ARTICLES

ACTIVATING *ULTRA VIRES* REVIEW: THE GERMAN FEDERAL CONSTITUTIONAL COURT DECIDES *WEISS*

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ABSTRACT: In its famous PSPP judgment, the German Federal Constitutional Court activated for the first time its *ultra vires* doctrine and declared that both the Secondary Markets Public Sector Asset Purchase Programme of the European Central Bank and its interpretation by the CJEU violated the proportionality requirements by not examining in a comprehensive and substantiated manner the economic policy effects that its practical implementation inevitably entails. However, this judgment is based on a manifestly erroneous interpretation of the relationship between the principles of proportionality and conferral and constitutes a concealed attempt to redefine the methods of interpretation of EU law and to impose the traditional perception of the constitutional court about the role of central banking and the existence of an absolute and inviolable separation between monetary and economic policy. At the same time, the constitutional court breaks its promise to exercise its *ultra vires* review in a cooperative spirit and fails to exhaust the institutional means that were available to it in order to resolve the matter in a legally appropriate and amicable manner that would not essentially amount to a precarious attempt to adjudicate economics.

KEYWORDS: German Federal Constitutional Court – Economic and Monetary Union – Secondary Markets Public Sector Asset Purchase Programme – *ultra vires* – proportionality – conferral.

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I. Introduction

More than a quarter of a century has passed since the day that the German Federal Constitutional Court (FCC) proclaimed in its seminal *Maastricht* judgment its capacity to review whether the EU institutions respect the limits of their conferred competences and to pronounce inapplicable at national level all legal instruments adopted by them in transgression of these boundaries.[1] This *ultra vires* doctrine inspired the case law of several other national constitutional courts, which announced their intention to operate in exceptional circumstances as an *ultima ratio* against the violation by the EU institutions of the principle of conferral.[2] There has even been an instance, in which one of those constitutional courts explicitly set aside a ruling given by the Court of Justice of the European Union (CJEU) in the context of the preliminary reference procedure on the basis that it constituted an illegal *ultra vires* act.[3] In another occasion, a supreme national court refused in essence to abide by a preliminary ruling on the rationale that judge-made principles of EU law cannot take precedence over national law.[4] However, both those cases had limited practical impact and were treated as isolated occurrences of judicial revolution against the interpretation of EU law that could partly be explained by the particular circumstances of the legal proceedings concerned.

[1] German Federal Constitutional Court judgment of 12 October 1993 2 BvR 2134/92, 2 BvR 2159/92 *Maastricht*.

[2] Spanish Constitutional Court declaration 1/2004 *European Constitution*, annotated by CB Schutte, 'Tribunal Constitucional on the European Constitution. Declaration of 13 December 2004' (2005) EuConst 281 and R Alonso Garcia, 'The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy' (2005) German Law Journal 1001; Polish Constitutional Tribunal judgment of 11 May 2005 K 18/04 *Accession Treaty*, annotated by K Kowalik-Banczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' (2005) German Law Journal 1355; Czech Constitutional Court decision of 26 November 2008 Pl. ÚS 19/08 *Treaty of Lisbon I*, annotated by P Briza, 'The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008' (2009) EuConst 143.

[3] Czech Constitutional Court decision of 31 January 2012 Pl. ÚS 5/12 *Slovak Pensions*, available at www.usoud.cz. See on that case R Zbiral, 'A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed *Ultra Vires*' (2012) CMLRev 1475; J Komarek, 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*; Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*' (2012) EuConst 323; G Anagnostaras, 'Activation of the *Ultra Vires* Review: The *Slovak Pensions* Judgment of the Czech Constitutional Court' (2013) German Law Journal 959.

[4] Danish Supreme Court judgment of 6 December 2016 Case 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A*, (*Dansk Industri*). An unofficial translation of that judgment is available at domstol.dk. See on that case U Sadl and S Mair, 'Mutual Disempowerment: Case C-441/14 *Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* and Case n. 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A*' (2017) EuConst 347 and E Gualco, '"Clash of Titans 2.0". From Conflicting EU General Principles to Conflicting Jurisdictional Authorities: The Court of Justice and the Danish Supreme Court in the Dansk Industri Case' European Papers (European Forum Insight of 26 March 2017) www.europeanpapers.eu 223.

The FCC emphatically reaffirmed on various occasions its role as the ultimate protector of constitutionality against the *ultra vires* introduction and interpretation of EU law.[5] However, it had refrained until recently from giving practical effect to its reserve power and had confined itself to the exercise of theoretical criticism against the extensive interpretation of the competences of the EU institutions and to the emission of increasingly clear warning signals that its judicial tolerance towards the relevant preliminary rulings of the CJEU was approaching its limits.[6] It is not surprising therefore the almost unprecedented magnitude of the attention that the first ever activation of its *ultra vires* review gave rise to, following its judgment on the Secondary Markets Public Sector Asset Purchase Programme (PSPP) of the European Central Bank (ECB).[7] In that case, the constitutional court concluded in substance that both the contested programme and its interpretation by the CJEU violated the proportionality requirements by not examining in a comprehensive and substantiated manner the economic policy effects that its practical implementation inevitably entails. The judgment essentially instructs the ECB to adopt within a transitional period of no more than three months a new decision that clearly demonstrates that the monetary policy objectives of the said programme are properly balanced against the economic and fiscal policy effects resulting from its application. Otherwise, the *Bundesbank* may no longer participate in the implementation and execution of the programme and to the purchase of government bonds on the secondary markets that this entails.[8] The constitutional court also imposes on the federal government and the national parliament the obligation to clearly communicate their legal views to the ECB and to take steps seeking to ensure that the latter conducts

[5] German Federal Constitutional Court judgment of 30 June 2009 2 BvE 2/08 *Treaty of Lisbon*. This ruling gave rise to an immense amount of academic literature. See amongst others D Doukas, 'The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty but Don't Do it Again!' (2009) ELR 866; J Ziller, 'The German Constitutional Court's Friendliness Towards European Law: on the judgment of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon' (2010) EPL 53; D Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* judgment of the German Constitutional Court' (2009) CMLRev 1795; D Grimm, 'Defending Sovereign Statehood Against Transforming the European Union into a State' (2009) EuConst 353; R Bieber, 'An Association of Sovereign States' (2009) EuConst 391; T Lock, 'Why the European Union is not a State' (2009) EuConst 407; C Schönberger, '*Lisbon* in Karlsruhe: *Maastricht's* Epigones at Sea' (2009) German Law Journal 1201; D Halberstam and C Möllers, 'The German Constitutional Court Says "*Ja zu Deutschland!*"' (2009) German Law Journal 1241. See also German Federal Constitutional Court judgment of 6 July 2010 2 BvR 2661/06 *Honeywell*. See on that case C Möllers, 'Constitutional Review of European Acts Only Under Exceptional Circumstances' (2011) EuConst 161.

[6] German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13 *OMT judgment*. See on that case A Pliakos and G Anagnostaras, 'Saving Face? The German Federal Constitutional Court Decides *Gauweiler*' (2017) German Law Journal 213 and M Payandeh, 'The OMT Judgment of the German Federal Constitutional Court' (2017) EuConst 400.

[7] German Federal Constitutional Court judgment of 5 May 2020 2 BvR 859/15 *PSPP Judgment*.

[8] German Federal Constitutional Court *PSPP Judgment* cit. paras 234-235.

the required proportionality assessment of the programme.[9] That is by far the most important part of the judgment, even though the constitutional court also makes several very significant observations about the potential impact of the PSPP on the principle of prohibition of monetary financing and explicitly concludes that the creation of any risk sharing regime between the national central banks would automatically amount to a violation of the constitutional identity.[10]

The vivid academic debate around that judgment illustrates an impressive range of interesting and important issues that arise from it. Some commentators stress that the case effectively underlines the inherent structural problems of the current Economic and Monetary Union (EMU) and brings back to the fore the urgent need for its institutional reform.[11] Others propose the introduction of novel institutional mechanisms capable of resolving the crises that are likely to arise in the judicial relations between the CJEU and the supreme national courts of the Member States.[12] Particular interest is also paid on the repercussions of the judgment for the fundamental EU principles and the operation of the preliminary reference procedure, as well as to the prospects of initiating infringement proceedings against Germany for violation of the Treaties.[13] Finally, serious concerns are expressed about the potential impact of the judgment on the case law of other national constitutional courts and the risk of its being abused by the governments of those Member States that are currently facing issues with the observance of the rule of law.[14]

Undoubtedly, the PSPP judgment constitutes an overt rejection of the exclusive prerogative of the CJEU to rule as the sole arbiter on the invalidity of the acts of the EU institutions.[15] The negation of that exclusive privilege is actually inherent in the very existence of the *ultra vires* review, given that its operation is based on constitutional law grounds but allows in essence to interpret indirectly the provisions of the Treaties and to examine accordingly the legality of EU acts adopted on their basis. Even if one were to assume

[9] *Ibid*. paras 229-233.

[10] *Ibid*. paras 180-221 and 222-228 respectively.

[11] See particularly to this end P Dermine, 'The Ruling of the Bundesverfassungsgericht in *PSPP* – An Inquiry into its Repercussions on the Economic and Monetary Union' (2020) EuConst 525.

[12] See especially D Sarmiento and JHH Weiler, 'The EU Judiciary After Weiss: Proposing A New Mixed Chamber of the Court of Justice' (2 June 2020) Verfassungblog verfassungsblog.de and O Garner, 'Squaring the PSPP Circle. How a "declaration of incompatibility" can reconcile the supremacy of EU law with respect for national constitutional identity' (22 May 2020) Verfassungblog verfassungsblog.de.

[13] See for instance S Poli and R Cisotta, 'The German Federal Constitutional Court's Exercise of *Ultra Vires* Review and the Possibility to Open an Infringement Action for the Commission' (2020) German Law Journal 1078; FC Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's *Ultra Vires* Decision of May 5, 2020' (2020) German Law Journal 1116.

[14] See indicatively in this respect S Biernat, 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland' (2020) German Law Journal 1104 and FC Mayer, 'To Boldly Go Where No Court Has Gone Before' cit. 1124.

[15] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452.

though that it is permissible to conduct such a review outside the institutional context of the Treaties, that still leaves to ascertain if the legal reasoning adopted by the constitutional court in order to arrive at its *ultra vires* verdict is normatively convincing and methodologically coherent. As it will be explained, the case reveals the existence of conflicting approaches between the constitutional court and the CJEU on the operation and the content of the legal principles of proportionality and conferral. However, the underlying rationale of the PSPP ruling is much more profound and relates to the contradictory views that the two courts have about the role of the ECB in the current eurozone architecture and the existence of a possible overlap between economic and monetary policy.

II. The preliminary reference of the German Constitutional Court and the preliminary ruling of the Court of Justice

The legal proceedings concerned the PSPP of the ECB.[16] This programme was adopted as part of the quantitative easing policy of the ECB, in order to serve the objective of maintaining price stability by supporting aggregate consumption and investment spending in the euro area so as to restore the historically low inflation rates that existed at the time of its implementation to levels below but close to two per cent. The programme authorized the Eurosystem to purchase on the secondary markets government bonds of the eurozone Member States meeting the eligibility criteria set by the ECB on the basis of certain allocation keys. Although it was originally planned to apply for one and a half years, that period was subsequently extended on several occasions and it is estimated that at the time that the constitutional court gave its judgment the total volume of the programme already amounted to more than two trillion euros.[17]

As it was expected, a group of individuals brought legal proceedings before the FCC contesting the validity of the programme. The applicants maintained in essence that the programme amounts to an *ultra vires* act because its adoption exceeds the mandate of the ECB and infringes the prohibition of monetary financing.[18] The constitutional court stayed the proceedings and referred a number of questions on the validity of the scheme, stressing in its preliminary request the existence of strong indications that its adoption

[16] Decision 2015/774/EU of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme. See on this programme S Grund and F Grle, 'The European Central Bank's Public Sector Purchase Programme (PSPP), the Prohibition of Monetary Financing and Sovereign Debt Restructuring Scenarios' (2016) ELR 781.

[17] See for example M Sinner and F Canepa, 'ECB wins court's backing for buying government debt' (11 December 2018) Reuters www.reuters.com.

[18] Arts 119 and 127 TFEU (monetary policy mandate of the European Central Bank) and art. 123(1) TFEU (prohibition of monetary financing).

violates the Treaties.[19] According to the constitutional court, the contested programme officially pursues a monetary policy objective and it also uses monetary policy instruments to attain that aim. In order to ascertain though whether that measure is covered by the mandate of the ECB, it is necessary to conduct an overall assessment and evaluation that also takes into account its expected effects. That further requires to subject the ECB to a full judicial review as regards the exercise of its competences that is also intended to make up for the absence of political control over that institution.[20] In the case at issue, the programme produces foreseeable and knowingly accepted economic policy effects that go beyond the mandate of the ECB. More specifically, it has a significant positive effect on the economic situation of the national banks that increases their credit rating and improves the refinancing conditions of the eurozone Member States enabling them to obtain loans on the capital market under much more favourable conditions. Given the above, tolerating the problematic economic policy effects of the contested programme could prove to violate the principle of proportionality in relation to its legitimate monetary policy objectives. This is even more so given that the programme and its implementation lack a specific statement of reasons, as concerns in particular the question whether the intended monetary policy effects of the bond purchase scheme were balanced against its foreseeable economic policy consequences.[21] As regards the alleged violation by the programme of the prohibition of monetary financing, the constitutional court admits that the purchase by the Eurosystem of government bonds on the secondary market is not generally precluded. However, the contested scheme has specific features that give rise to doubts as regards the observance of that prohibition. This is primarily because its modalities create a virtual certainty among market operators that issued government bonds will be purchased by the Eurosystem. That artificially improves the credit rating and the refinancing conditions of the eurozone Member States and reduces the incentive of their national governments to pursue a sound budgetary policy.[22]

Responding to the reservations expressed by the constitutional court, the CJEU concluded in *Weiss* that the PSPP is not in violation of the Treaty provisions.[23] As concerns the mandate of the ECB, the preliminary ruling focuses on the proclaimed objective of the scheme. It stresses that the specification of the aim of maintaining price stability as

[19] German Federal Constitutional Court order of 18 July 2017 2 BvR 859/15. See on this preliminary request A Lang, 'National Courts *Ultra Vires* review of the ECB's policy of quantitative easing: An analysis of the German Constitutional Court's preliminary reference order in the *PSPP* case' (2018) CMLRev 923.

[20] Art. 130 TFEU.

[21] German Federal Constitutional Court order 2 BvR 859/15 cit. paras 108-123.

[22] *Ibid*. paras 81-99.

[23] Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000. See indicatively on that preliminary ruling M Bobic and A Dawson, 'Quantitative easing at the Court of Justice – Doing whatever it takes to save the euro: *Weiss and Others*' (2019) CMLRev 1005; M Van der Sluis, 'Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in Weiss' (2019) LIEI 263; A Pliakos and G Anagnostaras, 'Adjudicating Economics II: The Quantitative Easing Programme Declared Valid' (2020) ELR 128.

the restoration of inflation rates to their original target level by easing the monetary and financial conditions in order to support aggregate consumption and investment spending in the euro area is not vitiated by a manifest error of assessment. Thus, the objective pursued by the bond purchase programme can be validly attached to the primary objective of the monetary policy of the EU. This conclusion is not invalidated by the fact that the programme is capable of having considerable effects that might possibly be pursued also though economic policy measures. The CJEU stresses in this respect that the authors of the Treaties did not intend to make an absolute separation between economic and monetary policy. Furthermore, the conduct of monetary policy will almost always entail an impact on interest rates and bank refinancing conditions that necessarily has consequences also for the financing conditions of the public deficit of the Member States. If the ECB were precluded altogether from adopting such measures when their effects are foreseeable and knowingly accepted, that would practically prevent it from using the means made available to it by the Treaties in order to achieve monetary policy objectives. This might represent an insurmountable obstacle to its accomplishing the tasks assigned to it by primary law.[24] Examining then the proportionality of the programme as to the monetary policy objectives, the preliminary ruling underlines that the ECB must be allowed a broad discretion when it prepares and implements an open market operations scheme that obliges it to make choices of a technical nature and to undertake complex forecasts and assessments. Based on this reasoning, the CJEU eventually concludes that the programme is suitable to attain its monetary policy objective and that the means that it employs in this respect are absolutely necessary to contribute to the effective attainment of that objective. It also adds that the ECB properly weighed up the various interests involved in the implementation of the PSPP by adopting measures that are intended to circumscribe the risk of losses and to take it into account.[25] Turning then on the alleged violation of the prohibition of monetary financing, the preliminary ruling stresses that the ECB built sufficient safeguards into its intervention in order to ensure that the latter does not reduce the impetus of national governments to follow a sound budgetary policy.[26]

III. Not *ultra vires*! The problematic legal reasoning of the German Constitutional Court

It was clear from the outset that the preliminary ruling would not satisfy the constitutional court, since it explicitly rejects its position of principle that the examination of conferral requires to subject the ECB to complete judicial review and to conduct an overall assessment and evaluation of the measures that it adopts in the performance of its powers taking also into account their predictable economic policy effects. However, one could

[24] *Weiss and Others* cit. paras 53-70.
[25] *Ibid*. paras 71-100.
[26] *Ibid*. paras 101-158.

still expect that the constitutional court would reluctantly accept the legality of the PSPP while exercising at the same time severe criticism against the limited judicial review that the CJEU performs over the ECB and the broad margin of appreciation that it recognizes to this specific institution.

That seemed even more likely, given the policy that the constitutional court had adopted in the recent past in relation to the Outright Monetary Transactions (OMT) programme of the ECB.[27] That programme authorized the Eurosystem to purchase on the secondary markets unlimited quantities of government bonds issued by selected eurozone Member States in order to restore the monetary policy transmission mechanism and to safeguard the singleness of monetary policy that was imperilled by the extreme spreads in the interest rates on the bonds of certain Member States that were at least partly caused by irrational and speculative market behaviour. In its historic first ever preliminary request on the legality of that programme, the constitutional court explicitly warned that it would consider the scheme as *ultra vires* unless it was interpreted by the CJEU in the restrictive way required in its preliminary reference.[28] However, the CJEU confirmed in *Gauweiler* the validity of the OMT programme on the basis of a legal reasoning that focused in essence on the proclaimed monetary policy objective of the scheme and underlined the need to recognize a wide margin of appreciation to the ECB.[29] The constitutional court retreated then from its original position and considered the programme as legal, expressing though

[27] Governing Council of the ECB, Outright Monetary Transactions (OMT Programme). The technical features of the programme were announced in a press release, European Central Bank, *Technical features of Outright Monetary Transaction* www.ecb.europa.eu.

[28] German Federal Constitutional Court order of 14 January 2014, 2 BvR 2728/13. See on that preliminary request M Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) EuConst 263 and I Pernice, 'A Difficult Partnership Between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU' (2014) Maastricht Journal of European and Comparative Law 3. See also the contributions in the Special Issue of (2014) German Law Journal 108.

[29] Case C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400. See on that preliminary ruling P Craig and M Markakis, '*Gauweiler* and the legality of Outright Monetary Transactions' (2016) ELR 4; G Anagnostaras, 'In ECB We Trust … The FCC We Dare! The OMT Preliminary Ruling' (2015) ELR 744; V Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*' (2016) CMLRev 139; A Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' (2015) EuConst 563; M Claes and JH Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' (2015) German Law Journal 917; H Sauer, 'Doubtful it Stood …: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment' (2015) German Law Journal 971; F Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) German Law Journal 1003; S Simon, 'Direct Cooperation Has Begun: Some Remarks on the Judgment of the ECJ on the OMT Decision of the ECB in Response to the German Federal Constitutional Court's First Request for a Preliminary Ruling' (2015) German Law Journal 1025. See also the contributions in the Special Issue (February 2016) Maastricht Journal of European and Comparative Law.

serious reservations as regards in particular the measure of judicial control that the CJEU had exercised over the ECB and the performance of its functions.[30]

That being so, the very first question that comes to mind is why the constitutional court did not consider as *ultra vires* the interpretation given by the CJEU to the OMT programme even though the legal reasoning of the *Gauweiler* preliminary ruling was almost identical to the one adopted in *Weiss* as regards the PSPP of the ECB. The next question that arises in this respect is why the constitutional court refrained from imposing in the *Gauweiler* case the obligation on the ECB to conduct a more comprehensive and substantiated proportionality review of the contested scheme that would also take into account its expected economic policy effects, even though it had clearly expressed in its preliminary reference the position that the specific features of the OMT programme effectively turned it into an economic policy instrument. These questions become even more interesting if one concentrates on the particular characteristics of those two asset purchase programmes. It becomes then apparent that the OMT scheme contravened much more patently the conditions that the case law of the constitutional court has imposed as necessary prerequisites, in order to consider as legal any programme involving the purchase of government bonds by the Eurosystem.[31] More precisely, that programme had a selective nature and authorized the purchase of bonds issued only by the more severely hit by the sovereign debt crisis Member States. It further had no temporal restrictions, and it did not impose any specific limitations on the volume of the government bonds that could be purchased on the secondary market. Despite those features, that programme was not considered by the constitutional court to be in violation of the Treaties. One could therefore be excused for thinking that if such a programme managed to escape the *ultra vires* review of the constitutional court, the same conclusion would have been arrived at much more comfortably in relation to the bond purchase scheme contested in the legal proceedings in *Weiss*.

Furthermore, the constitutional court stresses in its PSPP ruling that in order to conclude that an EU act violates the principle of conferral it must be established that the violation of competences is sufficiently qualified. That requires that the said act manifestly exceeds the mandate of the institution concerned, resulting in a structurally significant shift in the division of competences to the detriment of the Member States.[32] That confirms the *Honeywell* case law of the constitutional court, suggesting that its *ultra vires* review will be exercised only in very exceptional circumstances.[33] One would therefore expect that an *ultra vires* ruling would be supported by references to a number of bibliographical and other sources, attesting the existence of such a manifest violation. However, there is not a single such reference in the entire PSPP judgment as concerns the

[30] *OMT judgment* cit.
[31] *PSPP Judgment* cit. paras 201-203 and 215-217.
[32] *Ibid*. para. 110.
[33] *Honeywell* cit. para. 61.

contested programme and its interpretation by the constitutional court.[34] Instead, that latter court notes that the mere fact that commentators in legal scholarship and politics have argued for the permissibility of certain measures does not generally rule out that such measures can be found to constitute a manifest exceeding of competences.[35] In other words, the constitutional court suggests that an EU act can be pronounced as *ultra vires* even in case the existence of a qualified infringement of the principle of conferral is based exclusively on its own legal interpretations. That is so even if the legal proceedings relate to matters that are by their very nature open to subjective appreciation and assessment, such as the quality of the statement of reasons required in order to substantiate the proportionality of a policy measure and the rigorousness of the judicial control that should be exercised in that regard.

However, the most problematic aspects of the *ultra vires* ruling of the constitutional court only become apparent if one concentrates on the legal methodology adopted by that court to challenge the validity of the PSPP. In order to be able to exercise its judicial review over that particular scheme, the constitutional court must first circumvent the preliminary ruling that has considered it as valid. However, it relies in this respect on a blatant misinterpretation of the common constitutional traditions of the Member States and arrives at conclusions that violate the very letter of the Treaties. At the same time, it breaks its promise to interpret the national constitution in a cooperative and European friendly manner and chooses to ignite a multilevel crisis instead of resorting to the available institutional mechanisms in order to resolve a dispute that appears at first reading to concern a primarily procedural matter.

III.1. The attempt to redefine the methods of interpretation of EU law: The misconstruction of the role of proportionality

It is more than apparent that the *Weiss* preliminary ruling is at the centre of the attention and the criticism of the constitutional court. There are of course several objections that could be possibly expressed as regards in particular the manner in which that preliminary ruling overlooks at certain points the concerns and the arguments raised in the preliminary request of the constitutional court.[36] However, the constitutional court chooses a rather indirect method in order to exercise its *ultra vires* review over that preliminary ruling by focusing on a matter that seems on its surface to relate primarily to the application and the content of the principle of proportionality.

The constitutional court accepts that the application and interpretation of EU law falls principally to the CJEU, including the determination of the applicable methodological

[34] See also in this respect FC Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020' (2020) EuConst 733, 752-753.

[35] *PSPP Judgment* cit. para. 113.

[36] See for example M Bobic and A Dawson, 'Quantitative easing at the Court of Justice' cit.

standards. It immediately adds though that these standards are based on the constitutional legal traditions common to the Member States, which are notably reflected in the case law of the national constitutional courts and the other apex courts. It notes in this respect that the application of these methods and principles by the CJEU cannot and need not completely correspond to the practice of national courts, given the particularities of the EU legal order. However, the traditional European methods of interpretation and more broadly the general legal principles that are common to the laws of the Member States must not be manifestly ignored. Based on this reasoning, the constitutional court articulates the conditions under which it will consider itself bound by an interpretation given in the context of the preliminary reference procedure. It explains that it will respect the outcome of a preliminary request so long as the CJEU applies recognized methodological principles and its ruling is not arbitrary from an objective perspective, even when it adopts a position against which weighty arguments could be possibly made.[37]

It is apparent that the above construction amounts in essence to the introduction of a new *Solange*, clearly inspired by the famous case law of the constitutional court in the area of fundamental rights protection.[38] However, this time the focus is not on a substantive issue but rather on the recognized methodological standards of interpretation of EU law.[39] The constitutional court seems implicitly to take into account the autonomy of the EU legal order, to the extent that it specifically acknowledges that the particularities of EU law give rise to considerable divergencies with regard to the importance and weight accorded to the various means of interpretation. Furthermore, it confirms its *Honeywell* case law by reiterating that the mandate conferred upon the CJEU to ensure that the law is observed in the interpretation and application of the Treaties necessarily entails that this body should be granted a certain margin of error in the performance of its powers.[40] However, the manner that this new *Solange* is applied in practice suggests that the ultimate objective of its introduction is to authorize the constitutional court to impose its own understanding as regards the limits of monetary policy and the measure of judicial review that must be exercised over the ECB. That is attempted in a covert way, under the pretext of the need to respect the common constitutional traditions of the Member States.

The means chosen to attain that objective is the principle of proportionality. The constitutional court starts from the premise that this principle is recognized in all Member States and that its application necessarily requires a final balancing of all opposing legal interests at stake, including an assessment of the effects that the introduction of a given

[37] *PSPP Judgment* cit. para. 112.

[38] German Federal Constitutional Court judgment of 22 October 1969 2 BvR 197/83 *Solange II*.

[39] See also to this end D Petric, "'Methodological Solange" or the spirit of PSPP' (18 June 2020) European Law Blog Europeanlawblog.eu.

[40] *Honeywell* cit. para. 66.

measure may possibly entail.[41] It also argues that such an assessment is carried out by the CJEU in virtually all other legal areas, save that of the EMU.[42] The eventual aim of the constitutional court is to conclude that the preliminary ruling in *Weiss* runs counter to the recognized European methods of interpretation and that it is therefore methodologically arbitrary from an objective perspective. However, in order to be able to arrive at such a conclusion it must first bring this alleged violation of the common constitutional standards of interpretation as regards the principle of proportionality under the scope of its *ultra vires* review. In other words, it must prove that by applying proportionality in an erroneous manner the CJEU has patently exceeded the limits of its competences in a manner that specifically runs counter to the principle of conferral.[43] That requires in turn to establish the existence of a connection between proportionality and the principle of conferred powers.[44]

In its attempt to attest the existence of that connection, the constitutional court manifestly misinterprets the role that the Treaties and the relevant case law of the CJEU accord to proportionality as concerns the question of allocation of competences. It considers that this principle has a corrective function and that it constitutes the key determinant in the division of competences between the EU and its Member States.[45] The existence of a link between the principle of proportionality and the delimitation of competences is underlined by the constitutional court at many points throughout its judgment.[46] Based on this construction, the constitutional court concludes that the preliminary ruling in *Weiss* is methodologically untenable and incomprehensible because it attaches no legal relevance whatsoever to the serious economic policy effects that the contested asset purchase programme entails in practice.[47] That renders the principle of proportionality practically meaningless as regards the delineation between monetary policy and economic policy, since the suitability and necessity of the programme are not balanced against the significant economic policy effects that it necessarily produces to the detriment of the competences of the Member States.[48] Furthermore, the wide margin of appreciation that the CJEU recognizes to the ECB as regards the exercise of the competences and its readiness to accept without closer scrutiny the proclaimed monetary policy objective of its contested programme affords in essence to that institution the ability to decide autonomously on the scope of its mandate and to choose freely any means it considers suitable to carry out its functions even if the benefits are rather slim.[49] As a result, the preliminary ruling in *Weiss* constitutes an *ultra*

[41] *PSPP Judgment* cit. paras 124-125 and 132.
[42] *Ibid*. paras 146-153.
[43] *Ibid*. para. 110 and the case law mentioned therein.
[44] Arts 5(1) and (2) TEU.
[45] *PSPP Judgment* cit. paras 133 and 142.
[46] *Ibid*. paras 119, 123, 127, 139, 154, 156, 163, 177.
[47] *Ibid*. paras 119, 133, 141, 153.
[48] *Ibid*. paras 127, 133, 138.
[49] *Ibid*. paras 136-137 and 140-143.

vires act given that its interpretation of the monetary policy mandate of the ECB encroaches upon the competences of the Member States for economic and fiscal policy manners by empowering that institution to pursue its own economic policy agenda by means of an asset purchase programme.[50] For that reason, the constitutional court cannot rely on that preliminary ruling and it must conduct its own review in order to ascertain whether the Eurosystem remained within the competences conferred upon it by the provisions of the Treaties in the adoption and implementation of the PSPP.[51] It eventually concludes that the ECB manifestly violated the proportionality principle by not balancing the monetary policy objective of the contested asset purchase programme against the economic policy effects resulting from the means used to achieve it. For this lack of balancing and lack of stating the reasons informing such balancing, the actions of that institution exceed its monetary policy mandate and amount to an *ultra vires* act.[52]

Although the reasoning of the constitutional court seems to centre around the principle of proportionality, a closer reading of the PSPP ruling reveals that what actually lies at its core is the principle of conferred powers and the controversy about the correct methodological approach that should govern its application.[53] However, nothing in the Treaties suggests that proportionality is connected to the allocation of competencies as argued by the constitutional court. On the contrary, their very text makes it clear that proportionality and subsidiarity impose limitations on the exercise of the competences of the EU.[54] Hence, the proportionality principle comes into play only once it has been established that a given competence can be validly exercised by an EU institution.[55] Therefore, its purpose is to control the exercise of that legitimately conferred competence. Its potential infringement may lead to the conclusion that a given measure is invalid, but not for the reason that it has been adopted in violation of the principle of conferral. The entire legal reasoning of the constitutional court is based therefore on a patent misconception of the operation of proportionality that considers as part of the recognized methods of interpretation a fictional aspect of that principle.

That misinterpretation becomes even more apparent if one looks at the way proportionality is applied by the case law of the CJEU. The constitutional court seems to consider

[50] *Ibid*. paras 162-163.

[51] *Ibid*. para. 164.

[52] *Ibid*. paras 165-178.

[53] See also F de Abreu Duarte and M Mota Delgado, 'It's the Autonomy (Again, Again and Again), Stupid!: Autonomy Between Constitutional Orders and the Definition of a Judicial Last Word' (6 June 2020) Verfassungblog verfassungsblog.de.

[54] Art. 5(1) TEU. See also M Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) German Law Journal 979, 985.

[55] See on the application of this principle T Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 175-192 and TI Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) ELJ 158.

that the preliminary ruling in *Weiss* accepted implicitly the existence of a connection between proportionality and conferral and recognized to that former principle a compensatory function that intends to make up for the generous interpretation of the competences conferred to the ECB.[56] It is nevertheless apparent that no such link can be established from the case law of the CJEU. Every time it is called upon to examine the existence of a potential exceeding of competences, the CJEU starts by assessing whether the contested measure is covered by the mandate of the institution concerned. It is only in case of a positive answer that the judicial review may potentially proceed to the next stage that relates to the observance of the proportionality principle. That is the approach followed in both preliminary rulings given thus far on the validity of the asset purchase programmes of the ECB.[57] A similar policy has also been adopted in other legal areas, particularly when the case concerns the appropriateness of the legal basis chosen for the adoption of a given legal act.[58]

III.2. The attempt to redefine the methods of interpretation of EU law: The misconstruction of the intensity of the proportionality review

It is apparent therefore that the reasoning employed by the constitutional court in order to bring proportionality under the scope of its *ultra vires* review is manifestly erroneous. However, equally problematic are the conclusions that it arrives at as regards the content of that principle and the obligations that it imposes in relation to the acts of the ECB. The constitutional court accuses in essence both that institution and the CJEU for not examining the principle of proportionality in its strict sense, by failing to take into account the considerable economic policy effects of the PSPP and by not balancing them against its proclaimed monetary policy objective. For the preliminary ruling, that renders it methodologically untenable and objectively arbitrary.[59] For the contested programme, the consequence is that it lacks an adequate statement of reasons to allow to carry out a comprehensive and substantiated judicial review and to reach a conclusive assessment as to whether the programme in its specific form is still covered by the mandate of the ECB.[60] For that reason, the constitutional court imposes in essence the obligation on the federal government and the national parliament to require from the ECB to conduct a new proportionality assessment of the programme and to adopt a new decision that demon-

[56] *PSPP Judgment* cit. para. 128.

[57] *Gauweiler and Others* cit. paras 46-65 and 66-92 respectively and *Weiss and Others* cit. paras 53-70 and 71-100 respectively.

[58] See for example Case C-482/17 *Czech Republic v Parliament and Council* ECLI:EU:C:2019:1035.

[59] *PSPP Judgment* cit. paras 133-153.

[60] *Ibid*. paras 167-179.

strates in a comprehensible and substantiated manner that the monetary policy objective that it pursues is proportionate to the economic and fiscal policy effects resulting from the application of the scheme.[61]

There are nevertheless several objections that can be raised against that understanding of the content of the principle of proportionality and its practical application specifically in the area of the EMU. The first one is that the Treaties only refer to the appropriateness and necessity strands of proportionality review.[62] The Protocol on the application of the principles of subsidiarity and proportionality makes some reference to the need to take into account the effects of the proposed measures but this obligation is imposed on the EU legislature and concerns primarily the application of the principle of subsidiarity.[63] Turning then to the relevant case law of the CJEU, the conclusion is that the assessment of proportionality usually centres around the appropriateness and the necessity requirements.[64] It is only in very rare cases that it goes beyond the stage of the necessity review and extends to proportionality *stricto sensu*.[65] The constitutional court expressly admits this reality and makes reference to an extensive list of cases, in which that approach has been followed.[66] However, later in its judgment it concludes that the preliminary ruling in *Weiss* is methodologically incomprehensible because it allegedly contradicts the approach taken by the CJEU in virtually all other areas of EU law.[67]

Looking more closely at the cases that the constitutional court refers to in order to prove the application of stricter judicial standards outside the area of the EMU, it is immediately apparent that most of those cases concern the exercise of judicial review over national measures and not acts of the EU institutions.[68] One could certainly argue that it is not automatically permissible to apply more relaxed standards, when the validity of EU law is at stake. That is indeed correct but turning back to the case law mentioned by the constitutional court the second important observation is that this relates primarily to the

[61] *Ibid*. paras 232-235.

[62] Art. 5(3) TEU.

[63] Protocol n. 2 of the Treaty of the European Union on the application of the principles of subsidiarity and proportionality [2004].

[64] See indicatively in this respect Case C-58/08 *Vodafone and Others* ECLI:EU:C:2010:321 para. 51; Case C-59/11 *Association Kokopelli* ECLI:EU:C:2012:447 para. 38; Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28 para. 50; Case C-202/11 *Las* ECLI:EU:C:2013:239 para. 23.

[65] See T Marzal, 'From Hercules to Pareto: Of bathos, proportionality, and EU law' (2017) ICON 621.

[66] *PSPP Judgment* cit. para. 126.

[67] *Ibid*. paras 146-153.

[68] See indicatively in this respect Case C-300/06 *Voß* ECLI:EU:C:2007:757; Case C-110/05 *Commission v Italy* ECLI:EU:C:2009:66; Case C-280/18 *Flausch and Others* ECLI:EU:C:2019:928.

areas of fundamental rights protection, free movement of goods and the general principles of EU law.[69] In those areas, the balancing assessment required by the constitutional court is indeed possible given that it is usually easy to specify both the opposing legal interests involved and the effects that the application of a given measure may practically entail.[70] On the contrary, the exercise of a similar judicial review over matters of monetary and economic policy is particularly problematic.[71] This is because the complexity and technicality of the issues arising in those areas require the existence of economic expertise that courts do not normally possess.[72] If they were to perform the kind of proportionality review required by the constitutional court, they would be obliged to rely on the expert analyses of third parties. That would ultimately turn their review into a matter of prioritization of the one economic analysis over the other and would inevitably undermine the credibility of any judicial conclusion.[73]

Furthermore, it is not at all easy to ascertain the legal interests that should be balanced against the pursued objective of a monetary policy measure. In its preliminary ruling in *Weiss*, the CJEU referred to the risk of losses related to the application of the PSPP and stressed that the ECB had taken sufficient measures to circumscribe that risk.[74] The constitutional court notes that it can be objectively assumed that the introduction of those safeguards serves the budgetary autonomy of the Member States and promotes fiscal policy interests that are not covered by the ambit of monetary policy.[75] Although it accepts that the adoption of those measures can be a relevant factor in the examination of proportionality *stricto sensu*, the constitutional court requires though the extension of that review also to the foreseeable economic policy effects of the scheme.[76] However, it is a particularly challenging task to establish the economic policy effects that a monetary policy measure is likely to produce and to assess their impact in relation to its pursued

[69] See indicatively in this respect Joined Cases C-435/02 and C-103/03 *Springer* ECLI:EU:C:2004:552 (fundamental rights); Case C-148/15 *Deutsche Parkinson Vereinigung* ECLI:EU:C:2016:776 (free movement); Case C-407/18 *Addiko Bank* ECLI:EU:C:2019:537 (principle of effectiveness).

[70] See for example the balancing of the competing legal interests in Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333. See on that preliminary ruling F Ronkes Agerbeek, 'Freedom of expression and free movement in the Brenner corridor: the Schmidberger case' (2004) ELR 255; A Biondi, 'Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights' (2004) EHRLR 51; G Facenna, 'Eugen Schmidberger Internationale Transporte Planzüge v Austria: Freedom of Expression and Assembly vs Free Movement of Goods' (2004) EHRLR 73; G Gonzales, 'EC Fundamental Freedoms v. Human Rights in the Case C-112/00 Eugen Schmidberger v. Austria [2003] ECR I-5659' (2004) LIEI 219.

[71] See also I Feichtner, 'The German Constitutional Court's *PSPP* Judgment: Impediment and Impetus for the Democratization of Europe' (2020) German Law Journal 1090, 1097.

[72] See particularly in this respect M Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' (2014) German Law Journal 265, 270-272.

[73] See also G Anagnostaras, 'In ECB We Trust...The FCC We Dare! The OMT Preliminary Ruling' cit. 753.

[74] *Weiss and Others* cit. paras 93-99.

[75] *PSPP Judgment* cit. para.132.

[76] *Ibid*. paras 134-137.

objective. Given the vagueness surrounding the boundaries between economic and monetary policy and the extreme volatility of the circumstances in the respective areas, it is therefore very precarious to make predictions as to the type and magnitude of the consequences that a policy choice made in the one area may potentially generate in the other. It is not accordingly feasible to perform the balancing assessment required by the constitutional court over largely unspecified policy effects that cannot be properly measured in advance so as to be apt to the exercise of effective judicial review. It appears therefore that the only balancing test that can reasonably take place in that regard is the restrained cost benefit analysis review performed by the preliminary ruling in *Weiss*. That is intended to ensure that the potential negative side effects of a given measure do not manifestly outbalance the benefits linked to its primary monetary policy objective.

Arguably then, the case reveals the existence of conflicting methodological approaches around the content and the intensity of proportionality review in the monetary policy area. The CJEU applies a teleological approach that focuses on the proclaimed objective of the PSPP and the nature of the instruments used in order to attain it. On the contrary, the constitutional court requires the adoption of an effects-based approach that also includes a stricter balancing assessment. Contrary though to the conclusions of that constitutional court, there is no evidence to substantiate its claim that the latter approach stems from the national constitutional traditions of the Member States.[77] Even if one were to accept though that the adoption of an effects-based approach in the monetary policy area is indeed preferable, this would not render the preliminary ruling in *Weiss* an illegal *ultra vires* act. That is because the proportionality review of the programme made by the CJEU finds support in the text of the Treaties and does not contradict the relevant case law in other areas of EU law. It is therefore both reasonable and methodologically coherent and cannot be considered as untenable and objectively arbitrary.

III.3. Breaking the promise of exercising the *ULTRA VIRES* review in a cooperative and European friendly way

The objections that can be raised against the PSPP ruling of the constitutional court do not concern only the substance of the legal reasoning it employs in order to contest the proportionality assessment of the PSPP and its interpretation by the preliminary ruling in *Weiss*. They also relate to the readiness of that constitutional court to give practical effect to its reserve power, without exhausting the institutional means that were available to it in order to resolve the matter in a legally appropriate and amicable manner. In its *Honeywell* ruling, the constitutional court had stressed that its *ultra vires* review would be exercised in a manner that is open towards European law so as to protect the precedence

[77] See also in this respect E Venizelos, 'Passive and Unequal: The Karlsruhe Vision for the Eurozone' (27 May 2020) Verfassungblog verfassungsblog.de.

of application accorded to the provisions of EU law and to ensure their uniform application.[78] This promise is theoretically reiterated in its PSPP ruling, to the extent that the constitutional court confirms that all tensions should be resolved in a cooperative manner and mitigated through mutual respect and understanding.[79] It is also emphatically noted that *ultra vires* review should be exercised with restraint, giving effect to the openness of the constitution to European integration.[80]

The promise of a European friendly exercise of *ultra vires* review is nevertheless violated in practice by the failure of the constitutional court to make a second preliminary reference, specifically on the issue of the proportionality of the contested bond purchase programme. That would be the institutionally suitable mechanism to express its objections against the statement of reasons provided by the ECB and the interpretation of the programme made by the CJEU. That would give the opportunity to the ECB to explain whether it had performed the balancing assessment required by the constitutional court prior to the implementation of the programme and to provide the necessary evidence to substantiate its allegations. It would also allow the CJEU to react on the methodological approach to proportionality adopted by the constitutional court and to explicate its own position. After all, it should not escape attention that the principal criticism of the constitutional court against the PSPP related to its inadequate statement of reasons that made it impossible to reach a conclusive decision regarding its validity under the principle of conferral. That did not rule out that the programme in its specific form could still be considered as legal, on the basis of a comprehensive and substantiated proportionality assessment undertaken by the ECB.[81] Instead of proceeding to such a second preliminary reference, the constitutional court chose to consider the programme as *ultra vires* for its alleged lack of balancing and lack of stating the reasons informing such balancing and to require a new assessment by the ECB.

However, the *Taricco* case attests that resorting again to the preliminary reference procedure constitutes an effective and much more preferable alternative to a unilateral *ultra vires* ruling for the resolution of issues that have remained unsettled by a previous preliminary request.[82] In that case, the interpretation given by the CJEU in relation to national limitation periods liable to prevent the prosecution of serious infringements affecting the financial interests of the EU amounted in essence to a violation of the principle of legality in criminal matters as protected under Italian constitutional law.[83] More specifically, that interpretation contravened the overriding principle of the Italian constitutional

[78] *Honeywell* cit. paras 56-59.
[79] *PSPP Judgment* cit. para. 111.
[80] *Ibid*. para. 112.
[81] *Ibid*. para. 179.
[82] Case C-42/17 *M.A.S. and M.B*. ECLI:EU:C:2017:936.
[83] Case C-105/14 *Taricco and Others* ECLI:EU:C:2015:555.

legal order that criminal offenses and penalties must be established by precise rules that cannot be applied retroactively. When the case was brought before it, the Italian Constitutional Court lodged a request for a new preliminary ruling on the matter. In its preliminary reference, it clearly implied that it would activate its constitutional counter limits in case the original interpretation of EU law remained the same.[84] The CJEU eventually adopted an approach that reassured the constitutional concerns raised by its initial interpretation, relying on the existence of new information that had not been brought to its attention at the time of its previous preliminary ruling.[85]

That the *Taricco* paradigm could indeed have been followed also as regards the PSPP is very vividly illustrated by the events that took place after the *ultra vires* ruling of the constitutional court. The ECB reacted by releasing a number of unpublished documents to the *Bundesbank*, including the minutes of its meetings before the launching of its quantitative easing policy.[86] Those meetings concerned the prospects of buying sovereign bonds from the secondary markets and the effects that such a programme could entail. The ECB also published the official account of its last monetary policy meeting. In that meeting, its board members debated over the effectiveness of its currently applicable monetary policy instruments and the measure of their potential side effects on the area of economic and financial policy.[87] This information was forwarded to the German government, which expressed the position that these documents confirmed that the ECB had indeed assessed the proportionality of the PSPP in a manner that fully met the requirements of the constitutional court.[88] A similar position on the proportionality of that programme was also adopted by the German parliament.[89]

It is not certainly incontestable that the release of that information satisfies completely the standard of evidence required by the constitutional court in relation to the proportionality of monetary policy measures, given that it is virtually impossible to assess in a sufficiently precise manner the potential consequences that a given policy choice may possible

[84] Italian Constitutional Court judgment of 23 November 2016 n. 27/2017 www.cortecostituzionale.it.

[85] *M.A.S. and M.B.* cit. para. 28. See on that case C Rauchegger, 'National Constitutional Rights and the Primacy of EU Law: M.A.S.' (2018) CMLRev 1521; G Piccirilli, 'The Taricco Saga: The Italian Constitutional Court continues its European Journey' (2018) EuConst 814; M Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union' (2018) Maastricht Journal of European and Comparative Law 357; F Vigano 'Melloni overruled? Considerations on the "Taricco II" judgment of the Court of Justice' (2018) New Journal of European Criminal Law 18.

[86] See the letter sent by the President of the ECB to the European Parliament of 29 June 2020 www.ecb.europa.eu.

[87] Account of the monetary policy meeting of the Governing Council of the ECB www.ecb.europa.eu.

[88] G Chazan and M Arnold, 'German finance minister moves to resolve court stand-off with ECB' (29 June 2020) Financial Times www.ft.com.

[89] B Jennen, 'German Parliament Backs ECB Bond-Buying After Court Standoff' (2 July 2020) Bloomberg www.bloomberg.com.

have in another legal area.[90] However, there was clearly room to seek additional clarification from the ECB and it is also apparent that this institution would have responded positively to such a request in case of a new preliminary reference looking specifically at the proportionality of its contested programme. Instead of availing itself of the institutional mechanisms provided for by the Treaties, the constitutional court made a conscious choice to operate outside the framework of EU law and to exercise its reserve power in a very sensitive legal area characterized by the generalized and significant impact that every single action may potentially have on the entirety of the eurozone Member States. One could therefore be excused for thinking that such a policy patently contravenes its promise for a restrained and European friendly exercise of its *ultra vires* review.

IV. On the role of central banking and the relationship between economic and monetary policy

However, the case is much more than a mere conflict of methodological approaches on the operation and content of the principle of proportionality. A closer reading of the reasoning of the constitutional court reveals that its misconstrued reliance on the recognized European methods of interpretation and the introduction of the new *Solange* ultimately serve its traditional perception of the role of central banking and its position about the measure of judicial control that should be exercised over the ECB in the performance of its functions. The underlying rationale of the *ultra vires* ruling of the constitutional court seems to be that there exists a strict separation between economic and monetary policy that can never be violated, not even in cases of emergency.

IV.1. The applicable measure of judicial review over the policy measures of the European Central Bank

It is well known that the CJEU and the constitutional court have conflicting views about the intensity of the judicial control that the ECB should be subject to. That was already very apparent ever since the first historic preliminary reference of that constitutional court on the validity of the OMT programme. In that case, the constitutional court stressed that the independence of the ECB diverges from the requirements that the constitution puts in place in relation to the democratic legitimation of political decisions. It considered accordingly that the mandate of this institution should be interpreted narrowly, in order to meet these requirements. That makes it therefore necessary to carry out a comprehensive judicial review of its policy acts.[91] That position of principle has been

[90] Also see in this regard P Nicolaides, 'The ECB is Responding to the Federal Constitutional Court of Germany: A Comparison of Monetary Policy Accounts' (29 June 2020) EU Law Live eulawlive.com.

[91] German Federal Constitutional Court order 2 BvR 2728/13 cit. paras 58-60.

repeated since by the constitutional court on every possible occasion.[92] For that court, the transfer of monetary powers to an independent ECB does not violate the democratic principle only under the condition that the mandate of that institution is strictly limited to matters of monetary policy serving the aim of price stability and it is not extended to any other policy areas. This position is emphatically reiterated in the PSPP ruling and it is also connected to the corrective function that the principle of proportionality supposedly plays for the purposes of safeguarding the competences of the Member States.[93]

There are two principal objections against the exercise of such a comprehensive judicial review. The first one is that the imposition of a rigorous legal control over the acts of the ECB obliges that institution to operate under the constant threat that every single policy choice it makes may be potentially interpreted by the courts as a transgression of its powers. Hence, the refusal to recognize sufficient leeway to the ECB in the performance of its functions amounts to the exercise of an indirect pressure on it to adapt its strategy to the understanding of the monetary policy requirements by the courts. This runs counter to the very idea of having an independent body that is protected against any external interference, regardless of its source.[94]

The second objection is that the courts do not possess the required expertise and legitimacy to proceed to such a comprehensive review. Courts lack the necessary expertness to successfully adjudicate economics, in view of the complexity and the technicality of the issues that need to be assessed in that area. By advocating in favour of a full judicial review of the acts of the ECB, the constitutional court is actually imposing upon the judiciary a responsibility that it is virtually impossible to carry out effectively. Seen in this perspective, the exercise of such a review over the policy choices of the ECB exceeds the judicial mandate of the courts and gives rise to serious legitimacy issues.[95] The courts that are called upon to rule on the validity of the acts of that institution are not elected and their legitimacy originates not only from their independence but also from their expertise. It is the nature and the level of that expertise that ascertains the scope of their mandate.[96] In other words, the restrictive judicial review required by the constitutional court gives rise to the same democratic concerns as those that it is intended to address. Only that this time these concerns relate to the legitimacy and accountability of the judiciary.

Albeit not making specific reference to the inherent limits of its mandate, the CJEU proceeds on the premise that it is not for the judicature to substitute its own assessment of

[92] *OMT judgment* cit. paras 187-189 and German Federal Constitutional Court order 2 BvR 859/15 cit. paras 102-103.

[93] *OMT judgment* cit. paras 136, 143, 156, 160 and 163.

[94] Art. 130 TFEU.

[95] See in this respect H Sauer, 'Doubtful it Stood…: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment' cit. 979-980.

[96] See particularly in this regard *Weiss and Others* ECLI:EU:C:2018:815 opinion of AG Wathelet para. 117.

economic and technical facts for that of the much better equipped in that area ECB. It recognizes therefore to that institution a broad margin of appreciation to make complex and often controversial technocratic assessments and to give preference to the one course of action over the other.[97] As a result, the policy choices made by the ECB should not be contested so long as they seem to be based on a reasoned economic analysis. Judicial intervention is allowed only in exceptional circumstances, if there exists conclusive evidence that the measure at issue is manifestly inappropriate to attain the monetary policy objectives.[98] That constitutes in essence an extension to the ECB of the test traditionally applied by the CJEU as concerns the exercise of judicial review over the acts of the EU legislature. In those cases, the CJEU ultimately examines the proportionality of the restrictions imposed by the contested legislative measure and bases its legality assessment on the so called "manifestly inappropriate test". This test aims to respect the complex policy choices that the EU legislature is obliged to make in the exercise of its rule making powers.[99] Accordingly, a violation of proportionality only exists if its actions are evidently erroneous in relation to the objectives that they pursue. That leaves a considerable margin of appreciation to the EU legislature, taking into account that it is usually called upon to undertake intricate assessments in an area that necessarily entails various political and economic choices.[100]

In its *ultra vires* ruling, the constitutional court contests explicitly the suitability of that test for the exercise of judicial review over the ECB. Once again, it relies on its own understanding of proportionality and its misconstrued connection to the principle of conferral. Although that test is applied by the CJEU at the proportionality stage of its review and only after it has been established that a given measure is covered by the mandate of the ECB, the constitutional court considers that it is by no means conductive to restricting the competences of that institution that are limited to monetary policy. Based on that construction, it argues that the exercise of such a restrained judicial review allows the ECB to expand gradually its competences on its own authority. As a result, the limited standard applied by the CJEU fails to give sufficient effect to the principle of conferral and paves the way for a continual erosion of the competences of the Member States.[101] Consequently, the connection between proportionality and conferral attempted by the constitutional court is not simply the means to bring the preliminary ruling in *Weiss* under the scope of its *ultra vires* review. It is also the medium chosen to impose the views of that constitutional court as regards the intensity of the legality control that should be exercised over monetary policy measures.

[97] It seems though that a more rigorous judicial review applies in the area of banking supervision. See in this respect Case T-733/16 *Banque postale v ECB* ECLI:EU:T:2018:477. See on that case C Bosque and A Pizarroso, 'Welcome to Hard Look Review ECB' (28 January 2019) EU Law Analysis eulawanalysis.blogspot.com.

[98] *Gauweiler and Others* cit. paras 68-81 and *Weiss and Others* cit. paras. 73-81.

[99] See indicatively in this respect W Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) CYELS 439.

[100] Case C-380/03 *Germany v European Parliament and Council* ECLI:EU:C:2006:772 and case C-343/09 *Afton Chemical* ECLI:EU:C:2010:419.

[101] *PSPP Judgment* cit. para. 156.

IV.2. The existence of an overlap between monetary and economic policy and the role of the European Central Bank

That is not the first time that the constitutional court attempts to influence the interpretation and application of the Treaty provisions in the area of the EMU. In its celebrated preliminary request on the validity of the OMT programme, it made an apparent effort to preoccupy the outcome of the preliminary ruling by replacing in its reference the announced objective of the contested scheme with its own legal understanding of the monthly bulletins of the ECB and by reading in them arbitrarily an intention to neutralize spreads on government bonds of selected Member States and to safeguard the composition of the euro currency area. It relied then on this alleged immediate objective of the bond purchase programme, in order to consider irrelevant the assertion of that institution that its intervention on the secondary market was intended to restore the operation of its weakened monetary policy transmission mechanism and to serve thus a genuine monetary policy objective.[102] In its preliminary reference in *Weiss*, the constitutional adopted a seemingly more cooperative attitude that accepted the legitimacy of the announced objective of the programme and concentrated its criticism on the specific modalities of that scheme and the conditions of its implementation. One could still notice though in that preliminary reference a concealed attempt to misinterpret the preliminary ruling in *Gauweiler* and to make it look as if it had endorsed the basic positions of the constitutional court.[103]

The novelty of the approach adopted by the constitutional court in its PSPP ruling is that it is now contesting specifically the methodology used by the CJEU in order to consider a given measure as a valid monetary policy instrument. Its argument is that the preliminary ruling in *Weiss* violates a general principle of EU law, by failing to interpret it in the light of the common national constitutional traditions. If one looks though under the surface, this reliance on the recognized European methods of interpretation ultimately serves the position of the constitutional court that there exists in the Treaties an absolute separation between economic and monetary policy that cannot be violated under any circumstances.

Once again, there is no convergence on that issue between the CJEU and the constitutional court. One can easily identify the source of that confrontation in the split made by the Treaties between monetary and economic policy. The former belongs to the exclusive competence of the EU and is conducted by the ECB and the national central banks of the eurozone.[104] The latter is left to the Member States but the Eurosystem supports the general economic policies in the EU with a view to contributing to the attainment of

[102] German Federal Constitutional Court order 2 BvR 2728/13 cit. paras 70-72 and 95-98.

[103] German Federal Constitutional Court order 2 BvR 859/15 cit. For more on that particular point see A Pliakos and G Anagnostaras, 'Adjudicating Economics II: The Quantitative Easing Programme Declared Valid' cit. 139-140.

[104] Art. 3(1)(c) TFEU and art. 282(1) TFEU.

its objectives.[105] The artificial nature of this separation has not gone unnoticed.[106] The practical problems arising therefrom became even more evident after the emergence of the eurozone crisis, given that the implementation of financial reform programmes on the one hand and the adoption of open market operations measures on the other made it necessary to ascertain if and to what particular extent there can possibly be an overlap between the exercise of monetary and economic policy.

Pringle made it clear that these two policy areas are not impermeably sealed.[107] The CJEU stressed in this respect that an economic policy act cannot be treated as equivalent to an act of monetary policy for the sole reason that it may also have indirect effects on the stability of the euro.[108] *Gauweiler* confirmed later that the opposite is also true and that a monetary policy measure cannot be considered as an illegal economic policy act for the sole reason that it also produces indirect economic effects.[109] That case law established therefore the existence of an inevitable interconnection between economic and monetary policy under EU law, something that had already been largely accepted in the academic literature.[110] However, it did not clarify the notion of indirect effects as concerns in particular the extent of the practical impact that a monetary policy act could legitimately have in the area of economic policy.

Although clearly advocating in favour of a more restrictive demarcation between monetary and economic policy, the constitutional court concluded eventually that such indirect economic effects are in principle acceptable so long as the measure concerned remains predominantly of a monetary policy character.[111] In its preliminary reference in *Weiss*, the constitutional court took the opportunity to elaborate on that matter and to

[105] Arts 120 and 127(1) TFEU.

[106] A Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' cit. 563; T Tridimas and N Xanthoulis, 'A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict' (2016) Maastricht Journal of European and Comparative Law 17; HCH Hofmann, 'Controlling the Powers of the ECB: delegation, discretion, reasoning and care. What Gauweiler, Weiss and others can teach us' (ADEMU Working Paper 2018/107) 28.

[107] Case C-370/12 *Pringle* ECLI:EU:C:2012:756. For more on this case see V Borger, 'The ESM and the European Court's Predicament in *Pringle*' (2013) German Law Journal 113; P Craig, '*Pringle* and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) EuConst 263; B de Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: *Pringle*' (2013) CMLRev 805; G Beck, 'The Court of Justice, Legal Reasoning, and the Pringle Case-Law as the Continuation of Politics by Other Means' (2014) ELR 234.

[108] *Pringle* cit. paras 56 and 97.

[109] *Gauweiler and Others* cit. paras 59 and 110.

[110] P Craig and M Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions' cit. 21; M Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' cit. 269–272; J Bast, 'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review' (2014) German Law Journal 167, 174–176.

[111] *OMT judgment* cit. para. 196.

provide its own understanding of the notion of indirect effects. It argued in this respect that the economic policy effects of a measure that allegedly pursues a monetary policy objective can only be considered as indirect if the following two requirements are met.[112] First, if these effects do not constitute purposely accepted consequences of the measure that are foreseeable with certainty. Secondly, if they are not comparable in weight to the legitimate monetary policy objective pursued by the act. According to the constitutional court, such substantial and intentional effects could mean that the measure concerned should be qualified as predominantly of an economic policy nature.[113]

The preliminary ruling in *Weiss* explicitly rejected such a possibility, starting from the premise that it is not the intention of the Treaties to make an absolute separation between economic and monetary policy. Thus, a measure adopted by the Eurosystem can validly produce substantial economic effects so long as it still pursues a genuine monetary policy objective and employs means that are indeed of a monetary policy nature. Such effects may also be intentional and foreseeable, provided that they are required in order to serve the monetary policy objective pursued by the measure at issue.[114] The CJEU seems to have introduced in this regard a novel version of the effectiveness principle. Even widespread and intentional spillover effects between the areas of monetary and economic policy are acceptable, so long as these are actually necessary to guarantee the effective exercise by the ECB of its conferred powers. To state it otherwise, the separation between monetary and economic policy is bent whenever this is required so that the ECB can effectively employ a monetary policy instrument that is available to it. Provided that this is the case, the legality of the measure will then be ascertained on the basis of the standard proportionality review carried out by the CJEU.

In its PSPP ruling, the constitutional court explicitly rejects the above understanding of the notion of indirect effects and underlines that its interpretation by the CJEU violates primary law by extending in essence the competences of the EU also to matters of economic policy.[115] By connecting proportionality and conferral and by concluding that the preliminary ruling of the CJEU is untenable and methodologically incomprehensible to the extent that it omits to proceed to a balancing assessment and to take into account the knowingly accepted and foreseeable economic effects of the contested programme, the constitutional court relies therefore on the misconstrued European standards of interpretation in order to impose by the back door its own vision about the role of the ECB and the relationship between economic and monetary policy. It could be thus sustained that the principal concern of the constitutional court is the existence of a continuously increasing monetarization

[112] German Federal Constitutional Court order 2 BvR 859/15 cit. para. 119.
[113] *Ibid*. para. 121.
[114] *Weiss and Others* cit. paras 58-67.
[115] *PSPP Judgment* cit. paras 142 and 161-162.

of fiscal means and objectives that confers indirectly economic advantages to the less competitive eurozone Member States outside the strict conditionality context of financial assistance measures.[116] It has even been argued that the *ultra vires* ruling of the constitutional court attests in essence the priority given by that court to the rigorous observance of fiscal rules over the effective attainment of the objective of price stability.[117]

This vision of the constitutional court corresponds in essence to the traditional understanding of central banking.[118] It also finds support in the formal separation between monetary and economic policy embedded in the Treaties and the fact that the creation of the ECB was based predominantly on the institutional model of the *Bundesbank*. However, it is maintained that this static conception of the mandate of that institution fails to take account of the evolution of its role since its inception and especially of the new economic and legal reality that arose as a result of the eurozone crisis.[119] The argument is that the authors of the Treaties failed to provide the necessary tools to the euro area to effectively combat such a crisis and that the ECB had therefore to intervene more actively in order to cover this gap, also by means of unconventional monetary policy measures. This in turn changed the original ruled-based nature of the EMU and led progressively to the emergence of a more policy-oriented conception, also as concerns the mandate of the ECB.[120]

According to the CJEU, the ECB had the competence to cover the gap left in the institutional framework of the Treaties. Albeit rather implicitly, the preliminary ruling in *Weiss* seems to be making exactly that point by referring to the intentional portrayal in the Treaties of the primary objective of monetary policy in a general and abstract manner without spelling out precisely the way that this should be given concrete expression in quantitative terms. The implication therefore is that the ECB is in principle entitled to specify that objective and to choose the appropriate instruments that it must use for its

[116] See in this regard M Wilkinson, 'Fight, flight or fudge? First reflections on the PSPP judgement of the German Constitutional Court' (5 June 2020) Verfassungblog verfassungsblog.de.

[117] G Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (21 May 2020) European Law Blog Europeanlawblog.eu.

[118] See in this respect S Baroncelli, 'The Independence of the ECB after the Economic Crisis' in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014) 125, 126–129; A Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' cit. 571–573; T Beukers, 'The New ECB and Its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention' (2013) CMLRev 1579.

[119] See particularly in this regard S Baroncelli, 'The *Gauweiler* Judgment in View of the Case Law the European Court of Justice on European Central Bank Independence: Between Substance and Form' (2016) Maastricht Journal of European and Comparative Law 79, 88.

[120] A Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' cit. 575–576.

attainment, according to the particular circumstances of each individual case. This specification will only be challenged if it is vitiated by a manifest error of assessment.[121] Consequently, the mandate of the ECB is such that it can also cover the adoption of unconventional monetary policy measures intended to supplement the traditional monetary policy tools made available by the Treaties.

Apparently, the constitutional court is not convinced by this line of reasoning and the effectiveness requirements that seem to underpin it. Even though it seems now ready to accept that the adoption of unconventional monetary policy measures is an instrument that should in principle be available to the ECB, it is nevertheless apparent that it makes their implementation conditional on the existence of very restrained legal specifications.[122] Its new *Solange* and its attempt to confine the methodological autonomy of the CJEU constitute therefore the new tools to control the observance of those limits and to preserve the formal architecture of the EMU.

V. Concluding observations

It appears that the crisis ignited by the *ultra vires* ruling of the constitutional court will not have a catastrophic effect on the PSPP, following the coordinated actions made by the ECB and the national actors concerned to prevent the escalation of the situation. That is not to say that the ECB will adopt a new policy decision, as essentially instructed by the constitutional court. However, the release of its previously unpublished documents allowed the *Bundesbank* to conclude that the requirements of the constitutional court had been met and that it could continue its participation to the programme.[123] One might therefore think that the constitutional court has won this round and that this experience could even lead in the future to a more transparent and meticulous legal reasoning of the monetary policy measures enacted by the ECB.

However, the fact remains that this was the wrong decision at the worst possible moment. This is not only because of its unconvincing and incoherent legal analysis and the virtually impossible to meet standard of evidence that it imposes as regards the proportionality of monetary policy acts. It is not even because it conveys the message that it is for each national court to contest the binding nature of a preliminary ruling according its own understanding of the recognized European methods of interpretation, undermining the operation of the preliminary reference procedure and its spirit of fruitful cooperation and encouraging a confrontational attitude by other constitutional and supreme courts. It is primarily because any *ultra vires* ruling in the area of the EMU is by its very nature capable to produce transnational effects, exceeding the particular circumstances

[121] *Weiss and Others* cit. paras 55-56.

[122] German Federal Constitutional Court order 2 BvR 859/1 cit. para. 98.

[123] A Weber 'Bundesbank Will Continue Bond Buying as German Court Spat Ends' (3 August 2020) Bloomberg www.bloomberg.com

of the case and the boundaries of any single Member State. It compromises the credibility of the ECB and its ability to perform its powers in an independent and strictly technocratic manner, responding quickly and effectively to the evolving challenges and to the reactions of the markets. It is likely therefore to affect adversely the eurozone and the economies of its Member States and to seriously imperil the process of European integration. However, it should not be for the courts to undertake such an essentially political role. This would manifestly overstep the limits of their mandate and the boundaries of their judicial competence.[124] To paraphrase a bit the *ultra vires* ruling of the constitutional court, that role belongs according to the common national constitutional traditions to the elected and democratically accountable political actors. These should be left free to choose the appropriate course of action against those monetary policy measures that they consider to be in violation of the Treaties.[125]

Very ironically, the constitutional court is very likely to realize fairly soon how precarious it is to attempt to adjudicate economics ignoring the extreme volatility of the circumstances pertaining in that area. At the wake of the outbreak of the corona virus crisis, the ECB adopted the temporary Pandemic Emergency Purchase Programme (PEPP) as part of its quantitative easing policy.[126] It appears that this new asset purchase programme has already been chosen as the next target of a constitutional complaint.[127] The problem is though that this new scheme closely follows the regulatory logic of the PSPP, including its whatever it takes approach and the absence of a specific balancing of its potential economic policy effects.[128] It also has certain particular characteristics that make it even more problematic in the light of the legality criteria introduced by the constitutional court, especially as concerns the absence of conditionality in relation to the government bonds that are eligible for purchase.[129] Responding apparently to the *ultra vires* ruling of the

[124] See in this regard FC Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) German Law Journal 111, 134–136. See also German Federal Constitutional Court order 2 BvR 2728/13 of 14 January 2014 cit., Dissenting Opinion of Justice Lübbe-Wolff para. 28.

[125] German Federal Constitutional Court order 2 BvR 2728/13 of 14 January 2014 cit., Dissenting Opinion of Justice Gerhardt para. 23.

[126] Decision 2020/440/EU of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17).

[127] K Matussek, 'ECB's Foes Focus on Next Target: The Virus Rescue Plan' (7 May 2020) Bloomberg, www.bloomberg.com.

[128] See in this regard A Viterbo, 'The *PSPP* Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank' European Papers (European Forum Insight of 26 June 2020) www.europeanpapers.eu 671. See also I Feichtner, 'In the Name of the People? – The German Constitutional Court's Judgment on the European Central Bank's Public Sector Purchase Programme' (13 May 2020) justmoney.org.

[129] *PSPP Judgment* cit. paras 207-208 and 216.

constitutional court, the ECB has stressed emphatically that this new programme respects completely the proportionality requirements.[130] The constitutional court itself has considered it necessary to confirm in its press release that its *ultra vires* ruling does not concern any financial assistance measures adopted by the EU in the context of the corona virus crisis.[131] However, it will be interesting to see how that same court will manage to tackle its own legal reasoning in order to consider the programme as valid given that nobody can realistically envisage even the possibility of an opposite ruling.

"Emergency brake mechanisms are most effective if they do not have to be applied in practice".[132] These words of the until-recently President of the constitutional court remind us that such mechanisms could be possibly acceptable as means for the exercise of institutional pressure and the stimulation of a fruitful judicial dialogue but should never be practically activated, certainly not when they are likely to affect the entirety of the Member States and their citizens. Unfortunately, the constitutional court forgot very quickly the prudent advice of its now former President.

[130] See in this respect Reuters Staff, 'ECB's Lagarde defends bond buys against northern challenge' (8 June 2020) www.reuters.com.

[131] German Federal Constitutional Court press release of 5 May 2020, *ECB decisions on the Public Sector Purchase Programme exceed EU competences* www.bundesverfassungsgericht.de.

[132] A Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) EuConst 175, 195.