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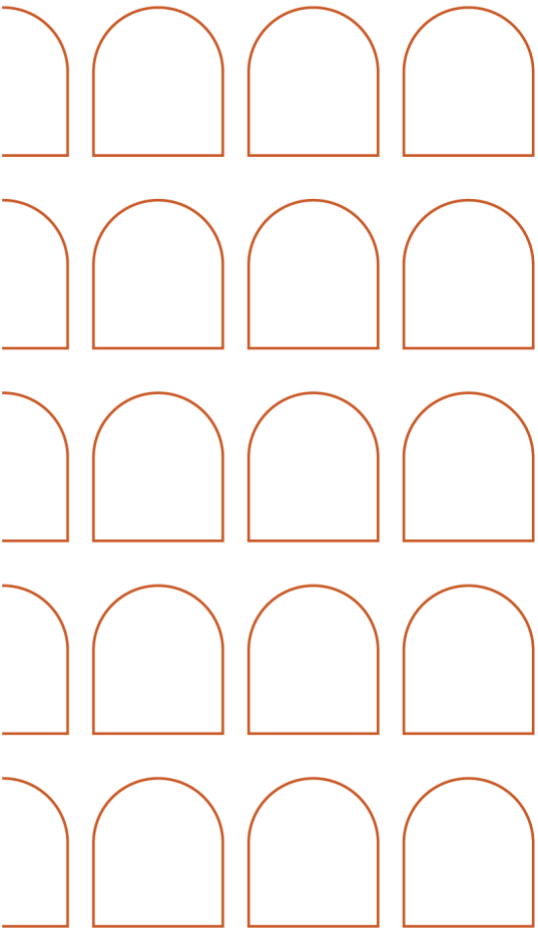

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Karlsruhe and its Discontents

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Department of Law

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Abstract

This article presents a detailed analysis of the judgment of the German Constitutional Court's judgment in *Weiss*, and of its aftermath, put in their wider context. The article deals with the position of the judgment in the case law of the German Constitutional Court, its controversial use of the principle of proportionality, the interpretation of the prohibition of monetary financing, the possible implications of the decision for the Union's budget, the impact on the European Central Bank and on the Union's economic constitution, the implementation of the judgment, the consequences for the European Court of Justice and the rule of law in the Union, and its problematic democratic claims. While this decision has all the elements to foster a constitutional moment in the Union, its meaning and direction are not yet clear. The final section deals with the possible medium- and long-term influence on the Union legal order.

Keywords

German Constitutional Court; Primacy; Proportionality; Economic Constitution; Democracy.

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1. Introduction

The *Weiss* litigation before the German Constitutional Court started in 2015, with the complaints of individuals who sought protection of their right to democratic participation, pursuant to the German Basic Law, against the European Central Bank's Public Sector Purchase Programme.[2]

The aim pursued by that Programme is to prompt a return to inflation rates below but close to 2%, the monetary policy target of the European Central Bank. This is achieved by purchasing bonds issued by all the States of the euro area, subject to certain conditions. The Programme started in 2015 as part of a wider quantitative easing programme and is still ongoing, complemented since March 2020 by the Pandemic Emergency Purchase Programme. What changed through time was the volume and rhythm of purchases, increased or decreased depending on the policy outlook.

The applicants challenged the inaction of the German government, the Bundesbank and the Bundestag against the Public Sector Purchase Programme, claiming that it overstepped the limits of monetary competence and breached the prohibition of monetary financing (Article 123(1) TFEU) and the budgetary autonomy of the Bundestag. On 18 July 2017, the German Court suspended the proceedings and referred a number of questions on validity to the Court of Justice of the European Union. The Court of Justice rendered its judgment on 11 December 2018,[3] confirming, closely following its *Gauweiler* judgment, the validity of the Programme. It took the German Court one year and a half to issue its own decision. Even though the issue of validity had been fully disposed of by the Court of Justice, the referring court saw fit to hold a hearing that lasted two full days, on 30 and 31 July 2019. Following that, it still took it almost a year to issue its judgment on 5 May 2020,[4] almost five years after the case started. A long time waiting to read this decision that was a shock for Union lawyers, a serious cause for concern at the European Central Bank, an ungraspable object for economists, and a Pole Star for illiberal policymakers and their reconstructed 'courts'.

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1 The opinions contained in this essay are personal and do not necessarily correspond to those of the Commission or of its Legal Service. My initial ideas on the subject were presented in the course on the constitutional law of the Union at Université Libre de Bruxelles in the fall semester of 2020, and in online courses at Universidad International Menéndez Pelayo, on 9 September 2020, and at the Academia de Práctica Jurídica Europea, on 10 December 2020. My thanks to Martín Martínez Navarro and Juan Ignacio Signes de Mesa for inviting me to both events, and for the discussion with them and the participants. Thanks are also due to Loïc Azoulai, Gabriel Betancor, Roberto Cisotta, Franz Mayer, Daniel Sarmiento and Günter Wilms for comments, suggestions and conversations on this topic. The essay was started in the summer of 2020 and finalised in June 2021, but it has been slightly updated for publication in February 2022.

2 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) (OJ L 121, of 14 May 2015, 20-24), amended several times and replaced by Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (ECB/2020/9) (OJ L 39, of 12 February 2020, 12-18).

3 Case C-493/17, *Weiss and others*, EU:C:2018:1000.

4 BVerfG, judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15 (DE:BVerfG:2020:rs20200505.2bvr085915).

'Im Namen des Volkes': these are the first words one can read in the judgment in which the German Court stated that, from the point of view of German constitutional law, the judgment of the Court of Justice in the *Weiss* case and the European Central Bank's Programme had manifestly overstepped the limits of Union powers, being *ultra vires*, unconstitutional and inapplicable in Germany.

It is startling for a decision that claims to protect democracy to be taken by a judicial body of a single State of the Union, in the name of one of its peoples, in a matter of vital importance for the euro area and the Union as a whole. As I will explain below, the democratic credentials of this intervention are questionable, as it is a decision taken from a national perspective on important measures adopted by the European Central Bank, an independent body created by the Union legal order, and disregarding the binding decision of the Court of Justice, the highest judicial authority of that legal order. Even in purely national terms, it is unclear how this decision would advance democratic principles.

This judgment also raises important issues about the economic constitutional law of the Union, an old theme that once again comes to the fore. Besides, the decision is a direct blow to the integrity of Union law, and, by implication, to the rule of law as framed at Union level. It is a precedent that could be followed by other national courts, in particular in countries with Eurosceptic governments that are dismantling their rule of law while the Union tries to protect it with imperfect tools.

The *Weiss* litigation has all the ingredients required to generate a constitutional moment for the Union. Will this potentiality become an actuality?

The notion of 'constitutional moment' is borrowed from Bruce Ackerman[5] to refer to those rare moments in which the foundations of a constitutional system change in a deep and lasting way. Constitutional moments may be the result of exogenous shocks but also of endogenous pressure. They may be due to political, socioeconomic or legal events – most often to a combination of those. Constitutional moments may be positive, consolidating the system, or regressive, eroding it, even destroying it. They may take place through formal constitutional amendments or through informal mutations, without touching the constitutional text. They may be due to judicial interventions or to acts of the political institutions, or to a mix of judicial and political developments. They may be successful, achieving their objective, or failed attempts that do not lead to a structural change.

It is too early to say whether the *Weiss* interaction between the Court of Justice and the German Court represents a constitutional moment, and in what direction it could move the elements that compose the complex 'mobile' of the law of integration.[6] Constitutional moments are usually recognised later, sometimes much later, when the process they launch reaches a stable state.

Considered in isolation, the *Weiss* litigation would tell us little. We need to understand whether it represents a break with the past, with a corresponding shift of paradigm, or whether

5 B. Ackerman, *We the People: Foundations* (Belknap Press, 1991).

6 V. Constantinesco, 'Coup de semonce? Coup de force? Coup d'épée dans l'eau? À propos de l'arrêt du Tribunal constitutionnel fédéral d'Allemagne du 5 mai 2020', (2020) 6 *Journal de droit européen*, 264, 267: 'Le président du 2e Sénat du BVerfG, le professeur Vosskuhle, comparait le réseau des Cours constitutionnelles et des Cours européennes à un mobile de Calder: chaque oscillation d'un élément se propage aux autres et les fait se mouvoir. Nul doute que la forte secousse venue du BVerfG ne se répercute sur les autres composantes. Mais il est trop tôt encore pour dire lesquelles se mouvront et dans quel sens elles iront.' See A. Voßkuhle, 'Une pyramide ou un mobile? La protection des droits de l'homme par les cours constitutionnelles européennes', *Dialogue entre juges* (Conseil de l'Europe, 2014), 38. The image of the mobile to refer to the law of integration was often used by Pierre Pescatore, in private conversations with the author between 2001 and 2004, probably with a more ordered and gracile artifact in mind [J. Baquero Cruz, *What's left of the law of integration?* (OUP, 2018), ch 1].

it is a natural development of existing lines of case law. To do so, we need to insert it in the relevant contexts, i.e. as part of the 'chain novel' of judgments through which the law is built,[7] and also in the wider political and economic discussion.

2. Relevant contexts

In structural terms, the relevant case law of the European Court is the 'intergenerational' line that starts with *Van Gend en Loos* and *Costa* v *ENEL*,[8] unfolds with *Internationale Handelsgesellschaft*, *ERTA*, *Foto-Frost*, *Francovich* or Opinion 1/91,[9] and continues with more recent decisions such as Opinion 2/13 or *Achmea*.[10] According to it, Union law, as we now call it, constitutes a legal system in its own right, rather than being a disparate assemblage of norms or an excrescence of the legal orders of the States or of international law. Union law is thus endowed with its own force of law, stemming from the Treaties, which are a constitutional pact between the States and their peoples that creates rights and obligations not only for those States but also for individuals.

Among the ramifications of this case law, one significant consequence is that Union law and the Court of Justice determine the effects of that law on the legal systems of the States, not each national system and its own courts. They are governed by the principle of direct effect, which sets the conditions upon which a provision of Union law is integrated into the national legal system, and the principle of primacy, which preserves the unity of Union law by binding national courts and other national authorities to set aside conflicting norms of national law that cannot be rendered compatible with Union law through interpretation. Other consequences are the monopoly of the Court of Justice to rule on the validity of Union acts (*Foto-Frost*), and the conception of national courts as courts of Union law, a corollary of the preliminary rulings procedure.

These doctrines aim at preserving the autonomy and effectiveness of Union law, preventing its fragmentation and the resulting erosion or loss of order-ness. At the same time, Union law is internally flexible, allowing for a reasonable and framed accommodation of national measures adopted in the general interest, for example through the exceptions to the free movement rules, the acceptance of higher levels of national fundamental rights protection (Article 53 of the Charter), or the respect of fundamental national constitutional structures (Article 4(2) TEU).

The primacy of Union law, inherent in the Treaties, was recalled by the Member States, in the very terms of the Court's case law, through declaration 17 annexed to the Treaty of Lisbon. At any rate, since 1964 there has never been an attempt or proposal of the States to overturn or limit primacy, as conceived by the Court of Justice, through a revision of the Treaties. Nevertheless, the primacy of Union law was not unconditionally accepted by all national courts. Some constitutional courts followed a different reasoning. This included the German Constitutional Court, which in time was to develop a very sophisticated approach to

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7 The metaphor of the 'chain novel' to refer to the development of case law is taken from R. Dworkin, *Law's Empire* (Belknap Press, 1986), 228-238.

8 Case 26-62, *Van Gend en Loos*, EU:C:1963:1; Case 6-64, *Costa* v *E.N.E.L.*, EU:C:1964:66.

9 Case 11-70, *Internationale Handelsgesellschaft*, EU:C:1970:114; Case 22/70, *Commission* v *Council* (ERTA), EU:C:1971:32; Case 314/85, *Foto-Frost*, EU:C:1987:452; Joined Cases C-6/90 and C-9/90, Francovich, EU:C:1991:428; Opinion 1/91 (European Economic Area I), EU:C:1991:490.

10 Opinion 2/13 (Accession to the European Convention of Human Rights), EU:C:2014:2454; Case C-284/16, *Achmea*, EU:C:2018:158.

this matter. For them, Union law does not have its own autonomous legal force. The force of law of Union rules does not stem from the Treaties but from the national constitution. The transfer of powers to the European level would thus not be unconditional. This leads to the emergence of potential limits to the primacy of Union law. This reasoning and its consequences are not in line with the case law of the Court of Justice.

From this point of departure, the national legal landscape presents many variants. Some constitutional systems are very open to Union law, accepting its primacy and other effects as it itself frames them. It is however uncommon for national constitutional courts to limit themselves to stating that the force of Union law springs from the national constitution while accepting that Union law and the Court of Justice may define its scope and consequences. It is more common for them to accept primacy as a matter of principle, while asserting potential exceptional limits.

In general terms, the German Constitutional Court seems less prone to self-restraint than other constitutional courts. This could be a German specificity linked to traumatic experiences in the 20th century, which may have led to some kind of constitutional overgrowth, with the Constitutional Court at the centre of a very assertive style of constitutional review, and relatively unconcerned about the traditional arguments on the counter-democratic character of that review.[11]

While remaining *sui generis*, the doctrinal elaborations of the German Court have had a significant influence over the constitutional courts of many European countries. An important decision of the German Court is never a purely national phenomenon. It will be read and assessed beyond Germany, and it can be expected that some constitutional courts will be influenced by it.

In relative terms, as regards Union law the approach of the German Court has been somewhat less assertive, barking more or less loudly from time to time but never daring to bite through decades of closer, deeper and wider integration. Until the *Weiss* judgment, the limits of integration remained a potential threat. In spite of the inherent instability of the national case law, due to its points of friction with the law of integration, a peaceful (but tense) coexistence was ensured, without seriously interfering with the integrity of Union law while influencing it through argumentation in ways that sometimes could seem justified, but sometimes less so.

A similar deference was practiced by other constitutional courts that embraced the primacy of Union law while setting potential limits without activating them. More recently, however, two national courts have openly defied the authority of the Court of Justice and the Union's rule of law: the Czech Constitutional Court in the Slovak pensions case,[12] and the Danish Supreme Court in *Ajos*.[13] These were relatively minor cases with a limited practical impact, but the blow at the very foundations of the Union was not insignificant. The German Constitutional Court has now followed these precedents in a decision with far-reaching legal, economic and political implications, finally acting on its longstanding constitutional threats. As will be seen, this has already had an impact in other Member States.

The tense relationship between the German Court and the Court of Justice is coupled, in the *Weiss* litigation, with specific questions surrounding the Economic and Monetary Union. From its inception, the euro area has been affected by a problematic design due to the

11 See M. Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and its Initial Reception', (2020) 21 *German Law Review*, 979, 989.

12 Judgment of 31 January 2012, CZ:US:2012:Pl.US:5:12:1; referring to Case C-399/09, *Landtová*, EU:C:2011:415.

13 Judgment of 6 December 2016, Case 15/2014, *Ajos* (English translation: https://europeanlawblog.eu/wp-content/uploads/2020/05/Judgment-15-2014-Danish-Constitutional-Court-DI-Final-Judgment.pdf); referring to Case C-441/14, *Dansk Industri*, EU:C:2016:278.

asymmetry between a fully integrated monetary policy, an exclusive Union competence entrusted to the European Central Bank, and an economic policy that remained at national level, subject to Union coordination. These fragilities are compounded by the prohibition of monetary financing and the no-bail-out clause (Articles 123 and 125 TFEU).

Those constraints have kept the single currency against the ropes during a protracted economic crisis. The main judgments of the Court of Justice in this area, *Pringle*, *Gauweiler* and *Weiss*,[14] interpret the applicable Treaty provisions in a reasonable way to enable the competent Union institutions to preserve the stability of the euro area. *Pringle* traces the limits within which the States of the euro area could jointly establish the European Stability Mechanism, outside but *alongside* the Union's system, to provide financial assistance to euro area States in order to ensure stability in debt crises. *Gauweiler* and *Weiss* define the conditions under which the European Central Bank can ensure the singleness, stability and sustainability of the common currency through monetary policy. What the Court's interpretations could not do, however, is to correct the problematic Treaty design.

On the German side, this subset of decisions include the initial judgments on the European Central Bank, which emphasised very strongly its independence and the constitutional grounds for its insulation from democratic processes,[15] and, among others, the subsequent judgments on the European Stability Mechanism, the Outright Monetary Transactions of the European Central Bank (*Gauweiler*), and the Single Resolution Fund,[16] with their increasing emphasis on the need to limit monetary policy and to ensure German budgetary autonomy.

Reading these decisions, one could readily see that a problem was hanging in the air. The *Gauweiler* exchange produced some convergence between both courts. The conflict was avoided in spite of a threatening reference. Nevertheless, the limitations imposed on the European Central Bank by the German Court did not fully coincide with those set by the Court of Justice. The potential for conflict remained in place after an inconclusive and ambivalent exchange.

One should also keep in mind the political and economic landscape. In policy terms, the impetus towards the deepening of Economic and Monetary Union seems to have come to a halt.[17] In a way that speaks volumes about the current political situation, the Council has ignored the Commission's proposals to integrate the European Stability Mechanism and the Fiscal Compact into Union law, and to establish a stabilisation mechanism.[18] Instead, the tasks of the European Stability Mechanism have been expanded to make it the final guarantor of the Single Resolution Fund,[19] in an area that belongs to the internal market, the core of the Union

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14 Case C-370/12, *Pringle*, EU:C:2012:756; Case C-62/14, *Gauweiler*, EU:C:2015:400; and *Weiss*, n 3 supra.

15 BVerfGE, *Maastricht*, BVerfGE 89, 155 (1993), paras 143-154; and the *European Monetary Union constitutionality* case, BVerfGE 97, 350 (1998).

16 Respectively, BVerfGE 135, 317 (2014); BVerfGE 142, 123 (2016); and BVerfGE 151, 202 (2018).

17 See *The Five President's Report: Completing Europe's Economic and Monetary Union*, of 2015 (https://ec.europa.eu/info/sites/info/files/5-presidents-report_en.pdf); and the Commision's *Reflection Paper on the deepening of the Economic and Monetary Union*, of 2017 (https://ec.europa.eu/info/sites/info/files/reflection-paper-emu_en.pdf).

18 Commission Proposals for a Council Regulation on the establishment of the European Monetary Fund [COM(2017) 827 final, of 6 December 2017]; for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States [COM(2017) 824 final, of the same date]; and for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function [COM(2018) 387 final, of 31 May 2018].

19 Agreement amending the Treaty Establishing the European Stability Mechanism, of 27 January and 8 February 2021 (https://www.esm.europa.eu/sites/default/files/esm-treaty-amending-agreement-21_en.pdf).

system. The COVID-19 crisis has again exposed the fragility of the euro area, and of the Union at large, but the reaction has been a significant package of measures, this time within the Union legal order, which exceptionally expand the Union's budgetary capacity to cope with the situation. Indirectly, the judgment of the German Court could also cast a shadow over these measures, including those adopted by the European Central Bank.

Two more elements should be added as part of the wider context. The first is the erosion of the Community method during the last decade, with an increasing number of States contesting its relevance and trying to avoid majoritarian decision-making and to replace it by consensual decision-making, the so-called 'Union method', as chancellor Merkel called it in her programmatic Bruges speech of 2010.[20] This tendency, with its emphasis on 'cooperation' over 'integration' (a term that has vanished from the vocabulary of Union politics), on sovereign States over limited sovereignties, are reflected in the expanding role of the European Council, with an impact on the institutional balance, and on the positions of the European Parliament, the Commission, and even the Council. It is also in tension with the ethos of the European Central Bank, whose decision-making is majoritarian and supranational. This phenomenon reflects pressures towards a mutation in the constitutional nature of the Union and of the status of the States within the organisation.

A second relevant phenomenon is the serious decay and near collapse in respect for the rule of law in some Union States. The intervention of the German Court could also have serious consequences in that regard.

3. The *Weiss* judgment of the German Court

The *Weiss* judgment of the German Court presents itself as an application of its previous case law on European integration, which is summarised before the assessment of the measure under review. This allows the reader to grasp the conceptual matrix from which the German Court approaches Union law (through a glass, darkly – or rather through a monocle), the standard of review it applies, and the overall justification for its approach. This also allows us to examine whether this judgment is a continuation of past case law or the beginning of a new paradigm.

In the previous case law, the German Court gradually identified certain elements of the German Basic Law that could not give way to the primacy of Union law: the protection of fundamental rights, the safeguarding of the division of powers between the State and the Union (the *ultra vires* doctrine), and constitutional identity.[21] The latter includes 'the human dignity core enshrined in fundamental rights under Art. 1 GG […] as well as the basic tenets that inform the principles of democracy, the rule of law, the social state and the federal state within the meaning of Art. 20 GG'.[22]

The potential impact of this case law has been widened by the enhanced possibilities of individuals to contest Union law in Germany, which seem to be far greater than in any other Member State. Under an interpretation of Article 38(1) of the Basic Law that applies exclusively

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20 Speech at the opening of the academic year of the College of Europe on 2 November 2010 (https://www.coleurope.eu/content/news/Speeches/Europakolleg%20Brugge%20Mitschrift%20englisch.pdf), 5-7.

21 The main steps of this case law are *Solange I* [BVerfGE 37, 271 (1974)], *Solange II* [BVerfGE 73, 339 (1986)], *Maastricht*, n 15 supra, *Lisbon* [BVerfGE 123, 267 (2009), and *Honeywell* [BVerfGE 126, 286 (2010)].

22 BVerfGE, *Weiss*, n 4 supra, para 115

to constitutional complaints relating to Union acts, any person can exercise a sort of *actio popularis*[23] before the Constitutional Court for the protection of the right to democratic participation, to prevent its erosion by the inaction of the German institutions vis-à-vis the operation of the Union, perceived as less democratic. This wide interpretation renders the admissibility of complaints based on that provision in relation to Union law much easier than when they concern comparable acts adopted by German authorities.[24]

According to the German Court, Article 38(1) of the Basic Law is not limited to a purely formal legitimation of State power. 'The citizens' right to democratic self-determination also applies with regard to European integration', protecting them 'against a manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union', and against Union acts that 'exceed the limits set by the principles enshrined in Art. 1 and Art. 20 GG, which Art. 79(3) GG declares inviolable'.[25] The German Court recalls that one cannot subject 'citizens to a political authority they cannot escape and in regard of which they cannot in principle influence, on free and equal terms, decisions on the persons in power and on substantive issues'.[26] At the same time, it recalls that the right to democratic self-determination is not about reviewing the contents of political decisions but aims at ensuring the effectiveness of democratic processes.[27]

Through this construction, the German Court claims for itself a competence to indirectly review the legality of Union acts and of related judgments of the Court of Justice. This extensive *locus standi* has given some individuals and groups a loudspeaker, far exceeding their actual democratic weight, for exerting pressure on sensitive Union issues.

The German Court also recalls that 'the manner and scope of the transfer of sovereign powers must satisfy democratic principles' because of the curtailment of the rights of the Bundestag, which must retain for itself 'functions and powers of substantial political significance'.[28] The attention shifts to 'budgetary responsibility', with this far-reaching statement: 'It is for the German Bundestag, as the organ directly accountable to the people, to take all essential decisions on revenue and expenditure; this prerogative forms part of the core of Art. 20(1) and (2) GG, which is beyond the reach of constitutional amendment […]. It falls to the Bundestag to determine the overall financial burden imposed on citizens and to decide on essential expenditure of the state […]. *Thus, a transfer of sovereign powers violates the principle of democracy at least in cases where the type and level of public spending are, to a significant extent, determined at the supranational level, depriving the Bundestag of its decision-making prerogative*'.[29]

The German Court also explains the content of the 'responsibility for integration' of German institutions. They have an obligation to monitor and to 'actively take steps to ensure conformity with the integration agenda (*Integrationsprogramm*) and respect for its limits'.[30] This seems to be an obligation of means, not of results. However, where it is not possible to ensure that those limits are respected, or to amend the Treaties to 'legitimise' the exercise of Union

23 M. Wendel, n 11 supra, 992; J. Dietze and others, 'Europe – Quo Vadis?', (2020) *Europäische Zeitschrift für Wirtschaftsrecht*, 525, 526.

24 For the general case law on admissibility, see BVerfGE 1, 97, 101 and 101 (1951) (against legislation); and BVerfGE 53, 30, 48 (1979) and BVerfGE 72, 1, 5 (1986) (against judicial decisions).

25 BVerfGE, *Weiss*, n 4 supra, para 88.

26 Ibid, para 99.

27 Ibid, para 100.

28 Ibid, para 103.

29 Ibid, para 104 (emphasis added).

30 Ibid, para 105.

powers, the German institutions 'are required to use legal or political means to work towards the rescission of acts not covered by the European integration agenda […] and […] to take suitable action seeking to limit the domestic impact of such acts to the greatest extent possible'.[31]

The abstract threshold for *ultra vires* review seems to be very high. A Union act would need to '*manifestly exceed EU competences, resulting in a structurally significant shift in the division of competences* to the detriment of the Member States […]. This is generally the case if the exercise of the competence in question by an institution, body, office or agency of the European Union *were to require a treaty amendment* in accordance with Art. 48 TEU or an evolutionary clause, requiring action on the part of the German legislature pursuant to either Art. 23(1) second sentence GG or the Act on the Bundestag's and the Bundesrat's responsibility with regard to European Integration'[32]

The German Court also recalls that the 'respective judicial mandates [should] be exercised in a coordinated manner', to preserve the primacy and uniformity of Union law. The '*ultra vires* review must be exercised with restraint, giving effect to the Constitution's openness to European integration'.[33]

This is the point of departure of the German Court. It can be questioned in its own terms, from the perspective of Union law. Besides, it is unclear whether in *Weiss* the German Court has been faithful to its own case law, as well as to the general Europe-friendly '*Weltanschauung'* of the Basic Law.

In the ruling, the German Court declared that the federal government and the Bundestag breached the rights of the applicants (and, by necessary implication, of all Germans having the right of democratic participation) under Article 38(1) of the German Basic Law by failing to take suitable steps challenging that in the Public Sector Asset Purchase Programme the European Central Bank neither assessed nor substantiated respect for the principle of proportionality. The holding may seem trite: it does not mean that the Programme is disproportionate.[34] However, the grounds are an integral part of the judgment, and when one considers the reasoning the decision starts to look more and more significant, and worrying.

The analysis is structured in six parts. The first two are about the *ultra vires* character of the *Weiss* judgment of the Court of Justice and of the challenged programme. Part 3 deals with the prohibition of monetary financing. Part 4 is about the sharing of risk among the Member States and the budgetary responsibility of the Bundestag. Parts 5 and 6 focus on the consequences for German institutions.

In part 1, the German Court discards the binding nature of the judgment of the Court of Justice, considering it 'simply not comprehensible and thus objectively arbitrary'.[35] That judgment would fail 'to give consideration to the importance and scope of the principle of proportionality […], *which also applies to the division of competences,* and is no longer tenable from a methodological perspective given that it completely disregards the actual effects of [the Programme] […]. Therefore, the judgment [of the Court of Justice] manifestly exceeds the mandate conferred upon it in Art. 19(1) second sentence TEU, resulting in a structurally significant shift in the order of competences to the detriment of the Member States. To this

31 Ibid, para 109.

32 Ibid, para 110, referring to BVerfGE, *Honeywell*, n 21 supra, para 71.

33 Ibid, paras 111 and 112.

34 Ibid, para 116.

35 Ibid, para 118.

extent, the [Court's] judgment itself constitutes an *ultra vires* act and thus has no binding effect [in Germany]'.[36]

The points of contention are many. For the Court of Justice, whether a measure of the European Central Bank constitutes an act of monetary policy depends on its objectives and on the instruments used, regardless of its relationship with economic policy; proportionality should be assessed in the light of the objectives of monetary policy; and the European Central Bank should be granted broad discretion, judicial review being limited to a control of manifest errors. For the German Court, those interpretations of the Court of Justice render 'meaningless' the principles of conferral and proportionality. [37] In its view, whether a measure of the European Central Bank belongs to monetary policy must be judged in the light of its *effects* and of its relationship with economic policy; its proportionality should be assessed in view of its 'economic policy effects'; and the Bank should be subject to a strict proportionality review.[38]

For the German Court, the 'suitability and necessity of the [Public Sector Purchase Programme]' would need to be 'balanced against the economic policy effects […] arising from the programme to the detriment of Member States' competences'; those 'adverse effects' should be 'weighed against the beneficial effects the programme aims to achieve'.[39] According to the judgment, 'the fact that the [European System of Central Banks] has no mandate for economic or social policy decisions, even when using monetary policy instruments, does not rule out taking into account, in the proportionality assessment […] the effects that a programme for the purchase of government bonds has on, for example, public debt, personal savings, pension and retirement schemes, real estate prices and the keeping afloat of economically unviable companies, and – in an overall assessment and appraisal – weighing these effects against the monetary policy objective that the programme aims to achieve and is capable of achieving'.[40] The German Court thus considers that the Court of Justice leaves it to the European Central Bank to determine the limits of its own competence, not carrying out a meaningful judicial review.

The German Court then explains why, in its view, this entails a manifest and structurally significant shift in the order of competences. This is based on the idea that the 'division' between economic policy and monetary policy is '*a fundamental political decision*'.[41] It cannot accept the judgment of the Court of Justice because it largely abandons 'the distinction between economic policy and monetary policy', and this would encroach upon the competences of the Member States for economic and fiscal policy.[42]

Having discarded the judgment of the Court of Justice, the German Court conducts 'its own review' on the decisions of the European Central Bank. It concludes that, due to the lack of sufficient proportionality analysis, '[those decisions] are neither covered by [its] monetary policy competence […] nor by its merely supporting competence regarding the Member States' economic policies'.[43] The Bank should have identified, weighed and balanced the programme's 'monetary policy objectives' against 'its economic policy effects'. In the absence of such reasoning, the German Court finds it impossible 'to review whether it was still proportionate to

36 Ibid, para 119.

37 Ibid, paras 123 and 127.

38 Ibid, para 156.

39 Ibid, para 133.

40 Ibid, para 140.

41 Ibid, para 159 (emphasis added).

42 Ibid, paras 162 and 163.

43 Ibid, para 164.

tolerate [*sic*] the economic and social policy effects of the [Programme], problematic as they may be in respect of the order of competences, or, possibly, at what point they have become disproportionate'.[44] This lack of grounds leads to the finding that the European Central Bank breached the principle of proportionality and exceeded monetary policy.[45] At the same time, the German Court leaves the substantive analysis for a subsequent case, to be carried out on the basis of a 'proper' assessment by the Bank.

Less attention has been paid to part 3 of the judgment, on Article 123(1) TFEU, because no *ultra vires* finding was made in it. The German Court considered that the judgment of the Court of Justice did not breach that provision. Although the Court's interpretation 'does meet with considerable concerns', if the safeguards which 'prevent circumvention of the prohibition of monetary financing' are 'strictly observed' 'a manifest violation of Art. 123(1) TFEU is not ascertainable'.[46]

The general test for Article 123(1) TFEU is that, to avoid a circumvention of this provision, the European Central Bank's interventions should be framed in such a way that 'the Member States do not know for certain that the Eurosystem will at a future point purchase their government bonds on secondary markets'.[47] The German Court shares the Court of Justice's restrictions, notably on the need for no prior announcement, the duration of the blackout period, the holding of bonds until maturity, and the requirement to decide on an exit strategy. It does, however, express concerns over the Court's approach and reinforces these conditions, which are interpreted in a stricter way.

Part 4 concerned the issue of risk-sharing. The Court of Justice declared this question hypothetical and inadmissible, because the European Central Bank did not provide for a risk-sharing regime as regards the purchase of debt instruments issued by the Member States. Nevertheless, the German Court ruled on the substance, noting that the adoption of a risk-sharing regime '*would in any case be prohibited under primary law*'.[48]

This section is used by the German Court to present its strict approach on budgetary matters, interpreting Articles 123 and 125 TFEU as embodying a principle of 'national budget autonomy' and holding that the Treaties 'do not allow a redistribution among national budgets'.[49]

The last two parts concern the consequences of the *ultra vires* findings for the competent German institutions. The duty to take 'active steps' becomes an obligation of result. Since the Programme has no legal force in Germany, the German institutions, including the Bundesbank, could not participate in it. Nevertheless, the German Court gave a period of three months during which additional explanations on proportionality could be given. The judgment also requires 'a new decision' by the European Central Bank 'that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme'.[50]

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44 Ibid, para 176.

45 Ibid, para 177.

46 Ibid, para 180.

47 Ibid, para 182.

48 Ibid, para 228.

49 Ibid, para 226.

50 Ibid, para 235.

4. A break with the past?

As is the case for many decisions of the German Court, the *Weiss* judgment presents itself as an intricate and seemingly bulletproof argumentative machine: a gigantomachy of words, impressive in its length and axiomatic construction, not without some sort of hypnotic power with its repetitions and apparent internal consistency. Nevertheless, it is a giant with feet of clay, with many weaknesses at crucial points of its reasoning.

Although it claims to be a continuation of prior case law, profusely quoting it, it departs from it in at least two respects.

The first is that, despite certain differences between the judgment of the Court of Justice and that of the German Court, the *Gauweiler* litigation ended with the recognition that the Outright Monetary Transactions programme was compatible with the Treaties and that the Basic Law did not question it. That programme was selective, buying bonds from specific euro area Member States with special financing needs, while the Public Sector Purchase Programme concerns the whole euro area. Besides, the Outright Monetary Transactions Programme was less constrained than the Public Sector Purchase Programme.

However, in *Gauweiler* the German Court did not object to the Outright Monetary Transactions Programme. The preliminary reference in *Weiss* was also far less threatening than the one in *Gauweiler*. A neutral observer might have expected that the new litigation would not lead to an *ultra vires* finding, since the previous programme seemed more problematic from the perspective of the German Court, but was upheld, and that Court seemed less concerned about the new programme. Declaring *ultra vires* a 'less problematic' intervention of the European Central Bank, the German Court's *Weiss* judgment seems to be an implicit overruling of its *Gauweiler* judgment. It also overrules or at least oversteps *Honeywell*, whose very strict limits for *ultra vires* review seem to have been ignored.[51]

Secondly, the German Court has moved from words to deeds, i.e. from trying to influence Union law through arguments and reservations, to one in which it acts on them. Reading the German *Weiss* judgment, one wonders what is left of the idea of the former president of the German Court that "'[e]mergency brake mechanisms' are most effective if they do not have to be applied", adding, with somewhat colourful language, that '[p]recisely because of their existence – and not despite their existence – it has never 'come to the crunch''.[52] Courting constitutional vertigo and juridical chaos, the German Court now defies the authority of Union law and of the Court of Justice in a case with incalculable economic and political impact.

It is this move from threat to action that could represent a paradigm shift. The new attitude, in which an ambivalent deference to the Court of Justice and the basic respect for the primacy of Union law are broken, may open a new period in the relationship between both courts,[53] and more generally between the Court of Justice and the Member States' constitutional and supreme courts.

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51 See F. C. Mayer, 'The *Ultra Vires* Ruling: Deconstructing the German Federal Constitutional Court's *PSPP* decision of 5 May 2020', (2020) 16 *European Constitutional Law Review*, 733, 755.

52 A. Voβkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*', (2010) 6 *European Constitutional Law Review* 175, 195.

53 This is the opinion of V. Constantinesco, n 6 supra, 264-265: 'le debut d'une nouvelle phase: celle de la rébellion d'un juge constitutionnel national, qui se considère comme le rempart de l'identité constitutionnelle qu'il entend protéger contre tout ce qu'il estime pouvoir la mettre en péril, au besoin en allant contre l'effet généralement reconnu aux arrêts préjudiciels de la Cour'.

Even if it represents a shift from argument to action, this was an accident waiting to happen – a possible, if not necessary, development in the relationship between Union law and the German Basic law as understood by the German Court.[54] An overarching consensus about the normative underpinnings of the autonomy and primacy of Union law is an essential requirement to ensure constitutional stability in the Union, and to safeguard its values, principles and policies in the general interest of all Europeans. That consensus is eroded by the competing national narratives that have been gaining ground in recent years. Those narratives sometimes undermine a shared (or at the very least convergent) conception about Union law. The coexistence of diverging positions and the strain to maintain stability through prudential means created a situation in which the quality of the interaction between the relevant legal orders could worsen at any time, especially under deteriorating socioeconomic, political and cultural conditions. This is what we see unfolding: not a sudden decay in the practice of Union law but old cracks becoming bigger under unprecedented pressure.

5. On uses (and abuses) of proportionality

One remarkable paradox of the judgment is that it purports to interpret Union law better than the Court of Justice, and above its authority to ensure that in the interpretation of the Treaties the law is observed. As Mattias Wendel has explained, while claiming to be based on the German Basic Law, *ultra vires* review 'necessarily implies an interpretation of [Union] law'. [55] The relevant legal bases and the principle of conferral are in the Union Treaties, and their limits cannot be ascertained through an interpretation of the Basic Law. *Ultra vires* review thus involves an 'excursion' into Union law. For an *ultra vires* finding to be made, a breach of Union law must be found. To do so, the German Court has to conclude that the Court of Justice got it wrong, indeed manifestly so. This is why the German Court showed extreme harshness with the judgment of the Court of Justice, discarding it as 'incomprehensible', 'objectively arbitrary' and 'methodologically flawed'.

These adjectives sound arrogant and do not seem to be in line with sincere cooperation. Mr Huber, the reporting judge in the German case, has declared that if they 'had argued in a friendlier manner, the criteria for an *ultra vires* act would not have been met'.[56] The '*Europarechtsfreundlichkeit*' of the German Court, the friendly attitude towards European law, seems to have reached its lowest mark, at least in the Second Senate of the German Court. The words of the reporting judge also show an instrumental understanding of the law, suggesting that the result had been reached before the legal analysis was carried out.[57]

What is more, the German Court committed several manifest errors of Union law, and seemed to misapply its own case law, giving it a twist that cannot be discerned in previous judgments, and almost overturning it.[58]

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54 See A. Bobic and M. Dawson, "Making sense of the 'incomprehensible': The PSPP Judgment of the German Federal Constitutional Court", (2020) 57 *Common Market Law Review*, 1953, 1964: 'the current disagreement has been in the making for some time'.

55 M. Wendel, n 11 supra, 984.

56 Cited by F. C. Mayer, n 51 supra, 757; interview with Mr Huber in *Süddeutsche Zeitung*, 13 May 2020, 5: 'Wenn wir freundlicher argumentiert hätten, hätten die Tatbestandsvoraussetzungen für einen Ultra vires-Akt nicht vorgelegen'.

57 See D.-U. Galetta and J. Ziller, "The *Bundesverfassungsgericht*'s Glaring and Deliberate Breaches of EU Law Based on 'Unintelligible' and 'Arbitrary' Grounds", (2021) 27 *European Public Law*, 63, 71.

58 Similarly, M. Wendel, n 11 supra, 984.

Union law is clearly misused as regards the principle of proportionality.[59] That principle, the German Court repeats so many times that a perspicuous reader will immediately raise brows, 'also applies to the division of competences', and would have a 'corrective function for the purposes of safeguarding the competences of the Member States'.[60]

That this is a gross misinterpretation of the Treaties should be obvious from the very wording, structure and aim of Article 5 TEU. Paragraph 1 tells us that '[t]he *limits* of Union competences are governed by the principle of conferral. The *use* of Union competences is governed by the principles of subsidiarity and proportionality'. It is clear that only 'conferral' will tell us whether the Union is competent in a given area. To assess respect for the principle of conferral one has to determine whether the aim and content of a measure are *suitable* to achieve its purported objectives, in the light of its legal basis. Once a competence exists, subsidiarity, the second step of the analysis, will tell us whether the Union may *use* a non-exclusive competence for a particular action. If the Union has a competence and can use it, the principle of proportionality tells us that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.' Proportionality concerns the intensity of the *use* of an existing Union competence for a given purpose. There is, therefore, a fundamental category mistake in the German judgment, which confuses 'the existence of powers and the exercise thereof',[61] and 'the concept of *lack of competence* with the *concept of unlawfulness*'.[62]

This does not mean that proportionality is irrelevant for the Member States. It has a 'federalist' dimension,[63] but only as a matter of legality review, since that principle makes sure that the exercise of Union competences creates the least burden possible, for individuals and also for the States.

When the Court of Justice strikes down a Union measure on proportionality grounds, it is not making any determination as regards competence, only as regards the substance of that measure. In areas of shared competence, such a judgment may have indirect consequences for the division of powers, since Article 2(2) TFEU provides that, in those areas, 'the Member States shall exercise their competence to the extent that the Union has not exercised its competence'. If the Court of Justice annuls a Union measure adopted in an area of shared competence for breach of the principle of proportionality, that part of the competence will return to the States. But the States may only use it in full respect of other Union measures, not affecting them or detracting from their effectiveness. Besides, national law could prevent them from enacting such measures for similar proportionality reasons.

There is however no room for this kind of analysis as regards exclusive competence. In accordance with Article 2(1) TFEU, '[w]hen the Treaties confer on the Union exclusive competence in a specific area, only the Union itself may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts'. A breach of the principle of proportionality by a Union act in an area of exclusive competence renders that act unlawful, but it has no impact on the division of competences. An alleged breach of the principle of proportionality by the European

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59 Ibid, 985-988; and Editorial Comments, 'Not mastering the Treaties: The German Constitutional Court's PSPP judgment', (2020) 57 *Common Market Law Review*, 965, 969-974.

60 BVerfGE, *Weiss*, n 4 supra, paras 123 and 133.

61 See A. Bobic and M. Dawson, n 54 supra, 1975; Editorial Comments, n 59 supra, 969.

62 For example, M. Wendel, n 11 supra 986; D.-U. Galetta and J. Ziller, n 57 supra, 82-84; and P. Dermine, 'The ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its repercussions on the Economic and Monetary Union', (2020) 16 *European Constitutional Law Review*, 525, 539.

63 See T. Tridimas, *The General Principles of EU Law* (OUP, 2nd edition, 2006), 91; G. de Búrca, 'The Principle of Proportionality and its Application in EC Law', (1993) 13 *Yearbook of European Law*, 112.

Central Bank cannot render its action *ultra vires*: it would be unlawful, but not on grounds of incompetence.

The choices of the Treaty drafters in Article 5 TEU are eminently reasonable. The irrelevance of proportionality to determine the existence of competence follows an impeccable logic. Proportionality is not a proper tool to assess competence issues or the relationship between different legal bases. Those questions are about the demarcation of substantive scopes of application. As such, they have nothing to do with the intensity of the action under review. Incompetence is a very serious defect in a legal act, affecting its validity at the root. A finding of incompetence cannot depend on a proportionality analysis, for that would create legal uncertainty about the basic question of the competence to act, leading to institutional confusion and paralysis.[64] This is why proportionality and other issues of legality are always examined *after* competence issues. Their analysis only makes sense once it has been concluded that the body adopting the measure is competent.

German constitutional law follows the same logic. In its decisions on the division of powers between the *Bund* and the *Länder*, the German Court considers that the principle of proportionality is irrelevant for those questions.[65] This case law is not mentioned in the *Weiss* judgment. No explanations are given for the metamorphosis of proportionality when the Union is concerned.

It is therefore the German *Weiss* judgment that seems 'objectively arbitrary' when it states that the principle of proportionality is relevant for the division of powers between the Union and its States in an area of exclusive competence. This is not in line with the clear wording of the Treaties and leads to a conflation of fundamental legal categories. Since this is the cornerstone of the judgment, without it the rest of the analysis on monetary policy falls to the ground like a house of cards.

There has been an attempt to justify this use of proportionality. For one author, 'proportionality, subsidiarity and the principle of conferral [would] form the Treaties' cornerstones to assuage concerns about intervention in Member States' competences', working 'complementarily towards the same goal'.[66] There would be 'a concern militating against limiting proportionality to the use of competence', as that could fetter 'the intention of the proportionality principle in counterbalancing supremacy and safeguarding the principle of conferral'. The principle of proportionality should thus morph into a rule about the existence of competence, to 'confine intrusion on Member State sovereignty to a minimum'.[67] This understanding of proportionality, involving a balancing between the effects of a Union measure on the Member States' competences and the expected positive consequences of that measure as regards the Union objective, could '*tackle this deficiency in Treaty design*'.[68]

This defence of the German *Weiss* judgment is, like the judgment itself, an attempt to rewrite the Treaty provisions on competence. One could not remedy alleged 'deficiencies in Treaty design' by inventive interpretations that have no basis in the text, structure and aim of the law. Besides, there is no 'deficiency in Treaty design' but a conscious choice to keep conferral, subsidiarity and proportionality as separate tools, and to assign to proportionality a

64 See T. Marzal, 'Making sense of the use of proportionality in the Bunderverfassunsgericht's PSPP decision', (2020) *Revue des affaires européennes*, 441, 445.

65 BVerfGE 81, 310 (1990) and BVerfG 88, 203 (1993). See M. Wendel, n 11 supra, 988; A. Steinbach, 'The Federalism Dimension of Proportionality', *European Law Journal*, forthcoming; and H.-J. Hellwig, 'Die Verhältnismäβisgkeit als Hebel gegen die Union', (2020) *Neue Juristische Wochenschrift*, 2497, 2499.

66 A. Steinbach, n 65 supra.

67 Ibid.

68 Ibid (emphasis added).

role in the review of the legality of Union measures but not as regards the definition of the boundaries of Union competence.

If the principle of proportionality is irrelevant to assess the existence of competence, one wonders why did the Court of Justice deal with it in the first place.

In its reference in *Gauweiler*, the German Court did not raise any question about proportionality. It was the Court of Justice, following the submissions of Poland and Spain and the Opinion of Advocate General Cruz Villalón, that introduced it in the debate.[69] One may wonder why the Court chose to do so, when this issue was irrelevant for assessing whether the Outright Monetary Transactions programme was a measure of monetary policy.[70] It is likely that the Court wanted to conduct a complete analysis of its legality. However, this ignored the particular framework of review in which the referring court was operating, and the possible unintended consequences of this enlarged scope of analysis.

Proportionality was not at the heart of the preliminary reference in *Weiss*, but two of the questions mentioned it. In the first one, the German Court asked whether the European Central Bank's 'mandate' was *exceeded* 'as a result of the fact that […] on account of its powerful economic policy effects, the Decision […] infringes the principle of proportionality'. The second one asked whether the Bank's Programme infringed the Treaties 'because its volume and implementation period of more than two years and the resulting economic policy effects *give grounds for a different view of the need for and proportionality* of the [Programme] and consequently, from a certain point in time, it *exceeds* the monetary policy mandate of the [European Central Bank]'. The questions were clearly connected to the issue of competence. Their ultimate intention could hardly be missed.

Instead of taking a step back and contesting their pertinence for the division of powers between the Union and the States, the Court of Justice went on to answer them, seemingly conceding that they were relevant for determining whether the measure under review could be qualified as an act of monetary policy. The Court may thus have taken the bait, in an example of the misunderstandings to which ambiguities or loose framing may lead in the context of preliminary references.

Not only is proportionality irrelevant for the division of powers between the States and the Union. As regards monetary policy, proportionality means that the content and form of the measures adopted by the European Central Bank should not exceed what is necessary to achieve their objective. This relationship of proportionality is internal to the logic of monetary policy. However, the German Court posits a relationship between monetary policy and economic policy, and claims that the proportionality of the former must be analysed in the light of its 'economic policy effects'. This is the second problematic step of the German *Weiss* judgment.

For the Court of Justice, 'the authors of the treaties did not intend to make an absolute separation between economic and monetary policies': 'a monetary policy measure cannot be treated as equivalent to an economic policy measure for the sole reason that it may have *indirect effects that can also be sought in the context of economic policy*'.[71] Economic policy is just another policy area and does not determine the contours of monetary policy, in the same way that monetary policy does not limit economic policy. A disproportionate measure of monetary policy is not a disguised measure of economic policy. It remains (disproportionate) monetary policy.

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69 Opinion of 14 January 2015 in Case C-62/14, *Gauweiler*, EU:C:2015:7, paras 159-201.

70 M. Wendel, n 11 supra 987.

71 *Weiss* judgment of the Court of Justice, n 3 supra, paras 60-61.

By contrast, the German Court claims that, since the competence for economic policy remains with the States, that policy is a limit to monetary policy. A measure of the European Central Bank with disproportionate 'economic policy effects' going beyond its *normal* 'monetary policy effects' would invade State powers. The German Court considers that the European Central Bank should periodically review whether the economic, fiscal, social and political *costs* of its monetary policy exceed their 'monetary policy effects'. It sees monetary policy as a second-order field, constantly held in check by economic policy.

This approach is highly problematic.

Firstly, it is remarkable to consider that among the consequences of a measure of the European Central Bank, even the simplest one like setting interest rates, one could distinguish between 'monetary policy effects' and 'economic policy effects'.[72] In economic terms, the notion of the non-monetary policy effects of monetary policy measures does not really make sense, as those measures are meant to have an impact in the real economy, and that impact cannot be separated from their putative 'monetary effects'.[73] This distinction could never be made operational in legal terms, because there is no benchmark to identify or quantify those 'non-monetary effects'.[74] Besides, the effects of monetary policy are largely unforeseeable in advance, as they depend on the reactions of many actors, and the legality of Union acts must be assessed in the light of the elements that existed at the time of their adoption, not of subsequent information.[75] In reality, the effects of the Public Sector Purchase Programme are not different, in qualitative or quantitative terms, from the effects of any other monetary policy measure of the European Central Bank, including a change of interest rates.[76] Any action or inaction of monetary policy, not just large asset purchases, is bound to have significant macroeconomic effects and an impact on the distribution of economic resources between and within the States.[77]

The second problem with this approach concerns the level of analysis. The German judgment is unclear on this point, but some passages and the general tone suggest that this would be the level of single Member States. The judgment thus suffers from 'national myopia: when articulating the range of actors whose interests must be considered, it consistently focuses on domestic stakeholders'.[78] Since this analysis is about the division of powers between the Union and its States and the proportionality test would be strict, the German Court would look for the point of Pareto-optimality, where a policy measure of the European Central Bank (or other Union institutions) would make no State worse off (or, even more strictly, no relevant group within each State worse off) while making at least one State better off (or one group within a State), thus strongly protecting the *status quo*. If it applied a Kaldor-Hicks test (a cost-benefit analysis at the aggregate level, where some actors may win and others lose),[79]

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72 *Weiss* judgment of the German Court, n 4 supra, para 139.

73 See F. Martucci, 'À l'obsession économique des nombres et au fétichisme juridique des règles, préférons le courage politique des choix: La BCE et la Cour constitutionnelle allemande' (2020) *La Semaine Juridique – Édition Générale*, No 23, 8 juin 2020, doctr. 707, para 16.

74 See P. Dermine, n 62 supra, 537.

75 See, for example, the judgment of 6 September 2017, *Slovakia and Hungary* v *Council*, C-643/15 and C-647/15, EU:C:2017:631, paragraph 221.

76 In this sense, L. Bini Smaghi, 'The judgment of the German Constitutional Court is incomprehensible', *LUISS Policy Brief*, No 25/2020, 3.

77 See I. Fleichtner, 'The German Constitutional Court's PSPP Judment: Impediment and Impetus for the Democratization of Europe', (2020) 21 *German Law Journal*, 1090, 1100.

78 See A. Bobic and M. Dawson, n 54 supra, 1982.

79 A. Steinbach, n 65 supra.

it seems that the German Court would still consider each State as the proper level of analysis, accepting changes in the *status quo within* the States but not *between* them.

At no point does the German *Weiss* judgment recognise that the relevant level of analysis would be the European level, i.e. that, to assess the proportionality of a monetary policy measure, its overall costs and benefits would have to be examined at Union level (or, for the monetary policy of the European Central Bank, at the Eurozone level), considering the economy of the euro area as an integrated whole and not as a juxtaposition of national economies. The German Court is unable or unwilling to 'think European', and to see this as an issue for the Union level to determine from a Union perspective.

Thirdly, as Miguel Maduro has argued, '[n]o appropriate proportionality analysis can be done by limiting the scope of the benefits to be taken into account but not the scope of the costs… Instead, the German Court's decision seems to say that the [European Central Bank] cannot take into account the economic and fiscal benefits that may arise from its monetary oriented decisions but must take into account all the potential economic, political and fiscal costs'.[80]

That the German Court's approach is incorrect, unduly turning monetary policy into a second-order policy, is also shown by the fact that it cannot be reversed. It is, indeed, tantamount to saying that the conduct of economic policy by the States could invade the sphere of monetary policy if it had a negative impact on the transmission of the latter, or an excessive deflationary impact, with negative externalities for some States (as has been the case).[81] These are economic facts, but they do not mean that monetary policy could be posited as a legal limit to the competence of the States to conduct economic policy under the Union's supervision.

The incorrectness of the approach of the German Court is underscored by the fact that a disproportionate monetary policy measure of the European Central Bank could never thwart, occupy or displace the economic policy of the Member States in a way that would be legally relevant.[82] The States remain free to conduct their economic policy through taxation and expenditure. It is economic policy coordination at Union level and the excessive deficit procedure (not the European Central Bank) that affect the economic policies of the States. The German Court does not really explain how a disproportionate measure of the European Central Bank could invade the area of economic policy of the Member States whose currency is the euro. It presumes that this is the case, without offering any justification – probably because there is none.

The perplexities with the use of proportionality by the German Court are compounded by the *strict review* that Court seems to require, and by the fact that it did not actually rule on proportionality, but only on the lack of reasoning as regards its understanding of proportionality.

The Court of Justice took the view that judges are not well placed to pass judgment on highly complex decisions of monetary policy. These are issues for the specialised economists and policy-makers that work in the independent institution that has that task. Therefore, the approach of the Court is to recognise this expertise, to grant the European Central Bank a 'broad discretion',[83] and to limit judicial review to manifest errors of assessment. For the

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80 M. Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court', *VerfBlog*, 6 May 2020, 3.

81 See H.-J. Hellwig, n 65 supra, 2500.

82 In this sense, P. Benigno and others, 'Theory, Evidence, and Risks of the ECB's Asset Purchase Programme', *LUISS School of European Political Economy Working Paper*, No 5/2020, 22; and I. Fleichtner, n 77 supra, 1097.

83 *Weiss* judgment of the Court of Justice, n 3 supra, para 73.

German Court, however, proportionality review should be applied strictly. Otherwise the Bank would be granted a sacrilegious *Kompetenz-Kompetenz*.

This argument is also incorrect, because the European Central Bank's competence is narrowly constrained by the limited primary aim of its policy. Indeed, allegations that the European Central Bank could be pursuing policy aims extraneous to monetary policy, exceeding the limits of its competence, can already be reviewed under the case law of the Court of Justice, by assessing whether the means and scope of a given measure genuinely serve the primary objective of monetary policy.

Besides, the Court of Justice also checks whether the European Central Bank has used one of the instruments that the Treaties put at its disposal. In consequence, the Bank's independence is doubly constrained by law, as it has one primary and predominant objective and can only use particular instruments. Those instruments may be amended by the Union legislature, acting in accordance with the ordinary legislative procedure (Article 129(3) TFEU). The European Central Bank also has a measure of flexibility as regards the instruments, as it can use 'other operational methods of monetary control as it sees fit', if so decided by a majority of two thirds of the Governing Council, and without prejudice to the power of the Council to define the scope of those methods 'if they impose obligations on other parties' (Article 20 of the Statute).

If followed, the standard of review contrived by the German Court would force judges to decide hard questions of monetary policy without having the required expertise, imperfectly framing those questions as proportionality issues, and being responsible for the unpredictable consequences of their decisions. Among the possible policy measures, they may have to decide which is the 'least onerous' one for the economic policies of the States, on the basis of the distinction between monetary policy and economic policy, an allegedly 'fundamental political decision' that cannot be operationalised. This could limit the scope of policy measures open to the European Central Bank, reducing its choices. In the end judges, not economists, would be deciding on monetary policy. This is a grim prospect for the stability of the euro area. The European Central Bank could end up being trapped in a suboptimal monetary policy for the sake of enforcing a hazy jurisdictional limit.

The final perplexity on proportionality relates to the fact that the German Court does not hold that the Public Sector Purchase Programme breaches that principle. The analysis is not really carried out, as the German Court claims not to have the elements it would need to conduct it. This is the way through which it tries to maximise the future pressure, criticising the lack of reasoning while avoiding the chaos that could have arisen from the finding of a substantive breach.

Even if the German Court's understanding of the principle of proportionality was correct (*quod non*), a step would still be missing between the finding of an insufficient or absent reasoning and the conclusion that the act is *ultra vires*, indeed manifestly and structurally so. It is difficult to see how a deficient or absent reasoning could turn an act into a structurally significant shift of competence. It is also hard to conceive how an improved motivation could render that very same act 'intra vires'.[84] A lack of reasoning on an issue of competence cannot lead to a declaration of incompetence: only the substance of a measure may be *ultra vires*. This is another aspect of the German judgment that ignores conventional legal methods. As Mattias Wendel puts it, it only reflects the willingness of the German Court 'to show a way out of the deadlock in which it has manoeuvred everyone involved'. At the same time, it demonstrates that 'there actually was no *ultra vires* act.'[85]

84 M. Wendel, n 11 supra, 990. Similarly, F. C. Mayer, n 51 supra, 755.

85 M. Wendel, n 11 supra, 991.

In any event, even if the German Court had dealt with the substance of the proportionality principle, it would remain hard to understand how a possible breach of the strict proportionality review proposed by the German Court could constitute a *manifest and structurally significant* breach of the Union's order of competences (within the meaning of the *Honeywell* case law), if the measure under review has been held compatible with the less exacting proportionality test (*manifest* error of assessment) applied by the Court of Justice. Could one court conclude that there is no manifest error of assessment while the other court finds a manifest and structurally significant breach? This would imply that the Court of Justice's analysis was so deficient that it could not even ensure the minimum respect of proportionality that would be required to avoid manifest breaches. This position also defies legal logic.[86]

6. The prohibition of monetary financing

The second problematic aspect of the German judgment concerns the part in which it confirms the compatibility of the Public Sector Purchase Program and of the judgment of the Court of Justice with the prohibition of monetary financing contained in Article 123 TFEU.

The German Court's interpretation of Article 123 TFEU suffers from the same problems as its proportionality analysis. This provision concerns substantive law and is unrelated to the division of powers between the Union and its States. The finding of a breach of Article 123(1) TFEU would not mean that the European Central Bank was acting beyond its competences, but that it was acting unlawfully. If *ultra vires* review were acceptable, which it is not as a matter of Union law, it does not seem legitimate or logical to extend it to the interpretation of Article 123 TFEU.

That part of the German *Weiss* judgment seems incoherent when compared with the part on monetary policy, and may reveal a compromise between the members of the German Court. After learning that the Court's approach renders the criteria that ensure compliance with Article 123(1) TFEU 'practically meaningless' or 'largely ineffective',[87] it comes as a surprise to read that there is no manifest circumvention of Article 123(1) TFEU after all. The German Court's intervention is more subtle here than in the part on the definition of monetary policy, although it is also based on sandy grounds. While as regards competence there was an *ultra vires* finding, this was only based on the lack of assessment as regards the German Court's conception of proportionality, without ruling on the merits. This approach at least left some room to try to find a solution, even though, as I will explain later, the remedy may be worse than the illness.

As regards the prohibition of monetary financing, the judgment of the German Court concerns the substance of the applicable provision, not only the reasoning, and this could (also) have a lasting influence on the monetary policy of the European Central Bank. The difference with the Court of Justice's approach is clear.

Article 123(1) TFEU only prohibits the European Central Bank to 'purchase *directly*' debt instruments from the Member States. The presence of the word 'directly' is not accidental – a more absolute prohibition would have included the term-of-art 'directly or indirectly'. This means that the intention was to allow for 'indirect purchases' – i.e. purchases in secondary markets, which are indeed provided for in the Statute of the European Central Bank. In consequence, the Court of Justice considers that, while Article 123(1) TFEU 'prohibits all

86 See F. C. Mayer, n 51 supra, 751: measured by the standards of *Honeywell*, 'the *ultra vires* verdict of the Senate majority of 5 May 2020 is simply not tenable.'

87 Ibid, respectively paras 197 and 214.

financial assistance from the ESCB to a Member State', it 'does not preclude, generally, the possibility of the ESCB purchasing from the creditors of such a State, bonds previously issued by that State'.[88]

Nevertheless, the Court added two limits to prevent circumventions of the prohibition. Firstly, 'the ESCB cannot validly purchase bonds on the secondary markets under conditions which would, in practice, mean that its intervention has an effect equivalent to that of a direct purchase of bonds from the public authorities and bodies of the Member States'.[89] Secondly, 'the ESCB must build sufficient safeguards into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123 TFEU, by satisfying itself that the programme is not such as to reduce the impetus which that provision is intended to give the Member States to follow a sound budgetary policy'.[90]

In both *Gauweiler* and *Weiss*, the Court of Justice mentioned a number of conditions that are part of the respective programs as justifying their compatibility with Article 123 TFEU. At the same time, the Court never stated that those safeguards would be cumulative conditions, and that a programme with less or different safeguards would breach that Treaty provision. Under the Court's case law, other conditions could ensure respect for that provision, or special circumstances may justify a less constrained programme.

In the German *Weiss* judgment, those contingent conditions are restated as a hard list,[91] giving the impression that the absence or softening of any of them could lead to a breach of Article 123(1) TFEU, and that this understanding is a condition not to declare this part of the judgment of the Court of Justice *ultra vires* as well. In another turn of the screw, this aims at creating a straitjacket for the future design of such measures.

An immediate difficulty raised by this fact is that some of these safeguards are not present in the Pandemic Emergency Purchasing Programme of the European Central Bank, which had been adopted when the judgment was issued, and has recently been challenged before the German Court.[92] While the press release of the German Court explained that the judgment did not apply to the new programme, the final part raises serious doubts concerning its compatibility with Article 123 TFEU (in the interpretation of the German Court).[93] This creates legal uncertainty around the new pandemic programme, with unpredictable consequences.[94]

7. Whose budgetary autonomy?

A similar assessment applies to the part of the judgment on 'risk sharing'. The Court of Justice considered this question hypothetical and inadmissible, as the Programme did not provide for the sharing of possible losses between national central banks. Nevertheless, the German

88 *Pringle*, n 14 supra, para 132; *Gauweiler*, n 14 supra, para 95; *Weiss*, n 3 supra, para 103.

89 *Gauweiler*, n 14 supra, para 97; *Weiss*, n 3 supra, para 106.

90 *Gauweiler*, n 14 supra, paras 100 to 102 and 109; *Weiss*, n 3 supra, para 107.

91 See M. Maduro, n 80 supra, 4.

92 See https://www.omfif.org/2020/06/fresh-german-legal-battle-over-ecb-easing/; and https://www.lefigaro.fr/flash-eco/virus-plainte-en-allemagne-contre-les-aides-de-la-bce-20210311.

93 See A. A. M. Mooij, 'The legality of the ECB responses to COVID-19', (2020) 45 *European Law Review*, 713-731.

94 See M. Maduro, n 80 supra, 4.

Court ruled on the substance, without any guidance from the Court of Justice, to find that the adoption of 'such a risk-sharing regime is not intended, and *would in any case be prohibited under primary law*',[95] requiring a Treaty amendment. The German Court also used this part of the judgment to restate its rigid approach on budgetary matters, in particular to recall that it sees Articles 123 and 125 TFEU as enshrining a principle of 'national budget autonomy', and that the Treaties 'do not allow a redistribution among national budgets'.[96]

The Court of Justice did mention that no provision of primary law provides for the sharing of losses among national central banks and that the European Central Bank decided not to adopt such a decision.[97] However, the Court did not hold that any risk-sharing regime would be incompatible with the Treaties and could not be established by the European Central Bank. While losses of national central banks may not be compensated within the European System of Central Banks, Article 33.2 of the Statute contains a rule on the allocation of net profits *and losses* of the European Central Bank itself. This means that risk- and loss-sharing is provided for by primary law for the direct interventions of the Bank. It would be sufficient for the European Central Bank to carry out market operations itself, not through national central banks, to operate under a risk-sharing regime provided by the Treaties. What we have here is another attempted turn of the screw from the German Court.

This part of the judgment not only stresses the extent to which the German Court's interpretation would limit any form of debt or risk mutualisation in a spirit of commonality and solidarity in the Union. It is also based on a rigid conception of national budgetary autonomy that seems to rule out the Union's own budgetary autonomy, creating immense hurdles for the Union to have a financial model that can cope with its changing needs and challenges, and even questioning the traditional operation of the Union's budget, which has always involved redistribution between and within the States. One may wonder, once again, whether this is in line with previous case law of the German Court itself, which had only excluded that the type and level of public spending are, *to a significant extent*, determined at the supranational level, and not that the Bundestag should maintain control over 'all essential decisions on revenue and expenditure'.

As regards debt and risk mutualisation, the German Court conflates democracy, budgetary autonomy and responsibility. Any form of mutualisation or 'fiscal transfer' becomes 'an encroachment on German democracy',[98] i.e. on the power of the Bundestag to determine revenue and expenditure. As Miguel Maduro has argued, the German Court considers that mutualisation could make Germany liable for decisions taken by other Member States, limiting the democratic self-determination of the German people. This leads the German Court to impose strict limits and conditions on what Germany could be liable for – requiring, in particular, the involvement of the Bundestag. In consequence, the participation of Germany in any form of debt or risk sharing could be precluded. Besides, these limits are based on the 'eternity clause' of the Basic Law (Article 79(3)), and it would not be possible to overcome them through constitutional amendments or Treaty revisions.[99]

It has been argued that this could have the positive effect of dealing with these matters through genuine Union own resources, and to channel solidarity through the Union's budget.[100] Miguel Maduro advocates an approach where 'such risk is shared on the basis of limited

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95 *Weiss* judgment of the German Court, n 4 supra, para 228.

96 Ibid., para 226.

97 *Weiss* judgment of the Court of Justice, n 3 supra, paras 162-163.

98 M. Maduro, n 80 supra, 4.

99 Ibid, 4-5.

100 A. Bobic and M. Dawson, n 54 supra, 1997.

liabilities that are guaranteed by resources that do not depend on the States but are genuinely European. In this case the liabilities of the different European's peoples will not go beyond what they may be required to pay for those own resources as citizens of the Union. Their democracies will not be liable for the other European peoples' decisions'.[101] Paul Dermine has also argued that the German judgment may have prompted the 'emergence of a stronger fiscal pillar', acting 'as a true catalyst', and triggering 'a fundamental rethinking of the economic constitution of the Eurozone which was long overdue'.[102]

This seems to be the way that has been followed in response to the COVID-19 crisis, with the New Generation European Union programme. This set of measures allows the Union to borrow from the markets to finance loans and spending for 750 billion euros, to be implemented in the short term, while the Union's debt will be repaid in the longer term (until 2058) on the basis of future own resources. The expenditure, which implies a certain degree of solidarity, will be channelled through the Union's budget.

Several caveats must however be made to a 'compensatory' approach that presents an enhanced fiscal policy at Union level as the replacement for a monetary policy that would be curtailed by the strictures of the German Court.

The first is that, however significant, this intervention is one-off, temporary and exceptional. In the circumstances, it is not possible to see it as a 'paradigm shift' in the Union's economic constitution.[103]

Secondly, this intervention should not replace an effective monetary policy of the European Central Bank. The euro area needs both legs to stand on its feet. Sufficient policy capacities from the European Central Bank, comparable to those of other central banks of advanced economies, should be preserved regardless of the budgetary outlook. Therefore, an exceptional rise in Union expenditure (overall still rather modest), or even a permanent rise in future, is not a valid argument to justify the straitjacket that the German Court wants the European Central Bank to wear. At most, that reality on the side of budgetary policy could be taken into account by the Bank when it calibrates its programmes.

Thirdly, it is unclear whether this exceptional borrowing for spending will not be problematic before the German Court. The points it made in the *Weiss* judgment do not only concern debt or risk mutualisation, but the whole budgetary area. The Union's budget is subject to the principles of balance, long-term equilibrium, and financing through own resources. These are substantive principles, not limits to competence, and the new financing scheme was considered compatible with them by the Council Legal Service, in a thorough and solid opinion.[104] However, this was based on interpretations that may be controversial under Karlsruhe's eyes, in view of its rigid approach to national budgetary autonomy, be it from the *ultra vires* perspective (as the German Court seems to have conflated the analysis of competence with the assessment of legality), or from the point of view of constitutional identity (to which 'budgetary autonomy' seem to belong, even though it is not mentioned in Article 20 of the Basic Law). Unsurprisingly, a new case has been lodged before the German Court and for some weeks it delayed the German approval of the Own Resources Decision, which received the support of more than two thirds of the members of the Bundestag and of all the members of the Bundesrat. On 15 April 2021 the German Court rejected the request for interim

101 M. Maduro, n 80 supra, 5.

102 P. Dermine, n 62 supra, 550.

103 For such a view, see M. Goldmann, 'The European Economic Constitution after the PSPP judgment: Towards Integrative Liberalism', (2020) 21 *German Law Journal*, 1058, 1072-1073 ('long-term consequences', 'new political paradigm', etc.).

104 Opinion of the Council Legal Service, No 9062/20, 24 June 2020.

measures, paving the way for the approval of the Own Resources Decision by Germany.[105] The main case remains pending, with the possibility of *ultra vires* review looming in the background once again.

If they are not controversial in Karlsruhe, fourthly, it might be because the whole legal construction, perhaps in part with a view to avoiding frictions with the German case law, was based on the idea that the Union's borrowing could only be allowed if it was backed by an amendment to the Own Resources Decision, to provide for the necessary headroom for future reimbursements – while not immediately establishing the Union' own resources that would be required to finance the overall operation. Without additional *genuine* own resources, however, those extra needs will have to be filled in with the resource based on the gross domestic product of the Member States, and the Union's budget will remain a mosaic of national budgetary capacities, with very little autonomy of its own.[106]

This illustrates the narrow bounds of the Union's budgetary autonomy under the Treaties. Concrete decisions on revenue and expenditure are adopted in the yearly budget through a special legislative procedure in which the Council acts by qualified majority (Article 314 TFEU). However, the budget is constrained by two other acts: the Own Resources Decision, whose adoption and amendment requires a unanimous agreement in the Council and the approval of all the Member States (Article 311 TFEU); and the multiannual financial framework, also subject to unanimity in the Council, plus the consent of the Parliament, which establishes the amounts of annual ceilings on commitment appropriations by category of expenditure and of the annual ceiling on payment appropriations (Article 312 TFEU).

The fundamental decisions on revenue and expenditure in the Union are therefore subject to unanimity and tend to reflect the minimum common denominator. Under those rules, the Union's budgetary autonomy is severely constrained. Another consequence of these decision-making rules is the risk of deadlocks and of undue linkages by Member States to obtain concessions in other files that are subject to the ordinary legislative procedure.

In sum, the limited, exceptional and temporary increase in the Union's fiscal capacity in the context of the COVID-19 crisis cannot be seen as a 'fundamental rethinking of the economic constitution of the Eurozone', or as a replacement for a robust monetary policy of the European Central Bank. Today, the idea of bringing the Union's decisions on own resources and the multiannual financial framework under qualified (or super-qualified) majority seems to be political science fiction. Even if that were to happen, one should still preserve an effective scope for the monetary policy of the European Central Bank.

8. The European Central Bank and the European economic constitution

The retentive conceptions of the German Court on monetary policy, the prohibition of monetary financing, risk sharing and budgetary matters reflect a peculiar vision of the European Central

105 BVerfG, order of the Second Senate of 15 April 2021, 2 BvR 547/21. This is only a decision on interim measures and one cannot give it too much significance as regards the general development of the German constitutional case law on Union matters.

106 On 22 December 2021, the Commission made its proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union (COM(2021) 570 final). The new own resources proposed are not genuine own resources but take the form of additional contributions from the Member States.

Bank and of its role in the Union system. Through those conceptions, the German Court is pushing for a highly problematic understanding of the economic constitution of the Union.

Paradoxically, the strong independence granted to the European Central Bank in the Treaty of Maastricht faithfully reflected the German policy preferences of that period.[107] It was also entrenched in the Basic Law with the insertion of Article 88: 'The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, *which is independent and committed to the overriding goal of assuring price stability*.'

This provision was at the heart of the Maastricht decision of the German Court of 1993.[108] It was on this basis that the German Court accepted the relevant part of the Maastricht Treaty, to protect the European Central Bank from contingent democratic pressures. The Maastricht decision did not impose any limit on the independence of the European Central Bank and contained no reference to the need of safeguarding State competences or democratic processes in that regard. There was no suggestion that economic policy could constitute a limit to monetary policy, or that proportionality could be a relevant criterion to define it. It is remarkable that what was the main condition for the legality of the Economic and Monetary Union seems to have become, in the *Weiss* judgment, 'the central problem'.[109]

Prior to the birth of the euro, the monetary policy of the Bundesbank had *never* been subject to any sort of constitutional review by the German Court.[110] The approach of the German Court remained unchanged, and respectful of Union law, in an important judgment of 31 March 1998 on German participation in the third stage of European and Monetary Union.[111] The complainants argued that by approving the passage to the third stage, the national parliament had breached their rights to democratic participation and property. The allegations based on democracy were curtly dismissed by the German Court, since '[t]he standard for and manner of entry into the third stage of monetary union are regulated in the Treaty [on European Union] and have acquired legally binding force in Germany by virtue of the ratifying legislation for which the Bundesrat and Bundestag were responsible'. In consequence, '[t]he Bundestag has no further competence or powers in relation to the protection of the sovereign authority which has already been transferred under the [Treaty on European Union]. In this respect a violation of Article 38(1) of the Basic Law does not come into question'.[112]

The allegations on the right to property were also dismissed. The German Court mentioned Article 88 of the Basic Law, 'which expresses the will of those amending the Constitution to transfer the tasks and authority of the German Bundesbank to a European Central Bank on condition that the European Central Bank is independent and is bound by the primary objective of price stability'. It emphasised that after that stage, with the creation of the common currency, 'the guarantor of this money ceases to be the German State and the prevailing strength of the economy in Germany'.[113] Prior to that decision, the government, the Bundestag and the Bundesrat keep a responsibility 'to assist the formation of the monetary

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107 See F. C. Mayer, n 51 supra, 760, referring to the account by H. James, *Making the European Monetary Union* (Harvard University Press, 2020, *passim*). See also F. Martucci, n 73 supra, para 20.

108 See n 15 supra, section C.II.3.a.

109 H.-J. Hellwig, n 65 supra, 2501.

110 M. Wendel, n 11 supra, 990. See F. C. Mayer, n 51 supra, 752.

111 BVerfGE 97, 350; English translation in A. Oppenheimer, *The Relationship between European Community Law and National Law: The Cases* (vol. 2, Cambridge University Press, 2003), 258-269.

112 Ibid, 263.

113 Ibid, 266.

union as a community of stability'. This required them 'to examine and evaluate economic data', to make 'an overall forecast of the stability of the planned monetary union'. However, the 'decisions which need to be made in this regard cannot be taken at the individualised level of a basic right. It is the political organs responsible for the overall assessment of general developments which are answerable and are able to scrutinize and correct their decisions as developments unfold'.[114]

A similar point was made in relation to Article 2(1) of the Basic Law: 'Long-term economic developments and the consequences which follow therefrom from the stability of a currency cannot be assessed from the point of view of an individual and isolated intervention, but must be constantly moulded and continually scrutinized. *This is not a matter for the courts but for the Government and Parliament*.'[115]

It is remarkable that Article 88 of the Basic Law, the specific provision on the European Central Bank, is only mentioned twice in the German *Weiss* judgment, in passing and without drawing any consequences from it. Article 88 of the Basic Law has fallen into oblivion, unenforced. One wonders what has happened during these three decades that might explain this astonishing sea-change. The obvious explanation could be: *It's the crisis, stupid!*

There may be some truth to this, but the reality might be more complex. The reasons behind the *Weiss* decision resemble those of the *Lochner* line of case law of the United States Supreme Court, which are not far away from the ordoliberal tenets underlying the German Court's approach. Until its reversal with the 'switch in time' of 1937, in the context of Roosevelt's 'court-packing plan', paving the way for the New Deal era, *Lochner* and its progeny stood not only for excessive judicial activism or for a very extensive substantive reading of the due *process* clause (the 14th amendment of the United States Constitution), but for a serious constitutional crisis prompted by obstinate judicial opposition to governmental action on the basis of questionable ideological grounds.[116] For decades, that opposition had unfortunate and lasting consequences for the United States economy. It also damaged the Supreme Court's authority and legitimacy.

That anti-interventionist stance was based on a particular understanding of 'neutrality', with a preference for 'government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law'. According to Cass Sunstein, '[g]overnmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behaviour of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. […] Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship'.[117]

In its *Weiss* judgment, the German Court is 'lochnerising' in its own way, more than a century later, ignoring the lessons of the laboratory of constitutional history. The national right to democratic participation is construed as a right that allows any citizen to oppose

114 Ibid, 268.

115 Ibid, 269 (emphasis added).

116 *Lochner* v *New York*, 198 U.S. 45 (1905) and its progeny were reversedd by *West Coast Hotel Co.* v *Parrish*, 300 U.S. 379 (1937). On the different dimensions of Lochner, see S. Choudhry, 'The *Lochner* era and comparative constitutionalism', (2004) 2 *I-CON*, 1, 6-15.

117 C. Sunstein, 'Lochner's Legacy', (1987) 87 *Columbia Law Review*, 873, 874.

supranational interventions in the economy at any time.[118] However, a restrictive judicial approach to those interventions in the context of a protracted and serious crisis may lead to political unrest and constitutional instability, cutting off the very branch on which the judiciary is sitting.

In terms of substantive economic constitutional law, the German Court seems to prefer limited action to strong measures of the European Central Bank, as if passivity was not, in itself, a policy choice with serious consequences. The justification for this is less related to democratic tenets than to German ordoliberal post-war thinking, with its insistence on the value of money, property, contract, and fair competition.[119] From that perspective, the very legitimacy of the State would require that price stability and the basic structures of the market are protected through hard and fast legal provisions.[120]

Hence the insistence on preserving the *status quo* through a particular interpretation of legal provisions,[121] preventing losses or even the risk of losses for the economic interests of shareholders, tenants, real estate owners, savers or insurance policy holders, i.e. the preservation of the existing distribution of wealth and entitlements *between* and *within* the States, which is seen as the natural consequence of market discipline and not as the result of legal and political constructs – including the customs union, the internal market with free competition, and the Economic and Monetary Union which are at the core of the Union, with their own redistributive effects. From such a perspective, which is deeply rooted in a sovereign conception of the market and the State as its servant, it is very difficult to see the Union at all, or to interact in a meaningful way with the global economic system.

The Treaties, however, do not correspond to a pre-determined model, and must be interpreted from a Holmesian perspective of *real economic neutrality*.[122] While the primary objective of monetary policy in the euro area is 'to maintain price stability', this is accompanied by the aim of supporting the general economic policies in the Union to contribute 'to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union' (Article 127(1) TFEU), which include *inter alia* 'a highly competitive social market economy, aiming at full employment and social progress'. Those other objectives cannot be discarded as vague desiderata that the European Central Bank would be free to ignore.[123] While securing its main objective, the Bank is legally bound to integrate those accompanying objectives in its monetary policy.

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118 See T. Giegerich, 'Putting the Axe to the Root of the European Rule of Law: The Recent Judgment of the German Federal Constitutional Court on the Public Sector Asset Purchase Programme of the European Central Bank', *Saar Expert Papers*, 6/2020, 6.

119 See I. Fleichtner, n 77 supra, 1093-1094 and 1099.

120 See M. Foucault, *Naissance de la biopolitique, Cours au Collège de France, 1978-1979* (Seuil-Gallimard, 2004), 120-122 (predominance of the market over the State), 144-145 (importance of price stability), and 168-184 (new conception of the role of law as regards State and market).

121 F. Martucci, n supra 73, calls this 'fétichisme juridique des règles'. It is transparent in the commentary of P. Kirchhof, former member of the German Court and among the few defenders of the *Weiss* judgment ('Die Rechtsarchitektur der Europäischen Union' (2020) *Neue Juristische Wochenschrift*, 2057), with references to money as an extralegal reality closely connected to freedom (2060 and 2062), and to the notion of 'Kampf um das Geld' (*passim*). The recent judgment of the German Constitutional Court annuling the rent cap for apartments in Berlin, penned by the same reporting judge, shows that the ordoliberal position is also followed in internal matters (BVerfG, judgment of the Second Senat of 25 March 2021, 2 BvF 1/20).

122 I refer to Justice's Holmes dissent in *Lochner* v *New York*, 198 U.S. 45 (1905).

123 This is the view of L. P. Feld and V. Wieland, 'The German Federal Constitutional Court ruling and the European Central Bank's strategy', *Freiburger Diskussionspapiere zur Ordnungsökonomik*, No. 20/05, at page 13 ('the ECB has substantial freedom whether to select and weigh such secondary targets or not').

Secondly, the aim of maintaining price stability cannot be understood as an obligation to protect the existing distribution of wealth and entitlements between the euro area States and within those States, or the value of the single currency as currently held by different groups. The objective is macroeconomic and systemic: price stability at large and in the long run (defined by the European Central Bank as an inflation rate below 2% but close to it), and not the protection of private property or savings. Safeguarding price stability may actually often require measures that have effects on the current distribution of wealth between and within the States. It is likely, moreover, that any measure of monetary policy has such effects.

In any event, the Public Sector Purchase Programme was justified by reference to the primary objective of monetary policy. A recital of the decision establishing it explained that, '[i]n an environment where key [European Central Bank] interest rates are at their lower bound, and purchase programmes focussing on private sector assets are judged to have provided measurable, but insufficient, scope to address the prevailing downside risks to price stability, it is necessary to add to the Eurosystem's monetary policy measures the [Public Sector Purchase Programme] as an instrument that features a high transmission potential to the real economy'.[124] This means that the European Central Bank was no longer able to conduct monetary policy with the interest rate instrument, which could not be lowered any further. The scenario of a 'deflationary spiral',[125] which is not in line with the objective of price stability, had to be tackled with the instruments provided for by the Statute of the European Central Bank, notably with asset purchases, accompanied by sufficient safeguards to ensure their proportionality. It is doubtful that inaction, 'allowing a temporary divergence from the inflation target', would have been in line with Union law,[126] when the instruments provided to the Bank allowed it to pursue its primary objective in such circumstances.

9. Did the judgment have any impact?

It has been suggested that, not taking a definite position on the measure under review, that judgment shows an island of self-restraint in its oceanic interference with the European Central Bank's monetary policy. The judgment leaves some room and time for accommodation, providing a 'weak remedy' and deferring 'the final assessment to the political organs'.[127] The European Central Bank or the Bundesbank could provide the required explanations on proportionality during the three months given to that effect. If those explanations were to be acceptable, the whole episode would remain without any impact on the Public Sector Purchase Programme.[128] From this perspective, the consequences of the judgment would be limited, 'trivial',[129] almost non-existent. Or would they? Would there be no breach of Union law if the European Central Bank could continue to operate its Programme as before the judgment?

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124 See Decision (EU) 2015/774, n 2 supra, recital 4. See F. Martucci, n 73 supra, para 15.

125 See L. Bini Smaghi, n 76 supra, 5.

126 See N. de Boer and J. Van 'T Klooster, 'The ECB, the Courts and the issue of democratic legitimacy after Weiss', (2020) 57 *Common Market Law Review*, 1689, 1691, and 1707-1708 (suggesting that the European Central Bank could have disregarded the inflation target on a temporary basis, as proposed by the German member of the Governing Council, Mr Weidmann).

127 T. Violante, 'Bring Back the Politics: The PSPP Ruling in its Institutional Context', (2020) 21 *German Law Journal*, 1045, 1052.

128 See, for example, D. Grimm, 'A long time coming', (2020) 21 *German Law Journal*, 944, 949; M. Wendel, n 11 supra, 981.

129 See J. H. H. Weiler and D. Sarmiento, 'The EU Judiciary after Weiss – Proposing a New Mixed Chamber of the Court of Justice', Op-Ed, *EU Law Live*, 1 June 2020, 1.

This may be a simplistic reading of the situation resulting from the judgment. In the interface between law and policy, the grounds of a judicial decision are much more significant than its operative part. The grounds have a bearing on future policy choices and future case law. It is through arguments that the German Court intends to have a lasting impact on monetary policy, on Union law, and on the Court of Justice.

The German judgment is designed like a set of Russian dolls: first comes the *ultra vires* finding on the *Weiss* judgment of the Court of Justice; inside, and based on the same arguments (wearing the same clothes, as it were), we find the *ultra vires* finding on the European Central Bank. If the second finding remained without effects, the first one would not vanish. It would continue to deploy effects of its own.

The threat for the monetary policy of the European Central Bank and for the economic constitutional law of the Union cannot be minimised. Requiring detailed explanations from German institutions to show compliance with its own understanding of the limits of monetary policy, the German Court pretends to impose those limits on the competent Union institutions. Under German law, the standard of review of the Court of Justice is being replaced by that of the German Court. It would be incorrect to think that nothing has happened. A lot would have happened about the standard of review that applies to monetary policy as far as its implementation in Germany is concerned.

The obvious intention of the German Court is to try to narrowly frame the policy debate for the future. That may be much more influential, if followed by the relevant actors, than the decision in the individual case. The Commission, the Court of Justice and the Central Bank have recalled, in press statements issued right after the judgment, that the European Central Bank is only subject to the jurisdiction of the Court.[130] Nevertheless, if in spite of such protestations the Central Bank 'internalises', in full or in part, the approach of the German Court, with strict proportionality and the conception of monetary policy as a second-order competence, the standard of review of the Court of Justice would be displaced and become moot. Monetary policy would be conducted within the stricter limits of the German Court, and the policy margin of the European Central Bank would be diminished. The Bank would not be subject to two masters at the same time (a situation that would in itself be harmful). A stricter master would have replaced the less exacting one. This would amount to a partial amputation of Union law, absorbed and redefined by German constitutional law.

It could also harm the Union and the euro from a global perspective. Monetary policy is also a matter of competition between monetary areas. The measures that the European Central Bank is implementing with its Public Sector Purchase Programme are similar in nature and scope to measures taken many years before by leading central banks to tackle deflation. It was that prior practice which showed that, in a low interest rate situation, large-scale purchases of government bonds could help bringing the inflation rate closer to the target.[131] If followed, the case law of the German Court would weaken the European Central Bank as a monetary policy maker, undermining the credibility and appeal of the common currency, and leaving the euro area in a fragile position vis-à-vis other monetary zones. Coupled with a constrained Union budget, this could compromise the optimality and sustainability of the euro area.

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130 Statement of Commission President von der Leyen of 20 May 2020 (https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_846); press release of the Court of Justice of 8 May 2020 (https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf); and press relase of the European Central Bank of 5 May 2020 (https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html).

131 The United States Federal Reserve started its asset purchases in 2009, in the wake of the Bank of Japan and other central banks, five years before the European Central Bank, which, in spite of a severe crisis, raised interest rates twice in 2011 (see P. Benigno and others, n 82 supra, 7).

The German *Weiss* judgment puts the European Central Bank in a very difficult situation. The Central Bank could continue to operate as before, giving a purely formal justification to the German Court, or allowing the Bundesbank to give additional explanations to the Bundestag, without expressly accepting the framework of analysis of the German judgment.

Another possibility is that the European Central Bank genuinely tries to accommodate the requirements of the German Court, relinquishing part of the policy scope that the Treaties grant it. This would mean that the Bank would no longer be subject to the Union law, but to a 'deviant' version thereof.[132] The correct version would become irrelevant, and this part of the economic constitutional law of the Union would be determined by the German Court.

The Court of Justice finds itself in a similar situation as regards its future case law. Will it maintain its jurisprudence, which has allowed it to protect the stability of the euro area and perhaps its very subsistence, while keeping some friction with the German Court? Or will it bend and adapt its case law, compromising the stability and viability of the euro area, and preventing the European Central Bank from conducting an effective monetary policy on a par with the leading central banks of the global economy?

What happened in practice was that the European Central Bank refrained from adopting a new decision on the Public Sector Purchase Programme, as seemed to be required by the German judgment. This is understandable, as an explicit acquiescence would have suggested that the Bank was subject to the German Court's jurisdiction, while it is only subject to that of the Court of Justice. At the same time, the discussion of monetary policy held by the Governing Council of the European Central Bank in June 2020 contained some language that echoed the balancing required by the German Court.

In the meeting, some members argued 'that the proportionality assessment of any monetary policy measure had to consider, among other things, the degree to which the measure contributed to achieving the monetary policy objective, on the one hand, and possible unintended side effects, on the other hand. It required a judgement as to whether other policy measures were available that were as effective and efficient while offering a better balance between intended and unintended effects.' An explanation followed on how the Public Sector Purchase Programme effectively achieved its monetary policy aim. The Governing Council clarified that, '[i]n assessing the benefits and costs of asset purchases, the relevant benchmark *was not the status quo*, but *a counterfactual situation in which policy accommodation through asset purchases had not been provided*'. The conclusion was a 'broad agreement among members that while different weights might be attached to the benefits and side effects of asset purchases, *the negative side effects had so far been clearly outweighed by the positive effects* of asset purchases on the economy in the pursuit of price stability. However, it was also noted that it could not be ruled out that unintended effects could increase over time and eventually outweigh the overall positive effects. It was thus seen as important to continuously assess the effectiveness and efficiency of the monetary policy measures, their transmission channels and their benefits and costs.' After the discussion, the main monetary policy decision was actually a large increase of the envelope for the Pandemic Emergency Purchase Programme, by 600 billion euros.[133]

The Bundestag adopted a resolution on the matter on 2 July 2020. The resolution starts recalling that '[t]he Federal Republic of Germany is firmly anchored in the European Union.

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132 For the creation of 'versions' of Union law in an 'alternative legal universe', see F. C. Mayer, n 51 supra, 742.

133 Account of the monetary policy meeting of the Governing Council of the European Central Bank held on 3-4 June 2020, https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html (emphases added).

European integration is a mandate of our Basic Law. It has secured peace in Europe, made State unity possible, and contributed to prosperity and social progress'. Secondly, the resolution explained the various ways in which it already monitored monetary policy, while respecting the independence of the European Central Bank. Thirdly, it referred to the policy discussion of the Governing Council of the European Central Bank, and to confidential documents of the Bank that it had received through the Bundesbank. On this basis, the Bundestag concluded that the proportionality requirements of the judgment of the German Court were clearly met by the Public Sector Purchase Programme. The Bundestag also noted that the German ministry of finance had reached the same conclusions.[134]

The Public Sector Purchase Programme thus remains in place, the Bundesbank continues to participate in it, and the volume of the Pandemic Emergency Purchase Programme is enhanced. Did the competent institutions comply with the judgment of the German Court, in line with its stricter test, or with the judgment of the Court of Justice?

It is difficult to say. On the one hand, the policy discussion of the Governing Council echoed the proportionality test proposed by the German Court. At the same time, while the Governing Council assessed whether the positive effects of asset purchases outweighed their negative side effects, reaching a 'broad agreement' that this was the case, it did not do so to determine whether its measures remain within the bounds of monetary policy, but whether they are effective and proportionate *as monetary policy*. In any event, its analysis does not take the *status quo* as the baseline for the assessment. For the European Central Bank, the level of economic analysis is European, not national, and it requires a comparison of the overall benefits and costs vis-à-vis 'a counterfactual situation' in which the asset purchase measures would not have been adopted.

The Bundestag's resolution shares this understanding. Significantly, it also argued that the Bundestag had all along complied with its 'responsibility for integration', giving to this notion a more positive meaning than the Second Senate of the German Court. The resolution starts recalling that Germany is 'firmly anchored' in the Union, that European integration is mandated by the Basic Law and has brought about the reunification of Germany, leading to 'prosperity and social progress'. The representatives of the German people strongly counter, with a firm restatement of allegiance to the European project, the overtones of disengagement that one could perceive in the German *Weiss* judgment. Secondly, the voting on this resolution tells a lot about the ideological constellation around these issues, which also becomes clear in the light of the identity of the applicants in *Gauweiler* and *Weiss*. The resolution was approved with support from all the mainstream parties (CDU/CSU, SPD, FDP and the Greens), counting for 545 out of the 709 seats of the Bundestag. Only *Alternative für Deutschland*, the extreme right party, voted against it (88 seats), while the extreme left (*Die Linke*, 67 seats) abstained. Judges are not politicians and should apply the law. At the same time, constitutional courts have a central political role and responsibility, and this suggests that, while acting in the name of democracy, the German Court, at any rate its Second Senate, may be losing touch with the position of the mainstream democratic forces in Germany.

The overall picture indicates that the policy response to the judgment of the German Court has been expediently and intelligently designed by economists and policy-makers who want to proceed with their very important and complex business, and who might regard this constitutional accident, and the lawyers responsible for it, with some embarrassment. It is unclear whether the European Central Bank has 'internalised' the strict proportionality analysis required by the German Court. The question may be moot, as central bankers are not judges and mostly care about the effectiveness of their monetary policy decisions. One may also deduce that the European Central Bank was already conducting a normal proportionality

134 'Urteil des Bundesverfassungsgerichts zum Anleihekaufprogramm PSPP der Europäischen Zentralbank' (document 19/20621, accessible at https://dip21.bundestag.de/dip21/btd/19/206/1920621.pdf), 3-4.

analysis before, and that it will continue to do so in future, providing transparent explanations to ensure *ex post* accountability before the competent Union institutions. As such, therefore, its policy reaction does not constitute a fundamental change of trajectory or a clear departure from Union law as interpreted by the Court of Justice.

In a subsequent ancillary application, the German Court was asked to rule on whether the follow-up by the competent German institutions and, indirectly, by the European Central Bank constituted a correct implementation of its judgment. This application has been rejected by order of 29 April 2021.[135] The German Court considered the application inadmissible, as it referred to measures taken after the judgment, which cannot be subject to an order of execution.[136] In any event, it also considered it unfounded, holding that it was not established that the measures taken by the German Government and the Bundestag, in cooperation with the European Central Bank, following the *Weiss* judgment are 'manifestly inadequate or essentially equivalent to complete inaction'.[137] Before reaching that conclusion, the German Court recognised that the competent German institutions have 'a broad margin of appreciation, assessment and manoeuvre' in exercising their responsibility with regard to European integration.[138] Significantly, this margin seems to apply as well in the context of the implementation of an *ultra vires* judgment. As a result, the ensuing obligations appear again to be mere obligations of means rather than concrete obligations of result. At the same time, the German Court refrained from taking a position on whether the proportionality assessment of the European Central Bank, as reflected in the resolution of the Bundestag, is in line with its judgment, since it considers that it is not for it to decide, in an ancillary case about the execution of the judgment, whether that assessment 'satisfies the substantive requirements deriving from Art. 5(1) second sentence and Art. 5(4) TFEU in every respect'.[139]

The litigation could thus seem to have ended first with the bang of the judgment and later with the whimper of this order, offering a 'weak remedy' in the concrete case, and deferring the final determination of the issue to 'the political level'.[140] The overall picture is most paradoxical. It is not easy to grasp the meaning and purpose of the whole exercise, as the competent institutions recover, at the stage of the execution of the judgment, the broad margin of appreciation that they seemed to have lost with the judgment. The question to be asked is one of institutional credibility and consistency: What has the German Court *done* in *Weiss*, over and above what it has *written*, and why?

It would be mistaken, however, to conclude that the judgment has remained a purely academic discussion devoid of any impact. This may be the case for the concrete assessment of the Public Sector Purchase Programme, which continues as before, perhaps accompanied by a slightly more elaborate public communication by the European Central Bank on its measures. But new cases are pending, including the one on the Pandemic Emergency Purchase Programme, and it is unclear whether the order on the execution of the *Weiss* judgment can be seen an incipient sign of retreat to a more deferential position, back to *Honeywell* as it were, or as a temporary truce. It is therefore not possible to assess at this stage the actual medium- and longer-term impact of the German judgment on monetary policy

135 BVerfG, Order of the Second Senate of 29 April 2021, 2 BvR 1651/15. For a first commentary, see M. Nettesheim, 'Das Ende eines epochalen Verfassungsstreits: Darlegungsanforderungen der EZB, Integrationsverantwortung und der Beschluss des Bundesverfassungsgerichts vom 29. April 2021', *VerfBlog*, 18 May 2021.

136 Ibid., paragraphs 82 to 88.

137 Ibid., paragraphs 89 to 111.

138 Ibid., paragraph 90

139 Ibid., paragraph 109.

140 T. Violante, n 126 supra, 1052-1053.

in the euro area, on the self-perception and margin of manoeuvre of the European Central Bank, and on the European economic constitution. What this whimper seems to indicate, perhaps, is that the European Central Bank and monetary policy may not have been the main targets of the judgment of the German Court.

10. The Court of Justice and the rule of law

Indeed, the overall tone of the judgment shows that the central targets were the Court of Justice and Union law, perhaps much more than the European Central Bank. While the impact on monetary policy and the European Central Bank is temporary and conditional, leaving room for (a not unproblematic) accommodation, the consequences for the judgment of the Court of Justice and for the Union rule of law are far more drastic, and seem to be permanent.[141] In addition, the German judgment does not seem to be a specific decision confined to the field of Economic and Monetary Union,[142] as it is based, at least in part, on general statements about Union law, the Court of Justice and the division of powers that could be relevant for the European legal order as a whole.

Having threatened for decades, since the Maastricht decision of 1993, to police the division of powers between the Union and its States, the German Court seems to 'finally have acted on it'.[143] One commentator even rejoices in the German judgment, arguing that 'it provides a doctrinal toolbox for national constitutional courts that face competence creep of EU law in their jurisdictions'. This would be 'not a small achievement'.[144]

I fail to see any ground for enthusiasm. Beyond its manifest legal errors and its dubious consequences for the economic constitution of the Union, the judgment of the German Court abandons the cooperative relationship and self-restraint in matters of Union law that its own case law had often emphasised in the past. And it does so at the worst possible time for the Union and its law, as this 'doctrinal toolbox', which seems to be composed of little more than a hammer, is put in the hands of national courts operating in all sorts of political regimes, to oppose Union measures on the basis of 'creative' competence arguments. This toolbox, with its national conceptions and its clear misuse of the principle of proportionality, is bound to be abused in ever more egregious ways by other highest courts, and comparable moves can be expected from national governments (as shown by the immediate enthusiastic reactions of some of them to this 'toolbox' gift).[145] Such uses of those notions will be harmful for constitutional stability in the Union concerning countries where the rule of law is already under severe strain, and where only the Union seems to be able to act to prevent the complete destruction of basic constitutional structures.

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141 See T. Violante, n 126 supra, 1052: 'The FCC thus deflects the CJEU's authority to deliver the last word on the constitutionality of a controversial monetary policy to defer the final assessment to the political organs.'

142 In this I would disagree with A. Bobic and M. Dawson, n 54 supra, 1996, who see the dispute as 'not grounded in the debate over 'ultimate' authority within the EU constitutional framework but rather in the law of EMU itself'.

143 See M. Maduro, n 80 supra, 5.

144 T. Violante, n 126 supra, 1046 and 1057.

145 'Polen lobt Karlsruher Urteil zu Europäischer Zentralbank', *Zeit online*, 10 May 2020; 'Hungary reacts to German constitutional court ruling', *euroactiv.com*, 15 May 2020. 'Eastern European States sense opportunity in German court ruling', *Financial Times*, 10 May 2020.

Several examples can already be given of national constitutional courts that have breached the primacy of Union law in the wake of the *Weiss* judgment of the German Constitutional Court.

In its judgment of 7 October 2021, in a case brought by the Polish Prime Minister, the Polish Constitutional Tribunal declared that the Polish Constitution takes precedence over Union law and that Article 19(1) TEU is unconstitutional insofar as it requires an independent national judiciary.[146] One basis for the judgment seems to be the idea that the Union would be acting 'outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties'. It is noted that European Court of Human Rights has held that, in view of irregularities in the appointment of some of its members, the Polish Constitutional Tribunal is not 'an independent and impartial tribunal established by law' within the meaning of Article 6(1) of the European Convention of Human Rights.[147] However, in a subsequent judgment the Polish Constitutional Tribunal has claimed that this judgment of the Strasbourg Court, and Article 6(1) of the European Convention on Human Rights, are also unconstitutional.[148]

On 8 June 2021, the Romanian Constitutional Court declared that the Romanian Constitution prevails over Union law and over judgments of the Court of Justice, in a case concerning judicial organisation. The Romanian Constitutional Court went so far as to claim that 'Article 148 of the Constitution does not give EU law priority over the Romanian Constitution, so that a national court does not have the power to examine the conformity of a provision of national law, found to be constitutional in the light of Article 148 of the Constitution, with the provisions of EU law.'[149]

It is worrying that the German Court seemed to ignore this wider context and the likely consequences for the rule of law *of* the Union and in the States of a judgment that openly contests the authority of the Court of Justice to interpret Union law, to define the limits of Union competences, and to rule on the validity of Union acts, besides disregarding the binding nature of preliminary rulings. It is difficult to imagine a more serious simultaneous blow to Union law, to the Court of Justice, and to European integration at a time where it has to confront an unending series of crises. I wonder whether the German Court just did not see the wider constitutional implications of its judgment, focused on a purely German discourse on the European Central Bank, or whether it wilfully chose to ignore them. Both possibilities seem problematic, but the second one would seem more worrying, as it would reflect a conscious choice to disregard its wider consequences for the rule of law in the Union over the longer term.

It is telling that some scholars who defended the theory of constitutional pluralism have parted ways with the German Court and consider that its *Weiss* judgment is not a legitimate use of the possibilities that constitutional pluralism would offer, as it does not represent a loyal engagement with Union law on technically correct, commonly agreed and fair grounds.[150]

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146 Case K 3/21. A summary of the operative part is accessible at: https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej. The full judgment has not been published yet.

147 Judgment of 7 May 2021, application No 4907/18, *Xero Flor w Polsce sp. Z o.o* v *Poland*.

148 Judgment of 24 November 2021, Case K 6/21. The operative part is accessible at https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny. The judgment has not been published yet.

149 Decision No 390, of 8 June 2021, accessible at https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf, paragraph 76.

150 See M. Maduro, n 80 supra, 5-6; F. C. Mayer, n 51 supra, 758 (arguing that the judgment 'flies into the face of constitutional pluralism').

For standard Union law and also for constitutional pluralism, the methods of legal discussion used by the German Court present serious shortcomings. A legal issue with consequences for the economy of the euro area and for the Union as a whole was discussed from a purely national perspective, among national lawyers and economists, with a selection of experts that over-represented 'the German banking and insurance' sectors, 'with basically no non-German European expertise in the room'.[151] The same is true of the parties and their lawyers.[152] By contrast, the Court of Justice conducted a European discussion, from the perspective of European law and of the general interest of the Union. This difference may be the cause for the cognitive gap between both judgments – 'meaningless', 'incomprehensible', 'arbitrary' and 'flawed' being, dismally, among the most used words in the German decision, referring to the judgment of the Court of Justice. The main differences between both pronouncements are due to the incompatible perspectives of both courts, and also to their divergent understanding of the role of law and judges as regards the economic system.

The epitome of this State-centred perspective was given by the former president of the German Court, Mr Voßkuhle, in an interview with *Die Zeit* published on 14 May 2020.[153] When asked whether he was not concerned that the Polish Constitutional Court could use similar arguments to erode the rule of law, his curt answer was: '*Die Polen tun, was sie tun, unabhängig davon, was wir tun*.' In its total lack of concern, this response, 'the Poles do what they do independently of what we do', unwittingly transmits a *Weltanschaaung* that does not recognise that the German Constitutional Court is a legal actor in a wider context and that its actions have significant consequences beyond the national borders. That approach erects a legal wall and leads to not seeing Union law and ultimately to not being able to see the Union.

Matej Avbelj, a card-carrying pluralist author, argues that the German judgment is a justifiable use of pluralism and can be distinguished from possible abuses of pluralist tenets by the constitutional courts of regimes with authoritarian tendencies, since the latter go against the 'shared values, common to the Member States',[154] and there the 'room for pluralism is small or even inexistent.'[155] According to Avbelj, the German Court's decision would simply be about the division of powers between the Union and the States, and about protecting the democratically legitimated economic policies of the latter. It would not 'detract from the fundamental values of the Union, in particular of democracy and the rule of law. To the contrary, it strengthens them.'[156]

This argument is perplexing. Without going so far as to claim that constitutional pluralism will perforce lead authoritarian regimes to undermine the rule of law, it is hard to deny that this theory is more prone to abuses and accidents than the simple adherence to the primacy of Union law.[157] In any event, it cannot be argued that the German *Weiss* judgment does not affect fundamental Union values at all, as it defies basic structures of the rule of law as it is framed at the Union level. It contests the exclusive competence of the Court of Justice to rule, as an independent judicial body, on the validity of Union acts, and its competence to trace the limits of Union powers. It ignores the binding force of a preliminary ruling, erodes the

151 See F. C. Mayer, n 51 supra, 761; N. de Boer and J. Van 'T Klooster, n 125 supra, 1720.

152 Similar concerns are expressed by M. Wendel, n 11 supra, 993.

153 https://www.zeit.de/2020/21/andreas-vosskuhle-ezb-anleihenkaeufe-corona-krise.

154 M. Avbelj, 'Constitutional pluralism and authoritarianism', (2020) 21 *German Law Journal*, 1023, 1029.

155 Ibid, 1030.

156 Ibid.

157 See D. Kelemen and L. Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland', (2019) 21 *Cambridge Yearbook of European Legal Studies*, 59.

primacy of Union law,[158] misinterprets the principle of proportionality, and undermines the exclusive scope of monetary competence and the equality among the States and their peoples.[159]

The editorial comments of the *Common Market Law Review* make the point clearly and strongly. The 'masters of the Treaties' secured the Court of Justice's autonomy 'by undertaking not to submit disputes concerning [Union law] to procedures outside of the Treaties (Article 344 TFEU)', and by establishing the preliminary rulings procedure, which is mandatory for courts of last resort and ends in binding preliminary *rulings*. They did not 'invest their national courts with a power to review the [Court's] decisions'.[160] The States 'are not free to individually and selectively opt out of rules they have collectively agreed to, including the exclusive jurisdiction of the [Court] over matters of EU law.' The conflict is thus one 'between the collective decision of the Member States as Masters of the Treaties to give a Union court the final word on the interpretation of the Treaties, and deviating views of courts of individual Member States, such as the [German Court]. The real issue is then the [German Court's] claim that Germany is prevented by the immutable core of its constitution laid down in the 'eternity clause' of the Basic Law from fully committing to this collective decision of the Masters of the Treaties'.[161]

Although Germany has a robust rule of law tradition and practice, it is not possible to dissociate this problematic judgment from the ongoing rule of law problems in other States, whose constitutional courts may now feel legitimised to act in a similar way. Indeed, the rule of law and democratic problems in some States, and the more diffuse but visible instability of political systems throughout the Union, are not unrelated to the economic crisis the Union has gone through in the last decade, and to the Union's indecisive response to it.[162] This goes to the heart of the judgment, as the European Central Bank was the only Union institution with the operational capacity required to respond to the crisis in order to sustain the euro, softening an impact that could have been far worse without its resolute interventions – and which could still be far worse in future if the Bank is weakened.

11. What democracy?

The claim that the German Court is protecting democracy is equally perplexing. The reporting judge for the German *Weiss* judgment has argued that the German Court has a function of 'democratic compensation' as regards the non-democratic activities of the European Central Bank.[163] Let us examine more closely this idea, which, together with the metamorphosis of the principle of proportionality, is at the core of the argumentation of the German Court.

158 See C. Blumann, 'Quelques enseignements de l'arrêt du Bundesverfassungsgericht du 5 mai 2020 sur les fondamentaux du droit de l'Union européenne', (2020) *Revue trimestrielle du droit de l'Union européenne*, 2020, 889.

159 See K. Lenaerts, 'L'égalité des États membres devant les traités: La dimension transnationale du principe de primauté', (4/2020) *Revue du droit de l'Union européenne*, 7-10.

160 Editorial comments, n 59 supra, 967.

161 Ibid, 968.

162 See M. Goldmann, n 103 supra, 1059.

163 P.-M. Huber, commentary on Article 19 IV of the Basic Law, in *GG Kommentar*, para 352 (7th edition, edited by H. von Mangoldt and others, 2018). Quoted by M. Wendel, n 11 supra, 993.

In democratic terms, what we have is a triangle of counter-majoritarian difficulties: a non-elected court of one Member State reviewing a policy decision of a non-elected central bank operating at Union level, and censuring the decision of another non-elected court at Union level.[164] All these bodies are independent and protected from the pressures of democratic decision-making for comparable reasons: to ensure that the process of interpretation and application of the law or monetary policy are not affected by the contingencies of the political process. It is hard to grasp how the intervention of the first judicial body could advance democracy in any meaningful way, at Union level or at national level.

When we see primary Union law as endowed with a broader form of democratic legitimacy than the one attaching to the products of ordinary Union or national politics, as the adoption and revision of the Treaties requires the heightened reflexive moment of an intergovernmental conference and the unanimous agreement, discussion and ratification by the parliamentary bodies of all the States (i.e. the representatives of their peoples), the position of the European Central Bank may appear much less undemocratic that the German Court claims it is. It is the Treaties, a form of legitimacy that is linked to the peoples of Europe, that endowed the European Central Bank and the European Court of Justice with their roles and powers in their areas of expertise, insulating them from the pressures of ordinary democratic politics.

The Union's Central Bank and Court are not supposed to operate on the basis of the ordinary democratic process, at national or Union level. Their legitimacy is functional and depends on expertise, methods, and outputs. That of courts is based on the application of recognised legal methods and procedures, and on the achievement of results that are legally justifiable and fair. The legitimacy of central banks is based on technocratic expertise in an area of great complexity, and on achieving effective results in the general interest, together with reasonable transparency and *ex post* accountability and oversight by the European Parliament, to make sure that monetary policy corresponds to its objectives.[165] In the Union, those institutions are insulated from the pressure of politics because it was considered, as a matter of primary law, that such a subjection would run counter their very objective. It is therefore contradictory to subject an independent central bank to strict judicial review on the basis of concerns of democratic legitimacy, a legitimacy from which both bodies are protected by rational design and by a higher form of democratic decision-making.

The elaborations of the German Court around proportionality aim at fostering future judicial debates on the substance of monetary policy, understood as competence issues and on the basis of a reframed standard of review. Judicial review would shift from the 'territorial' logic of competence review, which is about defining policy areas, to a review of substance and policy choices, focused on the possible merits (and demerits) of the monetary policy of the European Central Bank. This approach is also inconsistent with another line of case law of the German Court, according to which its intervention to safeguard the right to democratic participation has to show self-restraint, as it is not about reviewing the *contents* of the decisions under review but only about ensuring the effectiveness of democratic processes.[166] If it were followed, this modified approach could seriously undermine the independence of the European Central Bank and the effectiveness of its policy.

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164 A similar point is made by F. C. Mayer, n 51 supra, 760.

165 See J.-V. Louis, 'L'indépendance de la Banque centrale europénne', (2020) *Revue trimestrielle de droit européen*, 797, section II. For the United States Federal Reserve, see P. Conti-Brown and D. A. Wishnick, 'Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve', (2021) 130 *Yale Law Journal*, 636, 640, 659 and 669-670.

166 *Weiss* judgment of the German Court, n 4 supra, para 100.

The approach proposed by the German Court is unprecedented. In a comparative perspective, the judicial review of the content of monetary policy measures is limited or non-existent, precisely because of the lack of credible and manageable standards of review for those measures.[167] Since judicial review can do nothing to improve the European Central Bank's legitimacy, the balance found by the Court of Justice seems much more reasonable.

This is not the place to discuss the choice of the Treaties to insulate the European Central Bank from democratic influence, to make price stability its primary objective, subordinating all other policy concerns to it, to list its instruments in such detail, or to include so many provisions in primary law. Those choices may be discussed and also questioned. There could be valid alternatives[168] and relevant arguments for an increase in the democratic inputs of monetary policy,[169] to frame the independence of the European Central Bank, or to improve the cooperation between the Bank and the political institutions of the Union.[170] The Treaties could be amended in that regard, and many of those rules could be left to Union legislation. However, at present it seems very unlikely that the Treaties will be revised any time soon, even less on such controversial subjects. In any event, a change that would compromise the independence of the European Central Bank to pursue its primary objective would not satisfy the worldview behind the German *Weiss* judgment, which would continue to want an independent Bank insulated from the Union's democratic processes, but one that is curtailed in its powers to pursue that objective with the instruments provided to it *in certain circumstances*.

In any event, the European Central Bank is not impervious to more diffuse forms of political influence. It does not act in a vacuum and the political institutions of the Union and of the States have ways to try to influence its decisions by questioning the economic analysis underlying its actions, its balance of objectives in relation to its primary aim, or the consequences of its policies. If it wants to maintain its legitimacy across the Eurozone, the Bank will be reactive to reasonable criticism, and should explain its policy choices in a transparent way. However, this should happen at the Union level and not in particular Member States.[171]

What seems problematic is that the super-democratic constitutional decision to insulate the European Central Bank from the pressures of ordinary politics is understood selectively by a court in one State, which reserves to itself the possibility of thwarting it, in the name of democracy, when the decisions of the Bank do not correspond to the interests or preferences of that State or of particular groups in that State. Rather than 'compensating' for any possible democratic shortcoming, this would introduce some.

If the idea behind the judgment is that it protects the more democratic economic policy from the non-democratic monetary policy, this is unpersuasive. The German judgment does nothing to enhance the capacities of the States to pursue their economic policy. In the same way, it has no effect on the powers of the Union to coordinate the economic policies of the States. The judgment simply tries to excise part of the scope of monetary policy, without enhancing economic policy in any way. (Indeed, possibly undermining it, as both policies are

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167 See, for example, P. Conti-Brown and D. A. Wishnick, n 162 supra, 657.

168 Compare with the objectives of the monetary policy of the United States Federal Reserve, which include, *on an equal footing*, 'maximum employment, stable prices, and moderate long-term interest rates' (Federal Reserve Act, codified and amended at United States Code, Title 12, section 225a; and P. Conti-Brown and D. A. Wishnick, n 162 supra, 655).

169 See I. Fleichtner, n 77 supra, 1098-1101; M. Goldmann, n 103 supra, 1075-1077;

170 The criticisms to the independence of the European Central Bank are analysed by J.-V. Louis, n 162 supra, section III.A, who favours that central banks end their isolation and cooperate with the political institutions.

171 See P. Dermine, n 62 supra, 545.

complementary and 'the effectiveness of monetary policy is an essential condition for an efficient national fiscal policy'.[172]) The States do not and could not buy their own debt in secondary markets to ensure the stability of the currency and the effectiveness of monetary policy. This is not an instrument of economic policy that would be unduly used by the European Central Bank. It is, however, a possible instrument of monetary policy.

As the Court of Justice highlighted in its judgment,[173] Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank provides that the Bank and the national central banks of the system may 'operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or in other currencies, as well as precious metals'. Could the drafting be clearer? This provision of the Statute grants this instrument to the European Central Bank, but this does not deserve the attention of the German Court.

It has however been argued that the German *Weiss* decision reflects 'a justified concern about the democratic legitimacy of the ECB's *unconventional* monetary policies'. Union law would have been ill-prepared to allow the Bank to conduct its monetary policy during the Eurozone crisis, its 'legal mandate' being 'inadequate' to cope with an unprecedented situation of deflation. The Treaties would contain 'authorization gaps, *in the sense that the legal text does not prescribe a clear course of action for the significant choices the ECB faces*'. Those gaps would have been filled in by the Bank and accepted through the 'permissive approach' of the Court of Justice. This problematic situation would justify judicial interventions to police the boundaries of monetary policy or, since those interventions cannot really improve the 'democratic authorisation' of the Bank's policy, other adaptations that could render it more democratic.[174]

This is a convenient but incorrect narrative.

The pervasive presence, in the German judgment and in the literature following it, of the term 'mandate' ('*Mandat*'), in relation to the European Central Bank, deserves some attention. This notion evokes the narrow 'authorised' scope for action granted from a superior to an inferior, as in contract or banking law. But the European Central Bank does not operate on the basis of a narrow 'mandate'. It is entrusted with a discrete but vast area of policy enshrined in the Treaties as an exclusive competence for the euro area, whose boundaries are only defined by its *objectives* and its *instruments*.

The legal provisions governing a complex policy area cannot foresee all situations, or give 'instructions' to an institution to act in a particular way in each circumstance, excluding policy discretion. Monetary policy *is* a policy, not an automatic regulator. If an exclusion of discretion had been feasible, allowing to run the policy through the blind application of pre-established rules, there would have been no need to create decision-making procedures at the European Central Bank. There is no 'authorization gap', for the Bank was created on the assumption that its instruments could be used in different ways to pursue its objectives in different economic situations. Asset purchases have always been an instrument of monetary policy, although they have traditionally been used to 'provide liquidity to the banking sector on an ordinary basis'.[175] The unprecedented volume of those purchases and their use to ensure the transmission of monetary policy when the interest rate tool reaches its lower bound, becoming unusable, does not render asset purchases 'unconventional', although the scale of

172 See P. Benigno and others, n 82 supra, 22; P. Dermine, n 62, 538.

173 *Weiss* judgment of the Court of Justice, n 3 supra, paragraph 69.

174 See N. de Boer and J. Van 'T Klooster, n 125 supra, 1724, 1692, 1700 and 1710.

175 See P. Benigno and others, n 82 supra, 11.

this *new* use may be novel. This tool is a *standard* monetary policy instrument, although in normal times the volume of purchases will be smaller. In deflationary times, however, their large-scale global use in monetary policy seems to have become the rule rather than the exception.[176]

In legal terms, if those instruments are used to pursue the primary objective of monetary policy, that would be a policy development well within the competences of the European Central Bank. Their proportionality, as already explained, is not a matter of competence but of legality. This is not a 'gap' in any recognisable legal sense, unless one defends the implausible interpretation according to which the applicable legal rules would be self-defeating, rendering the Bank impotent to pursue its primary objective with the instruments given to it, and condemning it to let the euro choke at the altar of that interpretation. The alleged limits of the 'mandate' thus seem to be the result of an arbitrary reading of the applicable rules by one national court.

Besides, the judgment of the German Court does not pause to consider the reality of supranational democracy, of what is more legitimate for the European level, the relevant framework in this case. The German approach not only puts constitutional orders and legal cultures in a damaging competition:[177] it may also pitch European democracies against each other, creating the conditions of a quest for domination, as in the post-Westphalian order under the *ius publicum europaeum*. This antagonism is the very opposite of integration, which was designed to avoid it, and of a responsibility for integration properly understood. This term, 'responsibility for integration', has mostly a negative connotation for the German Court, at any rate for its Second Senate, referring to a sort of vigilance to ensure that the Union remains within the alleged limits of its '*Integrationsprogramm*', instead of conceiving it as a duty of sincere cooperation within the Union.[178] When it comes to matters of common concern, one democracy, large as it may be, should never try to outdo other democracies. This could be the antidemocratic result of the German Court's intervention, focused as it is on a purely national conception of democracy,[179] and unable or unwilling to look beyond the nation State.

Even in purely national terms, this intervention does not seem to be in line with democratic principles. The German Court becomes the loudspeaker of the economic or ideological preferences of certain German economic and political actors from the extreme right whose 'real aim is to end the euro',[180] and which, in view of the distribution of forces within the Bundestag, are politically marginal (although not insignificant) within the confines of German democracy. This loudspeaker is due to the abnormally large *locus standi* recognised by the German Court for individuals to indirectly contest Union acts on the basis of an extensive interpretation of the right to democratic participation.[181] In itself, that possibility of contestation is 'an anomaly' that can give rise to serious democratic questions.[182] The concerns of a non-

176 Ibid, 6 and 26.

177 See D.-U. Galetta and J. Ziller, n 57 supra, 101 ('attempt at cultural legal domination').

178 For a more positive conception, see the resolution of the Bundestag on the German *Weiss* judgment and the order of the First Senate of 6 November 2019, BVerfGE, 1 BvR 276/17, 'Right to be forgotten II'). On the diverging understandings of this notion by both Senates, see H. P. Aust, 'Zweierlei Integrationsverantwortung – Zur Begründung und Tragweite eines verfassungsrechtlichen Schlüsselbegriffs in der Rechtsprechung der beiden Senate des Bundesverfassungsgerichts', (2020) *Europäische Grundrechte-Zeitschrift*, 410-419.

179 N. de Boer and J. Van 'T Klooster, n 125 supra, 1713 and 1719.

180 Ibid, 1720, quoting a declaration from Mr Kerber, one of the applicants in the German case.

181 See F. C. Mayer, n 51 supra, 737.

182 Ibid., quoting the dissent of judge Lübbe-Wolf in the *Gauweiler* judgment of the German Court, para 18 (BVerfG, judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13).

elected body about the Bundesrat's behaviour vis-à-vis the independent European Central Bank cannot therefore be sustained on democratic grounds.[183]

The democratic theme is closely connected to the issue of decision-making in the European Central Bank. The Bank takes decisions by majority. Independent and unelected, the Bank nevertheless follows democratic decision-making in its field of expertise, favouring the majority view and not allowing the particular interests or conceptions of a single euro area State to block or undermine monetary policy. It may not be trivial to recall that the German member of the Governing Council voted against the Outright Monetary Transactions Programme and the Public Sector Purchase Programme, criticising them openly. The position of the German Court may hinder majoritarian decision-making at the Bank, with the possible effect of reducing monetary policy to the confines of Pareto-optimality. This would render monetary policy ineffective and in the long run self-defeating.

The stance of the German Court could thus seem opportunistic. While it claims to be based on the protection of the division of powers and democracy, it may be seen as an attempt to advance particular national economic interests or conceptions.[184] Stopping short of the overt ambition of the applicants to bring down the euro, or even the Union, and to return to the paradise lost of sovereign statehood, the judgment may also be seen as a barely concealed attempt to gain a veto power through the backdoor, yet another 'constitutional court card' that is not in line with the Treaties. The judgment could therefore be understood as being mostly about power, and aiming to rewrite the constitutional pact of the Maastricht Treaty.

Dieter Grimm, an influential German scholar and former judge of the German Court, has argued that this judgment has attracted more attention than the previous acts of rebellion from the Czech Constitutional Court and the Danish Supreme Court because it was rendered 'by the German Constitutional Court, *without any doubt the most powerful in the EU*'. But he hastened to add that the motive for this decision is not that the German Court 'wants to retain its position of power',[185] but the protection of State-based democracy. This is intriguing. In what sense would the German Constitutional Court be 'the most powerful' in the Union? Is it because of the economic power or the vast territory and population of the State it belongs to, because of its doctrinal prestige, because of the length of its judgments, or because of its 'superior' legal culture and tradition? This odd claim of superiority sits uneasily with the idea of integration and with the very terms of the Basic Law. Once we understand that the judgment cannot promote democracy in any meaningful way, the protestation that the decision is not about power reveals more than it conceals that the judgment is mainly about power, legal, economic, institutional and at bottom political power.

In one of the few positive commentaries on the German judgment, Paul Kirchhof, another former judge of the German Court and the mastermind of the Maastricht-Urteil, has written that 'European law means cooperation, not subordination', and that 'the Member States and the Union *can only be successful* acting together and in a cooperative way'.[186] If the constitutional conception of one State opposes certain policy developments, that would be the end of it unless the (almost unamendable) Treaties are revised.[187] The assumption seems to be that, at least in those cases but perhaps more generally, the Member States should take decisions through consensual methods, not through majority voting. They should 'cooperate' as sovereign entities under a revived *ius publicum europaeum*, not as integrated States with

183 See M. Wendel, n 11 supra, 983.

184 Similarly, J. Dietze and others, n 23 supra, 529.

185 D. Grimm, n 127 supra, 945.

186 P. Kirchhof, n 120 supra, 2061 ('Europarecht heiβt Kooperation, nicht Subordination') and 2063 ('Mitgliedstaaten und Union können nur gemeinsam – und kooperativ – erfolgreich sein').

187 Ibid, 2062.

framed sovereignties. The subtle but unmissable threat becomes apparent when the first sentence is reversed: the Union will (or will be made to) be unsuccessful if it pursues the path of supranational integration through majoritarian decision-making and the Community method, beyond mere cooperation.

Almost three decades after the Maastricht-Urteil, we see the German Constitutional Court ever less willing 'to grasp the meaning and potentialities of supranationalism'.[188] And it is not isolated in this predicament. Read from a 'sovereign revivalist' perspective, the German *Weiss* judgment appears as a symptom of the current systemic pressures for mutation in the Union's system, where the Community method, supranational integration and institutions, and majoritarian decision-making, the central contributions of integration to the post-war European constitutional settlement, are increasingly decried as lacking sufficient legitimacy, and may seem to be slowly replaced by the so-called 'Union method', which is framed around intergovernmental cooperation and State-centred politics and law, with a predominance of consensual decision-making in the European Council. The role of this institution within the system is rapidly changing, from its function of general and periodic political *impetus* to an almost permanent function of supra-legislature and of constitutional emergency *brake*, being or at least perceiving itself as *legibus solutus*, as though it were the incarnation of the Union's 'sovereign', with a far-reaching impact on the institutional balance and on the general functioning of the Union system.

This reveals a paradoxical phenomenon in the current stage of integration. In constitutional regimes, there is often a tendency for majorities to try to bend the fundamental rules and to decide for themselves constitutional matters that require a broader constituency. In those systems, constitutional or supreme courts intervene to protect minorities and to preserve the integrity of the constitutional order. By contrast, in the present Union there is increasing pressure to avoid majoritarian decision-making and to favour consensual methods, at least in some policy fields. This is reflected in the search for consensus under the ordinary legislative procedure, but may also lead to an undue preference for legal bases providing for unanimity (or, sometimes, to the use of intergovernmental methods), even though legal bases with qualified majority might be applicable. This trend is coupled with the division of the Union into two basic camps of States that have irreconcilable views of what integration is about and what being a Member State should mean: those for which the Union is a political endeavour based on shared fundamental values, and those for which it is a predominantly economic organisation that should not meddle with national political choices, that cannot legitimately protect those shared values, and where solidarity should be reduced to a minimum, or excluded.[189] The consensual and intergovernmental tendencies interact in a predictable way with this disagreement about the nature of the Union. More often than not, this results in unfortunate alliances that cut across fault lines, with very harmful effects for the prospects of the Union.

The Court of Justice, which remains the main preservationist actor in the Union system, will be unable to protect the majoritarian traits of the Union if the political institutions do not see the value of preserving them. In the political arena, the so-called 'Union method', with its multiplication of veto players and positions, may bring maximum control for the States, at least for some of them, i.e. the power *to block* doing certain things or doing them in a certain way, and this may calm the 'underlying anxiety regarding a possible loss of control'[190] that is visible in the German *Weiss* judgment. Nevertheless, it is an illusion to expect that an intergovernmental Union could allow the institutions *to act* in the general interest of European

188 J. H. H. Weiler, 'Does Europe Need a Constitution Demos, Telos and the German Maastricht Decision,' (1995) *European Law Journal* 1, 219, 244.

189 See J.-P. Jacqué, 'Une ou deux Europe(s)', (2020) *Revue trimestrielle de droit européen*, 781.

190 J. Dietze and others, n 23 supra, 526.

citizens and maintain the benefits that integration has brought to Europe during the last seven decades, in general and even more in the present difficult conditions with serious rule of law and democratic breakdown in several States. In reality, the quest for intergovernmental control plays directly into the hands of illiberal regimes, which will use it in deleterious ways. The opposite of what Paul Kirchhof writes may actually be closer to the truth: that the States and the Union may only remain successful if they maintain themselves in the path of integration, respecting the autonomy of Union law and its majoritarian decision-making processes.

12. A prelude to a positive constitutional moment?

What now? How will this unfortunate situation be mended? Can it be mended?

A first possible reaction would be that the Commission opens infringement proceedings against Germany.[191] On 10 May 2020, the president of the Commission, Ursula von der Leyen, issued a formal statement confirming that that institution 'upholds three basic principles: that the Union's monetary policy is a matter of exclusive competence; that EU law has primacy over national law and that rulings of the European Court of Justice are binding on all national courts'. The statement continues: 'The final word on EU law is always spoken in Luxembourg. Nowhere else.' Recognising the risks of this episode from a rule of law perspective, it referred to the Union as 'a community of values and law, which must be upheld and defended at all times. This is what keeps us together. This is what we stand for'. The statement finally recalled that the Commission's task is 'to safeguard the proper functioning of the Euro system and the Union's legal system' and evoked 'the option of infringement proceedings'.[192] At the time of writing, almost one year after the judgment was rendered, the Commission has not yet started those proceedings.

If brought before the Court of Justice, infringement proceedings could allow the Court to have the last word on the subject of the Public Sector Purchase Programme, as those proceedings are conducted in the framework of the Union legal order and the German Court would not be involved in them. This would give the Court of Justice the possibility of recalling the correct legal position under Union law, putting matters straight, for example as regards the principle of proportionality and the margin of appreciation of the European Central Bank, and reaffirming its authority to interpret Union law.

Infringement proceedings concerning decisions of the highest courts of the States, whose case law may have far-reaching consequences for Union law, are rare but not unprecedented.[193] So far, none has concerned a constitutional court, but their case law may also have systemic effects. In the two cases in which other national courts disregarded judgments of the Court of Justice, the Commission did not start infringement proceedings. However, those cases were less important, did not have a lasting impact, and are not relevant precedents for the current situation.

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191 For detailed analyses, see 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* 21, 1078; I. Pernice, 'Sollte die EU-Kommission Deutschland wegen des Karlsruher Ultra-Vires-Urteils verklagen? PRO', *VerfBlog*, 16 May 2020; and C. Möllers, 'Sollte die EU-Kommission Deutschland wegen des Karlsruher Ultra-Vires-Urteils verklagen? CONTRA', *VerfBlog*, 16 May 2020.

192 Statement 20/846, accessible at: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_846.

193 Case C-154/08, *Commission* v *Spain*, EU:C:2009:695; Case C-416/17, *Commission* v *France*, EU:C:2018:811.

Infringement proceedings could not put an end to the thorny underlying conflict for the future, which is due to the different and seemingly irreducible perspectives of both Courts. It would be difficult for the Court of Justice to embrace the German Court's perspective on the limits of monetary policy without betraying its function and self-understanding within the Union system, and without misinterpreting the applicable rules. An infringement procedure would also bring to the fore the difficult position in which the competent German institutions find themselves, in a conflict of loyalties between the respect they owe to the German Court and their obligations towards the Union. Those German bodies will probably argue that it is not in their hands to bring an end to the infringement, which is the making of an independent constitutional body.

The Commission has a wide margin of appreciation on whether to start infringement proceedings, and for the decision to move on to each phase, including the judicial stage. In this case, the conclusion of that assessment is not self-evident, as it is unclear whether those proceedings could pave the way to a satisfactory solution or rather exacerbate the conflict, rendering any settlement ever more difficult. In particular, the judicial stage of proceedings, where 'Luxembourg' would be judging 'Karlsruhe', could easily become controversial and be exploited by Eurosceptic and populist forces. On the other hand, an infringement procedure could lead the German Court to reconsider its position, and at least to return to the *Honeywell* deference in the pending cases against the Pandemic Emergency Purchase Programme and the Own Resources Decision. This could also have an impact on the constitutional or supreme courts of other States that may be tempted to follow the same path.

It seems that the Commission has finally considered that the advantages of initiating infringement proceedings outweighed the possible disadvantages, as on 9 June 2021 it decided to send a letter of formal notice to Germany for breach of 'the principles of autonomy, primacy, effectiveness, and uniform application of Union law, as well as the respect of the jurisdiction of the European Court of Justice under Article 267 TFEU'.[194] However, the Commission decided to close them on 2 December 2021, after the German government 'formally declared that it affirms and recognises the principles of autonomy, primacy, effectiveness and uniform application of Union law as well as the values laid down in Article 2 TEU, including in particular the rule of law', explicitly recognised 'the authority of the Court of Justice of the European Union, whose decisions are final and binding' and 'that the legality of acts of Union institutions cannot be made subject to the examination of constitutional complaints before German courts but can only be reviewed by the Court of Justice', and committed 'to use all the means at its disposal to avoid, in the future, a repetition of an "ultra vires" finding'.[195] It remains to be seen whether these commitments will have an impact on the future case law of the German Constitutional Court.

Secondly, an amendment of the German Constitution may also miss the mark as a satisfactory and realistic remedy. Besides the difficulties of putting it in practice, it is not clear that it would be possible, or useful. The German judgment is based, to a large extent, on the 'eternity clause' (Article 79(3) of the Basic Law), not amenable to constitutional revision. A constitutional amendment would not reach the desired result, confronting itself with 'eternity' – you can never beat 'eternity'. Besides, if there was a will the Basic Law already contains all the elements that would be needed, as a matter of interpretation, to achieve a satisfactory and stable solution to this and other problems of constitutional coexistence with the Union.

A third possibility would be to amend the provisions on the German Court's organisation and decision-making. For example, the German legislature could require a judgment of the

194 See section 4 in 'June infringements package: key decisions', INF/21/2743, of 9 June 2021, accessible at: https://ec.europa.eu/commission/presscorner/detail/e%20n/inf_21_2743.

195 See section 4 in 'December infringements package: key decisions', INF/21/6201, accessible at https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

plenary of the German Court in this kind of cases,[196] or unanimous decisions for *ultra vires* findings.[197] It could also reattribute cases on Article 38(1) of the Basic Law to the seemingly more 'europarechtsfreundlich' First Senate. Any of these changes could be useful, but they may also be perceived as attempts to thwart an independent judicial body – misguided as its line on Union law may be.

Fourthly, there has been a proposal for an institutional solution on the European side, with a resurrection of the idea of a 'competence court', revamped into a 'mixed chamber' of the Court of Justice composed of six judges from constitutional courts of the Member States and six judges from the Court of Justice, plus the president of the latter.[198] The 'mixed chamber' would decide by a majority of eight or nine judges appeals against judgments of the Court of Justice that uphold the legality of Union acts on competence grounds. The appeals would be introduced by national constitutional or supreme courts, State governments, or national parliaments, within one year of the judgment.

Without entering into its various technical details, which are not unproblematic, this proposal seems misplaced and could also be seen as a form of 'court packing' – in this case, of the Court of Justice. As Franz Mayer has put it, 'there already is a court of competence – the European Court of Justice'.[199] The counterargument is that the Court of Justice 'has not proved to be a strict guarantor in policing the limits to EU competences and jurisdiction'.[200] This frequent claim remains to be convincingly established.[201] The main guarantee against undue competence expansion in the Union is not the Court of Justice but the safeguards of the legislative process.[202] The excruciatingly difficult political process of the Union discards, before the stage of proposal or adoption, many policy ideas that could overstep the scope of Union powers – and many others that would not. As a matter of fact, it is likely that the competences of the Union are not used to their full capacity because of those political safeguards. The few competence claims that reach the Court are often deregulating arguments of private parties or substantive policy claims disguised as arguments about competence by States that have been outvoted in the Council. This explains why most of the cases on the scope of Union powers (which are not many) turn out to be unfounded and are justly dismissed.

This proposal is also unsatisfactory because the legal problem would remain intact as a matter of national constitutional law. There is no reason why the creation of a 'mixed chamber' would miraculously solve it. Besides, the Court of Justice's authority to interpret Union law and to trace the limits of its competences would be undermined, with ensuing uncertainties for the limits of Union competence and for the effectiveness of Union policies. In addition, the Court's composition would become unstable and a Trojan Horse would be inserted into it. The Court of Justice would actually become two Courts, one for normal cases and another for the review of the Court's decisions in competence cases. The second one

196 F. C. Mayer, n 51 supra, 744, suggests that the *Weiss* case should have been submitted to the plenary in view of the divergent position of the first senate on *ultra vires* review.

197 As proposed by P. M. Bender, 'Ambivalence of Obviousness – Remarks to the Decision of the Federal Constitutional Court of Germany of May 5, 2020', (2020) 9 *Max Planck Institute for Tax Law and Public Finance Working Paper*, 30-32.

198 J. H. H. Weiler and D. Sarmiento, n 128 supra.

199 F. C. Mayer, n 51 supra, 765.

200 J. H. H. Weiler and D. Sarmiento, n 128 supra, 3. See also T. Violante, n 127 supra, 1055.

201 As explained by D.-U. Galetta and J. Ziller, n 57 supra, 72.

202 See H. Wechsler, 'The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government', (1954) 54 *Columbia Law Review*, 543. See also R. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', (2009) 68 *Cambridge Law Journal*, 525.

would not really be a Union Court, as its members would not have been appointed in accordance with the Treaties. Such an idea, which recalls the problems of the initially envisaged agreement on the European Economic Area, would be in contradiction with the very foundations of the Union. The Treaties could be amended to introduce it, as there is no 'eternity' clause in the Union Treaties, which are a secular creation devoid of such forms of political theology, but it would be a very different Union.[203]

It would also be highly questionable to consider such a step after a judgment, the German *Weiss* judgment, that is manifestly unfounded. This and other analyses that try to adopt a balanced position between both Courts do not seem justified. They often take the conventional form of acknowledging that, although the judgment of the German Court has 'many methodological flaws' and 'offers the wrong answers', it would raise 'legitimate questions' about the case law of the Court of Justice on the European Central Bank.[204] There is, however, no room for equidistance in attributing blames and merits, or to argue that, in spite of all its weaknesses, the German judgment expresses nothing less than 'the will of preserving a Union of law'.[205] Even if there were a problem with the monetary policy of the European Central Bank or with the case law of the Court of Justice, which is far from self-evident, it would not be correct for a judicial body to 'reveal' it through a judgment that breaches several fundamental principles of the Union legal order, playing around legal categories to reach the desired result.

An equidistant author has argued that, as a reaction to the German judgment, the Court of Justice should 'increase the intensity of its review' and apply a 'higher standard of scrutiny' to the Bank. It should complement 'teleological analysis with meaningful impact assessment', on the basis of the distinction 'between indirect and direct economic policy effects', 'taking effects analysis more seriously', examining 'those effects that most obviously qualify as economic or fiscal', including 'their magnitude, their position in the chain of causation, and the extent to which they actually affect national economic policy spaces', and adding a 'proportionality *stricto sensu*' analysis.[206]

This proposal is puzzling. The distinction between the direct and indirect effects of monetary policy is similar and as unmanageable as the strict proportionality analysis that the same author rightly considers unworkable. Impact assessments are policy tools, and the judicial process is unsuited to carry out the very complex 'effects analysis' proposed. This would lead the Court of Justice into a territory in which it would not take decisions on legal grounds, creating the risk of hampering monetary policy. The same author contradicts his own ideas by acknowledging that a 'judge-dominated model of European Central Bank oversight' may not be meaningful, that courts, 'either national or European, may not be 'the most appropriate fora' for such a task, and suggesting that this may be 'a political exercise that should be best left to political, representative institutions'.[207] It suffices to look at the economic models of possible proportionality analyses by the European Central Bank to understand that

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203 Opinion 1/91, EU:C:1991:490, paras 46 and 71.

204 P. Dermine, n 62 supra, 540-541; M. Ludwigs, 'Die Konsequenzen des PSPP-Urteils für die Kompetenzordnung der EU', (2020) *Europäisches Wirtschafts- und Steuerrecht*, 186, 191.

205 M. Ruffert, 'Le bouleversement de l'Union économique et monétaire dans la crise pandémique', (2020) *Revue trimestrielle de droit européen*, 915, introduction to section II ('exprimant la volonté de préserver l'Union de droit').

206 P. Dermine, n 62 supra, 540-541.

207 Ibid, 546.

they are not amenable to judicial review, but a matter for discussion and decision among monetary policy experts.[208]

Another frequent proposal is that, instead of finding that an act of the Union is *ultra vires*, or before doing so, a new preliminary reference should be sent to the Court of Justice.[209] The obligation to submit a second reference to the Court of Justice was also emphasised by the more 'europarechtsfreundlich' German Constitutional Court of 1987 as regards the Bundesfinanzhof, a court of last resort. The German Constitutional Court qualified the absence of a second reference coupled with the breach of the preliminary ruling of the Court of Justice as an 'objectively arbitrary' decision of the Bundesfinanzhof,[210] incompatible with the right to a lawful judge under Article 101(1) of the Basic Law.

In line with Article 267 TFEU, 'a judgment in which the Court gives a preliminary ruling on the interpretation or validity of an act of a Community institution conclusively determines a question or questions of Community law and is binding on the national court for the purposes of the decision to be given by it in the main proceedings'.[211] Preliminary rulings are, therefore, *not only binding but also final*. The Court of Justice has admitted, exceptionally, the possibility of 'a further reference to the Court of Justice before giving judgment in the main proceedings […] when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier. However, it is not permissible to use the right to refer further questions to the Court as a means of contesting the validity of the judgment delivered previously, as this would call in question the allocation of jurisdiction as between national courts and the Court of Justice under Article [267 TFEU]'.[212]

The *Taricco* saga with the Italian Constitutional Court is usually given as an example of how that prolonged interaction might work.[213] However, in that case the references came from two different courts, and the quality of the legal exchange was not ideal. The way in which the Court of Justice avoided a clash with the Italian Constitutional Court was not very informative as regards the provisions and legal standards that would allow it to tackle such situations. Reading the judgment, one has the impression that the avoidance of a clash was more important than the reasoning. The Court of Justice did not seem to engage with the difficult legal tensions of the second reference or to conduct a balancing assessment between the interest in preserving the unusually large Italian conception of the principle of legality in criminal matters and the Treaty requirement to protect effectively the financial interests of the Union.

A *genuine* second reference, where the Court is asked to clarify a judgment or to consider a legal issue that has not been examined yet, can be a legitimate exercise on condition that the final and binding character of the first judgment is not contested and that the second judgment will also be respected, instead of leading to non-compliance or to a third

208 See L. P. Feld and V. Wieland, 'The German Federal Constitutional Court ruling and the European Central Bank's strategy', *Freiburger Diskussionspapiere zur Ordnungsökonomik*, No. 20/05. It would be surprising to see judges deciding on that basis.

209 See J. H. H. Weiler and D. Sarmiento, n 128 supra, 2; Editorial Comments, n 59 supra, 977; P.-C. Müller-Graff, (2020) 'Schockwellen im Unionsrechtraum: Das PSPP-Urteil des Bundesverfassungsgerichts', *Zeitschrift für Europarecht*, 160.

210 BVerfGE 75, 223 ('Kloppenburg-Beschluß'), paras 61-63; see J. Dietze and others, n 23 supra, 529.

211 Case 69/85, *Wünsche*, EU:C:1986:104, para 13.

212 Ibid, para 15; see also Case 14/86, *Pretore di Salò*, EU:C:1987:275, para 12.

213 For example, by J. Dietze and others, n 23 supra, 529. Case C-105/14, *Taricco*, EU:C:2015:555; Case C-42/17, *M.A.S. and M.B.*, EU:C:2017:936.

reference. Such a possibility should not be used as a means of putting pressure on the Court of Justice, leading it to 'get it right' under the threat of not following its ruling. Second references as an act of defiance would not be in line with the rules on the preliminary rulings procedure, or with sincere cooperation. Finally, this should remain an exceptional possibility, as it would lead to a prolongation of proceedings, which may be against the interest of the parties and reduce trust in an institutional framework that should provide justice swiftly and in a clear way.

The most realistic and effective solution to the situation created by the German *Weiss* judgment is located in the place where it came from: in the jurisprudence of the German Court, and indeed only that of its Second Senate, as the First Senate has a very different attitude towards Union law. Thus, in a recent decision, it held that in areas that are fully harmonised under Union law, such as personal data protection, the German Constitutional Court will safeguard fundamental rights through the individual complaint procedure provided for in the Basic Law but applying the Union's Charter of Fundamental Rights, in accordance to the Charter's standard of review as interpreted by the Court of Justice, and without considering national fundamental rights.[214] On condition that the preliminary rulings procedure is respected in future, this position would be in line with Union law, respecting its integrity and the authority of the Court of Justice. In stark contrast with the *Weiss* judgment of the Second Senate, it is a constructive judicial decision that takes a European perspective on a European issue, and ensures constitutional stability, a robust protection of fundamental rights, as well as a fruitful interaction between both legal orders.

Whether a jurisprudential shift from the Second Senate is possible will depend on its internal balance of forces.[215] It is highly unlikely if a majority of its members share the doctrinal position of the reporting judge in the *Weiss* case, Mr Huber. A recent article he co-signs with the Presidents of the Constitutional Courts of Austria and Slovenia and the former President of the Constitutional Court of Latvia vindicates the *Weiss* approach. The authors claim that all the constitutional courts of the Union should join forces to preserve the limits of the Union legal order through the so-called 'transfer review', '*ultra vires* review', and 'constitutional identity review'. The Court of Justice would '(mis)conceive' preliminary references 'as gestures of submission', dealing with them in a 'perfunctory manner'. This apologetic article even proposes that the Court of Justice should be bound 'to submit cases potentially affecting the national identity of the Member States as set out in Article 4 paragraph 2 TEU to the relevant constitutional (or supreme) court'. This discourse, the article concedes, 'may be susceptible to abuse and detrimental to legal certainty in the short term', but it would be 'indispensable' for an 'orderly, sustainable, and generally accepted process of European integration'.[216]

This is hardly an attractive or sustainable model for the future judicial development of Union law. In the politically fractured contemporary Union, it would certainly lead to abuse and legal chaos in the short-term. In the medium- or longer-term it would also provide the conditions for the destruction of any semblance of an integrated Union law. But the European perspective of the present essay and the widespread criticism of the German *Weiss* judgment, in Germany and elsewhere, will fall on deaf ears if the same State-centred vision (and mission) continues to be shared by the majority of the members of the Second Senate.

If they realise, however, the potentially catastrophic consequences of their approach in the *Weiss* case, if it were to be followed by other constitutional and supreme courts, a jurisprudential change could take place. This would be comparable to a recurrent pattern of

214 See order of 6 November 2019, n 175 supra.

215 On this issue, see F. C. Mayer, 'Lettre de Berlin: l'état du droit européen vu de l'Allemagne', (2021) No 645 *Revue de l'Union européenne*, 68, 70.

216 C. Grabenwarter, P. M. Huber. R. Knez and I. Ziemele, 'The Role of Constitutional Courts in the European Judicial Network', (2021) 27 *European Public Law*, 43, 44-45, 57, 60 and 61.

constitutional mutation identified by Bruce Ackerman in relation to the Reconstruction amendments and the New Deal in the United States: "In both cases, the conservatives' answer was the same. Rather than escalating the constitutional crisis further, they decided, with evident reluctance, that further resistance would endanger too many of the very values they held fundamental. They made the 'switch in time'."[217]

In this case, a positive 'switch in time' could take various forms.

The first and more modest one would be a surgical *distinguishing* in future judgments, with a return to the former deferential, if tense, relationship with the European Court of Justice on the basis of *Honeywell*.[218] The *Weiss* judgment would thus become isolated as a precedent. However, a degree of questionable pressure would be maintained on the Court of Justice and the European Central Bank.

A second possibility would be that the German Court takes the more ambitious decision of *overruling* its *Weiss* judgment, adopting a more deferential attitude to the Court of Justice and to the European Central Bank, and respecting the exclusive nature of monetary policy in the euro area as defined by the Court of Justice. If in future cases it has a reasonable doubt on policy measures of the European Central Bank, it would refer the matter to the Court of Justice and decide in line with the preliminary ruling, without reopening the discussion.

Thirdly, and much more fundamentally, the German Court could revisit and overrule its Union case law from the Maastricht decision of 1993, following the line traced by the First Senate of the German Court, limiting the interpretation of Article 38(1) of the Basic Law through an acceptance of the contemporary reality of democratic legitimation at Union level for issues that affect the Union as a whole, taking a more European perspective on the shared and autonomous legal force of Union law, and seeing Union constitutionalism and the Court of Justice as essential counterparts of German constitutional law and the German Court, not as competitors. This would grasp the true meaning of the eternity clause of the Basic Law: 'to exclude [Germany's] relapsing into dictatorship and barbarism, and nothing serves this aim with higher probability than Germany's integration into the European Union.'[219] The consequence would be the abandonment (or at least the suspension of the exercise) of the German Court's *ultra vires* and identity reviews, as the German Court did decades ago with fundamental rights.

If this happened, the German *Weiss* judgment would be recognised for what it is: a constitutional anomaly, but one that could lead to a positive transformation. Instead of remaining a regressive constitutional moment that could permanently damage the rule of law in the Union, the sustainability of the Union's economic constitution and the constitutional orders of the States, it could prompt a positive reaction. By taking such an extreme step, the German Court would have unveiled the inconsistencies of its own approach, showing its inherent instability and its serious negative consequences for Europe and for Germany. This could foster an equally strong reaction in the opposite direction, with the paradoxical effect of strengthening the integrity of Union law and the authority of the Court of Justice.

A reversal of the constitutional dead-end road taken in 1993 with the Maastricht judgment would contribute to establishing or reconstructing a more stable constitutional basis for the Union and its law, an overarching consensus that seemed to exist for several decades of integration and that has been under siege from various fronts for more than a decade, be it in relation to the economic crisis or the rule of law decay in illiberal regimes.

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217 B. Ackerman, n 5 supra, 49.

218 Editorial Comments, n 59 supra, 975.

219 Dissenting opinion of judge Lübbe-Wolf in the European Arrest Warrant case, BVerfGE of 18 July 2005, 2BvR 2236/04, cited by F. C. Mayer, n 51 supra, 767.

This extreme constitutional event could lead to a broader and more lucid constitutional understanding on the part of legal actors in the Union at large, fostering an awareness that their decisions have significant effects beyond borders, and that a purely national understanding of the law can undermine all the efforts to maintain the integrity of supranational law. A correct and sustainable European legal culture needs to analyse issues of Union law at the Union level, from a supranational perspective. This does not mean that the national perspectives should be ignored, and indeed they are not, but they should be integrated in a wider European assessment. In the end all boils down to the simple idea of recognising that respecting the law and being part of a shared legal system means abiding by its rules and procedures and accepting their consequences, *especially when one strongly disagrees with them*.

A subsequent development in another founding Member State that is not unrelated to the German *Weiss* judgment could be misinterpreted as a step in the right direction, but it is equally problematic for different reasons. In a judgment of 21 April 2021, the French *Conseil d'État*, the highest French administrative law court, declared that, contrary to the allegations of the French Prime Minister, it is not empowered to carry out an *ultra vires* review and is bound by the judgments of the Court of Justice.[220] The rule of law situation in some Union States seems to have played a major role in this decision.[221] However, the rest of the judgment does not really respect the case law of the Court of Justice and the primacy of Union law, based on the need to protect (a particular conception of) essential State functions, in this case related to security.

The integrity of Union law can be eroded using various techniques. The protection of essential State functions is not a more acceptable tool, or less prone to abuse, than the *ultra vires* review. The same applies to the so-called 'identity review'.[222] A reversal of these parochial legal tendencies and a more ordered practice of Union law would bring immediate benefits to the European Union and its law at large, in the many fields it covers at present. It would also be beneficial for the European economic constitution, allowing the Court of Justice, free from the pressure of the German Court, to maintain and develop a reasonable interpretation of the Treaties, in the light of the principle of economic neutrality, recognising a sufficient leeway to the European Central Bank and to the political institutions of the Union to carry out their policies through the Community method.

More fundamental changes as regards the European economic constitution may require a Treaty revision, in particular in the budgetary field. The Union can hardly continue to be a normative giant, setting legal standards for the Union as a whole on very important issues, and being a limit on the public revenue and expenditure of the States, and a major influence on the allocation of economic resources through the internal market and the single currency, while remaining a budgetary dwarf and a virtual non-entity in taxation, unable to correct the undesirable consequences of its normative and economic structures, and to ensure an optimal functioning of the market and a basic level of supranational solidarity. This is the issue in which

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220 Point 8 of the judgment, which is accessible at https://www.conseil-etat.fr/Media/actualites/documents/2021/04-avril/393099.pdf.

221 *Le Monde*, 21 April 2021, 'Le Conseil d'État autorise la poursuite de la conservation généralisée des données': 'Ensuite, explique-t-on au Palais royal, cette décision sera auscultée par les gouvernements d'Europe orientale qui eux aussi cherchent à s'affranchir de certaines contraintes du droit européen. Bref, la France aurait pu être assimilée aux anti-européens.'

222 See, for example, the judgment of the Hungarian Constitutional Court of 7 December 2021 on immigration matters (Case X/477/2021, accessible at http://hunconcourt.hu/uploads/sites/3/2021/12/x_477_2021_eng.pdf). Without directly challenging primacy or the Court of Justice, this judgment is heavily based on a 'presumption of reserved sovereignty', in particular as regards certain matters such as determining its 'its territorial unity, population, form of government and State structure', which it considers as part of its constitutional identity.

the Union will swim or sink in the following decades, or maybe years. However, the two basic budgetary acts of the Union, the Own Resources Decision and the multiannual financial framework, are stuck in the logic of unanimous decision-making, limiting the budgetary autonomy of the Union, and leaving a very narrow space for the Community method in the adoption of the yearly budget. Without a move of those two basic decisions to the ordinary legislative procedure, or to a reinforced form of qualified majority, this tension will continue to be a major source of instability in the Union system.

True constitutional law is always constitutional history, its roots lying in a more or less distant past, its normative consequences unfolding until the present, and into the future. For the European Union and its Member States, this history is unfolding, yet unwritten.