The PSPP Judgment of the German Federal Constitutional Court

The Judge's Theatre According to Karlsruhe

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Abstract

The PSPP decision of 5 May 2020 rendered by the German Federal Constitutional Court (FCC) does not constitute a break with the earlier jurisprudence of the FCC elaborated since the Lisbon Treaty judgment of 30 June 2009. Even though qualifying the acts of the Union as ultra vires has been likened to a warlike act, one should beware of hasty conclusions and look closely at the analysis of the Second Senate to form a moderate opinion of this decision decried by European and national commentators. Should the PSPP judgment of the Federal Constitutional Court be classified as "much ado about nothing", despite the procedure started by the European Commission, or, on the contrary, will the CJEU in the next months, sanction Germany for its obvious affront to and breach of the principle of the primacy of Union law? The (final?) power grab between the European and national courts remains to be seen. We can criticize the German FCC that it put the fundamental principles of the Union in danger. Yet, it is worth reflecting on the possible encroachment of competences by European institutions, because, in this case, the red line between monetary policy and economic policy is more than thin.

Keywords: German Constitutional Court, basic law, ultra vires, European Central Bank, primacy of Union law.

1. Introduction

Andreas Voßkuhle, the former President of the German Federal Constitutional Court (FCC) of Germany, ended his term of office on 6 June 2020 after twelve years of service.[1] On 5 May 2020, when he publicly pronounced the decision on

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1 Elected by the Bundesrat on 25 April 2008, Andreas Voßkuhle was initially Vice-President of the FCC and became, at 46, the youngest President of the FCC on 16 March 2010. The President of the First Senate and Vice-President of the FCC, Stefan Harbarth, is the current President of the *Bundesverfassungsgericht*. The only constitutional judge in office who has a rich political background: member of the *Bundestag* from 2009 to 2018 and elected judge to the FCC by the *Bundestag* on 22 November 2018.

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the European Central Bank's (ECB) public debt purchase program,[2] Voßkuhle was aware of the wave of incomprehension, annoyance, criticism and even desolation that the sentences he was about to read in the quiet courtroom would trigger in Germany, but also in many EU Member States and even within the European institutions. The President, in his red robe, is used to this kind of public interest. Since the decision of 30 June 2009 on the Lisbon Treaty,[3] this professor of public law at the University of Freiburg im Breisgau has had first hand knowledge of the fact that the position of the German Constitutional Court on European issues is of great interest in both national and European politics. The judgment of the Second Senate of the Court of 5 May 2020 represents a part of a consistent case-law that has climbed to a drastic *crescendo*: an unusual way of celebrating the end of the Voßkuhle era, a dogmatic and political fencing match between a national judge and the European institutions, or merely the logical continuation of the jurisprudential dance of Karlsruhe under the music of the German Basic Law of 23 May 1949?

It is rare that the decision of a national judge is the subject of such a plethora of comments in the general or specialized press: journalists, economists and, naturally, lawyers line up to point out the "unbearable heaviness of the German constitutional judge",[4] to note that the ECB is "put under pressure"[5] or that the FCC has set itself up as the "judge"[6] of the monetary institution whose legitimacy is "undermined".[7] On the face of it, this 237-paragraph decision probably constitutes a violation of EU law. Therefore, the European Commission considered, following the very terse replies to the German FCC by the ECB[8] and the CJEU,[9] the possibility of activating the Article 258 TFEU infringement

2 BVerfG, decision of the Second Senate, 2 BvR 859/15 (PSSP Judgment).

3 BVerfGE 123, 267.

4 Jacques Ziller, 'L'insoutenable pesanteur du juge constitutionnel allemand. À propos de l'arrêt de la deuxième chambre de la Cour constitutionnelle fédérale allemande du 5 mai 2020 concernant le programme PSPP de la Banque Centrale Européenne', *Blogdroiteuropeen Working Paper*, 2020/4, at https://blogdroiteuropeen.files.wordpress.com/2020/05/wp-ziller-bvergg-5-mai-2020.pdf; Among the *plethora* of various comments, *see e.g.* the special issue of *Revue trimestrielle du droit européen* titled 'The ECB, between the Union of Law and Democracy', in particular Diana Urania Galetta & Jacques Ziller, 'Les violations flagrantes et délibérées du droit de l'Union par l'arrêt 'inintelligible' et 'arbitraire' du Bundesverfassungsgericht dans l'affaire *Weiss*', *Revue trimestrielle du droit européen*, Vol. 56, Issue 4, 2020, pp. 855-887; *see also* David Capitant, 'L'arrêt de la Cour de Karlsruhe. Un coup de tonnerre dans un ciel serein?', *Notes du Cerfa, No. 155, Ifri*, October 2020.

5 Éric Albert *et al.*, 'La Banque centrale européenne mise sous pression par la Cour constitutionnelle allemande', *Le Monde*, 6 May 2020.

6 Jean Quatremer, 'La Cour constitutionnelle allemande s'érige en juge de la BCE', *Libération*, 5 May 2020.

7 Adrien Palluet, 'La Cour constitutionnelle allemande sape la légitimité de la BCE', *Courrier international*, 6 May 2020.

8 *See* at www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html.

9 *See* at https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058fr.pdf.

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procedure.[10] On 9 June 2021 the Commission finally decided to send letter of formal notice to Germany for breach of fundamental principles of EU law[11] in order to avoid the spread of this kind of decisions to other EU Member States, in particular states such as Hungary and Poland, which are openly Eurosceptic.

The near future will reveal the supposed failings of the German Constitutional Court, now blamed for corrupting the foundations of the EU, for throwing the European idea to the mercy of populists and sovereigntists of all stripes. Andreas Voßkuhle was right: not only the decision of the FCC over which he presides is 'irritating', but when he read it, all the commentators saw red, in the image of the scarlet robes of Karlsruhe judges. However, in view of its previous case-law, was a solution openly favorable to the ECB possible without putting the Basic Law, as interpreted by the German courts, in abeyance? Karlsruhe crossed the threshold of tolerance, but it did not do so without making some important nuances.

The facts are known: more than 1,700 individual constitutional complaints were lodged under Article 93(1), No. 4a of the Basic Law[12] against the failure of the Federal Government and the *Bundestag* to ensure that the decision of the Council of the ECB of 22 January 2015 on the extended asset purchase program and the decision of the ECB of 4 March 2015 on the public sector asset purchase program (PSPP), as amended by the decision of 5 November 2015, as well as the decisions of 16 December 2015, 18 April 2016, 11 January 2017 and 13 December 2017 are complied with, 11 January 2017 and 13 December 2018, be repealed or not implemented, and against the failure of the *Deutsche Bundesbank* to challenge its participation in the ECB's purchase program by bringing an action before the CJEU. Finally, the individual constitutional complaints were directed against the applicability of the Great Chamber judgment of the CJEU of 11 December 2018, which was the answer to the request for a preliminary ruling by the German FCC on 18 July 2017, to the scope of the German Basic Law.[13] Some of the complaints stated that the European Monetary

10 "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union." *See* the reply sent on 9 May 2019 by the European Commission President Ursula von der Leyen to the European deputy Sven Giegold, published on her Twitter account, which states that "The Court of Justice in Luxembourg always has the final word on EU law." *See also* "The Commission is currently analyzing in detail the over 100 pages long decision of the German Federal Constitutional Court", at https://twitter.com/sven_giegold/status/1259141585595437056/photo/1.

11 *See* at https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743. *See* Benedikt Riedl, 'Die Ultra-vires-Kontrolle als notwendiger Baustein der europäischen Demokratie', *Verfassungsblog*, 21 June 2021, at https://verfassungsblog.de/ultra-vires-pspp/.

12 "[…] on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority […]." Basic Law for the Federal Republic of Germany, translated by Christian Tomuschat, David P. Currie, Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German *Bundestag*.

13 Judgment of 11 December 2018, *Case C-493/17, Weiss and others*, ECLI:EU:C:2018:1000.

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Institute, through the public sector asset purchase program, had exceeded its area of competence by encroaching upon the economic competence of the Member States, but also by violating the prohibition of monetary budgetary financing by central banks and, lastly, by violating the constitutional identity of the Federal Republic of Germany.

Before beginning its controversial analysis, the constitutional judge clarified, by declaring part of the constitutional complaints inadmissible, that a legal act of an EU institution cannot be directly the subject of an individual constitutional complaint (*Verfassungsbeschwerde*), because, according to the FCC's reasoning,

> "acts of institutions, bodies, offices and agencies of the European Union do not constitute 'acts of public authority' within the meaning of Art. 93 (1) No. 4a of the German Basic Law and § 90 (1) of the Federal Constitutional Court Act."[14]

This solution also applies to decisions of the Council of the ECB.[15] With regard to the failure of the Federal Central Bank of Germany to lodge an appeal to contest its participation in the program thus drawn up, the court follows its consistent case-law when finding that the German institution is an authority subordinate to the State administration and cannot be part of the "constitutional bodies" on which a "specific integration obligation" (*spezifische Integrationsverantwortung*) is imposed.[16]

The Second Senate considers the constitutional complaints to be well-founded insofar as they concern the failure of the Federal Government and the *Bundestag* to ensure, by taking appropriate measures, that the ECB does not cross the threshold of the competences conferred on it and ultimately encroach on the economic policy domain of the EU Member States. The FCC's reasoning is based on the fact that the failure of the German federal authorities to act ultimately constitutes an infringement of the principle of the attribution of monetary policy powers. The FCC's reasoning unfolds by highlighting its jurisprudential continuity while moving to a higher stage: *declaring an EU act qualified as ultra vires not binding in Germany*.

It is probably too early to grasp the full extent of the decision handed down on 5 May 2020. A retrospective look at the origins of the German FCC's reasoning (Section 2) could shed light on the controversial elements of its recent judgment (Section 3).

14 PSSP Judgment, para. 93: "[…] Maßnahmen von Organen, Einrichtungen und sonstigen Stellen der Europäischen Union keine Akte öffentlicher Gewalt im Sinne von Art. 93 Abs. 1 Nr. 4a GG und § 90 Abs. 1 BVerfGG sind […]." BVerfGE 142, 123, 179; decision of 30 July 2019 (2 BvR 1685/14, 2 BvR 2631/14).

15 Id. para. 94.

16 Id. para. 95; *see e.g.* BVerfGE 123, 267, 352 s; BVerfGE 126, 286, 306; BVerfGE 129, 124, 181; BVerfGE 132, 195, 238.

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2. Freeze Frame or Jurisprudential Continuity in the Service of the German Basic Law: The Political Law according to Karlsruhe

In its decision on the Financial Stability Pact and the Euro Rescue Plan of 19 June 2012,[17] the FCC concluded that Article 23(2) of the Basic Law[18] applied to the procedure for drawing up the Pact and the Euro Rescue Plan. It also stressed the need to preserve the existence of an area of executive responsibility of the federal government (*Kernbereich exekutiver Eigenverantwortung*). On 12 September 2012 the FCC finally declared the creation of a European Stability Mechanism compatible with the German Basic Law under certain conditions: the effective participation (and thus the decision-making power) of the representatives of the German people in these maneuvers to ensure the financial health of the Eurozone must be guaranteed.[19] The broad interpretation of the principle of democracy (*Demokratieprinzip*) and the restrictive understanding of transfers of sovereignty powers under Article 23(1) of the Basic Law[20] are becoming commonplace in the German constitutional jurisprudence.

The principle of democracy, as interpreted by the German FCC,[21] has the function of a barrier to the process of European integration which "finds its limits in the Basic Law"[22] and which serves to demonstrate the possibility of a democratic deficit in the EU (Section 2.1). The integration process is therefore "under the total supervision" of the Karlsruhe judges (Section 2.2).

17 BVerfGE 131, 152.

18 "The *Bundestag* and, through the *Bundesrat*, the *Länder* shall participate in matters concerning the European Union. The Federal Government shall notify the *Bundestag* of such matters comprehensively and as early as possible."

19 BVerfGE 132, 195.

20 "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79."

21 Armin von Bogdandy, 'Prinzipien der Rechtsfortbildung im europäischen Rechtsraum. Überlegungen zum Lissabon-Urteil des BVerfG', *Neue Juristische Wochenschrift*, 2010, p. 3 *et seq*.

22 Dieter Grimm, 'Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union. Zum Lissabon Urteil des Bundesverfassungsgerichts', *in* Dieter Grimm, *Die Zukunft der Verfassung II Auswirkungen und Globalisierung*, Suhrkamp, Berlin, 2012, p. 153: "Der Fortgang der europäischen Integration […] findet in [dem Grundgesetz] Grenzen".

2.1. The "Democratic Deficit"[23] of the EU or the Individual Right to Sufficient Democratic Legitimation of Union Bodies

The definition of democracy as 'government of the people' does not go beyond the stage of a regime whose primary purpose is domination. It is not an ideal regime in which the people hold all state power and exercise it directly or indirectly. Rather, it is a "principle of organization relating to the holding and exercise of state power", the purpose of which, after all, is no different from that of any other type of regime: to organize people while keeping them in submission.[24]

In the democratic institutional architecture, the parliament occupies a singular place. At the level of the EU, despite the significant strengthening of the competences of the European Parliament, it remains a body whose power is unable to compete effectively with the Commission or the Council, which dominate the institutional landscape. Its direct democratic legitimacy does not correspond to the level of legitimacy of the *Bundestag*,[25] because it does not follow the rule of equal vote (one man – one vote).[26] As long as the principle of democracy does not receive sufficient guarantees at European level, equivalent to those of the national legal system, the EU will continue to be characterized by a

23 BVerfGE 123, 267, 30 June 2009, 364-365: "Ein nach Art. 23 in Verbindung mit Art. 79 Abs. 3 GG nicht hinnehmbares strukturelles Demokratiedefizit läge vor, wenn der Kompetenzumfang, die politische Gestaltungsmacht und der Grad an selbstständiger Willensbildung der Unionsorgane ein der Bundesebene im föderalen Staat entsprechendes (staatsanaloges) Niveau erreichte, weil etwa die für die demokratische Selbstbestimmung wesentlichen Gesetzgebungszuständigkeiten überwiegend auf der Unionsebene ausgeübt werden. Wenn sich im Entwicklungsverlauf der europäischen Integration ein Missverhältnis zwischen Art und Umfang der ausgeübten Hoheitsrechte und dem Maß demokratischer Legitimation einstellt, obliegt es der Bundesrepublik Deutschland aufgrund ihrer Integrationsverantwortung, auf eine Veränderung hinzuwirken und im äußersten Fall sogar ihre weitere Beteiligung an der Europäischen Union zu verweigern." On the influence of the European integration on the democratic principle, see Karl-Peter Sommermann, 'Verfassungsperspektiven für die Demokratie in der erweiterten Europäischen Union: Gefahr der Entdemokratisierung oder Fortentwicklung im Rahmen europäischer Supranationalität?', Die Öffentliche Verwaltung, 2003, p. 1009 et seq.

24 Ernst-Wolfgang Böckenförde, 'Príncipes de la démocratie, forme politique et forme de gouvernement', *in* Ernst-Wolfgang Böckenförde, *Le droit, l'État et la constitution démocratique. Essais de théorie juridique, politique et constitutionnelle*, LGDJ/Bruylant, Paris/Bruxelles, 2000, p. 278.

25 Martin Morlok & Christina Hientzsch, 'Das Parlament als Zentralorgan der Demokratie', *Juristische Schulung*, 2011, p. 1 *et seq*.

26 Daniel Halberstam & Christoph Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"', *German Law Journal*, Vol. 10, Issue 8, 2009, p. 1247: "[…] the voting mechanisms to the European Parliament do not function according to a strict rule of democratic equality, one (wo)man, one vote. […] [I]f there is no people, there is no parliament. As there is no European people, the European Parliament is not a real parliament, *i.e*. a popular representation (*Volksvertretung*)."

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democratic deficit.[27] However, when, in the decision on the Treaty of Lisbon of 30 June 2009,[28] the FCC analyses the characteristics of the "democratic standard", it notes that "the elements of the democratic principle cannot be achieved in the same way within the European Union". The two types of democratic standards lie in the structural differences between the *sui generis* international organization, the EU, and the state constitutional architecture. There is therefore a qualitative difference between these two democratic forms. Indeed, there cannot be a requirement of perfect symmetry between these two legal orders, because "as long as the organization of the competences of the Union" obeys the principle of the express delegation granted by the states following a "procedure of decision-making cooperation respecting the responsibility of state integration" and "as long as a balance between the competences of the EU and those of the states is maintained, the democracy of the EU must and cannot be analogous to the democratic standard of the state".[29]

The core of a democratic regime, which is part of "the common constitutional tradition of the European states", is the right of the people to "freely and equally determine the government and the legislature".[30] But this right cannot be transposed to the institutional level of the EU, because neither the European Parliament nor the Commission has a role equivalent to that of the *Bundestag* or the Federal Government.[31] The "responsibility of the state bodies for sustainable integration" means that the political system of the Federal Republic as well as

27 Stefan Oeter, 'Souveränität und Demokratie als Probleme in der "Verfassungsentwicklung" der Europäischen Union. Fragen aus Verfassungstheorie und Verfassungsgeschichte an die deutsche Debatte um Souveränität, Demokratie und die Verteilung politischer Verantwortung im geeinten Europa', *ZaöRV*, Vol. 55, 1995, p. 661: "The powers of the Parliament are clearly too weak to really respond to the requirements of the principle of democracy and the idea of parliamentary control of legislation and administration" (Die Rechte des Parlaments seien eindeutig zu schwach ausgeprägt, um wirklich den Anforderungen aus dem Demokratieprinzip und dem Gedanken parlamentarischer Kontrolle der Gesetzgebung und Verwaltung gerecht zu werden).

28 BVerfGE 123, 267.

29 BVerfGE 123, 267, 368: "Solange die europäische Zuständigkeitsordnung nach dem Prinzip der begrenzten Einzelermächtigung in kooperativ ausgestalteten Entscheidungsverfahren unter Wahrung der staatliche Integrationsverantwortung besteht und solange eine ausgewogene Balance der Unionszuständigkeiten und der staatlichen Zuständigkeiten erhalten bleibt, kann und muss die Demokratie der Europäischen Union nicht staatsanalog ausgestaltet sein."

30 BVerfGE 123, 267, 366: "[…] die demokratischen Grundsätze in der Europäischen Union nicht in gleicher Weise wie im Grundgesetz verwirklicht werden können […]"; pp. 367-368: "In einer Demokratie muss das Volk Regierung und Gesetzgebung in freier und gleicher Wahl bestimmen können […]. Die Europäische Union erkennt diesen demokratischen Kerngedanken als gemeineuropäische Verfassungstradition an […]."

31 BVerfGE 123, 267, 368: "As a representative body of the peoples in a supranational community […], it [the Parliament] cannot, and need not, as regards of its composition, comply with the requirements that arise at state level from the equal political right to vote of all citizens. The Commission also as a supranational, special body […] need not extensively fulfill the conditions of a government that is fully accountable either to Parliament or to the majority decision of the electorate because the Commission itself is not bound by the will of the electorate in a comparable manner."

that of the EU must comply with the principles of Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law.[32]

The FCC's recognition of an individual right to democracy under Article 38(1)[33] paves the way for the FCC to review transfers of sovereign powers to the EU through the prism of constitutional identity.[34] The "unjustified detachment from the scope of Article 38(1), first sentence" is one of the 'procedural peculiarities' of the *Lisbon decision*[35] that recurs in subsequent case-law.[36] The question of whether the Treaty provisions are in conformity with Article 38 does not as such lend itself to criticism. What is problematic is "how Article 38 of the Basic Law is interpreted and applied" by the court.[37] According to the FCC's analysis, the scope of the Article is not limited to the existence of an 'individual guarantee of participation' in the election of members of parliament, but also confers on citizens "the individual right to claim a relationship of legitimacy between those entitled to vote and the public authority of the European Union",[38] an 'individual right to democracy'.[39] The way in which German deputies are elected is used as a justification for developing a complex set of relationships between the voters on the one hand and the power exercised by

32 BVerfGE 123, 267, 356: "A permanent responsibility of integration (*dauerhafte Integrationsverantwortung*) is incumbent upon the German constitutional bodies. In the transfer of sovereign powers and the elaboration of the European decision-making procedures, it is aimed at ensuring that, seen overall, the political system of the Federal Republic of Germany as well as that of the European Union comply with democratic principles within the meaning of Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law"; p. 364: "The constitutional requirements placed by the principle of democracy on the organizational structure and the decision-making procedures of the European Union depend on the extent to which sovereign responsibilities are transferred to the Union and the degree of political independence in the exercise of the sovereign powers transferred."

33 "Members of the German *Bundestag* shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience."

34 Christine Langenfeld, 'La jurisprudence récente de la Cour constitutionnelle allemande relative au droit de l'Union européenne', *Titre VII Les Cahiers du Conseil constitutionnel*, Issue 2, 2019.

35 Christoph Schönberger, 'Die Europäische Union zwischen "Demokratiedefizit" und Bundesstaatsverbot. Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts', *Der Staat*, 2009, p. 539: "Zu den prozessualen Eigenheiten des Lissabon-Urteils gehört die uferlose Entgrenzung des Anwendungsbereichs von Art. 38 Abs. 1 S. 1 GG."

36 BVerfGE 134, 366, 380 *et seq*.; decision of 5 May 2020, paras. 64 and 90.

37 Matthias Jestaedt, 'Warum in die Ferne schweifen, wenn der Massstab liegt so nah? Verfassungshandwerkliche Anfragen an das Lissabon-Urteil des BVerfG', *Der Staat*, 2009, p. 503: "Gegenstand der Kritik ist, *wie* Art. 38 GG ausgelegt und angewendet wird […]".

38 Schönberger 2009, pp. 539-540: "Der Gewährleistungsgehalt dieser Vorschrift beschränkt sich […] nicht auf die Individualgarantie der Teilnahme an der Bundestagswahl […]. Vielmehr leit Art. 38 Abs. 1 S. 1 GG dem deutschen Bürger in der Deutung des Bundesverfassungsgerichts einen umfassenden Individualanspruch auf einen ‚legitimatorischen Zusammenhang zwischen den Wahlberechtigten und der europäischen Hoheitsgewalt'."

39 Matthias Jestaedt, 'Warum in die Ferne schweifen, wenn der Massstab liegt so nah? Verfassungshandwerkliche Anfragen an das Lissabon-Urteil des BVerfG', *Der Staat*, 2009, p. 504 : "[…] individuellen Recht auf Demokratie."

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the EU on the other. The subjectification[40] of the right to vote in Article 38 makes it possible to set limits on the process of European integration that would go too far and no longer fit into this framework of legitimation. With this reasoning, the German FCC has turned every *quivis ex populo* into a procedural constitutional guardian of European democracy.

The result is not only the demand that the public power of the EU be legitimated in accordance with the canons of the Basic Law. Namely, with Lisbon, it became possible for a citizen who considers that his or her individual right to sufficient legitimation of supranational power is infringed by a 'treaty amendment' to lodge an "individual constitutional complaint against the law ratifying the treaty amendment".[41] Here, the subjectification of this right is all the more astonishing, as it goes against the solutions delivered by the FCC in the national framework. Indeed, a voter cannot rely on Article 38 in order to bring an action before the Karlsruhe Court for a violation of the *Bundestag*'s powers.[42]

The elastic interpretation of Article 38 and its combination with the requirement of legitimacy of the EU's power has only external effects, but still cannot constitute the textual basis for justifying an internal violation of the *Bundestag*'s competences. The political meaning of the decision is clear: in the future, even if the law ratifying a treaty amendment escapes the control of the Constitutional Court thanks to the requirement of "a quorum of one third of the members of the *Bundestag*", it will not be immune to the possibility of an individual constitutional complaint.[43] "The traditional political consensus of the major parliamentary fractions in the field of European issues should not prevent the review by the Constitutional Court."[44]

In order to ensure that the internal system of checks and balances is maintained, the FCC exercises control over the degree of the European integration process, which must remain in conformity with the "eternity clause" enshrined in Article 79(3) of the Basic Law.

40 Martin Nettesheim, 'Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG', *Neue Juristische Wochenschrift*, 2009, p. 2869, speaks of an "indivisible right posing the requirement of statehood".

41 Schönberger 2009, p. 540: "[…] jeden *quivis ex populo* zum verfassungsprozessualen Hüter der europäischen Demokratie erhebt […], jede zukünftige Vertragsrevision über den Weg einer Verfassungsbeschwerde gegen das Zustimmungsgesetz […] unterzogen werden kann."

42 BVerfGE 62, 397, 399, on the early dissolution of the *Bundestag* as a result of Chancellor Helmut Schmidt's clever political game, quoted by Schönberger 2009, p. 541.

43 On the participation of the individual in the development of law and jurisprudence, *see* Johannes Masing, *Mobilisierung des Bürgers für die Durchsetzung des Rechts. Europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht*, Duncker & Humblot, Berlin, 1997.

44 Schönberger 2009, p. 541: "Der übliche europapolitische Konsens der großen Bundestagsfraktionen soll die verfassungsgerichtliche Überprüfung nicht hindern." This solution is not "convincing from the point of view of constitutional dogma" and "the political-legal significance of the case-law is obvious" ([s]o wenig das verfassungsdogmatisch überzeugen kann, so offenkundig ist der rechtspolitische Sinne dieser Rechtsprechung).

2.2. The European Integration Process under the "Full Supervision of Karlsruhe"[45]

Article 23(1) of the Basic Law provides that in order to contribute to "the development of the European Union", the Federal Republic "may transfer sovereign powers by a law with the consent of the Bundesrat" and that paragraphs 2 and 3 of Article 79 apply to

> "the establishment of the European Union as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible."

The consequence of this article is that any amendment to the "conventional foundations" of the EU must follow the rules of the constitutional revision procedure of the Basic Law and not the ordinary legislative procedure.

Secondly, the "eternity clause" (*Ewigkeitsklausel*), applicable to the European institution, constitutes the material limit that must be respected by the legislator ratifying a treaty or an amendment to existing treaty regulations. If this limit were to be exceeded, the Federal Republic would find itself unable to continue its participation in the European integration process. In this hypothesis, the constituent power of the people would have to be exercised in order to abrogate the current constitution and establish a new one in line with the advanced stage of development of the supranational organization.

For the FCC, in 2009 the process of European integration has reached a stage that cannot be surpassed without violating the 'heart' of the Basic Law, *i.e.* the principles protected by Article 79(3) of the Basic Law. The violation of the constitutional identity codified in Article 79(3) represents, from the perspective of the principle of democracy, an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the fundamental principles of Article 79(3) of the Basic Law.[46]

The application of the "eternity guarantee" to the European integration process is problematic in view of the genesis of the provision and its purpose. It is intended to protect the principles enumerated therein from 'enemies' of the democratic and liberal constitutional system of the Basic Law. The principles enumerated are the following: the division of the Federation into *Länder*, their

45 Christian Calliess, 'Unter Karlsruher Totalaufsicht', *Frankfurter Allgemeine Zeitung*, 27 August 2009, p. 8.

46 BVerfGE 123, 267, 344, or 404: "Without the expressly declared will of the people, elected bodies are not competent to create a new subject for legitimation, or to delegitimize the existing ones." The notion of "constitutional identity" also appears in the decisions of the French Constitutional Council (*Conseil constitutionnel*) without the latter providing satisfactory details. *See e.g.* decision DC No. 2006-540, 27 July 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, para. 19: "Considering, firstly, that the transposition of a directive cannot run counter to a rule or principle inherent in the constitutional identity of France, unless the constituent has agreed to it" (Considérant, en premier lieu, que la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti).

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participation in federal legislation, the principles laid down in Articles 1 and 20 of the Basic Law demonstrate the constituent will of 1949 to ensure a sphere unamenable to amendment in which the constituent elements of a democratic and free order are enshrined. The FCC "fails to demonstrate why the specific problems of the democratic organization of the European Union should trigger the application of the ultimate limitation of the 'eternity clause'".[47]

The Second Senate goes even further and states that *the Federal Republic cannot participate in a European federal state* on the grounds that such a 'creation' would exceed the limits set by the Basic Law. The "eternity clause" is understood by the German Constitutional Court as a guarantee of German "sovereignty":

> "When [...] the threshold of the creation of a federal state and the renunciation of state sovereignty is crossed, which would require the free decision of the people in Germany beyond the present applicability of the Basic Law, the level of democratic requirements should fully correspond to the needs of democratic legitimation of a Union organized according to the state model. [...] An unacceptable democratic deficit under Article 23 in combination with Article 79(3) of the Basic Law would mean that the scope of competences, the political organizational power and the degree of autonomous will formation of the Union's organs have reached a level of federalization comparable to that of a federal state (analogous to a state)."[48]

The FCC stated as early as 2009 that the Basic Law does not allow the transition to a European federal state without a change in the constitutional text. However, "from a constitutional point of view", this analysis becomes "more than doubtful". *(i)* First of all, the question of a European federal state is not on the political agenda. *(ii)* Secondly, the FCC does not offer "any definition of the concept of a federal state", nor does it discuss the importance and functions of a body representing the federated states, alongside the parliament bringing together the representatives of the European people(s).[49]

47 Christoph Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones at Sea', *German Law Journal*, Vol. 10, Issue 8, 2009, p. 1208.

48 BVerfGE 123, 267, p. 364-365: "A structural democratic deficit that would be unacceptable pursuant to Article 23 in conjunction with Article 79.3 of the Basic Law would exist if the extent of competences, the political freedom of action and the degree of independent opinion-formation on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, *i.e.* a level analogous to that of a state [...]. If an imbalance between type and extent of the sovereign powers exercised and the degree of democratic legitimation arises in the course of its responsibility for integration, to endeavor to effect a change, and in the worst case, even to refuse further participation in the European Union."

49 On this argument, *cf.* Schönberger 2009, pp. 556-557, which explains that the Second Senate of the FCC imagines a federal construction "emptied of all substance" (*blutleere Konstruktion*), which is only a "reminiscence of federal state theory" (*Reminiszenzen an die deutsche Bundesstaatstheorie*) of the 19th century. *See* Christoph Schönberger, 'Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiebung des Staatenbund-Bundesstaat-Schemas', *Archiv des öffentliches Recht*, 2004, p. 88.

This is the argument that the FCC takes up in its decision of 5 May 2020, while insisting on the "reserved" (*zurückhaltend*) and "Europe-friendly" (*europafreundlich*)[50] nature of the *ultra vires* review it is conducting.

3. The Federal Constitutional Court's Review of the Ultra Vires Decision: On the Edge of Legal Policy

The FCC's review of EU secondary legislation is not a revelation in the judgment of 5 May. The story goes a long way back: the decision on the Maastricht Treaty handed down in 1993 marked the beginning of the controversial review exercised by the German FCC, who ensures that secondary law does not undermine the provisions of primary law (Section 3.1) and in particular the principle of the division of competences between the EU and the Member States (Section 3.2).[51]

3.1. The Duty of the German Federal Authorities to Ensure the Distribution of Powers Attributed to the EU

The Second Senate of the FCC found a violation of Article 38(1) in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law. This violation consists in the failure of the Federal Government and the *Bundestag* to act to ensure that the measures taken by the ECB in the contested decisions comply with the principle of proportionality (*Grundsatz der Verhältnismäßigkeit*).[52] The German FCC's intellectual sleight of hand consists in finding this violation committed by domestic constitutional bodies. It is not a question of immediately challenging the decisions of the ECB, but of condemning the inaction of the German government and *Bundestag*.

The blow to the European monetary institution comes only at the second phase of the analysis, as a direct consequence of the failure to act. In fact, after having pronounced the violation of the mentioned articles of the Basic Law by the organs of the Federation, the FCC declares that the contested decisions on the purchase of assets represent a

> "qualified, because manifest and structurally significant, exceeding of the competences attributed to the ECB by Article 119, Article 127 ff. TFEU and Article 17 ff. of the Statute of the European System of Central Banks and of the European Central Bank"[53]

by stating that *the decision of the CJEU of 11 December 2018 is no longer "justifiable" (nachvollziehbar) and is therefore rendered ultra vires*.[54] However, in this case, the

50 Para. 112 of the decision.
51 BVerfGE 89, 155 of 12 October 1993; in the same vein: BVerfGE 126, 286, 308 *et seq*.
52 Para. 116 of the decision.
53 "[S]tellt eine qualifizierte, weil offensichtliche und strukturell bedeutsame Überschreitung der EZB in Art. 119, Art. 127 ff. AEUV und Art. 17 ff. ESZB-Satzung zugewiesenen Kompetenzen dar."
54 Id. para. 116.

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Second Senate does not give a final ruling on the proportionality of the ECB's decisions. After these preliminary remarks, the Second Senate undertakes a lengthy analysis which, despite the violent nature of the result, contains certain nuances that are worthy of the reader's attention.

It is true that the interpretation by the CJEU "binds" (*bindet*) the national authorities, but the content of the delimitation of competences drawn in Luxembourg "is no longer justifiable" (*nicht mehr vertretbar*). The review of the validity or interpretation of a measure taken by EU bodies falls within the jurisdiction of the CJEU, except in those cases in which it is a question of an *"objectively arbitrary interpretation of the Treaties"* (*objektiv willkürlichen Auslegung der Veträge*).[55] The difficulty here is not the reality of an arbitrary interpretation by the CJEU that would disregard the scope of the competences attributed to an institution of the EU, but rather the role of the FCC in declaring this disregard, as it insists, that the judgment of 11 December clearly exceeds the 'mandate' granted to the CJEU under Article 19(1) TFEU, according to which "the Court of Justice of the European Union shall ensure that the law is observed in the interpretation and application of the Treaties". The logical consequence is that the CJEU, by stepping out of its sphere of competence, has issued a judicial decision which is no longer binding on the national authorities, who are exempt from its application.

The *questio diabolica* that draws the conclusion of the existence of an *ultra vires* act is the distinction between the exercise of a monetary or economic policy by the ECB. The red line delimiting the respective competences of the EU and the Member States lies at this level. If the German FCC decides that the preparation and implementation of the asset purchase programs for government securities is not a "monetary policy" (*Währungspolitik*) "exclusively attributed to the ESCB" (*ausschließlich dem ESZB zugewiesene*) in accordance with Article 127 TFEU,[56] but that the measures, taken by a Union body actually involve the exercise of an economic policy (*Wirtschaftspolitik*), a competence which "in principle" (*grundsätzlich*) belongs to the Member States, then it opens the way to declaring that a failure to respect the division of competences entails the expiration of the obligation to apply secondary legislation deemed *ultra vires*. However, the fields of action of monetary and economic policy are not hermetically sealed with

55 Id. para. 118.

56 "[…] The basic tasks to be carried out through the ESCB shall be: to define and implement the monetary policy of the Union […]."

regard to the relevant terms of the TFEU[57] and it is in this sense that the Court of Luxembourg has interpreted the Treaties, in particular by underlining that

> "within the institutional balance established by the provisions set out in Title VIII of the TFEU, in which the independence guaranteed to the ESCB [...] is embedded, the authors of the Treaties did not intend an absolute separation of economic and monetary policy"

and by rejecting the FCC's view that not every effect of an open market operation program which was knowingly accepted and foreseeable with certainty by the ESCB at the time of the establishment of that program should be regarded as an "indirect effect" thereof.[58] The FCC, in turn, dismisses this argument by pointing to the actual effects of the securities purchase program and the lack of an overall assessment in the Luxembourg judgment. By failing to examine whether the ESCB and the ECB were complying with the "monetary policy mandate" (*währungspolitischen Mandats*) granted to them and by failing to carry out a thorough analysis of the proportionality of the measures taken, the CJEU failed, according to the Second Senate, to perform its "corrective function to protect the competences of the Member States". Therefore, from a German perspective, the solution of the CJEU "emptied the principle of limited jurisdiction under Article 5(1), first sentence, and (2) TEU of its substance".[59]

The principle of proportionality, a guiding principle of EU law which has its origins in the legal systems of the Member States, *consists of three elements, three steps which must be followed: the appropriateness, necessity and adequacy of the measure*. The latter satisfies these requirements if it achieves "in a consistent and

57 *See e.g.* Article 119 TFEU: "(1) For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition. (2) Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition. (3). These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments." *See also* Article 120 TFEU: "Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union [...]"; Article 121 TFEU: "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council [...]."

58 *Case C-493/17, Weiss and others*, paras. 60-61.

59 Id. para. 123; Article 5(1) and 2 TEU: "(1) The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (2) Under the principle of conferral, 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. Competences not conferred upon the Union in the Treaties remain with the Member States."

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systematic manner the objective pursued", which leads the CJEU, according to Karlsruhe, to question the manifestly inadequate nature of the objective pursued and to examine the possibility of taking measures that would have been less intrusive by dispensing with "an examination of proportionality in the strict sense" (*Prüfung der Verhältnismäßigkeit im engeren Sinne*).[60] This interpretation of the principle of proportionality does not allow the CJEU, according to the Senate, to draw the necessary distinction between competences in the field of monetary policy, on the one hand, and in the field of economic policy, on the other, leading it to blur the distribution of these competences between the Union and its Member States. The consequence of the elastic interpretation of the principle of proportionality makes it, in this particular case, "inoperable" (*funktionslos*).[61] However, in the judgment of 11 December 2018, the European Court, after having established the extended competences of the monetary institution, proceeds to examine the proportionality of the contested measures allowing the purchase of assets of public securities in three steps showing successively that "despite the monetary policy measures" the "annual inflation rates of the euro area" are

> "largely below the 2% objective set by the ESCB, which meets the objective pursued by the PSPP: the maintenance of price stability and in view of the foreseeable effects of the PSPP and since it does not appear that the objective pursued by the ESCB could have been achieved by another type of monetary policy measure [...] the PSPP does not go manifestly beyond what is necessary to achieve this objective"

(examination of the appropriateness and necessity of the measure). The public debt purchase program is also "implemented" on a temporary basis in order to achieve the objective pursued and includes mechanisms to prevent and limit the risk of losses to only a part of the securities purchased.[62] The Second Senate notes that these instruments serve the budgetary autonomy of the Member States and thus their budgetary policy, which does not belong to the field of monetary policy controlled by the EU. In view of the solution provided by the CJEU judgment, the Karlsruhe Court logically concludes that, in "this form", the principle of proportionality cannot "fulfil" the "corrective function for the purposes of safeguarding the competences of the Member States".[63] At this point, the FCC begins to deploy its aggressive arsenal in order to deliver the *coup de grâce* to the public debt purchase program:

> "[t]he complete concealment of the economic policy effects of the PSPP, which, with regard to the determination of the ESCB's objectives, is not

60 Para. 126 of the decision, with reference to the jurisprudence of the CJEU, *see e.g.* CJEU, Judgment of 9 September 2010, *Case C-64/08, Engelmann*, ECLI:EU:C:2010:506; Judgment of 16 December 2010, *Case C-137/09, Josemans*, ECLU:EU:C:2010:774

61 Para. 127 of the decision.

62 *Case C-493/17, Weiss and others*, paras. 74 *et seq*.

63 Paras. 132-133 of the decision.

> tenable from a methodological perspective, leads to the proportionality test losing its function, since the appropriateness and necessity of the PSPP, apart from the risk of losses, is not placed in relation to the economic policy effects to the detriment of the Member States' competences, which are not weighed up against the expected benefits."[64]

The minimal control exercised by the Luxembourg judge on the "manifest error of assessment" of the ECB (*offensichtlicher Beurteilungsfehler*) does not allow in any case to probe the disputed measure in depth and to note the possible exceeding of the distribution of competences anchored in the Treaties. This means nothing more than an "erosion of the Member State competences in the field of economic and budgetary policy", as well as a "weakening of the democratic legitimation of the public power exercised by the Eurosystem", the body comprising the ECB and the national central banks that have adopted the euro. Both aspects, erosion and weakening, are incompatible with the German Basic Law.[65]

The FCC argues that it is the close link between the distinction of competences for economic and monetary policy, which constitutes "a fundamental political decision with implications beyond the individual case" (*eine über den Einzelfall hinausgehende politische Grundentscheidung*), and it is the principle of democracy that is undermined by the superficial review of the CJEU. Karlsruhe insists that classifying a measure as a monetary policy measure instead of an economic policy act

> "does not only affect the division of competences between the European Union and the Member States, but also decides on the level of democratic legitimacy and control of the policy area concerned, since monetary policy is transferred [...] to the independent ESCB",

64 Para. 133: "Das völlige Ausblenden der wirtschaftspolitischen Auswirkungen des PSPP, das schon bei der Bestimmung der Zielsetzung des ESZB methodisch nicht nachvollziehbar ist führt dazu, dass die Verhältnismäßigkeitsprüfung ihre Funktion verliert, weil Geeignetheit und Erforderlichkeit des PSPP – von dem Verlustrisiko abgesehen – nicht mit den wirtschaftspolitischen Auswirkungen zulasten der Kompetenzen der Mitgliedstaaten in Beziehung gesetzt und diese nicht mit den erhofften Vorteilen abgewogen wurden"; *see also* para. 136.

65 Id. para. 157; *see also* the constant jurisprudence: BVerfGE 134, 366, 395 *et seq*.; BVerfGE 142, 123, 192 *et seq*.; BVerfGE 146, 216, 250 *et seq*.

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which is denied state monetary financing[66] under Article 123 TFEU.[67] However, the FCC does not hastily conclude that the mechanism for the purchase of public debt securities circumvents the prohibition contained in Article 123 TFEU[68] by confirming the analysis of the *OMT* decision.[69] Furthermore, an intrusion of the ECB into the economic and budgetary policy of the States could jeopardize its independence. According to the FCC, *de facto* granting such a competence, and leaving the problematic measures (whose sprawling effects extend over a large number of sectors of national political, economic and budgetary life) to the European monetary institution would extinguish any possibility of intervening in the decisions taken. While a change in the delimitation of the areas of action is not excluded, this can only take place following a revision of the Treaty pursuant to Article 48 TEU.[70]

Finally, the FCC transposes here the reasoning it follows with regard to the compatibility of the level of European integration with the German Basic Law: if one wishes to move to a higher stage of integration, it is necessary to leave the current system behind and adopt a new constitutional text allowing for more advanced integration. As with the limits set by the national court in the *Lisbon Treaty decision*, the prospective answer here is a revision of the Treaty to allow for the allocation of economic and budgetary policy issues to the SECB, because the EU must now confine itself to "coordinating state measures" and not take their place. The rigid interpretation by the Second Senate of the principle of the division of competences between the EU and the Member States does not make it possible, in the current jurisprudential configuration, for another mental construction to be made which could validate, in particular, the reasoning of the CJEU. Indeed, it jeopardizes the measures adopted by the ECB and, in general,

66 Para. 159: "Die Zuordnung einer Maßnahme zur Währungs- statt zur Wirtschafts- oder Fiskalpolitik berührt nicht nur die Frage der Kompetenzverteilung zwischen der Europäischen Union und den Mitgliedstaaten; sie entscheidet zugleich über das demokratische Legitimationsniveau und die Kontrolle des entsprechenden Politikbereichs, weil die Währungspolitik […] dem unabhängigen ESZB übertragen ist", with reference to the Judgment of 9 March 2010, *Case C-518/07, Commission v Germany*, ECLI:EU:C:2010:125. BVerfG, decision of 30 July 2019 (2 BvR 1685/14): "The Europeanisation of national administrative structures and the establishment of independent bodies, offices and agencies of the European Union require a minimum of democratic legitimation and oversight (Art. 23 [1], third sentence in conjunction with Art. 79 [3] and Art. 20 [1] and [2] of the Basic Law)"; para. 181.

67 "Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as "national central banks") in favor of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments"; in that respect, *see* Judgment of 16 June 2015, *Case C-62/14, Gauweiler and others*, ECLI:EU:C:2015:400.

68 Para. 213: "Im Ergebnis kann auf der Grundlage des Urteils des Gerichtshofs vom 11. Dezember 2018 […] eine Umgehung des Verbots monetärer Staatsfinanzierung nicht festgestellt warden"; *see also* para. 214.

69 BVerfGE 142, 123, 228 with reference to *Case C-62/14, Gauweiler and others*, para. 126.

70 "The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures […]."

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casts the shadow perceived as a weapon of mass destruction over the primacy of the acts of the EU and the jurisdictional competence of the CJEU. Any other interpretation would betray the previous solutions of the German FCC.

3.2. The Effects of the Ultra Vires Review by the Federal Constitutional Court

The integration responsibility (*Integrationsverantwortung*),[71] which in the light of the individual right to democratic legitimation under Article 38(1) in conjunction with Article 20(2) of the Basic Law, obliges federal constitutional bodies to "oppose" the ECB's public debt purchase program (to be "qualified as an *ultra vires* act"), *i.e.* in the event of "manifest and structural infringements by the organs, institutions and other bodies of the European Union".[72] This integration responsibility is the instrument used by the FCC to examine the need for democratic legitimation and to control the European integration process.[73] In this case, the Federal Government and the *Bundestag* are obliged to ensure that a "proportionality review" is carried out by the ECB.

> "The Federal Government and the *Bundestag* must make their legal position known to the ECB or otherwise ensure that a situation in conformity with the Treaties is restored. The qualification of the ECB measure as an *ultra vires* act results in the non-application of the principle of precedence of application of Union law."

The final shot is fired: the act *"is not to be applied in Germany and has no binding effect in relation to German constitutional bodies, administrative authorities and courts"*.[74] Of course, this control is exceptional, because the FCC itself recognizes that it is essential for the smooth running of the European machinery that a certain unity of case-law on the competences of the EU be guaranteed. The FCC therefore confines itself to carrying out a minimal review only if

> "the fact that the act is contrary to the division of competences is manifest and that it is of particular importance with regard to the principle of attribution and the obligation arising from the principle of the rule of law to respect the law."[75]

The review of EU acts results from the failure of the German constitutional bodies to ensure that the division of competences is respected in the preparation of European decisions and only takes place after the preliminary question has been referred to the CJEU.

71 On the concept of integration, *see* Andreas Voßkuhle, 'Artikel 92', *in* Hermann von Magoldt *et al*., *Grundgesetz Kommentar, 7th Edition*, C.H. Beck, 2018, para. 85a; Andreas Voßkuhle, 'Integration durch Recht – Der Beitrag des Bundesverfassungsgerichts', *JuristenZeitung*, 2016, p. 164 *et seq*.; Claus Dieter Classen, 'Artikel 23', *in* von Magoldt 2018, para. 15.

72 Paras. 229-230.

73 Classen 2018, para. 15.

74 Paras. 232, 233, and 234.

75 BVerfGE 126, 286, 302 *et seq*.

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The reasoning may offend the reader's sensibilities,[76] but in view of the logical sequence of the decision, which is more than one hundred pages long, it is difficult to imagine any other outcome. The violation of the principle of the division of competences between the EU and the Member States, the (relative) failure to respect the principle of proportionality and the obligation of integration weighing on the German constitutional bodies guided by the principle of (absolute) democracy in its German version seal the fate of the ECB's public debt purchase program. The European Monetary Institute and all the EU's governing bodies are being asked either to explain and justify the measures taken or to engage in hostilities against Germany. If the infringement procedure is brought before the CJEU, *the key to the enigma will be in the hands of the Luxembourg Court, which will have to examine its own case-law. A case-law which, according to its German counterpart, has validated an ultra vires act in violation of the Treaties*. An *abyss* for the CJEU?

The 'drama foretold' in the FCC's *OMT decision*, which did not unravel in 2016, has finally fulfilled the "promise of a confrontation".[77] The setting is the same, but this time heavy artillery is mobilized on both sides. In the specific case of the *PSPP judgment*, the German Parliament neutralized the conflict. A very large political alliance formed of Chancellor Angela Merkel's coalition parties with the Greens and the Liberal Democrats voted on 2 July 2020 to accept the explanation the ECB provided for the public sector purchase program (PSPP). This vote fulfilled the FCC's ruling concerning the proportionality of the measures. The *Bundestag* considered "the ECB's statement to complete a proportionality check as comprehensive" and therefore, sufficient.[78] But that was not the final act in this theatre: in a judgment of 29 April 2021,[79] the Second Senate refused to declare the PSPP decision of 5 May 2020 unenforceable under § 35 of the Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*)[80] and indirectly validated the political decision of 2 July 2020 giving the final approval to the public debt asset purchase program. For the Commission, however, the judgment of 29 April 2021 "does not reverse the breaches concerning the principle of primacy of Union law".[81]

76 *See* Franz C. Mayer, 'Auf dem Weg zum Richterfausrecht. Zum PSPP-Urteil des BVerfG', *Verfassungsblog*, 7 May 2020, at https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/, who argues for an infringement procedure as the "civilized" way to resolve the conflict.

77 Philippe Cossalter & Audrey Schlegel, 'La décision OMT de 2016: une ouverture', *RFDA*, 2017/4, p. 811.

78 Antrag der Fraktionen CDU/CSU, SPD, FDP und Bündnis 90/Die Grünen, 1 July 2020, Drucksache 19/20621, at https://dip21.bundestag.de/dip21/btd/19/206/1920621.pdf. The Parliament approves the statement of the ECB resulting of the meeting of 3-4 June 2020: Account of the monetary policy meeting of the Governing Council of the European Central Bank, at www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html.

79 2 BvR 1651/15, Rn.1-111; *see* Martin Nettesheim, 'Größe und Tragik. Zum Eilbeschluss des Bundesverfassungsgerichts zu 'Next Generation EU", 21 April 2021, *Verfassungsblog*, at https://verfassungsblog.de/grose-und-tragik/.

80 "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."

81 *See* at https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743.