ISSN 2384-9169
Fascicolo n. 2 - 2020
rivista.eurojus.it

The German Federal Court and its first ultra vires review: a critique and a preliminary assessment of its consequences

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1. The *ultra vires* review of the German Federal Court and the first reactions to the ruling of the 5th May 2020

Numerous rulings of the German Federal Court concerning the development of the European integration process have accompanied its advances since 1967[1]. On the one hand, the Bundeverfassungsgericht ("BVerfG") has been open to the EU integration process

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[1] 22 BVerfGE 293 (the decision on "*EEC Regulations Constitutionality*"). The most notorious judgments, that concern the protection of fundamental rights, are the "*Solange I* decision" (BVerfGE 37, 271, reported in English as Internationale Handelsgesellschaft in *Common Market Law Review,* 1974, p. 540) and "the *Solange II* decision" (BVerfGE 73, 339, reported in English as Re: Wiinsche Handelsgesellschaft in *Common Market Law Review*, 1987, p. 225).

("*Europarechtsfreundlichkeit*")[2] and has contributed to increase the protection of human rights in the EU. On the other hand, the mentioned Court has set out conditions for the exercise of EU powers; it has undertaken to carry out an *ultra vires review*[3] of EU acts and also an identity review[4] to check whether they are compatible with the principles of its Basic Law.

The leading judgment of the former review, made in the name of the democratic principle, is the 1994 *urteil* (Maastricht decision)[5]. Here, the Federal Court launched warnings to EU institutions in order to protect the prerogatives of the Bundestag: indeed, the basic assumption was that the manner and the scope of transfer of powers to the EU must satisfy the mentioned principle. An announcement was made that it would closely monitor the way EU powers are exercised in order to see if the limits conferred on the EU institutions by primary law are respected: if those bodies were to develop the Union Treaty in a way that was no longer covered by that Treaty, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. State organs would be prevented for constitutional reasons from applying them in Germany. Accordingly, the Federal Court committed to review the legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or whether they transgress them.

In the so-called "*Lisbon decision*" of 2009[6], the Karlsruhe Court went even further since it stated that there are constitutional limits to the ability of the national legislator to transfer powers to the EU[7]. The BVerfG goes as far as launching the idea to create «an additional type of proceedings before the Federal Constitutional Court that is especially tailored to ultra vires review and identity review to safeguard the obligation of German bodies not to apply in individual cases in Germany legal instruments of the European Union that transgress competences or that violate constitutional identity»[8].

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[2] For example, it is noteworthy that in *Solange II*, cit., the Karlsruhe court even acted to defend the prerogatives of the Court of Justice, in particular, the correct use of the preliminary procedure by domestic courts. B. ZWINGMANN, *The Continuing Myth of Euro-Scepticism - The German Federal Constitutional Court Two Years after Lisbon*, in *International Comparative Law Quarterly*, 2012, pp. 670-674.

[3] The foundational judgment was case 2 BvR 687/85 (the "Kloppenburg decision").
J. BAST, *Don't Act beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review*, *German Law Journal*, 2014, p. 168.

[4] This expression was coined in the case 2 BVerfG 2/08 *Lisbon Treaty* ("The Lisbon decision"). For the unofficial translation in English see https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.
The identity review with respect to EU law acts is carried out to protect the «inviolable core content of the constitutional identity» of the German Basic Law. In the Lisbon decision there is a list of these "core principles" that include: democracy, the rule of law, the principle of the social state, the republic, the federal state, as well as the substance of elementary fundamental rights indispensable for the respect of human dignity. Ibidem, para 217.

[5] See, in particular, the "*Maastricht decision*" (BVerfGE 89, 55. For the English text, see *Common Market Law Review*, 1994, p. 57).

[6] See *supra* n. 4.

[7] J. H. DINGFELDER STONE, *Agreeing to Disagree: The Primacy Debate between the German Federal Constitutional Court and the European Court of Justice*, in *Minnesota Journal of International Law*, 2016, p. 141.

[8] Para 241 of the Lisbon decision.

The doctrine of *ultra vires* review was refined in *Honeywell*[9]. This is the first ruling in which the BVerfG acknowledged that not only the political Institutions but also the Court of Justice (or "CJEU") could be found to breach the principle of conferral. The judgment concerns the way the judges of the Kichberg had interpreted the effects of a Directive (not yet in force) and of the general principle of non-discrimination on the basis of age in the *Mangold* case[10]. However, in *Honeywell* the BVerfG set a very high standard to exercise its *ultra vires* review: the Court would act only in cases of an obvious lack of competence leading to a grave shift in the power structure between the EU and the Member States[11]. Thus, although the Federal Court indirectly admitted the possibility not to apply a ruling of the Luxembourg Court if the latter acted outside its competence[12], it excluded that in Mangold case the Court of Justice had actually developed the law so as to transgress the Treaty boundaries. In addition, the Karlsruhe judges held that before declaring an EU act *ultra vires* or against Germany's constitutional identity, it was necessary to make a reference for a preliminary ruling to the Court of justice[13]. Having so strictly defined the conditions to declare that a ruling of the CJEU was *ultra vires*, it seemed that they could never be applied in practice.

In subsequent constitutional complaints, the BVerfG had the chance to examine whether the EU institutions acted outside their mandate and affected the Bundestag's budgetary responsibility, by adopting decisions concerning the Economic and Monetary Union[14]. In relation to one of these complaints, in 2014 the BVerfG makes a reference for preliminary ruling to the Court in Luxembourg for the first time concerning one of the ECB's programmes for the purchase of government bonds on secondary markets known as "Outright Monetary Transactions Programme" (the "OMTP")[15]. This is a turning point in the case- law of the BVerfG since it opens up the possibility to contest the rulings of the Court of Justice concerning the ECB's unconventional monetary policy activities. The questions referred by the German Federal Court concern the legality of the OMT Programme, in the light of the prohibition of monetary financing, set out by art. 123 TFEU and of art. 119 TFEU. After receiving the answer from the Court of Justice in the *Gauweiler*[16] case, the BVerfG had to decide whether the judges of the Kirchberg had overstepped the boundaries of their competence. The conclusion was that the Court of Justice had not manifestly exceeded its

[9] See case BVerfGE 126, 286 (the "Honeywell decision"). For the English translation see *Common Market Law Review*, 2011, p. 1067. For comments see M. PAYANDEH, *Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, in *Common Market Law Review*, 2011, p. 9 ss.

[10] CJEU, Judgment of 22 November 2005, Case C-144/04, *Mangold*, ECLI: EU:C:2005:709.

[11] C. MÖLLERS, *German Federal Constitutional Court Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, Honeywell*, in *European Constitutional Law Review*, 2011, p. 165.

[12] More precisely, the BVerfG stated: «A putative further development of the law on the part of the Court of Justice of the European Union, which would no longer be justifiable in terms of legal method, would only constitute an evident breach of the principle of conferral if it also had the effect of establishing competences in practice». See the Honeywell decision, *supra* n. 9, para 78.

[13] BVerfGE 126, 286, para 60. This is an interesting development since the Federal Constitutional court did not consider itself bound to refer to the Court of Justice as any other court of last instance. See A.F. TATHAM, *Central European Constitutional Courts in the face of EU membership*, Leiden/Boston, 2013, p. 96 ss.

[14] See the case 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 (the "Greek bailout decision") and case 2 BvR 1390/12 the "European Stability Mechanism decision".

[15] Case 2 BvR 2728/13.

[16] CJEU, Judgment of 16 June 2015, C-62/14, *Gauweiler and Others*, ECLI: EU:C:2015:400.

powers under art. 19 (1) TEU in holding that the OMT Programme did not violate the prohibition of monetary financing of the budget[17]. The BVerfG considers itself bound by the *Gauweiler* ruling and also by the conditions that were set for that programme to become illegal; the position is taken that the German Bundesbank may participate in the implementation of the OMT Programme within the framework laid down by the Court in Luxembourg[18]. Although the BVerfG accepted as binding the ruling of Court of Justice, it is clear that it does not share the low-intensity review on the ECB's activity[19] and the methodology used by the judges of the Kirchberg to assess the proportionality of the OMT Programme[20].

Having sketched the main lines of the case-law of the Federal Constitution Court, it is beyond doubt that there has been a "*crescendo*" in the concerns raised by the BVerfG with respect to the way the EU institutions exercise their powers. Yet, the ruling of 5 May 2020 of the Second Senate of the Federal Court[21] came as a surprising. For the first time it was found that the conditions for the exercise of the *ultra vires* review were met: according to the German Court, EU institutions, in particular the ECB and the Court of Justice in the *Weiss* case[22], had overstepped the boundaries of the Treaty and breached the Basic Law and, in particular, the budgetary powers of the Bundestag. The ruling in *Weiss* concerns the legality of the ECB's secondary markets public sector asset purchase programme (PSPP) whose validity is confirmed by the Court of Justice.

The threat of setting aside a judgment of the mentioned Court on the ground that it is *ultra vires* has finally become real. The BVerfG has not only "barked but it has also bitten"[23]; the area affected by the ruling is one where the EU enjoys exclusive powers: monetary policy. This is the reason why the outcome of the ruling is a particularly qualified act of rebellion. It is perceived as creating in the EU a crisis within the current situation of crisis, which is due to the pandemic.

It is no wonder that the stance taken by the highest court in Germany has attracted remarkable attention. In a limited number of cases the position of the BVerfG is supported on account of the ECB's democratic deficits[24]. In other cases, the ruling of 5th May is considered a window of opportunity since it may provide momentum "for the incremental establishment of the EU fiscal union"[25], or for reforming the Treaty so as to build a genuine Economic Monetary Union[26]. In a couple of cases, suggestions were made to change the EU treaties to

[17] Para. 190.
[18] Para 171.
[19] Paras 183-186.
[20] Para 196.
[21] See Judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.
[22] CJEU, Judgment of 11 December 2018, case C-493/17 *Weiss*, ECLI:EU:C:2018:1000. See section n. 2.
[23] This expression is borrowed from N. PETERSEN, *Karlsuhe Not Only Barks, but Finally Bites - Some Remarks on the OMT Decision of the German Constitutional Court, The OMT Decision of the German Federal Constitutional Court*, in *German Law Journal*, 2014, p. 321-328.
[24] J. ÖBER, *The German Federal Constitutional Court's PSPP Judgment: Proportionality Review Par Excellence*, in *Europeanlaw* blog, 2 June 2020, M. SIRAGUSA, C. RIZZA, *L'"insostenibile leggerezza" del sindacato giurisdizionale sulle decisioni di politica monetaria della BCE*, in Rivista *Eurojus*, 2020, p. 608.
[25] M. AVBELJ, *The Right Question about the FCC Ultra Vires Decision*, in *VerfBlog*, 2020/5/06.
[26] D. SCHWARZER, S. VALLÉ, *Pushing the EU to a Hamiltonian Moment in German Council on Foreign Relations*, in *(DGAP) Policy paper* n. 10, 10 May 2020, p. 5-6, M. DANI, J. MENDES, A.J. MENENDEZ, M. WILKINSON, H. SCHEPEL, E. CHITI: *At the End of the Law: A Moment of Truth for the Eurozone and the EU*, in

accommodate the concerns raised by the BVerfG. One scholar proposes that domestic courts be allowed to set aside a ruling of the Court of Justice if it affects the constitutional identity of a Member State[27]. A second author suggests creating a constitutional chamber within the Court of Justice to rule upon the request of a supreme or constitutional court when it considers that the EU has manifestly exceeded its powers[28]. These are interesting proposals which in a revision of the Treaties could be discussed, should the decision be taken to develop the EU and transform it into something more than a very "*sui generis*" international organisation. For the time being, all domestic courts have to apply the current Treaties and are bound by the case-law of the Court of Justice. The BVerfG deviated from the rules which are applicable to all Member States. This is the fundamental reason why its latest ruling was not well received by many scholars[29]. Most have disapproved of the methods of the interpretation chosen by the Karlsruhe court with respect to the principle of proportionality[30] and have raised concerns about the impact of the ruling on the principle of supremacy. One scholar[31] specifically criticises the BVerfG's refusal to accept the outcome of the *Weiss* case.

This short paper intends to summarise the most salient parts of the BVerfG's ruling in order to focus on a selection of legal issues arising from it: firstly, critical comments will be made on the interpretation of the principle of proportionality carried out by the domestic court; secondly, the Court's assessment of the ECB Decision, setting up the PSPP[32] will be briefly commented. Next, the paper will hint at the impact that the ruling is likely to have on the ECB's independence; then, the wide discretion left to the German government to implement the ruling will be emphasised. Subsequently, the reaction of the Institutions to the judgment

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VerfBlog, 2020/5/15, M. DAWSON, A. BONIĆ, *Op-Ed: "What did the German Constitutional Court get right in Weiss II?*, in *EU Law live*, 12 May 2020.

[27] O. GARNER, *Squaring the PSPP Circle: How a 'declaration of incompatibility' can reconcile the supremacy of EU law with respect for national constitutional identity*, in *VerfBlog*, 2020/5/22.

[28] D. SARMIENTO, *An Infringement Action against Germany after its Constitutional Court's ruling in Weiss? The Long Term and the Short Term*, in *EU Law live*, 12 May 2020.

[29] See M. MADURO, *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court*, in *VerfBlog*, 2020/5/06, J. ZILLER, *L'insoutenable pesanteur du juge constitutionnel allemande A propos de l'arrêt de la deuxième chambre de la Cour constitutionnelle fédérale allemande du 5 mai 2020 concernant le programme PSPP de la Banque Centrale Européenne*, in Rivista *Eurojus*, 2020, p. 151 ss, D.U. GALETTA, *Karlsruhe über alles? Il ragionamento sul principio di proporzionalità nella pronunzia del 5 maggio 2020 del BVerfG tedesco e le sue conseguenze*, in *Federalismi.it*, 7 maggio 2020, S. CAFARO, *Quale quantitative easing e quale unione europea dopo la sentenza del 5 maggio?* in *Sidiblog.it*, 8 May 2020, T. MARZAL, *Is the BVerfG PSPP decision "simply not comprehensible"?: A critique of the judgment's reasoning on proportionality, VerfBlog*, 2020/5/09, 9 May 2020, G. TESAURO, P. DE PASQUALE, *La BCE e la Corte di giustizia sul banco degli accusati del Tribunale costituzionale tedesco*, in *Il Diritto dell'Unione europea*, *Osservatorio europeo*, 2020, 11 May 2020, B. CARAVITA, M. CONDINANZI, A. MORRONE, A.M. POGGI, *A wrong decision in a difficult political phase*, in *Federalismi,* 2020, 13 May 2020, P. ELEFTHERIADIS, *Germany's Failing Court*, in *VerfBlog* n. 2020/5/18, 18 May 2020, R. KELEMEN, P. EECKHOUT, F. FABBRINI, L PECH, R. UITZ, *National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order*, *VerfBlog*, 2020/5/26, 26 May 2020. Other scholars, who were critical of the judgment, are referred throughout this essay.

[30] P. NICOLAIDES, *Op-Ed: The Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank: Setting an Impossible and Contradictory Test of Proportionality*, in *EU Law live*, 15 May 2020, G. DAVIES, *The German Constitutional Court Decides Price Stability May Not Be Worth Its Price*, in *EU law blog,* 20 May 2020.

[31] U. ŠADL, *When is a Court a Court?*, in *VerfBlog*, 2020/5/20.

[32] Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme, [2015] OJ L 121/20 and the subsequent amendments (Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, [2017] OJ L 16/51).

will be briefly described and commented on, with special attention to the position of the Commission. Then, short remarks will follow on the consequences that the ruling of the BVerfG may have on the legality of the Pandemic Emergency Purchase Programme (PEPP). The final section will seek to assess the impact that the judgement of the 5th May 2020 may have on the discussion of the mutualisation of sovereign debt which has attracted considerable attention with the outbreak of the pandemic.

2. The issues at the heart of the ruling of 5 May 2020 and its unprecedented impact on the authority of the Court of Justice

The recent judgment of the Second Senate of the Federal Court concerns the controversial boundary between monetary and economic policies in the Treaty provisions[33] and, more precisely, the interpretation provided by the Court of Justice in the *Weiss* case[34]. The BVerfG carried out a review of the judgment of December 2018 which confirmed the legality of the ECB's bond-purchase activity, in particular of the PSPP, adopted in 2015. The risk of this monetary Programme is that it may circumvent the prohibition set out in art. 123 of the TFEU. It is well known that this provision intends to avoid the risk of moral hazards by Members of the euro area. The legal question at the heart of the ruling of 5 May 2020 is whether the founders of the Treaty continue to have incentives to adopt a sound budgetary policy, considering the scope and the structure of the PSPP. Indeed, the latter falls within monetary policy, but it also indirectly supports Member States' economies. Yet, EU competence in the area of economic policies is limited under art. 5 (1) TFEU: the EU may only exercise a coordinating action.

The *Weiss* case is the second preliminary reference of the German constitutional court to the CJEU after the that in the *Gauweiler* case[35]. For the Court of Justice, the PSPP falls within the sphere of monetary policy, and does not provide certainty to purchasers of government bonds that the European System of the Central Bank will buy those bonds within a certain period and under conditions allowing those market operators to act, *de facto*, as intermediaries for the Eurosystem.

The BVerfG, acting as a supreme constitutional court of the EU[36], conducted a review of the judgment rendered in *Weiss* and concluded that it was adopted *ultra vires*; it is therefore not binding. The bond-buying programme, forming part of monetary policy, does not comply with the principle of proportionality and the assessment of the Court of Justice which ruled in favour of the validity of this programme "does not satisfy the requirements of a "comprehensible review as to whether the ESCB [European System of Central Banks] and the

[33] This essay will not deal with the boundaries between the monetary and economic policies. For an early discussion on this topic see judgment of 27 November 2012, case C-370/12, *Pringle*, ECLI: ECLI:EU:C:2012:756 and the comments made by R. CISOTTA, *L'Unione europea nel sistema delle relazioni economiche e monetarie globali. Un'indagine giuridica*, Torino, 2018, pp. 30 ss, 82 and *passim*.

[34] For comments on this case M. DAWSON, A. BOBIĆ: *Quantitative Easing at the Court of Justice – Doing whatever it takes to save the euro: Weiss and Others*, in *Common Market Law Review*, 2019, p. 1004 ss.

[35] It should be noted that this programme has never been implemented. R. CISOTTA, *Profili istituzionali della BCE e la fine (prossima?) del Quantitative Easing*, in *Osservatorio sulle fonti*, 2018, p. 13.

[36] H. SAUER, *Substantive EU law review beyond the veil of democracy: the German Federal Constitutional Court ultimately acts as Supreme Court of the EU,* in *EU Law live* (weekend edition), 9 May 2020, p. 8.

ECB observe the limits of their monetary policy mandate"[37]. As a result, the EU judicial body is accused of having breached the principle of conferral. It is affirmed that the latter «is not solely a principle of EU law but also incorporates constitutional principles from the Member States. It is integral to justifying the decrease in the level of democratic legitimation of the public authority exercised by the European Union; in Germany, this decrease in democratic legitimation not only affects objective tenets of the Constitution (Art. 20(1) and (2) GG) but also bears upon the citizens' right to vote»[38].

The position of the Federal Court is that "the proportionality principle has a corrective function"[39] and the assessment of the PSPP, carried out by the European court, does not satisfy the requirements of a comprehensive review as to whether the ESCB and ECB's decisions act within their mandate since the actual effects of the mentioned monetary Programme are not considered. Relying on the wording of the *Honeywell* decision as far as the violations of Member States' competences are concerned[40], the BVerfG affirms: «The judgment of 11 December 2018 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»[41]. In short, as a result of the *Weiss* ruling, Member States' sovereignty in the field of economic policy is reduced.

The Court in Karlsruhe considers that the assessment of the PSPP carried out in *Weiss* and the safeguards identified by the Court of Justice with respect to the risk that the PSPP circumvents the prohibition of art. 123 TFEU was not at all convincing[42]. The BverfG argues that the proportionality test should have been carried out in a different manner: the suitability and necessity of the PSPP had to be balanced against the economic policy effects – other than the risk of losses – arising from the programme to the detriment of Member States' competences. In addition, these adverse effects had to be weighed against the beneficial effects the programme aimed to achieve. The Court went into great detail in explaining the adverse economic effects of the PSPP for private citizens. The accusation against the Court of Justice is that it has downplayed those specific effects.

The BverfG also contested the legality of the ECB's programme for pursuing the monetary policy objective unconditionally while ignoring the economic policy effects resulting from the programme. The Bank failed to substantiate that the PSPP is proportionate[43]. Therefore, the view of the Federal Court is that the ECB manifestly disregards the principle of proportionality enshrined in art. 5(1) second sentence and art. 5(4) TEU. This violation of the principle of proportionality is structurally significant, so that the actions of the ECB constitute an *ultra vires* act.

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[37] Para. 123.
[38] Para. 158.
[39] Para. 133.
[40] In the Honeywell decision the conditions to determine that an act was adopted *ultra vires* are that the impugned act is «manifestly in breach of competences» and leads «to a structurally significant shift to the detriment of the Member States in the structure of competences». B. SCHRIEWER, *The German Federal Constitutional Court's First Reference for a Preliminary Ruling to the European Court of Justice German Practice*, in *German Yearbook of International Law*, 2014, p. 703.
[41] Para. 119.
[42] Para. 185.
[43] Para 232.

Finally, the Karlsruhe court gave an ultimatum to the Bundesbank: if the Governing Council does not adopt a new decision that shows 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, the Bundesbank, which advises the German government in the field of monetary policy, has three months to prepare for the termination of its participation in the decisions upon which the PSPP is based[44]. In addition, the Bundesbank must ensure that the bonds already purchased under the mentioned programme and held in its portfolio are sold based on a – possibly long-term – strategy coordinated with the ESCB.

The language of the ruling against the way the PSPP was approved and assessed in the EU context is so strong that one may consider that the BVerfG is engaging in an all-out war with EU institutions and that their failure to satisfy the conditions dictated by the Court would so seriously breach the German Constitution as to justify the triggering of art. 50 TEU.

The judgment under discussion affects equally the powers of the ECB and those of the Court of Justice but undermines the authority of the latter in an unprecedented manner. This attack is particularly serious since the Luxembourg court and not the BverfG has the primary responsibility to ensure that the principle of conferral is respected by other EU institutions, including the ECB, and that they are all subject to the rule of law. The Karlsruhe court goes so far as to provide the correct interpretation of the proportionality principle and of the ECB acts, setting itself as the final arbiter of what is lawful and unlawful in the EU.

The risks of a decentralised *ultra vires* review are clear: should other constitutional courts question the legality of the rulings of the Court of Justice, the entire EU edifice would collapse.

The ruling under discussion may be criticised since it was released by a highest domestic court of a "big" Member State; this organ, far from having exercised self-restraint in its *ultra vires* review, has undermined the European integration process. The threat is significant, since attacking the Court's interpretation of the purchase of the public debt programme on the secondary markets may put in jeopardy the existence of the euro area. It is submitted that whereas it is appropriate for highest domestic courts to question EU law when there are risks that fundamental rights are affected, by contrast, the exercise of the *ultra vires* review should be subject to considerable self-restraint, no matter if it is made in the name of a democratic principle, when the destiny of the Economic Monetary Union, which is at the heart of the European Integration process, is at stake.

3. Criticism against the German Federal Court's reasoning that questions the Court of Justice's assessment of the proportionality principle

According to the Federal Court, the judgment in *Weiss* is not good law. In particular, in ruling that decisions of the ECB Governing Council did not exceed the ECB's competences, the CJEU failed «to give consideration to the importance and scope of the principle of proportionality (Art. 5(1) second sentence and Art. 5(4) TEU), which also applies to the

[44] On the position of the Bundesbank and on its obligation to respect EU law, see N. DE ARRIBA-SELLIER, *Between Karlsruhe and Luxembourg, lies Frankfurt? The Bundesbank and the Bundesverfassungsgericht's PSPP decision*, in *EU Law live*, 15 May 2020.

division of competences, and is no longer tenable from a methodological perspective given that it completely disregards the actual effects of the PSPP»[45].

It is submitted that the principle of proportionality does not apply to the division of competences. The statement in para 118 mentioned above is wrong. The Federal Court criticises the self-imposed restraint of the Court of Justice regarding the activity of the ECB since it "fails to give sufficient effect to the principle of conferral [...] and paves the way for a continual erosion of Member State competences"[46]. This, in turn, leads to a breach of the democratic principle[47]. The position of the Federal Court that the proportionality principle has a "corrective function" to safeguard Member States' competences cannot be shared. The scope of an EU exclusive policy, such as the monetary policy, cannot be reduced through the proportionality principle in order to protect the Member States' prerogatives in the field of the economic policy. Although there are voices that share the concerns of the BVerfG and find that the Court of Justice could have applied a more stringent proportionality test[48], most scholars have criticised the legal analysis of the proportionality principle[49]. T. Marzal argues that: «Using proportionality review (especially the balancing exercise) to decide whether a measure falls within the conferred competences might be seen as methodologically wrong»[50]. Yet, it should be acknowledged that it is the same Court of Justice that in *Gauweiler*[51] and in *Weiss*[52] assesses the proportionality of the OMTP[53] and the PSPP. Therefore, the CJEU has accepted to examine the proportionality of acts adopted in the context of an exclusive competence.

It should be emphasised that the Court of Justice has consistently held that when EU institutions are required to make choices of a technical nature and to undertake complex forecasts and assessments, its review is limited to verify whether they manifestly disregard the limits of their discretion. The Federal Court acknowledges that the Court of Justice has always refused to carry out an in-depth analysis of the proportionality of EU measures. Yet, the position is taken that the proportionality assessment in *Weiss* is faulty since it fails to closely scrutinise the positions of the ECB; in its view, when Member States' fundamental interests are affected, this is inappropriate[54]. In the author's opinion, in *Weiss* the Court of Justice checked whether there was a legitimate objective that the ESCB was pursuing to justify the PSPP, and whether in adopting that programme the system went manifestly beyond what was

[45] Para. 118.
[46] Para. 156.
[47] Para. 158.
[48] J. ÖBER, *The German Federal Constitutional Court's PSPP Judgment: Proportionality Review Par Excellence*, cit.
[49] See G. DAVIES, *The German Constitutional Court Decides Price Stability May Not Be Worth Its Price*, cit.
[50] D.U. GALETTA, *Karlsruhe über alles? Il ragionamento sul principio di proporzionalità nella pronunzia del 5 maggio 2020 del BVerfG tedesco e le sue conseguenze*, cit., T. MARZAL, *Is the BVerfG PSPP decision "simply not comprehensible"? A critique of the judgment's reasoning on proportionality*, cit.
[51] C-62/14, *Gauweiler*, cit. The Court had already assessed the proportionality of the OMT programme in order to check whether it was disproportional to the objectives of the monetary policy. The conclusion was that the contested acts were valid. This is also emphasised by P. DE SENA AND S. D'ACUNTO, *La corte di Karlsruhe, il mito della "neutralità" della politica monetaria e i nodi del processo di integrazione europea*, in *Sidiblog*, 2020, 14 May 2020.
[52] C-493/17, cit., paras. 24 and 74-100.
[53] C-62/14, cit., para. 71.
[54] Para. 140.

necessary to achieve the objective. This is the classic way the proportionality test is carried out. True, the Court did not balance the monetary and economic effects of the PSPP as a German judge would have done. To the author's knowledge, such a balancing exercise has never been made in the context of an examination of the limits of an exclusive competence. However, even assuming that the CJEU had applied a "light" proportionality review of acts adopted in an area of exclusive competence, is it proportionate to declare a ruling of the Court of Justice inapplicable? In the author's opinion, the answer is negative.

The next critical remark concerns the German Court's finding that the test carried out in *Weiss* is unusual with respect to established case-law. The BVerfG makes a long list of cases in which the Court of Justice examined the effects of national as well as EU measures in all fields of EU law[55]. The aim is to prove that the actual effects of the contested measures were usually taken into consideration by the CJEU whereas in *Weiss* they were not. This conclusion is based on the false premise that all cases concerning the effects of a certain measure, whose compatibility with the Treaty is questioned, must be assessed in the same manner. Yet, there is a difference between a Member State's measure that, say, amounts to a restriction of fundamental freedoms and an EU measure. EU institutions are subject to respect of the Treaty, but must be able to act in order to achieve their objectives. As to national measures, they must be subject to a strict proportionality assessment regarding the extent to which they prevent the functioning of the internal market or the principle of free movement. The Court thoroughly examines the effects of national measures on the single market and whether national authorities may enact less restrictive alternative measures to achieve the same policy objective. The BVerfG fails to see that the proportionality test cannot be the same when EU judges are asked to assess an EU act. By not making any distinctions between the two categories of measures, the BVerfG draws the wrong conclusion that the *Weiss* case is inconsistent with the case-law of the Court of Justice.

A further criticism concerns the German Federal Court's statement that the CJEU neither subjects the safeguards built into the PSPP to avoid a breach of art. 123 TFEU to closer scrutiny, nor does it test them against counter indications. In other words, the proportionality test applied by the Court of Justice is not in line with the principle of an effective judicial review of measures potentially circumventing the prohibition of monetary financing, and contradicts the approach applied by the CJEU in other areas of law. Reference is made to two cases, concerning the powers of the Commission to impose fines for infringing competition rules[56]. In particular, in the *Chalkor* case the Court admitted that although in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, this does not mean that the EU Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. The concerned institution is under an obligation to provide detailed evidence in decisions to impose fines. The novelty of the case is that the individual decision must be subject to a proportionality assessment by the Commission.

[55] Paras 146-153.

[56] Para 184 refers to CJEU, Judgment of 8 December 2011, C-386/10 P, *Chalkor* v *Commission*, ECLI:EU:C:2011:815 and CJEU, Judgment of 6 November 2012, *Otis and others*, C-199/11, ECLI:EU:C:2012:684.

It is submitted that the BVerfG is not convincing when it states that it is contrary to the principle of an effective judicial review to subject the PSPP to a judicial scrutiny which is less intense than that applied to a Commission's decision imposing a fine against an undertaking. Indeed, the nature of the decision of the ECB, setting up the PSPP, is different from the individual decisions, issued by the Commission in the context of competition law.

A further unconvincing argument was advanced in favour of an intense judicial review *vis-a-vis* the ECB's PSPP: this is its lack of democratic accountability[57]. This point cannot be shared since it is not up to the Court to remedy the democratic deficits of the EU institutional setting; this task belongs to the Masters of the Treaties.

After concluding that the Luxembourg Court had not correctly assessed the ECB's decision on the PSPP, the Federal Court carried out its autonomous interpretation of the contested act: the PSPP is not considered illegal *per se*. It may fall within the monetary policy; however, for the Court it is dubious that the economic effects of the programme were fully taken into consideration by the Governing Council[58]. The BVerfG recognises that it is not for itself to decide how the concerns raised by the PSPP are to be weighed in the context of a monetary policy decision; rather, the point is that such effects, which are created or at least amplified by the PSPP, must not be completely ignored[59].

The position of the BVerfG can be criticised since a domestic court cannot impose its own methods of interpretation of acts of EU law since this would lead to a fragmentated application.

What is striking in the ruling of 5th May 2020 is that it is not clear whether the Governing Council breached the proportionality principle or the duty to state reasons. On the one hand, it seems that by pursuing the monetary policy objective unconditionally while ignoring the economic policy effects resulting from the programme, the ECB manifestly disregards the principle of proportionality[60]. On the other hand, the BVerfG examines the text of Decision (EU) 2015/774[61] to check whether the economic effects resulting from the PSPP were weighted and balanced against the expected positive contributions to achieving the monetary policy objective. Having admitted that this was not ascertainable, the Court states that: "For this lack of balancing and lack of stating the reasons informing such balancing, the ECB decisions at issue violate Art. 5(1) second sentence and Art. 5(4) TEU and, in consequence, exceed the monetary policy mandate of the ECB deriving from Art. 127(1) first sentence TFEU"[62]. The conclusion that is finally drawn up by the Court is that the decision of the Governing Council of 2015 (and the related subsequent decisions) are merely affected by a lack of motivation[63]. If it is so, this is good news since the implication is that the ECB could expand its reasoning to justify the programme. This may be sufficient to appease the Federal Court's concerns. Once again, it may be wondered whether it was really appropriate to rely

[57] See para 143 of the judgement of 5th May 2020. Along these lines, see M. SIRAGUSA, C. RIZZA, *L'"insostenibile leggerezza" del sindacato giurisdizionale sulle decisioni di politica monetaria della BCE*, cit.
[58] Paras 167-169.
[59] Para. 173.
[60] Para 165.
[61] *Supra* n. 32.
[62] Para. 177.
[63] Paras 167-169.

on the *ultra vires* doctrine, considering its damaging effect for the EU, in order to stigmatize the reasoning of the ECB.

4. Criticism against the statement that the *Weiss* judgment threatens the independence of the ECB

The BVerfG states that, as a result of the *Weiss* judgment, it is largely impossible to distinguish between monetary and economic policies. The conclusion is drawn as follows: «[...] This approach jeopardises the independence of the ECB guaranteed in Art. 130 TFEU, as it possibly exposes the ECB to political pressure that it make use of the leeway afforded it by the CJEU. The broader the scope of the ECB's mandate, and the further it reaches into areas reserved to economic and fiscal policy, the greater the risk that interested parties try to influence the ECB's decision-making»[64].

The position of the Karlsruhe court with respect to the risk that the ECB loses its independence is one sided: the *Weiss* judgment is considered a threat to the ECB's independence given that the Court of Justice gives its blessing to the use by the ECB of powers affecting economic policy. At the same time, the BVerfG neglects the risk that its ruling entails for the ECB's independence. The conclusion that the PSPP is not proportionate to the monetary policy objectives may affect the Central Bank's independence in deciding how to best fulfil its mandate in the sphere of monetary policy. It is submitted that the ECB's independence may be affected not only by political pressure but also "legal interference"[65]. It is not up to the Constitutional Court of a Member State to decide how far the monetary interventions of the Governing Council of the ECB should go to achieve the objectives defined in art. 119 (2) TFEU. As noted by an author, commenting on the OMTP reference to the Court of Justice in the *Gauweiler* case, «the Constitutional Court [...] has overstepped the boundaries of its powers and expertise»[66]. This does not mean that the Bank cannot be subject to judicial scrutiny. As it has been said, the German Federal Court should confine itself to a rationality review of the ECB's Decisions rather than undertaking a full review of those acts[67]. However, it must be acknowledged that the ruling of 5th May 2020 does not have a direct and actual impact on the independence of the ECB. This will ultimately depend on the position that the German government decides to take in order to comply with the ruling of its Constitutional Court. We turn to this issue in the next section.

5. The consequences of the ruling of 5 May 2020 for the German government and the Bundestag

The BVerfG does not consider that the Federal Government and the Bundestag have yet actually breached their responsibility with regard to the European integration agenda by

[64] Para. 161.
[65] *Contra*, see Dawson and Bobic, M. DAWSON, A. BONIĆ, *Op-Ed: "What did the German Constitutional Court get right in Weiss II?*, cit.
[66] F.C. MAYER, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, in *German Law Journal*, 2014, p. 115 ss.
[67] M. GOLDMANN, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, in *German Law Journal*, 2014, p. 280.

failing to actively advocate for the termination of the PSPP. The Court indicates what it expects from these organs in para. 232 of its ruling: they are required «to take steps seeking to ensure that the ECB conducts a proportionality assessment in relation to the PSPP. This duty does not conflict with the independence afforded both the ECB and the Bundesbank (Art. 130, Art. 282 TFEU, Art. 88(2) GG), as was already decided by the Second Senate. The Federal Government and the Bundestag must clearly communicate their legal view to the ECB or take other steps to ensure that conformity with the Treaties is restored»[68].

The German government and Bundestag seem to be caught between the anvil and the hammer: either they implement the ruling and ask the Governing Council of the ECB to carry out a comprehensive proportionality assessment of the programme, or they consider themselves bound by the *Weiss* judgment, as the principle of supremacy would require. In order to respect the Federal Court's ruling and to be considered accountable to its citizens, the German government is likely to take some steps to assuage the concerns raised by the BVerfG. It is reassuring that the indication provided by the Court in para. 232 is not prescriptive. The Bundestag and the Government are left with a choice: they could inform the ECB that greater evidence of a proportionality assessment need be given in the PSPP or they could take other steps to ensure that conformity with the Treaties is restored. It is up to the German government to work out a solution with the other members of the euro area in order to comply with the ruling of the BVerfG and, in doing so, it is allowed a considerable degree of freedom.

6. The reactions of the EU institutions to the judgment of the German Federal Court and the need to open an infringement procedure

The three EU institutions particularly concerned by the ruling of 5 May 2020 have responded. The ECB was to the first to make its press release public. The position of the Governing Council of the ECB issued a very neutral statement. That body affirms that «it remains fully committed to doing everything necessary within its mandate to ensure that inflation rises to levels consistent with its medium-term aim and that the monetary policy action taken in pursuit of the objective of maintaining price stability is transmitted to all parts of the economy and to all jurisdictions of the euro area»[69].

The Court of Justice[70] issued a press release on the ruling of the Federal Court which in itself is an exceptional decision. This shows the importance attached to the position of the domestic court and the concerns that it causes in Luxembourg. In its statement, the EU judicial body stresses that the rulings under art. 267 TFEU are binding for national courts and that the purpose of that remedy is to ensure that EU law is applied uniformly. Furthermore, only the Court of Justice is competent to decide on whether an act of an EU institution is valid or not. Should national courts take a different position from that of the Court, the unity of the EU legal order would be jeopardised and legal certainty would be affected. Finally, it is affirmed that: «Like other authorities of the Member States, national courts are required to

[68] Para. 232.
[69] https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html.
[70] https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf.

ensure that EU law takes full effect. That is the only way of ensuring the equality of Member States in the Union they created»[71].

The President of the European Commission also issued a press release[72]. Her reaction is complementary to that of the Court since she recalls the Treaty rules as well as fundamental judicial principles. Her first remark is that she has taken note of the Court of Justice's clear statement on the ruling of the Federal Court. Secondly, we are reminded that the Union's monetary policy is a matter of exclusive competence and that EU law has primacy over national law. Then, she restates the concept that the rulings of the European Court of Justice «are binding on all national courts and that the final word on EU law is always spoken in Luxembourg. Nowhere else»[73].

Next, she gives the news that the Commission is considering possible steps to take, which may include the option of infringement proceedings. The closure is evocative: «the European Union is a community of values and of law, which must be upheld and defended at all times. This is what keeps us together. This is what we stand for»[74].

It may be questioned whether it is appropriate for the Commission to start an infringement action against Germany. There are only two precedents (concerning France and Spain) in which such an action for breaches carried out by courts of last instance has been brought and upheld by the Court of Justice[75]. This is a time in which a ruling of the Court of Justice for the anti-EU position of the German Federal Court proves that the EU is pervaded by a state of profound crisis. Yet, the breach of EU law, in particular of art. 267 para. 1 b), by the highest judicial organ is serious, considering its disruptive effects on the authority of the Court of the Justice. Although other constitutional courts in Denmark[76] and in the Czech Republic[77] have challenged the Court of Justice's authority by declaring *ultra vires* one of its rulings, in the present case the BVerfG jeopardises the spirit of comity and loyal cooperation between a domestic court and the Court of Justice that inspired its decision in *Honeywell* and threatens the functioning of the euro area. The relations between the Italian Constitutional Court and the Court of Justice in the *Taricco* saga were also difficult, although the issue at stake was the protection of fundamental rights rather than the way the ECB exercises its exclusive powers. Yet, Herculean efforts were made in the dialogue between the two courts to avoid a clash. The Italian Constitutional Court made use of the preliminary ruling procedure

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[71] Ibidem.
[72] https://ec.europa.eu/commission/presscorner/detail/en/statement_20_846.
[73] Ibidem.
[74] Ibidem.
[75] See CJEU, Judgment of 12 November 2009, C-154/08 *Commission* c. *Spain,* ECLI:EU:C:2009:695 and CJEU, Judgement of the 4 October 2018, C-416/17 *Commission* c. *France*, ECLI:EU:C:2018:811. The first time the possibility to bring an action for a breach of EU law committed by a court of last instance was examined is in CJEU, Judgement of 9 December 2003, C-129/00 *Commission* v *Italy*, ECLI:EU:C:2003:656. D. SARMIENTO, *An Infringement Action against Germany after its Constitutional Court's ruling in Weiss? The Long Term and the Short Term*, cit.
[76] For comments on the judgement of the Højesteret (Supreme Court, Denmark) and its *ultra vires* review of the CJEU judgement of 1 April 2016, case C-441/14, *Ajos*, ECLI:EU:C:2016:278 see U. ŠADL, *When is a Court a Court?*, cit.
[77] For comments on the judgement of the Constitutional Court of the Czech Republic and its *ultra vires* review of the Landtová ruling (judgement of 22 June 2011, C-399/09, *Marie Landtová*, ECLI:EU:C:2011:415) see J. KOMAREK, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*; *Judgment of 31 Jan. 2012, Pl. OS 5/12, Slovak Pensions XVII*, in *European Constitutional Law Review*, 2012, pp. 323-337.

in the context of art. 267 TFEU[78] in order to offer the Court of Justice the opportunity to avoid the triggering of the counter-limits, as result of the interpretation of art. 325 TFEU in the *Taricco* case[79]. The Luxembourg Court played its part in the dialogue by making sure that the protection of fundamental rights could be reconcilable with the principle of supremacy so as to assuage the concerns of the domestic court[80].

It should be added that the governments of those Member States that contest the way the Court of Justice has interpreted art. 19 TEU in infringement procedures, related to the reform of the domestic judiciary[81], may find in the latest ruling of the BVerfG a useful precedent to disobey the judgments of the Luxembourg court. As a result, attacks on the rule of law in those contexts are likely to find new force. Of course, this unwelcome development would only be a side-effect of the ruling of the BVerfG and it can be a stand-alone ground to open an infringement procedure against Germany.

Yet, it is submitted that the Commission should decide to start an action on the basis of art. 258 TFEU for the very same fact that a court of last instance has considered a judgment released in the context of a preliminary ruling on the validity of an EU act of highly as not binding. This is an objective breach of EU law. This move would not necessarily imply an escalation of the conflict. It is to be hoped that, during the pre-trial phase of the infringement procedure against Germany, the government could give the Commission adequate reassurances that the breaches of EU law committed by its Constitutional court will be ended. The Commission could therefore decide not to issue a reasoned opinion and close the infringement procedure.

7. The consequences of the ruling of 5 May 2020 for the Pandemic Emergency Purchase Programme (PEPP): a preliminary assessment

It may be thought that the ruling of 5 May 2020 may have an indirect impact on the purchase programme that was inaugurated on 24 March, in addition to the Asset Purchase Programme (APP), as a reaction to the spread of the pandemic (the so-called PEPP)[82]. Yet, these worries[83] are perhaps excessive. Indeed, apart from the fact that the policy objectives of the latest programme are not identical to those of the APP, the circumstances that triggered that purchase programme are exceptional, as is well illustrated by the instituting Decision[84].

[78] CJEU, Judgment of 5 December 2017, C-42/17 *M.A.S., M.B.* (preliminary ruling raised by the Italian Constitutional Court), ECLI:EU:C:2017:936.
[79] CJEU, Judgement of 8 September 2015, C-105/14 *Taricco and others* (preliminary ruling of the District court, Cuneo), ECLI:EU:C:2015:555.
[80] For insightful comments on the Taricco ruling and the follow-up, see for all C. AMALFITANO, *La vicenda Taricco e il dialogo (?) tra giudizi nazionali e corte di Giustizia*, in *Il Diritto dell'Unione europea*, 2018, p. 153. See also footnote n. 75 for references to the numerous scholars who have written about the preliminary rulings raised by the Italian Constitutional Court.
[81] CJEU, Judgment of 24 June 2019, C-619/18 *Commission* c. *Poland*, ECLI:EU:C:2019:531.
[82] Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ 2020, L 91/1.
[83] M. MADURO, *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court*, cit., D. KYRIAZIS, *The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango*, in *EU law blog*, 6 May 2020.
[84] Recital no. 3 of Decision (EU) 2020/440, cit., states: «The PEPP is established in response to a specific, extraordinary and acute economic crisis, which could jeopardise the objective of price stability and the proper

This means that assuming that someone challenges the latter act, the PEPP could not necessarily be censured on the ground that the programme lacked a "proper" proportionality assessment. Indeed, it would be hard to accuse the ECB of having failed to motivate the purchase of bonds considering the economic contraction that the members of the euro area will experience as a result of the containment measures adopted to counter the pandemic.

8. The position of the German Federal Court on risk sharing regimes in relation to bonds of the Member States

The Federal Court makes an important statement with respect to the PSPP. The latter, *in its current design*, does not provide for such a risk-sharing regime in relation to bonds of the Member States purchased by national central banks. «Against this backdrop, it can be ruled out that the PSPP affects the constitutional identity of the Basic Law (Art. 23(1) in conjunction with Art. 79(3) in conjunction with Art. 20(1) and (2) GG) in general and the overall budgetary responsibility of the German Bundestag in particular»[85]. The implication of this statement is that any scheme for the allocation of risks between national central banks that enable a redistribution of sovereign debt between the Members of the euro area would not only be *ultra vires* but also in breach of the German constitutional identity. Here, the Federal Court is seeking to warn the German government that any risk-sharing solution in relation to the purchase of Member States' bonds would be considered contrary to the non-amendable parts of the Constitution. The executive may thus rely on this part of the ruling to continue its opposition to any mutualisation of sovereign debts. In fact, it must be acknowledged that there are no legal bases in the TFEU to support such a solution, and a revision of the Treaty would be necessary to change the *status quo*.

It should be noted that the recent Franco-German proposal[86] to set up a temporary recovery fund of EUR 500 billion to support the economies across the EU affected by the pandemic should be interpreted as excluding the mutualisation of sovereign debts and is therefore in line with the BVerfG's ruling. The new instrument will be part of the multiannual financial framework and will be operative by 1 January 2021; it is designed to provide additional resources to those made available under the long-term EU budget. The Commission will finance the recovery support "by borrowing on markets on behalf of the EU"[87], taking advantage of its high credit rating on the market. This is the first great novelty of the instrument, which is proposed in the name of the principle of solidarity. The second piece of news is that the fund should be integrated in the system of EU own resources and could possibly be financed by drawing on new categories of own resources.

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functioning of the monetary policy transmission mechanism. Due to these exceptional, fast-evolving and uncertain circumstances, the PEPP requires a high degree of flexibility in its design and implementation compared with the APP and its monetary policy objectives are not identical to that of the APP». It should also be noted that the Governing Council, probably mindful of the *Weiss* case, uses the expression "proportionate" several times in its Decision when describing how the purchases will be carried out under the PEPP.

[85] Para. 228.

[86] Press release no. 173/20 of 18 May 2020 : <https://www.bundesregierung.de/resource/blob/973812/1753772/414a4b5a1ca91d4f7146eeb2b39ee72b/2020-05-18-deutsch-franzoesischer-erklaerung-eng-data.pdf?download=1> (accessed 20 May 2020).

[87] Ibidem, p. 2.

The idea launched by the two governments has the merit of providing a genuine medium-term solution to boost the "most affected sectors and regions"[88]. The German Chancellor has shown great flexibility and willingness to make grants available (in addition to loans) to countries in need should the new instrument be finally approved with the unanimous vote of all Member States[89]. Yet, the proposed fund could be considered a way to side-line any discussion on the mutualisation of debt in the near future. Indeed, it is an *ad hoc* measure designed to make less dramatic the impact of the pandemic on the economies of those members of the euro area mostly affected by the crisis related to Covid-19. However, the new fund, which in itself is a welcome development and may save the EU from an existential crisis, does not solve the fundamental problems of the Economic Monetary Union which remains unaccomplished. In order to build a genuine one, the Treaty would need to be revised so as to strengthen EU competence in the field of the economic policy.

[88] Ibidem.

[89] At the moment, there is no support for the proposed fund by Austria, Denmark, the Netherlands and Sweden.