are gradually reinforced both by formal means (through the adoption of new Treaty provisions) and by factual means, involving appropriately shaped practice (which in practice amounts to identifying fields of interest to the Union institutions, subsequently occupying them, and later entrenching them through the relevant Treaty amendments, which in such cases typically merely "ratify" earlier practical actions)[12]. In order to legitimize such actions of the Union *ex post*, the concept of so-called "complementary competence" has even been adopted. This concept arises in situations where the harmonization of national provisions is impossible, while at the same time it is assumed that the Union's action does not "supersede" the competences of the Member States. Paradoxically, therefore, it is accepted that the Union operates in a particular area, but that such action – at least *de iure* – does not diminish or otherwise limit the actions of the Member States. The Union acts only in a complementary capacity, and the competence formally remains with the Member States. In legitimizing complementary competences, it is emphasized that in such cases, the Union's action merely replicates the competences of the Member States, which continue to remain exclusively within their purview. In this way, the Union neither removes nor diminishes anything, but merely provides accessory support to the actions of the Member States, with the aim of achieving a synergy effect that yields a better and more holistic outcome.

By referring to the concept of complementary competences, the notion of a "competence constellation" was developed – a concept that was accepted in the Treaty of Lisbon and was intended to safeguard the Member States from being stripped of the competences conferred upon them[13]. Nevertheless, in practice, this so-called "competence constellation" has not resolved the problem of competence creep; ergo, it has not safeguarded the Member States from the Union's interference in areas that have not been explicitly conferred upon it. Moreover, some commentators even argue that the construction of complementary

[12] Cf. M.D. Cole, J. Ukrow, L.L. Eur, Ch. Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, Saarbrücken 2020, *passim*.

[13] A. Benz, Ch. Zimmer, *The EU's competences: The 'vertical' perspective on the multilevel system*, „Living Reviews in European Governance" 2010, vol. 5, nr 1, p. 5ff.

competences merely legitimizes the phenomenon of competence creep – a phenomenon that, it is added, is inherent in the logic of integration, the essence of which is, after all, the deeply integrated nature of competences at the European level. Hence, it is sometimes observed that the source of competence creep does not lie solely in the abuse of the European Union's functional powers, even though this is indeed a serious problem in its own right. Its true cause lies, however, in the political teleology of the Union and the praxeology of its functioning. This, in turn, is determined by a fundamental principle – namely, effective governance – which means that, realistically, no single area or issue can be hermetically sealed off from European integration. At a strictly normative level, this implies that the competences of the Member States, in one form or another, must ultimately be aggregated within a supranational structure, as only then can effective political action be achieved[14]. It appears that this very perspective is intended to justify and legitimize the phenomenon of competence creep, by arguing that it is inherent in the logic of the European integration process, the course of which – alongside formal and transparent mechanisms – must necessarily be supplemented by factual mechanisms that are not always visible or obvious. Accordingly, it is suggested that integration occurring "through the backdoor" is not, in fact, a dysfunction of the Union but rather a necessary element of the success of the integration objective.

When analyzing the phenomenon of competence creep, it is noted that it has several sources. The first source is the adoption by the EU of legislation that has an indirect impact on another area. Consequently, the European Union adopts a given regulation, *prima facie* concerning an undisputed area – i.e. one falling within the scope of EU legislation – but at the same time, this regulation also, to a greater or lesser extent, covers regulatory areas that lie outside the Union's competence. The second source is the case law of the courts, which in many instances extends the scope of the Union's action beyond the areas precisely defined by the Treaties. This particularly concerns institutional provisions of the Union, which are increasingly correlated with provisions establishing individual rights, thereby encompassing areas formally excluded from Union action – *nolens volens* – within the scope of the European Union's activities.

[14] For further discussion on this matter, see: J. Ruszkowski, *Ponadnardowość w systemie politycznym Unii Europejskiej*, Warszawa 2010, *passim*.

A prime example is the issue of judicial independence, which is, *expressis verbis*, regulated within the exclusive competence of the Member States; yet, through an extensive interpretation of the individual right to a fair trial (a subjective right), this area has been extended to institutional provisions, which the Union has "appropriated" by asserting its competence to define the minimum constitutional standards applicable to the administration of justice in the Member States. Another example of the judicial mechanism of competence creep is the landmark judgment of the Court of Justice of the European Union in the so-called Bosman case of 1995. Although the Union has never been granted competence to legislate in the field of sport, the Court of Justice held that sport constitutes a specific form of economic activity and, to that extent, falls within the scope of EU law, particularly with respect to the free movement of workers. As a result, one of the outcomes of the Bosman ruling was that the number of foreign players from other EU Member States playing on a single team could no longer be restricted, a clause that had previously been standard in football clubs, for example. The third source of competence creep is the increasing practice of the European Union concluding international agreements and acceding to various regional conventions that are, in some cases, not accepted by at least some Member States. When the European Union accedes to such an agreement, each Member State becomes bound by its provisions, which obviously limits their freedom of action. A recent example is the EU's announced intention to accede to the Istanbul Convention – that is, the Council of Europe Convention on preventing and combating violence against women and domestic violence. Although the Convention has been incorporated into the national legislation of most Member States, in some States it has been found to be incompatible with their constitutions (e.g. Romania); in others, it has not been ratified despite having been signed earlier (e.g. Bulgaria, the Czech Republic, Slovakia, Lithuania, Latvia); and in yet others, there are heated debates on the merits and drawbacks of the Convention (e.g. Poland). The European Union, whose political agenda fully aligns with the content of the Convention, seeks to compel the Member States to incorporate its provisions into their domestic legal orders by binding the Union itself to the Convention's provisions, which *ipso iure* would render them binding in those Member States that remain hesitant. The fourth source of competence creep is so-called "soft law." Soft law is used in the European Union with particular enthusiasm, taking the form

of various guidelines, recommendations, proposals, and standards. Although formally non-binding, in practice, compliance is pursued through mechanisms of evaluation and assessment of national policies by the Member States. The fifth source of competence creep consists of various aspects of economic governance, such as financial assistance packages that come with conditions which the Member States must fulfill in order to benefit from the assistance. The best-known example is, of course, the Next Generation EU mechanism and the related national recovery plans, which in essence serve as instruments through which the European Union compels the Member States to undertake various legislative and non-legislative actions consistent with Brussels' policy line. Finally, the sixth source of competence creep is – perhaps surprisingly – the conduct of the Member States themselves[15]. It is undeniable that national governments also bear responsibility for competence creep. This is because, for instance, many of the "EU" measures adopted to combat crises in Europe were, in reality, initiated by the Member States themselves. An example is the European Stability Mechanism, which, although all euro area members participate in it, was established by the Member States as a new international organization intended to foster cooperation and coordination of fiscal policy. The national governments are also responsible for the emergence of soft law, whose force relies on the so-called "shame of not following one's non-binding commitments". Such soft law often emerges from the so-called "Open Method of Coordination" among the governments of the Member States, which can lead to significant changes in the internal systems of those States. Moreover, the Member States' responsibility for the proliferation of competence creep is sometimes the result of their own actions: national governments seeking to introduce unpopular or controversial solutions at home prefer to incorporate them into the EU agenda, thereby ensuring that their subsequent implementation takes place under the banner of implementing EU law, rather than as an act of unilateral national action.

In analyzing the sources of competence creep, its concrete manifestations, and its effects, attention is drawn to the fact that competence creep gives rise to a group of "winners" and "losers". At first glance, this group seems obvious, with the European Union and its institutions on the side of the winners and the Member States – whose competences are slowly

[15] Cf. S. Garben, *Competence Creep Revisited*, „*Journal of Common Market Studies"* 2019, nr 2, p. 205ff.

but steadily shrinking – on the side of the losers. However, such a view dangerously oversimplifies the nature of the relationship between the EU and the Member States. In reality, the true winners of competence creep are, above all, the national and European executives as well as the national and European courts, which have expanded their power and influence to such an extent that today it is these courts – particularly the Court of Justice of the European Union – that are regarded as the "masters of the Treaties," a label that for many years was reserved for the Member States themselves. On the side of the losers in the process of competence creep stand not necessarily the Member States as such but, above all, their parliaments, which have gradually lost the scope of their legislative authority. This authority, having been "Europeanized," has shifted to the European level and to the realm of strictly executive regulation, which remains the domain of executive lawmaking[16]. For these reasons, the problem of competence creep cannot be viewed solely as a legal problem, reducible to the "exceeding of competences," but rather as a political problem that concerns the very ontology of the integration process. Indeed, competence creep is a democratic problem. Firstly, because competence creep lacks legal legitimacy. Secondly, because it is very often non-transparent, usually observable only *ex post*. Thirdly, because the beneficiaries of this process are institutions that do not possess sufficient democratic legitimacy, namely, the national and European executives and the national and European courts. By contrast, institutions that are traditionally perceived as democratic – namely, parliaments – are the "victims" of the competence creep process, which progressively diminishes their legal and political authority.

Of course, in its details, the phenomenon of competence creep is far more nuanced and complex. Moreover, it also provokes doctrinal debates – but not with respect to the very essence of the phenomenon itself, but rather concerning its precise definition and the identification of what undoubtedly falls within the concept of competence creep and what does not. Despite these debates, it can be accepted that the notion of competence creep refers to the European Union's ability to act in areas where it has not been directly conferred with competences. Consequently, competence creep amounts, in other words, to the systematic expansion of the Union's decision-making sphere (a political science definition)

[16] Cf. *Ibidem*.

or – alternatively put – to the gradual erosion of the normative content of Article 5 of the Treaty on European Union (TEU), which *expressis verbis* stipulates that "The Union 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" (a legal definition). It should be added that, according to the TEU, "Competences not conferred upon the Union in the Treaties remain with the Member States." It is worth recalling that this principle of conferred competences, as formulated in the TEU, is further safeguarded by the principles of subsidiarity and proportionality.

The former principle means that "In areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at the central level or at the regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Article 5(3) TEU). According to the principle of proportionality, "The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties" (Article 5(4) TEU). It is noteworthy that although the *telos* of both principles, which coexist with the principle of conferral – namely, subsidiarity and proportionality – was initially different, namely, to operate in favor of the Member States as a kind of shield in potential competence disputes with the European Union, practice has unfortunately taken a dramatically different course. As a result, the provisions enshrining these two principles have today become a kind of springboard for the phenomenon of competence creep, or, viewed from the opposite perspective, the phenomenon of the shrinking of Member State competences. This applies in particular to the principle of subsidiarity, which, through its pivotal nature, has effectively reversed its original meaning and the normative sense attributed to it. From a principle that *a priori* protected the Member States against Union interference, it has become a principle that masks the actions undertaken by the Union in areas not conferred upon it. Consequently, the provision of Article 5(3) TEU has undergone a profound transformation, becoming one of many gateways for the introduction of competence creep. As a result, subsidiarity has turned out to be, from the perspective of protecting the interests of the Member States, a veritable Trojan horse within the Treaties, as it only ostensibly protects the Member States against an expansion of Union

action, while in fact, in the form in which the subsidiarity principle is enshrined in Article 5 TEU, it serves as a basis for actions exceeding the conferred competences—provided that "the objectives of the proposed action cannot be sufficiently achieved by the Member States" or "by reason of the scale or effects of the proposed action, can be better achieved at Union level." It should be borne in mind that, politically speaking, it is the Council and the Commission that decide what can be better and more effectively achieved at the Union level, while, legally speaking, it is the Court of Justice of the European Union[17].

In conclusion, it must be noted with regret that both subsidiarity and proportionality – which, in their Treaty-based formulation, simply mean that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties" – have become fuel for the phenomenon of competence creep. Instead of protecting the Member States, these principles have acquired the status of a Treaty-based license for the Union to act in areas not expressly conferred upon it, provided that such actions are deemed necessary, preferable, and, above all, more effective from the perspective of the integration objective – namely, greater, deeper, and more effective integration. Thus, competence creep – something that no one envisaged when drafting the Treaties – paradoxically finds its basis in the very principles that were originally conceived as instruments of defense for the Member States. It must be acknowledged with sadness that the old adage has proven true in this case: "He who lives by the sword, dies by the sword." The Member States wielded the principles of proportionality and, especially, subsidiarity, brandishing them as emblems of respect for their sovereignty within an integrating Europe, while in reality, both principles have turned against the Member States, effectively expanding the scope of Union action[18]. It seems that the mistake in this case lay in the deceptive thinking that focused solely on one side of the interpretation of the principle of subsidiarity. Commentators discussing this principle primarily emphasized its defensive potential, pointing out that the Union cannot act if a Member State is better placed to achieve the objectives in a given area. Thus, it was naively believed that subsidiarity protects the Member

[17] For further discussion on this matter, see: J. Helios, W. Jedlecka, *Wykładnia prawa Unii Europejskiej ze stanowiska teorii prawa*, Wrocław 2018, p. 141ff.

[18] Cf. G. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, "Columbia Law Review" 1994, vol. 93, p. 400ff.

States against actions by the Union. At the same time, however, it was forgotten that this principle also contains an equally significant offensive potential, according to which the Union may act if this is considered necessary or more effective for achieving the specified objectives. It hardly needs to be demonstrated that the practical application of Article 5 TEU best illustrates how the offensive potential of the principle of subsidiarity has been accentuated, as if its original protective function vis-à-vis the Member States had been forgotten. As a side note, it is worth mentioning that a similar interpretative conversion can be observed with respect to Article 4 TEU and the famous principle of respect for the constitutional identity of the Member States. This principle was likewise intended as a shield to protect the Member States against undue interference, deriving directly from the Treaty obligation to respect the fundamental constitutional and political structures of the Member States. However, the consistent case law of the Court of Justice of the European Union has slowly but effectively eroded the principle of constitutional identity, progressively narrowing its scope and, most importantly, severing its link to the constitutional system – something that *prima facie* conflicts with the very notion of constitutional identity[19].

It is worth noting that the phenomenon of the expansion of Union competences – competences that have never been directly conferred upon the EU – is accompanied by the maximization of the so-called objective of the European Union, which has become the guiding principle for all Union institutions. It is even argued that, in the case of the European Union, the objective is, in essence, a *brutal tool* that effectively "competence-sterilizes" the Member States by encroaching upon their autonomy.

An objective, especially when treated instrumentally, leads to the abandonment of one's own autonomous identity (*giving up an autonomous identity*) and subordination to the objective itself and, obviously, to the entity that defines that objective. This is precisely why the phenomenon of competence creep is so critically assessed – because, being essentially extra-legal and lacking democratic legitimacy, it destabilizes the legal structure of the European Union, which is anchored in the Treaties.

The objective of the European Union, which serves, inter alia, to justify competence creep, is today unequivocally identified as "more Europe"

[19] Cf. K. Kovács, *Constitutional or ethnocultural? National identity as a European legal concept*, "Intersections. East European Journal of Society and Politics" 2022, vol. 8, nr 1, p. 170ff.

(*plus d'Europe*). As a result, purposive and functional interpretations dominate the interpretation of the Treaties, while other interpretative techniques (such as historical interpretation) have only secondary significance. This, in turn, further fuels the phenomenon of competence creep, especially when correlated with the doctrine of the autonomy of EU legal concepts and terms. Increasingly, these concepts are assigned meanings that differ from those traditionally recognized in the national legal orders of the Member States – meanings that are often strictly instrumental, directed towards serving the idea of strengthening the European Union. Moreover, the raw material of such interpretation is found in the general principles of EU law, which – as is often noted – are, as a rule, interpreted unidirectionally, i.e., in a way that favors the Union over the Member States. This results in the Union's acquiring an unequivocal status as an asymmetrical structure at the expense of the Member States. This occurs primarily because, in the interpretation of the Treaties, of the objective of the Union, and of the principles of EU law, the focus is placed first and foremost on the Union itself and not on its Member States[20]. From this point of view, the interpretative techniques are clearly pro-Union and, at best, ambivalent towards the Member States. This is best demonstrated by the two fundamental objectives of the European Union, namely, the development of the Union and its effectiveness. Both objectives, moreover, are in practice interpreted in the same way – that is, as deepening or strengthening integration – because only such integration best embodies development and ensures the effectiveness of the EU.

For this reason, the objectives of the Union – namely, its development and effectiveness – leave no alternative. Those mechanisms – both legal and practical – that operate *in plus* for the European Union and its institutions, while at the same time *in minus* for the Member States, will always be regarded as more effective and more conducive to development. The unquestioned *telos* of the Union is, after all, its own maximization, and this invariably entails the simultaneous minimization of the Member States.

Competence creep takes various forms in practice. One example is legislation that progressively covers new areas that were not foreseen by the Treaties at all. Another, perhaps the most visible and indeed the

[20] For further discussion on this matter, see: J. Sozański, *Ogólne zasady prawa a wartości Unii Europejskiej (po traktacie lizbońskim). Studium prawnoporównawcze*, Toruń 2012, *passim*.

most striking form, is the case law of the Court of Justice of the European Union (CJEU), which, relying on the objective of the Union, has become increasingly active and, consequently, increasingly unfavourable to the Member States. Evidence of this is found in the issue of the conflict between constitutional law and Union law, which for a long time remained unresolved. The courts of both sides (i.e. the Union and the Member States) exercised a form of mutual deterrence, meaning that neither court definitively settled the matter, thereby leaving an indeterminate space that, in a certain sense, satisfied both the national courts and the CJEU. Today, as we know, especially in the context of the so-called rule of law disputes, the CJEU has become increasingly decisive and unambiguous in asserting the primacy of Union law, even in relation to the constitutions of the Member States. It has done so by invoking, inter alia, the objective of the Union, namely its development and the deepening of cooperation, operating on the assumption that, without recognition of the primacy of the Treaties – including over national constitutions – the achievement of the Union's objectives would be significantly hindered, if not impossible. Another form of competence creep consists in the international agreements concluded by the Union with third countries and other subjects of international law, particularly in the economic sphere, which increasingly restrict the significance of the Member States, often rendering them merely the addressees and enforcers of treaty obligations. Competence creep is also manifested in the ever-growing body of EU soft law acts, which generate recommendations, standards, expectations, and guidelines addressed to the Member States. These are often observed to be complied with, mainly for political reasons, by the Member States, which wish to avoid Union ostracism and a lowering of their so-called EU rating – a rating that, incidentally, is itself neither clear nor based on transparent criteria and that also functions as a form of competence creep. Intuitively, this rating compels the Member States to adapt to the Union's model even in areas where no "hard" obligation exists, because this enhances a Member State's credibility within the Union and enables it to benefit from various financial support programmes. Finally, another form of competence creep is found in administrative practice and various political actions, which have acquired the label of so-called parallel integration. This takes the form of various Union guidelines and policies that progressively narrow the role of the Member States.

Decision-Making Outside the State

All forms of action whose *a priori* intention or *post factum* effect is the de facto modification of the Treaties beyond the Treaties themselves collectively constitute what is known as "covert integration" [21]. This phenomenon accelerates and centralizes the actions of the European Union and, through a feedback loop, generates pressure to amend the Treaties – ostensibly in the name of promoting the convergence of Union policy and law, which are increasingly diverging when one considers the factual and formal dimensions of integration. Competence creep is, therefore, an essential component of a much broader and more dangerous process of covert integration in areas that are formally reserved to the Member States – a process that takes place *outside the formal European political decision-making arena*[22].Until recently, the Member States had been the principal actors within this arena. However, for some time now, they have been increasingly ignored, with decision-making mechanisms being constructed in such a way as to marginalize, and even bypass, the Member States. The latter phenomenon has, indeed, been given a technical term: "state bypassing." State bypassing occurs wherever activity is expected not from the Member States themselves, but rather from other actors, such as local authorities, pressure groups, think tanks, and so forth. The concept of state bypassing—or decision-making beyond the state – aligns closely with the popular theory of multi-level governance[23]. It distinguishes between so-called state actors, represented by the governments of the Member States, and non-state actors[24]. Initially, the latter category consisted of the Union institutions themselves. However, over time, the number of actors involved in the process of multi-level governance has increased, with proposals being made to include, alongside the classical actors, additional entities – both in relation to state actors and to non-state actors. Within the former category are included actors

[21] Cf. A. Héritier, *Covert integration in the European Union*, [w:] *European Union. Power and policy-making*, ed. J. Richardson, S, Mazey, Lonon 2015, p. 351ff.

[22] Cf. L. Hooghe, G. Marks, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, „British Journal of Political Science" 2008, vol. 39, p. 1-39.

[23] For further discussion on this matter, see: J. Ruszkowski, *Teorie systemu politycznego Unii Europejskiej*, [w:] *Europeizacja. Mechanizmy, wymiary, efekty*, red. A. Pacześniak, R. Riedel, Oslo-Toruń-Wrocław 2010, p. 75ff.

[24] For further discussion on this matter, see: R. Gadbled, E. Muir, *Actors and Roles in EU Law: Asking 'Who Does What?' in the European Union Legal System*, „European Constitutional Law Review" 2022, vol. 18, nr 4, p. 621ff.

situated below the state level (*sub-state actors*)[25]. The aforementioned distinction—and, as a result, also the multiplication of actors – is closely linked to the belief in the growing role of so-called *unbundling of territoriality*, i.e., the emergence of new spheres of presence in the public space, including in decision-making processes, both outside and above the state, which results in the involvement of various relevant actors in these areas. Below the state, these actors include, inter alia: cities, regions, local institutions (both private and public), non-governmental organizations, lobbyists, political parties, interest groups, and courts (especially as they are endowed with the attribute of independence). At the *supra-state* level, actors include: international organizations, large corporations, euroregions, associations and other transnational organizations, European party families, and so-called Europarties. Of course, the contemporary trend towards state bypassing is not solely related to the sheer multiplication of actors engaged in the process of multi-level governance. It also results from the increasing involvement in this process of entities that exhibit an inherent tendency to bypass the state. These are primarily actors that, historically, culturally, legally, politically, and territorially, have little or no connection to the state. Such entities are particularly inclined to bypass the state in the European decision-making process, simultaneously perceiving decision-making outside and above the state as a modern form of governance, while governance within and with the state is considered an anachronism in an era of increasingly globalized relations. In this way, the role of the state in multi-level governance is devalued and delegitimized, being replaced by decision-making outside the state as a decidedly more modern, more democratic, and more effective alternative. For these reasons, it is observed that today, even actors that are paradoxically linked to the state in various ways are increasingly inclined to bypass it. These include local authorities, non-governmental organizations, various associations, business entities, and even political parties. Local authorities and NGOs, in particular, are increasingly eager to engage in European decision-making procedures that bypass the state–especially since they are increasingly financed from extra-state sources. This creates a mechanism that almost structurally separates these actors from the state, thereby deepening the process of

[25] Cf. M. Keating, L. Hooghe, M. Tatham, *Bypassing the nation-state? Regions and the EU policy proces*, [w:] *European Union: Power and policy-making*…, p. 445ff.

state bypassing. For these reasons, it must be concluded that the phenomenon of state bypassing is not a defect but a deliberately intended effect of the processes of deepening European integration. This means that, in the foreseeable future, it will undoubtedly continue to grow in scale.

The mechanisms collectively referred to as *ultra vires* actions – including competence creep and the various consequences of actions designed to bypass the state – constitute the reality of the European Union. This reality, with the Treaty provisions remaining unchanged, increasingly diverges from that to which the Member States originally agreed when they adopted the European Treaties in their final form. Hence, there arises a natural pressure to formally amend the Treaties to achieve convergence between the Treaties *in book* and the Treaties *in action*. This is all the more so given that the currently applicable Lisbon Treaty is, by the standards of the European Union, an exceptionally old document, which has not been amended for over fifteen years. Meanwhile, in the Union, the practice has traditionally been that, although practical actions always preceded de lege lata amendments to the Treaties, such amendments would relatively quickly follow in order to formalize them (e.g., the Maastricht Treaty, the Amsterdam Treaty, the Nice Treaty, or the Lisbon Treaty). Consequently, the practices historically present in the European Union were not as glaring as they are today. This, in turn, explains why research on the European Union and its political system is now so popular, if not fashionable – research that focuses on mechanisms that, in essence, amount to extra-treaty changes to the Treaties, namely, *ultra vires* actions, competence creep, and state bypassing. The open question remains whether such actions actually represent a reversal of integration or, on the contrary, a guarantee of its sustainability.

Summary

The article positively verifies the hypothesis included in the title, i.e. that *ultra vires* actions, creeping competences and so-called decision-making outside and above the state (states bypassing) introduce actual changes to the treaties in the European Union, even if they are not formally reflected. Introducing actual changes does indeed change the European Union, which sometimes – although not always – is only subsequently confirmed in the revision of the treaties that constitute primary law. Such

changes are a response to various situations, e.g. to turbulences in the functioning of the Union, to crises or other types of sudden and unforeseen events or finally to political calculations formulated by the leaders of the European Union. Therefore, the second hypothesis included in the introduction, according to which the Union is still a structure in the making, an unfinished and undefined structure, is also positively verified. It can be said that the European Union is a never-finished project, a project that is subject to permanent evolution, accommodation to the situation, but also to the expectations that politicians and citizens formulate for it. It is a structure whose study cannot be confined within the narrow framework of legal analysis, because the letter of the law itself does not answer the fundamental question about the functioning of the Union, its ability to respond to emerging expectations or, finally, to political, economic or social contexts, which always modify rigid normative regulations. Hence, it is not surprising that various research methods were used to verify research hypotheses, including dogmatic-legal, systemic, functional and historical analysis. There is no doubt that only the use of various methods will give a satisfactory effect of a heuristic approach to the problem of changes in the functioning of the European Union, which do not have their own, which are not reflected in the content of the treaties.

It should be noted that informal activities that in fact change the mechanisms of the functioning of the European Union have intensified recently. This is due to two factors. The first is the fact that since the entry into force of the Lisbon Treaty, i.e. since 2009, the Union has not amended its treaties, which is an exceptionally long time for the European Union without interference in the treaties. So far, changes to the treaties have been quite regular, as evidenced by the Maastricht Treaty, the Amsterdam Treaty and the Nice Treaty. The second factor is the multiplication of factual circumstances that encouraged actions that in fact modified the provisions of the treaties. The latter include: 1) the financial crisis of 2008 and its effects; 2) the so-called rule of law crisis, which evoked the issue of EU principles and values; 3) the migration crisis related to massive irregular migration to the European Union; 4) the war in Ukraine and the general, highly unstable international situation; 5) the ambitions of the European Union itself to play a more serious role in the international environment.

Bibliography

Alberts T., *The Future of Sovereignty in Multilevel Governance Europe – A Constructivist Reading*, „Journal of Common Market Studies" 2004, nr. 1.

Benz A., Zimmer Ch., *The EU's competences: The 'vertical' perspective on the multilevel system*, „Living Reviews in European Governance" 2010, vol. 5, nr 1.

Bermann G., *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, "Columbia Law Review" 1994, vol. 93.

Bober L., *Doktryna ultra vires – odwrócenie integracji czy gwarancja jej trwałości?*, „Paragraf. Studia z Prawa i Administracji" 2024, nr 4.

Cole M.D., Ukrow J., Eur L.L., Etteldorf Ch., *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, Saarbrücken 2020.

Czachór Z., *Od Traktatu o Unii Europejskiej z Maastricht do Konferencji w sprawie przyszłości Europy. Analiza procesu ciągłości i zmiany*, [w:] *Unia Europejska w turbulentnym świecie. 30 lat traktatu z Maastricht*, red. J.M. Fiszer, T. Stępniewski, Lublin – Warszawa 2022.

R. Gadbled R., Muir E., *Actors and Roles in EU Law: Asking 'Who Does What?' in the European Union Legal System*, „European Constitutional Law Review" 2022, vol. 18, nr 4.

Garben S., *Competence Creep*, „Journal of Common Market Studies" 2017, nr 1.

Garben S,, *Competence Creep Revisited*, „J*ournal of Common Market Studies"* 2019, nr 2.

Helios J., Jedlecka W., *Wykładnia prawa Unii Europejskiej ze stanowiska teorii prawa*, Wrocław 2018.

Héritier A., *Covert integration in the European Union*, [w:] *European Union. Power and policy-making*, ed. J. Richardson, S, Mazey, Lonon 2015.

Hooghe L., Marks G., *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, „British Journal of Political Science" 2008, vol. 39.

Keating M., Hooghe L., Tatham M., *Bypassing the nation-state? Regions and the EU policy process*, [in:] *European Union: Power and policy-making*, ed. J. Richardson, S. Mazey, New York 2015.

Kleine M., *Informal Governance in the European Union: How Governments Make International Organizations Work*, London 2013.

Klejnowski M., *Siła państw w Unii Europejskiej. Formalnoprawne wyznaczniki siły państw w Radzie UE i Radzie Europejskiej*, Toruń 2014.

Kovács K., *Constitutional or ethnocultural? National identity as a European legal concept*, "Intersections. East European Journal of Society and Politics" 2022, vol. 8, nr 1.

Ochmański J. W., *Spory o działania ultra vires w Unii Europejskiej*, Warszawa 2023.

Ruszkowski J., *Ponadnardowość w systemie politycznym Unii Europejskiej*, Warszawa 2010.

Ruszkowski J., *Pomijanie państw (states bypassing) w systemie wielopoziomowego zarządzania Unią Europejską*, [w:] *Państwo w Unii Europejskiej*, red. J. Ruszkowski, R. Podgórzańska, Szczecin 2017.

Ruszkowski J., *Teorie systemu politycznego Unii Europejskiej*, [w:] *Europeizacja. Mechanizmy, wymiary, efekty*, red. A. Pacześniak, R. Riedel, Oslo-Toruń-Wrocław 2010.

Sozański J., *Ogólne zasady prawa a wartości Unii Europejskiej (po traktacie lizbońskim). Studium prawnoporównawcze*, Toruń 2012.

Szymanek J., *Downplaying of the role of Member State: competence creep and state bypassing in decision making in the European Union*, [w:] *Between State Sovereignty and a European Federation*, ed. J. Szymanek, Warsaw 2023.

Weatherill S., *Competence Creep and Competence Control*, „Yearbook of European Law" 2004, nr 1.