# Is the BVerfG PSPP decision “simply not comprehensible”?

Toni Marzal 2020-05-09T10:03:10

Upon reading the BVerfG’s bombshell PSPP decision, one cannot but be struck at how little it thinks of the quality of the legal reasoning of the CJEU with regards to the proportionality test. This is what finally leads the BVerfG to condemn the CJEU’s *Weiss* decision as *ultra vires*. The choice of words signals that the BVerfG intends its rebuke to be nothing short of humiliating. The CJEU’s application of proportionality renders this principle “meaningless” (127), manifestly contradicts its own case law and that of domestic courts, is not “tenable from a methodological perspective” (141), and ultimately is “simply not comprehensible and thus objectively arbitrary” (118). If the BVerfG is the teacher and the CJEU the pupil, the grade dispensed is a miserable fail.

If one is to judge others so harshly, it is wise to make sure that one’s own position is irreproachable. The BVerfG failed to do so. As has already been pointed out in this blog, its own reasoning on proportionality is not without flaws. A closer reading makes one wonder if it is not rather the BVerfG’s reasoning that is “simply not comprehensible”. Indeed, the BVerfG’s reasoning on proportionality is parochial, misguided and reductive.

## A parochial understanding of proportionality

One of the key arguments of the BVerfG is that the CJEU’s application of proportionality in *Weiss* goes against both the CJEU’s own case law, as well as that of the constitutional courts in every Member State. The BVerfG explains that proportionality includes three cumulative sub-tests: the measure under review must advance a legitimate purpose (suitability), that purpose cannot have been attained just as effectively through less costly means (necessity) and the benefit obtained must be proportionate to the cost incurred (proportionality *stricto sensu*). It reproaches the CJEU for failing to include a balancing stage in its reasoning, i.e. the third and last sub-test, since it abstained from weighing the benefits of the PSPP against other (non-monetary) interests. In the BVerfG’s own words: “The application of the principle of proportionality by the CJEU cannot fulfil its purpose, given that its key element – the balancing of conflicting interests – is missing” (138). Such criticism assumes, rather parochially, that the German understanding of proportionality is universal. This is far from true.

The BVerfG’s assessment is ironic as the CJEU can only be described as a champion of proportionality. Internationally, it is often referred to as one of the courts who have most enthusiastically embraced this principle. However, its use of proportionality is as varied as it is widespread. In some cases, it does include some form of a balancing assessment (see here for a famous example where the CJEU

weighs the free movement of goods against the freedom of expression). Most often, however, the CJEU shirks from such a complex evaluation (see here). Frequently, proportionality only means checking whether the measure under review serves to advance a legitimate purpose and whether there are no less costly alternatives that would be just as effective (suitability and necessity). Other times, proportionality is a less intrusive review that involves only the first aspect (suitability). Which form proportionality will take depends on the circumstances. It is in any case certain that *Weiss*' light-touch application of proportionality is not in any way exceptional – there are numerous similar examples in the review of both national and EU measures. It is also undeniable that there are good reasons for judicial self-restraint: after all, is the CJEU, or indeed any court, well-placed to compare apples and oranges, and decide if, say, environmental protection outweighs in a certain set of circumstances the free movement of capital?

It is a bold assertion of the BVerfG that the CJEU's mandate to ensure the right interpretation and application of EU law is exceeded "where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded" (112). This claim is a dubious one – what are those traditional methods and what would be the basis for controlling the CJEU's famously idiosyncratic approach to interpretation? In any case, the irony here is that, even if proportionality developed early in Germany, it only made its way into many other EU jurisdictions because of the influence of EU law as interpreted by the CJEU. In the UK, for example, proportionality is very much perceived as a civil law doctrine imported from the continent, and judges often underline just how exotic (and how German) it is from the perspective of the common law tradition. In France, the *Cour de cassation* has since 2013 pushed judges to review the proportionality of the application of French legislation, arguing that this is necessary to comply with EU law – again much to the chagrin of many in that country who see proportionality as alien to French legal culture.

This does of course not mean that the *ideas* of proportionality or balancing are unknown to the common law or French traditions. Indeed, who could be against such universal ideals? However, different legal systems provide different answers to the question of *how*, *when* and *by who* proportionality should be applied. This is why this principle is still today perceived as somewhat of a foreign transplant in France and the UK. For one, it runs against tradition to allow judges to discard the application of legislation if found to be disproportionate. It is however the balancing stage of proportionality that is seen as most problematic: is weighing the importance of the interests at stake not a legislative function, rather than a judicial one? It is therefore common to see national judges censor nothing but the most "manifest" lack of proportionality and engage in balancing only with the utmost care. Herein, therefore, lies one of the fallacies of the BVerfG: to infer from the general recognition of proportionality in the EU and in the legal system of Member States that the CJEU should have applied it in a particular (German) way when reviewing the ECB's decision.

## Is proportionality even relevant to the distribution of competence?

Another reproach made by the BVerfG is that "[t]he specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principle meaningless for the purposes of distinguishing, in relation to the PSPP, between monetary policy and economic policy" (127). To put it otherwise, the CJEU's misapplication of the principle of proportionality (i.e. not including a balancing test) prevented it from monitoring whether the ECB had illegally ventured outside the field of monetary policy. The BVerfG makes here two fundamental mistakes.

The first is that it is simply not true that the CJEU in *Weiss* purported to rely on the principle of proportionality to distinguish the monetary from the fiscal. It distinguished two issues, which the BVerfG seeks to confuse. The first was whether the PSPP was indeed a monetary measure, and here the CJEU did not make any use of proportionality. The second was whether, *as a monetary measure*, the decision was substantively proportionate, per art. 5 TEU. This provision explicitly relates only to how EU institutions *use* their competence – and not to the limits of these competences. It is an extremely broad and self-standing requirement, since it does not depend on any impact on fundamental rights. It seems therefore natural that the CJEU usually conducts a very light-touch review, as it did in *Weiss*. The BVerfG itself does not disagree with this – it states in its decision that deference should be afforded to the ECB in the "substantive exercise" of its powers (143).

The second mistake is to assume that proportionality, whether it includes a balancing test or not, can actually be of use to distinguish a monetary measure from a fiscal one. The BVerfG is right to point out that across Europe proportionality has become a staple methodology in determining whether restrictions of fundamental rights can be justified on behalf of the public interest, or more generally if a certain measure is substantively a rational one. It is not true however that proportionality has been accepted as a good tool for the purpose of allocation of competence. On the contrary, it is generally accepted that proportionality is of little use when it comes to that. In fact, proportionality destroys the very idea of a division of competence, since it would a lead a judge to accept the adoption of a measure justified, not on the basis of the domain in which it belongs, but because on the whole it brings about beneficial consequences.

It is therefore perfectly understandable that the CJEU did not rely on proportionality to determine if the PSPP was a monetary measure. The key debate is instead whether it makes more sense to focus on the measure's purpose or instead on its effects. This is a common problem: is a smoking advertisement restriction a health or an economic measure? The CJEU in *Weiss* opts for a purposive approach: a measure is monetary if it objectively pursues monetary objectives. The opposite, an effects-based assessment, would have been tricky – which is why the CJEU's approach certainly is not completely unreasonable. Indeed, how does one classify a certain effect as "health-related" as opposed to "economy-related" – here, monetary

or fiscal? And how can one of the two be said to be preponderant? Is not the problem precisely the fact that the two cannot be distinguished? That is why the CJEU pointed out in *Weiss* that trying to separate monetary from fiscal effects would make it impossible for the ECB to exercise its competence (an argument that the BVerfG failed to respond to).

## A skewed application of the balancing test

The BVerfG was not only wrong to insist on a proportionality assessment to determine whether the PSPP was a monetary measure. Its own assessment of the proportionality of the PSPP is also profoundly defective. Indeed, the only interests that it considered as relevant to that operation were certain fiscal costs. Why this restriction? If one is to assess any action of the ECB from a balancing perspective, surely we should not stop at *fiscal* costs, nor indeed focus only on *costs.* Instead, we ought to weigh also fiscal benefits (as also pointed out already in this blog), as well as non-fiscal considerations. For instance, there is recently a lot of talk about whether the Eurosystem should integrate environmental considerations within its monetary policy. Why should those concerns be excluded when deciding whether the ECB's decision is proportionate?

According to the BVerfG, however, the costs that the ECB should have taken into account are the familiar talking points of the austerity and ordoliberal agenda. The decision is remarkably transparent about this. Does this not create the risk, it points out, that "economically unviable companies" will be artificially kept afloat? And that *certain Member States* may not implement the "necessary consolidation and reform measures" (170)? Was it not foreseeable at the time of the PSPP decision that several Member States were planning to "increase new borrowing in order to boost the economy with investment programmes" (171)? Ultimately, the BVerfG concludes, the PSPP's proportionality depends on whether it may "prevent Member States from adopting own measures to pursue a sound budgetary policy".

Such a skewed application of the balancing test further confirms that the BVerfG should pause before giving lessons on proportionality. It also attracts the suspicion that its ultimate concern is not the competence on which the PSPP decision is based, but its substantive merits. Simply put, the BVerfG is not convinced that Mario Draghi's ECB took sufficient note of particular German interests. In this sense, it is revealing how the BVerfG argues that its approach is the only one that preserves the independence of the ECB from "political pressure" (161). Given its insistence on the need to subject the PSPP to a balancing assessment that includes only the concerns of the austerity and ordoliberal agenda, this claim lacks some credibility.

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