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The German Federal Constitutional Court's Decision in *Weiss*: A Contextual Analysis

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Competence; Constitutional law; Economic and monetary policy; Economic and monetary union; EU law; Germany; National courts; Supremacy of EU law

Abstract

This contribution offers a contextual analysis of the controversial judgment of the German Federal Constitutional Court (BVerfG) in Weiss*, thereby identifying the main roots of the conflict between the BVerfG and the European Court of Justice (ECJ). This conflict, which essentially also includes the European Central Bank (ECB), is rooted in a unique convergence of two fundamental and until this very day unresolved issues: the legal fiction in primary Union law of the separability of economic from monetary policy, and the irresolvable conflict between the Union law's primacy and the national constitutional limits thereof, fuelled by the unbalanced institutional relationship between the independent ECB and a national constitutional court. Due to the structural nature of the problems there are no ready-made solutions.*

Introduction

On 5 May 2020 the German Federal Constitutional Court (*Bundesverfassungsgericht* (BVerfG)) issued its final judgment in *Weiss*[1] concerning the Secondary Markets Public Sector Asset Purchase Programme (PSPP) (the PSPP decision), consisting namely of the January 2015 decision of the Governing Council of the European Central Bank (ECB) on an expanded asset purchase programme[2] and the March 2015 ECB decision on a PSPP, including the subsequent amending decisions.[3] In this judgment, the BVerfG considered the lack of reasons regarding the proportionality of this decision in comparison to its economic and fiscal policy effects as sufficiently severe to classify the PSPP decision as ultra vires, thereby ordering the German Bundesbank to withdraw from the programme after a transitional period, unless the ECB would still provide the missing proportionality test. In order to reach this conclusion, the BVerfG had to disqualify the European Court of Justice (ECJ) judgment confirming the legality of the PSPP decision in rather strong language, referring to the European Court's reasoning as "not comprehensible and … arbitrary".[4] The BVerfG's ruling does not only mark the provisional end to a dispute concerning the legality of the main unconventional monetary policy measures of the ECB that began with the German constitutional complaints against the 2012 ECB decision on Outright Monetary Transactions (OMT) and the first-ever

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[1] *Weiss*, judgment of 5 May 2020, 2 BvR 859/15, available in English at: *https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html* [Accessed 23 October 2020].

[2] ECB, "Expanded asset purchase programme", *https://www.ecb.europa.eu/press/pr/date/2015/html/pr150122_1.en.html* [Accessed 23 October 2020].

[3] Decision 2015/774 on a secondary markets public sector asset purchase programme [2015] OJ L121/20.

[4] *Weiss*, judgment of 5 May 2020 at [118].

preliminary reference of the BVerfG to the ECJ in 2014, but it also stands for the first application by the BVerfG of its "ultra vires doctrine". It takes thus little imagination to realise that this judgment has come as a real bombshell not only in legal, but also political circles.[5]

Rather than focus on a case-note style summary and scrutiny of the facts of the case and their legal classification, the aim of this contribution is to provide a contextual analysis of *Weiss*, focusing on a number of structural legal issues. These, in the authors' assessment, form the basis of the dispute and support the view that the real significance of this judgment does not lie in the BVerfG's rejection of PSPP, but in its implications on the functioning of the judicial dialogue between the ECJ and the highest national courts in the EU as the main tool to manage the indissoluble tensions between Union law's primacy and Member States' *domaine réservé*. In fact, what is presently submitted is that the clash between the ECJ and the BVerfG is rooted in a unique convergence of two fundamental and, until this very day, unresolved issues. The first issue concerns the legal fiction of Economic and Monetary Union (EMU) in primary European Union (EU) law. Whereas the conduct of one policy field—monetary policy for the euro area—is allocated as an exclusive competence to a non-majoritarian Union institution which is, at Primary law level, insulated from any meaningful accountability besides judicial review, the other policy field—economic policy—remains with the Member States to the exclusion of the Union, which may at best co-ordinate Member States' actions. The artificial distinction of economic and monetary policy that underlies the delimitation of competences in EMU defies, however, economic reality and the closely intertwined interaction between both.

The second issue relates to the mutually exclusive claim of the Union and the national legal order to define the boundaries of Union action, which prevails over conflicting national law. Once these claims converge, a clash between the legal orders is inevitable. In EMU, such a scenario becomes likely if the dividing line between the Union and the national legal order is to be drawn from different perspectives. With the Union legal order having the monetary policy objective and the national legal order having the autonomy to conduct economic policy as points of departure, the delineation of competences enters a twilight zone. This conflict is further amplified by the unbalanced relationship between the institutional actors at the supranational and national level effectively charged with determining the boundaries of Union action. Whereas traditionally the dispute about the boundaries of Union law is settled between courts in a judicial dialogue, in relation to the monetary union, the dispute, in its essence, takes place between the supranational central bank and a national court, with the ECJ acting as an intermediary.

It is this conjuncture of the legal separation of competences belonging to the same entwined policy domain, the irresolvable conflict between the Union law's primacy and the national constitutional limits thereof, paired with the unbalanced institutional relationship of an independent supranational central bank and a national constitutional court, that sets the scene for the emergence of constitutional crisis and an unprecedented harm of the ECJ.

This contribution will identify the main roots of the conflict between the BVerfG and the Union's institutions and, thereafter, offer a concise analysis of the BVerfG's final judgment in *Weiss*. For this, first, the blurred lines between economic and monetary policy that stand in sharp contrast to the separation of these two policy areas in primary Union law are discussed. Having set the scene, the strategies that the three main institutional actors have applied in defining monetary policy and delineating it from economic policy will be presented. The anlaysis will draw a picture of the tensions, under which the case of *Weiss* took place. Secondly, the contribution will shed further light on the mutually exclusive claim of the Union and the national legal order to define the boundaries of Union action, which shapes the relationship between the ECJ and the BVerfG and that explains the differing approaches of these courts to the delineation of

[5] See, e.g., the contributions in the *German Law Journal*, Special Collection on European Constitutional Pluralism and the PSPP Judgment, 31 August 2020, *https://germanlawjournal.com/german-law-journal-special-collection-on-european-constitutional-pluralism-and-the-pspp-judgment/* [Accessed 23 October 2020].

monetary and economic policy and to the standard of review of monetary policy decisions. Against the backdrop of these findings, the BVerfG's judgment in *Weiss* will be discussed with a view to its implications for EMU, for the composite European constitution[6] and for the judicial dialogue between Europe's highest courts. The contribution ends with main conclusions and an outlook.

The relationship between economic and monetary policy in EMU: on legal fictions and economic realities

The first issue that lies at the heart of the conflict in *Weiss* between the ECB and the ECJ on the one side, and the BVerfG on the other side is the way in which these institutions approach the discrepancy between the legal separation of economic and monetary policy in primary Union law and the interdependencies of both as understood in economics. In fact, the Treaty provisions on EMU create a legal fiction that is not easily reconciled with economic (and political) reality. The stands taken by the ECB, the ECJ and the BVerfG bear witness to the practical difficulties in determining the dividing line between both policy fields in the context of a competence review.

The blurred lines between economic and monetary policy

It is well documented that one of the most basic characteristics of EMU is the different degrees to which the economic and monetary policies of the Euro area Member States are actually pooled at supranational level or, to put it more bluntly, the different degrees to which they have been integrated.[7]

Article 3(1)(a) of the Treaty on the Functioning of the European Union (TFEU) lists monetary policy for the euro area Member States as an exclusive competence of the EU. Primary Union law does not as such provide for a legal definition of the term *monetary policy*. Instead, art.127(1) TFEU defines objectives that delimit the scope of the term in a functional manner. The primary objective of the European System of Central Banks (ESCB) is "to maintain price stability". This alludes to the basic function of monetary policy, which has been described as,

> "one of the two principal means (the other one being fiscal policy) by which government authorities in a market economy Euro area Member States regularly influence the pace and direction of overall economic activity, importantly including not only the level of aggregate output and employment but also the general rate at which prices rise or fall."[8]

What is more, as a quantification of price stability by means of an inflation target or a target range is missing from the Treaties, the ECB has to define price stability for itself as to maintain the inflation of the "Harmonised Index of Consumer Prices (HICP)" for the euro area "below, but close to 2% over the medium term".[9] Article 127(1) TFEU also introduces a secondary objective, according to which the ESCB must also support the general economic policies in the Union with a view to contributing to the achievement of the Union objectives stated in art.3 TFEU. This support must, however, be without prejudice to the objective of price stability, which makes clear that this secondary objective is subordinated to the price

[6] Term by L. Besselink, *A Composite European Constitution* (Groningen: European Law Publishing, 2007).

[7] For the important historic perspective see E. Mourlon-Druol, "History of an Incomplete EMU", in F. Amtenbrink and C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford: Oxford University Press, 2020), p.13.

[8] B.M. Friedman, "Monetary policy", NBER Working Paper Series, Working Paper 8057, December 2000, p.1, *https://www.nber.org/system/files/working_papers/w8057/w8057.pdf* [Accessed 11 November 2020].

[9] See ECB, "The outcome of the ECB's evaluation of its monetary policy", *ECB Monthly Bulletin*, June 2003, 79. It is for this reason the ECB has been described as having *goal* independence. See J. de Haan, F. Amtenbrink, and S.C.W. Eijffinger, "Accountability of Central Banks: Aspects and Quantifications" (1999) 209 *BNL Quarterly Review* 169.

stability objective. This has been interpreted not only to exclude supporting[10] action by the ECB that would jeopardise its price stability objective,[11] but according to some commentators also as an instruction to counter general economic policies "if inflation diverges from the statutory goal and if the ECB finds contractionary actions to be justified by its primary objective."[12] At the same time it has been noted that the existence of the secondary objective implies that the TFEU does not entail the isolation of monetary policy from other economic policy goals, as within the limits of its discretion the ECB is entitled to choose between economic policy goals.[13]

With the exception of specific subparts of economic policy such as, for example, the regulation of the internal market or of indirect taxes,[14] the EU Treaties confer neither an exclusive nor a shared general competence for economic policy on the Union. Article 5(1) TFEU states in a rather non-committal wording that the Member States must co-ordinate their economic policies within the Union, whereby the Council is empowered to adopt measures, including, in particular, broad guidelines for these policies. This is mirrored by the wordings of arts 120(1) and 121(1) TFEU, both of which refer to the economic policies of the Member States, which the latter are supposed to regard as a matter of common concern and which they are to conduct with a view to contributing to the achievements of the Union objectives listed in art.3 TEU. What is more, the rather general reference in the above-mentioned provisions to economic policy has to be taken with a grain of salt, as namely the provisions on EMU in title VIII of the TFEU do not cover all policy areas and policy measures by which the Member States or the Union for that matter can influence the national or European economy and, more concretely, stimulate (sustainable) economic growth, such as by means of industrial policy or employment policy. When the TFEU in the EMU context refers to the co-ordination of national economic policies this by-and-large actually covers fiscal policy and even more specifically government spending.[15] In *Pringle* the ECJ has confirmed that arts 2(3) and 5(1) TFEU limit the Union's active engagement with economic policy "to the adoption of coordinating measures."[16]

What becomes clear from these observations is thus that primary Union law construes a legal divide between economic and monetary policy at the fundamental level of the distribution of competences in the Union legal order. This assumes that a clear delimitation of these two policy fields is feasible in practice and ultimately also justiciable. Yet, from an economic point of view this separation is built on anything but solid grounds.[17] Indeed, monetary policy measures may very well be distinguished from fiscal policy measures, based on the overarching objectives pursued (for example price developments or employment

[10] To be sure, some commentators argue that the Union's competence in the area of economic policy may actually be greater than what art.5 TFEU suggests. See e.g. B. de Witte, "EMU as Constitutional Law", in F. Amtenbrink and C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford: Oxford University Press, 2020), pp.278, 284.

[11] See e.g. M. Selmayr, " Das Recht der Europäischen Währungsunionn" in P.-C. Müller-Graff (ed.), *Europäisches Wirtschaftsordnungsrecht* (Baden-Baden: Nomos, 2015), pp.1387, 1482.

[12] D. Adamski, "Objectives of the EMU" in F. Amtenbrink and C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford: Oxford University Press, 2020), pp.214, 222 and 223.

[13] S. Griller, "Artikel 12" in E. Grabitz, M. Hilf and M. Nettesheim, Das Recht der Europäischen Union (München: *C.H. Beck*, 2012), paras 28 and 29.

[14] Articles 114(1) and 113 TFEU.

[15] On the notion of fiscal policy see, e.g., M. Horton and A. El-Ganainy, "What is fiscal policy?" (2009) 46 *Finance and Development* 52, 53.

[16] *Pringle v Ireland* (C-370/12) EU:C:2012:756; [2013] 2 C.M.L.R. 2 at [64].

[17] See P. Craig and M. Markakis, "Gauweiler and the Legality of Outright Monetary Transactions" (2016) 41 E.L. Rev. 4 at 21; M. Waibel, "Monetary policy in the EU: an exclusive competence only in name?", University of Cambridge Faculty of Law Research Paper No.11/2017, *https://ssrn.com/abstract=2915162* [Accessed 11 November 2020]; F. Amtenbrink, "The European Central Bank's Intricate Independence Versus Accountability Conundrum in the Post-crisis Governance Framework" (2019) 26 M.J.E.C.L 165 at 168; Editorial, "'Longing' for Less Interesting Times? The German Federal Constitutional Court and the Primacy of EU Law" (2020) 45 E.L. Rev. 293, 294.

rates), the instruments applied (for example central bank interventions or government stimuli), or the actors involved (for example central banks or central governments).

However, such dividing lines become blurred when considering the economic interdependency, interactions, and mutual direct and indirect effects that measures taken by the different principles monetary policy and fiscal policy actors have. Indeed, it has been observed that as "both inflation and cyclical [economic] conditions depend on the policy mix, monetary and fiscal policies are de facto interdependent".[18] Put differently, much hinges on the interaction between monetary and fiscal policy (authorities), whereby the main actors involved have what has been described as a "substitution relationship". As Afonso, Alves and Balhote, observe, "when governments attain high levels of public debt or budget deficits, then the central bank assumes a somewhat more dominant position to confront the fiscal problem."[19] This (potential) role of monetary policy as a substitute for failing fiscal policy may be particularly significant in the euro area, which, as a result of asymmetric integration in EMU, has to rely on a complicated and, in the view of many observers, inadequate system to coordinate autonomous and potentially diverging national fiscal policies.[20] In this context, De Grauwe observes that "the absence of a full political union which includes a Central European government with the power to spend and to tax, and which is independent of national governments", constitutes the most important design flaw of EMU, as in his view, "such a government is the only institution that can fully back the ECB."[21]

To put it bluntly, in the words of Howard and Verdun: "the institutional architecture of EMU, as set-out in the Maastricht Treaty, had a fair-weather design."[22] The absence of a European economic policy counterweight or fiscal capacity that can provide an adequate stabilisation function may already be problematic in "normal" economic times. Yet, it becomes system critical in times of crisis, such as during the recent European financial and sovereign debt crisis, but also in the COVID-19 pandemic. Particularly as EMU—with its persisting disparities between economic structures and performances of Member States and its very limited degree of fiscal integration or capacity—is prone to asymmetric shocks, which in a currency union can no longer be addressed by individual countries through the autonomous application of monetary policy and exchange rate instruments.[23]

In the case of an overriding price stability objective, the ultimate and sole aim of monetary policy is to ensure low inflation and stable prices. Hence, the argument could be made that monetary policy should not affect the economy in any other way, as this entrenches on the economic policy competence of the Member States. Yet, while such a view may be conducive to a legally enforceable delineation of monetary policy measures from economic policy measures in the context of a competence review, it is difficult to reconcile with the process by which monetary policy measures actually affect the development of prices.

[18] Brackets added. C. Wyplosz, "Economic policy coordination in EMU: strategies and institutions", paper presented at the German-French Economic Forum in Bonn, 12 January 1999 (revised March 1999), p.3; A. Afonso, J. Alves, and R. Balhote, "Interactions between Monetary and Fiscal Policies" (2019) 22 *Journal of Applied Economics* 132.

[19] A. Afonso, J. Alves and R. Balhote. "Interactions between Monetary and Fiscal Policies" (2019) 22 *Journal of Applied Economics* 132 at 149. See also: J. Gali and R. Perotti, "Fiscal Policy and Monetary Integration in Europe", NBER Working Paper 9773, available at *https://www.nber.org/papers/w9773* [Accessed 2 November 2020]; Wyplosz, "Economic policy coordination in EMU", paper presented at the German-French Economic Forum in Bonn, 12 January 1999 (revised March 1999), p.3.

[20] See e.g. F. Amtenbrink and J. de Haan, "Economic Governance in the European Union—Fiscal Policy Discipline versus Flexibility" (2003) 40 C.M.L.R. 1075; D. Howarth and A. Verdun, "Economic and Monetary Union at Twenty: a Stocktaking of a Tumultuous Second Decade: Introduction" (2020) 42 J.E.I 287.

[21] P. De Grauwe, "Flaws in the Design of the Eurosystem?" (2006) 9 *International Finance* 143.

[22] Howarth and Verdun, "Economic and Monetary Union at Twenty" (2020) 42 J.E.I. 287 at 288.

[23] K.A. Hafner and J. Jager, "The Optimal Currency Area Theory and the EMU" (2013) 48 *Intereconomics* 315; D. Masciandaro and D. Romelli, "The Economics of European Monetary Integration" in F. Amtenbrink and C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford: Oxford University Press, 2020), p.37 with further references.

The adjustment of money market interest rates, as well as the influencing of market expectations on their future development, has as its very aim to affect the economy through various channels, which together steer the development of prices.[24] This includes market interest rates, such as bank lending and deposit rates, financial and real asset prices, and the exchange rate, which together then affect the supply and demand of goods and services, as well as labour markets.[25] Through these transmission channels, monetary policy thus affects the economy in various ways, the point being that in the case of an overriding single objective of price stability, central bank measures are not aimed at or have as their final objective specific policy outcomes concerning these economic variables, for example, wage formation. Instead, these effects on the economy can be rather understood as a means to an end, that is to ensure the effectiveness of monetary policy within the single currency area that is geared towards keeping inflation within certain predefined boundaries.

By definition, monetary policy thus affects the economy and market participants, including citizens in this regard, in areas that fall in the general economic or fiscal policy domain for which, in the case of EMU, the Member States remain in charge. It is for this reason that it can be argued that monetary policy decisions, even if taken by a depoliticised central bank, by their very nature touch upon highly political questions of public interest.[26] The flipside of the coin is that economic policy and namely a highly expansionary fiscal policy affects price developments and thus the monetary policy stands of an independent central bank. If anything, the European sovereign debt crisis has highlighted how the economic policies of the Member States and specifically public deficit and debt developments have a significant impact on the monetary policy of the ECB.[27] Economic and monetary policy are thus communicating vessels.

Monetary policy has (re-)distributional effects, a phenomenon that is not limited to EMU or the role of the ECB. Bernanke has observed that "[m]onetary policy is a blunt tool which certainly affects the distribution of income and wealth, although whether the net effect is to increase or reduce inequality is not clear."[28] Some of these effects have been referred to as "collateral consequences of monetary policy", thereby hinting towards their undesirability, as is the case for the effects of the ECB's accommodative monetary policy on financial conditions and the distributional consequences of very low savings accounts rates and rising asset prices.[29] The question here is whether and to what extent these potential collateral effects can and should determine the monetary policy stands of a central bank or whether it is up to governments and thus fiscal policy to take mitigating or corrective action.[30]

What emerges from these brief observations is that the economic interdependency, interactions, and mutual direct and indirect effects of measures pursued by different actors to ultimately achieve different

[24] K. Tuori, "Monetary Policy (Objectives and Instruments)" in F. Amtenbrink and C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford: Oxford University Press, 2020), pp.615, 624–626.

[25] Bank of England, "The Transmission Mechanism of Monetary Policy" (1999) 39 *Bank of England Quarterly Bulletin* 161; ECB, "Monetary Policy Transmission in the Euro Area" (2000) *ECB Monthly Bulletin* 43; Deutsche Bundesbank, (2019) *Geld und Geldpolitik* 160 and 161, available at *https://www.bundesbank.de/resource/blob/606038/5a6612ee8b34e6bffcf793d75eef6244/mL/geld-und-geldpolitik-data.pdf* [Accessed 11 November 2020].

[26] S. Griller, "Artikel 127" in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union* (München: C.H. Beck, 2012), para.29.

[27] Tuori, "Monetary Policy (Objectives and Instruments)" in Amtenbrink and Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford: Oxford University Press, 2020), pp.652 and 653; A. Hinarejos, "The Legality of Responses to the Crisis" in F. Amtenbrink and C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford: Oxford University Press, 2020), p.1367.

[28] B.S. Bernanke, "Monetary policy and inequality", *Brookings Blog*, 1 June 2015, *http://www.brookings.edu/blogs/ben-bernanke/posts/2015/06/01-monetarypolicy-and-inequality* [Accessed 23 October 2020].

[29] M. Draghi, "The ECB's recent monetary policy measures: Effectiveness and challenges", Camdessus lecture, IMF, Washington, DC, 14 May 2015, *https://www.ecb.europa.eu/press/key/date/2015/html/sp150514.en.html* [Accessed 23 October 2020].

[30] M. Draghi, "The ECB's recent monetary policy measures: Effectiveness and challenges", Camdessus lecture, IMF, Washington, DC, 14 May 2015, who refers in this context to a duty of the central bank "to raise awareness".

economic objectives defy the notion of a clear-cut delineation of monetary policy from economic policy that is based on the effects that a given measure (potentially) has on one or the other policy field.

The ECB's, ECJ's, and BVerfG's approach to determining the scope of monetary policy

That the legal fiction in primary Union law cannot be easily reconciled with economic reality also becomes clear from the partially congruent and partially inconsistent approaches to delimiting monetary policy from economic policy adopted by the ECB, the ECJ, and the BVerfG: these actors are tasked with clarifying legal concepts in EMU whilst assuming different roles and having different starting points.

Starting with the author of the monetary policy measure contested in *Weiss* and, previously, in *Gauweiler*, the ECB has emphasised early on that monetary policy is not an effective instrument to "raise economic activity above its sustainable level", as this would ultimately "simply lead to ever higher inflation, not faster economic growth."[31] With regard to its contribution to economic policy and as if to manage expectations regarding the implications of its secondary policy objective, the ECB has maintained both in publications and public appearances, for example before the European Parliament, that "the best contribution monetary policy can make to sustainable growth and employment in the euro area is to maintain price stability in a credible and lasting manner".[32] These public statements do not support the view that the ECB has pursued a strategy to define its primary objective in such a way to include a broader set of economic policy goals or to give an expansive interpretation to its secondary objective.[33] In fact, the Bank has emphasised the economic constraints that apply to its monetary policy strategy and the important role of national governments to take structural economic reforms.[34] Referring to "one monetary policy and many fiscal policies", it has described the EMU framework as being one that "is based on clearly specified objectives and a clear allocation of responsibilities between policy areas"; a framework that "is conducive to well-aligned policy outcomes, provided that all policy-makers live up to their responsibilities."[35]

The ECB has thus effectively acknowledged the interdependence of monetary and fiscal policies, and the need for a policy mix referred to in the previous section. This also explains the ECB's emphasis on structural reforms in and convergence between the economies of the euro area Member States.[36] In the course of the European financial and sovereign debt crisis the ECB could be seen taking a series of unconventional or non-standard policy measures by applying monetary policy instruments provided for in its Statute, including the Securities Market Programme (SMP), the announced Outright Monetary Transactions Programme (OMT), and the Public Sector Purchase Programme (PSPP).[37] Despite the controversy regarding the legal feasibility and economic benefit of these measures, the ECB has in essence

[31] W.F. Duisenberg, "The Eurosystem's monetary policy strategy: The first year's experience", Speech at the joint congress of the Federations, EUROFINAS and LEASEUROPE, 11 October 1999 (Paris), available at *https://www.ecb.europa.eu/press/key/date/1999/html/sp991011.en.html* [Accessed 23 October 2020]. Similarly, ECB, *The Monetary Policy of the ECB* (Frankfurt: ECB, 2011), p.57.

[32] W.F. Duisenberg, "The Eurosystem's monetary policy strategy: The first year's experience", Speech at the joint congress of the Federations, EUROFINAS and LEASEUROPE, 11 October 1999.

[33] In fact, the ECB's standpoint has been criticised in the past, for example, by the European Parliament: see F. Amtenbrink and K. van Duin, "The European Central Bank before the European Parliament: Theory and Practice after Ten Years of Monetary Dialogue" (2009) 34 E.L. Rev. 561, 575 and 576.

[34] W.F. Duisenberg, "The Eurosystem's monetary policy strategy: The first year's experience", Speech at the joint congress of the Federations, EUROFINAS and LEASEUROPE, 11 October 1999.

[35] ECB, *The Monetary Policy of the ECB* (Frankfurt: ECB, 2011), p.15.

[36] E.g. K. Masuch, R. Anderton, R. Setzer, and N. Benalal (eds), "Structural Policies in the Euro Area", ECB Occasional Working Paper Series No.2010 (June 2018), available at *https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op210.en.pdf* [Accessed 2 November 2020].

[37] For a detailed overview see Tuori, "Monetary Policy (Objectives and Instruments)" in Amtenbrink and Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford: Oxford University Press, 2020), p.615.

consistently maintained that in the prevailing economic conditions in the euro area these measures were geared towards preservation of the effectiveness of the supranational monetary policy in the euro area and its overriding primary objective, namely by "safeguarding an appropriate monetary transmission and the singleness of the monetary policy" in the euro area.[38] In the face of money market interest rates close to or below the zero lower bound, the ECB has defended PSPP, which is the focus in *Weiss*, as a necessary monetary policy instrument "that features a high transmission potential to the real economy", whereby it has considered the purchases as proportionate to its aims as a result of a series of safeguards geared towards addressing related financial risks.[39] The ECB has thus taken a self-focused and goal-oriented approach to the definition of the scope of its monetary policy competence, aimed at ensuring the effectiveness of its single monetary policy in the euro area. In fact this picture is confirmed by the ECB's monetary policy stands in response to the COVID-19 pandemic, where it has been observed by a member of the ECB's Executive Board that,

> "[a]s a mandate-driven, goal-oriented institution, the ECB will make its future monetary policy decisions on the basis of what is required in order to secure price stability under all circumstances."[40]

Turning to the ECJ, with its judgments in *Pringle* and, thereafter, *Gauweiler* and *Weiss* the Court has had the opportunity to analyse the delineation of monetary and economic policy from two different perspectives. Whereas in *Pringle* the focus was on the Union law limits to the general economic policy competence of the euro area Member States to sign an intergovernmental Treaty amongst each other to establish the European Stability Mechanism (ESM Treaty), in *Gauweiler* and, thereafter, *Weiss* the emphasis was on the scope of the exclusive monetary policy competence of the Union.[41] The ECJ's approach to the issue may be summarised as one that recognises the interdependency of the two policy areas. Different to what will be observed for the BVerfG later, the European judges avoid a clear-cut delineation based on the effects of the measure taken. First developed in *Pringle* and thereafter confirmed in *Gauweiler* and *Weiss*, primarily reference is made to the main focus or aim and thus the objective of the measure in question, as perceived by the author(s) of the measure, and, moreover, the nature of the instrument that is utilised to implement that measure.[42] At the level of the delimitation of competences the ECJ thus applies a reduced standard of review, by which the Court checks on whether there was "a manifest error of assessment" by the ECB when qualifying its own act as pursuing the monetary policy objective. This arbitrariness test ultimately allows to conclude that the ECB overstepped the Union's monetary policy competence only in instances in which the act pursues openly objectives other than those that can objectively

[38] ECB, "Technical features of Outright Monetary Transactions", Press release, 6 September 2012; Decision 2015/774 on a secondary markets public sector asset purchase programme [2015] OJ L121/20; Decision 2020/188 on a secondary markets public sector asset purchase programme [2020] OJ L39/12. On the ECB's view see P. Cour-Thimann and B. Winkler, "The ECB's non-standard monetary policy measures: the role of institutional factors and financial structure", ECB Working Paper Series, No.1528 (April 2013), available at *https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1528.pdf* [Accessed 2 November 2020].

[39] Decision 2020/188 on a secondary markets public sector asset purchase programme [2020] OJ L39/12, preamble No.6–7.

[40] Blog post by P.R. Lane, "The monetary policy response to the pandemic emergency", 1 May 2020, *https://www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200501~a2d8f514a0.en.html* [Accessed 23 October 2020].

[41] *Pringle v Ireland* (C-370/12) EU:C:2012:756; [2013] 2 C.M.L.R. 2; *Gauweiler v Deutscher Bundestag* (C-62/14) EU:2015:400; [2016] 1 C.M.L.R. 1; *Proceedings brought by Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11. Discussing these judgments are, e.g., the various contributions in the special section "The ESM before the Court" in (2013) 14 *German Law Journal*, available at *https://germanlawjournal.com/volume-14-no-01/* [Accessed 23 October 2020]; Craig and Markakis, "Gauweiler and the Legality of Outright Monetary Transactions" (2016) 41 E.L. Rev. 4; V. Borger, "Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler" (2016) 53 C.M.L. Rev. 139.

[42] *Pringle* (C-370/12) EU:C:2012:756; [2013] 2 C.M.L.R. 2 at [53] and [55]; *Gauweiler* (C-62/14) EU:2015:400; [2016] 1 C.M.L.R. 1 at [46]; *Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11 at [53].

be linked to the monetary policy objective of art.127(1) TFEU or in which instruments other than those provided for in the Statute of the ESCB and of the ECB are used. Emphasising that monetary policy decisions and namely open market operations involve "choices of a technical nature and to undertake forecasts and complex assessments", the ECJ also applies a reduced standard of review in the context of the evaluation of the proportionality of the measure in question, by which it checks on whether the act does not go manifestly beyond what is necessary to achieve the monetary policy objective.

Unlike what can be observed for the BVerfG, the ECJ does not engage with the question whether the independent position of the ECB in the Union institutional framework and the degree of democratic legitimation of the exercise of its powers should be factored in defining or delimiting the scope of the Union's exclusive monetary policy competence. Indeed, by focusing primarily on the aim of the measure and also on the nature of the instrument used, the ECJ's approach to the delineation of economic and monetary policy has some similarities with its long-standing approach to the choice of legal bases in primary Union law. Here the Court has emphasised that "the choice of legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review", whereby such factors include in particular the aim and content of the measure in question.[43]

While considering the consequences of the effects of an economic policy measure on monetary policy, or vice versa, for the qualification of the measure, the ECJ refuses to view such effects as the decisive determinant for classifying a measure. In its view, the fact that a policy measure that is coined as economic or monetary policy may have indirect effects in fields that can be attributed to the other policy area does not change the nature of that measure.[44] In concrete terms, the mere fact that a central bank measure that is aimed at safeguarding the singleness of monetary policy might also have effects on matters attributable to economic policy (namely the stability of the euro area) and may also be pursued in the context of economic policy does not change the monetary policy nature of that measure.[45] In fact, in *Weiss* the ECJ finds evidence for the view that "the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies", referring to the secondary objective of the ECB and the ECB's obligation pursuant to art.127(1) TFEU to comply with the guiding economic principles mentioned in art.119(3) TFEU, which inter alia do not only include stable prices but also sound public finances.[46] Both in *Gauweiler* and, with reference to this earlier judgment, in *Weiss* the ECJ stresses that by their very nature monetary policy measures have effects on the real economy, referring in this context to "inherent effects".[47]

Where the ECB and the ECJ take a somewhat pragmatic approach to the delimitation of monetary policy from economic policy that emphasises the inseparability of these fields in favour of the scope of the Union's exclusive monetary policy competence, the BVerfG's approach is dominated by what may be summarised as the prevention of a (potential) "competence creep".[48] The BVerfG takes the legal fiction in the Treaties as its analytical point of departure in seeking to establish clear-cut differentiators between

[43] *Commission v Council* (C-45/86) EU:C:1987:163; [1988] 2 C.M.L.R. 131 at [11]; *Commission v Council* (C-300/89) EU:C:1991:244; [1993] 3 C.M.L.R. 359 at [10]; *European Parliament v Council of Ministers of the European Communities* (C-295/90) EU:C:1992:294; [1992] 3 C.M.L.R. 281 at [13].

[44] *Pringle* (C-370/12) EU:C:2012:756; [2013] 2 C.M.L.R. 2 at [56]; *Gauweiler* (C-62/14) EU:2015:400; [2016] 1 C.M.L.R. 1 at [51]–[52].

[45] *Gauweiler* (C-62/14) EU:2015:400; [2016] 1 C.M.L.R. 1 at [51]–[52]; repeated in *Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11 at [61]

[46] *Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11 at [60].

[47] *Gauweiler* (C-62/14) EU:2015:400; [2016] 1 C.M.L.R. 1 at [108]; *Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11 at [66].

[48] Generally, on the scope of this notion: S. Weatherill, "Competence Creep and Competence Control" (2004) 23 *Yearbook of European Law* 1; S. Garben, "Competence Creep Revisited" (2019) 57 J.C.M.S. 205.

monetary and economic policy at the level of the separation of competences. While explicitly acknowledging the ECJ's approach to determining the scope of monetary policy, already in its preliminary reference in *Gauweiler*, the BVerfG stresses the importance of the effects that an instrument deploys in pursuing a particular objective as a decisive factor for the categorisation of a measure as belonging in the economic or monetary policy domain. In *Weiss* this then takes centre stage. The German court refers to the effects of PSPP "on, for example, public debt, personal savings, pension and retirement schemes, real estate prices and the keeping afloat of economically unviable companies" that have to be taken into account 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",[49] and hence in order to determine whether a monetary policy measure exceeds the ECB's monetary policy mandate to the detriment of the Member State's economic policy competences and, ultimately, also to the detriment of the complainants German constitutional (participatory) rights. In essence, the BVerfG finds the ECJ's approach to the legal review of the ECB measure unsuitable for the purpose of a substantive competence review, as becomes already clear from its final decision in *Gauweiler*.

The German court is clearly unsatisfied with the proportionality test applied by the ECJ, which in its view is not,

> "questioning or at least discussing and individually reviewing the soundness of the underlying factual assumptions, and without testing these assumptions against indications that evidently argue against a character of monetary policy."[50]

What is more, while recognising the political economy rationale of central bank independence, the German judges reiterate that the ECB's independence "leads to a noticeable reduction in the level of democratic legitimation of its actions and should thus lead to a restrictive interpretation, as well as to a particularly strict judicial review, of the mandate of the European Central Bank", first and foremost by the ECJ, ensuring that the reduction in democratic legitimation of the ECB's action is limited to what is "absolutely necessary".[51]

It is somewhat ironic that, just like the ECB and the ECJ, the BVerfG recognises the close ties between monetary and economic policy. Yet, in contrast to these two Union institutions, the German court does not interpret overlaps and effects that monetary policy may have on economic policy as a sign of the inseparability of these fields, but rather as an encroachment on a remaining national policy domain for which the Union has no exclusive or shared competences.

Union law's primacy and national ultra-vires review: an insoluble conflict

From the previous section it has become clear that the ECB, the ECJ and the BVerfG have answered the difficult question of how to delineate economic and monetary policy—as required by the legal fiction introduced by the Treaties—differently. Despite the very EMU-related topical nature of the controversy, the dispute has implications beyond the EMU.

Whenever courts of different legal orders reach different conlusions, a conflict of legal orders emerges. The conflict between the EU legal order and a national legal order is unique in that both have the legitimate claim to be applicable within the same territory of a Member State. Once the scope of norms originating from different legal orders overlap and their legal consequences are contradicting each other, a conflict rule has to decide which of the two norms prevails. For the Union legal order, the principle of primacy claims that the Union norm takes precedence in all cases of a conflict between Union and national norms.

[49] *Weiss*, judgment of 5 May 2020 at [139].
[50] *OMT*, judgment of 21 June 2016 at [182]–[183].
[51] *OMT*, judgment of 21 June 2016 at [58]–[60], [187] and [189].

The German national legal order recognises this Union conflict rule provided that EU law does not exceed the limits set by the "integration programme" of the European Union,[52] to which the Germany has consented to, by a parliamentary act based on art.23(1) of the German Basic Law, and provided that Union law is not at odds with the so-called eternity clause under art.79(3) of the German Basic Law, which protects the core of the German constitution. Article 23(1) of the German Basic Law serves in this sense as a national conflict rule that the national norm takes precedence over a Union one, if the latter is located outside the realm of that "programme of integration".

In theory, there should be no conflict between these two conflict rules, as the principle of primacy has only to be observed within the scope of Union law and the realm of the "programme of integration" is defined by the scope of the latter. In practice, however, the problem arises because the dividing line between the EU legal order and the national legal order can be drawn from two different perspectives: from within Union law, answering the question about the scope of Union law, or from outside Union law, answering the question about which limits national law sets. These perspectives can diverge, which leads to a conflict, for which there is no conflict rule due to the lack of a meta-legal order. In such a situation a conflict should be avoided by those that are ultimately responsible for the authoritative interpretation of the conflicting norms: the highest courts.

This observation leads to three conclusions. First, the simultaneous application of these different perspectives results in an indissoluble conflict between the supranational and national legal order. Secondly, this conflict derives from the legitimate co-existence of these legal orders within the territory of the Member State and does not as such depend on courts interpreting these legal orders. Thirdly, for their part, courts play a crucial role in avoiding the eruption of this conflict. In light of these observations, the next section will revisit the rationale for the legitimate co-existence of two distinct legal orders within the territory of a Member State and will discuss how the highest courts try to avoid conflict through judicial dialogue.

The origin of the conflict: the legitimate co-existence of two distinct legal orders in the European Union

The Union law's claim to be applicable within the territory of the Member States (direct effect) and to take precedence over conflicting national norms (primacy) derives from the fact that "the law stemming from the Treaty [is] an independent source of law",[53] by which,

> "the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."[54]

The law created by this Treaty "cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty."[55] Obligations, which the Member States enter into when signing the Treaty, "would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories."[56] In this context, it is important to recall that "the Community constitutes a new legal order of international law".[57] Its source

[52] *Lisbon*, judgment of 30 June 2009, 2 BvE 2/08 at [236] (available in English at *https://www.bundesverfassungsgericht.de/e/es20090630_2bve000208en.html* [Accessed 23 October 2020]).

[53] *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* (6/64) EU:C:1964:66 [1964] C.M.L.R. 425 at [594].

[54] *Costa* (6/64) EU:C:1964:66 at [593].

[55] *Costa* (6/64) EU:C:1964:66 at [594].

[56] *Costa* (6/64) EU:C:1964:66 at [594].

[57] *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) EU:C:1963:1 [1963] C.M.L.R. 105 at [12].

of existence—its basic norm (*Grundnorm*)—is autonomous from the Member States, which distinguishes Union law from any other international legal order.[58]

The Union legal order and the national legal orders co-exist within the territory of the Member States. Given that both legal orders are based on distinct *Grundnormen*, there is no principled relationship of hierarchy between them. The Union legal order's claim to be applicable within the territory of a Member State is on an equal footing with the same claim of the national legal order of the respective Member State.[59] This necessitates the existence of a rule that is established by the one legal order and consented to by the other, which deals with conflicts between these legal orders. The former is the principle of primacy. The latter refers to a provision of the national legal order, which can—in exercising a Member State's legal autonomy—be conditional provided that such conditions do not undermine a country's general international law obligation to perform treaties.[60]

In the German context, this consent to the principle of primacy is expressed by art.23(1) of the German Basic Law. Following the case law of the BVerfG on the limitations of the consent given by Germany to the Union legal order's claim to be applicable within the German territory, the BVerfG has developed three constellations in which the Union law's claim may exceed the limits defined by art.23(1):

- Protection of fundamental rights, as established in the *Solange II* judgment:[61] the Union law's claim to be applicable on German territory exceeds the national constitutional limitations, if the EU rule in questions falls short of the "essentially comparable standards of fundamental rights provided for in the Basic law" ("fundamental rights review").
- Protection of the distribution of competences between the EU and the Member States, as established in the *Maastricht* judgment:[62] the Union law's claim to be applicable on German territory exceeds the national constitutional limitations, if the supranational rule in question was adopted in a way that signifies a "structural shift in the structure of competences" ("ultra vires review").
- Protection of the constitutional identity, as established in the *Lisbon* judgment:[63] the Union law's claim to be applicable on German territory exceeds the national constitutional limitations, if its content—as interpreted by the ECJ—encroaches upon the inviolable constitutional identity of Germany—as enshrined in art.79(3) of the German Basic Law—which refers to the protection of human dignity (art.1 of the German Basic Law), the principle of national democracy and to the rule of law (art.20 of the German Basic Law). This entails that the democratically legitimised national institutions must be able to exercise the remaining national competences in an effective and self-determined way ("identity review").

The constitutional limitations of the consent given by the German national legal order to the Union legal order's claim to take precedence over conflicting national norms relate to particularly significant grounds such as the protection of human rights and of the principle of democracy. Human rights are protected by the "fundamental rights review" and by the "identity review", if human dignity is affected.[64]

[58] R. Schütze, "On 'Federal' Ground : the European Union as an (Inter)national Phenomenon" (2009) 46 C.M.L. Rev. 1069 at 1082.

[59] For further details, see R. Repasi, *Wirkungsweise des unionsrechtlichen Anwendungsvorrangs im autonomen IPR* (Tübingen: Mohr Siebeck, 2018), pp.31–39.

[60] See Vienna Convention on the Law of Treaties art.26.

[61] *Solange II*, Order of 22 October 1986. 2 BvR 197/83, BVerfGE 73, 339.

[62] *Maastricht*, judgment of 12 October 1993, 2 BvR 2134/92, BVerfGE 89,155.

[63] *Lisbon*, judgment of 30 June 2009.

[64] *European Arrest Warrant II*, Order of 15 December 2015, 2 BvR 2735/14 (available in English at *https://www.bundesverfassungsgericht.de/e/rs20151215_2bvr273514en.html* [Accessed 23 October 2020]).

Democracy is protected by the "ultra-vires review", as the adoption of Union law beyond the scope of Union competences disregards the limits of the conferral of Union competences by the national act of ratification and encroaches upon the exercise of the remaining national competences. The "identity review" examines the potential transfer of new competences upon a supranational organisation in light of the democratic legitimacy of this organisation and tests the democratic quality of the remaining room for manoeuvre of national political institutions when exercising their freedom to act. This refers, most prominently, to the budgetary autonomy of the German federal parliament (*Bundestag*) when deliberating on the budgetary consequences of its policy decisions.[65]

A closer look at the constitutional limitations of the EU law's principle of primacy reveals that the BVerfG has raised over time the threshold for concluding that a violation of these limitations took place. As regards, more specifically, the "ultra-vires review", the BVerfG has clarified in *Honeywell* that only a "manifest and structurally effective" transgression of the limits of Union competences by EU institutions, bodies and agencies allows for the conclusion that the Union has acted ultra vires.[66] The German Court has also made clear that there can only be an ultra-vires act if the ECJ had the opportunity to take a position on the legality of the act through a preliminary reference.[67] When interpreting and applying EU law, the ECJ has, as the BVerfG called it, "a right to tolerance of error",[68] which means that the ECJ and the BVerfG may differ in their views on the meaning of Union law without every difference being significant enough for qualifying the Union act as interpreted by the ECJ an ultra-vires act provided that the ECJ's reasoning is methodologically sound. In other words, interpretive differences between the ECJ approving an Union legal act and the BVerfG lead to declaring this act—including the confirmatory case law of the ECJ—as ultra vires,

> "only if, on a sensible interpretation of the concepts determining the Basic Law, [the interpretation and application of EU law by the ECJ] no longer appear to be comprehensible and are manifestly untenable."[69]

With *Honeywell* the BVerfG has thus raised the bar for the "ultra-vires review" in two ways: procedurally, there can only be an "ultra-vires review" if the ECJ has presented its own legal assessment of the EU act under review; in substantive terms, provided that the ECJ confirms the legality of the EU act, the existence of differences in interpretation does not automatically lead to an ultra vires verdict. The interpretation chosen by the ECJ must rather have a "structurally significant shift to the detriment of Member State competences" as its effect in order to trigger the "ultra-vires review".[70] This strengthening of the position of the ECJ within the "ultra-vires review" leads to a paradox that materialised itself in *Weiss*. On the one hand, in *Honeywell* the ECJ has received unexpected support from the BVerfG against criticism of the former's judgments merely based on differences in opinions between the two courts. On the other hand, as a result of its line of reasoning, the BVerfG now became compelled to argue that an ECJ judgment is absurd and arbitrary, if it ever intended to declare a Union act ultra vires. Hence, somewhat paradoxically, the BVerfG has forced itself to bluntly undermine the judicial authority of the ECJ as a result of the enhancement of the requirements for the assumption of an ultra vires act that was intended to actually strengthen the position of the supranational court.

[65] *EFSF*, judgment of 7 September 2011, 2 BvR 987/10 (available in English at *https://www.bundesverfassungsgericht.de/e/rs20110907_2bvr098710en.html* [Accessed 23 October 2020]).

[66] *Honeywell*, Order of 6 July 2010, 2 BvR 2661/06 at [68] (available in English at *https://www.bundesverfassungsgericht.de/e/rs20100706_2bvr266106en.html* [Accessed 23 October 2020].

[67] *Honeywell*, Order of 6 July 2010 at [66].

[68] *Honeywell*, Order of 6 July 2010 at [66].

[69] *Honeywell*, Order of 6 July 2010 at [88].

[70] *Honeywell*, Order of 6 July 2010 at [64], [68] and [71].

Moderating two legitimate claims: judicial dialogue of Europe's supreme courts

In a pluralist understanding of the relationship between the supranational and the national courts,[71] both courts claim ultimate authority to judge on a given matter albeit being aware that exercising this ultimate authority will inevitably undermine the judicial authority of the other court. Being aware of this potential consequence, both courts recognise each other's ultimate authority and apply self-restraint in grey areas, in which a conflict of the Union legal order's claim to prevail over national law and the national legal order's claim of declining this primacy might arise. The "Damocles sword" of domestic courts rejecting the judicial authority of the ECJ prompts the latter to adjust its case law in cases of significant pressure from the domestic courts. Consequently, the interdependence of supranational and domestic courts triggers a judicial dialogue, in which the threat of exercising ultimate judicial authority leads to a constant modification of the case law of the highest courts involved in this dialogue.[72]

The track record of the BVerfG speaks in favour of the success of this model of judicial dialogue with the ECJ. The well-known *Solange* saga pushed the ECJ to develop its case law on fundamental rights protection at the supranational level on the basis of "general principles of Community law".[73] Another example can be found in the field of the "European Arrest Warrant". A criminal conviction rendered *in absentia*, which was originally considered by the ECJ as not precluding the automatic extradition under the Framework Decision on the European Arrest Warrant,[74] was held by the BVerfG to violate the guarantee of human dignity, being protected by the constitutional identity pursuant to art.79(3) of the German Basic Law.[75] Without referring this question to the ECJ, the BVerfG considered this understanding of the Framework Decision as an "acte clair". Shortly after the BVerfG insinuated to activate the identity review in this matter, the ECJ confirmed the BVerfG's interpretation in a preliminary ruling.[76] Also, supreme courts of other Member States have influenced the ECJ's case law via this mechanism. Most recently, the Italian Corte Costituzionale considered the retroactive application of criminal sanctions in the field of VAT fraud, which was the consequence of an ECJ judgment that deemed the shortening of the limitation period for VAT fraud cases an infringement of art.325 TFEU,[77] to violate the prohibition of retroactive sanctions in Italian substantive criminal law. Upon a preliminary question by the Corte Costituzionale whether the ECJ would reconsider its findings of the previous judgment with regard to the retroactivity, the ECJ replied positively and adjusted its case law.[78]

Before the BVerfG's final judgment in *Weiss*, the relationship between the BVerfG and the ECJ was considered to be a "textbook example" for judicial dialogue, which secured a remarkable influence of the German Federal Constitutional Court on the development of the case law of the ECJ.[79] *Weiss* constitutes

[71] M. Kumm, "Who is the Final Arbiter of Constitutionality in Europe: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice" (1999) 36 C.M.L. Rev. 351; A. von Bogdandy, "Pluralism, Direct Effect, and the Ultimate Say: on the Relationship between International and Domestic Constitutional Law" (2008) 6 I.J.C.L. 397; F.C. Mayer, "Multilevel Constitutional Jurisdiction" in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Oxford and München: Hart and Beck, 2010), p.399; M. Goldmann, "Constitutional Pluralism as Mutually Assured Discretion: the Court of Justice, the German Federal Constitutional Court, and the ECB" (2016) 23 M.J.E.C.L. 119; A. Bobić, "Constitutional Pluralism is Not Dead: an Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice" (2017) 18 G.L.J. 1395.

[72] N. Petersen, "Karlsruhe's Lochner Moment? A Rational Choice Perspective on the German Federal Constitutional Court's Relationship to the CJEU after the PSPP Decision" (2020) 21 G.L.J. 995, 997.

[73] J.H.H. Weiler, "Eurocracy and Distrust" (1986) 61 Wash. L. Rev. 1103, 1119.

[74] *Melloni v Ministerio Fiscal* (C-399/11) EU:C:2013:107; [2013] 2 C.M.L.R. 43.

[75] *European Arrest Warrant II*, Order of 15 December 2015.

[76] *Aranyosi and Caldararu* (C-404/15 and C-659/15 PPU) EU:C:2016:198; [2016] 3 C.M.L.R. 13.

[77] *Criminal Proceedings against Taricco I* (C-105/14) EU:C:2015:555; [2016] 1 C.M.L.R. 21.

[78] *Criminal Proceedings against MAS* (C-42/17) EU:C:2017:936; [2018] 2 C.M.L.R. 15.

[79] N. Petersen, "Karlsruhe's Lochner Moment?" (2020) 21 G.L.J. 995, 998.

a fracture within this dialogue as the BVerfG, for the first time, considers a Union act the legality of which under Union law was confirmed by the ECJ, as ultra vires without referring a second preliminary question, in which it asks the ECJ to reconsider problematic elements of its reasoning in the ruling confirming the Union act.

The case of *Weiss*: a constitutional "high noon" peculiar to EMU

In *Weiss*, the diverging views on how to deal with the legal fiction in the Treaties that separates monetary from economic policy collided with the conflict of the legitimate claims of the EU legal order to prevail over national law and of the national legal order to review the confines of Union law. This special encounter has the potential of triggering a constitutional crisis. In no other field than EMU do the two most extreme kinds of Union competences—an exclusive one in the field of monetary policy and a co-ordinating one in the field of economic policy—overlap. In no other policy field is the exercise of the exclusive competence conferred upon a non-majoritarian institution that is only subject to judicial control and no other substantive system of checks and balances. And in no other field does the discrepancy between the legal fiction of clearly separable policy fields of economic and monetary policy clash with an economic and political reality that does not reflect a rigid separation of these fields. Those were the ingredients for a clash between the ECJ and the BVerfG, in which the latter for the first time activated its ultra-vires control.

Prologue: The lack of transparency as the formal main ground for the judgment

As a preliminary note, it is worth mentioning that the BVerfG bases its conclusion that the ECB's PSPP decision is ultra vires on the lack of stating the reasons informing whether and how the ECB has weighed "the considerable economic policy effects resulting from the PSPP" and "balanced them, based on proportionality considerations, against the expected positive contributions to achieving the monetary policy objective".[80] The German court did not scrutinise the substance of the PSPP decisions. It did thus not apply its own proportionality assessment and did not replace the ECB's reasoning by an own judicial appraisal. The BVerfG did not consider itself in a position to draw any conclusions in terms of substance, as in its view the ECB decisions under review did not contain any information that could be scrutinised. As a consequence, after a transitional period of three months following the co-ordination with the ESCB,

> "the *Bundesbank* may thus no longer participate in the implementation and execution of [PSPP], unless the ECB Governing Council adopts a new decision 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."[81]

Thus, in order to escape the ultra-vires verdict, the ECB had to state reasons and make its reasoning transparent. The consequences of the *Weiss* judgment therefore appear minimal compared to the Court's accusation of the PSPP decisions to be ultra vires.

This observation must, however, take into consideration that the BVerfG needed the ECB's reasons in order to apply a legality test that it established extensively in the judgment. This test includes detailed criteria as to how to scrutinise the proportionality of an ECB monetary policy decision. Since the BVerfG's criteria do, however, differ from those applied by the ECJ under the heading of "proportionality", the German court had to ultimately declare the ECJ's interpretation of EU law as "not comprehensible and thus arbitrary". Finally, the criteria of the BVerfG's proportionality test beg the question whether—given the special economic circumstances, within which PSPP was adopted—any reasons provided by the ECB

[80] *Weiss*, judgment of 5 May 2020 at [176]–[177].
[81] *Weiss*, judgment of 5 May 2020 at [235].

could have satisfied the German court. The focus of the critical discussion of the BVerfG's judgment should therefore be on the court's proportionality test, despite the fact that formally it is only an *obiter dictum*.

The actual clash: considering the non-application of the proportionality test to the delimitation of competences as "simply not comprehensible and thus to be considered arbitrary"

As a result of the higher threshold for concluding that a Union act is ultra vires despite an ECJ judgment confirming its legality established in *Honeywell*, the BVerfG needed to conclude in *Weiss* that the ECJ's interpretation of Union law in reply to the preliminary questions referred by the German court are "simply not comprehensible and thus objectively arbitrary".[82] According to the BVerfG, the ECJ's confirmation of the legality of the PSPP decisions,

> "manifestly fails 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 division of competences, and is no longer tenable from a methodological perspective given that it completely disregards the actual effects of the PSPP … Therefore, the Judgment of the CJEU 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."[83]

This bold statement begs the question whether the proportionality assessment made by the ECJ in *Weiss* meets—from the perspective of Union law—this standard of review.

The BVerfG bases its conclusion on the assumption that,

> "the specific manner in which the CJEU applies the principle of proportionality in [*Weiss*] renders that principle meaningless for the purposes of distinguishing, in relation to the PSPP, between monetary policy and economic policy, i.e. between the exclusive monetary policy competence conferred upon the EU (Art. 3(1)(c) TFEU) and the limited conferral upon the EU of the competence to coordinate general economic policies, with the Member States retaining the competence for economic policy at large (Art. 4(1) TEU; Art. 5(1) TFEU)."[84]

In other words, the main point of critique aims at the fact that the ECJ did not apply the principle of proportionality to the delimitation of Union competences.[85]

In *Weiss*, the ECJ had discussed, first, whether the PSPP decisions fell within the scope of the ECB's exclusive competence to conduct the Union's monetary policy and art.127(1) TFEU.[86] In doing so, it had referred to the primary objective of monetary policy to maintain price stability and the secondary objective to support the general economic policies in the Union. As explained above, the very fact that a monetary

[82] *Weiss*, judgment of 5 May 2020 at [118].

[83] *Weiss*, judgment of 5 May 2020 at [119].

[84] *Weiss*, judgment of 5 May 2020 at [127].

[85] See also the critique put forward by A. Bobic and M. Dawson, "Quantitative Easing at the Court of Justice—Doing Whatever it Takes to Save the Euro: Weiss and Others" (2019) 56 C.M.L. Rev. 1005, 1023 who insist on a "*substantive* engagement with the proportionality" that the ECJ is lacking when reviewing unconventional monetary policy measures. Such substantive review would require "considering less burdensome alternatives … [and] engaging in a genuine analysis of alternative measures" (at 1024–1025). The authors are silent on whether they want to apply proportionality to the delimitation or to the exercise of the monetary policy competence. Given, however, that they suggest to look at "alternative programmes (with, for example a lesser impact on national policy competences)" (1023) it seems that they—just like the BVerfG—criticise the ECJ for not applying a proportionality test to the delimitation of the ECB's competence to act.

[86] *Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11 at [53] to [70].

policy measure—adopted to realise monetary policy objectives—has "certain effects on the real economy which might also be sought—to different ends—in the context of economic policy"[87] does not change the nature of the measure to such an extent that it exceeds the limitations of the ECB's exclusive competence. As a second step, the ECJ had then applied the principle of proportionality to assess whether the ECB had exercised its exclusive competence in a disproportionate manner in adopting the PSPP decisions.[88] The ECJ had thus applied the principle of proportionality, as enshrined in art.5(4) TEU, in the context of the review of the exercise of the Union competence, rather than in the context of the delimitation of Union competences. The question that arises here is whether the ECJ's approach to the application of the principle of proportionality, could be qualified as simply not comprehensible under Union law.

The wording of art.5(1) TEU supports the approach of the ECJ as it refers to the "use of Union competences", which is governed by the principles of subsidiarity and proportionality. Furthermore, the question *whether* a Union institution may act at all on the basis of a Union competence is governed by the principle of subsidiarity pursuant to art.5(3) TEU. Yet, the principle of subsidiarity is not applicable to exclusive competences. It is only after it has been ascertained that a Union measure can be based on a Union competence that the principle of proportionality—being also applicable to exclusive competences—applies and that form and content of a measure is analysed by balancing the Union interest in realising Union objectives in the most efficient manner with the Member States' interest in safeguarding their autonomy. The effects that a Union measure has on Member State competences are therefore to be taken into consideration when examining the form and content of this measure, but not when delimitating the Union competence as such.

Applying the principle of proportionality to the delimitation of competences would also lead to a questionable outcome. Theoretically and strangely, it would mean that, although a certain measure falls within the scope of an exclusive Union competence, Member States would have a reserve competence within this scope to the extent that the Union acted in a disproportionate manner.[89] Such an outcome runs counter to art.2(1) TFEU, according to which Member States' action is pre-empted within the scope of exclusive competences, and art.2(2) TFEU that includes a reserve competence of Member States depending on the extent to which the Union made use of a shared competence. The BVerfG's application of the principle of proportionality in the field of monetary policy renders the exclusive competence into a de facto shared competence. Finally, applying a proportionality test to the division of competences creates legal uncertainty. Proportionality arguments relate to the particularities of individual cases, which change over time and in relation to Member States. The "economic policy effects" that the BVerfG would like to see considered under the principle of proportionality[90] such as "public debt, personal savings, pension and retirement schemes, real estate prices and the keeping afloat of economically unviable companies"[91] differ depending on whether the general economy is in a state of deflation or inflation. A dividing line between an exclusive competence (monetary policy) and a co-ordinating one (economic policy) that changes in relation to the state of the economy is hardly sustainable and hardly of service to legal certainty, which is crucial in the field of competences. In fact, such an approach bears the danger of ultimately resulting in the emptying of the Union's monetary policy competence in the euro area in favour of the Member State's remaining competences in the area of economic policy.

Despite the argument that under Union law the principle of proportionality cannot be used for delimitating competences, the BVerfG claims boldly in its final decision in *Weiss* that "completely disregarding the

[87] *Weiss* (C-493/17) at [66].
[88] *Weiss* (C-493/17) at [71] to [100].
[89] M. Wendel, "Paradoxes of Ultra-vires Review: a Critical Review of the PSPP Decision and its Initial Reception" (2020) 21 G.L.J. 979, 989.
[90] *Weiss*, judgment of 5 May 2020 at [138].
[91] *Weiss*, judgment of 5 May 2020 at [139].

economic policy effects of the PSPP contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law".[92] It refers in this context to the ECJ's case law in the field of fundamental rights, indirect discriminations, fundamental freedoms and the principle of effectiveness and equivalence, but also to the allocation of competences and state aid, and wonders, "why a different standard should apply with regard to delimiting the competences for monetary policy and economic policy".[93] Yet, in cases that involve individual rights the proportionality test balances these rights with public interests, whereby the relationship between them is profoundly different to the relationship in the field of competences between the Union and the Member States.

The most comparable field to EMU is the one to which the BVerfG referred under the heading of "provisions allocating competences". The case law mentioned by the BVerfG comprises the *ENISA*,[94] the *short selling*[95] and the *Menthol* cases.[96] In these cases, the ECJ reviewed—in the field of the internal market harmonisation based on art.114(1) TFEU—whether it is actually and objectively apparent from the legal act under review that its purpose is to improve the conditions for the establishment and functioning of the internal market. This formula derives from the *Tobacco Advertising* case[97] and was established in order to define the scope of art.114(1) TFEU. In requiring more than the presence of an "abstract risk of obstacles to the exercise of the fundamental freedoms or of distortions of competition", in this line of cases the ECJ did examine the effects of a measure. However, the Court did not apply this approach as part of a proportionality test, but in the context of defining the scope of the legal basis of art.114(1) TFEU. It is therefore problematic to establish that in *Weiss* the ECJ has deviated from its previous case law. On the contrary, as mentioned above, it has applied the principle of proportionality to the use of the legal base and not to is delimitation, just as art.5(1) and (4) TEU require.

The need for a higher standard of judicial review when the democratic legitimacy of the act under review is precarious

While it is difficult to sustain that the ECJ's interpretation of EU law in *Weiss* is "simply not comprehensible and thus (to) be considered arbitrary", this is not to say that the BVerfG's concern as to the intensity of the judicial control that the ECJ subjects the ECB is entirely unfounded.[98]

For the delimitation of the ECB's exclusive monetary policy competence, the ECJ relies on the ECB's assessment of the nature of the measure.[99] In doing so, the Court creates a somewhat circular argument that the qualification of a measure—the purpose of which is to control whether the acting Union institution has crossed the limits of Union competences—is based on a self-assessment by the very acting Union institution. The question that arises in this context is whether such a test can ever lead to the conclusion that the ECB has acted outside its monetary policy mandate.[100] What is more, as has already been observed above, the ECJ exercises considerable judicial self-restraint in its review of the proportionality of the exercise of the ECB's competence. The ECJ allows the ECB "broad discretion", which it justifies with reference to the ECB having "to make choices of a technical nature and to undertake complex forecasts

[92] *Weiss*, judgment of 5 May 2020 at [146].
[93] *Weiss*, judgment of 5 May 2020 at [153].
[94] *ENISA* (C-217/04) EU:C:2006:279 at [42].
[95] *ESMA (short selling)* (C-270/12) EU:C:2014:18 at [113].
[96] *Poland v European Parliament and Council (Menthol)* (C-358/14) EU:C:2016:323 at [32].
[97] *Germany v European Parliament and Council (Tobacco Advertising)* (C-376/98) EU:C:2000:544 at [83].
[98] See also the critique of the ECJ's judgment in *Gauweiler* (C-62/14) by T. Tridimas and N. Xanthoulis, "A Legal Analysis of the Gauweiler Case" (2016) 17 M.J.E.C.L. 17, 31.
[99] *Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11 at [57].
[100] M. van der Sluis, "Similar, therefore Different: Judicial Review of Another Unconventional Monetary Policy in Weiss (C-493/17)" (2019) 46 L.I.E.I. 263, 273.

and assessments".[101] In *Weiss*, the ECJ thus applies an arbitrariness test, which only reviews whether the ECB in adopting the PSPP decisions has not exceeded the outer limits of its discretion, that is, in the words of the Court, whether there is "a manifest error of assessment" and "whether the PSPP does not go manifestly beyond what is necessary" to achieve the monetary policy objective.[102] Given the abovementioned interactions between economic and monetary policy, the particularities of monetary policy at the zero lower bound of interest rates and how the ECB as an institutions deals with the legal fiction of the separation of economic and monetary policy, it can hardly surprise that the ECB was found not to have committed a manifest error of assessment in adopting the PSPP decisions.

It is the arbitrariness standard applied by the ECJ that provokes the BVerfG. It underpins its critique and its claim to apply a higher standard of judicial scrutiny with the "diminished level of democratic legitimation" under which the ECB operates when conducting the Union's monetary policy as an independent institution.[103] Considering that the ECB's course of action cannot be remedied by any political Union institution and, moreover, that a change of its basic legal framework requires a Treaty amendment, the BVerfG observes that "it is imperative that adherence to limits of the ECB's competence be subject to full judicial review".[104] From a Union law perspective the ECJ is the only institution that is in a position to set limits to the ECB's actions. By applying an arbitrariness standard when reviewing ECB measures, in the eyes of the BVerfG, the ECJ waives its control function. The BVerfG highlights—somewhat surprisingly, given Germany's general insistence on central bank independence that is also reflected by the second sentence of art.88 of the German Basic Law—how impactful the conduct of monetary policy is on the functioning of democracy.

From a legal perspective the large degree of independence of the ECB in conducting monetary policy may be considered something of an anomaly to the approach to the legitimation of the exercise of public power. This has been justified with the clearly circumscribed single and overriding objective of the ECB and with the purpose it serves in allowing the ECB to pursue price stability as a public good free from political interference.[105] Yet this also implies that the legitimation of the delegation of the (monetary) policy function to an independent agency that derives from the delegation of such specific tasks by the legislator and a more-or-less corresponding set of accountability arrangements becomes frail when the policy objective shifts or when the independent agency effectively makes principle distributional choices.[106] Put differently, the scope of powers exercised by an independent central bank and the degree of democratically legitimation that it requires are communicating vessels.

Yet, the ECJ's approach to the independent ECB is far from surprising considering its established case law. In fact, the European Court early on had lowered its standard of review in the field of "expert governance" to the check of manifest disproportionality.[107] The primary rationale for this approach can be found in the ECJ's reluctance to substitute its own judgment for that of the presumably better qualified

[101] *Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11 at [73].
[102] *Weiss* (C-493/17) at [78]–[79].
[103] Articles 130 and 282(3) TFEU. See *Weiss*, judgment of 5 May 2020 at [143].
[104] *Weiss*, judgment of 5 May 2020 at [143].
[105] M. Selmayr, "Das Recht der Europäischen Währungsunion" in P.-C. Müller-Graff (ed.), *Europäisches Wirtschaftsordnungsrecht* (Baden-Baden: Nomos, 2015), pp.1480 and 1481; M. Ioannidis, "The European Central Bank" in F. Amtenbrink and C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford: Oxford University Press, 2020), pp.384–385.
[106] P. Tucker, "How can Central Banks Deliver Credible Commitments and be 'Emergency Institutions'?" in J.H. Cochrane and J.B. Taylor (eds), *Central Bank Governance and Oversight Reform* (Washington: Hoover Institution Press, 2016), p.8. See F. Amtenbrink, "The European Central Bank's Intricate Independence Versus Accountability Conundrum in the Post-crisis Governance" (2019) 26 M.J.E.C.L. 165, 175.
[107] See instead of many P. Craig, *EU Administrative Law*, 3rd edn (Oxford: Oxford University Press, 2018), pp.472–474, 652–653.

experts "under the guise of proportionality".[108] The choice for such a proportionality standard encounters democratic legitimacy concerns since judicial self-restraint lowers the overall accountability of the expert body that adopted the decision under review. These concerns are particularly grave in the case of the ECB. In contrast to expert bodies such as, for example, the European Medicines Agency (EMA), the ECB's legal framework is laid down and secured by primary Union law. The EMA's statute is established in a secondary Union law act[109] and can be amended by means of the ordinary legislative procedure. Normally, restrained judicial control is compensated for by the Union legislator's ability to amend the legal framework, under which the expert body acts. However, in the case of the ECB, such amendments require a Treaty change. Furthermore, courts are the only actors that can remedy an ECB decision since the Treaties equipped it consciously with a strong independence guarantee against any political influence on its course of action. Consequently, courts and their choice of standard of judicial review are in the spotlight when it comes to holding the ECB to account for its actions.

The diverse approaches to the intensity of the standard of judicial review of ECB measures by the BVerfG and the ECJ reflect the two sides of the relationship between monetary policy and democracy described by Feichtner: "money can be seen at once as crucial to democracy and in need of protection from democracy."[110] Whilst the ECJ rather confirms the intention of the drafters of the Treaties to shield the ECB from influence from (democratically) elected politicians, the BVerfG seeks to keep the impact of independent monetary policy decision on national democracy as limited as possible by narrowing its monetary policy mandate.

On the one hand, it can be argued that the need for debating a strengthening of the democratic legitimation of monetary policy becomes more pressing the more consequential the ECB decisions are for the real economy and the more these decisions have redistributive effects within the Member States' societies.[111] On the other hand, the question arises whether the approach that underlies the BVerfG's argument is pertinent. The BVerfG ultimately perceives courts as counterbalances to the ECB and the national economic policy domain as the object that needs to be shielded from monetary policy decisions made by the supranational ECB. This approach has two shortcomings. First, courts have limited expertise in matters relating to monetary policy. If judges act as counterbalances to expert bodies, they effectively substitute their judgment for that of experts. Or, to put it more bluntly, one non-majoritarian body (a court) replaces the decision by another non-majoritarian body (a central bank). The issue of the fragile democratic legitimation of decisions with potentially far reaching implications is hardly solved by such a switching of actors. Secondly, it can be noted that the BVerfG's approach, which aims at narrowing monetary policy decisions down to those that have limited economic effects, does not contribute to strengthening the democratic legitimacy of the ECB, but rather to protecting national policy choices. National policy choices can, however, not delimit the scope of monetary policy decisions which must be effective within the entire Euro area. Given its position as a supranational central bank that has to conduct a monetary policy for the benefit of the single currency area that covers 19 national economies and a significant part of the internal market, the economic effects that the ECB has to consider when taking monetary policy decisions by definition have to surpass those in single Member States. If stronger democratic control of the ECB is required, such control must be exercised first and foremost by the European Parliament and be aimed at the implication of monetary policy decisions on the well-functioning of the single currency and the entirety of its underlying economies.

[108] Craig, *EU Administrative Law*, 3rd edn (Oxford: Oxford University Press, 2018), p.653.

[109] Regulation No.726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L136/1.

[110] I. Feichtner, "The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe" (2020) 21 G.L.J. 1090, 1093.

[111] Amtenbrink, "The European Central Bank's Intricate Independence" (2019) 26 M.J.E.C.L. 165.

Conclusions and outlook

Following the transitional period of three months granted by the BVerfG to remedy the lack of reasons, the Bundesbank,[112] the German government and the German Parliament[113] have considered the documents delivered by the ECB and their content as sufficient to meet the criteria set by the BVerfG in *Weiss*. The ECB for its part has continued PSPP with full participation of the Bundesbank and, moreover, in the face of the COVID-19 pandemic the ECB in March 2020 launched a new, temporary, asset purchase programme of private and public sector securities with an envelope of €600 million, which in June 2020 was even increased to €1,350 billion.[114] From all this it could be concluded that the commotion surrounding the judgment in the end was much ado about nothing. Yet, such a conclusion would disregard the significance of the underlying fundamental legal issues at stake. These issues are of a structural nature. At the same time, on closer inspection, the implications of the judgment beyond the EMU-specific context in which it has to be placed may actually be less severe than what some initial comments on the judgment have suggested, which feared that the BVerfG would provide integration critical national highest (constitutional) courts and even more so national governments with a viable line of reasoning to reject the primacy of Union law and inconvenient ECJ judgments in other highly politicised policy fields at their own pleasure.[115]

The two fundamental issues driving the *Weiss* judgment reflect the halfway house which the European legal order still resembles. First, there is the issue of the asymmetric integration of economic and monetary policy in EMU, whereby the Member States remain in charge of defining general economic policy based on a limited Union co-ordination framework and the conduct of the exclusive Union competence for monetary policy is assigned to an institution that is by and large shielded from the political business cycle and the system of (democratic) checks and balances attached thereto. The only exception is judicial oversight of the ECB's activities. Secondly and crucially, as the supranational and the domestic legal order coexist within the territory of the Member States, this legal fiction has considerable conflict potential when it comes to the exercise of competences within EMU. As part of the supranational legal order monetary policy measures claim to prevail over national law, whilst the national legal order claims to control whether monetary policy measures have not exceeded the limitations defined by domestic constitutional law for Union measures. At the intersection of monetary and economic policy the exercise of the monetary policy competence encroaches upon the national competences to pursue—under the conditions of national democratic decision-making procedures—autonomous economic policies. At the same time the threat of the national legal order to disobey undermines the credibility of monetary policy.

As these fundamental issues are rooted in the very constitutional structure of European integration and the Treaty approach to EMU, there are no ready-made fixes. Arguably, the potential for conflict arising from the legal separation of monetary from economic policy can ultimately only be solved by the establishment of a general economic policy competence and a proper fiscal capacity at the supranational level that can form a counterbalance to monetary policy. Narrowing the monetary policy mandate of the

[112] "Weidmann sieht Forderungen des Verfassungsgerichts als erfüllt an", F.A.Z. of 3 August 2020, *https://www.faz.net/aktuell/finanzen/jens-weidmann-verfassungsgerichtsurteil-zur-ezb-erfuellt-16887907.html* [Accessed 23 October 2020].

[113] Deutscher Bundestag, *Urteil des Bundesverfassungsgerichts zum Anleihekaufprogramm PSPP der Europäischen Zentralbank*, 1 July 2020, BT-Drs. 19/20621, *http://dipbt.bundestag.de/dip21/btd/19/206/1920621.pdf* [Accessed 23 October 2020].

[114] Decision 2020/440 on a temporary pandemic emergency purchase programme [2020] OJ L91/1; Decision 2020/1143 amending Decision 2020/440 on a temporary pandemic emergency purchase programme [2020] OJ L248/24.

[115] R.D. Kelemen et al., "National courts cannot override CJEU judgments", *VerfBlog*, 2020/5/26, *https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments* [Accessed 2 November 2020]; references at F.C. Mayer, "To Boldly Go Where No Court has Gone Before: The German Federal Constitutional Court's ultra vires Decision of May 5, 2020" (2020) 21 G.L.J. 1116 at 1124.

ECB by introducing a stricter legal definition of the monetary policy mandate in art.127(1) TFEU and by limiting the type of open market operations that the ECB can engage beyond what is currently stated in art.123(1) TFEU, would restrict the ECB in its legal capacity to act, not least in the face of crises. In fact, curtailing monetary policy-making to a however defined core task, would first require the establishment of a supranational fiscal capacity, enabling the Union to take effective measures in times of crisis. For the time being, as the sovereign debt crisis and also the COVID-19 pandemic have highlighted, the ECB de facto has to come to the rescue where the Member States fail to act in a timely and decisive manner.

What is more, limiting the ECB's mandate would also not as such enhance its democratic legitimacy. Reasonable demands for increasing the democratic legitimacy of the supranational central bank that takes decisions with potentially far reaching redistributive implications at arm's length from the political institutions should be realised by enhancing democratic accountability in ways that do not result in a capture of monetary policy by political institutions. Since the present Treaty framework does not provide sufficient room for an appropriate democratic oversight, a Treaty amendment to strengthen the European Parliament's supervision of the ECB should be considered. In any event, courts are ill equipped to act as main sources of democratic legitimation of the exercise of public power.

Finally, as far as the relationship between the ECJ and the BVerfG is concerned, while the judicial dialogue between these courts might currently undergo a cooling-off period, it will survive the *Weiss* episode. The need for such dialogue in the halfway house, which is Europe, outweighs the collateral damage of the incident. As highlighted in this contribution, the risk of a repetition in other fields of Union law is rather minimal. This is the case because the constellation that triggered the stand-off between the ECJ and the BVerfG is rather special: the presence of de facto one policy field that is artificially separated into different fields and competences, which are assigned with exclusivity to two different levels. What is more, this artificial separation of policy fields is combined with an acting Union institution whose action can only be reviewed and remedied by courts.

There is arguably no other Union policy field that comes along with the same mix of ingredients. Either the acting Union institutions are politically controlled by the European Parliament or the Council, or the scope of the Union competences actually reflects the scope of the real policy field that it covers. The presence of either will prompt courts when reviewing measures taken in these fields to exercise judicial self-restraint, which forms the basis for a functioning judicial dialogue. This also explains why institutional solutions[116] to manage the future of the judicial dialogue between the ECJ and the Member States' supreme courts are not necessary. Such new institutions go beyond what is necessary for maintaining the judicial dialogue as conflicts regarding the delimitation of competences are rather unlikely to break out in other areas than EMU. Furthermore, a new institution will not change anything with regard to the constitutional roots of the conflict, that is the co-existence of two legal orders within the territories of the Member States that both legitimately claim to be applicable. From a national constitutional perspective, the qualification of a Union legal act to be ultra vires does not change only because another judicial institution (even it is composed of national constitutional judges) comes to a different conclusion.

Whilst the clash between the ECJ and the BVerfG seems to have been avoidable given that the ECJ's assessment of the ECB's unconventional monetary policy measures was not "simply not comprehensible and thus to be considered arbitrary", the valid points of critique that underlie the BVerfG's judgment should not be ignored. In times of economic crisis, EU politics was unable to act forcing the ECB to take action within its policy mandate, thereby stretching the limits of the mandate. Such stretching entails democratic legitimacy concerns given the strong independence of the ECB. Courts are, however, not in a position to solve a problem that is deeply political. The clash between the ECJ and the BVerfG is therefore, above all, a call to action for the Union's political institutions.

[116] D. Sarmiento and J.H.H. Weiler, "The EU judiciary after Weiss: proposing a new mixed chamber of the Court of Justice", *VerfBlog*, 2020/6/02, *https://verfassungsblog.de/the-eu-judiciary-after-weiss/* [Accessed 23 October 2020].