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# Proportionality and Karlsruhe's *Ultra Vires* Verdict

## Ways Out of Constitutional Pluralism?

Martin Höpner

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## Abstract

In May 2020, for the first time in its history, the Federal Constitutional Court (FCC) of Germany declared Union acts as being *ultra vires*. According to the FCC, the European Central Bank (ECB) and the Court of Justice of the European Union (CJEU) had acted beyond their mandates because they did not apply strong proportionality standards to the ECB's Public Sector Purchase Programme (PSPP). The resulting stalemate within constitutional pluralism has revived the discussion about the possible introduction of an Appeal Court with the "final say" over constitutional conflict. As the analysis of the PSPP conflict shows, such a judicial authority would reach its limits the more we move from the surface to the core of the struggles between European and national constitutional law. The different readings of proportionality are difficult to bridge, and the mutually exclusive claims about the nature of the supremacy of European law are not accessible to compromise at all. We should therefore not expect too much from an Appeal Court, if it were introduced.


**Keywords:** constitutional conflict, Court of Justice of the European Union, European Central Bank, European law, European Monetary Union, Federal Constitutional Court, proportionality


## Zusammenfassung

Im Mai 2020 hat das deutsche Bundesverfassungsgericht (BVerfG) erstmals europäische Rechtsakte als *ultra vires* klassifiziert. Dem Urteil zufolge haben die Europäische Zentralbank (EZB) und der Europäische Gerichtshof (EuGH) ihr Mandat überspannt, indem sie auf eine strenge Verhältnismäßigkeitsprüfung des Public Sector Purchase Programme (PSPP) der EZB verzichteten. Das Patt zwischen den Gerichten hat die Debatte über ein europäisches Berufungsgericht, das in europäischen Verfassungsgerichten das letzte Wort sprechen könnte, neu belebt. Wie die Analyse des PSPP-Konflikts verdeutlicht, würde ein neues Höchstgericht an Grenzen stoßen, sobald die Tiefenstruktur des Spannungsfelds zwischen Europarecht und mitgliedstaatlichem Verfassungsrecht in den Blick gerät. Die unterschiedlichen Lesarten des Verhältnismäßigkeitsprinzips lassen sich nur schwer überbrücken und der Konflikt über die Natur des Vorrangs des Europarechts ist Kompromissen gänzlich unzugänglich. Von einem Berufungsgericht, würde es gegründet, sollte daher nicht zu viel erwartet werden.


**Schlagwörter:** Bundesverfassungsgericht, Europäische Währungsunion, Europäische Zentralbank, Europäischer Gerichtshof, Europarecht, Verfassungskonflikt, Verhältnismäßigkeit

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# Proportionality and Karlsruhe's *Ultra Vires* Verdict: Ways Out of Constitutional Pluralism?

## 1 When European and constitutional law collide

On May 5, 2020, the Federal Constitutional Court (FCC) of Germany handed down its judgment on German participation in the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) (BVerfG, 2 BvR 859/15). According to the Court's decision, two Union institutions had been acting outside of their mandates *(ultra vires)*. The ECB, the Second Senate ruled, had overstepped its mandate by failing to document the proportionality of the PSPP. In addition, the FCC found the *Weiss* judgment by the European Court of Justice (CJEU), which had confirmed the legality of the PSPP without applying strong proportionality standards on ECB actions, likewise to be *ultra vires* (CJEU, C-493/17). Never before had the FCC declared a legal act of an EU institution lacking binding force at the national level. To that extent, the judgment can indeed be described as historic.

Although the ruling provoked all kinds of reactions, the critical reactions outweighed the affirmative ones.[1] For the critics, the main problem was not, however, practical damage done to the monetary operations of the ECB. With regard to the PSPP programme, the conflict was quietly solved with the German Bundestag president's and the finance minister's declarations, both at the end of July 2020, that the proportionality documents, which the Bundesbank had in the meantime handed over to them, met the criteria defined by the FCC. With regard to the current Pandemic Emergency Purchase Programme (PEPP), FCC President Vosskuhle made clear at the very beginning of the ruling pronouncement on May 5, 2020, that the decision had no respective bearing. Even if complainants against the PEPP were to rely on the *PSPP* judgment, the *ultra vires* review would be conditional upon prior referral to the CJEU, as the FCC had announced in the *Honeywell* decision (BVerfG, 2 BvR 2661/06) and confirmed in Headnote 1 of the *PSPP* decision. That would take years. It is therefore safe to assume that PEPP is out of the firing line, too.

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1 See, for example, the fifteen reactions in issue 5/2020 of the *German Law Review*. Among them, four can be classified as decisively negative and one as slightly negative, compared to only one that can be classified as decisively positive and two as slightly positive. The other seven reactions are neutral or refrain from a respective positioning.

Also, the ruling hardly includes clearly defined limits for future asset purchase programmes after PSPP and PEPP. This holds true for the symmetry of the purchases (symmetry in accordance with the shares in the ECB's capital) as much as for possible purchase limits. Going further than the PSPP with regard to one or more of such criteria does not necessarily make purchase programmes illegal because, as Headnote 7 states, it always depends on an "overall … appraisal." Note also that the ruling applies for, the same Headnote says, "a programme *like the PSPP*" (my emphasis). A programme with other objectives or under other conditions, we can conclude, would need to be assessed in a different way. If this seems like a pedantic interpretation, it is worth recalling the judicial reviews of the Outright Monetary Transactions (OMT) programme from 2012. This programme aimed at minimizing spreads, that is, at controlling the refinancing conditions of the euro Member States. There was no purchase limit, because it was all about the threat of unlimited central bank intervention: "Whatever it takes." Nor were any symmetric purchases involved. The OMT programme nevertheless successfully passed scrutiny by the CJEU *and the FCC alike*. The *PSPP* ruling lacks any indication that the FCC aimed at correcting its OMT decision from June 2016 (BVerfG, 2 BvR 2728/13).

Yet the implications of the *PSPP* ruling go beyond the practical impact on asset purchase programmes. Most critics were much more worried about the damage done to the integrity of the European legal order. By dissenting a CJEU ruling and thereby questioning the supremacy of European law, the FCC has, according to this view, granted itself a power of review to which it was not entitled.[2] As one of the founding members of the European Economic Community in 1957 and the largest EU country today, Germany has in addition sent a potentially dangerous signal to the Highest Courts of other member countries (see among others Kelemen et al. 2020; Mayer 2020, 1124). If the supremacy of European law could be questioned by anyone who dislikes some of its parts, the European legal order would effectively suffer if not even die off, the critics argued. Consequently, some of the critics of the FCC asked the Commission to open an infringement procedure against Germany (Poli and Cisotta 2020),[3] and asked the executive, legislative, and judicial branches of the Member States to ultimately accept the unconditional supremacy of European law.

Most readers will agree that the lack of a final say once the CJEU and Constitutional Courts at the Member State level disagree is unsatisfactory. But the assumed solution of an unconditional acceptance of European supremacy on the side of all constitutional

2 Since its *Lisbon* decision from 2009 (2 BvE 2/08), the FCC distinguishes between two control reservations: it controls whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (*ultra vires* control), and it reviews whether the inviolable core content of the constitutional identity is respected (identity control). Some portray *ultra vires* control as a subcategory of identity control.

3 On October 30, 2020, EP vice president Katarina Barley reported that the Commission had finished its preparation of a (not yet published) infringement procedure against Germany. See 2:04:38 here: https://www.youtube.com/watch?v=wl6HB2ZSw7U&fbclid=IwAR15KDy-USUqhBdnxDS52MyFuXjrHen0haByRUYXZhlGtBLyvc7l2h9aItM.

bodies throughout the EU is remarkably naïve because it would presuppose constitutional change in almost all Member States. It is true that Constitutional Courts have only rarely declared Union acts as nationally non-binding. This holds true for Denmark, the Czech Republic, and now Germany. This small number of cases, however, must not be confused with the number of Highest Member State Courts which insist on their final authority to scrutinize the constitutionality of European acts.

Such an insistence is present among almost all of the Highest Courts of the EU-27. As an expression of their integration friendliness, all Constitutional Courts at Member State level have accepted the supremacy and direct effect of European law, although never written into the Treaties, wherever competences have been delegated to the Union level (Grimm 2017, 25–28). The other side of the coin is their readiness to control the limits within which the supremacy of European law shall operate: where competences have not been delegated, supremacy shall not apply (Stone Sweet 2000, 319; Grimm 2017, 54). The unconditional acceptance of absolute supremacy would imply a European competence-competence, that is, the competence to unilaterally extend the list of supranational competences. This, the Constitutional Courts argue, cannot be the content and purpose of the integration programme, at least as long as the EU is not a federal state. The primacy of European law, according to this view, can only be *relative* primacy, subject to certain constitutional limits (Grimm 2020a).

The matter is worth a closer look, given the lack of awareness of the large number of Constitutional Courts that define limits to European supremacy. In the late 1990s, Slaughter, Stone Sweet, and Weiler carried out comparative research on the respective rulings of six of the then-existing fifteen Highest Courts within the EC (see the contributions to the edited volume by Slaughter et al. 2000): Belgium, France, Italy, Germany, the Netherlands, and the UK. They found some forms of constitutional control reservations in all the countries analyzed. Mayer (2000) enlarged the picture by examining all fifteen EC Member States. According to his findings, only three Highest Courts had clearly refrained from defining limits to supremacy: those of Luxembourg, the Netherlands (in contradiction to Slaughter et al.), and Finland. Two other cases, Portugal and the UK, were unclear; in the other ten cases, constitutional control reservations were present. More recently, Lindner (2015) analyzed a sample of nine countries that also included four Eastern European cases: Latvia, Hungary, Poland, and the Czech Republic. He confirmed the presence of control reservations for all his cases (see also von Bogdandy and Schill 2011, 1433–34).

Limits to the unconditional acceptance of supranational supremacy – of European *monism*, in the terminology of Kumm (1999, 353–62) – are, as we see, the rule rather than the exception. It is very unlikely that this will change in the near future. "National Courts Cannot Override CJEU Judgments," as a group of twenty-seven European lawyers put it in reaction to the *PSPP* decision (Kelemen et al. 2020), can therefore only be understood as an expression of a vision for the wider future. It is not a clarification of the *status quo* and cannot solve the conflict at hand. There is an alternative, however: a

supranational Appeal Court could reconcile the conflicts between the CJEU and Constitutional Courts if they agree to disagree. The idea has been revived in the aftermath of the judgment from May 5, 2020. In this paper, we will use the PSPP conflict to carefully think the value-added to this idea through.

The idea of the Appeal Court will be introduced in more detail in Section 2. Section 3 will turn to the prehistory of the *PSPP* ruling and reveal that the concept of proportionality was at the center of the conflict. The concept will therefore be revisited (Section 4) before the paper will analyze its use in the ruling of the FCC (Section 5). Section 6 will discuss the persuasiveness of the ruling. Afterwards, by dividing the PSPP conflict into its components, Section 7 will examine the potential value-added of a legal super-authority.

## 2 A European Appeal Court?

The PSPP conflict is an expression of the nonhierarchical judicial order of the EU, a multipolar order in which both the CJEU and Highest Courts at Member State level claim the "last word" about constitutional conflict. The judicial and political science literatures discuss this lack of a final arbiter as "constitutional pluralism" that allows for multiple, unranked, sometimes inconsistent legal sources and rules of recognition (Kumm 1999; Barber 2006; von Bogdandy and Schill 2011). Constitutional pluralism can work well if the signals which both sides send to each other lead to a productive, innovative constitutional dialogue (see in particular Barber 2006, 328–29). The other side of the coin is that pluralist legal systems run a risk of constitutional crisis if both sides hand down inconsistent instructions and stick to their respective perspectives (ibid. 2006, 306). Consequentially, several scholars have offered ideas for constitutional reform: an additional "Constitutional Council" (Weiler 1999, 322), "European High Court" (Horsley 2018, 282), or "Court of Appeal" (Weber and Ottmann 2018, 180–81) could complement the European judiciary and ultimately decide constitutional conflict.

The most prominent proposal originates from Weiler (1999). According to him, the new Court shall have jurisdiction over issues of competence only. Any EU institution, including the European Parliament and any Member State shall be allowed to refer cases to it. The president of the CJEU shall act as the president of the Appeal Court and its judges shall be sitting members of the Highest Courts of the Member States. The Appeal Court would be superior to the CJEU and shall hence be able to revoke the CJEU's rulings. The idea has proponents in remarkably different camps. Weiler is a European law expert who is concerned about potential blockades when the views of the CJEU and Constitutional Courts collide. Other supporters of the reform idea, such as Herzog and Gerken (2008), are CJEU critics who seek to restrict the European Highest Court in its role as the "engine of integration." Still others, such as the rather reluctant proponent Mayer (2000, 337), are decided pro-Europeans.

The heterogeneity of the proponents becomes less puzzling if one takes a closer look at the suggested composition of the new body. Hatje (2020), for example, suggests an Appeal Court not composed of representatives from the Highest National Courts alone, but composed of an equal number of both national and CJEU judges. This sounds fair, given that the aim is to address conflict between these two sides. Actually, however, such composition would change the nature of the game, compared to Weiler's original proposal. Imagine a situation in which Member State judges argue that the CJEU has overstepped its mandate. Even if all national judges close ranks, now the maximum they can achieve is stalemate if the European judges stick to the solution proposed by the CJEU. Such a stalemate would most likely be insufficient to overrule the CJEU, implying that the judges from the Member States' Constitutional Courts can never succeed against the CJEU's opposition.

Recently, in reaction to the PSPP conflict, Weiler and Sarmiento (2020) have updated the original Weiler proposal. The authors suggest a new appeal procedure within the province of the CJEU, with a "Mixed Grand Chamber" being composed of six CJEU judges and six judges from the Highest Courts of the Member States and presided over by the CJEU president. As in the earlier proposal, the new chamber shall only deal with conflicts over the distribution of competences. But here, a decision *validating* a contested Union measure would have to be supported by at least eight or nine judges. This idea circumvents the structural disadvantage of the national representatives that the parity solution would otherwise bring about.

In the remainder of this paper, I will analyze the PSPP conflict in detail, in order to think through the value-added of the Appeal Court idea.

## 3 From Karlsruhe to Luxembourg and back: OMT and PSPP

Wherever principals delegate competences, the limits of the agents' mandates are prone to conflict (Jensen and Meckling 1976). Yet it is more than coincidental that the first case in which the FCC classified a Union act as *ultra vires* concerned the monetary union and the mandate of the ECB in particular. This is due to the extraordinary dynamism of the European Monetary Union (EMU), and central banking beyond the EMU, on the one hand, and the stasis of the contractual basis of the EMU,[4] on the other. The concurrence of stasis and dynamism opens room for conflict about the narrowness of the reading of the contractual basis and the strictness of judicial scrutiny.

4 Articles 119–127 of the Treaty on the Functioning of the European Union (TFEU) assign monetary policy to the European System of Central Banks, while economic policy, including budgetary policy, is to remain with the Member States. Article 282 (2) TFEU defines maintaining price

The euro area was created by countries that blatantly contravened the conditions of an "optimal currency area" (Johnston and Regan 2016; Scharpf 2018). The necessary convergence did not occur during the first ten years of the euro either. This first decade ended with the financial crisis spilling over from the US, putting the eurozone under maximum stress. With the ensuing euro crisis came a range of rescue measures, such as the introduction of the European Financial Stability Facility (EFSF) (and later the European Stability Mechanism, ESM) and the OMT programme, none of which were envisaged in the Treaties. Even more, in the meantime, central bank policies had changed worldwide, due to the *quantitative easing* operations responding to secular stagnation and deflationary tendencies, of which the PSPP programme is part.[5]

In January 2014, for the first time in its history, the FCC stayed proceedings in order to refer questions on the interpretation of European law to the CJEU in Luxembourg under the preliminary ruling procedure (BVerfG, 2 BvR 2728/13). At issue were the criteria for determining whether the ECB was operating within the scope of the Treaties with its OMT programme. It was aimed at shielding risk premia on government bonds from uncontrolled increase, an aim obviously different from inflation steering. According to the ECB, the programme was nevertheless in line with the mandate of the central bank because it aimed at protecting the transmission mechanism of monetary policy.

Luxembourg responded with its *Gauweiler* judgment of June 2015 (CJEU, C-62/14). The CJEU discussed separately whether the CJEU blurred the line between monetary and economic policy, whether the OMT programme was an unlawful circumvention of the ban on monetary finance in Article 123 TFEU, and whether the OMT programme was proportional. With regard to the boundary between monetary and economic policy, the CJEU confirmed the necessity of sheltering the functioning of the transmission of monetary policy by the means of differential bond acquisition (paras. 46–65). With regard to the supposed circumvention of the ban on direct state finance, it referred to a number of characteristics that, according to the CJEU, prevented the OMT programme from implying such circumvention, in particular the fact that the number of bonds that could be acquired was practically delimited; that the ECB did not acquire bonds directly from the issuing finance ministries; that the ECB did not intend to announce the amounts of bonds to be acquired *ex ante*; and that holding to maturity would remain an exception to the rule (paras. 93–127). In addition, although the FCC had not explicitly asked for it, the CJEU performed a proportionality test. It pointed out that the ECB had a wide discretion (para. 68) and found no "manifest error[s] of assessment" (para. 74; see also para. 81) in the ECB's written assessment that the programme was

stability as the "primary goal" of the European System of Central Banks. Article 123 (1) TFEU prevents fiscal policy from being pursued through monetary instruments with its specific prohibition on the monetary financing of state budgets. Article 125 (1) TFEU is a no bailout clause.

5 Saurugger and Terpan (2019) is an excellent overview of EMU-related case law of the CJEU before the PSPP conflict.

both appropriate and limited to what was required (paras. 66–92). The FCC accepted the CJEU decision in its *OMT* judgment from June 2016 (BVerfG, 2 BvR 2728/13) and thus dismissed the complaints.

We now approach the PSPP conflict. The ECB adopted the PSPP by decisions taken in the fall of 2014. In contrast to OMT, the programme is part of *quantitative easing*, which is, according to the ECB, designed to return (in this case, raise) the rate of inflation to the target of below, but close to, 2 percent. Once again, complaints were lodged with the FCC in Karlsruhe, with in essence the same objections as in the OMT case, and once again Karlsruhe decided to make a referral to the CJEU (BVerfG, 2 BvR 859/15). This time the FCC explicitly, in three of its questions, wondered about the proportionality of the measure (Questions 3c, 3d, and 4). In particular, in Question 3c, the German Highest Court asked whether the programme "on account of its strong economic policy effects … violated the principle of proportionality."[6]

The CJEU's response came with the *Weiss* judgment of December 2018 (CJEU, C-493/17). According to the ruling, as in the *OMT* case, the programme was not an illegal circumvention of the ban on state finance (paras. 102–108). The CJEU again emphasized the wide discretion of the ECB (para. 73) and performed a proportionality test on the basis of the search for manifest assessment errors[7] in the written statements of the ECB. It came to the conclusion that the programme was an appropriate measure in order to bring inflation back to the target and did not go beyond what was necessary (paras. 71–97). The Second Senate of the FCC, however, perceived the *Weiss* ruling to be superficial in substance and ungracious in tone. A particular source of displeasure was the handling of Question 5, which related to risk sharing in the event that a Eurosystem central bank had to be recapitalized. Here, Luxembourg refused to give an answer because the question, it said, was hypothetical (para. 165). At the hearing in the *PSPP* case on July 30 and 31, 2019, the sense of frustration among the Karlsruhe justices about the response was clearly visible (see also Kahl 2020, 826).

And so Karlsruhe's *PSPP* judgment came about. The FCC rejected that the PSPP was covert monetary financing of the participating countries. In this respect, the Second Senate raised serious concerns against the interpretation of their Luxembourg colleagues, but argued that their assessments were at least comprehensible and therefore not *ultra vires* (see in particular para. 184). However, Karlsruhe objected to the way the CJEU had tested the proportionality of the intended monetary effects of the measure, on the one hand, and the unintended side effects on economic policy in competence of the Member States, on the other. Karlsruhe therefore declared the CJEU's earlier *Weiss* judgment to be incomprehensible, objectively arbitrary, and as such an *ultra vires* act not applicable to Germany.

6 It is therefore not clear why Goldmann (2020, 1074) accuses the FCC of not having "even put much weight on the proportionality principle" in its referral.

7 See paras. 24, 56, 78–81, 86, 91–93.

Thus the concept of proportionality was at the center of the struggle between the CJEU and the FCC. We will trace the reasoning of the FCC in more detail in Section 5, but beforehand revisit proportionality in theoretical terms and recognize that its application across jurisdictions is far from uniform.

## 4 What is proportionality?

Proportionality is among the most common legal concepts that jurists use to rationalize judicial decision making, here in particular to supervise political authority (Harbo 2010, 160). According to the concept, all kinds of actions of public authorities that affect citizens' fundamental rights are only lawful if they are proportional, that is, if they pass a special proportionality test. The concept was first developed by German administrative courts in the late nineteenth century and served as a constraint to police action (Cohen-Eliya and Porat 2010, 271–76). It spread to many countries and international orders in the course of the twentieth century (Tsakyrakis 2009; Barak 2012, 175–210; Klatt and Meister 2012; Sauter 2013, 4). The EU is among such orders: according to Article 5 (1) of the Treaty on European Union (TEU), "The use of Union competences is governed by the principles of subsidiarity and proportionality."[8] In its rulings introduced in Section 3 of this paper, the CJEU has confirmed that the range of applicability of the concept also encompasses actions of the ECB, such as their bond purchase programmes. The struggle between the FCC and the CJEU is about how the proportionality test shall be performed in such cases.

The test consists of four stages: one pre-stage and three main stages.[9]

- Most jurists describe the proper purpose test as a necessary step before the actual proportionality test begins. The Court asks whether the legislator has a mandate for legislation in the respective field, and whether the act under review pursues a legitimate, lawful aim.
- The first stage is about suitability (alternative terms: appropriateness, rational connection). The Court asks whether the act is capable of achieving its legitimate aim.
- The second stage is about necessity. The Court asks whether the act does not go beyond what is necessary, in other words: whether it is minimally intrusive. An act is less intrusive the less it interferes with the constitutionally protected rights of the persons affected.[10]

8 Note that Article 5 TFEU does not narrow the applicability of proportionality down to situations in which public actions interfere with fundamental rights.

9 Among others: Grabitz (1973, 571–86); Alexy (2003, 135–36); Tridimas (2006, 139); Rivers (2006, 181); Barak (2012).

10 At first glance, the PSPP conflict in which public authorities are not conflicting with individual rights but with other public authorities within the same multilevel system falls out of this cat-

– The third stage is about the balance between cost and benefit (terms: adequateness, appropriateness, proportionality *strictu sensu*). The Court weights the reduction in enjoyment of rights against the gain achieved. In the light of this part of the test, a measure is only proportional if its urgency outweighs the infringement on the side of the persons affected. The Court asks, in the words of Lübbe-Wolff (2014, 17): Is it worth this?

The third stage – proportionality in the narrow sense – is the contested part, as two examples shall illustrate. The first example is from Grimm (2007, 396), a proponent of testing proportionality in the narrow sense. Imagine a law that allows the police to fatally shoot someone if this measure is the only way of preventing them from harming another's property. Because property is constitutionally protected in almost all countries and because the aim of the act is therefore lawful, it will pass the pre-test. Shooting the person will in fact prevent him from vandalizing property, therefore the act passes stage one as well. Since shooting him to death is the only possible measure to prevent him from harming property in our thought experiment, and since the measure does not go beyond that, the act also passes the second stage of the test. Without the third stage, the test would be finished now and the act would have passed the test. Only the third stage brings about what most certainly every reader thinks is right: the hypothetical act is unlawful because the price of shooting the person in question and killing them is out of proportionality.

The second example comes from Tsakyrakis (2009, 487–88), a critic of the proportionality test in the narrow sense. In the 1950s, the US Supreme Court decided a number of landmark cases on ethnic desegregation in schools, according to which the segregation of black school children was unlawful. All readers will agree that the Supreme Court did the right thing: it protected the constitutional rights of people of color. Rephrased in the language of proportionality, the Supreme Court argued that telling black children they cannot be educated together with white children is brutally offensive to their dignity in a way that forcing whites to share their classrooms accordingly is not.

So far, so good. But now imagine whites being so passionately racist and the pain they would feel if their children were co-educated with black children so overwhelming that it outweighs the gain on the side of the children of color or their parents. If that were true, should the US Supreme Court, in the light of the last stage of the proportionality test, have decided differently? Obviously not. The thought experiment, according to Tsakyrakis (2009 and 2010), reveals a fundamental problem of the proportionality test: it trades moral considerations, which are at the heart of human rights, against a utilitarian perspective.

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egory. We will, however, later see that the FCC nevertheless reconstructed the conflict as a fundamental rights conflict: In its view, interference with the economic matters of the Member States translates into interference with the citizens' individual right to democracy (Sections 5 and 6).

Khosla (2010, 305) has argued that Tsakyrakis' racism example is misleading because even if the US Constitutional Court had fully decided the case on the basis of proportionality (which it did not) and even if the amount of racism among the white persons involved was as overwhelming as assumed in the thought experiment above, the decision of the Supreme Court would have nevertheless been the same, because the act in question would not have passed the pre-stage of the test: the aim of the act in question was unconstitutional in the first place. The proportionality test as a whole, Khosla argues, must not be confused with its final balancing stage. Nevertheless, the objection that balancing is misleading because it tends to treat all interests involved with equal legitimacy and thereby deprives fundamental rights of their normative power is widespread and a matter of ongoing controversy. A famous proponent of this line of critique is Habermas (1992/2019, 312).[11]

Another line of objection to balancing is that it assumes that costs and benefits of public actions come in a common currency and can therefore be objectively weighted by judges. What judges really do when they balance, according to this critique, is deciding which of the interests involved *shall* weigh more. Such decisions, however, are inherently political. In this view, balancing is a tool that enables courts to overstep their mandate to the disfavor of democracy. Elected politicians, rather than judges, according to this perspective, should ask and answer the question "Is it worth this?", and take on the responsibility for their answers vis-à-vis their electorates. In Germany, scholars such as Böckenförde (1990, 19–20) and Hillgruber (2011, 862) conform to this line of critique. Schlink (1976, 152–53) famously asked the FCC to stick to the proportionality test but to abandon its final stage.[12]

Our snapshot of the judicial debate makes clear that the proportionality test is far from uncontroversial. It does therefore not come as a surprise that the actual use of the tool differs widely (Knill and Becker 2003). German and Israeli courts, for example, put much weight on the final balancing stage (Stone Sweet and Mathews 2008, 163), while French and Canadian courts use the test more reluctantly (De Búrca 1993, 110; Grimm 2007, 393). Nowag (2020) argues that proportionality poses a "lost in translation" problem to jurists: the widespread use of the term hides that the legal concepts behind it are significantly different. It follows from this that the ways the FCC and the CJEU understand and use proportionality are not necessarily the same, too.

11 Alexy (2003, 134), Barak (2012, 488–90), and Grimm (2016) respond to Habermas.
12 Barak (2012, 481–92), a proponent of the proportionality test, categorizes and extensively discusses criticisms.

## 5 Proportionality in the *PSPP* decision of the FCC

The background knowledge provided in the last section enables zooming into the details of the *PSPP* decision with particular emphasis on the use of proportionality. Remember that the plaintiffs accused the ECB of, first, having circumvented the ban on the use of the central bank for the purpose of monetary finance in Article 123 TFEU and, second, of having overstepped its monetary policy mandate by having intervened in the economic policy matters of the Member States in too intrusive a way. Likewise, they accused the CJEU of having acted *ultra vires* by not having intervened.

With regard to the first objection, the FCC expresses "serious concerns" (para. 184) against the way the CJEU reviewed the matter, but eventually argues that the CJEU's conclusions are comprehensible.[13] The second objection is where different readings of proportionality come in. In direct contradiction to the CJEU in *Gauweiler* and *Weiss*, Karlsruhe points out that the ECB's mandate is *narrowly* defined (para. 143). Side effects of its decisions on economic policy, the FCC argues, are unavoidable, but have to remain proportional as they affect the citizens' individual right to democracy (para. 160). Constitutional supervision over proportionality is therefore essential, but the CJEU, the argument of the FCC goes, did not go beyond a search for manifest assessment errors in the written statements of the ECB and therefore refused to apply a meaningful proportionality test.

Proportionality, the FCC makes clear, is among the general principles of EU law (para. 124) and usually consists of three main steps, in accordance with what we have seen in the previous section: suitability, necessity, and appropriateness (para. 125). This, according to the FCC, holds true not only for Germany, but for many other Member States as well, such as France, Spain, Sweden, Italy, Austria, Poland, Hungary, and the UK (ibid.). The FCC goes on to argue that the CJEU, when it tests the proportionality of acts of EU institutions, uses the concept differently: it tests whether the acts in question are appropriate for attaining the legitimate objective pursued (pre-test and main stage 1), thereby frequently limiting its review to whether the relevant measures are manifestly inappropriate; and it tests whether they do not manifestly exceed the limits of what is appropriate and necessary in order to achieve the objectives (stage 2). But "little to no consideration," the FCC complains, "is given to whether the measure is actually proportionate in the strict sense … As a general rule, the CJEU refrains from reviewing proportionality in the strict sense" (para. 126).

In what follows, the FCC recapitulates the CJEU's proportionality test step by step and finds that the specific manner in which it was applied in *Weiss* "renders that principle meaningless" (para. 127) for two reasons. First, the application of *all stages* of the test

13 The official English version of the decision is to be found here: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html;jsessionid=9B49C52B247046BFF230FB86746390B6.1_cid377.

lacked severity because it did not go beyond the search for *manifest* errors of assessment on the side of the ECB (para. 156). According to the Karlsruhe judges, the CJEU refrained from seriously questioning the aim and necessity of the programme. "As a result," the FCC says, "the CJEU allows asset purchases even in cases where the purported monetary policy objective is possibly only invoked to disguise what essentially constitutes an economic fiscal policy agenda" (para. 137; see also para. 142). This standard of review, the FCC says, "is by no means conducive to restricting the scope of the competences conferred upon the ECB" (para. 156).

Second, the Second Senate criticizes the lack of test stage three and thereby "the complete disregard of the PSPP's economic policy effects" (para. 133). The decisive sentence reads as follows: "[T]he review of proportionality is rendered meaningless, given that suitability and necessity of the PSPP are not balanced against the economic policy effects … arising from the programme to the detriment of Member State's competences, and that these adverse effects are not weighted against the beneficial effects the programme aims to achieve" (ibid.).

Proportionality *strictu sensu* balances cost and benefit. Which side effects of the PSPP need to be considered, according to the FCC, in order to assess its proportionality? In paras. 170–175, the Highest Court of Germany lists the refinancing conditions of the Member States,[14] the stability of the banking sector, real estate and stock market bubbles, and the survival of economically unviable companies under conditions of dysfunctionally low interest rates. The FCC also makes clear that these side effects are examples and that it is not for the FCC to decide how such concerns are to be weighted. Rather, "the point is that such effects, which are created or at least amplified by the PSPP, must not be completely ignored" (para. 173).

The FCC emphasizes, as we have already seen, that the balancing stage of the test is not a German peculiarity but known and practiced in many Member States. It does not necessarily follow that the CJEU has to apply the test accordingly, too. How does the FCC justify its view that the CJEU's softer testing of proportionality is illegitimate (paras. 146–152)? "[C]ompletely disregarding the economic policy effects of the PSPP," Karlsruhe argues, "contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law" (para. 146), the FCC argues. Now the Second Senate uses much space for extensive references to decisions in which the CJEU performed much harder proportionality tests, including attention to practical effects. The references encompass judicial fields such as fundamental rights protection, indirect discrimination, the common market rules, and state aid, among others. We will come back to this differential application of the proportionality test below.

14 The idea that the *improvement* of refinancing conditions could be a disproportional interference into the economic matters of the Member States is surely among the most obscure aspects of the *PSPP* ruling.

The lack of a serious test, Karlsruhe argues, "allows the ECB to expand … its competences on its own authority" and "paves the way for a continual erosion of Member State competences" (para. 156). It concludes that the ECB, insofar as it did not document the proportionality of its PSPP programme on the basis of a serious test, acted *ultra vires*, as much as the CJEU did when it abstained from asking the ECB for a respective documentation and from performing a meaningful proportionality test on its part.

## 6 Discussion

In *Gauweiler* and *Weiss*, the CJEU tested the proportionality of ECB actions differently from how German constitutional lawyers would have most likely done it. This alone can hardly justify Karlsruhe's *ultra vires* verdict. As we have seen in Section 5, the concept is contested and its application differs among jurisdictions. The EU, consisting of twenty-seven different jurisdictions, has developed its own way of applying legal concepts such as proportionality. Also, while the FCC restricts the proportionality test to interference with human rights, Article 5 (1) TFEU states that the use of all Union competences is governed by proportionality. It must not come as a surprise that the differing ranges of application come with a different application mode. None of the respective applications are "right" or "wrong" per se. Critics accordingly accused the FCC of having illegitimately insisted on "a very German understanding of proportionality" (Nowag 2020, 9; see also Feichtner 2020, 1097; Perju 2020, 1020). With respect to the FCC's insistence on a proportionality test *strictu sensu*, the critics most certainly have a valid point. The FCC cannot impose its own proportionality standards upon the CJEU.

If the FCC had stopped here, its *PSPP* decision would lack persuasive power indeed. But Karlsruhe went two steps further. First, it accused the CJEU not only of a differing but also of a *differential* use of proportionality. Critics may object that such differential use is not necessarily "wrong" per se either: Why not test public interference with human rights differently from interference with, say, fundamental freedoms? Tridimas (2006, 193–94), for example, argues that it makes sense to differentiate between proportionality as the guardian of individual rights and proportionality as a tool of market integration. "As a result," he says, "the intensity of review varies considerably" (ibid., 137).

One may therefore, again, wonder about the legitimacy of the FCC's objection. But second, the FCC accused the CJEU of a *specific form* of differential use of proportionality: a form that over time systematically enlarges the discretion of EU institutions to the disfavor of Member State institutions, by the means of systematically applying a softer proportionality test against measures of the former and a harder test against measures of the latter institutions. In the *PSPP* case, according to the FCC, the differential use of the concept resulted in the lack of meaningful judicial control whatsoever, at the cost of

disproportional interference with the economic matters of the Member States. This is a legitimate objection, at least from the point of view of national constitutional law.

The differential application of proportionality has been acknowledged by European law scholars for a long time. The FCC could have made its point even more persuasive if it had referred to this literature strand more extensively. According to De Búrca (1993, 111, 146), for example, the CJEU performs a quite rigorous and searching examination of justifications whenever measures at the Member State level have been challenged; when action is brought against the Union, by contrast, a looser proportionality test is generally used. As Harbo (2010, 172) puts it, proportionality in the narrow sense is applied "whenever the Court finds it suitable in order to promote the desired outcome": more integration (see also Knill and Becker 2003, 463–69).

Particularly enlightening is Sauter (2013), who identifies three parallel standards of proportionality in the jurisprudence of the CJEU: against private parties under competition law, the Court performs a least restrictive means test and engages in the balancing of costs and benefits (=balancing stage 3); against Member State measures, the Court applies a least restrictive means test; and against Union-level institutions, it runs a manifestly inappropriate test only. Harbo (2010, 184) wonders about the softness of the test if it is applied against EU institutions and asks whether it should be called a proportionality test after all since it, according to him, "is in fact a reasonableness test in disguise." And Tridimas (2006, 180) states that the proportionality requirement has turned out to be an unreliable ground on the basis of which to tame Union competences. The FCC's objection therefore has a solid ground in the literature.

From the perspective of national constitutional law, this specific form of differential use of the concept is hard to accept. This also holds true for a couple of possible justifications of the view put forward by the CJEU. The differential use of the test could be easier to justify if the criterion for differentiation was the policy field only. But the actual criterion is the *addressee*, rather than the policy field: proportionality, as the CJEU uses it, constrains EU action systematically less than Member State action, *independently from the kind of action*. The fundamental freedoms illustrate this point nicely, as the CJEU performs a softer proportionality test when the Union lawmaker interferes with fundamental freedoms, compared to situations in which lawmakers at Member State level interfere accordingly (Höpner and Schmidt 2020).

Another justification could be that the Union lawmaker needs particular discretion in order to make European democracy work. But the same could be said about national democracy. Above all, this argument would fail to justify the soft test of ECB action: in the *PSPP* case, democracy is affected by the side effects (the cost), rather than by a too narrow room of discretion on the side of the ECB (if it is affected at all). The most straightforward justification of the biased application of proportionality would be to approve it as an expression of the Court's dedication to the goal of an "ever closer Union." This is most certainly how European lawyers in favor of the stricter control of Member

State actions see it (critically Knill and Becker 2003, 468). But this justification would obviously not convince constitutional lawyers, who have a point when they argue that competence drift shall be equally controlled in both directions.

Critics of the *PSPP* ruling have also argued that the FCC should at least have asked the CJEU for another preliminary ruling before its *ultra vires* verdict, since Karlsruhe's reading of the proportionality requirement did not become fully clear in its previous ECB-related decisions. Meinel (2020, 48), for example, puts forward that the FCC blurred the line between proportionality as a means to limit interference with private rights and proportionality as a means to protect competencies (see also Hellwig 2020; Wendel 2020). Perhaps the FCC should indeed have referred another set of questions to the CJEU, in order to give each side a chance to rethink their points of view (Simon and Rathke 2020, 955). With regard to the different understandings of the proportionality requirement, however, everything had been said after *Weiss*.

Specifically, the CJEU had already been aware that the FCC would not differentiate between disproportional intervention into Member States' fields of competence, on the one hand, and disproportional intervention into individual rights, on the other. In the reading of Karlsruhe, protection of the principle of enumerative conferral equals protection of the *individual right* to democracy, as the FCC had famously declared in its *Lisbon* decision from 2009 (2 BvE 2/08, see in particular para. 177) and re-emphasized in its *OMT* judgment (see para. 83). European law scholars may disagree, perhaps on solid ground. Nevertheless, in this regard, the *PSPP* decision did not bring any news. In general, the CJEU had already insisted on a wide mandate of the ECB, implying soft scrutiny in the form of a manifest-errors-of-assessment test only, as much as the FCC had already insisted on a narrow mandate of the ECB, implying hard, "meaningful" proportionality requirements.

In sum, both the CJEU and the FCC had made their perspectives clear before they provided their "final says." One may sympathize with one perspective more than the other, but it is fair to concede that both views are, within their respective European law and constitutional law contexts, legitimate, clear, and logically comprehensible. Remember now that the PSPP dispute has revived the discussion about a European Appeal Court as a possible way out of the stalemate that can occur when the judicial dialogue results in disagreement. Imagine such an Appeal Court after the contradicting *Weiss* and *PSPP* decisions and their different interpretations of proportionality. Which value-added could the Appeal Court have offered?

## 7 Conclusion: A way out of constitutional pluralism?

We can use the discussion in the previous sections to decompose the PSPP conflict and to question the potential value-added of a legal super-authority step by step. Imagine first that the FCC had exclusively insisted that the proportionality of Union-level actions shall be fully tested German-style, or that the CJEU had openly excluded the ECB from the proportionality requirement laid down in Article 5(1) TFEU. If that were true, an Appeal Court could have corrected the mistakes made by either of the courts. It could have done so by strictly sticking to the judicial code. Given that even Highest Courts can make manifest mistakes, an Appeal Court can be of help if they occur. But this is not the constellation of the PSPP conflict. The views put forward by both courts were comprehensible and legitimate within their own legal contexts.

An Appeal Court could also easily have mandated a practical solution of the (almost trivial) kind the practitioners came up with in July 2020: it could have asked the ECB to make its proportionality assessment of the PSPP transparent to the public, or to confidentially pass it on to the governments and parliaments of the Member States of the eurozone. That would have been of help. With an Appeal Court, the judiciary would have not left politicians alone with two contradicting instructions, one indicating the legality and another indicating the unconstitutionality of the PSPP.

Consider, however, the political nature of such conflict resolution (Sölter 2020). Given that a *hyper law* above European and national constitutional law does not exist, moderation between the contradicting instructions of both sides must not be confused with the finding of justice on a common legal basis. This does not imply that an Appeal Court is a bad idea: judicial decisions often are political compromises in disguise (remember the critics of *balancing* in Section 4). But the architects of a new judicial conflict resolution body should be aware of the political nature of the task, even if they ask jurists to do the job.

The more we move from the surface to the deep structure of the PSPP conflict, however, the less the matters become accessible to compromise. This holds true for the differing readings of the proportionality requirement, and the softer test that European law runs against Union-level institutions in particular. The differing readings among the two courts can hardly be bridged without suspending long lines of jurisprudence on both sides. An arbitration that successfully overrides one or both of these lines is hard to imagine and most certainly impossible. Again, the absence of a *hyper law* above both kinds of law, on the basis of which a judicial compromise could be declared, further complicates the matter.

Fully non-accessible to compromise is the very core of the PSPP conflict: the claim of an unconditional supremacy of European law, on the one hand, and of constitutional control reservations at national level, on the other (Haltern 2020, 819). In the perspective of the CJEU, a denial of full supremacy would undermine the uniformity of Union

law application. This is something the CJEU cannot accept. Likewise, the affirmation of unconditional supremacy would be unconstitutional in the perspective of most constitutional courts within the EU.

Imagine an Appeal Court's arbitration that asks a Constitutional Court such as the FCC to accept a European measure that, from the national Highest Court's point of view, interferes with a highly ranked, constitutionally protected human right, or that manifestly overstretches the European competence order. In the view of the affected court, such an arbitration outcome would be no less unconstitutional and therefore nationally non-applicable than the European measure before the arbitration.[15] Everything else would imply asking Constitutional Courts to accept that the EU has a competence-competence, that is, a competence to unilaterally enlarge its list of competences, as long as a new European institution – the Appeal Court – agrees.[16] It would therefore be naïve to expect all national-level control reservations to vanish after the introduction of an Appeal Court. By contrast, if conflicts fundamentally interfere with sovereignty and supremacy, the dual structure of last-word claims would persist.

An Appeal Court, if founded, could surely offer some help, as we have seen above and as Weiler and Sarmiento (2020) have argued. But we should not expect too much from it. Even leaving aside all problems related to its composition, the supermajority required for validating contested Union measures (Grimm 2020b), and the necessary treaty change, the value-added of the proposed constitutional reform may remain modest. In particular, the dual structure of the European legal order would not disappear. Even with an Appeal Court, it would sometimes confront politicians with inconsistent instructions.

It may, therefore, be more promising to learn to live with the multipolar legal order of the EU like it is, and to encourage all sides to engage in fruitful dialogue and mutual adjustment wherever possible. The "basic stress" within the European legal order, which is indeed present, is not likely to vanish in the foreseeable future, and would not disappear even if an Appeal Court were introduced. In the light of Luxembourg's extensive reading of European-level individual rights such as the fundamental freedoms (Höpner and Schmidt 2020) and the differential control of proportionality of European and Member State measures, the number of *ultra vires* verdicts from the side of Member State's Highest Courts has been very low so far, three such cases in about sixty years. Constitutional Courts hesitate to choose the "nuclear option." Recognizing the merits of constitutional pluralism would imply not branding *ultra vires* verdicts as catastrophes, but to value such signals as necessary correctives that – hopefully – encourage the CJEU to rank legitimate calls for effective autonomy protection higher than in the past.

15 The same holds true for the likely outcome of an infringement procedure against Germany as a reaction to the FCC's PSPP ruling (compare Section 1).

16 One can also put it this way: without control reservations, the Appeal Court would work as a constitutional assembly.

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