

IS THIS COMPLETELY M.A.D.? THREE VIEWS ON THE RULING OF THE GERMAN FCC ON 5TH MAY 2020

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This brief note, on the Bundesverfassungsgericht's Weiss judgment of 5th May 2020, highlights three implications of the German Federal Constitutional Court's landmark ruling and its constitutional significance with implications for the wider context of Member States' cooperation in the EU and European integration as a whole. We explain the relevant background of the judgment and argue that the specific issue created by the judgment might be addressed quickly but that the resulting judicial turmoil for the broader relationship between the law of the EU and the Member States can only be remedied by treaty changes in the longer term in order to avoid the Mutually Assured Destruction (M.A.D.).

1 INTRODUCTION

On 5th May 2020, the Bundesverfassungsgericht (BVerfG) in Germany, ie the German Federal Constitutional Court (FCC), has delivered a landmark ruling¹ of constitutional significance with implications not only for the specific policy areas concerned, but also in the wider context of Member States' cooperation in the EU and European integration as a whole. In this note on the judgment Annegret Engel first presents the relevant background and competence allocation highlighting the need for a better demarcation of the boundaries between EU and Member State's competences. Then, Julian Nowag looks more specifically at the BVerfG's treatment of proportionality and its claim of an *ultra vires* judgment by the Court of Justice of the European Union (Court of Justice). Finally, Xavier Groussot explores the *ultra vires* review and the consequences of the judgment for constitutional pluralism. We argue that the specific issues created by the judgment might be addressed quickly but that the resulting judicial turmoil for the broader relationship between the EU's and Member States' law can only be remedied by treaty changes in the longer term in order to avoid the Mutually Assured Destruction (M.A.D.).

2 BACKGROUND TO THE CASE

The judgment concerns the Public Sector Purchase Programme (PSPP) under which the European Central Bank (ECB) via the Euro's constituent national central banks was able to purchase assets on the secondary markets with the aim to achieve market neutrality by providing securities for the rescue of the Eurozone in the aftermath of the economic crisis.

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¹ BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR980/16.

The ECB's decisions² to launch the PSPP were subsequently challenged before the German FCC as *ultra vires*,³ claiming that the German state having failed to challenge the ECB's action in accordance with the German Basic Law (Grundgesetz – GG).⁴

The main issue in the proceedings relates to the distinction between monetary and economic policies under EU law. The claimants argue that the PSPP programme exceeds the EU's exclusive competences under the monetary policy area and thus encroaching upon the Member States' coordinating competence under the economic policy area, thereby infringing the principle of conferred powers (Article 5 TEU). By Order of 18 July 2017, a preliminary reference was made by the German FCC to the Court of Justice questioning the validity of the ECB's measures and asking for clarification on the division of competences between the EU and the Member States.

In its *Weiss* judgment,⁵ the Court of Justice upheld the contested decisions as being compatible with the EU's objectives under the monetary policy without infringing the prohibition of monetary financing (Article 123 TFEU) or Member States' sovereignty in budget matters. In particular, the Court of Justice relied in its judgment on the evidence provided by the ECB, mainly focusing on the (monetary) objectives of the measures in question rather than their (economic) effects. When the case came back, the German FCC heavily criticised this methodology⁶ and rejected the Court of Justice's ruling as 'incomprehensible'.⁷

While criticism from a national court, in particular the German FCC, is not unprecedented,⁸ the timing and the rigorousness of the decision are certainly remarkable. The discrepancies in the interpretation and application of EU law with regards to the principle of conferred powers and the principle of proportionality⁹ have culminated in a dissenting judgment from the national court without much further room for dialogue.¹⁰ In a Statement issued by the President of the Commission Ursula von der Leyen, the German FCC's decision was said to be in contempt of the principle of primacy of EU law and the

² Decision of the Governing Council of the European Central Bank of 22 January 2015 and Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) [2015] OJ L 121/20, in conjunction with Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/33) [2015] OJ L 303/106, Decision (EU) 2015/2464 of the European Central Bank of 16 December 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/48) [2015] OJ L 344/1, Decision (EU) 2016/702 of the European Central Bank of 18 April 2016 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2016/8) [2016] OJ L 121/24, and Decision (EU) 2017/100 of the European Central Bank of 8 December 2016/11 January 2017 (ECB/2017/1) amending Decision (EU) 2015/744 (ECB/2015/10) on a secondary markets public sector asset purchase programme [2017] OJ L 16/51.

³ BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, para 112.

⁴ Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG.

⁵ Case C-493/17 *Weiss and Others* EU:C:2018:1000.

⁶ BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, para 141.

⁷ *ibid* para 153.

⁸ See eg the *Solange* saga.

⁹ BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, paras 125 and 126.

¹⁰ See also Dimitrios Kyriazis 'The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango', (*European Law Blog*, 6 May 2020) <<https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/>> accessed 14 June 2020.

binding nature of Court of Justice's rulings, reserving the option of infringement proceedings in accordance with Article 258 TFEU.¹¹

3 THE CONUNDRUM OF THE CORRECT CHOICE OF LEGAL BASIS: DELIMITING EU COMPETENCES UNDER THE MONETARY AND ECONOMIC POLICY AREAS

As a general rule, the Union has no genuine powers itself but derives all its competences to legislate in a specific area from the Member States who have given up some of their sovereign rights by having transferred them to the EU. This principle of conferred powers is enshrined in Article 5 TEU. Any competences not conferred on the EU remain with the Member States, which are thus the ultimate masters of the treaties, also referred to as *Kompetenz-Kompetenz*. Therefore, a clear delimitation between different types of competences is an essential prerequisite for the determination of the legitimate actor(s) to be involved in the legislative process,¹² since the reliance on an incorrect legal basis and thus a wrongfully taken action would render any such measure adopted thereon invalid.

From a purely normative perspective, the conflict between the EU's monetary and economic policies derives from the different categorisation of competences introduced by the Treaty of Lisbon,¹³ which classifies the former as an exclusive competence¹⁴ of the Union according to Article 3(1)(c) TFEU, whereas the latter remains under the Member States' competence according to Article 5(1) TFEU while the EU has a coordinating function.¹⁵ Both policy areas can be found under the same Title VIII of Part Three TFEU, although specific provisions refer to the economic policy under Chapter 1 and the monetary policy under Chapter 2. According to Article 119 TFEU, the primary objective of the Union's monetary policy is the maintenance of price stability,¹⁶ whereas the economic policy is merely defined as based on Member States' close cooperation, the internal market and common objectives.¹⁷ The delimitation between those two competences becomes even more obscured considering the explicit prohibition of monetary finance enshrined in Article 123 TFEU.

As a result of this unfortunate constitutional setup and artificial distinction between two concurrent policy areas, it seems unsurprising that such a conflict would reach the judiciary sooner rather than later. Indeed, legal basis litigation can be traced back a long time in the Court of Justice's history. In the quest for the correct choice of legal basis in the case

¹¹ European Commission, Statement from 10 May 2020

<https://ec.europa.eu/commission/presscorner/detail/en/statement_20_846> accessed 10 June 2020.

¹² An institution's subjective interpretation of the delimitation of competences has often led to arbitrary decisions and created inter-institutional conflicts, see Holly Cullen and Andrew Charlesworth, 'Diplomacy by other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' [1999] 36(6) *Common Market Law Review* 1243-1270.

¹³ Before the introduction of the Lisbon Treaty, there was no clear set of competences in the treaties; the scope of each policy area was defined individually in the respective treaty provision which were thus subject to a constant shift and re-interpretation by the courts in favour of the *acquis communautaire*.

¹⁴ According to Art. 2(1) TFEU, only the Union is allowed to legislate and adopt legally binding acts under the exclusive competences, with Member States' actions being allowed only when empowered to do so or for the implementation of Union acts.

¹⁵ According to Art. 2(3) TFEU, the Union has the power to provide the arrangements necessary for Member States' coordination as determined by the Treaty.

¹⁶ Art. 119(2) TFEU.

¹⁷ Art. 119(1) TFEU.

of overlapping competences, the European courts have developed general criteria of legal basis litigation, most notably the ‘centre of gravity’ theory.¹⁸ Thus, the Court of Justice usually focuses on the main aim or objective of a measure and disregarding any incidental or ancillary effects.¹⁹ While this rather objective-driven approach has been criticised occasionally,²⁰ the ‘centre of gravity’ theory has been a useful tool in legal basis litigation and provided at least some degree of legal certainty when determining the correct legal basis.²¹ The inevitable judicial review of the delimitation between monetary and economic policies may have thus sparked hopes for clarification, hence the reason for the German FCC’s question to the Court of Justice. However, the recent attempts to delimit these two areas of competence have unfortunately added more to the confusion than contributed to its diminishment.

3.1 CONFLICTING VIEWS BETWEEN THE GERMAN FCC AND THE COURT OF JUSTICE

Applying the ‘centre of gravity’ theory in its *Weiss* ruling, the Court of Justice thus predominantly focused on the main objective of the contested measures. Unsurprisingly from an EU law perspective, the Court of Justice found this to be in line with the primary objective of maintaining price stability under the EU’s monetary policy, while disregarding any indirect effects:

‘[A] monetary policy measure cannot be treated as equivalent to an economic policy measure for the sole reason that it may have indirect effects that can also be sought in the context of economic policy’.²²

Despite acknowledging the rather vague nature of the definition of monetary policy objective in the treaties, the Court of Justice nevertheless considered the ECB’s evidence sufficient to justify the use of the Union’s competences. The Court’s analysis itself contributes little to further clarify the delimitation of the Union’s monetary policy from economic policies. Echoing its previous reasoning in *Pringle*²³ and *Gauweiler*,²⁴ the Court of Justice merely states that economic effects are inevitable, adding that the ECB would be precluded from adopting such measures, thus rendering the monetary policy provisions obsolete, if it had come to a different decision.²⁵

¹⁸ This was established in Case C-300/89 *Commission of the European Communities v Council of the European Communities (Titanium Dioxide)* EU:C:1991:244, para 10, where the court held that the objective factors of a measure include in particular the aim and content of a measure.

¹⁹ This was first established in Case C-70/88 *European Parliament v Council of the European Communities* EU:C:1991:373, para 12.

²⁰ See eg Marise Cremona, ‘External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law’ (2006) 2006/22 EUI WP LAW.

²¹ An extensive discussion of the development of the ‘centre of gravity’ theory as well as other general criteria of legal basis litigation can be found in Annegret Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer 2018).

²² Case C-493/17 *Weiss and Others* EU:C:2018:1000, para 61.

²³ Case C-370/12 *Thomas Pringle v Government of Ireland* EU:C:2012:756.

²⁴ Case C-62/14 *Gauweiler and Others* EU:C:2015:400.

²⁵ Case C-493/17 *Weiss and Others* EU:C:2018:1000, paras 63-67.

But does this reasoning of *effet utile* really help in disentangling the overlap between the two policy areas? Arguably not.²⁶ In fact, this could very well be turned on its head, asking the question the other way around: would it not render any economic policy provisions obsolete if we do not take into account such economic effects? This is then the perspective of the national court, the German FCC, which considers the Court of Justice's ruling 'untenable'²⁷ and an encroachment upon its sovereign rights as part of the gradual 'competence creep' in the Union,²⁸ a 'structurally significant shift in the order of competences to the detriment of Member States'.²⁹ Disregarding the principle of conferred powers, this would consequently allow the ECB to gradually expand its own powers 'in a manner that is not necessarily noticeable from the outset'.³⁰ In turn, however, the German FCC's judgment calls into question the authority of the Court of Justice in the interpretation of EU law according to Article 19 TEU and the principle of supremacy when applied in the national context.³¹

As could be argued, the conflict between the BVerfG and the Court of Justice highlights the original sin which may have contributed to the extent the financial crisis actually took in the EU: How is it feasible to have a common monetary union with a common currency, but without a common economic policy (at least for the Eurozone)? Admittedly, Articles 136 to 138 TFEU are special provisions for those Member States' whose currency is the Euro, allowing the Council to adopt measures to strengthen the coordination and surveillance of Member States' budgetary discipline,³² and setting economic policy guidelines for them, while ensuring compatibility with those adopted for the whole of the EU as well as their surveillance.³³ However, this does not ensure the level of coordination needed for an adequate protection of the financial markets through swift decision-making in the Eurozone in times of crisis.³⁴

Without this inherent constitutional flaw, the EU would have most likely been able to tackle the financial crisis in a much swifter and more assertive manner, thus reducing the impact it has had on the Eurozone. This further bears the question of what would happen in a similar situation in the future: to which extent can the EU's competence under the monetary policy area continue to compensate for the lack of powers under the economic policy area, even without the constitutional rebellion of a national court such as the German FCC? And what can be done in order to avoid such a conflict of competences in the first place?

²⁶ See already with regards to the distinction made in the *Pringle* case which was criticised as mere 'legal formalism', Paul Craig, 'Pringle: Legal Reasoning, Purpose and Teleology' (2013) 20(1) Maastricht Journal of European and Comparative Law 3-11, 5.

²⁷ BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, para 117.

²⁸ See eg Stephen Weatherill, 'Competence creep and competence control' (2005) 23 Yearbook of European Law 1-55.

²⁹ BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, para 157.

³⁰ *ibid* para 156.

³¹ Federico Fabbrini, 'Suing the BVerfG', (*Verfassungsblog*, 13 May 2020) <<https://verfassungsblog.de/suing-the-bverfg/>> accessed 12 June 2020.

³² Art. 136(1)(a) TFEU.

³³ Art. 136(1)(b) TFEU.

³⁴ For some more detailed reflections, see Kaarlo Tuori, 'The European Financial Crisis: Constitutional Aspects and Implications' (2012) 2012/28 EUI WP LAW.

3.2 THE WAY FORWARD: ON THE VERGE OF A RE-DISTRIBUTION OF EU COMPETENCES?

As the law currently stands, the overlap between monetary and economic policies leads to a conflict of competences between the EU and Member States. Yet, a clear-cut delimitation without encroaching upon the respective other policy area seems impossible to achieve.³⁵ However, as has been acknowledged by the German FCC in its judgment:

‘The distinction between economic policy and monetary policy is a fundamental political decision with implications beyond the individual case and with significant consequences for the distribution of power and influence in the European Union. The classification of a measure as a monetary policy matter as opposed to an economic or fiscal policy matter bears not only on the division of competences between the European Union and the Member States; it also determines the level of democratic legitimation and oversight of the respective policy area, given that the competence for the monetary policy has been conferred upon the ESCB as an independent authority’.³⁶

Thus, the only possible solution to this conflict of interests between the national and European level directly resulting from the inherent flaw of overlapping competences in the treaties is indeed by a re-distribution of those very competences, which would require treaty change. While this might mean raising the economic leg by further ‘communitarising’ Member States’ competences, the separation of the two policy areas into different competence categories has proven problematic and is clearly unsustainable in the longer term. A formal treaty change would be in line with the principle of conferred powers and thus provide much needed legal certainty.

Treaty changes in the EU bear a certain risk of failure, as was the case with the failed Constitutional Treaty before the Treaty of Lisbon was introduced. However, without such a change of the constitutional setup of competences and in light of the most recently announced Pandemic Emergency Purchase Programme (PEPP),³⁷ as a response to the coronavirus pandemic, a similar conflict could occur in the very near future. In fact, the only aspect which both the German FCC and the Court of Justice agree on is the compatibility with the prohibition of monetary financing according to Article 123 TFEU, which arguably the new PEPP might fall foul of.³⁸ Thus, a timely political solution in the form of a treaty change could prevent further legal uncertainty and unnecessary judicial turf wars between the Court of Justice and national courts in the longer term.

³⁵ BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, para 161.

³⁶ *ibid* para 159.

³⁷ European Central Bank, Press-release from 18 March 2020, <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html> accessed 11 June 2020.

³⁸ Miguel Poiarés Maduro, ‘Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court’ (*Verfassungsblog*, 6 May 2020) <<https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/>> accessed 15 June 2020.

4 THE PROPORTIONALITY REVIEW OF THE BVERFG'S PSPP AND ITS LINK TO *ULTRA VIRES* AND CONSTITUTIONAL CORE

4.1 SOLANGE BABEL'S TOWER HAS NOT BEEN FINALISED

While the judgment may have broader implication for the relationship between EU and national law that seem best addressed by treaty change, the judgment itself addresses a particular act and situation. A substantial amount of criticism of the BVerfG's decision relates to its proportionality analysis, and most likely more criticism will follow. The reaction is maybe not surprising as it is the first time in the history of the EU that a national court refuses to comply with a direct ruling of the Court of Justice after a preliminary ruling on the matter.³⁹ In effect, the BVerfG apparently unhappy with the competence demarcation by the Court of Justice, uses the proportionality principle as safeguard of the economic policy domain. Reading the commentary on the use of proportionality principle by the BVerfG three interrelated lines of critique seem to exist. These focus on the BVerfG having misconstrued the proportionality review under EU law, criticise the proportionality review performed in the judgment is itself as inconsistent, and identify an attitude that might be summarised as 'am deutschen Wesen mag die Welt genesen' or as Davies⁴⁰ has put it: 'colonialist'.

The commentators point out that the proportionality review applied by the BVerfG is not in line with the EU proportionality requirement⁴¹ where it is not obvious that proportionality *stricto sensu* applies given that Article 5(4) TEU seems more narrow, only requiring the EU to 'not exceed what is necessary to achieve the objectives of the Treaties'.⁴² As noted the BVerfG seems to take issue with this, citing numerous examples to show that the proportionality review in EU law is different. But rather than accepting this EU proportionality review, it replaces the Luxembourg proportionality with its own conception of proportionality.⁴³ It thereby seems to overlook that although the Luxembourg's proportionality review has been (deeply) inspired by the German proportionality review, it does not mean that they are the same.⁴⁴ Some go even so far to suggest that the BVerfG

³⁹ And the BVerfG did not even send a second request before issuing its judgment, see eg J.H.H. Weiler and Daniel Sarmiento, 'The EU Judiciary After Weiss – Proposing A New Mixed Chamber of the Court of Justice' (*EU Law Live blog*, 1 June 2020) <<https://eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler/>> accessed 29 June 2020.

⁴⁰ Gareth Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (*European Law Blog*, 21 May 2020) <<https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price>> accessed 10 June 2020.

⁴¹ See amongst many eg Dimitrios Kyriazis, 'The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango' (*European Law Blog*, 6 May 2020) <<https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango>> accessed 10 June 2020.

⁴² Gareth Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (*European Law Blog*, 21 May 2020) <<https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price>> accessed 10 June 2020.

⁴³ Pavlos Eleftheriadis, 'Germany's Failing Court' (*Verfassungsblog*, 8 May 2020) <<https://verfassungsblog.de/germanys-failing-court>> accessed 10 June 2020.

⁴⁴ Diana-Urania Galetta, 'Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5 May 2020 of the German BVerfG and its consequences' (*CERIDAP*, 8 May 2020)

invented a new proportionality test, as proportionality in the EU does not require the balancing of ‘conflicting’ policy objectives beyond where such balancing is explicitly recognised as for example in Article 106 (2) or 107 (3) TFEU.⁴⁵ Moreover, it has been pointed out that even if the Court of Justice’s proportionality review is not up to the standards of Karlsruhe, it is something rather different in a legal system to reject a judgment against which no further appeals are possible, such as the Court of Justice’s.⁴⁶

The second line of criticism concerns the proportionality test applied, or one might say imposed by the BVerfG. This test has been criticised, in particular, because it creates a kind of catch-22 situation for the ECB:⁴⁷ It requires the ECB to balance monetary and fiscal policy as having equal value⁴⁸ while the EU legal framework foresees a monetary policy as the objective of the ECB taking priority. In a similar fashion it has been criticised that such a balance would not be something familiar or easy to understand for lawyers.⁴⁹ This lack of comfortability with such a balancing possibly stems from the idea of incommensurability⁵⁰ and is reflected in a number of the arguments advanced against the BVerfG’s proportionality assessment. For instance, it has been suggested that it would be impossible to carry a balancing as the ‘ECB would have to identify a common denominator in order to balance the effects [..and it would be unworkable to do so] in practice because it requires the ECB to take into account an unspecified number and type of effects outside the boundaries of monetary policy.’⁵¹ In a similar direction, Maduro criticises the balancing required by the BVerfG for its ‘profound’⁵² inconsistency. Such a balancing would be rather one-sided: it would have to take account of the economic, fiscal and political costs but at the same time seems not to be able to take account of any ‘economic, fiscal and political benefits of the

<<https://ceridap.eu/karlsruhe-uber-alles-the-reasoning-on-the-principle-of-proportionality-in-the-judgment-of-5-may-2020-of-the-german-bverfg-and-its-consequences>> accessed 10 June 2020.

⁴⁵ Phedon Nicolaidis, ‘The Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank: Setting an Impossible and Contradictory Test of Proportionality’ (*EU Law Live Blog*, 15 May 2020) <<https://eulawlive.com/op-ed-the-judgment-of-the-federal-constitutional-court-of-germany-on-the-public-sector-asset-purchase-programme-of-the-european-central-bank-setting-an-impossible-and-contradictory-test-of>> accessed 10 June 2020.

⁴⁶ Peter Meier-Beck, ‘Ultra vires?’ (*D’Kart Antitrust Blog*, 11 May 2020) <<https://www.d-kart.de/en/blog/2020/05/11/ultra-vires>> accessed 10 June 2020.

⁴⁷ Ana Bobić and Mark Dawson, ‘What did the German Constitutional Court get right in Weiss II?’ (*EU Law Live Blog*, 12 May 2020) <<https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson>> accessed 10 June 2020.

⁴⁸ See eg BVerfG (n 1) paras 133 f., 146, 163, 165, 167 f., 173, 176.

⁴⁹ Peter Meier-Beck, ‘Ultra vires?’ (*D’Kart Antitrust Blog*, 11 May 2020) <<https://www.d-kart.de/en/blog/2020/05/11/ultra-vires>> accessed 10 June 2020.

⁵⁰ See eg Francisco Urbina, *A Critique of Proportionality and Balancing* (CUP 2017).

⁵¹ Phedon Nicolaidis, ‘The Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank: Setting an Impossible and Contradictory Test of Proportionality’ (*EU Law Live blog*, 15 May 2020) <<https://eulawlive.com/op-ed-the-judgment-of-the-federal-constitutional-court-of-germany-on-the-public-sector-asset-purchase-programme-of-the-european-central-bank-setting-an-impossible-and-contradictory-test-of>> accessed 10 June 2020.

⁵² Miguel Poiaras Maduro, ‘Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court’ (*Verfassungsblog*, 6 May 2020) <<https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court>> accessed 10 June 2020.

monetary oriented decisions.⁵³ Overall, many commentators highlight that such balancing would be ‘a highly political process [...] best left to the legislature.’⁵⁴

Thus, it is not surprising that many have criticised a BVerfG’s attitude which suggests that the German standard of proportionality is the correct one to be applied. It has brought about an impressive list of claims surrounding the German Sendungsbewusstsein (sense of mission) along the lines of ‘am deutschen Wesen soll die Welt genesen’:

- ‘Why should a German standard be imposed as an EU standard.’⁵⁵
- ‘In a club of many members, it is more offensive for one to tell the others how it should be run, than for that member to simply turn their back. [...] It is not so much un-European, as colonialist.’⁵⁶
- ‘Das BVerfG erklärt dem EuGH in ziemlich schulmeisterlicher Manier [...] the principle of proportionality’⁵⁷
- ‘[T]hat attitude of “cultural dominance” which clearly transpires (at least in my eyes) from all the reasoning of the Zweiter Senat regarding the principle of proportionality, and the necessity that the decisions taken within the PSPP programme respect it.’⁵⁸
- ‘The FCC is teaching the CJEU how to be a court worthy of the title. And it is doing so for the most unsophisticated of all reasons: The FCC does not like the outcome.’⁵⁹

This sense of German exceptionalism was certainly not helped by the fact that the BVerfG in its this proportionality review highlighted those interests that seem mainly relevant from a German perspective and less relevant in other Member States.⁶⁰

Overall, the judgment certainly displays a very German understanding of proportionality but equally a very German understanding of EU law as public law all shaped by a German understanding of administrative review and judicial review of such acts. The first part of the judgment very much reads like a judgment of BVerfG examining whether a

⁵³ Miguel Poiarés Maduro, ‘Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court’ (*Verfassungsblog*, 6 May 2020) <<https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court>> accessed 10 June 2020.

⁵⁴ Instead of many, see Gareth Davies, ‘The German Constitutional Court Decides Price Stability May Not Be Worth Its Price’ (*European Law Blog*, 21 May 2020) <<https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price>> accessed 10 June 2020.

⁵⁵ Toni Marzal ‘Is the BVerfG PSPP decision “simply not comprehensible”? A critique of the judgment’s reasoning on proportionality’ (*Verfassungsblog*, 9 May 2020) <<https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible>> accessed 10 June 2020.

⁵⁶ Gareth Davies, ‘The German Constitutional Court Decides Price Stability May Not Be Worth Its Price’ (*European Law Blog*, 21 May 2020) <<https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price>> accessed 10 June 2020.

⁵⁷ Franz C. Mayer, ‘Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG’ (*Verfassungsblog*, 7 May 2020) <<https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht>> accessed 10 June 2020.

⁵⁸ Diana-Urania Galetta, ‘Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5 May 2020 of the German BVerfG and its consequences’ (*CERIDAP*, 8 May 2020) <<https://ceridap.eu/karlsruhe-uber-alles-the-reasoning-on-the-principle-of-proportionality-in-the-judgment-of-5-may-2020-of-the-german-bverfg-and-its-consequences>> accessed 10 June 2020.

⁵⁹ Urška Šadl, ‘When is a Court a Court?’ (*Verfassungsblog*, 20 May 2020) <<https://verfassungsblog.de/when-is-a-court-a-court>> accessed 10 June 2020.

⁶⁰ Franz C. Mayer, ‘Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG’ (*Verfassungsblog*, 7 May 2020) <<https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht>> accessed 10 June 2020.

judgment of the Bundesverwaltungsgericht (the Federal Administrative Court -the ultimate appeal for administrative matters) and the review of the administrative decision performed by the Federal Administrative Court was compliant with the constitutional principles. Even the structure of the judgment very much reminds the reader of this form of review. It first examines the Court's judgment - in this case the Court of Justice's – and, then, explores in a second step whether the administrative decision - in this case the ECB's - itself is proportional. The BVerfG's judgment even finds one of the classical deficiencies of German administrative law, a failure to explain whether a proportionality assessment has been carried out. Thus, just as in administrative law cases, the BVerfG is examining not necessarily the proportionality review by the Court of Justice *per se*. Instead, it is assessing the overall review intensity and, then, in a second step the question whether the programme as a decision of a public authority could be justified – using the 'corrected' standard of review. In this sense, the judgment might not be so surprising, at least for a German public lawyer.⁶¹

The second element that also seems rather German relates to the incommensurability issue. For the German constitutional court, the idea of incommensurability does not exist.⁶² Instead, the BVerfG uses the principle of *praktischen Konkordanz*⁶³ known expressly from the area of fundamental rights protection.⁶⁴ As such, the BVerfG does not consider it particularly problematic or difficult to balance different fundamental rights against each other or to balance eg the freedom of the arts against requirements of child and youth protection.⁶⁵ The principle of *praktische Konkordanz* is a method for solving norm conflicts between two objectives of equal value and could be said to be at the heart of German public and constitutional law. It is such a balancing that the BVerfG expects the ECB to perform as part of proportionality assessment. The BVerfG expects the ECB not to act blindly without regard to the consequence. Instead, it should identify possible interest affected⁶⁶ by its decision. In practise, the BVerfG does not necessarily require a 'full weighing' of the different interests but rather the performance of the usual suitability and necessity test plus finally and exploration of whether any *foreseeable* negative effects of the PSPP programme would have *manifestly* outweighed their benefits (proportionality *stricto sensu*). And in nearly traditional German administrative law fashion, the BVerfG expressed concern that it was not discernible whether such an enquiry had taken place⁶⁷ thereby emphasising the procedural element of proportionality.⁶⁸ Such an exercise is not too different from the obligations

⁶¹ Or as Bobić and Dawson put it 'a student who was a good positivist', see Ana Bobić and Mark Dawson, 'What did the German Constitutional Court get right in Weiss II?' (*EU Law Live Blog*, 12 May 2020) <<https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson>> accessed 10 June 2020.

⁶² Except maybe with regard to human dignity which is not subject to any balancing, see eg BVerfG, *Luftsicherheitsgesetz*, 1 BvR 357/05 (2006) ECLI:DE:BVerfG:2006:rs20060215.1bvr035705.

⁶³ Principle of practical concordance.

⁶⁴ See Robert Alexy, *Theorie der Grundrechte* (Suhrkamp 1994).

⁶⁵ BVerfG *Mutzenbacher*, 1 BvR 402/87 (1990).

⁶⁶ Fundamental right might also come into play.

⁶⁷ Thus, the three months period to provide reasons.

⁶⁸ What Davies calls 'extra-territorial application of national administrative law' - Gareth Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' (*European Law Blog*, 21 May 2020) <<https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price>> accessed 10 June 2020.

outlined by the GC has in its recent *Steinboff* decision⁶⁹ regarding the ECB or those of the Commission in *Ledra*.⁷⁰ In *Steinboff*, the GC held that even where ECB fulfils only its consultative function to the Member States it would be bound by the Charter and the requirement to contribute to the aims of the EU contained in Article 2, 3 and 6 TFEU.⁷¹ Therefore, the ECB would have been required to take account of *possible* violations of those norms when providing its advice to Cyprus on the restructuring programme.

What becomes clear is that the BVerfG employed a rather German understanding of proportionality and that this concept might not be the same as the EU's concept. It seems like a classical lost in translation situation: just because something is called *Verhältnismäßigkeit* in judgments of the Court of Justice it does not mean that the German *Verhältnismäßigkeit* is meant. *Verhältnismäßigkeit*, proportionality, proportionnalité or its myriad of other translations does not mean the same thing in different legal systems. It is a concept not just a term, and concepts are difficult to translate as they are embedded in their cultural context.⁷² The cultural context, in this case the constitutional context, matters.

We might, thus, think of a version of the tower of babel where people had the same intention of jointly building a tower but were hampered by the fact that they did not understand each other. The EU edifice is built by numerous actors and courts, using multiple languages, all of which have a claim to be the official language of the EU and the Court of Justice. Thus, even though the same terms are used in the different language for a concept and their actual meaning might be close, there might still be considerable difference due to the (legal) cultural background⁷³ in which they are embedded. The metaphor of the Babel's tower as common edifices build by numerous actors is also interesting in another way. Building successfully relies on common standards. Just because everyone involved uses 'the ell' to determine length doesn't mean the building will be stable. As long as the builders involved are not aware that there are Scottish, Polish, French, Swedish and different variations of the Danish and German 'ell'. In essence, the whole situation is also a very familiar problem encountered in the building of the EU's internal market. There might a myriad of interpretation what is a 'safe' toy for kids. The EU has managed to overcome these problems in the internal market by means of mutual trust and commonly agreed standards and entrusted the final interpretation to the Court of Justice.⁷⁴ What is however different, is

⁶⁹ Case T-107/17 *Steinboff and others* EU:T:2019:353. For a comment see Diane Fromage, 'The ECB and its expanded duty to respect and promote the EU Charter of Fundamental Rights after the Steinboff case' (*EU Law Analysis*, 9 June 2020) <<http://eulawanalysis.blogspot.com/2020/06/the-ecb-and-its-expanded-duty-to.html>> accessed 10 June 2020.

⁷⁰ Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and others* EU:C:2016:701 in particular paras 67-68. For a comment see Alicia Hinarejos, 'Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising' (*EU Law Analysis*, 25 September 2016) <<http://eulawanalysis.blogspot.com/2016/09/bailouts-borrowed-institutions-and.html>> accessed 10 June 2020.

⁷¹ Case T-107/17 *Steinboff and others* EU:T:2019:353 para 98.

⁷² See eg Theo Hermans, 'Cross-cultural translation studies as thick translation' (2003) 66:3 *Bulletin of the School of Oriental and African Studies* 380-389.

⁷³ In a similar direction pointing to the different legal cultures between in terms of drafting of judgments between the BVerfG and the Court of Justice, see Diana-Urania Galetta, 'Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5 May 2020 of the German BVerfG and its consequences' (*CERIDAP*, 8 May 2020) <<https://ceridap.eu/karlsruhe-uber-alles-the-reasoning-on-the-principle-of-proportionality-in-the-judgment-of-5-may-2020-of-the-german-bverfg-and-its-consequences>> accessed 10 June 2020.

⁷⁴ See also Pavlos Eleftheriadis, 'Germany's Failing Court' (*Verfassungsblog*, 8 May 2020) <<https://verfassungsblog.de/germanys-failing-court>> accessed 10 June 2020.

that the Court of Justice is not, anymore, an arbiter but rather just considered another player in the game, and a player that the BVerfG does not trust, at least in this particular instance.

While these observations might explain what we see, it still leaves us with the question that Claes had already raised with regard to Gauweiler:⁷⁵ Why should the German standard be(come) the EU standard for review?

4.2 THE BVERFG PROPORTIONALITY IN ITS BROADER CONTEXT

Maybe the BVerfG's judgment does not imply that the German standard of proportionality needs to become the EU standard. To focus solely on proportionality would miss the broader picture in which the BVerfG places its proportionality review. A pure violation of the BVerfG proportionality review standard alone would not justify disobeying with EU law as also the BVerfG's judgment highlights.⁷⁶ And Eleftheriadis argues the BVerfG's case law on *ultra vires* and constitutional identity review which should only come into play with regard to 'important constitutional transformations, not to any error supposedly committed by an international body to which we have delegated powers. [But] the *ultra vires* review [is reserved] for manifest failures and for what we might call violations of constitutional fundamentals.'⁷⁷ The broader context is therefore crucial to understand how the BVerfG could establish such a grave instance.

Traditionally, we have seen three distinct areas of review by the BVerfG, the Solange type fundamental rights protection, the *ultra vires*, and finally the constitutional identity as constitutional core.⁷⁸ While it has been observed previously⁷⁹ that there is an overlap between these pillars of review, this judgment further highlights this connection. Without this connection the BVerfG would not have been able to claim to have established an *ultra vires* act in line with its established case law. Hence, the BVerfG rejects the proportionality review by the Court of Justice not (solely) because it is, in its view, too lenient but rather because it occurs in a specific context that is linked to the constitutional identity/core.

The BVerfG highlights the democratic principles protected by the unamendable constitutional identity/core of the German Constitution, democratic participation by means of democratic election.⁸⁰ Or maybe more precisely equal chances for the citizens to affect the democratic process as the BVerfG has highlighted in its case law on elections to the Bundestag.⁸¹ The *PSPP* judgment highlights the importance of this principle and requires increased judicial review in cases where such democratic legitimacy exists only in diminished

⁷⁵ See Monica Claes, 'The Validity and Primacy of EU Law and the "Cooperative Relationship" between National Constitutional Courts and the Court of Justice of the European Union' [2016] *Maastricht Journal of European and Comparative Law* 151.

⁷⁶ See eg para 110 highlighting that a transgression of the competences needs to be structurally relevant in the competence allocation and to the detriment of the Member States.

⁷⁷ Pavlos Eleftheriadis, 'Germany's Failing Court' (*Verfassungsblog*, 8 May 2020) <<https://verfassungsblog.de/germanys-failing-court>> accessed 10 June 2020.

⁷⁸ See section 4 for a focus on the *ultra vires* review.

⁷⁹ See the decision in BVerfG 15.12.2015 - 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514 and the comment on its relevance Julian Nowag, 'EU law, constitutional identity, and human dignity: A toxic mix?' (2016) 54 *Common Market Law Review* 1441-1454, available also at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2840473> accessed 10 June 2020.

⁸⁰ para 101.

⁸¹ See eg BVerfG, *Ländersitzkontingente* - 2 BvF 3/11 - (25 July 2012) ECLI:DE:BVerfG:2012:fs20120725.2bvf000311.

from.⁸² Thereby, the BVerfG picks up a theme already existent in its *Gaulweiler* decision. There it demanded a restrictive interpretation of the ECB's monetary mandate due to the ECB's independence and thus diminished democratic legitimacy.⁸³

The BVerfG finds the *overall* review of ECB acts by the Court of Justice insufficient and thus *ultra vires* because Court of Justice's review is lenient both in terms of the legal basis as well as in terms of proportionality.⁸⁴ In this regard, it is important to highlight that the BVerfG could not decide with certainty that the ECB acted itself *ultra vires*. It is rather the review or more precisely the perceived lack of oversight by the Court of Justice compounded by the absence of democratic oversight over the ECB that would allow the ECB to act (potentially) *ultra vires*. The BVerfG highlights a number of times⁸⁵ that the lenient review with regard to the legal basis combined with the lenient review over how the ECB uses the power derived from this legal basis means that no meaningful control of the actions of the ECB is in takes place.⁸⁶ Or to put it bluntly: under the Court of Justice's review standards the ECB can do what it likes, as long as the ECB does not openly oversteps its competence. Thus, the BVerfG concern is that the Court of Justice essentially has handed the ECB a competence-competence: the ECB can decide how it interprets the legal basis for its actions and moreover does not face constraints in how it exercises its power under that legal basis.

Seen from this perspective the Court of Justice's failure in the view of the BVerfG was to grant the ECB with such a power. An unlimited power/competence that conceivably might be used in such a broad way that it touches upon the core of the 'the right to vote' and the 'budgetary autonomy' of the Bundestag as protected by the constitutional identity clause.⁸⁷ Thus, the combination of a light touch legal basis review with a light touch review of the actions, in particular in terms of proportionality spells the danger of *ultra vires* acts.⁸⁸ This danger is compounded where such acts are able to touch upon core values protected by the German constitution.

If this is the relevant 'danger zone' for the BVerfG, would that not also spell trouble for other areas of EU action?⁸⁹ The judgment seems to send a clear message to the ECB as an institution with less democratic legitimacy that a more stringent review will need to take place.⁹⁰ But could the same not be said about other independent EU agencies or possibly even the Commission? It is certainly not an unreasonable to point to such dangers. However,

⁸² Ana Bobić and Mark Dawson, 'What did the German Constitutional Court get right in Weiss II?' (*EU Law Live Blog*, 12 May 2020) <<https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson>> accessed 10 June 2020.

⁸³ Armin Steinbach, 'Ultra schwierig?' (*Verfassungsblog*, 6 May 2020) <<https://verfassungsblog.de/ultra-schwierig>> accessed 10 June 2020.

⁸⁴ See para 156.

⁸⁵ See para 140 and 164ff.

⁸⁶ See also Armin Steinbach, 'Ultra schwierig?' (*Verfassungsblog*, 6 May 2020) <<https://verfassungsblog.de/ultra-schwierig>> accessed 10 June 2020.

⁸⁷ See eg para 102, 103, 234, but see also the previous Lisbon judgment where the BVerfG equally highlighted these matters as core, BVerfG 30 June 2009 - 2 BvE 2/08 - para 256.

⁸⁸ See in particular para 156.

⁸⁹ Besides form well described problems that the PSPP judgment might create in terms of the rule of law procedures in Poland and Hungary.

⁹⁰ See also Ana Bobić and Mark Dawson who explain: 'Judicial review of ECB needs to be more detailed as there are less political review due to independence', see Ana Bobić and Mark Dawson, 'What did the German Constitutional Court get right in Weiss II?' (*EU Law Live Blog*, 12 May 2020) <<https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson>> accessed 10 June 2020.

the Commission's better regulation agenda which includes increased procedural steps in terms of the proportionality review and where relevant the oversight and involvement of the EU Parliament should mitigate against such a danger. Moreover, the EU's better regulation agenda also allows the Court of Justice to perform a more meaningful review of Commission acts.⁹¹ However, this reasoning might well apply to a whole range of independent EU agencies depending on whether the Court of Justice applies what Öberg⁹² calls administrative review or the more lenient legislative standard.

Overall, the judgment links review intensity by the Court of Justice with the *ultra vires* review by the BVerfG. And in good tradition⁹³ the BVerfG's judgment can be framed in a Solange fashion: As long as there is no meaningful review either at the stage of competence or in the exercise of the competence (eg by means of proportionality) for institutions of the EU with reduced democratic legitimacy, the BVerfG will carry out such a review by means requiring compliance with (its own) administrative law based proportionality review.

This judgment sends a strong message. Yet, it seems rather surprising that BVerfG would expect that other actors in the European arena would not only fully understand the German proportionality test but also expect them to apply it. In such a situation one is indeed left with the questions whether the EU edifice suffers from an insurmountable Babel tower problem. But it doesn't have to be that way. As others pointed out the judgment's challenge might lead to a reform of the EMU.⁹⁴ More broadly it seems to challenge not only the EMU but the Court of Justice's judicial review intensity of a whole range of independent EU governance structures. Looking at this challenge not only from a narrow proportionality perspective but from the overall review intensity might help. For independent EU governance structures the BVerfG judgment seems to demand either more democratic control or a more intense judicial review, whether in the form of legal basis review or in form of how these EU institutions exercise their powers. Working on these underlying structural issues rather than debating how to define 'the ell', or 'the proportionality', might be more effective for building towers, or building the EU edifice.

If the EU were to accept the BVerfG's message and wanted to address the identified gap, the Court of Justice could obviously change its review intensity. However, another far reaching adjustment could be implemented by means of EU secondary legislation. The EU could adopt legislation to extend the Commission's Better Regulation agenda beyond the

⁹¹ See Julian Nowag and Xavier Groussot, 'From Better Regulation to Better Adjudication? Impact Assessment and the Court of Justice's Review' in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Hart Publishing, 2018) 185-202, available also <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024039> accessed 10 June 2020.

⁹² Jacob Öberg, 'The German Federal Constitutional Court's PSPP Judgment: Proportionality Review Par Excellence' (*European Law Blog*, 2 June 2020) <<https://europeanlawblog.eu/2020/06/02/the-german-federal-constitutional-courts-pspp-judgment-proportionality-review-par-excellence/>> accessed 9 June 2020; see also Jacob Öberg, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes' [2017] 13:2 *European Constitutional Law Review* 248-280.

⁹³ See with regard to the case BVerfG *Mr R* 15.12.2015 - 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514. Mathias Hong 'Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court' (*Verfassungsblog*, 18 February 2016) <<http://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court>> accessed 9. June 2020.

⁹⁴ Ana Bobić and Mark Dawson, 'What did the German Constitutional Court get right in Weiss II?' (*EU Law Live Blog*, 12 May 2020) <<https://eulawlive.com/op-ed-what-did-the-german-constitutional-court-get-right-in-weiss-ii-by-ana-bobic-and-mark-dawson>> accessed 10 June 2020.

realm of the Commission and the case of adopting legislation. It would require all independent EU agencies to perform a regulatory impact assessment addressing specifically proportionality of the measure and subsidiarity. The requirement to carry out such an impact assessment could take account of the distinction of Article 263 TFEU. It would thus only apply to legislative and regulatory acts but not in the case of decision addressed to individual persons.

Such a proposal might raise questions about the extent to which it would encroach on the ECB's independence and the extent to which the ECB would be bound by it. While these questions of competence are interesting, in practice it is unlikely that the ECB would be able to withstand such the pressure to adopt such measures. Moreover, such legislation could be introduced in tandem with the ECB, so that the normal legislative rules and internal ECB rules would be the same and come into force at the same time.

Measures like these should be able to address the issues identified by the BVerfG. But broader questions regarding EU law and *ultra vires* review by national courts remain and are the domain of issues surrounding theories of constitutional pluralism.

5 THE WORLDS OF CONSTITUTIONAL PLURALISM AND *ULTRA VIRES* REVIEW

5.1 CONSTITUTIONAL PLURALISM AFTER THE LISBON DECISION: AN *ULTRA VIRES*ATION OF EU LAW?

The last decade has been the seed of a reinforcement of the control of the FCC over the Court of Justice case law and its exclusive jurisdiction in the judicial review of EU acts. The *Lisbon*,⁹⁵ *Honeywell*⁹⁶ and *OMT*⁹⁷ decisions have been paradigmatic in this respect by structuring a solid *ultra vires* test. The *Weiss* case constitutes the culmination of this process of structuring, where the FCC frustration – that appears rather clearly between lines in the earlier *OMT* decision – has certainly played a role in the making of the decision delivered on 5 May 2020. In general, the national courts in the European Union have reacted differently to the claim of ultimate judicial *kompetenz-kompetenz* established and anchored in the Court of Justice case law. Most of the national courts do not see any objection to the exclusive jurisdiction of the Court of Justice. Yet, some national courts have claimed jurisdiction to review Union acts and it is so that no courts have expressly acknowledged the ultimate authority of the Court of Justice.⁹⁸ Indisputably, national constitutions of some Member States were construed in such a way that the final constitutional, legislative and judicial authority lies in the Member State.⁹⁹ The case law of the FCC in Germany provides here the best and most advanced sample of a national constitutional court reacting towards primacy of EU law and the related issue of the exclusive jurisdiction of the Court of Justice. Those issues have arisen mainly in the context of fundamental rights and the division of

⁹⁵ BVerfG, Case No. 2 BvR 2/08.

⁹⁶ BVerfG, Case No. 2 BvR 2661/06.

⁹⁷ BVerfG, Case No. 2 BvR 2728/13.

⁹⁸ See House of Lords, *The Future Role of the European Court of Justice* (2004) 6th report, para 65.

⁹⁹ *ibid* para 67.

competences for many decades.¹⁰⁰ The tension has particularly increased in the wake of Lisbon Treaty with the judgment of the FCC in the *Lisbon* decision¹⁰¹ and the development of a structured test to declare an EU act *ultra vires*.

The Lisbon ruling of the FCC on 30 June 2009 reflects a defensive approach and a skepticism towards European integration.¹⁰² The core of the ruling is focused on the concept of constitutional identity. The FCC states that the principle of conferral and the duty under EU law to respect identity are the expression of the foundation of Union authority in the constitutional law of the Member States.¹⁰³ The paragraph 241 clearly reflects a radical view on constitutional pluralism.¹⁰⁴ Indeed, the constitutional court considers in a systematic manner, which are the means of judicial review available to challenge Union law, ie *ultra vires* review or identity review (the so-called eternal clause). It even proposes to the national legislature an additional type of proceeding especially tailored for the review of EU legislation. The ruling of the FCC in *Honeywell* delivered in 2010 is known as building on the *Lisbon* decision and elaborating a complete *ultra vires* test often called the *Honeywell* protocol involving a preliminary ruling reference to the Court of Justice followed by a high standard of judicial review.¹⁰⁵ The test (or protocol) was put into action for the very first time in the *OMT* decision after sending a reference to the Court of Justice (and this is also for the very

¹⁰⁰ The assertion by the Court of Justice (Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114) that Community law is superior to the national law of the Member States - even their constitutional law - was the trigger of the national court's rebellion, which reacted against the evident lack of human rights within EC law in the *Solange* cases. Decision of 29 May 1974, *Internationale Handelsgesellschaft*, BVerfGE 37, 271 (1974) Common Market Law Review 540; Decision of the 22 October 1986, BVerfG 73, 339 (1987) 3 Common Market Law Review 225. See for an overview of the debate, Bruno de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in Philipp Alston (ed), *The EU and Human Rights* (OUP, 1999), 859, 863-864; and Matthias 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 Common Market Law Review 351, 364. Notably, the possibility to control the compatibility of EU law in the light of fundamental rights guaranteed by national constitutional law was already invoked by the FCC in 1967. See *Bundesverfassungsgericht*, 18 October 1967, BVerfGE 22, 233.

¹⁰¹ BVerfG, Case No. 2 BvR 2/08.

¹⁰² Christian Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon' [2009] 10 German Law Journal, 1259, 1260; and Frank Schorkopf, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10 German Law Journal 1219, 1220-1221.

¹⁰³ BVerfG, Case No. 2 BvR 2/08, para 234.

¹⁰⁴ *ibid*, para 241: 'The *ultra vires* review as well as the *identity review* can result in Community law or Union law being declared inapplicable in Germany. To preserve the viability of the legal order of the Community, an application of constitutional law that is open to European law requires, taking into account the legal concept expressed in Article 100.1 of the Basic Law, that the *ultra vires* review as well as the establishment of a violation of constitutional identity is incumbent on the Federal Constitutional Court alone. It need not be decided here in which specific types of proceedings the Federal Constitutional Court's jurisdiction may be invoked for such review. Availing oneself to types of proceedings that already exist, i.e. the abstract review of statutes (Article 93.1 no. 2 of the Basic Law) and the concrete review of statutes (Article 100.1 of the Basic Law), *Organstreit* proceedings (Article 93.1 no. 1 of the Basic Law), disputes between the Federation and the *Länder* (Article 93.1 no. 3 of the Basic Law) and the constitutional complaint (Article 93.1 no. 4a of the Basic Law) is a consideration. What is also conceivable, however, is the creation by the legislature of an additional type of proceedings before the Federal Constitutional Court that is especially tailored to *ultra vires* review and identity review to safeguard the obligation of German bodies not to apply in Germany, in individual cases, legal instruments of the European Union that transgress competences or that violate constitutional identity'.

¹⁰⁵ See Daniel Sarmiento, 'Requiem for Judicial Dialogue. The German Federal Constitutional Court's Judgement in the Weiss Case and its European Implications' (*EU Law Live Blog*, Weekend Edition, 9 May 2020). < <https://eulawlive.com/app/uploads/weekend-edition-16.pdf> > 10 accessed 10 June 2020.

first time for the FCC) and following the delivery of the *Gauweiler* case.¹⁰⁶ The FCC though clearly showing its discontent with the standard of judicial review used by the Court of Justice came to the conclusion that the ruling was not *ultra vires*.¹⁰⁷ In *Weiss*, by contrast, the decision of the CJEU was declared *ultra vires*. It is true that this is not the first time that previous decisions of the CJEU are declared *ultra vires* by a national court. This has already happened in the *Landtova* case¹⁰⁸ in Czech Republic and the *AJOS* case in Denmark.¹⁰⁹ Yet, the situation is quite dissimilar from the *Weiss* case since these two other cases involved a situation of interpretation of national law in light of EU law. This is different from the *Weiss* case, which involves the validity of an act taken by the ECB. Moreover, the Czech and Danish cases were followed by national legislative reforms in line with the Court of Justice case law.¹¹⁰ This is obviously not a possibility in the *Weiss* situation.¹¹¹ The *Weiss* case is also at odds with the recent reasonably serene dialogue¹¹² established between many constitutional courts of other Member States as it is illustrated in Spain, Italy and France by the *Melloni*,¹¹³ *Taricco*¹¹⁴ and *Jeremy F* decisions.¹¹⁵ The *Weiss* case appears as an ultimatum directed towards EU law. It goes against the key constitutional precepts established a long time ago in *Internationale Handelsgesellschaft*.¹¹⁶ In other words, *Weiss* is a specific ‘Ur-Teil’ or a clear ultimatum sent in the context of a very definite situation deemed *ultra vires* (the ruling of the Court of Justice in *Weiss* from 2018) and within the broader setting of an EU constitutional pluralist world. This is quite a paradox. And this begs the essential question whether the European constitutional pluralist world is going to collapse and be destroyed from within.

¹⁰⁶ BVerfG, Case No. 2 BvR 2728/13.

¹⁰⁷ *ibid* paras 102-103.

¹⁰⁸ See judgement of Czech Constitutional Court of 31 January 2012, (CZ) Pl. U´S 5/12, Slovak Pensions XVII. See Jan Komárek, ‘Playing with Matches: the Czech CC Declares a Judgment of the Court of Justice of the EU *Ultra vires*’ (2012) 9 European Constitutional Law Review, 323. The decision is described as an episode of the ‘judicial war’ opposing the constitutional and the Supreme Administrative court.

¹⁰⁹ See eg Mikael Rask Madsen and Henrik Palmer Olson, ‘Clashes Legal Certainties – The Danish Supreme Court’s Ruling in AJOS and the Collision between Domestic Rules and EU Principles’ in Mark Fenwick and others (eds), *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law* (Hart, 2017) 189.

¹¹⁰ See for development Helle Krunke and Sune Klinge, ‘The Danish Ajos Case: The Missing Case from Maastricht and Lisbon’ [2018] 3 European Papers 157.

¹¹¹ See section 1.

¹¹² See contra the judgment of the Hungarian Constitutional Court on the EU relocation policy of refugees ((HR) Decision 22/2016 (XII.) AB on the Interpretation of Article E) (2) of the Fundamental Law). The Hungarian Constitutional Court relied on the national constitutional identity to refuse the relocation.

¹¹³ See Case C-399/11 *Melloni* EU:C:2013:107; and of the Spanish Constitutional Tribunal, Tribunal Constitucional, order 86/2011 and judgment 26/2014. See also the position of the Constitutional Tribunal (1/2004) on 13 December 2004 where it considered the ultimate supremacy of the national constitution without overtly confronting the primacy of EC law. Indeed, dealing with the accession to the Constitutional Treaty, the Tribunal Constitucional maintained that there was no rivalry between the primacy of Community law and the principle of supremacy as proclaimed in the Spanish Constitution since they constitute categories of different orders.

¹¹⁴ See Case C-105/14 *Taricco* EU:C:2015:555; and Case of the Italian Constitutional Court, Corte Costituzionale, order 24/2017.

¹¹⁵ See Case C-168/13 PPU *Jeremy F* EU:C:2013:358. The French Constitutional Council received the case on 27 February 2013 and the decision was granted on the merits of the case on 14 June 2013. See Francois-Xavier Millet and Nicoletta Perlo, ‘The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional law?’ (2013) German Law Journal. The first preliminary reference of the French Constitutional Council to the CJEU is described as a milestone which, however, may remain an isolated example due to the limited jurisdiction.

¹¹⁶ See Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

5.2 IS THE CONSTITUTIONAL PLURALIST WORLD GOING TO COLLAPSE?

The world of constitutional pluralism is eclectic and opulent. It is made of many branches, many streams, deep waters, abrupt cliffs and numerous secret vales. It is appealing but easy to get lost in it.¹¹⁷ To try exploring and defining the exact boundaries of the world of constitutional pluralism is the task for a legal Lara Croft or a legal Indiana Jones. One needs to be adventurous and daring for this mission. This case note, by contrast, is reductionist and merely focuses on the origins of constitutional pluralism. To map the full theory of constitutional pluralism is not the task for a case note. Yet, for fully grasping the consequences of the *Weiss* case on the doctrine, it is important to look at the origins of the constitutional pluralism and to comprehend its main claims. There is no ‘one and unique’ doctrine of constitutional pluralism but many doctrines of constitutional pluralism. Constitutional pluralism is, perhaps not so surprisingly, pluralist in nature. This posture adds nevertheless to the complexity of the doctrine.

The term ‘constitutional pluralism’ was coined by Neil MacCormick in the late 90’s in his Chapter 7 on ‘juridical pluralism and the risk of constitutional conflicts’.¹¹⁸ It is worth noting that already at this early stage, MacCormick had difficulties to make a choice and was oscillating between two approaches or schools of Constitutional pluralism: A radical approach to pluralism (‘radical pluralism’)¹¹⁹ and an international law approach to pluralism (‘international pluralism’).¹²⁰ At the end of his Chapter, McCormick made the choice of the international law approach to pluralism.¹²¹ His new terminology was quickly and broadly endorsed by the doctrine and a new school (‘discursive pluralism’) grown rapidly – inspired by MacCormick original idea – from the writings of Maduro.

Discursive pluralism offers a framework for preventing constitutional conflicts. Maduro has established a set of (contrapunctal) principles, which forms the basis of this theory and aims at ensuring the coherency of the system.¹²² The hallmark of his theory is based on dialogue: a horizontal discourse (between national courts) and a vertical discourse (between the Court of Justice and the national courts). In addition, *discursive legal pluralism* takes into consideration the so-called *institutional choice* and thus views the question of ultimate authority not only as a question of legal sovereignty but also as closely linked to political

¹¹⁷ See eg Matej Avbelj and Jan Komárek, *Constitutional Pluralism in the EU and Beyond* (Hart, 2012); and Klemen Jaklic, *Constitutional Pluralism in the EU: A True Novelty* (OUP, 2014).

¹¹⁸ See Neil MacCormick, Chapter 7, ‘Juridical Pluralism and the Risk of Constitutional Conflicts’ (97-121) in Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP, 1999).

¹¹⁹ See Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP, 1999) 119. Radical pluralism is the view that ‘it is possible that the European Court interprets Community law so as to assert some right or obligation as binding in favour of a person within the jurisdiction of the highest court of a member state, while that court in turn denies that such a right or obligation is valid in terms of the national constitution’. Such conflicts are ‘not logically embarrassing’ because ‘strictly, the answers are from the point of view of different systems’. For MacCormick, it is plausible that each constitutional order recognize the legitimacy of every other within its own sphere, while none asserts or acknowledges the constitutional superiority over another.

¹²⁰ *ibid*, according to MacCormick, ‘pluralism under international law’ means that ‘the obligations of international law set conditions upon the validity of state and of Community constitutions and interpretations thereof and hence impose a framework on the interactive but not hierarchical relations between systems’.

¹²¹ *ibid* 122.

¹²² Miguel Poiares Maduro, ‘Contrapunctal Law: Europe’s Constitutional Pluralism in Action’, in Neil Walker (ed), *Sovereignty in Transition* (Hart, 2003) 501.

sovereignty.¹²³ The theory of discursive pluralism is monist in nature in the sense that European and national constitutional law constitutes two levels of a unitary system¹²⁴ and thus bears striking similarities with the federalist theory, the black sheep of constitutional theories in Europe.¹²⁵

These three original schools (Radical-International-Discursive) offer an interesting point of departure for discussing the repercussions of *Weiss* on the doctrine of constitutional pluralism. It is also important to note that the doctrine of constitutional pluralism in the EU has been free from deep and solid criticisms for almost a decade.¹²⁶ Weiler has for instance famously stated to show the dominance of constitutional pluralism that it ‘is today the only Membership Card which will guarantee a seat at High Tables of the public law professoriate’.¹²⁷ But doubts as to the doctrine have slowly started to rise and have been crystalized in the context of the litigation during the economic crisis (and this particularly after the *Gauweiler case / OMT* decision).¹²⁸ The critique is mostly articulated around two main claims: a theoretical claim (focusing on the monist nature of constitutional pluralism) and a contextual claim (focusing on the repercussion of the *OMT* decision on EU Law). The theoretical claim is strong and criticize the (almost) overall monist nature of the doctrine of constitutional pluralism in EU law. It can be found in the writings of Eleftheriadis (2010)¹²⁹ and Loughlin (2014).¹³⁰ In essence, the claim is that the monist and Kelsenian approach to constitutional pluralism seen in many schools¹³¹ does not fit the pluralist nature of the doctrine. There is a conceptual misfit in constitutional pluralism or what Loughlin calls more poetically an ‘oxymoron’.¹³² The contextual claim arises in the wake of the *OMT* decision where the FCC and the CJEU confronted head to head the unsuitability of their views on the issue of judicial *kompetenz-kompetenz*. This case appears to indicate the end of an era. The

¹²³ This is one of core link with the theory of constitutional pluralism à la MacCormick *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (n 118) See for developments, Anneli Albi, ‘Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of Co-operative Constitutionalism’ [2007] 3 *EuConst.* 25; and Jan Komárek, ‘European Constitutionalism and the European Arrest Warrant – In Search of the Contrapunctal Principles’ Limits’ (2007) 44 *Common Market Law Review* 9.

¹²⁴ Ingolf Pernice, ‘Multilevel Constitutionalism in the European Union’ (2002) 27 *European Law Review* 511. *Multi-level constitutionalism* or *Verfassungsverbund* (compound of constitution) originates from Germany and more precisely from the theory of Pernice. European and national constitutional law constitutes two levels of a unitary system. The essence of multi-level constitutionalism is based on the non-hierarchical relationship between the EU and national legal orders. See also Ingolf Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?’ (1999) 36 *Common Market Law Review* 70.

¹²⁵ Compare Maduro’s theory of constitutional pluralism with the basic tenets of EU federalism.

¹²⁶ Martin Loughlin, ‘Constitutional pluralism: an Oxymoron?’ (2014) 3 *Global Constitutionalism* 22.

According to him ‘since 2002, the concept of constitutional pluralism has been actively promoted, invariably with a positive inflection, and it now seems to have achieved the status of a school, perhaps even a sect’.

¹²⁷ Joseph Weiler ‘Prologue: Global and Plural Constitutionalism—Some Doubts’ in Grainne de Búrca and Joseph Weiler (eds), *The Worlds of European Constitutionalism* (CUP, 2011) 8.

¹²⁸ See BVerfG, Case No. 2 BvR 2728/13.

¹²⁹ Pavlos Eleftheriadis, ‘Pluralism and Integrity’ (2010) 23 *Ratio Juris* 365.

¹³⁰ Martin Loughlin, ‘Constitutional pluralism: an Oxymoron?’ [2014] 3 *Global Constitutionalism* 22.

¹³¹ See Neil MacCormick, Chapter 7, ‘Juridical Pluralism and the Risk of Constitutional Conflicts’ (97–121) in Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP, 1999) 102–104 and 107–108.

¹³² The critique of Loughlin, ‘Constitutional pluralism: an Oxymoron?’ (n 126) is a critique against double monism what he calls the problematic of parallel play which is particularly visible in the school of ‘radical pluralism’.

situation was rightly described by Sarmiento as ‘deathly as enriched uranium’.¹³³ A major problem with the theory of constitutional pluralism is that it does not ensure the equality between the Member States.¹³⁴ Kelemen is particularly critical towards constitutional pluralism.¹³⁵ In a text post-*OMT* decision, he strongly points out the danger of the dalliance with constitutional pluralism and considered that the model of constitutional pluralism is fundamentally unsustainable since ‘in any constitutional order worthy of the name, some judicial authority must have the final say’.¹³⁶ For him,

‘[T]he contemporary literature on constitutional pluralism has gone too far in the other direction, with its rejection of the Court of Justice’s straightforward understanding of supremacy. Huge amounts of intellectual energy, including from leading scholars in the field, have been devoted to developing conceptual and theoretical foundations for what turns out, ultimately, to be an unsustainable position’.¹³⁷

Is this the end of the theory of constitutional pluralism in EU law like it has been the end of the neo-functionalist movement at one point? It is a difficult question to answer particularly because the theory of constitutional pluralism as explained earlier is multi-faceted and based on a multitude of schools.¹³⁸ It is true, however, that it was easier to be a constitutional pluralist before the structuring and application of the *Honeywell* test (which requires the sending of a preliminary reference in the first step). Indeed, it was easier for the FCC and the Court of Justice to be engaged in ‘parallel play’ without strong direct confrontation. This is not the situation anymore after the *OMT* and *Weiss* situations. But *Weiss*, we should keep in mind, is also very different from the *OMT* decision in the sense that there is no legal and political solutions available for avoiding and resolving the constitutional conflict at issue. *Weiss* is a constitutional dead end.

Then, what is happening when there is precisely no legal or political solutions for avoiding and resolving the constitutional conflict – like it is in fact and unfortunately in the *Weiss* situation?¹³⁹ Kumm has considered two scenarios¹⁴⁰ if a national court would invalidate

¹³³ See Daniel Sarmiento, ‘The OMT Case and the Demise of the Pluralist Movement’, (*Despite our Differences*, 21 September 2015) < <https://despiteourdifferencesblog.wordpress.com/2015/09/21/the-omt-case-and-the-demise-of-the-pluralist-movement/> > accessed 29 June 2020.

¹³⁴ See Federico Fabbrini, ‘After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States’ (2015) 16 *German Law Journal* 1003.

¹³⁵ Daniel Kelemen, ‘On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone’ (2016) 23 *Maastricht Journal of European and Comparative Law* 136.

¹³⁶ *ibid* 139.

¹³⁷ *ibid* 150.

¹³⁸ Ana Bobić, ‘Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice’ [2017] 18 *German Law Journal* 1395, 1397. The author defends constitutional pluralism and argues for a balanced approach to primacy.

¹³⁹ See Alexander Somek, ‘Monism: A Tale of the Undead?’ in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in EU Law and Beyond* (Hart, 2012) 343. According to Somek ‘constitutional pluralists give up precisely where an answer is most needed: what happens when the constitutional conflict cannot be prevented or solved?’

¹⁴⁰ Mattias Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11 *European Law Journal* 262. See also Mattias 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 *Common Market Law Review* 351, 375, 384.

EU secondary legislation: the *Cassandra scenario* and the *Pangloss scenario*.¹⁴¹ The *Cassandra scenario* is based on the prophecy and fear of a major constitutional cataclysm in such a situation. The *Pangloss scenario* views the risk of constitutional explosion as more or less inexistent and refutes the domino effect of such an attitude. Kumm ponders that there are solid grounds to deem that the second scenario comes closer to depict probable events than the first and argues for a residual and subsidiary role to be given to the national courts as ultimate arbitrators of fundamental constitutional commitments.¹⁴² However, we may also envisage another scenario particularly in the wake of *Weiss*: the *Martin scenario* (*Martin* is the pessimistic soul in the famous Voltaire's book *Candide*, he also happens to be the realist in the book). This is an important scenario not to neglect since it is based on the reality and imminence of a race to the bottom. Indeed, there are no valid reasons to rule out that a *race to the bottom* would happen.¹⁴³ This particularly so when the *Honeywell* test exacerbates the tension between the FCC and the Court of Justice as seen before in the *OMT* decision. It is also tenable to argue that by looking for instance at the *European Warrant Arrest*¹⁴⁴ saga or at the rule of law crisis in Poland and Hungary that a domino effect is highly probable.¹⁴⁵ In this regard it should be noted that Polish and Hungarian governments members of the Ministry of Justice have already supported the 'ultra vires position' of the FCC in *Weiss*.¹⁴⁶ This is pathetic.

In the end, it makes no sense to base the source of validity of EU law at the domestic level when there is a bridge based on domestic constitutional arrangement permitting EU law to travel in order to play its (primacy) role in the national legal order.¹⁴⁷ The 'ultra vires position' also destroys the integrity of Article 267 TFEU by blurring the separation of functions between the Court of Justice and the national courts. In addition, it could be contended that if a national court invalidates EU secondary legislation, then the Court of Justice should have the possibility, in turn, to nullify national legislation. Symmetry ensures the coherence of the system. This is, of course, an unworkable situation. Unfortunately, the growing uses of qualified majority voting as well as the enlargement have clearly increased the risk of constitutional frictions.¹⁴⁸ As to the new Member States, it is not a secret that most of them boast very powerful constitutional courts using a system of *ex-post* constitutional

¹⁴¹ Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (n 140) 291-293.

¹⁴² *ibid* 304. The author proposes that national courts may give precedence to their specific and essential constitutional provisions for striking EU legislation.

¹⁴³ *ibid*.

¹⁴⁴ See for more developments, Xavier Groussot, 'Supr[i]macy à la Française: Another French Exception?' [2008] 27 Yearbook of European Law 89.

¹⁴⁴ *ibid*. See also Xavier Groussot, 'Constitutional Dialogues, Pluralism and Conflicting Identities' in Avbelj and Komárek (eds), *Constitutional Pluralism in EU Law and Beyond* (Hart, 2012) 319.

¹⁴⁵ *ibid*.

¹⁴⁶ See the tweet of Polish Deputy Justice Minister Kaleta (5 May 2020, 'Rule of Law in Poland') stating: 'the EU says only as much as we, the members states, allow it.' A few days later, on 9 May 2020, the Hungarian Justice Minister Varga stated in an interview that 'the fact that ECJ has been overruled is extremely important' ('Eastern European States sense opportunity in German Court Ruling', 10 May 2020, Financial Times).

¹⁴⁷ Stephen Weatherill, 'Competence creep and competence control' (2005) 23 Yearbook of European Law 1-55.

¹⁴⁸ Wojciech Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe – Democracy – European Union' (2006) EU LAW Working Paper No. 2006/40 <<http://ssrn.com/abstract=963757>> accessed 29 June 2020.

review.¹⁴⁹ Concerning qualified majority voting, the German ‘*banana*’ case has offered a perfect example of the palpable tension.¹⁵⁰ The threat level is very high.¹⁵¹ We should prevent the *Martin’s scenario*. Conflicts on the meaning and range of primacy cannot be resolved by requiring the Court of Justice and the domestic courts to jettison their claims. Compromise is necessary and the dialogue is of essence. But is it possible to reach a compromise after the *Weiss* case? The answer seems unfortunately rather negative.¹⁵²

The ruling in *Weiss* is not constructive and jeopardizes the fragile equilibrium of EU law. This is even more so in times of rule of law crisis where some national courts are ready to rely on extreme legal arguments in order to avoid their responsibility to apply EU law in a correct manner. In this explosive political context, the FCC is not here playing with matches but is playing with a bazooka when applying his vision of the right ‘proportionality test’. Problematically, the proportionality test relied on by the FCC in *Weiss* is construed on a very shaky legal basis and can difficultly be applied by the ECB. There is an obvious legal impasse. At the theoretical level and borrowing the words of Tuori, there is also no perspectivism in the ruling of the FCC.¹⁵³ Put differently, the *Weiss* case is not about a joint cultural heritage or inter-legality since the reliance on the principle of proportionality¹⁵⁴ is clearly based on a national vision of the principle of proportionality.¹⁵⁵ We are facing here a clear situation of *potentia* (power over) without *potestas* (power to).¹⁵⁶ This is dangerous from an EU constitutional perspective but is it enough to constitute the end of constitutional pluralism?

Our view on this matter is that it is not the end yet of constitutional pluralism but the ruling in *Weiss* certainly does not help its cause. The criticism on constitutional pluralism will certainly increase substantially after *Weiss* since it shows its limits, particularly when it is formulated in its most radical form. The legal impasse in *Weiss* opens for a necessary solution

¹⁴⁹ Miguel Poiars Maduro, ‘Contrapunctal Law: Europe’s Constitutional Pluralism in Action’, in Neil Walker (ed), *Sovereignty in Transition* (Hart, 2003) 508-509. According to author, in a situation where of ex-post constitutional judicial review is lacking, the possibility of conflict between EU acts (other than treaties) and national constitutions is, to a large extent, eliminated.

¹⁵⁰ See BVerfG 102, 147. In the *banana* case, which dealt with the Regulation 404/93, German undertakings alleged breaches of Articles 12 and 14 of the Fundamental Law, concerning the right to property, the right to freely exercise a professional activity and the principle of equality. The Court explicitly relied on the *Solange II* formula and linked it with the *Maastricht* decision. The interesting part of the judgment lies in the interpretation of the requirements for constitutional complaints regarding secondary Community law. In that respect, the control of constitutionality of secondary Community law, in conformity with Article 100 of the Fundamental Law, is granted only if detailed motivations prove that the Community law measure does not guarantee the minimum level of protection of fundamental rights.

¹⁵¹ *ibid.*

¹⁵² See Section 3(2) for a discussion on the PEPP. A preliminary ruling under Article 267 TFEU might also be sent in the PEPP by a German court to restore the dialogue in the near future.

¹⁵³ See Kaarlo Tuori, ‘From Pluralism to Perspectivism’ in Gareth Davies and Matej Avbelj, *Research Handbook on Legal Pluralism and EU law* (Edward Elgar, 2018).

¹⁵⁴ See discussion in section 5.1 as to Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114. *Weiss* goes head to head with the Court of Justice case law on primacy and proportionality.

¹⁵⁵ Contrast the *Weiss* case with text of the former President of the German FCC Andreas Voßkuhle, ‘Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund’ (2010) 7 *European Constitutional Law Review* 175, 198. According to him, ‘the case-law of the constitutional courts that form part of the Verbund proves to be a discursive struggle for the “best solution”, which makes the multilevel cooperation between the European constitutional courts ultimately a multilevel instance for learning (Lernverbund). The mutually inspiring further development of the European constitutional culture, which has only been touched upon here, is extremely promising as regards European integration by constitutional law and constitutional jurisdiction’.

¹⁵⁶ Martin Loughlin, *Foundations of Public Law* (OUP, 2010).

of the conflict in a political form at the highest level, ie it opens for a necessary reform of the Treaties. Two solutions are available here to tackle effectively the constitutional crisis created by the *Weiss* case: either an explicit formulation of a primacy clause in the new Treaty or the creation of a constitutional mixed chamber at the Court of Justice in the lines proposed by Weiler and Sarmiento.¹⁵⁷ The first solution with a primacy clause would create a federal framework and integrated model for the European Union but will close for good the schools of ‘radical’ and ‘international’ constitutional pluralism and lead to the possible amendment of certain national constitutions. *Un mal pour un bien?* The second solution would allow the possibility to find a legal solution to a potential *Weiss* situation in the future and create a ‘red line’ so desperately needed between the Court of Justice (through the mixed constitutional chamber) and the national courts making *ultra vires* appraisals. Given the circumstances, not to do anything for the future would be ‘constitutionally criminal’ and would probably lead to the M.A.D. (Mutual Assured Destruction) of the EU constitutional legal order.

6 CONCLUSION: OUR PROPOSALS FOR REFORM

The judgment from the German FCC requires response from the side of the EU. One of these responses could be an infringement procedure according to Article 258 TFEU. However, this would solve none of the underlying issues we have outlined above. We therefore propose much more detailed and nuanced responses in order to avoid the M.A.D. of the EU constitutional legal order.

In the short term, it will be necessary to address the differences in judicial review at the national *vis-à-vis* the European level. This could either be in the form of changing the Court of Justice’s review intensity or by means of secondary EU legislation, requiring all independent EU agencies to perform a regulatory impact assessment specifically addressing proportionality and subsidiary requirements of proposed measures. These could help to re-instantiate dialogue between the German FCC and the Court of Justice.

In the longer term and in order to address the structural flaws at constitutional level, it will be necessary to formally change the European treaties. We suggested that these changes should incorporate the following:

- Remedy the artificial delimitation between monetary and economic policies and putting both on an equal footing, AND
- Either adding a primacy clause in the treaty, thus creating a federal framework and integrated model for the EU at the expense of constitutional pluralism, OR
- Creating a mixed constitutional chamber at the Court of Justice according to the proposal brought forward by Weiler and Sarmiento, which would allow for a legal solution to any similar *Weiss* situation in the future

The BVerfG’s judgment may be seen as a thorn in the eyes of the Court of Justice and the EU as a whole, but if responded to adequately could help to reform these weaknesses of the EU constitutional legal order to the better.

¹⁵⁷ Joseph Weiler and Daniel Sarmiento, ‘The EU Judiciary After Weiss – Proposing a New Mixed Chamber of the Court of Justice’ (*EU Law Live Blog*, 1 June 2020) <<https://eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler/>> accessed 10 June 2020.

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