DEVELOPMENTS IN EUROPEAN LAW

The First Ever Ultra Vires Judgment of the German Federal Constitutional Court: PSPP

Will the Barking Dog Bite More Than Once?

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Abstract

In May 2020, the German Federal Constitutional Court (FCC) delivered its judgment in the PSPP case. At first it seemed that it would be a remake of the Gauweiler/OMT case between the German Court and the CJEU. Shockingly, however, the German FCC decided that not only had the ECB acted ultra vires by failing to duly justify its PSPP decision, but it also found the CJEU to have delivered an incomprehensible and objectively arbitrary judgment by which the German Court was not bound. This case note not only traces the history of the PSPP proceedings, but it also tries to review the heavy criticism that the FCC's verdict has garnered. In the context of European integration and due to the German FCC's authority among supreme courts in Europe, it is a dangerous precedent, that the European Commission tries to curb through infringement proceedings. One can only hope that it will be settled for good and shall remain an unfortunate but singular incident.

Keywords: judicial dialogue, ultra vires, PSPP, German Federal Constitutional Court, infringement procedure.

1. Introduction

In May of last year, a verdict handed down by the German Federal Constitutional Court (*Bundesverfassungsgericht*, German FCC) in Karlsruhe caused a veritable legal earthquake. The Constitutional Court gave its first ever *ultra vires* ruling in matters of European law. The decision made headlines in national and international newspapers alike and before long, internet blogs[1] and scientific journals all across the continent were commenting on the decision.

Against the background of the *OMT/Gauweiler* proceedings, it came as a surprise, albeit not a big one, that the German Constitutional Court actually declared the PSPP program of the European Central Bank (ECB) to be *ultra vires*.

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1 *See*, among many, the blogposts of *Verfassungsblog*, at https://verfassungsblog.de/.

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What sent shockwaves through the legal landscape though was the fact that the German FCC held that the CJEU itself had acted *ultra vires* when it upheld the PSPP in its preliminary ruling.

Now that a year has passed and the dust has settled, the judgment and its effects may put into perspective. To this end, the present contribution not only presents and analyses the verdict, but also tries to take stock of the plethora of academic literature already published on this ruling.

2. The Prologue: The OMT/Gauweiler Case

The PSPP judgment was predated by a first procedure on an ECB asset purchase program, the *OMT/Gauweiler* case. As is well known, in September 2012 and following the famous "whatever it takes" statement made by then ECB President Mario Draghi, the ECB's Governing Council adopted the technical features of a program for conducting Outright Monetary Transactions (OMT), aimed at purchasing government bonds of selected Member States if and as long as these Member States simultaneously adhere to the reform measures agreed upon with the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM).

In Germany, constitutional complaints were lodged before the German FCC, claiming that the OMT program exceeded the limits of ECB competences conferred upon it by the Treaties. In essence, the claimants held that the ECB was conducting economic policy, which was beyond the scope of its mandate. By order of 14 January 2014,[2] the German FCC suspended the relevant proceedings and referred two questions to the CJEU for a preliminary ruling in accordance with Article 267(1) TFEU. The reference gained considerable attention, not only because of the questions asked, but also and in particular because it was the first ever reference to the CJEU by Germany's highest court.[3]

2 Cases 2 BvR 2728/13 *et al.*, Order of the Second Senate of 14 January 2014, ECLI:DE:BVerfG:2014:rs20140114.2bvr272813. Most decisions are available in English at the FCC's website at www.bundesverfassungsgericht.de/.

3 *See, inter alia*, Ingolf Pernice, 'A Difficult Partnership between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU', *Maastricht Journal of European and Comparative Law*, Vol. 21, Issue 1, 2014, pp. 3-13; and Mattias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference', *European Constitutional Law Review*, Vol. 10, Issue 2, 2014, pp. 263-307.

About a year and a half later, the CJEU ruled that a program like OMT (which was never put into place) was in conformity with European law.[4] With the *Gauweiler/OMT* judgment, the CJEU delivered a teleological interpretation of Article 123(1) TFEU and established specific requirements for asset purchase programs in order to avoid prohibited budgetary funding.[5] It underlined, however, that when the ECB purchases government bonds on the secondary market, sufficient safeguards must be established to ensure that the ECB's intervention does not infringe or circumvent the prohibition of monetary financing laid down in Article 123(1) TFEU. Moreover, the measures undertaken in the context of such an asset purchase program must be proportionate to the objectives of monetary policy in accordance with Articles 119(2) and 127(1) TFEU. Finally, any such program must not be designed in a way that would lessen the impetus for Member States to follow a sound budgetary discipline.

Another year later the German FCC handed down its final ruling.[6] It acknowledged the CJEU's judgment and regarded an asset purchasing program in conformity with the German Constitution (meaning that the German *Bundesbank* may participate in the implementation of such a program) if and to the extent that the prerequisites defined by the CJEU are met; *i.e*. if *(i)* purchases are not announced; *(ii)* the volume of the purchases is limited from the outset; *(iii)* there is a minimum period between the issuing of the government bonds and their purchase by the ECB that is defined from the outset and prevents the issuing conditions from being distorted; *(iv)* only government bonds of Member States are purchased that have bond market access enabling the funding of such bonds; *(v)* purchased bonds are held until maturity only in exceptional cases, and 6) purchases are restricted or ceased and purchased bonds are remarketed should

4 Judgment (Grand Chamber) of 16 June 2015, *Case C-62/14, Gauweiler*, ECLI:EU:C:2015:400. *See*, among the many comments, *inter alia*, Georgios Anagnostaras, 'In ECB We Trust… the FCC We Dare! The OMT Preliminary Ruling', *European Law Review*, 2015/5, pp. 744-762; Francesco Martucci, 'La Cour de justice face à la politique monétaire en temps de crise de dettes souveraines: L'arrêt Gauweiler entre droit et marché', *Cahiers de droit européen*, Vol. 51, Issue 2-3, 2015, pp. 493-534; Vestert Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler', *Common Market Law Review*, Vol. 53, Issue 1, 2016, pp. 139-196; Takis Tridimas & Napoleon Xanthoulis, 'A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict', *Maastricht Journal of European and Comparative Law*, Vol. 23, Issue 1, 2016, pp. 17-39.

5 *Cf*. Patrick Sikora, 'PSPP auf dem Prüfstand: Das Weiss-Urteil des EuGH', *Europäisches Wirtschafts- und Steuerrecht*, 2019/3, p. 141.

6 Cases 2 BvR 2728/13 *et al*., Judgment of the Second Senate of 21 June 2016, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813. *See* on this decision, *inter alia*, Sven Kaufmann, 'Le Bundesverfassungsgericht et les limites à la primauté du droit de l'Union. Confrontation ou complémentarité dans l'intégration européenne?', *Revue trimestrielle de droit européen*, Vol. 53, Issue 1, 2017, pp. 59-73; Mehrdad Payandeh, 'The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court Within the European Constitutional Architecture', *European Constitutional Law Review*, Vol. 13, Issue 2, 2017, pp. 400-416; Lorenzo Federico Pace, 'The OMT case, the "intergovernmental drift" of the Eurozone crisis and the (inevitable) rectification of the BVerfG jurisprudence in light of the ECJ's Gauweiler judgment', *Il diritto dell'Unione Europea*, 2017/1, pp. 153-170; Robert Böttner, 'Rechtmäßigkeit des Ankaufs von Staatsanleihen durch die EZB im OMT-Programm', *Zeitschrift für das Juristische Studium*, 2016/6, pp. 776-780.

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continuing the intervention become unnecessary. The German FCC thus toned down its evaluation of the OMT program as outlined in its reference for a preliminary ruling.[7]

Furthermore, it underlined that the execution of the European integration agenda comes with several drops in influence (Einflussknicke) that may lower the level of the democratic legitimation of European public authorities' acts, for example with regard to the ECB's independence (Article 130 TFEU), but that other strands of legitimation at the supranational level take the particularities of this level into account. However, the *Bundesverfassungsgericht* pointed out that a strict delimitation of competences as enshrined in the principle of conferral (Article 5 TEU) is indispensable for safeguarding the citizens' "right to democracy" that flows from their right to vote [Article 38(1) and (2) of the Basic Law]. It is the task of the German FCC, by way of its *ultra vires review*, to control that acts of the Union do not amount to *de facto* treaty amendments when they transgress the limits of conferred competences, to prevent a violation of the principle of sovereignty of the German people. This is the case when the transgression of competence is "manifest" and "of considerable weight". In its judgment on the banking union, the German FCC added that the assumption of a manifest excess of competence does not presuppose that no different legal opinions are held on this issue. The fact that voices in academic literature, in politics or in the media attest to the harmlessness of a measure does not in principle prevent a finding of an obvious exceeding of competence. "Obvious" exceeding of competence may also be the case if it is the result of a careful and detailed reasoned interpretation.[8]

The German FCC reiterated that the CJEU must be given the opportunity to hand down a preliminary ruling before the national court could determine an *ultra vires* act. In doing so, the German FCC must take into account the Union-specific methods of interpretation that have been developed by the CJEU. It is not the task of the German FCC to replace the interpretation of the CJEU with its own, as long as they are handled in a methodologically correct manner within the usual bounds of legal debate; the CJEU has a "right to tolerance of error" and to judicial development of the law as long as it applies recognized methodological principles and does not proceed in a way that is objectively arbitrary.[9]

7 *Cf*. Sikora 2019, p. 141.

8 *See* Cases 2 BvR 1685/14 *et al*., Judgment of the Second Senate of 30 July 2019, ECLI:DE:BVerfG:2019:rs20190730.2bvr168514, para. 152 (my translation).

9 *See also* id. para. 151: An exceeding of competences exists "if – when applying established methodological standards – a competence for the contested measure cannot be demonstrated under any legal point of view […]. In relation to the CJEU, it is also informed by the differences in the mandate to be fulfilled and the standards to be applied by the Federal Constitutional Court on the one hand and the CJEU on the other. In this respect, it must also be taken into account that the CJEU must be granted a certain margin of error […]. This margin is covered by the mandate conferred in Art. 19(1) second sentence TEU and is only exceeded when an interpretation of the Treaties is not comprehensible and must thus be considered objectively arbitrary."

3. The Main Story: The PSPP Proceedings

3.1. Factual (and Legal) Background

Even before the judgment in the *OMT* case was handed down, a new asset purchasing program was established by the ECB: the Public Sector Asset Purchase Program (PSPP) as one of four sub-programs of the extensive Expanded Asset Purchase Program (EAPP) announced by the ECB on 22 January 2015,[10] an instrument of so called "quantitative easing" (QE). Until the end of 2018, a total of around 2.1 trillion euros worth in government bonds was purchased under this program. Of the eligible marketable debt securities, 10% were to be purchased in securities issued by eligible international organizations and multilateral development banks, and 90% were to be purchased in securities issued by eligible central, regional or local governments and recognized agencies or public non-financial corporations. The national central banks' share was 90%, and the remaining 10% were to be purchased by the ECB. The distribution of purchases across jurisdictions was in accordance with the key for subscription of the ECB's capital as referred to in Article 29 of the ESCB Statute.[11] The PSPP was designed within the framework of monetary policy to counteract deflation and increase inflation to the target value of "price stability" (*i.e*. inflation rate below, but close to 2%). This was to serve the underlying monetary policy objective of increasing liquidity on the interbank market and of credit to the euro area economy.[12] In essence, the asset purchase program (*cf*. Article 18.1 of the ESCB Statute) was intended to secure an appropriate monetary policy transmission, which is recognized as a legitimate goal of monetary policy.[13]

Several constitutional complaints were initiated before the German FCC against the PSPP. In essence, the complainants argued that by launching the PSPP the European System of Central Banks violated the prohibition of monetary financing laid down in Article 123 TFEU and the principle of conferral of Article 5 TEU in conjunction with Articles 119 and 127 *et seq*. TFEU. As a result, the German Federal Government and the German *Bundestag* violated the complainants' constitutional rights by not taking the necessary steps to ensure the non-implementation of the PSPP. Moreover, in case of default of government bonds purchased by the national central banks, it is possible that the ESCB decides to share these losses (*cf*. Article 32.4 of the ESCB Statute), which in turn could make the recapitalization of the German National Bank (*Bundesbank*) necessary. As a consequence, the *Bundestag* could be impaired in its right to decide on the national budget on its own authority due to decisions made by third parties. It would amount to a violation of the German constitutional identity

10 ECB Decision (EU) 2015/774 of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), repealed and replaced by ECB Decision (EU) 2020/188 of 3 February 2020 on a secondary markets public sector asset purchase programme (ECB/2020/9).

11 *See* Article 6 of the amended ECB Decision (EU) 2015/774.

12 *See* Recital 4 of the ECB Decision (EU) 2015/774.

13 *See also* the summary of the program by Mark Dawson & Ana Bobić, 'Quantitative Easing at the Court of Justice – Doing Whatever It Takes to Save the Euro: Weiss and Others', *Common Market Law Review*, Vol. 56, Issue 4, 2019, p. 1006.

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[Article 79(3) of the Basic Law] if such a system of risk sharing was not precluded under primary law.

To be precise, the constitutional complaints only indirectly challenged the PSPP. From the point of view of German constitutional law, they were directed against the Federal Government and the Parliament. Legal standing in the context of constitutional complaints is based on Article 38(1) of the Basic Law,[14] which enshrines the citizens' right to vote in elections to the German *Bundestag*. It guarantees democratic legitimation of public power and aims to protect against measures outside an uninterrupted chain of legitimation. This right to democratic self-determination also applies with regard to European integration and protects against a (manifest and structurally significant) exceeding of competences on the part of the Union and its bodies. If Union bodies act outside the scope of their conferred powers, they act outside the German Act of Assent to the European Treaties conferring these powers upon the Union and are thus not democratically legitimized (*ultra vires*). The Federal Government and the *Bundestag* are required by the principle of democracy to act in accordance with their responsibility for integration and to act towards compliance with the principle of conferred powers. In a nutshell:

> "It is only admissible to challenge acts of secondary or tertiary EU law by means of a constitutional complaint for the purposes of asserting that German constitutional bodies violated their responsibility with regard to European integration (Integrationsverantwortung) either by implementing such acts or, subsequently, by failing to actively take steps to ensure that conformity with the European integration agenda (Integrationsprogramm) is (re-)established."[15]

3.2. The Bundesverfassungsgericht's Reference for a Preliminary Ruling

As in the *OMT* case, the *Bundesverfassungsgericht* decided to submit another set of questions for a preliminary ruling.[16] It is immediately noticeable that the referral (unlike in the *OMT* proceedings, where the FCC rather 'dictated' its findings[17]) is much more fact-oriented and formulated as a balanced request for judicial dialogue.[18]

14 *See* Philip M. Bender, 'Ambivalenz der Offensichtlichkeit: Zugleich Anmerkung zur Entscheidung des BVerfGs vom 5. Mai 2020', *Zeitschrift für europarechtliche Studien*, Vol. 23, Issue 3, 2020, p. 412.

15 Cases 2 BvR 1685/14 *et al*., Judgment of the Second Senate of 30 July 2019, ECLI:DE:BVerfG:2019:rs20190730.2bvr168514, para. 102.

16 Cases 2 BvR 859/15 *et al*., Order of the Second Senate of 18 July 2017, ECLI:DE:BVerfG:2017:rs20170718.2bvr085915. *See* in detail Andrej Lang, 'Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP Case', *Common Market Law Review*, Vol. 55, Issue 3, 2018, pp. 923-951.

17 *Cf*. Franz C Mayer, 'Rebels Without a Cause? Zur OMT-Vorlage des Bundesverfassungsgerichts', *Europarecht*, 2014/5, p. 482.

18 Sikora 2019, p. 142; Annelieke Mooij, 'The Weiss Judgment: The Court's Further Clarification of the ECB's Legal Framework', *Maastricht Journal of European and Comparative Law*, Vol. 26, Issue 3, 2019, p. 452; Lang 2018, p. 934.

Several aspects justified a new referral. First of all, the German FCC and several experts held that the PSPP is different from the OMT program and therefore, the CJEU did not exhaustively answer the questions surrounding such an asset purchase program. In fact, the OMT was restricted to ESM program States (conditionality, selectivity, parallelism), and additional liquidity in the OMT was to be sterilized through other monetary instruments (which is inherently excluded under quantitative easing).[19] Secondly, from a European law perspective, only the CJEU can rule on the *invalidity* of acts of European institutions, bodies, offices and agencies, either by way of an action for annulment or a preliminary ruling. This holds true even (thirdly) from the perspective of German constitutional law.

The German FCC found that the PSPP violated Article 123(1) TFEU, which prohibits monetary financing from Member State budgets, and exceeded the ECB's monetary policy mandate from Article 127(1) and (2) TFEU as well as Articles 17 *et seq*. of the ESCB Statute because the program's economic policy effects are at least equal to the monetary policy objectives. In essence, the *Bundesverfassungsgericht* argues that *(i)* the program provided not a legal, but a *de facto* certainty regarding the purchase of government bonds by the Eurosystem; *(ii)* it is not possible to ascertain whether a sufficient minimum waiting period elapses between the issuing of the bonds and the purchase on the secondary market, which is necessary fora veritable market price to take shape; *(iii)* all bonds are *de facto* held until maturity, even though this is only allowed as an exception; this would make these sovereign debts irrelevant to the market and thus distort Member States' refinancing conditions; and *(iv)* it is possible, in principle, to purchase bonds with a negative yield at maturity, thereby not only lending money, but effectively also giving money to the issuing State.

Therefore, while formally government bonds are purchased on the secondary market, the PSPP would turn it, in practice, into action with *an equivalent effect to the direct purchase of government bonds from the Member States, thereby undermining the effectiveness of and even circumventing the objectives pursued by Article 123(1) TFEU*. Buyers on the primary market would turn into intermediaries for the ESCB for the direct purchase of government bonds. The FCC concluded that the PSPP is (also) an economic policy instrument. While the ESCB and the ECB have the competence to *support* the general economic policy of the EU, provided that this does not interfere with their primary (monetary policy) objective of maintaining price stability [Article 127(1) TFEU], in the FCC's view *the foreseeability and the volume of the PSPP create economic policy effects that are disproportionate and outweigh their monetary policy character*. Lastly, the FCC holds that the legal framework underlying the PSPP lacks comprehensible reasons that would allow for the close monitoring of the (continued) necessity of the program.

The last question referred to the CJEU concerned *risk sharing within the ESCB*. The Federal Republic of Germany is constitutionally required to ensure the functioning and the financing in the event of insufficient or even negative net equity (institutional liability, Anstaltslast) of its national central bank. The ECB

19 *Cf*. Sikora 2019, p. 140. On the differences *see also* Mooij 2019, p. 460.

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has argued that no risk sharing applies in respect of securities of national issuers that are purchased by the national central banks (80% of the purchased bonds), a limited risk sharing applies in respect of securities of national issuers that are purchased by the ECB (10% of the purchased bonds), and a full risk sharing in accordance with the relevant capital key applies only in respect of bonds issued by international issuers and purchased under the PSPP (10% of the purchased bonds). The German FCC argued that there is no legal guarantee prohibiting an extension of risk sharing for bonds purchased by national central banks from national issuers. It would amount to a *violation of* Articles 123 and 125 TFEU as well as Article 4(2) TEU and, as a consequence, *Germany's constitutional identity* [Article 79(3) of the Basic Law] if it became necessary to provide recapitalization for the national central banks through budgetary resources to an extent that approval by the German Bundestag would be required, thus affecting the overall budgetary responsibility of the German Parliament.

3.3. Judgment of the CJEU

Another two months later, on 11 December 2018, the CJEU, basically following the AG's opinion,[20] delivered its judgment in the case.[21] First, the CJEU explained that *the PSPP was duly justified*.[22] It argued that, in accordance with its case-law, justification in the sense of Article 296(2) TFEU not only covers the wording of the measure (including the considerations in the published act), but also the context and the whole body of legal rules governing the matter in question.[23] Against this background, the ECB has given sufficient reason for the PSPP in press conferences, minutes of meetings and various publications and reports depicting the economic and monetary background of the measures taken. Moreover, these documents show that the ECB has taken into account the potential side effects and possible impact of PSPP on budgetary decisions of the Member States.[24] Taking into consideration the ECB's primary-law based independence, the CJEU engages in a process-oriented review where the ECB's operational discretion is accompanied by a close review of the procedure and justifications leading to the PSPP.[25]

The CJEU also considers *the PSPP as a measure of monetary policy*. The CJEU reiterates that a measure must be assessed in accordance with the objectives pursued and the instruments used in order to determine whether it is monetary or economic policy. Furthermore, the CJEU underlines that there can be no absolute separation between economic and monetary policies, which was not the intention of the authors of the Treaties.[26] In contrast to the German FCC, the

20 Opinion of Advocate General Wathelet delivered on 4 October 2018, *Case C-493/17, Weiss and others*, ECLI:EU:C:2018:815.

21 Judgment of 11 December 2018 (Grand Chamber), *Case C-493/17, Weiss and others*, ECLI:EU:C:2018:1000.

22 Id. para. 42.

23 Id. para. 33 with further reference.

24 Id. para. 38.

25 Dawson & Bobić 2019, p. 1031.

26 *Case C-493/17, Weiss and others*, para. 60.

CJEU holds that even if (economic) effects of a measure were knowingly accepted and definitely foreseeable from the outset, they can still be regarded as "indirect effects" that have no consequences for the characterization of a measure as economic or monetary policy.[27] Otherwise the ESCB would be prevented from using the means that the Treaties provide for the attainment of monetary policy objectives and might even represent and insurmountable obstacle for accomplishing its tasks, especially in times of crises. The AG added in his opinion that "indirect" economic effects that a monetary policy measure can and may produce are not to be confused with "limited", "ancillary" or "marginal" effects.[28] Instead, as the ESCB may support the EU's economic policy, the only limitation on that support is not to undermine the monetary policy objective of maintaining price stability. "Indirect" effects, therefore, can be quite direct, so long as they are not primary. The CJEU also deals in much detail with the question of the PSPP's proportionality[29] and concludes that the program is appropriate to achieve the objective of maintaining price stability and does not manifestly go beyond what is necessary to achieve that objective. The safeguards included in the PSPP (subsidiarity of PSPP within the APP, purchases distributed across all euro area states, limited risk sharing) limit its impact in terms of economic policy and guarantees that the program does not, principally, pursue economic policy objectives.

Concerning the predictability of the ESCB's purchasing practice (thereby rendering the PSPP equivalent to a (prohibited) primary market intervention),[30] the CJEU found that operators cannot know for certain if, when, and to what extent the ESCB would buy government bonds under the PSPP. It held that the constant evaluation and adjustment of the program by the ECB's Governing Council, the subsidiarity to other APP programs, the absence of selectivity, the maximum limits on purchases (which are *no obligation to purchase*), the blackout period (which is monitored by the ESCB's risk management committee in order to ensure the forming of market prices) and the monitored disclosure of information constitute *sufficient guarantees to ensure that government bonds are purchased on the secondary market without these purchases being equivalent to direct purchases* due to certainty on the part of the operators. Constantly evaluating and adjusting the program to what is necessary preserves the temporary nature of the program. The level of predictability is therefore negligible and does not reduce the States' impetus to conduct a sound budgetary policy.[31]

27 Id. paras. 62 *et seq*.; For Dawson & Bobić 2019, p. 1019, "*the most direct effects of the programme are precisely its economic effects*, with a general raising of prices (and therefore a meeting of the inflation target) constituting an *indirect* consequence of a broader easing of economic conditions and the general money supply" (emphasis in the original).

28 *Case C-493/17, AG Opinion*, para. 113.

29 *Case C-493/17, Weiss and others*, paras. 71 *et seq*. For a critical view on the proportionality review *see* Dawson & Bobić 2019, pp. 1022 *et seq*.

30 *Case C-493/17, Weiss and others*, paras. 109 *et seq*.

31 Id. paras. 129 *et seq*.

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Holding bonds until maturity and/or with a negative yield does not constitute a problem for the Court either.[32] The former is a possibility and is in no way precluded by Article 18 of the ESCB Statute, so long as it meets the objectives of the program in question. On the contrary, the fact that the ESCB has the option of selling purchased bonds at any time helps ensure a sound budgetary policy. As regards the purchase of bonds with a negative yield, the CJEU found that these operations are not excluded by Article 18 of the Statute. It furthermore points out that bonds with a negative yield can be issued only by States whose financial situation is assessed positively by operators in the market. Moreover, the AG argued that excluding bonds with a negative yield from purchases under the PSPP would run counter to the principle of market neutrality.[33]

Finally, the CJEU threw out the final question regarding risk sharing. In line with several written observations submitted in the case, it argues that, *(i)* firstly, there is currently no system of unlimited risk sharing installed by the PSPP Decision. *(ii)* Secondly, there has been a sustained intention on the part of the ECB to strictly limit loss sharing. *(iii)* Thirdly, even if such a system were established, it is uncertain whether recapitalization of national central banks by national budget funds would be necessary. Therefore, in the CJEU's view, the question is hypothetical and thus inadmissible.[34]

All in all, the CJEU's decision did not come as a surprise. The CJEU relied on its previous case-law, especially the *Gauweiler/OMT* decision,[35] and found that *the PSPP does not violate European law*. It confirmed and supported the ECB's wide margin of discretion due to the technical nature of their decisions and its guaranteed independence, resulting in a limited judicial reviewability of its acts. Most authors agreed with the verdict.[36] Some authors criticized that the CJEU rejected the fifth question as inadmissible and considered this as "provoking an

32 Id. paras. 145 *et seq*.

33 *Case C-493/17, AG Opinion*, para. 74.

34 *Case C-493/17, Weiss and others*, paras. 159 *et seq*.

35 In fact, as Corinna Dornacher, 'Schlusskapitel oder Zwischenakt? Anmerkung zum Urteil des EuGH v. 11.12.2018, Rs. C-493/17 (Weiss u. a.)', *Europarecht*, Vol. 54, Issue 5, 2019, p. 547. points out, the CJEU refers no less than 36 times to the *Gauweiler/OMT* case. Mooij 2019, p. 452. points to the fact that the rapporteur (L. Bay Larsen) was the same in both cases.

36 *See*, among others, Sikora 2019; with a critical view on the aspect of the "predictability" of ESCB purchases Peter-Christian Müller-Graff, 'Bank- und Kapitalmarktrecht: Anleihenkaufprogramm der EZB zulässig', *Europäische Zeitschrift für Wirtschaftsrecht*, 2019, pp. 172-173; Dornacher 2019.

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escalation"[37] and, in view of the CJEU's case-law, this may in fact raise an eyebrow.[38]

3.4. Final Judgment of the Bundesverfassungsgericht

Comments on the CJEU's decision giving prospect on the FCC's final verdict mostly did not expect what happened on 5 May 2020:[39] the German Constitutional Court not only ruled that *the PSPP was ultra vires and thus unconstitutional* (with regard to German law), but it also decided that *the ruling handed down by the CJEU was also an ultra vires act because it was methodologically flawed*.

The FCC, following its earlier case-law and based on the individuals' right to vote, set out to explain that any transfer of competences to the EU must meet democratic standards. This includes that the EU must not have the power to decide on its own competences (no *Kompetenz-Kompetenz*)[40] and the German Parliament must not be deprived of its substantive leeway to take decision and shape policy, especially in the form of its budgetary powers,[41] as this would result in a loss in substance of the sovereign power afforded to German citizens. The Federal Government and the Parliament are called upon to monitor compliance with the European integration agenda and to take the necessary steps to prevent or reverse any transgression of competences and restore accordance of the exercise of public power with their legal bases.

The FCC reiterates that it is the CJEU's task to decide on the validity of Union acts, for otherwise, if national courts could readily invoke this authority, this could undermine the primacy of application of EU law and jeopardize its uniform application. However, the FCC underlines, *national courts must preserve the right to an ultra vires review in order to monitor, in exceptional cases*, that the EU does not adopt a legal interpretation that would amount to an amendment of the Treaties or an expansion of the EU's competences. As *the Member States remain the 'Masters of the Treaties'*, "certain tensions are thus inherent in the design of the EU", which must be resolved "through mutual respect and understanding".[42]

37 Matthias Ruffert, 'Europarecht: Anleihekäufe der EZB: Die massiven Käufe von Staatsanleihen durch das ESZB seit Januar 2015 sind unionsrechtskonform', *Juristische Schulung* 2019, p. 182; Sikora 2019, p. 145; Dornacher 2019, p. 549. refers to it (less dramatically) a "missed opportunity" for judicial dialogue. Mooij 2019, p. 464. agrees with the hypothetical nature of the question, but states that the CJEU could have used the opportunity to provide guidance as to what extent a "silent bailout" under TARGET2 is acceptable.

38 In Judgment of 22 November 1978, *Case C-93/78, Mattheus*, ECLI:EU:C:1978:206, para. 8, and Judgment of 16 July 1992, *Case C-343/90, Lourenço Dias*, ECLI:EU:C:1992:327, para. 18, the CJEU held that it cannot give a ruling on a matter which relates to measures not yet adopted by the Union institutions. In *Gauweiler* (para. 27.); on the other hand, the CJEU admitted hypothetical questions (OMT was in essence only announced in a press release and lacked implementing measures) because these were admissible in the main proceedings before the referring court.

39 Cases 2 BvR 859/15 *et al*., Judgment of the Second Senate of 5 May 2020, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

40 Id. para. 102.

41 Id. para. 103.

42 Id. para. 111.

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The German FCC goes on to prepare its frontal assault against the CJEU: the methodological standards recognized by the CJEU for the development of the law are based on constitutional legal traditions common to the Member States and the application of the methods and principles by the CJEU cannot and need not completely correspond to the practice of domestic courts. The CJEU is granted a certain margin of error and the FCC must respect the methodologically correct verdict of the CJEU even against weighty arguments. However, *the CJEU exceeds its mandate where "traditional European methods of interpretation" and "general legal principles that are common to the laws of the Member States are manifestly disregarded."* If a decision amounts to a manifest exceeding of competences, it lacks the minimum democratic legitimation required under the German constitution.[43] The interpretation given by the CJEU, the FCC continues, "is simply not comprehensible and thus objectively arbitrary" because it manifestly failed to give consideration to the importance and scope of the principle of proportionality and completely disregarded the effects of the PSPP when determining whether is it monetary or economic policy.[44] This approach by the CJEU "essentially renders meaningless the principle of conferral".[45]

The FCC held that the CJEU *accepted the information given by the ECB as fact without further scrutiny* and without regard to the foreseeable and/or intended economic and fiscal consequences when determining the PSPP's economic or monetary policy nature. In doing so, the CJEU allowed the ESCB to decide autonomously on their own competences. As a result, the FCC continued, the CJEU allows asset purchase programs "even in cases where the purported monetary policy objective is possibly only invoked to disguise what essentially constitutes an economic and fiscal policy agenda." Instead, the CJEU "completely disregarded" the economic policy effects of the PSPP and therefore the proportionality review cannot fulfil its purpose of balancing conflicting interests.[46]

The FCC admitted that the ECB enjoys a margin of appreciation as regards the assessment and appraisal of the consequences of its actions and the weighing of such consequences in relation to the objectives pursued by the asset purchase program. However, the FCC held, the CJEU's interpretation is flawed in that the Contracting Parties did not intend to make an absolute distinction between monetary and economic policy because they belong to two different types of categories of competences (exclusive *versus* supporting). As the ECB and the national central banks enjoy independence, they have a diminished level of democratic legitimation. Therefore, adherence to the limits of conferred competences by the ECB must be subject to full judicial review. Disregarding economic policy effects of a monetary policy measure is incompatible with a restrictive interpretation.[47] This "contradicts the methodological approach taken

43 Id. para. 112.
44 Id. para. 118.
45 Id. para. 123.
46 Id. paras. 136, 138 *et seq*.
47 Id. paras. 141 and 143.

by the CJEU in virtually all other areas of EU law", the FCC continued, referring to CJEU case-law concerning, *inter alia*, fundamental rights and fundamental freedoms.[48]

As a consequence of the finding that *the CJEU acted ultra vires*, the FCC found that it cannot rely on the judgment given in the preliminary ruling procedure but instead must conduct its own review to decide on the preliminary questions. The German FCC concluded that due to the lack of sufficient proportionality considerations, the PSPP is neither covered by the monetary policy competence of the ECB [Article 127(1) first sentence TFEU] nor by its merely supporting competence regarding the Member States' economic policies [Article 127(1) second sentence TFEU]. The program must constitute a suitable and necessary means for achieving the aim pursued and the program's monetary policy objective and its economic policy effects must be identified, weighed and balanced against one another. While the FCC held that the PSPP's monetary policy objective is in principle not (yet) objectionable, the ECB manifestly disregarded the principle of proportionality by pursuing that objective unconditionally while ignoring the economic policy effects resulting from the program. More precisely, the ECB failed to show a balancing in its decision and to state the reasons informing such balancing (*Abwägungs- und Darlegungsausfall*).[49] Therefore, the FCC arrived at the conclusion that *the actions of the ECB constitute an ultra vires act*.[50]

On the other hand, the FCC did not strike down the CJEU's finding that *the PSPP does not violate Article 123(1) TFEU*. On the condition that the safeguards established by the CJEU are strictly observed, the PSPP does not circumvent the prohibition of monetary financing.[51] While in the FCC's view the application of some of the criteria give rise to "considerable concerns", an overall balancing leads to the conclusion that *a manifest violation of Article 123(1) TFEU is not ascertainable*. This is not put into question by the purchase under the PSPP of government bonds with a negative yield to maturity.[52] Nevertheless, in order to conduct an effective judicial review of any instruments of the ESCB for which it enjoys broad discretion, sufficient information on the program and its aspects must be given either in advance or *ex post*. If information in advance is not possible without undermining the effectiveness of the PSPP, any relevant information on past operations must be given (so long as this does not provide insights into future operations) in order to meet the requirement under Article 296(2) TFEU that a statement of reasons for any measure (be it *ex ante* or *ex post*) must enable the persons concerned to ascertain the reasons for the measure and to enable the CJEU to exercise its power of review.[53]

As a result of the *ultra vires* finding, the FCC ordered the Federal Government and the Bundestag to take steps seeking to ensure that the ECB conducts a

48 Id. paras. 146 *et seq*.
49 Id. para. 177.
50 Id. paras. 164 *et seq*.
51 Id. paras. 180 *et seq*.
52 In this context, the FCC even agrees with the CJEU's finding on the inadmissibility of the fifth preliminary question on the risk-sharing because it was too hypothetical. *See* Id. paras. 222 *et seq*.
53 Id. para. 189.

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proportionality assessment in relation to the PSPP within a transitional period of three months. Within that timeframe, *the ECB Governing Council needs to adopt a new decision* that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the program. Following that period, and in the event that the concerns voiced by the FCC are not taken account of, the PSPP would continue to be an *ultra vires* act and would not partake in the precedence of application of EU law (*Anwendungsvorrang*). As a result, the ultra vires act is not to be applied in Germany and has no binding effect in relation to German constitutional bodies, administrative authorities and courts. The Bundesbank would thus no longer be allowed to participate in the implementation and execution of the PSPP, neither by carrying out any further purchases of bonds, nor by contributing to another increase of the monthly purchase volume.[54]

4. Analysis / Comment

It is not quite clear how the German FCC reached its verdict, but sound legal reasoning does not appear to be the main aspect. From the point of view of German constitutional law, the FCC found that the Federal Government and the *Bundestag* violated the constitution because they did not prevent or act against a usurpation of competences on the part of the EU. The FCC rejected those complaints that were directed against the PSPP (and the CJEU's judgment) directly, as those acts are not acts of national public authority and can thus not be subject of a constitutional complaint. Nevertheless, the infringement by the German State bodies was based on the (indirect) finding that the EU (through the ECB and the CJEU) acted outside the scope of its conferred competences (*ultra vires*). However, the German decision was in no way without a (better) alternative. In terms of the cooperative relationship with the CJEU, the German FCC could have obliged the Federal Government and the *Bundesbank* to monitor the risk, to counteract any increase in risk at the European level and, in the event of an overruling, to bring an action for annulment. In (foreseeable) later proceedings, the *ultra vires* card may have been used as *ultima ratio*.[55]

To be clear, the German decision was not the first to declare an act of the Union's institutions inapplicable in the national legal order. The French *Conseil*

54 Id. paras. 232 and 234.
55 *Cf.* Sikora 2019, p. 145.

d'État,[56] the Danish *Højesteret*[57] and the Czech *Ústavní soud*[58] already refused to follow certain CJEU judgments. In these cases, however, *the national courts did not replace the CJEU's assessment with their own, as did now the Bundesverfassungsgericht*. The other cases were concerned with the interpretation of national law in light of EU law, whereas the PSPP ruling dealt with the validity of an act taken by the ECB.[59] The German FCC's *ultra vires* ruling carries political and legal dynamite because of the authority of the German FCC among constitutional and supreme courts in Europe and the reservations to European law that other Member States' highest courts had already developed. It has been predicted that this ruling will encourage Eurosceptic states and their highest courts to refuse allegiance to CJEU rulings more easily. This is all the more dangerous because the German FCC did not take recourse to some very specific element of Germany's constitutional identity, but instead to the meta-principle of proportionality, thus opening Pandora's box to making nearly any European act reviewable before a national supreme or constitutional court.[60]

While few authors praised the German FCC's decision as logical, dogmatically convincing, an important red line and by no means surprising,[61] it was criticized by the majority of scholars. It reveals *the 'fundamental paradox' of the EU as a*

56 Conseil d'Etat (Assemblée) of 22 December 1978, Case No. 11604 – *Cohn-Bendit*; *see* on this Gerhard Bebr, 'The Rambling Ghost of "Cohn-Bendit": Acte Claire and the Court of Justice', *Common Market Law Review*, Vol. 20, Issue 3, 1983, pp. 439-472. This case-law has been formally abandoned by the judgment of the Conseil d'État (Assemblée) of 30 October 2009, Case No. 298348 – *Mme Perreux*; *see* on this Claus D. Classen, 'Der Conseil d'État auf Europakurs', *Europarecht*, Vol. 45, Issue 4, 2010, pp. 557-563; and Dominique Ritleng, 'L'arrêt Perreux, ou, La fin de l'exception française', *Revue trimestrielle de droit européen*, 2010/1, p. 223.

57 Danish Supreme Court (*Højesteret*), judgment of 6 December 2016, Case 15/2014 – *Ajos*; *see* Rass Holdgaard *et al*., 'From Cooperation to Collision: the ECJ's Ajos Ruling and the Danish Supreme Court's Refusal to Comply', *Common Market Law Review*, Vol. 55, Issue 1, 2018, pp. 17-53; Ulla Neergaard & Karsten Engsig Sørensen, 'Activist Infighting Among Courts and Breakdown of Mutual Trust?: The Danish Supreme Court, the CJEU, and the Ajos Case', *Yearbook of European law*, Vol. 36, 2017, pp. 275-313; Mikael Rask Madsen *et al*., 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation', *European Law Journal*, Vol. 23, Issue 1-2, 2017, pp. 140-150.

58 Czech Constitutional Court (*Ústavní soud*), judgment of 31 January 2012, Case No. Pl. Ús 5/12 – *Landtová*; *see* Jan Komárek, 'Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires', *European Constitutional Law Review*, Vol. 8, Issue 2, 2012, pp. 323-337; Robert Zbíral, 'Czech Constitutional Court, Judgment of 31 January 2012, Pl. ÚS 5/12. – A Legal Revolution or Negligible Episode?', *Common Market Law Review*, Vol. 49, Issue 4, 2012, pp. 1475-1491.

59 *Cf*. Annegret Engel *et al*., 'Is this Completely M.A.D.? Three Views on the Ruling of the German FCC on 5th May 2020', *Nordic Journal of European Law*, Vol. 3, Issue 1, 2020, p. 144.

60 Bernhard Wegener, 'Karlsruher Unheil – Das Urteil des Bundesverfassungsgerichts vom 5. Mai 2020 (2 BvR 859/15) in Sachen Staatsanleihekäufe der Europäischen Zentralbank', *Europarecht*, Vol. 55, Issue 4, 2020, p. 354.

61 *See, inter alia*, Michael Pießkalla, 'Das BVerfG-Urteil zum Staatsanleihekaufprogramm der EZB: Eine wichtige rote Line', *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 31, Issue 12, 2020, pp. 538-542.

supranational community with the Member States as 'Masters of the Treaties'.[62] While the EU is founded by and dependent on the will and transfer of powers by the Member States, the CJEU derives from the founding treaties an autonomous legal order that has outgrown classic public international law.[63]

First of all, as regards the content of the judgment, it is interesting to note that the *ultra vires* ruling is not based on the FCC's finding that the PSPP violated the prohibition of monetary financing [Article 123(1) TFEU] or was primarily (and thus illegitimately) an economic policy measure,[64] even though there would be strong arguments that the asset purchase program was indeed a substitute for direct fiscal assistance to indebted States.[65]

Instead, the FCC held that *neither the ECB nor the CJEU sufficiently reviewed the proportionality of the PSPP* because they did not take due account of the economic policy effects of the measure. Hence, the CJEU's interpretation is "simply not comprehensible and thus objectively arbitrary". While this language has been considered too harsh and unfriendly, it is, upon closer inspection, only a logical follow-up on the FCC's *ultra vires* case-law and consequently a dogmatic necessity.[66] The FCC was forced to throw out the CJEU's ruling in order to get to the PSPP Decision. Leaving the irritating language aside, at a substantial level the German FCC insinuates that proportionality arguments can be used for the delimitation of competences. This is one of the greatest flaws of the German judgment.[67]

In accordance with Article 5(2) TEU, the delimitation of competences between the EU and the Member States is based on the principle of conferral. According to this principle, the EU may act only within the limits of the competences conferred upon it by the Member States. Competences not conferred upon the EU in the Treaties remain with the Member States. Proportionality (alongside with subsidiarity), on the other hand, is not a principle that governs the *repartition* of competences, but instead the *exercise* of competences.[68] Only if the EU (or the ECB/ESCB) has a competence under the

62 Classen & Nettesheim, '§ 9. Rechtsquellen des Europäischen Unionsrechts', *in* Oppermann/Classen/Nettesheim (eds.), *Europarecht*, 8th edn. 2018, para. 8.

63 *Cf., inter alia*, Friedemann Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG', *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 31, Issue 12, 2020, pp. 533-536.

64 Id. p. 534.

65 *See, inter alia*, Dirk Meyer, Written testimony to the Bundestag's European Affairs Committee on the PSPP judgment, at www.bundestag.de/resource/blob/697480/6a9a51187f089e80bd6221993926a4de/meyer-data.pdf. *See also* the Memorandum on the ECB's Monetary Policy, signed by former central bankers, October 2019, at www.hanswernersinn.de/dcs/Memorand-ECB-Monetary-Policy-04102019.pdf.

66 Ulrich Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie', *Neue Zeitschrift für Verwaltungsrecht*, 2020/12, p. 821.

67 *Cf*. Kainer 2020, p. 535.

68 *See*, among others, Paul Dermine, 'The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union', *European Constitutional Law Review*, Vol. 16, Issue 3, 2020, p. 539; Toni Marzal, 'Making Sense of the Use of Proportionality in the Bundesverfassungsgericht's PSPP Decision', *Revue des affaires européennes*, 2020/2, p. 444; Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', *German Law Journal*, Vol. 21, Issue 5, 2020, p. 985.

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principle of conferral can proportionality issues lead to the unlawfulness of a measure. In this case, however, the institution would not have acted *ultra vires* (*i.e. outside* its competences) but instead unlawfully, but still *within* their assigned competences. Interestingly, the German FCC explicitly rejected the application of a proportionality assessment for the allocation of competences in the *German* federal system.[69]

It should be stressed in this context that European primary law (in contrast with what the German FCC insinuates) *does* allow the ECB to support the economic policy of the EU, so long as the primary objective of maintaining price stability is guaranteed. In fact, the wording of Article 127(1) TFEU reveals that the ESCB is even obliged to support economic policy as a secondary objective. Moreover, an in accordance with the CJEU's finding, there is hardly any functioning monetary policy without economic effects. Monetary policy conducted by the ECB with (intended or at least accepted) economic effects is thus not *per se* excluded by the Treaties.[70] Therefore, even economic policy *effects* cannot lead to the conclusion that the CJEU has misinterpreted the Treaties. On the contrary, taking the degree of economic policy effects into account when determining whether or not the ECB was competent to act would turn the priorities in Article 127(1) TFEU upside down: The ECB would have to face trade-offs and compromises when conducting their monetary policy, even though the provision just mentioned underlines that economic policy shall be *without prejudice* to the ECB's primary objective of price stability (monetary policy).[71]

Moreover, the CJEU's approach to look at the aims of a measure and the instruments used to pursue these aims in order to delineate economic from monetary policy measures is well in line with the CJEU's established case-law. The CJEU recognizes policy effects but does not consider indirect effects to be decisive for determining the character of a measure. Frankly, the CJEU takes a rather pragmatic (and, of course, Euro-friendly) approach to the likewise pragmatic strategy of the ECB, an approach certainly amenable to criticism. The German FCC, on the other hand, seems to insist on an (unrealistic and artificial[72]) clear-cut separation between economic and monetary policy in order to prevent a "competence creep" on the part of the EU.[73] Even if there were such a clear

69 Case 2 BvG 1/88, Judgment of the Second Senate of 22 May 1990 – BVerfGE 81, 310 (338): "The limits on State intervention in the legal sphere of the individual derived from the principle of the rule of law are not applicable in the federal-state relationship and the repartition of competences. This applies in particular to the principle of proportionality, which has the function of defending individual rights and freedoms. The associated thinking in the categories of freedom and encroachment can neither be applied specifically to the subject-matter competence of the *Land* determined by a competitive relationship between the Federation and the *Land*, nor to delimitations of competence in general." (my translation).

70 *See also* Fabian Amtenbrink & René Repasi, 'The German Federal Constitutional Court's Decision in Weiss: A Contextual Analysis', *European Law Review*, Vol. 45, Issue 6, 2020, p. 760.

71 *Cf.* Phedon Nicolaides, 'An Assessment of the Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank', *Legal Issues of Economic Integration*, Vol. 47, Issue 3, 2020, p. 282.

72 *See, inter alia*, Dermine 2020, p. 535; Engel *et al.* 2020, p. 130.

73 *Cf.* Amtenbrink & Repasi 2020, p. 765.

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delineation between the two policy fields, classifying a measure as either one or the other negates the fact that it can actually be both. Moreover, the identification of the (economic) costs and the (monetary) benefits (or *vice versa*) of a policy initiative is in itself highly subjective and open to interpretation.[74] This is why, even if one were to accept the new sort of proportionality test that the FCC tried to establish, it would be impossible to comply with:[75] who's to balance economic and monetary policy effects if the Treaties do not tell us what they are supposed to be precisely?

Moreover, in contrast with what the German FCC concludes, the CJEU did not contradict its own case-law. Although the FCC cites a number of CJEU decisions from a wide range of areas, it does not deal with them in substance, but applies a very German understanding of proportionality.[76] In particular, the German FCC refers to a number of areas of CJEU case-law that involve individual rights and their balancing with public interests. This, however, is profoundly different from cases involving the determination of EU and Member State competences.[77] Moreover, it is not true that this form of proportionality assessment is "common to the legal systems of the Member States" as a "recognized method".[78] The Karlsruhe Court overlooks the fact that the principle of proportionality found its way into other national legal systems and, of course, also into the EU legal system partly as a German 'legal transplant' *via* the detour of the CJEU.[79] There, however, they were not adopted blindly as a foreign concept, but formulated within the framework of the respective legal system. This is precisely what the FCC means when it accepts that the CJEU has as its own methods of interpretation (that may differ from the FCC's own standards). In this context, as far as the (EU law) proportionality analysis conducted by the CJEU is concerned, upon closer inspection, it does not seem like the CJEU had incorrectly applied this principle. As Article 5(4) TEU provides, the principle of proportionality requires that the substance and form of EU action not exceed what is necessary to achieve the objectives of the Treaties. When the German FCC finds that a key element in the form of the balancing of conflicting interests (in the meaning of the German "proportionality in the strict sense" or "*Angemessenheit*") is 'missing' from the CJEU's assessment, this is because it is *not* a part of the *European* proportionality principle.[80]

Furthermore, it should be stressed that the CJEU's judgment was rendered by the Grand Chamber, *i.e.* by 15 jurists who, according to Article 253 TFEU, "possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence".

74 *Cf.* Dermine 2020, p. 538.
75 Nicolaides 2020, p. 281.
76 With the same view *see* Engel *et al.* 2020, p. 138.
77 *Cf.* Amtenbrink & Repasi 2020, p. 774.
78 Kainer 2020, p. 535.
79 Marzal 2020, p. 444.
80 *See*, in this respect, *also* Thomas Ackermann, 'Not Mastering the Treaties: The German Federal Constitutional Court's PSPP Judgment', *Common Market Law Review*, Vol. 57, Issue 4, 2020, p. 972; Engel *et al.* 2020, p. 134.

If the decision in *Weiss* were indeed "simply incomprehensible and thus objectively arbitrary", there should have been critical voices already in the literature commenting on the CJEU judgment.[81] This holds true even against the German FCC's approach that an obvious *ultra vires* act can exist even if there is no opposing legal opinion on a matter. Overall, the CJEU's limited proportionality test can be understood with good reasons as a necessary expression of judicial self-restraint in the control of an institution that is competent and resolutely independent in highly complex monetary and economic policy contexts.

The German FCC blatantly calls into question the primacy of EU law.[82] In doing so, the FCC's judgment is itself an *ultra vires* act, in essence for two reasons. *(i)* Firstly, even if one were to follow the FCC's approach regarding the principle of proportionality, the German FCC was in breach of European law since it did not give the CJEU a second chance to rule on this very issue.[83] The FCC should have submitted new questions for preliminary ruling allowing the CJEU to clarify its proportionality assessment of the ECB decision.[84] In fact, this would not be unprecedented if one looks, for example, at the judicial dialogue conducted between the CJEU and the Italian *Corte Costituzionale* in the cases of *Taricco*.[85] *(ii)* Secondly, the German FCC ordered the German Government and the *Bundestag* (as institutions in breach of German constitutional law in the course of the proceedings) to ensure that the ECB and German *Bundesbank* redraft the PSPP decision. This is nothing less than an order to interfere with the central banks' guaranteed independence (Article 130 TFEU).[86] In fact, the independence secured by European primary law does not mean that central banks are beyond any legal review. Legal review is indeed necessary to compensate for the lack of democratic legitimacy that independence entails. This is, however, why the CJEU stressed that due to the decreased democratic (input) legitimacy, the central banks need to pay closer attention to the justification of their legal acts. In this context, the Karlsruhe Court should bear in mind that, as a constitutional court, it represents a similar "democratic anomaly" from the point of view of legitimacy as a central bank, whose minimal democratic feedback to the direct representation of the people can only be justified by the function it fulfils.[87]

81 *Cf*. Kainer 2020, p. 536; Franz C. Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP Decision of 5 May 2020', *European Constitutional Law Review*, Vol. 16, Issue 4, 2021, p. 752.

82 Claude Blumann, 'Quelques enseignements de l'arrêt du Bundesverfassungsgericht du 5 mai 2020 sur les fondamentaux au droit de l'Union européenne', *Revue trimestrielle de droit européen*, 2020, pp. 892 *et seq*.

83 Mayer 2021, p. 756.

84 Hoai-Thu Nguyen & Merijn Chamon, 'The Ultra Vires Decision of the German Constitutional Court', *Hertie School Jacques Delors Centre Policy Paper*, 2020, p. 16; Amtenbrink & Repasi 2020, p. 771; Ackermann 2020, p. 969.

85 *Cf*. Matteo Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union', *Maastricht Journal of European and Comparative Law*, Vol. 25, Issue 3, 2018, 357-373.

86 Nguyen & Chamon 2020, p. 16. *Cf. also* Jean-Victor Louis, 'L'indépendance de la Banque centrale européenne', *Revue trimestrielle de droit européen*, 2020, pp. 825 *et seq*.

87 Kainer 2020, p. 536; Böttner 2016, p. 780. *See also Case C-493/17, Weiss and Others*, *AG Opinion*, para. 117.

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From the point of view of national constitutional law, the *ius standi* of individuals against EU acts, which has been broadened in recent years, is worthy of criticism. As indicated above, the proceedings are not directed against the acts directly, but are played out *via* the claim that the German constitutional bodies must exercise their responsibility for integration and counteract European acts that are taken outside their competences. This is justified with the right to elect the German *Bundestag* from Article 38 of the Basic Law and the "right to democracy" that follows from this. In the meantime, this right has even been extended to formal aspects of the transfer of powers.[88] As a result of the link between individual voting rights and European integration, *anyone* can lodge a constitutional complaint against virtually *any* transfer of competences to the EU and any use of competences by the EU, even if there is no possible infringement of Germany's constitutional identity.[89] To be clear, this is not to deny that the EU's very construction suffers from a fundamental, maybe even insoluble constitutional and jurisdictional conflict[90] between two equally competent jurisdictions. A national court's 'final say', however, should be restricted to a very narrow set of cases affecting the nation's specific constitutional identity. The above-mentioned dialogue between the CJEU and the Italian Constitutional Court proves that the CJEU is not unwilling to accept this argument on the basis of Article 4(2) TEU.

On the occasion of the order for reference in the *OMT* proceedings, two judges of the FCC expressed considerable doubts about extending the right to vote to a means to challenge EU acts and used strong arguments to justify why, in their view, the constitutional complaints before the FCC should already have been rejected as inadmissible, as a result of which a question for reference would have lacked relevance for a decision.[91] As Justice *Lübbe-Wolff* held, allowing plaintiffs to turn against federal inaction with respect to EU acts goes "beyond the limits of judicial competence under the principles of democracy and separation of powers".[92] The German FCC, Justice *Gerhardt* added, "is not responsible for general constitutional supervision" and an *ultra vires* review [based on Article 38(1) of the Basic Law] opens the door "to a general right to have the laws enforced (*allgemeiner Gesetzesvollziehungsanspruch*)", *i.e.* an *actio popularis*, which the Basic Law does not foresee. It does not fit into the constitutional framework of parliamentary work that, "with the help of the Federal Constitutional Court, an individual may steer the *Bundestag's* right of initiative into a specific direction".[93]

88 Case 2 BvR 739/17, Judgment of the Second Senate of 13 February 2020, ECLI:DE:BVerfG:2020:rs20200213.2bvr073917, on the Agreement on a Unified Patent Court.

89 Wegener 2020, p. 349; Haltern 2020, p. 820. holds that this leads to the constitutional complaint being "wide open as a barn door" and a "de-subjectification of fundamental rights".

90 Taking a different view, Ackermann 2020, p. 968. states instead that the conflict is "inherent in the design of the German constitution". According to Engel *et al*. 2020, p. 133, this specific type of conflict is inherent in the asymmetric distribution of competences in the EMU.

91 *See* Cases 2 BvR 1390/12 *et al*., Order of the Second Senate of 17 December 2013, ECLI:DE:BVerfG:2013:rs20131217.2bvr139012 – *OMT (reference for preliminary ruling)*, Dissenting Opinions of Justices Lübbe-Wolff and Gerhardt.

92 Dissenting Opinion of Justice Lübbe-Wolff, para. 2.

93 Dissenting Opinion of Justice Gerhardt, paras. 2, 6 and 21.

Overall, it is not without irony that the German FCC bases its decision on the eternity clause of Article 79(3) of the Basic Law to oppose European integration and thus the State objective of European integration in Article 23 of the Basic Law. As Justice *Lübbe-Wolff* noted in her dissenting opinion to the judgment in the European Arrest Warrant case:

> "Article 79(3) of the Basic Law, as the constitutional limit of European integration, has rightly been applied with care [...] because the meaning of this provision is to exclude our country relapsing into dictatorship and barbarism, and nothing serves this aim with higher probability than Germany's integration into the European Union."[94]

5. Epilogue

The very same day the ruling was handed down, the ECB "took note" of the German verdict.[95] Only three days after the Karlsruhe judgment, the CJEU released a press statement, underlining first that "departments of the institution never comment on a judgment of a national court", but also reiterating that *"the Court of Justice alone [...] has jurisdiction to rule that an act of an EU institution is contrary to EU law."*[96] This is nothing short of a passive-aggressive confirmation of the now shattered relationship between Karlsruhe and Luxembourg, which used to be a "textbook example of judicial pluralism".[97] In fact, the German FCC's case-law in EU affairs strongly influenced the CJEU and nudged it to develop its own case-law, for example in the area of fundamental rights protection.[98]

The European Commission, on its part, also stressed that EU law has primacy over national law and that rulings of the CJEU are binding on all national courts and that "the final word on EU law is always spoken in Luxembourg. Nowhere else."[99] From the outset, it even considered an infringement procedure against the Federal Republic of Germany. From a legal point of view, this would both be

94 Case 2 BvR 2236/04, Judgment of 18 July 2005, ECLI:DE:BVerfG:2005:rs20050718.2bvr223604 – *European Arrest Warrant*, para. 178 (Dissenting Opinion of Judge Lübbe-Wolff).

95 ECB Press Release of 5 May 2020, at www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html.

96 CJEU, Press Release No. 58/20 of 8 May 2020. On this press statement *see* the interesting comments by Justin Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment', *German Law Journal*, Vol. 21, Issue 5, 2020, pp. 1032-1044.

97 Niels Petersen, 'Karlsruhe's Lochner Moment? A Rational Choice Perspective on the German Federal Constitutional Court's Relationship to the CJEU After the PSPP Decision', *German Law Journal*, Vol. 21, Issue 5, 2020, p. 998.

98 *Cf*. Amtenbrink & Repasi 2020, p. 770.

99 Statement by Commission President von der Leyen of 10 May 2020, STATEMENT/20/846, at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_846.

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possible[100] and not even unprecedented.[101] Regardless of the (political) controversy,[102] however, it may be impossible to rectify this sort of judicial infringement. In effect, the Federal Republic of Germany, through the Federal Government, could not take the necessary measures since it has no control over the independent *Bundesverfassungsgericht* or over the *Bundesbank*.[103] Surprisingly, in early June of this year, the Commission decided to launch an infringement procedure.[104] One can only hope that the dispute will be settled in the preliminary stage, because it does not appear to be promising to the Courts' relationship if the CJEU were to be made the judge in its own case.[105]

As a solution to the underlying judicial conflict, several authors have voiced the idea of a *Union Court of Competence* as a final arbiter.[106] These ideas, in fact, are not new. They have been outlined throughout the years as an approach to tackle the fundamental dilemma of the Union as a supranational compound of sovereign States.[107] Proposals include a separate chamber at the CJEU, a new court as a separate Union institution or a judicial body supplementing the Union legal order. As widespread as the possible institutional designs are the ideas on this court's composition: It should include judges from national supreme courts and the CJEU, but approaches vary as to the size of the bench and the ratio of national and European judges. However, it is questionable if this would be a viable option: considering that the design of European primary law vests the CJEU with this role of final arbiter, doubts remain whether national high courts would renounce their self-given right to have the final say in favor of a different judicial body.[108]

100 *Cf*. Sara Dietz, 'Die gerichtliche Kontrolle der EZB durch den EuGH und das BVerfG – ein Konfliktfall im Verfassungsgerichtsverbund und Eurosystem? Anmerkungen zum PSPP-Verfahren', *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 30, Issue 22, 2019, p. 933.

101 *See e.g*. Judgment of 9 December 2003, *Case C-129/00, Commission v Italy*, ECLI:EU:C:2003:656; Judgment of 12 November 2009, *Case C-154/08, Commission v Spain*, ECLI:EU:C:2009:695; and Judgment of 4 October 2018, *Case C-416/17, Commission v France (Arcor II)*, ECLI:EU:C:2018:811. *See also* Sara Poli & Roberto Cisotta, 'The German Federal Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission', *German Law Journal*, Vol. 21, Issue 5, 2020, pp. 1081 *et seq*.

102 *See* the discussion between Ingolf Pernice, 'Sollte die EU-Kommission Deutschland wegen des Karlsruher Ultra-Vires-Urteils verklagen? PRO', *Verfassungsblog*, 16 May 2020, at https://verfassungsblog.de/sollte-die-eu-kommission-deutschland-wegen-des-karlsruher-ultra-vires-urteils-verklagen-pro/ and Christoph Möllers, 'Sollte die EU-Kommission Deutschland wegen des Karlsruher Ultra-Vires-Urteils verklagen? CONTRA', *Verfassungsblog*, 16 May 2020, at https://verfassungsblog.de/sollte-die-eu-kommission-deutschland-wegen-des-karlsruher-ultra-vires-urteils-verklagen-contra/.

103 *Cf*. Nguyen & Chamon 2020, p. 13.

104 Formal notice under Article 258 TFEU of 9 June 2021, INFR(2021) 2114.

105 Benedikt Riedl, 'Die Ultra-vires-Kontrolle als notwendiger Baustein der europäischen Demokratie', *Verfassungsblog*, 12 June 2021, at https://verfassungsblog.de/ultra-vires-pspp/, even considers that the infringement proceedings are inadmissible altogether.

106 *See*, most prominently, Daniel Sarmiento & Joseph H. H. Weiler, 'The EU Judiciary After Weiss: Proposing A New Mixed Chamber of the Court of Justice', *Verfassungsblog*, 2 June 2020, at https://verfassungsblog.de/the-eu-judiciary-after-weiss/; *cf. also* Ackermann 2020, p. 976.

107 *Cf*. Mayer 2021, p. 765. with further references.

108 Id. p. 765.

The practical effects of the case regarding the substance of the German FCC's ruling remained minimal. The *Bundesbank* asked the Governing Council of the ECB to explain its proportionality considerations regarding the PSPP. At its meeting on 3-4 June 2020, the Governing Council presented extensive considerations on proportionality as part of the monetary policy deliberations and made these and the subsequent decision public on 25 June 2020. In addition, at its meeting on 24 June 2020, the Governing Council decided to allow the *Bundesbank* to transmit to the German Government, on condition of confidentiality, documents that reveal the Governing Council's considerations regarding the PSPP since its launch. Meanwhile, the Governing Council adopted a recast of the decision on the asset purchase program which replaced the original PSPP decision.[109] On 2 July 2020, the German *Bundestag* adopted a resolution[110] determining that the ECB has complied with the justification requirement. It has thus fulfilled its overall budgetary responsibility and its responsibility for integration. Nonetheless, upon expiry of the three-month period stipulated in the FCC's judgment, one of the plaintiffs had applied for the issuance of a so-called enforcement order in accordance with section 35 of the Act on the FCC.[111] Unsurprisingly, the FCC found that its judgment has been complied with.[112]

The actual legal dispute has thus been settled, but its implications continue to smolder. The next dark clouds are already gathering on the horizon. In March 2020, the ECB launched the Pandemic Emergency Purchase Program (PEPP),[113] another non-standard monetary policy instrument (such as SMP, OMT, and APP, including PSPP), which covers both private and public sector securities. While PEPP is very similar to the PSPP, some important safeguards that characterized the PSPP are altered or not included in the PEPP (notably purchase limits, allocation of purchases, and eligibility requirements).[114] As expected, a new set of constitutional complaints have been filed against this program in March 2021.[115] The specific characteristics of this program may in fact cross the red lines that the German FCC established before finding an infringement of the prohibition of monetary financing of Article 123 TFEU.[116] On the other hand, the German Federal Government and the *Bundestag* are

109 Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (ECB/2020/9).

110 *See* Parliamentary Paper of the German Bundestag No 19/20621 of 1 July 2020.

111 "The Federal Constitutional Court may specify in its decision who is to execute it; in individual cases it may also specify the method of execution."

112 Case 2 BvR 1651/15 *et al*. – *PSPP (enforcement order)*, Order of 29 April 2021, ECLI:DE:BVerfG:2021:rs20210429.2bvr165115.

113 Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase program (ECB/2020/17).

114 *See* Annamaria Viterbo, 'The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank', *European Papers*, Vol. 5, Issue 1, 2020, pp. 677 *et seq*.

115 Case 2 BvR 420/21 – *PEPP*, pending.

116 Sebastian Grund, 'Legal, Compliant and Suitable: The ECB's Pandemic Emergency Purchase Programme (PEPP)', *Hertie School Jacques Delors Centre Policy Brief*, 2020, holds that the PEPP is compatible with the requirements established by the German FCC.

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forewarned to act in accordance with their responsibility for integration. In response to an enquiry from a Member of Parliament, the Federal Government held that the ECB's Governing Council had conducted a comprehensible proportionality test on the PEPP.[117]

Secondly, constitutional complaints have been initiated against the new Own Resources Decision. On 15 April 2021 the German FCC denied a preliminary injunction (after having issued on 26 March 2021 a so-called 'hanging decision' (*Hängebeschluss*), *i.e.* a form of pre-preliminary injunction before the actual preliminary injunction is decided), which would have barred the German President from signing the Act ratifying the EU's Own Resources Decision, including the 'Corona Reconstruction Fund' (NextGenerationEU).[118] The plaintiffs argue that the Own Resources Decision is an *ultra vires* act because the EU may not incur debt and the decision would create mutual responsibilities among the Member States for their respective liabilities. Upon summary examination, the FCC found that the 2020 Own Resources Decision does not, in any case, violate Article 79(3) of the Basic Law with a high degree of probability. However, the consequence assessment required accordingly shows that the disadvantages that would result from issuing the preliminary injunction clearly outweigh the risk of disadvantages the event of a rejection of the application. The FCC holds that the Own Resources Decision does not affect the overall budgetary responsibility of the *Bundestag*, at least not with a high degree of probability. While this may lead to the conclusion that the FCC will rebut the constitutional complaints as unfounded, it is not impossible that the main proceedings, which are still pending, will reach a different conclusion. In both cases, the German FCC is likely (and, if it wants to hand down an *ultra vires* verdict, obliged) to submit questions to the CJEU for preliminary ruling. These cases may eventually trigger the constitutional crisis that some expected from the PSPP ruling.[119]

Lastly, Poland's relationship to the EU judiciary is becoming increasingly tense. After several referrals by the European Commission to the CJEU and a CJEU ruling on the (lack of) impartiality of the Polish Supreme Court's Disciplinary Chamber[120] (and its continued activity), news got out that the Polish Government has asked the Constitutional Tribunal to decide whether the Polish constitution has primacy over EU law. While it is just another step along the currently difficult road between Poland and the EU,[121] this may well be the beginning of what many considered the most damaging effect of the PSPP

117 *See* Parliamentary Paper of the German Bundestag No 19/22022 of 1 September 2020.

118 2 BvR 547/21, Order of the Second Senate of 15 April 2021, ECLI:DE:BVerfG:2021:rs20210415.2bvr054721 – *Own Resources*. *See* Benedikt Riedl, 'The Own Resources Decision as an Ultra Vires Act or a Violation of Constitutional Identity? An Analysis of Possible Procedural Scenarios', *EU Law Analysis blog*, 14 April 2021, at http://eulawanalysis.blogspot.com/2021/04/the-own-resources-decision-as-ultra.html?m=1.

119 *Cf*. Amtenbrink & Repasi 2020, p. 771.

120 Judgment of 19 November 2019, *Case C-585/18, A.K.*, ECLI:EU:C:2019:982.

121 *See* in this context, Stanisław Biernat, 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland', *German Law Journal*, Vol. 21, Issue 5, 2020, especially p. 1114.

judgment, *i.e.* the reception of the judgment as a much appreciated impetus against EU integration by some Member States (and their national constitutional courts), especially Poland and Hungary.[122]

To sum up, it remains unclear why the German FCC decided the way it did. The judgment does not appear to be a logical consequence of the EU's trespassing of well delineated competences. One may only speculate where the relationship between Karlsruhe and Luxembourg took a wrong turn, but the FCC's judgment is clearly out of line. One may even accuse the German FCC of handing down an incomprehensible and arbitrary judgment. Here and there you will hear voices saying that the decision has more to do with individual judges' legal or political opinions than with rational legal arguments. Hopefully, the *ultra vires* judgment will remain a singular incident.

To conclude, one should remember the words of AG *Cruz Villalón* in his opinion in *Gauweiler*:

> "It seems to me an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity'."[123]

122 *See*, among others, Ackermann 2020, p. 974.

123 Opinion of Advocate General Cruz Villalón delivered on 14 January 2015, *Case C-62/14, Gauweiler*, ECLI:EU:C:2015:7, para. 59.

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