

B. NATIONAL COURTS

Making sense of the “incomprehensible”: The *PSPP* Judgment of the German Federal Constitutional Court

Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15,
Judgment of 5 May 2020

1. Introduction

Once upon a time, a central bank was created whose mandate was defined in rather unconventional terms. Those founding the central bank wanted to have their cake and eat it: while it could conduct monetary policy in an unfettered manner, it was prohibited from anything more than glancing at economic policies and providing possible support to Member States. This central bank coped with its mandate until the realities of the euro crisis hit, when it became obvious that new, alternative measures were necessary. Quantitative easing presented itself as an effective option to maintain price stability; but also caused headaches for anyone attempting to make sense of and find coherence in the EMU’s legal framework. Is it possible to control the European Central Bank in carrying out its increasingly demanding mandate? And if so, who is to do it? These questions have presented themselves repeatedly before the German Federal Constitutional Court (hereinafter FCC) and the European Court of Justice. From 6 September 2012 until present, the ECB has initiated three different quantitative easing (hereinafter QE) programmes,¹ while the FCC has submitted two preliminary references to the Court of Justice. We now

1. OMT: Technical features of Outright Monetary Transactions, 6 Sept. 2012, <www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html>. PSPP: ECB Decision 2015/774 of 4 March 2015 on a secondary markets public sector asset purchase programme, O.J. 2015, L 121/20, amended by Decision 2015/2101 of 5 Nov. 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, O.J. 2015, L 303/106, Decision 2015/2464 of 16 Dec. 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, O.J. 2015, L 344/1, Decision 2016/702 of 18 April 2016 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, O.J. 2016, L 121/24, and Decision (EU) 2017/100 of 11 Jan. 2017 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, O.J. 2017, L 16/51. PEPP: Decision 2020/440 of the ECB of 24 March 2020 on a temporary pandemic emergency purchase programme, O.J. 2020, L 91/1.

have a total of four binding judgments,² issued by two courts, which are (to say the least) contradictory in their findings.

The most recent event in this back and forth took place on 5 May 2020, when the FCC decided that the ECB's Public Sector Purchase Programme (PSPP) would exceed its monetary policy mandate if the ECB was unable to further justify the programme's proportionality. The FCC also found that the ECJ's judgment confirming the compliance of the PSPP programme with EU law is *ultra vires*, and thus inapplicable in Germany. That the decision caused shock and dismay may be an understatement. According to many commentators, the FCC has "set a bomb",³ "gone nuclear",⁴ and "struck a blow"⁵ to the EU integration project. In response, the Court of Justice⁶ and the ECB⁷ issued thin (if unconventional) statements that the ruling would not alter the two institutions' existing way of operating under the Treaties.

Certainly, rejecting a preliminary ruling of the ECJ is an exceptional event in itself. One must add that this judgment was pronounced by a constitutional court that has frequently questioned the ECJ's case law. In addition, this is the constitutional court of a State that holds 27 percent, meaning the largest part, of the ECB's capital key (which would lead to particularly disastrous consequences if its recommendation of German non-participation were implemented). Finally, one must sprinkle on top of the mix the political and economic context of the decision: an EU legal framework suffering from rule of law erosion in several Member States and an Economic and Monetary Union facing renewed challenges following the Covid-19 crisis. This heady mix has established a legal outcome that is difficult to digest.

A longer-term perspective may also allow us to observe that, for all the shock, this was a ruling that was "a long time coming",⁸ and could have been

2. In addition to two Orders for reference.

3. Sandbu, "German court has set a bomb under the EU legal order", *Financial Times*, 5 May 2020 <www.ft.com/content/79484c01-b66b-4f81-bdc6-fd4def940821> (websites last visited 15 Sept. 2020).

4. Sarmiento and Utrilla, "Germany's Constitutional Court has gone nuclear. What happens next will shape the EU's future" *Euronews* 20 May 2020 <www.euronews.com/2020/05/15/germany-constitutional-court-gone-nuclear-what-happens-next-will-shape-the-eu-future-view>.

5. Poiars Maduro, "The German Constitutional Court struck a blow to EU integration. This is how we can save it", *Euronews* 22 May 2020 <www.euronews.com/2020/05/20/german-constitutional-court-struck-blow-to-eu-integration-this-is-how-we-can-save-it-view>.

6. Court of Justice of the European Union, Press Release following the judgment of the German Constitutional Court of 5 May 2020, Press Release 58/20 of 8 May 2020, <curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf>.

7. European Central Bank, "ECB takes note of German Federal Constitutional Court ruling and remains fully committed to its mandate", 5 May 2020 <www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html>.

8. Grimm, "A long time coming", 21 GLJ (2020), 5.

expected by anyone following the law of EMU and the interaction between the two Courts closely. It is in this sense not accidental that such a dramatic ruling should come in this field at this time: a context which combines long-standing tensions over the relationship between the national and EU legal orders with the specific challenges of the EMU setting. In this annotation, we therefore attempt both to explain the ruling of the FCC in light of the developments in EMU law and to give context to the FCC's finding that the ECJ's earlier decision was "incomprehensible" and thereby *ultra vires*.

We start with a summary of the factual economic and legal background (section 2) and of the FCC judgment (section 3). We then turn to the heart of the conflict: between, on the one hand, the ECB's operational independence and ability to conduct a sound monetary policy, and on the other, its accountability, in particular who is responsible for limiting the powers of the ECB and in what ways. We thus focus on the central legal themes the judgment raises, namely the case law of the two Courts regarding competence control (4.1); the implications of this for the ECB's mandate (4.2); the role of the principle of proportionality in shaping the ruling (4.3); the implications for the principle of primacy of EU law (4.4); and finally, the prohibition of monetary financing and its relation to new ECB activity following the Covid-19 crisis (4.5).

As will be shown throughout this case note, while the FCC's reasoning displays a number of deficiencies (particularly the lack of transparency of the tests laid down to assess ECB activity and the failure to make clear the centrality of proportionality for addressing *ultra vires* questions in its initial reference), many of these difficulties emerge from crucial shortcomings in the current EMU legal framework. These deficiencies cannot be resolved through judicial decisions alone, but require political momentum for more comprehensive reform. While still in their infancy, the new Macron-Merkel (and later Commission) proposal for a Recovery Fund, and early indications that the ECB may begin to incorporate proportionality-based reasoning more robustly in its decision-making, may represent first steps towards this brave new world in the Eurozone's governance.

2. Factual and legal background to the dispute

The immediate economic context of the FCC decision, as indicated above, is constituted by the three QE programmes of the European Central Bank (one of which, the OMT programme, was never activated). The similarities and differences between the three QE programmes are important for understanding both the development of the case law on QE and its possible future following *PSPP*. The programmes and their dominant features are summarized in the table below.

Table 1:

	OMT Press release of 6 Sept. 2012	PSPP Decision 2015/774, Decision 2015/2464, Decision 2016/702, Decision 2017/100	PEPP Decision 2020/440 Press release of 4 June 2020
Conditionality	Conditional upon full compliance with macroeconomic adjustment programs	No conditionality	No conditionality
Maturity	Government bonds' maturity between one and three years	Minimum remaining maturity of one year; maximum remaining maturity of 30 years	Minimum remaining maturity of 70 days; maximum remaining maturity of 30 years
Volumes of purchase	No quantitative limit. Purchase only from Member States who are undergoing macroeconomic adjustment programs	60 billion quantitative limit. May purchase no more than 33% of a particular Member State's bond issue. High credit quality assessment needed (Step 3)	750 billion limit as of 24 March 2020, increased to 1,350 billion with decision of 4 June 2020. 33% limit per Member State retained
Time limit	No time limit	Originally to end September 2016. Extended until December 2017 and beyond, if necessary, by Decision 2017/100	Originally to end 2020. Extended to end June 2021 with decision of June 4 2020

Selectivity	Aimed at States receiving financial assistance and subject to an MoU	PSPP is not selective, instruments can be purchased across the euro area. Delimitation by capital key of NCB	Delimitation by capital key of the NCB, but conducted in a flexible manner, with fluctuations over time
Transparency	Weekly publication of aggregate holdings and their market value. Observance of a minimum period between issuance of security and purchase on secondary market. No prior announcements. ESCB has reserved right to sell.	Weekly publication of aggregate holdings and their market value. Instruments purchased only after a blackout period defined by the Governing Council. No prior announcements. ESCB has reserved right to sell.	Weekly publication of aggregate holdings and their market value. Publication on a monthly basis of monthly net purchases and cumulative net purchases.

The first of these programmes, the OMT, had already been the subject of litigation before both courts. In *Gauweiler*, the FCC had asked the ECJ whether the OMT programme was within the ECB's monetary policy mandate, whether the programme was proportionate and whether it infringed the prohibition of monetary financing in Article 123(1) TFEU. The FCC's reference was written in a highly sceptical tone,⁹ indicating severe doubts as to the compatibility of the OMT with the relevant provisions of EU and German constitutional law. The FCC nonetheless accepted the ECJ's finding that the OMT – because of the broad discretion afforded to the ECB in fulfilling its mandate, as well as a number of safeguards designed to ensure conformity with Article 123(1) TFEU – was compatible with the Treaties and the division of powers safeguarded therein.¹⁰

The current dispute concerns the PSPP, established in 2015, primarily as a device to tackle deflation in the Euro area and hence return the ECB to its self-established just-below-2 percent inflation target. As seen in the table

9. Borger, "Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler*", 53 CML Rev. (2016), 139.

10. Case 2 BvR 2728/13 *Gauweiler*, Judgment of 21 June 2016 (hereinafter BVerfG *Gauweiler*), <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html>.

above, there are a number of differences between PSPP and OMT (one important example being that the PSPP is aimed at *all* Eurozone States). The complainants argued that the PSPP breached the principle of conferral, as it violated the mandate laid down in Article 119 TFEU and Article 127 TFEU, and the prohibition of monetary financing enshrined in Article 123(1) TFEU. The latter were partly directed against alleged omissions of the Federal Government, the *Bundestag*, and the *Bundesbank* to take steps against the decisions of the ECB implementing and amending the PSPP programme.¹¹ In part, the constitutional complaints directly challenged the ECB decisions,¹² alleged to be *ultra vires* acts.¹³

The FCC's preliminary reference covered three main issues: whether the ECB had complied with its obligation to state reasons; whether the PSPP was covered by the monetary policy mandate of the ECB; and whether the programme violates the prohibition of monetary financing.¹⁴ The principle of proportionality was mentioned by the FCC in relation to the first two issues. The FCC had stressed in the Order for reference that it considers the ECJ's findings in *Gauweiler* as binding for the interpretation of these issues:¹⁵ indirect effects of monetary policy on economic policy do not make them equivalent;¹⁶ lack of prior announcements concerning the volume and timescale of purchases acts as a safeguard in relation to Article 123(1) TFEU;¹⁷ and the duty to state reasons must be assessed with reference to the wording of the measure, but also its context and the whole body of legal rules governing the matter.¹⁸ The FCC warned that if the ECJ found the PSPP outside the ECB's mandate and in breach of the prohibition of monetary financing, such a transgression would be considered structurally significant,¹⁹ thus meeting the *ultra vires* standard.

On the first point, the FCC questioned whether the ECB had breached its duty to state reasons by mentioning neither the economic policy effects of the

11. Complaints I, II, III, IV, cf. *Bundesverfassungsgericht*, Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, Judgment of 5 May 2020 (hereinafter BVerfG *PSPP*), <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html> paras. 19, 33, 42, and 53.

12. *Ibid.*, paras. 33, 53.

13. *Ibid.*, para 1.

14. Dawson and Bobić, "Quantitative Easing at the Court of Justice – Doing whatever it takes to save the euro: *Weiss and Others*", 56 CML Rev. (2019), 1005, 1014.

15. Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *PSPP*, Order of 18 July 2017 (hereinafter BVerfG *PSPP* Order) <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718_2bvr085915en.html>, para 79.

16. Case C-62/14, *Gauweiler*; EU:C:2015:7, paras. 52, 56; relying on its findings in Case C-370/12, *Pringle*, EU:C:2012:756.

17. Case C-62/14, *Gauweiler*, para 106.

18. *Ibid.*, para 70.

19. BVerfG *PSPP* Order, cited *supra* note 15, para 66.

PSPP, nor the details of the blackout period.²⁰ The ECJ deemed the duty to state reasons to be satisfied, because the PSPP decisions defined both the objective of the measure and the economic context in which they had been adopted,²¹ and the ECB had provided further clarification in subsequent documents.²² Further, it held that the ECB's duty to state reasons did not encompass an obligation to publish details on the blackout period.²³ On the second point, the ECJ found that the ECB had not overstepped its mandate: as the PSPP was pursuing a monetary policy goal, it did not represent a measure of economic policy, regardless of the possible "indirect" economic effects it entailed. Here, the ECJ explicitly disagreed with the FCC,²⁴ concluding that the foreseeability of the economic effects of the PSPP does not automatically classify them as "direct" in the sense of the *Gauweiler* criteria listed above.

With regard to the proportionality of the PSPP, the ECJ held that the PSPP was a suitable means to achieve the ECB's monetary policy goal.²⁵ The finding that the ECB had not committed a manifest error of assessment²⁶ stems from the wide margin of discretion the ECB had for technical and complex assessments.²⁷ Further, the measure did not go beyond what was necessary to achieve this goal.²⁸ In particular, the ECJ highlighted that the PSPP was not selective, that it provided for stringent eligibility criteria, and that it was temporary in nature.²⁹ The ECJ also accepted that a limitation of the measure in time and volume would reduce its efficacy.³⁰

Finally, the ECJ applied the criteria it had developed in *Gauweiler* for examining compliance of the PSPP with the prohibition of monetary financing. For this purpose, the ECJ analysed the foreseeability of ECB action,³¹ and concluded that the ECB had implemented sufficient safeguards to ensure the legality of the PSPP decision.³² Accordingly, the ECJ held that Member States' impetus for a sound budgetary policy was not interfered with.³³ As a last point, the ECJ found both the fact that the PSPP did not

20. Case C-493/17, *Weiss*, EU:C:2018:1000, para 29.

21. *Ibid.*, para 34.

22. *Ibid.*, paras. 36–41.

23. *Ibid.*, paras. 43 et seq.

24. *Ibid.*, para 62.

25. *Ibid.*, paras. 71–78.

26. *Ibid.*, para 78.

27. *Ibid.*, para 73.

28. *Ibid.*, para 81.

29. *Ibid.*, paras. 82–84.

30. *Ibid.*, paras. 90–92.

31. *Ibid.*, paras. 109–128.

32. *Ibid.*, para 127.

33. *Ibid.*, para 144.

foresee an obligation to sell government bonds before maturity,³⁴ and that government bonds at a negative yield could be purchased under the PSPP, compatible with Article 123(1) TFEU.³⁵

3. Judgment of the Bundesverfassungsgericht

The FCC delivered its response to the ECJ's ruling on 5 May 2020. First, the FCC recalled that according to its jurisprudence on constitutional review in relation to EU law, it may only review the violation by national constitutional organs of *their* responsibility with regard to European integration.³⁶ The FCC therefore declared the complaints admissible only insofar as they are directed against the omission of German constitutional organs to take action.³⁷

According to its jurisprudence, the FCC performs three heads of review concerning EU law acts: fundamental rights review, *ultra vires* review, and identity review.³⁸ An act is considered to be *ultra vires* where it exceeds the competences of EU organs in a significant manner (with the FCC according the EU institutions a certain margin of tolerance of error). As such an act would be in violation of the principle of conferral, it would not have binding force in Germany. As explained below,³⁹ the FCC included a number of safeguards prior to declaring an EU act *ultra vires*, recalling its obligations under the Treaties and the binding nature of the preliminary reference procedure.⁴⁰ The FCC did not mention the exclusive jurisdiction of the ECJ to declare EU acts invalid, as set out in *Foto-Frost*.⁴¹

According to the FCC, a manifest and structurally significant exceeding of competences by organs of the EU would trigger the responsibility of German constitutional organs to take action against them. The failure to do so would thus violate the individual right to vote in elections of the German Bundestag guaranteed by Article 38(1) of the Basic Law.⁴² The FCC stated that the Federal Republic is not entitled under the Basic Law to transfer powers which, as a result, would lift the Bundestag's prerogative to "determine the overall financial burden imposed on citizens":⁴³ such a transfer of competence would

34. *Ibid.*, para 149.

35. *Ibid.*, para 157.

36. BVerfG *PSPP*, *supra* note 11, para 89.

37. *Ibid.*, para 85.

38. Dawson and Bobić, *op. cit. supra* note 14, 1008.

39. Section 4.1. *infra*.

40. BVerfG *PSPP*, *supra* note 11, para 117.

41. Case 314/85, *Foto-Frost*, EU:C:1987:452, paras. 15–17.

42. BVerfG *PSPP*, *supra* note 11, paras. 98–115.

43. *Ibid.*, para 104.

infringe the principle of democracy, forming part of Germany's constitutional identity. German constitutional organs are obliged to continually monitor the action of EU organs in this regard, and particularly of those which have only "weak links to democratic legitimation".⁴⁴

To determine such a violation, the FCC focused on two issues: first, whether by adopting the decisions on PSPP, the ECB had overstepped its mandate by breaching the principle of proportionality and the principle of conferral.⁴⁵ Second, it analysed whether the ECB had infringed the prohibition of monetary financing.⁴⁶

On the first point, for determining whether the ECB had overstepped its mandate in a qualified manner, the FCC explicitly did not rely on the findings of the ECJ in its *Weiss* judgment. According to the FCC, the judgment itself is an *ultra vires* act and does not, as a consequence, bind the FCC in its review,⁴⁷ given that the proportionality review exercised by the ECJ neutralizes the principle of proportionality's function to protect Member State competence.⁴⁸ The main point of criticism which the FCC raised concerns the failure of the ECB, and the ECJ, to consider the economic policy effects of the PSPP.⁴⁹ According to the FCC, this was necessary in order to detect the competing interests touched upon by the PSPP and balance them against each other (this balancing representing the core of proportionality review).⁵⁰ The failure to take economic policy effects into account, and the vague delimitation between economic and monetary policy, led the FCC to conclude that the ECJ failed to perform meaningful competence review with regard to the ECB's action.⁵¹ This allowed the ECB to choose any means it deemed adequate to reach its monetary policy goal, without having to balance the beneficial effects and collateral damages of the measure in question.⁵² This is in conflict with the ECB's limited democratic legitimization, which would require its mandate to be narrowly defined.⁵³

The FCC thus performed its own proportionality review of the PSPP.⁵⁴ In its view, it was not bound by the ECJ's proportionality analysis, "given that on this point, the judgment is simply not comprehensible".⁵⁵ The decisions of the

44. *Ibid.*, para 108.

45. *Ibid.*, paras. 117–178.

46. *Ibid.*, paras. 180–221.

47. *Ibid.*, para 116.

48. *Ibid.*, para 123.

49. *Ibid.*, paras. 138–145.

50. *Ibid.*, para 133.

51. *Ibid.*, paras. 140–142.

52. *Ibid.*, para 140.

53. *Ibid.*, para 144.

54. *Ibid.*, para 164.

55. *Ibid.*, para 116.

ECB lack the information necessary to fulfil this task, as they do not give evidence of whether the ECB has considered and balanced the PSPP's effects.⁵⁶ According to the FCC, the oral proceedings have shown, however, that there are indeed several negative effects to the PSPP which should have been taken into consideration. The FCC highlighted, for instance, that there is a risk that Member States will be discouraged to implement consolidation measures and a risk of losses for private savings.⁵⁷ Furthermore, the fact that the volume of the programme increased over time renders the balancing of these effects all the more necessary.⁵⁸ On this point, the failure of the ECB to state reasons on the balancing of interests was in breach of the principle of proportionality. As a result, the PSPP decisions in their current form were not covered by the ECB's mandate and represent *ultra vires* acts.⁵⁹

Turning to the second issue, concerning the prohibition of monetary financing, the FCC accepted in this regard the safeguards established in *Gauweiler*.⁶⁰ Nevertheless, the FCC criticized the way the ECJ examined these safeguards in *Weiss*, as the ECJ neither scrutinized them closely, nor explored whether there were circumstances capable of disproving their actual effectiveness. The FCC concluded that this approach did not permit meaningful judicial review.⁶¹ The FCC found it contradictory, for example, that prior announcements of purchases do not breach the uncertainty required by the prohibition of monetary financing, but at the same time provide enough information to contribute to the programme's proportionality.⁶²

A further safeguard analysed by the ECJ concerns the blackout period. In *Gauweiler*, the ECJ had considered the blackout period to be suitable for preventing market operators from knowing for certain that they could immediately re-sell government bonds to the ESCB. Such certainty would instead make them *de facto* intermediaries of bond issuers, incompatible with Article 123 TFEU.⁶³ According to the FCC in *PSPP*, the blackout period could not be adequately judicially reviewed, as the ECB did not disclose, neither in advance nor subsequently, any information on its duration.⁶⁴ The fact that the ECJ found this compliant with the ECB's duty to state reasons is a further point of criticism raised by the FCC.⁶⁵ The FCC finally criticized the

56. *Ibid.*, paras. 169, 176.

57. *Ibid.*, paras. 169–175.

58. *Ibid.*, para 169.

59. *Ibid.*, para 177.

60. *Ibid.*, para 183.

61. *Ibid.*, para 184.

62. *Ibid.*, para 185.

63. Case C-62/14, *Gauweiler*, paras. 104–106.

64. BVerfG *PSPP*, *supra* note 11, paras. 187–191.

65. *Ibid.*, para 190.

ECJ's finding that Article 123 TFEU allows the holding of bonds until maturity (even beyond exceptional cases).⁶⁶ In its view, purchasing government bonds for an indefinite time period would make the ECB a permanent source of financing for the Member States concerned.⁶⁷

Ultimately, and in spite of these misgivings, the FCC agreed that the PSPP contains sufficient guarantees to prevent a circumvention of Article 123 TFEU.⁶⁸ According to the FCC, the most relevant criteria in this regard were the allocation of purchases according to the ECB's capital key, and the purchase limit of 33 percent.⁶⁹ The FCC also agreed with the ECJ that the purchase of government bonds at a negative yield does not breach Article 123 TFEU.⁷⁰

Finally, the FCC examined whether the scheme of allocation of risks redistributed sovereign debts among Member States,⁷¹ a question the ECJ had declared inadmissible.⁷² After having stated that such a redistribution would represent an assumption of liability illegal under the Basic Law,⁷³ the FCC held that the ECB's decisions did not violate Germany's constitutional identity. In addition, given that such redistribution is also prohibited under primary law, such a redistribution could not, in fact, currently take place.⁷⁴

As a result of its finding that the PSPP decisions are *ultra vires*, insofar as the ECB failed to state the reasons for their proportionality, the FCC concluded that the principle of primacy of EU law does not apply.⁷⁵ Further, the Federal Government and the *Bundestag* are obliged to take appropriate steps to ensure that the ECB fulfils this obligation.⁷⁶ With regard to the PSPP decisions themselves, the FCC set a transitional period of no more than three months for the *Bundesbank* to coordinate with the ESCB and the Governing Council of the ECB in demonstrating the proportionality of the PSPP. Otherwise, the *Bundesbank* would be prohibited from participating further in its implementation.⁷⁷

66. *Ibid.*, para 193.

67. *Ibid.*, para 195.

68. *Ibid.*, paras. 199, 213–217.

69. *Ibid.*, para 217.

70. *Ibid.*, para 218.

71. BVerfG *PSPP*, *supra* note 11, para 222.

72. Case C-493/17, *Weiss*, para 166.

73. BVerfG *PSPP*, *supra* note 11, para 227.

74. *Ibid.*, para 228.

75. *Ibid.*, para 234.

76. *Ibid.*, para 232.

77. *Ibid.*, para 235.

4. Analysis

4.1. *Ultra vires* review

The position of the FCC⁷⁸ in the German constitutional set-up is in some ways analogous to the constitution-making activities of the Court of Justice,⁷⁹ insofar as the case law of the FCC has resulted in a gradual constitutionalization of the entire legal order.⁸⁰ This exceptionally strong domestic position has translated into the FCC becoming one of the most influential courts in the EU, widely cited by other European constitutional courts.⁸¹ On closer inspection of the relationship between the two courts, and the way they develop and apply *ultra vires* review, in particular in relation to EMU, it is visible that the current disagreement has been in the making for some time. The present section will look at the competing standards for *ultra vires* review, in order to highlight some of the underlying issues of the *PSPP* litigation, as well as to set the stage to analyse the broader consequences of this decision for the primacy of EU law and the obligations of national courts stemming therefrom.

In Germany, *ultra vires* review in relation to European integration was first introduced in the *Maastricht Treaty* decision. As is well known, sovereignty had been forcefully reasserted and relied upon by the FCC when it introduced its claim to perform an *ultra vires* review,⁸² in contrast to the well-established case law of the ECJ concerning its exclusive jurisdiction to interpret and annul

78. For a thorough presentation, see Hailbronner, *Traditions and Transformations. The Rise of German Constitutionalism* (OUP, 2015). For a comprehensive analysis of the *Bundesverfassungsgericht's* case law, see Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed. (Duke University Press, 2012).

79. Burley and Mattli, "Europe before the Court: A political theory of legal integration", 47 *International Organization* (1993), 41, 42; Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2001), 2–3; Lenaerts, "The Court's outer and inner selves: Exploring the external and internal legitimacy of the Court of Justice", in Adams, de Waele, Meeusen and Straetmans (Eds.), *Judging Europe's judges. The legitimacy of the case law of the European Court of Justice* (Hart Publishing, 2015), p. 15.

80. Huber, "The Federal Constitutional Court and European integration", 21 *EPL* (2015), 83; Vranes, "German constitutional foundations of, and limitations to, EU integration: A systematic analysis", 14 *GLJ* (2013), 75; Kommers, "The Federal Constitutional Court in the German political system", 26 *Comparative Political Studies* (1994), 470, 470–471.

81. General Report, Conference of European Constitutional Courts (2014), 9; Anagnostaras, "Activation of the *ultra vires* review: The *Slovak Pensions* judgment of the Czech Constitutional Court", 14 *GLJ* (2013), 959.

82. Aziz significantly calls the *Bundesverfassungsgericht's* case law on the ultimate say "sovereignty jurisprudence." Aziz, "Sovereignty *Über Alles*: (Re)configuring the German legal order" in Walker (Ed.), *Sovereignty in Transition* (Hart Publishing 2003), p. 293.

EU acts.⁸³ The decision was consequentially characterized as marking the beginning of constitutional pluralism,⁸⁴ as the FCC countered the ECJ's claim to the final say with its own. Ultimately, the FCC's addition of *ultra vires* review is designed to control the democratic pedigree of Union acts,⁸⁵ the limits of which are defined by Article 79(3) of the Basic Act.⁸⁶ In the *Lisbon Treaty* decision,⁸⁷ the FCC found that it would be logically impossible for the EU to be able to decide on the scope of its own competence,⁸⁸ conferral being a principle of both European and national constitutional law.⁸⁹ Thus, the FCC will police "obvious transgressions ... when the European Union claims competences."⁹⁰

In *Honeywell*,⁹¹ the FCC carried out an *ultra vires* review of the ECJ's *Mangold* decision, of direct relevance for the review in *PSPP*. The FCC linked the limited extent of primacy to the principle of conferral,⁹² adding that its task to perform an *ultra vires* review is to be coordinated with the Treaty-based mandate of the ECJ,⁹³ thereby significantly narrowing⁹⁴ its scope of review. First, prior to any finding, the ECJ must have a say through the preliminary reference procedure, as the FCC abides by its obligation of sincere

83. Case 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:4, para 3; Case 106/77, *Simmenthal*, EU:C:1978:49, paras. 18–22; Case 166/73, *Rheinmühlen*, EU:C:1974:3, para 4; Case 314/85, *Foto-Frost*, para 17.

84. Most notably MacCormick, "The *Maastricht-Urteil*: Sovereignty now", 1 ELJ (1995), 259.

85. Kokott, "Report on Germany" in Slaughter, Stone Sweet and Weiler (Eds.) *The European Court and National Courts, Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart Publishing, 1998), p. 81; Huber, op. cit. *supra* note 80, 98; Kumm, "The jurisprudence of constitutional conflict: Constitutional supremacy in Europe before and after the Constitutional Treaty", 11 ELJ (2005), 262, 264. For an opposing opinion, according to which democracy control is a separate head of review, see Claes, "Luxembourg, here we come? Constitutional courts and the preliminary reference procedure", 16 GLJ (2015), 1331, 1335.

86. Art. 79(3) of the Basic Law represents the constitutional identity of Germany. Cases 2 BvR 2134/92 and 2159/92, *Maastricht Treaty*, Judgment of 12 Oct. 1993, paras. B.1.a)[5]-[6].

87. Case 2 BVerfG 2/08 *Lisbon Treaty*, Judgment of 30 June 2009, <www.bverfg.de/e/es20090630_2bve000208en.html>, para 240.

88. *Ibid.*, para 233.

89. *Ibid.*, para 234.

90. *Ibid.*, para 240.

91. Case 2 BVerfG 2661/06 *Honeywell*, Order of 6 July 2010, <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html>.

92. *Ibid.*, para 55. The FCC uses the term "primacy of application" and not "supremacy", which would otherwise indicate a hierarchical superiority of the entirety of Union law over the entirety of national law, at para 53.

93. *Ibid.*, paras. 56, 60–61.

94. Kommers and Miller, op. cit., *supra* note 78, p. 350.

cooperation and mutual respect.⁹⁵ Its function is to avoid conflict “whenever possible”.⁹⁶ Second, the FCC will police only “manifest transgressions”, a rather high threshold.⁹⁷ Third, not only must the transgression be manifest, it also needs to fall within an area which is highly significant in the structure of competence division between the EU and its Member States. Beyond the test itself, there are two further qualifications in *Honeywell* that restrict the applicability of *ultra vires* review: first, only the FCC is allowed to carry it out; and second, “the Court of Justice has a right to tolerance of error.”⁹⁸ The majority found the ECJ’s *Mangold* judgment *intra vires*.⁹⁹

Regardless of whether the standard of “manifest transgression” is reachable or not, there seems to be little information or guidance in this case law as to how to determine when a policy area is “highly significant” in the structure of competence division between the EU and the national level.¹⁰⁰ *Honeywell* implies that in competence review, the content of the policy area, and not only the method of transferring the competence, is relevant. This would eliminate some of the differences between *ultra vires* and identity review, as it appears that the two operate on a spectrum: a shift that is “highly significant” in the structural division of competences represents an intrusion of a lesser degree, whereas once an intrusion is made into areas defined as the constitutional core, no further qualification is necessary. The former requires a certain quality of the process of conferral, while the latter is of an absolute nature. The FCC goes on to explain that a structurally significant shift is one that results in establishing new competences in practice, or expanding existing ones “with

95. Möllers notes that *Honeywell* adds the obligation to carry out the review in a “restrained” manner, confirming the importance of self-restraint in the conduct of courts involved in a possible constitutional conflict; Möllers, “German Federal Constitutional Court: Constitutional *ultra vires* review of European acts only under exceptional circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*”, 7 EuConst (2011), 161, 163 (note), 165. This is also in line with the ECJ’s requirement in *Foto-Frost*, that a preliminary reference is required when the national court doubts the validity of an EU act, and that only the ECJ may make such a finding. Case 314/85, *Foto-Frost*, para 15.

96. Huber, op. cit. *supra* note 80, 89.

97. In his dissent, Justice Landau states that manifest must mean “each expanding interpretation of the Treaties which is tantamount to a non-permissible autonomous amendment of the Treaty.” *Honeywell*, *supra* note 91, Dissenting Opinion of Justice Landau, para 101.

98. *Honeywell*, *supra* note 91, para 66.

99. *Ibid.*, paras. 71, 75, 80. Justice Landau dissented, arguing that the ECJ is left to operate without any institution or Member State being able to effectively keep it in check, *ibid.*, para 99. See also, Möllers, op. cit. *supra* note 95, at 167.

100. *Honeywell*, *supra* note 91, para 61. Payandeh, “Constitutional review of EU law after *Honeywell*: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice”, 48 CML Rev. (2011), 9, 25.

the weight of a new establishment”.¹⁰¹ In that sense, “highly significant” in fact seems to operate as a *de minimis* threshold, rather than a content denominator in *ultra vires* review. After *Honeywell*, the *ultra vires* review of the FCC was considered by some commentators to be weak, bordering non-existent.¹⁰²

These developments should be considered alongside those at the EU level, where the ECJ has incrementally expanded the applicability of EU law in its *Mangold* decision and related case law,¹⁰³ drawing criticism for stepping into areas of exclusive Member State competences, such as the organization of the national social security system.¹⁰⁴ In other cases concerning the same subject matter,¹⁰⁵ the *Mangold* doctrine was not applied, causing inconsistency and legal uncertainty.¹⁰⁶ While this is not the only area of EU law where the ECJ expanded the self-referential system of the Treaties,¹⁰⁷ the case law concerning the general principle of non-discrimination on grounds of age offers a good illustration of the dangers of leaving the ECJ to its own devices in policing the principle of conferral.

Furthermore, in reviewing the compliance of EU institutions with the division of competences, the ECJ has also been consistently criticized for its lax standard.¹⁰⁸ Back in 1987, the ECJ developed its own general standard for annulling EU acts. First, in *Foto-Frost* the ECJ imposed an obligation for national courts to submit a preliminary reference in the event they consider an EU act invalid, establishing for itself the exclusive jurisdiction to annul EU

101. *Honeywell*, *supra* note 91, para 78.

102. Payandeh, *supra* note 100, 25.

103. See e.g. Case C-372/04, *Watts*, EU:C:2006:325; Case C-444/05, *Stamatelaki*, EU:C:2007:231; Case C-267/06, *Maruko*, EU:C:2008:179; Case C-555/07, *Küçükdeveci*, EU:C:2010:21.

104. In relation to expansions of EU law that started with Case C-144/04, *Mangold*, EU:C:2005:709, Weatherill cites Lenaerts: “there simply is no nucleus of sovereignty that the Member States can invoke, as such, against Union law”, Lenaerts, “Constitutionalism and the many faces of federalism”, 38 *AJCL* (1990), 205, cited in Weatherill, *Law and Values in the European Union* (OUP, 2016), p. 30. See also, Editorial Comments, “The scope of application of general principles of Union Law: An ever expanding Union?”, 47 *CML Rev.* (2010), 1589; de Mol, “The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (Unbridled) expansionism of EU law?”, 18 *MJ* (2011), 109.

105. Case C-411/05, *Palacios de la Villa*, EU:C:2007:604; Case C-427/06, *Bartsch*, EU:C:2008:517; Case C-88/08, *Hütter*, EU:C:2009:381; Case C-388/07, *Age Concern England*, EU:C:2009:128; Case C-229/08, *Wolf*, EU:C:2010:3; Case C-341/08, *Petersen*, EU:C:2010:4.

106. Editorial Comments, *supra* note 104, 1593.

107. E.g. the ECJ established that EU citizenship carries a substance of rights which Member State measures may not negate, in Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124, paras. 42–44.

108. Weatherill, “Competence creep and competence control”, 23 *YEL* (2004), 1.

acts, for the purposes of safeguarding uniformity and coherence of EU law.¹⁰⁹ The annulment of an EU act is a rather exceptional event, with *Tobacco Advertising* still standing as the outlier of competence control.¹¹⁰ In *Consorzio Cooperativo d'Abruzzo*, a further differentiation was made between EU measures that are illegal (to which *Foto-Frost* applies), and those which are non-existent (nullity *ex nunc*) as they exhibit “particularly serious and manifest defects”.¹¹¹ In such situations, the national court is allowed to declare that the measure in question never produced legal effects, in line with the principles of legal certainty and legitimate expectations.¹¹² A further elaboration of this exception was given in *Commission v. BASF*: “From the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations.”¹¹³ Regardless of the existence of this option, the ECJ has not allowed national courts to use it to an extent of any relevance.¹¹⁴ This context, where the ECJ is criticized for an insufficiently robust review of EU action, is vital in understanding the FCC’s ruling.

Two analogies may be of some use in understanding this element of the dispute. The first concerns Article 114 TFEU. By its nature, the wording of Article 114 TFEU leaves a broad scope to the EU legislature to define what is “necessary” for the functioning of the EU’s internal market. As a result, the provision has frequently been criticized as leading to competence creep.¹¹⁵ Insofar as most areas of national regulation lead to discrepancies that may affect market operators differently across States, Article 114 TFEU seems to justify EU intervention across a wide range of policy areas, thus negating the ordinary use of the principle of conferral to limit the EU’s powers. Similarly, the EU’s monetary policy mandate is also highly functional in nature. As long as divergences between national economies inhibit the “singleness” of

109. Case 314/85, *Foto-Frost*, para 17.

110. While the ECJ recently annulled the Data Retention Directive, this was done by conducting fundamental rights review, rather than competence control. See Case C-293/12, *Digital Rights Ireland*, EU:C:2014:238.

111. Case 15/85, *Consorzio Cooperativo d'Abruzzo*, EU:C:1987:111, paras. 9–10.

112. *Ibid.*

113. Case C-137/92 P, *Commission v. BASF* EU:C:1994:247, paras. 49–50. Confirmed in Case C-245/92 P, *Chemie Linz*, EU:C:1999:363, para 93; Case C-475/01, *Commission v. Greece*, EU:C:2004:585, paras. 18–20.

114. Bast, “Don’t act beyond your powers: The perils and pitfalls of the German Constitutional Court’s *ultra vires* review”, 15 GLJ (2014), 167, 171–172.

115. It is for this reason that Weatherill describes Art. 114 TFEU not as a meaningful constraint on policy-makers but rather as a “drafting guide”: Weatherill, “The limits of legislative harmonization ten years after *Tobacco Advertising*: How the Court’s case law has become a ‘Drafting Guide’”, 12 GLJ (2011), 3.

monetary policy, the ECB's price mandate stability allows, or even demands, ECB intervention to re-enforce the monetary transmission mechanism. It is therefore hardly surprising that an *ultra vires* finding should emerge in a case involving monetary policy. The functional nature of this legal basis – and its artificial separation from economic policies of Member States – inevitably draws ECB activity into conflict with national attempts to police the conferral principle.¹¹⁶

The second analogy concerns the interaction between the FCC and ECJ in the field of fundamental rights. While subject to historical dispute,¹¹⁷ the interaction between the two courts has long been associated with a certain progressive narrative in EU law, namely a process of national courts prompting the ECJ to improve the standards of fundamental rights protection in the wider EU system. The ECJ has often been sensitive to such requests, both by incorporating fundamental rights as general principles of EU law and by creating a normative basis for the Union's political institutions to develop what became the Charter system. In this sense, the FCC's finding of *ultra vires* is part of a historical narrative that may inhabit the minds of national judges in particular. Just days after the FCC's judgment, a leading judge of the FCC defended the ruling precisely in these terms i.e. as an open invitation to the ECJ to improve its standard of review.¹¹⁸ If – so the narrative goes – national contestation of rights infringements in EU law prompted the ECJ to improve the system of policing such violations, so an *ultra vires* finding may prompt the ECJ to police more vigilantly the exercise of EU competences in the future. Declaring a judgment of the ECJ *ultra vires* can thus be seen as the culmination of an attempt to reconcile¹¹⁹ the conflicting demands of two interacting legal orders (and furthermore to reconcile conferral with the open-ended nature of the ECB's Treaty-mandated role). This context is an important, and often overlooked, prelude that paints a much more detailed picture of the judicial interactions under analysis.

116. On this wider problem, see Davies, "Democracy and legitimacy in the shadow of purposive competence", 21 ELJ (2015), 1.

117. See contra Delledone and Fabbrini, "The founding myth of European Human Rights Law: Revisiting the role of national courts in the rise of EU human rights jurisprudence", (2019) EL Rev., 2.

118. See the interview with the *FAZ* given by Peter Huber: <www.faz.net/aktuell/politik/inland/peter-huber-im-gespraech-das-etz-urteil-war-zwingend-16766682.html>.

119. Suggestions have been made that the FCC should have submitted a second preliminary reference to further demonstrate its respect of the principle of sincere cooperation. See <verfassungsblog.de/squaring-the-pspp-circle/>. We address this point specifically in section 4.4. *infra*.

4.2. *Ramifications of ultra vires review for the ECB Mandate*

How then were these general considerations regarding competence control applied by the FCC in scrutinizing ECB activity? In line with *Honeywell*, the FCC thus submitted in *Gauweiler* its first preliminary reference to the ECJ, for it to be able to determine whether the ECB's mandate covers the OMT programme, or conversely, results in an encroachment on Member States' economic policy competence and breaches the prohibition on monetary financing.¹²⁰ After preliminarily finding the programme *ultra vires*, the FCC set out its own vision of a Treaty interpretation that would comply with the current division of competences.¹²¹ Justice Lübbe-Wolff dissented from the majority, finding that the Order for reference is itself a judicial *ultra vires* act, which disregards the constitutional role of the FCC.¹²² She emphasized that the admissibility criteria applied to allow the constitutional complaint were too widely extended, not least since the case relates to matters of European integration.¹²³

In its response in the *Gauweiler* decision, the ECJ provided an interpretation setting out the conditions necessary for a quantitative easing programme to comply with the Treaties, albeit a different one from that suggested by the FCC in its order for reference.¹²⁴ The academic community read the reply from the ECJ as being firmly on a "collision course"¹²⁵ with the FCC, predicting that the final decision in the case would result in a "profound constitutional crisis for the EU".¹²⁶ The FCC accepted the ECJ's findings, interpreting them as binding conditions for the ECB to keep within its monetary policy mandate in the future.¹²⁷ At this point in time, it may be observed that the FCC, although deciding to apply sincere cooperation and mutual respect, explicitly puts it to the ECJ that this specific litigation will have permanent consequences for further judicial review of ECB action. In other words, the FCC formed an expectation that the ECJ will maintain a coherent and consistent interpretation of the EMU legal framework, and police the ECB accordingly. Nevertheless, it retained its power of *ultra vires*

120. BVerfG *Gauweiler*, *supra* note 10, paras. 36, 39, 63, and 80.

121. *Ibid.*, para 100.

122. *Ibid.*, Dissenting Opinion of Justice Lübbe-Wolff, paras. 1, 5–10.

123. *Ibid.*, para 14.

124. For a more detailed analysis of each of these conditions, see Tridimas and Xanthoulis, "A legal analysis of the *Gauweiler* case. Between monetary policy and constitutional conflict", 23 MJ (2016) 17, 23–30, and 30–31.

125. Fabbrini, "After the *OMT* case: The supremacy of EU law as the guarantee of the equality of the Member States", 16 GLJ (2015), 1003, 1012.

126. Kelemen, "On the unsustainability of constitutional pluralism. European supremacy and the survival of the Eurozone", 23 MJ (2016), 136, 138.

127. BVerfG *Gauweiler*, *supra* note 10, para 9.

review for exceptional situations if the ECJ significantly departs from its standards.

The *PSPP* litigation therefore presented itself as the direct continuation of this judicial interaction, where the FCC expected the ECJ to apply the *Gauweiler* criteria to the *PSPP*. In this respect, the FCC reiterated that the ECJ is granted a margin of error,¹²⁸ but that the existence of opposing legal interpretations does not prevent a finding that competences are manifestly exceeded, even when “careful and meticulously reasoned interpretation” was applied.¹²⁹ The findings of the ECJ in the preliminary reference are “in principle”¹³⁰ binding on the FCC when it conducts its review, save for situations where the interpretation of the Treaties put forward is “simply not comprehensible and thus objectively arbitrary”.¹³¹ While the FCC subsumes this under the “margin of error” standard,¹³² it does not substantiate how this conclusion is reached, or what it means specifically in stating that an interpretation is “not comprehensible”. It therefore remains unclear what is meant by comprehensibility, and how this requirement will be used in the future *vis-à-vis* the ECJ, or other EU institutions.

In addition, the FCC does not explain how the principle of proportionality became the central consideration in determining whether a certain competence is “highly significant” in the structure of competences, beyond stating that general principles “apply accordingly” in *ultra vires* review. The decision here cross-refers to the July 2019 decision concerning the SSM Regulation,¹³³ where the same is repeated in analogy to the *ultra vires* review of participation in intergovernmental institutions. Without going into a detailed elaboration of the difference between German participation in European integration as opposed to intergovernmental organizations, at the very least it is possible to see that the centrality of the principle of proportionality could not reasonably have been expected by the ECJ in considering whether the *Honeywell* standard was met. So while both courts to some extent continued with their narratives concerning the final say, it can be imputed to the FCC that – by inserting proportionality in the heart of the *ultra*

128. BVerfG *PSPP*, *supra* note 11, para 112.

129. *Ibid.*, para 113.

130. *Ibid.*, para 118.

131. *Ibid.* Nowag has suggested that a better translation, instead of “comprehensibility”, would be the FCC’s standard of traceability of the decision-making process. This would mean that the FCC cannot re-trace the steps taken by the ECJ in reaching its conclusions. See Nowag, “The BVerfG’s proportionality review in the *PSPP* Judgment and its link to *ultra vires* and constitutional core: Solange Babel’s Tower has not been finalised” (June 15, 2020), <ssrn.com/abstract=3634218>.

132. As it cross-refers to paras. 112–113 in 118. BVerfG *PSPP*, *supra* note 11.

133. *Bundesverfassungsgericht 2 BvR 1685/14 SSM Regulation*, Judgment of 30 July 2019, <www.bverfg.de/e/rs20190730_2bvr168514.html>, para 152.

vires standard after the fact – it reserved for itself a somewhat unfair advantage. If the preliminary reference procedure is to be a useful tool, the communication underlying it needs to be clear, unequivocal, and open. In section 4.4. below, we further elaborate on whether this point may have necessitated the submission of a further reference to the ECJ.

The consequence of an *ultra vires* finding by the FCC places an obligation on German constitutional organs to respect the citizens' right to vote concerning the transfer of sovereignty to the EU (the *Integrationsverantwortung* under Art. 38(1) of the Basic Law). In the present case, this resulted in an obligation on the *Bundesbank* to take three months to coordinate with the ESCB and ECB Governing Council, with the aim of ensuring the principle of proportionality is respected.¹³⁴ Placing such an obligation on the *Bundesbank* can be characterized as unconventional at best, even by the standards of German constitutional jurisprudence. The ECB president Christine Lagarde rejected any sort of obligation being imposed on the ECB, arguing that the bond-buying programme was endorsed by the ECJ, and the ECB will continue doing "whatever is necessary" to fulfil their mandate "undeterred".¹³⁵

Having said this, the written submissions of the ECB formed part of the oral hearings before the FCC after the response of the ECJ was published.¹³⁶ The same was done in the *Gauweiler* litigation. This casts some doubt on the consistency of the President's response. Would it not, according to Lagarde's logic, be entirely inappropriate for the ECB to justify itself before a national court, potentially contrary to Article 130 TFEU? Absent specified formal accountability routes, we would contend that – to the contrary – there is nothing problematic in the ECB actively defending and justifying its policies. Importantly, the ECB has increasingly started to use the language of the proportionality test (as demanded by the FCC and as already commonly used by other EU institutions, such as the Commission). Lagarde, in her most recent hearing at the ECON Committee of the European Parliament, stressed that:

"In this context, the ECB has to, of course, constantly evaluate whether its policy measures achieve their intended purpose. This assessment also includes analysing potential side effects of the measures considered and determining whether alternative instruments might be more efficient in attaining the objective. In my first hearing before this Committee in

134. BVerfG *PSPP*, *supra* note 11, para 235.

135. "ECB will continue doing whatever is necessary to deliver on mandate, Lagarde says", *Euractiv*, 8 May 2020, <www.euractiv.com/section/economy-jobs/news/ecb-will-continue-doing-whatever-is-necessary-to-deliver-on-mandate-lagarde-says/>.

136. BVerfG *PSPP*, *supra* note 11, para 62.

September 2019, I referred to this assessment as a ‘cost-benefit analysis’.’¹³⁷

The very structure of the answer follows steps of the proportionality test very closely. Similarly, in a recent interview, Isabel Schnabel, Member of the ECB Executive Board, stated: “And I can assure you that the ECB is always assessing very carefully that our measures are suitable, necessary and proportionate.”¹³⁸ The ECB Governing Council therefore subsequently published the proportionality analysis of the PEPP as well, using the same language demanded by the FCC.¹³⁹

It appears that the ECB is in fact developing a particular argument: that proportionality analysis was there all along, embedded in the ECB’s decision-making processes. The ECB thus had no reason to refuse to collate already-existing documents and, in so doing, provide the type of proportionality analysis to the Bundesbank that the FCC required.¹⁴⁰ The President of the *Bundesbank* found the ECB submission in compliance with the demands of proportionality analysis.¹⁴¹ This point is re-enforced by other recent analyses, suggesting that the FCC’s decision has led to a marked increase in the extent and quality of references to proportionality analysis in recent meetings of the Bank’s Governing Council.¹⁴² In short, a subtle re-arrangement of accountability practices under the shadow of judicial decisions seems to have already begun.

137. ECB Press Release, 8 June 2020 <www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200608~4225ba8a1b.en.html>.

138. Interview with Isabel Schnabel, 11 May 2020 <www.ecb.europa.eu/press/inter/date/2020/html/ecb.in200511~4e8f649287.en.html>.

139. Speech by Isabel Schnabel, Member of the Executive Board of the ECB, 27 June 2020, <www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200627~6009be389f.en.html>; Speech by Yves Mersch, Member of the Executive Board of the ECB, “In the spirit of European cooperation”, 2 July 2020, <www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200702~87ce377373.en.html>.

140. See also Lagarde’s letter to MEP Sven Simon of 29 June 2020, setting out the way it will approach the decision of the FCC. Importantly, Lagarde states: “In line with the principle of sincere cooperation, the Governing Council has decided to accommodate this request and to authorize the Deutsche Bundesbank to disclose these documents to the German Federal Government” <www.ecb.europa.eu/pub/pdf/other/ecb.mepletter200629_Simon~ece6ead766.en.pdf>.

141. “Weidmann sieht Forderungen des Verfassungsgerichts als erfüllt an”, FAZ 3 Aug. 2020, <www.faz.net/aktuell/finanzen/jens-weidmann-verfassungsgerichtsurteil-zur-ebz-erfuellt-16887907.html?GEPc=s3>.

142. Nicolaides, “The ECB is responding to the Federal Constitutional Court of Germany: A comparison of monetary policy accounts”, *EU Law Live*, 29 June 2020 <eulawlive.com/op-ed-the-ecb-is-responding-to-the-federal-constitutional-court-of-germany-a-comparison-of-monetary-policy-accounts-by-phedon-nicolaides/>.

Was the FCC then ultimately justified in rejecting the response from the ECJ and making an *ultra vires* finding? In principle, we are of the view that *ultra vires* review at the national level can enhance, or at the very least encourage, more stringent judicial review at the EU level. The safeguards built into the *ultra vires* standard by the FCC in principle operate to ensure that an *ultra vires* finding is an extremely exceptional event (a standard required by the need for a uniform and coherent interpretation of EU law). However, this general point needs to be considered alongside the specificities of how *ultra vires* was applied in *PSPP*. The FCC could have been significantly more transparent in the manner in which its preliminary reference to the ECJ was submitted. Such a step would enable more cooperative dialogue, thus allowing *ultra vires* review to better fulfil its constitutional role in safeguarding the conferral principle.¹⁴³

4.3. *Proportionality and the delineation of EU and national competence*

As indicated above, the core of the FCC's reasoning in *PSPP* concerns the principle of proportionality. As already discussed, while concerns as to whether the PSPP programme met proportionality standards were raised in the FCC's Order for reference, it was not apparent that these concerns would add up to an *ultra vires* finding.¹⁴⁴ Here, three obvious problems present themselves. The first concerns whether proportionality is applicable and how it should apply to the delineation of competence. The second is the nature of the proportionality test as interpreted by the FCC and what proportionality should require when applied to the ECB. The last concerns the way proportionality balancing was in fact conducted by the two courts. To what extent was the FCC right in coming to its dramatic conclusion that the ECJ's application of proportionality in *Weiss* was "simply incomprehensible", and to what extent might the same charge be levelled at the FCC?¹⁴⁵

The first of these questions is the one that received the least attention in the FCC's ruling. The FCC therefore largely ignored the suitability of proportionality as a tool to assess the delineation of competences between national and EU levels.¹⁴⁶ In this respect, the FCC seems to operationalize

143. On the effect on uniform and coherent interpretation of EU law, and possible procedural routes open to the courts under analysis to this end, see section 4.4. *infra*.

144. This might be contrasted with the FCC's initial reference in *Gauweiler*, where proportionality arguments were peripheral.

145. See e.g. Marzal, "Is the BVerfG's PSPP Decision "Simply not comprehensible?", *Verfassungsblog* 9 May 2020 <verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/>.

146. BVerfG *PSPP*, *supra* note 11, para 113: "general principles apply in the context of an *ultra vires* review"

general principles found in domestic German public law in a manner rarely used in the EU legal order. While the ECJ's case law on proportionality is cited at length, the methodology in its application is largely ignored: namely, that proportionality is not used as a principle to *determine whether* an EU institution is acting within its competences, but rather is used subsequently to assess *how* those competencies are used. In the words of the Editorial Comments on *PSPP* of this journal, this move seems to heavily conflate two steps – on the existence of powers and the exercise thereof – that are conceptually distinct.¹⁴⁷

More broadly, the ECJ has rarely used proportionality as a subsidiarity-enhancing principle.¹⁴⁸ Such uses have come from more recent case law. In *Vodafone*, therefore, Advocate General Maduro argued that “an assessment of proportionality requires the Court to consider whether the greater ability of the Community to achieve the goals of the relevant legislation is such as to justify the loss of Member State autonomy involved in the approach chosen by the legislature”.¹⁴⁹ While the ECJ, in its final judgment, did not use similar wording, it famously relied on a Commission impact assessment to support the Commission's finding that the goals of the roaming regulation could not have been similarly achieved by national legislation or legislation regulating purely the wholesale market.¹⁵⁰

In *PSPP*, it seems clear that the FCC uses proportionality as a subsidiarity-enhancing principle, drawing on the insertion of Article 5(4) TEU into the Lisbon Treaty. Here, there is a clear interaction between proportionality and the discussion above on the principle of conferral. According to the FCC's reasoning, to consider whether a measure is within EU competence, we must first examine whether it falls into the content of constitutional identity (in the sense of Art. 79(3) Basic Law), and if not, whether it nevertheless touches on the structural division of competences provided for under the Basic Law. The relevant question in this regard is whether any change in the division of competences is “structurally significant”; a question which can *itself* only be answered if the proportionality of the *PSPP* can be demonstrated.¹⁵¹ The ECJ and ECB's failure to take fully into account economic policy effects (such that *no actor* conducted a meaningful balancing of economic and monetary, and hence

147. Editorial Comments, “Not mastering the Treaties: The German Federal Constitutional Court's *PSPP* judgment”, 57 *CML Rev.*, (2020) 965, 969.

148. On this particular use, see Kosta, “The principle of proportionality in EU law: An interest-based taxonomy” in Mendes (Ed.), *EU Executive Discretion and the Limits of Law* (OUP, 2019).

149. Opinion of A.G. Maduro in Case C-58/08, *Vodafone*, EU:C:2009:596, para 37.

150. Case C-58/08, *Vodafone*, EU:C:2010:321, paras. 51–80.

151. BVerfG *PSPP*, *supra* note 11, para 165.

national and supra-national, interests) thus renders PSPP disproportionate and hence *ultra vires*. Two steps that are therefore seen by the ECJ as distinct (one regarding the nature of the measure; the other regarding its proportionality) are seen by the FCC as inseparable, explaining much of the conflict between the two rulings.

Are the two “stages” in fact separable? While they may be in principle, the difficulties of separating the existence and exercise of competence is radically heightened by the nature of ECB activity, whereby fulfilling monetary policy tasks necessarily spill-over into fiscal prerogatives, such that the division of responsibilities between the national and EU levels is irretrievably blurred. The ECB’s mandate is based on the historic Kohl-Mitterand compromise whereby the ECB remains tied to a strict price stability goal alongside a loose EU fiscal policy remaining subject to national coordination.¹⁵² The nature of all ECB QE programmes – as the ECJ repeatedly argued in *Weiss*¹⁵³ – reflects the complete inability to separate these two policy fields. The monetary transmission mechanism is highly linked to general economic conditions. The context of EMU is precisely one where traditional monetary tools have been exhausted and where extensive liquidity is thus one remaining mechanism to maintain the singleness of monetary policy. In this sense, while the ECB’s mandate and the principle of conferral seem to limit EU activity in the fiscal policy field, the necessary inter-linkages between the two fields mean that the principle of conferral is simply unable to carry out its usual subsidiarity-enhancing function. In this sense, the use by the FCC of proportionality under Article 5(4) TEU is an attempt to compensate for a more fundamental challenge to the principle of conferral in EMU, brought on by fissures between the formal rules (which separate the two fields) and economic reality (which force them together).

The EMU’s existing legal framework thus pushes both the ECJ and the FCC into doctrinal moves that are hard to practically operationalize. In the ECJ’s case, this move is the notion of “direct” and “indirect” effects in *Weiss*¹⁵⁴ that is repeatedly criticized by the FCC as providing the ECB with almost limitless discretion to declare which effects are “direct” and which are not¹⁵⁵ (in spite of significant evidence, as discussed above, that economic policy effects are a core and not merely “indirect” mechanism through which QE programmes work). On the side of the FCC, this is the demand to use proportionality as a tool for policing competences that turns both proportionality and *ultra vires*

152. And recognized by members of the ECB. See e.g. the interview with Isabel Schnabel, cited *supra* note 138.

153. Case C-493/17, *Weiss*, para 60.

154. *Ibid.*, paras. 61–63.

155. BVerfG *PSPP*, *supra* note 11, para 128.

into increasingly complex tests. Proportionality thus now requires weighing a number of interests: partly concerning minimizing burdens (on savers, pensioners and other interested parties, as explored below); but partly about minimizing infringements on national competences. These different elements of the test could go in competing directions, i.e. a measure could be proportionate in terms of its impact on particular horizontal interests but not in terms of its impact on national powers and *vice versa*. The tests of both courts to limit ECB activity are thus increasingly difficult to utilize and defend. Absent broader constitutional change (e.g. a broadening of the ECB's mandate to reflect the inter-dependencies of monetary and fiscal measures), core principles such as conferral and proportionality seem unable to carry out some of their constitutional functions in balancing national and European interests.¹⁵⁶

While not discussed by the FCC, the role of national central banks within the ESCB adds some weight to the potential constitutional importance of proportionality as a subsidiarity enhancing device. While national banks – together with the ECB – constitute in combination the European System of Central Banks, this system is clearly hierarchical in nature.¹⁵⁷ To give one example, while national central bank governors sit on the ECB's governing board, they do not do so as “representatives” of their State.¹⁵⁸ This adds important context to the significance of proportionality as a device to defend national autonomy in the ECB case – the opportunities to defend national prerogatives found in other EU processes (e.g. the role of the Council in the ordinary legislative procedure) are absent in the ESCB system.¹⁵⁹ What remains to be explained by the FCC is how this legitimate procedural deficiency, i.e. the difficulties in conducting a robust balancing of interests, is determinative of whether a particular measure is fiscal or monetary in nature. As in other parts of the judgment, the FCC identifies the right problem (the difficulties of treating monetary policy as an exclusive EU competence, and fiscal policy a national one). At the same time, this is a problem that does not stem mainly from poor reasoning on the part of the ECJ, but rather from difficulties with the EMU legal framework (which both segments the two policy fields, and fails to secure national prerogatives in monetary policy adequately).

156. See more generally De Boer and Van 't Klooster, “The ECB, the courts and the issue of democratic legitimacy after *Weiss*”, in this *Review*.

157. See Zilioli, “The ECB's powers and institutional role in the financial crisis: A confirmation from the Court of Justice of the European Union”, 23 MJ (2016), 1.

158. See Art. 130 TFEU.

159. On the wider EMU context of the decision, see Fromage, <issuu.com/eulawlive/docs/2020_018?e=40736167/78350760>.

The FCC's ruling spends far more time on the second question, i.e. the type of proportionality standard to be applied to ECB activity and to review of EU law more broadly. While above the concern is vertical power-sharing (EU/Member State), in this stage of analysis, the FCC's main concern is horizontal power-sharing, i.e. how monetary decisions influence other actors within society beyond its direct addressees. It is here that the FCC makes most efforts to engage in comparative reasoning, citing both an array of other (national) courts and the ECJ itself to argue that proportionality boils down to a three-stage assessment of suitability, necessity, and *stricto sensu* balancing.¹⁶⁰ This is accompanied by the statement that the ECJ is entitled to a "margin of error" in applying these tests and that, in defining them, "it is not for the Federal Court to substitute the ECJ's interpretation with its own when faced with questions of interpreting EU law."¹⁶¹ Much of the early critical reaction to the FCC's ruling, including within Germany, is that the FCC does precisely this.¹⁶² Most significantly, by insisting on a third "*stricto sensu*" element, the FCC insists on a step in the proportionality test that is by no means obviously embedded in EU and even in national judicial practice. The wider concern therefore is of a colonization of the general principles of EU law according to the domestic standards of one constitutional system.¹⁶³

This criticism is given more teeth by three further factors. Firstly, proportionality standards are being applied in an area of exclusive EU competence.¹⁶⁴ Secondly, they are being applied not to a legislative but to a delegated act, i.e. to the Decisions of the ECB establishing the PSPP. Finally, they are being applied to an independent institution, the ECB, that does not (as the Commission for example does) have a wide range of policy objectives to weigh and balance, but a strict mandate. It is not therefore clear, either, which interests are to be "balanced" via the *stricto sensu* stage or where this balancing ought to lead. As Gareth Davies has pointed out, such balancing

160. BVerfG *PSPP*, *supra* note 11, paras. 124–126.

161. *Ibid.*, para 112.

162. See e.g. Mayer, "Auf dem Weg zum Richterfaustrecht?", *Verfassungsblog* 7 May 2020 <verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/>; Marzal, *op. cit. supra* note 145.

163. Davies, "The German Constitutional Court decides price stability may not be worth its price", *European Law Blog* 21 May 2020 <europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price/>. This concern is not confined to PSPP alone; see e.g. concerns regarding the use of the right to privacy standard in the FCC's *right to be forgotten* case law, Bobić, "Developments in the EU-German judicial love story: *The Right To Be Forgotten II*", 21 *GLJ* (2020) (S1), 31.

164. See Nicolaidis, "The Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank: Setting an impossible and contradictory test of proportionality" *EU Law Live Blog* 15 May 2020 <eulawlive.com/oped-the-judgment-of-the-federal-constitutional-court-of-germany-on-the-public-sector-asset-purchase-programme-of-the-european-central-bank-setting-an-impossible-and-contradictory-test-of/>.

implies that the ECB is in a position to conclude that the fiscal effects (or effects on other important interests) of its activities somehow outweigh its monetary policy objective.¹⁶⁵ It would seem, however, that such a conclusion would be precluded by the nature of the ECB's mandate as defined in Article 127(1) TFEU, which makes clear that support for the general economic policies of the Union may be given "only without prejudice to the objective of price stability".

Some of these criticisms are more convincing than others. Regarding exclusive competence, while subsidiarity is excluded in fields where the Union has exclusive power to act, proportionality is not.¹⁶⁶ Regarding delegated legislation, while indeed it was, in *PSPP*, an ECB Decision that was subject to review, by its nature there may be reasons to subject delegated legislation to substantial proportionality analysis (e.g. when compared to legislative acts). If one of the goals of proportionality is to avoid irrational and arbitrary policy-making,¹⁶⁷ the legislative process – and the deliberative and pluralist institutional form it carries – is surely one mechanism by which arbitrary legislation is avoided. While the ECB carries high expertise, it does not carry the kinds of checks and balances of other EU institutions. Furthermore, while the decision at issue in *PSPP* was not directed at individuals, it was directed at specific addressees, principally the national central banks who are directed to act in the name of the ESCB.¹⁶⁸

The objection to *stricto sensu* balancing may be more compelling. While it is not true that the ECB's legal framework precludes balancing of any kind (all EU institutions engaged in economic policy are instructed under Art. 119(3) TFEU to take the principles – of stable prices, sound public finances and monetary conditions and a sustainable balance of payments – into account), it is certainly the case that Article 127 TFEU tips the scales of balancing from the outset. More broadly, the FCC's objection to the lack of balancing faces a larger paradox. While, on questions of *ultra vires*, the FCC seems to be asking the ECB to stick closely to its monetary policy mandate, on the issue of *stricto sensu* balancing, the FCC seems to ask the ECB to do exactly the opposite, namely to integrate concerns that are secondary from the perspective of its over-arching constitutional mission. "Balancing" of the kind the FCC demands seems necessary from a constitutional perspective: the ECB's tasks clearly spill-over from monetary policy, impinging on a wide range of

165. Davies, op. cit. *supra* note 163.

166. See e.g. Tridimas, *The General Principles of EU Law* (OUP 2006), p. 176.

167. See Harbo, "The function of the proportionality principle in EU Law", 16 *ELJ* (2010), 158, 159–161.

168. Öberg, "The German Federal Court's *PSPP* Judgment: Proportionality Review Par Excellence", *European Law Blog* 2 June 2020 <europeanlawblog.eu/2020/06/02/the-german-federal-constitutional-courts-pspp-judgment-proportionality-review-par-excellence/>.

interests and goals entrusted by the Treaties to other EU or national institutions. As an institution with exclusive competences, no other actor can conduct interest-balancing in the field of monetary policy on the ECB's behalf. Yet, fair balancing – in the sense of weighing monetary and other interests on even scales – seems problematically excluded by the nature of the ECB's legal framework (meaning that once again, that framework creates constitutional problems courts are unable to fully solve).

Part of the confusion around the balancing elements of the FCC's opinion are that the necessity and *stricto sensu* stages of the FCC's reasoning are related, and even often merged in its analysis.¹⁶⁹ Even if one were to reject the idea that the ECJ or ECB should have conducted *stricto sensu* balancing, necessity is a well-accepted element of proportionality reasoning in EU law (as elaborated in Art. 5(4) TEU) and was conducted in the ECJ's *Weiss* judgment.¹⁷⁰ At a minimum, necessity requires that the policy-maker demonstrate that less burdensome alternatives were considered and may be excluded only where these alternatives are not effective in reaching the policy goal. As the FCC points out, however, the ECJ in *Weiss* tends to interpret necessity in a free-standing manner, i.e. it does not consider the interests *on behalf of whom* the notion of "less burdensome" is to be articulated.¹⁷¹ Is this less burdensome from the perspective of national legislatures? From the perspective of those negatively affected by such a programme? Or from the perspective of some other interest? In this sense, there is necessarily a relation between necessity and *stricto sensu* balancing: necessity *itself* requires identifying the range of interests affected by a given decision (such that negative policy externalities or "burdens" may be minimized).¹⁷²

In this sense, the FCC might have avoided the charge of "colonization" while still maintaining the thrust of its proportionality critique by focusing merely on the necessity stage of the proportionality test. Here, legitimate questions might be asked both of the ECB and of the ECJ. There is little doubt that ECB decisions have high distributive consequences. The effects and scale of its QE programmes go way beyond affecting prices, but also significantly shape lending, employment and poverty.¹⁷³ There are furthermore many other ways in which the goals of QE in achieving price stability through general economic stimulus could have been conducted, from direct transfers to

169. BVerfG *PSPP*, *supra* note 11, para 133.

170. Case C-493/17, *Weiss*, paras. 79–99.

171. BVerfG *PSPP*, *supra* note 11, para 139.

172. Harbo, *op. cit. supra* note 167, 165.

173. See e.g. Reisenbichler, "The politics of Quantitative Easing and Housing Stimulus by the Federal Reserve and European Central Bank, 2008–2018", 43 *West European Politics* (2020), 2.

citizens to greater investment in green or other infra-structure projects.¹⁷⁴ There remains therefore a well-founded public interest – particularly given the ECB’s independence – of encouraging it to produce and publish wide-ranging distributive analyses, such that it can be utilized, both by the ECJ (as a tool to objectively review ECB acts) and other accountability rendering actors (such as parliaments).¹⁷⁵ The FCC may in this sense have articulated the right problem through the wrong tools. There are legitimate reasons to question both the level of diligence exercised by the ECB in designing its QE programmes (admittedly in circumstances of high uncertainty) and the standard of ECJ review. The unilateral imposition of *stricto sensu* proportionality on the wider field of EU law may not, however, be required to re-enforce this point.

The last question in relation to proportionality is not the nature of the proportionality test but the way it is operationalized by both courts. As we have argued in a previous piece, and acknowledged in a recent editorial within this journal,¹⁷⁶ objections to the way in which the proportionality analysis in the ECJ’s *Weiss* ruling was conducted are not entirely without merit.¹⁷⁷ While formally the ECJ conducted both a suitability and a necessity analysis – for which it devoted considerable space in its judgment – it did not ask the ECB to substantiate the factual basis behind its PSPP decisions, nor did it meaningfully explore possible alternatives (beyond accepting at face value the ECB’s argument that these would not have been equally effective).

In this sense, potential divergences between proportionality review of monetary policy and how such review is conducted in other fields (including of ECB activity) provides the FCC with a spear that it used to a significant effect (namely in an extensive comparative overview of how the ECJ conducts proportionality analysis in other areas of EU law).¹⁷⁸ While, in academic literature, this lowered standard of review has often been justified on the basis of the ECB’s independence, the ECB itself has long accepted transparency and procedural accountability as fully reconcilable with its decision-making autonomy.¹⁷⁹ It accepts that answering questions from MEPs and national

174. See e.g. <www.feps-europe.eu/attachments/publications/feps%2520gperc%2520policybriefgreenqe.pdf>. A related question is of course whether such measures would be Treaty compliant. See the analysis provided in this briefing of the European Parliament’s research service: <[www.europarl.europa.eu/RegData/etudes/BRIE/2016/581970/EPRS_BRI\(2016\)581970_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581970/EPRS_BRI(2016)581970_EN.pdf)>.

175. Dawson and Bobić, *op. cit. supra* note 14, 1033.

176. Editorial Comments, *supra* note 147, 972.

177. Dawson and Bobić, *op. cit. supra* note 14, 1022–1028.

178. See the (over 100!) cases cited by the FCC in *BVerfG PSPP*, *supra* note 11, paras. 147–152.

179. Dawson, Maricut-Akbik and Bobić, “Reconciling independence and accountability at the European Central Bank: The false promise of proceduralism”, 25 *ELJ* (2019), 75.

legislatures and justifying its internal decision-making process is entirely consistent with its independence under Article 127(1) TFEU (the ECB has thus described its independence and accountability as “two sides of the same coin”).¹⁸⁰ In this sense, meeting a higher proportionality threshold seems a reasonable burden (even if many would disagree with the conclusion that the failure to do so reaches the *ultra vires* threshold demanded by the FCC’s *Honeywell* ruling, as discussed further below).

These problems in the ECJ’s proportionality analysis do not preclude, however, that the FCC’s reasoning carries difficulties of its own. One concerns the range of actors whose interests must be balanced via proportionality. Here, the FCC can easily be accused of national myopia: when articulating the range of actors whose interests must be considered, it consistently focuses on domestic stakeholders, namely impacts on savers, pension schemes, bank credit ratings and “keeping afloat economically unviable companies”.¹⁸¹ If interest balancing is to be accepted as a more central element of the proportionality test, it surely must be articulated from a European rather than national perspective.¹⁸² Here, those who would be negatively affected by a failure to adopt an ambitious QE programme (including within Germany!), or by negative effects on the monetary transmission mechanism, must surely also be included.¹⁸³ More broadly, the FCC fails to give a clear indication of what kind of proportionality reasoning would meet its own standard. How could, for example, the ECB juggle the paradox highlighted above, namely its dual obligation (as the FCC sees it) both to remain within a monetary mandate and to thoroughly integrate fiscal policy concerns in its decisions? In truth, to do so may require more extensive changes to EMU’s broader legal and institutional architecture than purely judicial dialogue can allow.

4.4. *The principle of primacy and consequences for judicial interactions*

The decision of the FCC opened up important questions concerning the status of the principle of primacy of EU law, and the ensuing consequences for judicial interactions in the EU, especially between courts conducting

180. See <www.ecb.europa.eu/press/key/date/2017/html/sp170328_1.en.html>.

181. These are however given as “examples”. See BVerfG *PSPP*, *supra* note 11, para 139.

182. The FCC leaves some scope for this: “It is not for the Federal Constitutional Court to decide in the current proceedings how such concerns are to be weighed exactly in the context of a monetary policy decision; rather, the point is that such effects, which are created or at least amplified by the PSPP, must not be completely ignored.” BVerfG *PSPP*, *supra* note 11, para 173.

183. See Maduro, “Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court”, *Verfassungsblog* 6 May 2020 <verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/>.

constitutional review. As once put by Maduro, “If an alien were to land on earth and (let us assume the impossible . . .) were to be interested in the relationship between European law and national law, his perception of reality would vary considerably depending on whether he would land on the European Court of Justice or some national constitutional courts.”¹⁸⁴

In the same vein, the two courts appear to regard the issue through entirely different lenses. The FCC in its preliminary reference anticipated a necessary *ultra vires* finding concerning the ECB’s bond-buying programme; failing this, the FCC warned it will find the judgment *ultra vires* if the ECJ does not abide by its own standards from *Gauweiler*. Given that the reply from the ECJ did not follow this approach, the FCC set out its vision of the principle of primacy:

“If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardize its uniform application. Yet if the Member States were to completely refrain from conducting any kind of *ultra vires* review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences.... In principle, certain tensions are inherent in the design of the European Union;”¹⁸⁵

In the view of the FCC, courts thus need to be mindful of the opposing tendencies between the requirements of EU law and national constitutions. Back in its *Gauweiler* decision, the FCC set out the relationship between the principle of primacy and the Basic Law, concluding that any review must be done cautiously, with restraint, and in a way that is open to European integration.¹⁸⁶ In what read as a third *Solange* conclusion, the FCC accepted the different interpretation of the OMT programme provided by the ECJ. Substantively, the FCC accepted the conditions attached to the OMT programme as defined by the ECJ,¹⁸⁷ as well as the standard of review of Union acts.¹⁸⁸ The FCC does, however, mention the arguments it found to be important for the review of the OMT programme, which were not taken into account by the ECJ, and the questions submitted in the preliminary reference

184. Maduro, “Contrapunctual law: Europe’s constitutional pluralism in action” in Walker, *op. cit. supra* note 82, 502–503.

185. BVerfG *PSPP*, *supra* note 11, para 111.

186. BVerfG *Gauweiler*, *supra* note 10, paras. 121, 154, 156.

187. *Ibid.*, para 174.

188. *Ibid.*, para 179. The FCC mentions specifically that the standard of review is now more explicit in relation to the ECB (para 180).

concerning the independence of the ECB that the ECJ did not answer.¹⁸⁹ It also provided a cautionary conclusion on the margin of error granted to the ECJ:

“Against this backdrop, it is not the task of the Federal Constitutional Court to replace the interpretation of the Court of Justice with its own when faced with issues of interpretation of Union law that can – even when handled in a methodologically correct manner within the usual bounds of legal debate – yield differing results On the contrary, as long as the Court of Justice applies recognized methodological principles and does not act in a way that is objectively arbitrary, the Federal Constitutional Court must respect judicial development of the law by the Court of Justice even when the Court of Justice adopts a view against which weighty arguments could be made....”¹⁹⁰

As already mentioned, the FCC found the ECJ’s judgment in *Weiss* methodologically flawed and objectively arbitrary. We can see that the FCC is using each preliminary reference procedure to invite the ECJ to create further standards of review: of the limits of ECB mandate, of the principles of the EMU legal framework, and of proportionality. It also uses the procedure to inform the ECJ how it understands the answers it received, and how they will be applied in the future.

But what is the impression of Maduro’s alien who landed in Luxembourg? By way of a reaction to the judgment, the ECJ issued an unusual press release.¹⁹¹ It stated that while the ECJ does not comment on national judicial decisions, it is necessary to emphasize the binding nature of the preliminary reference procedure, the need for a uniform interpretation of EU law, and the exclusive power of the ECJ to annul an EU act according to *Foto-Frost*. The press release concluded that “[t]hat is the only way of ensuring the equality of Member States in the Union they created.” Lindeboom deconstructs the press release as being inconsistent with the way equality of Member States and the *effet utile* of EU law have been interpreted by the ECJ, ultimately showing it reduces the equality argument to that of sovereign equality in the international law arena.¹⁹² The reactions to the German decision among some EU law academics¹⁹³ followed the logic of the press release, i.e. that an understanding

189. *Ibid.*, paras. 181–189.

190. *Ibid.*, para 161.

191. CJEU Press Release, *supra* note 6.

192. 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 *PSP* Judgment”, 21 *GLJ* (2020) 1032, 1036–1039.

193. Kelemen, Eeckhout, Fabbrini, Pech, Uitz, “National courts cannot override CJEU Judgments: A joint statement in defence of the EU legal order” *Verfassungsblog* 26 May 2020 <verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>.

of supremacy of EU law as hierarchical is the only viable way of preserving the European Union and its legal system as we know it. They pointed to the immediate reaction of the Polish Government, declaring that it is possible to disregard the decisions of the ECJ for the preservation of constitutional identity, in an attempt to fortify their capture of the judiciary, for which there is now a web of connected cases closed and pending before the ECJ.

However, there must be a possibility for national courts to (exceptionally) question the decisions of the ECJ and demand they be consistent and respectful of EU primary law, without this causing an existential crisis for the EU legal order. This points to the fundamental difference between contesting the ECJ and EU law on well-established constitutional principles and decades-long jurisprudence on the one hand, and a blatant disregard for the rule of law under the guise of protecting constitutional identity, on the other. Constructive instances of contestation of primacy of EU law are those that remain within a reasonable interpretation of the values contained in Article 2 TEU, as opposed to destructive contestation, which questions the very essence of those values.¹⁹⁴ In the words of Lenaerts, the core values shared by all members of the club are non-negotiable,¹⁹⁵ such as judicial independence and the rule of law. The developments taking place in Poland and Hungary form not a reasonable disagreement in the interpretation of judicial independence, but its complete disregard.¹⁹⁶ In our view, the FCC remained within the scope of reasonable disagreement as to the interpretation of the ECB's powers and accountability – a value embedded in the rule of law.¹⁹⁷

The very addition of the different heads of review before national constitutional courts created a cooperative judicial space in the EU, forcing the ECJ to take notice of national constitutional concerns and adjust its case law accordingly. It is precisely incremental and permanent contestation and accommodation that results in a uniform and coherent interpretation and application of Union law, with conferral as its defining principle.¹⁹⁸

194. On this point in more detail, see Bobić, “Constructive *versus* destructive conflict: Taking stock of the recent constitutional jurisprudence in the EU”, 22 CYELS (2020) (forthcoming).

195. Lenaerts and Wójcik, “Judges should be fully insulated from any sort of pressure”, *Verfassungsblog* 30 Jan. 2020 <verfassungsblog.de/judges-should-be-fully-insulated-from-any-sort-of-pressure/>.

196. Pech and Scheppele, “Illiberalism within: Rule of law backsliding in the EU”, 19 CYELS (2017), 3.

197. Pech, “The rule of law as a constitutional principle of the European Union”, (2009) Jean Monnet Working Paper 04/09, <eclass.uoa.gr/modules/document/file.php/LAW272/rule%20of%20Law.pdf>.

198. Bobić, “Constitutional pluralism is not dead: An analysis of interactions between the European Court of Justice and constitutional courts of Member States”, 18 GLJ (2017) 1395, 1423–1427.

Nevertheless, uniform and coherent interpretation of EU law cannot be read in isolation from Article 4(2) TEU, which ensures a level of diversity in the ultimate application of EU law at the national level. Indeed, the ECJ has for decades shared the interpretation of the principle of proportionality with national courts, for example, in internal market law.¹⁹⁹ If the concern of the ECJ is absolute uniformity of EU law by whatever means, then, as Lindeboom remarks, a consistent application of the infringement proceedings against all Member States should be enough to achieve this.²⁰⁰ Yet, the ECJ's case law establishes that EU law created rights in favour of individuals, and the resulting obligations for Member States to ensure those rights, also through national courts,²⁰¹ ensuring the coherence of the system of judicial protection.²⁰² Following this logic, uniformity and coherence of EU law do not demand identical outcomes in every case in every Member State. Rather, they demand EU law granted rights of individuals to be protected within the scope of values within Article 2 TEU.

It has been pointed out that the FCC could have found it more appropriate to follow the approach of the Italian Constitutional Court in the *Taricco* litigation.²⁰³ Here, the Italian Constitutional Court submitted a second preliminary reference, as the Italian Constitution would not permit the Italian Court to follow the response it received to the first reference. This is most certainly a welcome approach.²⁰⁴ Yet it is not as far away from what took place in the QE litigation under analysis as might first appear. Namely, in the same way the Italian Court had twice asked the ECJ to clarify issues when the national constitution demanded otherwise, the FCC sought the interpretation of the ECB mandate first in *Gauweiler*, and then in *PSPP*. Importantly, the FCC demanded that the ECJ set a general standard of review for ECB action, and apply it to monetary policy instruments of the ECB, thereby demanding an increase in the legal accountability of the ECB. What the FCC could certainly have learned from the Italian example is to be very clear why they consider the

199. Tridimas, "Constitutional review of Member State action: The virtues and vices of an incomplete jurisdiction", 9 I-CON (2011), 737.

200. Lindeboom, op. cit. *supra* note 192, 1038.

201. Case 6/64, *Costa v. ENEL*, EU:C:1964:66, para 7.

202. Case 314/85, *Foto-Frost*, para 16.

203. Garner, "Squaring the PSPP Circle" *Verfassungsblog* 22 May 2020, <verfassungsblog.de/squaring-the-pspp-circle/>; Editorial Comments, *supra* note 147, 976. On the litigation more generally, see Garner, Editorial: "The borders of European integration on trial in the Member States: *Dansk Industri*, *Miller* and *Taricco*", 9 *European Journal of Legal Studies* (2017), 1.

204. We argue that an explicit obligation to do so cannot be read from Case 314/85, *Foto-Frost*, so this remains in the area of possible, but not mandatory, action.

PSPP an *ultra vires* act already in its Order for reference. Nothing prevented the FCC from conducting the same proportionality analysis of the ECB's fact-finding process *before* submitting the reference, and pointing the ECJ explicitly to the problems it encountered. This concerns specifically the *stricto sensu* step of the proportionality test, which was never flagged as central in the Order for reference.

That the FCC should have done more in its Order for reference is not a controversial proposition. In fact, the ECJ's Recommendations for national courts in relation to the preliminary reference procedure²⁰⁵ provide numerous options that could have been employed with the aim of mitigating miscommunication between the two courts. For example, the Recommendations make it an obligation for the referring court to detail the reasons why it doubts the validity of the act in question;²⁰⁶ it is essential for the national court to set out all the relevant matters of law and fact.²⁰⁷ Finally, it is for the national court to decide at which point in the proceedings the request should be made,²⁰⁸ possibly after both sides have been heard.²⁰⁹ Crucially, the Recommendations allow for communication between the Court Registry and the referring court, whenever additional information and clarification is necessary.²¹⁰

Transposed to the situation at hand, the FCC was not only at liberty to fully include the full proportionality analysis in the reference, it would have aided the ECJ immensely to be able to take note of the importance of *stricto sensu* balancing when conducting an *ultra vires* review. It is thus possible to conclude that the Order for reference itself resulted in what might be seen as a strategic selection of weapons, keeping some hidden lest they become necessary. This is contrary to the well-established approach of the FCC that it will perform its review through exhibiting openness towards EU integration as a vehicle for sincere cooperation²¹¹ and self-restraint.²¹² Thus, it is possible to conclude that the FCC did not fully abide by the principle of sincere cooperation: it should have provided full and comprehensive information to the ECJ for it to be able to reach a decision that would not upset the delicate balance necessary for the operation of the principle of primacy, and uniform

205. Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings of 20 July 2018, O.J. 2018, C 257/1–8.

206. *Ibid.*, point 7.

207. *Ibid.*, point 9.

208. *Ibid.*, point 12.

209. *Ibid.*, point 13.

210. *Ibid.*, point 28.

211. *Honeywell*, *supra* note 91, para 100.

212. Huber, *op. cit. supra* note 80, 89; National report (2014) – German Federal Constitutional Court, <www.confueconstco.org/reports/rep-xvii/allemand_EN.pdf>.

and coherent interpretation of EU law. However, as we explain above, we do not consider this to amount to a denial of the rule of law as a value underpinning the EU and national constitutional setup more broadly.²¹³

As noted in an earlier annotation,²¹⁴ the usefulness of judicial interactions in this context may have reached its limits, with communication carried out in such a way that neither court could fully and reasonably expect what would happen next. In relation to the decision of the ECJ in *Weiss*, the ECJ and the FCC are not so much meaningfully talking *to*, but rather *past* each other.²¹⁵ For example, as mentioned, the ECB's strictly defined monetary policy mandate, which is formally separate, but factually inseparable from economic policy, causes the need for legal improvisations given that existing principles such as conferral cannot usefully be applied, thus amplifying the risk of miscommunication and opposing interpretations. The ECJ overlooks and often rewords questions in preliminary references beyond recognition, in order to be able to reach an interpretation necessary to support the ECB's independence.²¹⁶ At the same time, the FCC, while having warned the ECJ of its worries as regards the outcome of its *ultra vires* review, did not sufficiently signpost which considerations it finds specifically relevant, such as the proportionality test.

In addition, the FCC only conducted *ultra vires* review, and concluded that constitutional identity was not affected by the PSPP.²¹⁷ It is crucial to point out that, as explained above, *ultra vires* review looks at the structural division of competences against the standards of the Basic Law, whereas identity review precludes certain *content* from ever being subject to European integration. According to the FCC, constitutional identity requires that the *Bundestag* be able to conduct an overall budgetary responsibility.²¹⁸ In addition, when concluding that constitutional identity was not affected, the FCC based this finding on the lack of risk-sharing embedded in the PSPP.²¹⁹ This potentially

213. As opposed to the approach taken in the Editorial Comments, *supra* note 147, 975.

214. Bobić and Dawson, "COVID-19 and the European Central Bank: The Legal Foundations of EMU as the Next Victim?" *Verfassungsblog* 27 March 2020 <verfassungsblog.de/covid-19-and-the-european-central-bank-the-legal-foundations-of-emu-as-the-next-victim/>.

215. Dawson and Bobić, *op. cit. supra* note 14, 1047.

216. For an analysis of the ECJ's practice of reformulating questions, where the authors conclude that this is a "decision-making approach" aiming to "neutralize conflicts" and "Europeanize disputes". See Šadl and Wallerman, "The referring court asks, in essence: Is reformulation of preliminary questions by the Court of Justice a decision writing fixture or a decision-making approach?", 25 *ELJ* (2019), 416.

217. BVerfG *PSPP*, *supra* note 11, para 228.

218. *Ibid.*, para 115.

219. *Ibid.*, para 228.

leaves the door open for identity review to be engaged in matters that involve risk-sharing of a kind that the Merkel and Macron recovery plan²²⁰ envisages.

Importantly, the FCC stresses that risk-sharing is currently prohibited both in primary EU law and the Basic Law.²²¹ While this means that a reform of EMU rules is possible, serious concerns remain whether the FCC would find such an amendment to be in breach of constitutional identity. The present litigation may thus be seen as the ultimate culmination of the apparent disconnect between what the law says the ECB can do, and what it actually does. In other words, it is not the courts that need changing, but the legal framework in which they operate. The FCC's decision, as we will discuss further below, demonstrates a need to transform the EMU legal framework, and re-think the position of the ECB within it. That does not necessarily imply, however, a similar need to reform the EU's judicial system.

4.5. *From PSPP to PEPP: Covid-19 and the prohibition on monetary financing*

It has often been the case in the history of EU law that the part of a judgment indecisive for the outcome of a case is particularly decisive for the future of the legal order.²²² Similarly, in the FCC's *PSPP* decision, one element of the judgment – its reasoning on Article 123(1) TFEU – played little role in the case's outcome but is likely of great importance to the EU's future. In the FCC's Order for reference, and in *Gauweiler*, concerns that QE programmes may flout the prohibition on monetary financing were of central importance. In *Gauweiler*, the FCC had repeatedly asked whether the size and nature of the OMT programme (outlined in the introductory table) provided market participants (and the States whose debt they purchased) with *de facto* certainty. This certainty would imply that their securities would be purchased by the ESCB, thus preventing a true market price from being formed (and hence diluting the market discipline the prohibition in Art. 123(1) TFEU would otherwise imply). In its ruling in *Gauweiler*, the ECJ had relied on a number of safeguards – such as the observance of a black-out period and the lack of prior announcements – to argue that purchases under the OMT carried a level of unpredictability such that they could not be seen as equivalent to direct or “primary” purchases.²²³

220. The German Government Press Release on the Recovery Fund <www.bundeskanzlerin.de/resource/blob/656734/1753772/414a4b5a1ca91d4f7146eeb2b39ee72b/2020-05-18-deutsch-franzoesischer-erklaerung-eng-data.pdf>; “EU still divided on recovery but Denmark relaxes position” <euobserver.com/coronavirus/148617>.

221. BVerfG *PSPP*, *supra* note 11, para 228.

222. Case C-6/64 *Costa v. ENEL*.

223. Case C-62/14, *Gauweiler*, paras. 93–127.

Importantly, however, the ECJ had insisted in *Weiss* that the nature of these safeguards was not fixed but would vary according to the programme in question:

“The safeguards which the ESCB must provide so that those two restrictions are observed will depend both on the particular features of the programme under consideration and on the economic context in which that programme is adopted and implemented. Whether those safeguards are sufficient must then be determined by the Court in the event of the programme being challenged.”²²⁴

The FCC, both in its Order for reference in *PSPP*, and in its final decision, does not follow this reasoning. The FCC instead interprets the *Gauweiler* safeguards as binding criteria, which must be fulfilled in order for a breach of Article 123(1) TFEU to be avoided. This initial disagreement is thus of some importance – while the ECJ (with some justification) interprets Article 123(1) TFEU as a broad principle that can be met by various means, the FCC has repeatedly treated the ECJ’s interpretation of Article 123(1) TFEU as establishing specific *rules and benchmarks* against which both current and future QE programmes are to be assessed.

In *PSPP*, the FCC therefore examines the safeguards of Article 123(1) TFEU developed by the ECJ in *Gauweiler* and *Weiss* one by one. It is clear from this that the FCC considers the ECJ’s reasoning on Article 123(1) TFEU to be inadequate. The FCC in particular questions whether the ECJ scrutinized the effectiveness of the safeguards built into *PSPP*, particularly whether the lack of information on the blackout period observed by the ECB prior to asset purchases rendered it unamenable to judicial scrutiny. The difficulty with Article 123(1) is that it imposes paradoxical obligations.²²⁵ While on the one hand, any steps taken by the ECB to meet it must be subject to objective review, on the other, it seems to demand *intransparency*, namely that market participants (and hence the judiciary too) lack information on when and how assets will be purchased.²²⁶ This inherent tension ties the FCC in knots as well: its complaint that the ECB refuses to disclose details on the blackout period comes immediately after it equally chastises the ECB for *disclosing too much* information on the amount and distribution of purchases (hence

224. Case C-493/17, *Weiss*, para 108.

225. Dawson and Bobic, *op. cit. supra* note 14, 1034–1036.

226. As a side-note, one might separate the two: this argument is made by the FCC, namely that *ex post* publication of certain details like the nature of a black-out period (or alternatively disclosure of information to courts under conditions of secrecy) might facilitate judicial review while still leaving a degree of market uncertainty.

providing certainty for market participants).²²⁷ The FCC thus adopted an openly contradictory position, prompted by a legal framework that forces the ECB to be both transparent and intransparent at the same time.

Having argued that the “safeguard” of the blackout period cannot be objectively verified, the FCC nonetheless concluded that the standards of Article 123(1) TFEU have been met. It does so by relying on other safeguards built into the PSPP programme. Three criteria seem of particular importance. The first concerns the volume of the PSPP and distribution of purchases between States. The fact that bond purchases from any one State are limited to 33 percent is of particular importance, providing a “sufficient safety margin in ensuring that there is no absolute certainty regarding purchases of bonds by the Eurosystem”.²²⁸ The second safeguard of importance is that the purchase of bonds under the PSPP remains tied to the ECB’s capital key, thus providing “an objective criterion that is independent of the economic and budgetary situation of the respective Member State”.²²⁹ The third safeguard is the quality criteria associated with the PSPP – namely that bonds are only purchased from States with a sufficient credit rating. Here, the FCC seems exceptionally specific, arguing that Article 123(1) TFEU specifically requires that purchases from any State lower than at least Credit Quality Step 3 would fall foul of the *Gauweiler* criteria.²³⁰ Cumulatively, these safeguards imply that there is no “manifest” circumvention of Article 123(1) TFEU.

The FCC insisted in its press release on the *PSPP* decision that its reasoning was confined solely to the PSPP programme and carried no implications for newer programmes of the ECB, such as the PEPP programme, established to counter the effects of Covid-19.²³¹ It is difficult, however, to avoid the conclusion that the Article 123(1) TFEU element of the FCC’s ruling carries immense significance for PEPP’s future. This is even suggested by the judgment’s timing, with the ruling pushed back by two months, following the Covid-19 outbreak. It is noticeable that precisely those safeguards that are highlighted in the ruling as being most crucial for allowing the PSPP’s legality are the safeguards that, in various ways, the newer PEPP programme either relaxes or abandons altogether.²³²

This begins with the capital key. As Decision 2020/440 establishing the PEPP makes clear, while PEPP is guided by the capital key, it also allows the

227. BVerfG *PSPP*, *supra* note 11, paras. 185–186.

228. *Ibid.*, para 202.

229. *Ibid.*, para 203.

230. *Ibid.*, para 208.

231. See BVerfG Press Release No. 32/2020 of 05 May 2020, ECB decisions on the Public Sector Purchase Programme exceed EU competences, <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html>, para 1.

232. *PEPP* Decision, *supra* note 1.

ECB to deviate from it where necessary.²³³ This of course reflects an obvious policy logic, which is that the Covid-19 epidemic affects Eurozone States differently. There are signs from the ECB's initial implementation that it has indeed utilized its power to deviate from the capital key, purchasing larger shares of Italian debt than would be justified under the formal criterion of Italy's capital subscription.²³⁴ The other two criteria – the 33 percent limit and the quality criteria for purchased debt – are retained in the current version of the PEPP. The programme does, however, reduce the minimum eligible remaining maturity for government bonds.²³⁵ There have also been ongoing demands on the ECB to relax its quality criteria for debt purchases given the limited remaining eligible securities the ECB can now purchase. The ECB's "whatever it takes" logic regarding the PEPP – and its most recent expansion of the programme's size – suggests a more flexible programme than the strict interpretation of the FCC seemingly allows.

This sets the stage for yet another confrontation between the FCC and the ECB regarding the PEPP. The AfD grouping within the Bundestag has already announced the filing of a constitutional complaint against the new programme.²³⁶ More broadly speaking, the FCC has over the last decade eased the admissibility threshold for *ultra vires* claims considerably.²³⁷ Importantly, this change in admissibility criteria may lead to well-financed or populist interests overwhelming the judicial route in an attempt to influence government policy. It has been a more general criticism directed to both courts that judicial review is a harmful tool when it comes to the highly technical area of monetary policy, where judges do not have the requisite expertise.²³⁸ At the same time, the EMU remains an executive-driven policy field, where judicial control may play a supplementary role in increasing the transparency and quality of the decision-making process.²³⁹ In this fraught context, how might

233. *Ibid.*, Art. 5(3).

234. "ECB set to expand bond-buying to soak up debt" *Financial Times*, 2 June 2020, <www.ft.com/content/3cf499f7-9c17-46c6-bedd-8893f2d56cf7>.

235. PEPP Decision, *supra* note 1, Art. 2

236. "Fresh German legal battle over ECB easing" OMFIF 17 June 2020 <www.omfif.org/2020/06/fresh-german-legal-battle-over-ecb-easing/>.

237. In her Dissent in *Gauweiler*, Justice Lübbe-Wolff claims that actions based on the constitutionally guaranteed right to vote were previously only admitted for identity review. In addition, she points to the extension of admissibility, because the FCC will review not only actions, but also omissions of German constitutional organs responsible for European integration. BVerfG *Gauweiler*, Dissenting Opinion of Justice Lübbe-Wolff, *supra* note 10, paras. 16, 17, 21.

238. Goldmann, "Adjudicating economics? Central bank independence and the appropriate standard of judicial review", 14 GLJ (2014), 265.

239. Dawson, Maricut-Akbik and Bobić, *op. cit. supra* note 179.

a future destructive conflict between the two courts regarding PEPP be avoided?

Absent more radical reform of EMU rules, this may require heightened modesty on both sides. From the side of the FCC, rendering PEPP compatible with its own interpretation of Article 123(1) TFEU would require returning to a more principles-based approach to that provision. If, for example, a key concern of the FCC is the predictability of market purchases, the very flexibility of the PEPP is seemingly a constitutional advantage in that it renders ECB purchases more unpredictable. In addition, the FCC in any future dispute would surely have to re-evaluate the proportionality critique at the centre of the PSPP dispute in light of the possible changes in the accountability practices of the ECB discussed in an earlier section (e.g. greater incorporation of proportionality in decision-making).

From the side of the ECB, this would require going to greater lengths in enumerating the objective standards underlying deviations from the capital key, including how – in the case of Covid-19 – public health considerations might inform the “flexibility” built into the PEPP programme. The key element underlying the FCC’s reasoning seems to be: is there anything guiding the ECB’s purchase decisions beyond concerns regarding the fiscal positions of States? This suspicion may be heightened by the lack of criteria contained in PEPP beyond that purchases will be made “to the extent deemed necessary and proportionate to counter the threats posed by extraordinary economic and market conditions.”²⁴⁰

More radically, further confrontation could be avoided by re-thinking or re-interpreting what Article 123(1) TFEU requires. Here, two elements seem of importance. The first concerns the contradictory impulses Article 123(1) TFEU (as it is now read) seems to require. The above “compromises” are inherently contradictory, with one strategy being to comply with Article 123(1) TFEU through heightened unpredictability and the other doing so through more stable and objective guiding criteria. This suggests more serious deliberation on what should really drive Article 123(1) TFEU: the substantive need to avoid market certainty or the procedural need to determine clearly how ECB decisions are oriented?

The second element concerns the underlying “telos” behind Article 123(1) TFEU. Both the ECJ and FCC are responsible for providing it with a meaning highly attached to moral and budgetary hazard.²⁴¹ Its goal is therefore closely connected to avoiding irresponsible spending practices and debt issuance on the part of Member States. Even leaving aside the limited room such a reading

240. PEPP Decision, *supra* note 1, Art. 4.

241. See e.g. Schepel, “The bank, the bond and the bailout: On the legal construction of market discipline in the Eurozone”, 44 *Journal of Law & Society* (2017), 1.

provides for solidarity between and within Member States, current judicial interpretation of Article 123(1) TFEU seems heavily influenced by the shadow of the euro crisis, where poor fiscal outlooks were commonly associated with either lacking regulatory structures (e.g. of private lenders) or irresponsible government spending. The EU's current fiscal outlook is informed by an entirely different set of circumstances, as it seems tied not to any intentional regulatory decision of a Member State, but rather to objective factors, namely the spread of the Covid-19 crisis and its uneven impacts. It is thus unclear how helpful a discourse focused on "sound budgetary decisions" is when applied to this context.

Both of these factors suggest, as other elements of this annotation have argued, more thorough re-thinking of the Treaty's economic policy chapter. Without this, either a direct confrontation, or a delicate re-adjusting of institutional positions, seems required in order to guarantee the survival of the PEPP. Either way, the dispute over the PSPP – and the manner in which it is resolved – carries high stakes for the future of EMU, and other ECB activity.

5. Conclusion – Rebuilding the EMU and rebuilding judicial cooperation

What does the FCC's ruling in *PSPP* mean for the future of EU law and the law of EMU in particular? While it is of course too early to do anything but speculate, much will depend on the reaction of policy-makers to the judgment. The FCC provided the German Government and *Bundesbank* with a three month deadline to provide evidence that the ESCB had conducted a proportionality assessment of the PSPP.²⁴² Failing such an assessment, German institutions may no longer participate in the PSPP. A number of commentators have questioned whether such an instruction is compatible with the independence either of the *Bundesbank* or the ECB.²⁴³ At the time of writing, the ECB collected information demonstrating the proportionality of the PSPP, and this will be presented to the *Bundestag* and FCC via the *Bundesbank*.²⁴⁴ This solution – and a more general "upgrading" of

242. BVerfG *PSPP*, *supra* note 11, para 235.

243. Konstadinides, "The German Constitutional Court's Decision on PSPP: Between mental gymnastics and common sense", *UK Constitutional Law Blog* 14 May 2020 <www.constitutionallaw.org/2020/05/14/theodore-konstadinides-the-german-constitutional-courts-decision-on-pspp-between-mental-gymnastics-and-common-sense/>. See also the debate in the German Bundestag on this question <www.bundestag.de/mediathek?videoId=7444492#url=bWVkaWF0aGVrb3ZlcmxheT92aWRlb2lkPTc0NDQ0OTI=&mod=mediathek>.

244. See <www.faz.net/aktuell/wirtschaft/zwischen-verfassungsgericht-und-ezb-zeichnet-sich-ein-kompromiss-ab-16829193.html?GEPC=s3>.

proportionality within ECB decision-making – seems of particular importance given the possibility of future litigation against PEPP sponsored by populist groups (as the previous section discussed)

Others have gone further, arguing that the judgment requires more drastic action at the EU level, namely an infringement action against the FCC for failure to comply with its own obligations under Article 19(1) TEU.²⁴⁵ Such an action would have as its goal the protection of the ECB from national interference and a clear statement by the ECJ on its exclusive competence to determine the legality of acts of EU institutions, and that preliminary references regarding the interpretation and validity of EU law are binding.

While the merits of such a proposal are worth serious consideration, they also face a number of obstacles. Infringement proceedings against court decisions are notoriously rare in the EU legal order and for good reasons – they ultimately hold governments accountable for the actions of independent judicial institutions.²⁴⁶ In addition, the decision taken by the ECJ here would be one on merits; not whether a national court *should have* submitted a preliminary reference.²⁴⁷ This means that the very judicial independence the ECJ is trying to protect in Poland and Hungary, would be hampered in Germany. This would be directly contrary to Lenaerts' argument that “judges should be fully insulated from any sort of pressure”.²⁴⁸ A more serious problem may be the signal such an action would send and who would be responsible for transmitting it. An infringement action would surely further deteriorate an already strained relationship between the FCC and the ECJ, at a time where German participation in the EMU is especially crucial. This is all the more so given that the actor who would ultimately determine the legality of the action would be one of its main objects, namely the ECJ.²⁴⁹ An infringement action promises high rewards – a symbolic clarification of an un-ending academic argument between “monists” and “pluralists” over the nature of sovereignty in EU law. Yet it carries even higher risks – that any answer by the ECJ would deepen rather than resolve the underlying legal conflict.

More significantly, such an action would, in our view, turn attention away from the main underlying cause of the dispute between the two courts, which

245. Pernice, “Sollte die EU Kommission Deutschland wegen des Karlsruher Ultra Vires Urteils verklagen?”, *Verfassungsblog* 16 May 2020, <verfassungsblog.de/sollte-die-eu-kommission-deutschland-wegen-des-karlsruher-ultra-vires-urteils-verklagen-pro/>; Fabbrini, “Suing the BVerfG”, *Verfassungsblog* 13 May 2020, <verfassungsblog.de/suing-the-bverfg/>.

246. See Varga, “Why is the *Köbler* principle not applied in practice?”, 23 MJ (2016), 6.

247. As in Case C-416/17, *Commission v. France*, EU:C:2018:811.

248. Lenaerts and Wójcik, op. cit. *supra* note 195.

249. In direct conflict with the foundational principle of judicial independence, *nemo iudex in causa sua*.

is not grounded in the debate over “ultimate” authority within the EU constitutional framework, but rather in the law of EMU itself. Many of the difficulties observed in the *PSPP* ruling therefore concern specific deficiencies in EMU law, namely i) the separation of fiscal and monetary policy dictated by the ECB’s mandate (and the lack of a robust fiscal counter-part to the ECB); ii) the ambiguous objectives underlying Article 123(1) TFEU; iii) the position of national representatives within the ECB’s decision-making structure; and iv) the lack of clarity over the applicable standard of judicial review for ECB acts. As we have attempted to highlight, the EMU legal framework has been repeatedly stretched to breaking point in the decade following the euro crisis, with the ECB being a central victim both of impractical limits placed on its activities before its birth and the inherently paradoxical demand that it be both “independent” and “accountable” at the same time.²⁵⁰

As has long been the case in the history of integration, national governments have often preferred to delegate functions they need to bear themselves – namely how to properly fiscally fortify the euro area – to technocratic EU institutions, who can better absorb political blame.²⁵¹ This process of delegation, however, increasingly focuses political debate on an institution – the ECB – who cannot meaningfully be an object of *full* political accountability. The Treaty’s separation of economic from monetary policy and its entrustment of the latter to the ECB under a “strict” mandate has therefore forced both the EU and national courts to develop doctrines that sit in uneasy tension with certain principles of EU law (such as conferral and proportionality).

This legal and economic framework is compounded by difficulties in the internal and external logic of the FCC’s ruling. We pointed in this annotation to a number of such problems, namely i) a lack of clarity over how proportionality and competence control inter-relate; ii) a failure to embed *stricto sensu* balancing in EU law’s existing proportionality test; iii) a narrow reading of Article 123(1) TFEU that severely limits new programmes to combat the Covid-19 epidemic and potentially invokes constitutional identity review; iv) a failure to keep within *Honeywell* standards as regards the exceptional nature of declaring an EU act *ultra vires* and the principle of sincere cooperation; and v) a failure to openly and unequivocally include all elements in the Order for reference that would be relevant for the ECJ in providing its response.

250. Dawson, Maricut-Akbik and Bobić, op. cit. *supra* note 179.

251. See Tesche, “Instrumentalizing EMU’s democratic deficit: The ECB’s unconventional accountability measures during the Eurozone crisis”, 41 *Journal of European Integration* (2019), 4.

In spite of these flaws, the FCC judgment's more positive external legacy could be making increasingly infeasible the national political strategy of "hiding behind the ECB".²⁵² It was therefore in the week following the judgment that the German Government finally relented in its decade long opposition to the possibility of the EU raising its own debt instruments.²⁵³ While – as we have discussed – the judgment problematizes some of these potential reforms (in particular in relation to debt and risk-sharing), such political changes may significantly relieve the political pressure faced by the ECB and with it encourage a re-consideration of some of EMU's founding rules.

Perhaps future EU law scholars will tell a different tale to the one set out in this piece's introduction: that once upon a time, this dispute forged not mutual incomprehension, but a legal basis for EMU that better reflected the functional challenges the Eurozone faced, allowing the gradual re-building of the Eurozone following the Covid-19 crisis. Just as importantly, this tale tells of a decision which ended not in rupture but in re-founding a more cooperative relationship between two of Europe's most prominent courts. A happy ending is challenging, but not impossible.

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252. Avbelj, "The right question about the FCC *ultra vires* Decision", *Verfassungsblog* 6 May 2020, <verfassungsblog.de/the-right-question-about-the-fcc-ultra-vires-decision/>.

253. See the Macron-Merkel proposals as taken-up by Commission Communication, "Europe's Moment: Repair and Prepare for the Next Generation", COM(2020)456 final.

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