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**The *Bundesverfassungsgericht* PSPP Decision:
A blow to the European project**

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LL.M. Law in a European and Global Context

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Abstract

The German Federal Constitutional Court sent shockwaves across Europe on 5 May 2020, when it declared a ruling by the European Court of Justice and ECB decisions as ultra vires and established a three-month transitional period for the ECB Governing Council to provide further justification in order to ascertain the legality of its measures, which the ECJ had already confirmed.

The ruling is unprecedented and is likely to inflame the already existing tensions between national and European sovereignty. This is more so when the contested ECB programme amounts to the Public Sector Purchase Programme, an exceptional bond-buying measure launched in 2015 and deemed pivotal to combat the lasting effects of the European sovereign debt crisis. In times of increased spending by the EU, the schism between net contributors and beneficiaries is prone to show and is likely deepened by the asymmetric impact of economic crises on MS.

As Europe faces the rise of nationalism, a public health crisis and a consequent economic crisis caused by the Covid-19 pandemic, the decision could not have come at a worse time. The Bundesverfassungsgericht's ruling is one that underscores dissent at a time where solidarity is much needed. The decision constitutes a significant drawback to the consistency and effectiveness of the EU legal order as it openly defies well-established rules and foundations. Furthermore, it is likely to serve as an opportunity for illiberal regimes to push their anti-rule of law agenda as well as pave the way for the undermining of further exceptional ECB programmes such as the Pandemic Emergency Purchase Programme.

Key words: PSPP Decision, German Constitutional Court, Primacy, Rule of Law

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Abbreviations

AG – Advocat General

APP – Asset Purchase Programme

CJEU – Court of Justice of the European Union

EC – European Commission

ECB – European Central Bank

ECJ – European Court of Justice

EP – European Parliament

EPP – European People’s Party

EMU – European Monetary Union

ESCB – European System of Central Banks

ESFS – European Financial Stability Facility

ESM – European Stability Mechanism

FCC – (German) Federal Constitutional Court

IMF – International Monetary Fund

MS – Member State(s)

MEP – Members of the European Parliament

MPs – Members of Parliament

ORD – Own Resources Decision

PEPP – Pandemic Emergency Purchase Programme

PSPP – Public Sector Purchase Programme

QE – Quantitative Easing

TFEU – Treaty on the Functioning of the European Union

TEU – Treaty on European Union

Chapter 1

Introduction

The times we live in Europe are turbulent ones. With the Covid-19 pandemic ever-present in our day to day, at the time of writing, international attention is focused on facing the third wave whilst also speeding up the vaccination process. The EU's response has been extensive and diverse. According to the European Council¹, a €750 billion rescue package - Next Generation EU - has been created to tackle the devastating effects caused by the crisis. Alongside it, EU leaders agreed on a €1074.3 billion long-term EU budget for 2021-2027 (Multiannual Financial Framework) together with €540 billion of funds that make up safety nets, designed to support workers (support to mitigate unemployment risks in an emergency – SURE), businesses (a new European Investment Bank Guarantee Fund) and MS (Pandemic Crisis Support set up by the European Stability Mechanism). Additional measures included the Pandemic Emergency Purchase Programme and others financed by amendments to the 2020 EU budget, such as the Coronavirus Response Investment Initiative and Coronavirus Response Investment Initiative Plus.

It seems that the EU has been proactive in ensuring continuous support for its economy and for those who in it partake. However, we must not forget the underlying issues that affected the discussions between European finance ministers and undermine the European project: the increased lack of trust and solidarity between MS in the EU. At the beginning of the corona crisis, MS had taken up unilateral decisions rather than unified action, with little cooperation between them. Later, countries in southern Europe, such as Italy and Spain, had called for a common response in the form of “corona bonds” – a jointly issued bond for eurozone member states which would lower the interest rates for several countries. This idea is not a novel one. Italy has proposed it during the 2009 financial crisis and in 2012 during the peak of the euro zone's sovereign debt crisis. However, northern countries such as Germany and the Netherlands dismissed the idea as they did again this year, during the pandemic.

By contrast, one could say that the EU coronavirus response has been an example of

¹ Council of the European Union, A recovery plan for Europe (2021) Available at: <https://www.consilium.europa.eu/en/policies/eu-recovery-plan/>.

solidarity and cooperation. At the time of writing, the Commission has authorised six contracts, for 2.6 billion doses of future vaccines, by entering into Advanced Purchase Agreements with individual vaccine producers on behalf of Member States.² The European Commission's vaccination strategy has also provided crucial aid to companies in bolstering their manufacturing capacities and have been expeditious in working towards the authorisation and availability of the vaccines. Furthermore, it has helped ensure the supply of medical equipment by launching the joint procurement of personal protective equipment, whereby producers made offers covering or exceeding the quantities requested by the MS. Further action has been taken across areas such as research, free flow of goods and workers and of course, the economy. As we have seen, the EU's economic response to the crisis has been the most substantial yet, with the overall EU's recovery package currently standing at 2364.3 billion euros at the time of writing. It is difficult to imagine any other group of sovereign countries that have benefited as much as the MS have from such centralised but coordinated action across vital areas to combat the pandemic and its tragic effects.

Be that as it may, the lingering feeling of dissent will persist even in the presence of such sizeable aid and perhaps because of it, depending on the perspective. It is indeed a matter we will touch upon leading to the analysis of the ruling subject of this paper: the *Bundesverfassungsgericht's* Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15- (the PSPP ruling). The German Constitutional Court, in essence, upheld constitutional complaints by several parties against the European Central Bank's Public Sector Purchase Programme, which enabled the purchase of government bonds and debt securities aimed at stabilising levels of inflation.

Most importantly, the Court stated that it was not bound by the ECB decision enacting the programme or the ECJ's preliminary ruling confirming its validity. In this sense, the *Bundesverfassungsgericht* held that the ECJ acted beyond the monetary policy mandate conferred to it - *ultra vires*, by lack of a proper proportionality assessment.

Never has the German Constitutional Court "bitten"³ in such a manner. The possible political and legal implications are varied and concerning: several fundamental EU

² European Commission (2021), Overview of the Commission's response. Available at: https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/overview-commissions-response_en#public-health.

³ See Nguyen, H.-T., Chamon, M. (2020), "The ultra vires decision of the German Constitutional Court Time to fight fire with fire?", p.2. Available at: https://opus4.kobv.de/opus4-hsog/frontdoor/deliver/index/docId/3524/file/20200528_German_Constitutional_Court_Nguyen.pdf.

principles such as the principle of proportionality and conferral of EU law are put to the test; the preliminary reference procedure and the established way of dialogue between courts – an integral part of the legitimate functioning of the EU legal order - has also been undermined; the independence of EU institutions, particularly the ECB, and the ECJ's exclusive power of treaty interpretation has also fallen victim to the ruling.

Crucially, this was done whilst declaring a judgment from the ECJ inapplicable in Germany and by unilaterally granting itself the power to review the validity of a decision taken by an EU institution under the ECJ's exclusive jurisdiction. This hugely hampers the principle of primacy of EU law. Another concerning factor is the relationship between the ECJ and national courts. Other European courts have already called the principle of primacy into question, and after the *Bundesverfassungsgericht's* decision, they may very well not be the last, given the rise of nationalism in some MS and their hindering of the rule of law. Not less significantly, the judgment may also undermine the credibility of future ECB financial assistance programmes such as the Pandemic Emergency Purchase Programme.

If we add the legal and political turmoil to the social and economic frictions dating back to the last decade, the European project is threatened. With the rise of populism and the rule of law being undermined within the Union, Europe must be able to recover in a coherent and unified manner. This paper will analyse the conjuncture leading up to the decision, the state of affairs within the Union and the institutions in question, and draw a tentative conclusion regarding the impact of the decision and its effects on the EU legal order.

Chapter 2

Political and Economic Disruption leading up to the Decision

Reproval of the EU and elements of EU integration has been present for quite some time, and most recently in the European Parliament. The EU has long been criticised for its alleged undermining of national sovereignty and lack of democratic legitimacy. Economically, it has been deemed wasteful, burdensome in its regulations, and the euro reckoned as the leading cause of the sovereign debt crisis in 2008. Politically, its migration and asylum policy has been considered the cause of the 2014 migration crisis, and its acts have been used to justify populist and nationalist views in several countries across the Union. These are solely some of the issues that affect the EU's public perception, which has contributed to the increasing levels of distrust and opposition towards the European project (Euroscepticism). The present section will broach these two (pivotal) orders of the EU to determine precisely what kind of scenario the FCC has issued its judgment in.

Political Context

Firstly, we should look at the political situation, seen as legal decisions are rarely unconnected to the political spectrum. Euroscepticism has been a phenomenon ever-present in the minds of pro-EU (integration) politicians and scholars and can be used to personify the dissenting voices towards the general path undertaken by the Union.

Perhaps the most remarkable manifestation and concretisation of Euroscepticism has been Brexit – where the UK became the first country ever to leave the EU -. Early records of the term can be traced back to 11 November 1985, in the “The Times”⁴ (a British newspaper). Former Prime Minister Margaret Thatcher had been vocal in her discourse against the EU, particularly regarding the erosion of national sovereignty by the European project. The Maastricht Rebels - British MPs who refused to support the implementation of the Maastricht Treaty in British Law – was an early sign of opposition by political actors of MS towards primary EU law, particularly against the advancement of the integration

⁴ See Cardiff EDC (2016), Information Guide: Euroscepticism. Available at: <https://orca.cf.ac.uk/77359/1/Euroscepticism.pdf>.

process.

The failure to ratify the Treaty establishing a Constitution for Europe after the French and Dutch referendums' rejection is another early illustration of this phenomenon. The Treaty of Nice and the Treaty of Lisbon, albeit approved, were initially rejected by the Irish electorate through referendums. These drawbacks cannot help but delegitimise the integration process.

It is essential to consider that Euroscepticism, in our political context, can be easily linked to the notion of populism. According to the Oxford Learner's Dictionary, populism is "a type of politics that claims to represent the opinions and wishes of ordinary people". Euroscepticism can be a trickier concept to define, mainly because it is a relatively recent term that aims to describe subjective beliefs and political ideas. For the sake of this argument, we can assume that it relates to a feeling of dissent towards the EU and anything which personifies it. In this sense, it is easy to see how populist movements would harness a sentiment of discontent (felt by "ordinary people") regarding some of the political issues on which the Union intervenes and use it to garner votes and undermine the latter's actions.

According to professors Matthijs Rooduijn and Stijn van Kessel, "When focusing on the political supply side (political parties) as well as the demand side (citizens), populism and Euroscepticism can often be observed in tandem. (...) Euroscepticism and populism can typically be found (...) in particular among parties with radical left socioeconomic positions on the one hand and radical right sociocultural positions on the other. Moreover, preliminary analyses indicate that at the voter level, populist and Eurosceptic attitudes often coincide."⁵. From this excerpt, we can ascertain that populism and Euroscepticism go hand in hand, illustrated by recent European elections. As pointed out by the authors, the polarisation of socioeconomic and cultural positions is another concerning factor for legislative discourse at the European level, be it at the left or the right.

In the 2014 European elections, Eurosceptic parties took a quarter of the seats available

5 Rooduijn, M., van Kessel, S., "Populism and Euroscepticism in the European Union" (Case Summary). Available at: <https://oxfordre.com/politics/oso/viewentry/10.1093/S002facrefore/S002f9780190228637.001.0001/S002facrefore-9780190228637-e-1045.jsessionid=8338D365A82669513CF28AA95E6A0699?t:state:client=H4sIAAAAAAAAAAFV0u0oDQRS98YFKsLHxB8QuM7OJMVkkWASFkEWE+KjHzc06Zjlz3rlu3MbW0h/xh6yt7aysXJuAxYHz4nDev2BzuQEajUgw9lQIHXR+j4J1wMhUdYVxjOS0FRGpNDIGMbQGHV8iRRO5ZucG7XTcnnSB00WwB20sPr7337Y+fi17XYD2Dzu4Xwbu6Opoy7GUPutTSalfiCZnxxUkGO70/kQu9wEd4gUYG26FeW+nnEBiahFNDmPM1WYZdH728Mb8c/VPhrkM3ho2eZRl7cpEiUSIHalzwpknlGmvr5JUtdv9405PKJXUUMkqb/3LW9hK1FH3IOIcq0F1m95dmUPC+GR50078AudQZvw3AQAA>.

in the EP. In countries such as the UK (UK Independence Party), France (National Front), Denmark (People's Party), and Greece (*Syriza*), these anti-establishment parties came first. In Italy (Five Star Movement) and Ireland (Sinn Féin), they came second. Albeit initially called by some a "British disease", Euroscepticism is by no means confined to the old Albion.

In the 2019 elections, the trend was that the two largest political party groups – the European People's Party and the Socialist and Democrats – lost votes, particularly in predominant countries such as France (National Rally), Germany (Alternative for Germany), and Italy (*Lega*). Inversely, two smaller pro-European party groups – the Liberals and the Greens – made significant inroads. On the other side of the spectrum, Eurosceptic parties took 28.4% of the seats in the EP, 26.2% if we exclude those won by the UK. In this sense, the weight of Eurosceptic parties (which constitute the Identity and Democracy group) in the EP has remained essentially unchanged. However, this means that the significant electoral advances of these parties in 2014 were not a short-term effect of the eurozone crisis. Instead, the 2019 elections have consolidated the legislative representation of the Eurosceptic impetus which surged across Europe. Another interesting factor about these elections was the Eurosceptics' major shift to the right: the seats held by the group of radical rights in the EP almost doubled from 55 to 106 MEPs.

As explained by Professor Oliver Treib⁶, this rightward shift can be traced back to two sources: "(...) First, major radical left parties have changed their programmatic stances, moving from defenders of domestic welfare states against European austerity policies to embracing EU-level solutions to social inequality, poverty, and social exclusion (...) – measures which would involve major transfers of legislative competencies and financial resources from the national to the European level. (...) Second, several radical right Eurosceptic parties have made major electoral gains, and many new far-right parties made it into the EP for the first time.". The fact that novel far-right Eurosceptics have gained such electoral results reflects how Euroscepticism and opposition towards further integration have been consolidated amongst the European people.

⁶ Treib, O. (2020), "Euroscepticism is here to stay: what cleavage theory can teach us about the 2019 European Parliament elections". Available at: https://www.researchgate.net/publication/339823392_Euroscepticism_is_here_to_stay_what_cleavage_theory_can_teach_us_about_the_2019_European_Parliament_elections.

Economic Context

Moving on to the EU's economy, the situation is also not ideal. The European debt crisis has hit Europe hard since the end of 2009. The accumulation of deficits by southern European countries caused by a myriad of factors culminated in the inability of several MS to refinance their government debt or bail out excessively indebted banks. Those factors include the 2008 collapse of the Icelandic banking system, the global financial crisis of 2007-2008, and the consequent Great Recession, which took place from 2008 through 2012.

The Great Recession had exposed the fragility of financial intermediaries at a global level, and, like many central banks, the ECB cut rates and expanded its refinancing operations massively. However, a coincidence of several factors led to the triggering of a confidence crisis in the financial markets. Although each country has its own drawbacks, the focus shifted to their level of debt, and given the framework of the eurozone, governments had no lenders of last resort.

Countries such as Portugal, Greece, Spain, and Cyprus could not repay nor refinance their government debt without assistance from third-party financial institutions. These were the ECB, the International Monetary Fund, and, eventually, the European Financial Stability Facility/European Stability Mechanism. A highly accommodative monetary policy meant that low interest rates incentivised countries from the South to borrow from those in the North. Those countries tended to borrow aggressively due to their weaker economies, and the financial hit that came from the other side of the Atlantic reflected and aggravated their economic under-performance and consequent inability to pay what they owed to lenders wary of excessive sovereign debt.

Perhaps shockingly, in 2009, the new Greek government, led by George Papandreou, disclosed that their predecessors had flagrantly underreported its budget deficit, which meant a violation of EU policy and gave rise to fears of political and financial instability. The 2009 deficit had been revised from a previous 6%–8% to 12.7% of GDP. The figure for Greek government debt at the end of the year increased from its first November estimate at €269.3 billion (113% of GDP) to a revised €299.7 billion (127% of GDP), according to the European Statistical Office. This was more than double the limit of 60% set by the eurozone and the highest in any EU country. The country's credit ratings plummeted.

In February 2010, Greece announced several austerity measures to curb the deficit. Strikes and riots followed. At that time, other countries like Portugal, Ireland, and Spain also watched the dollar value of debt rise and their markets crash. The following month, the IMF and eurozone members agreed on a safety net of 22 billion euros and 30 billion euros in emergency loans in April. The Greek deficit had then been reviewed again by the EU, announcing that the figure stood at 136% of the GDP and not at 127%. In May, the eurozone and the IMF agree on a 110 billion-euro bailout package for the Greeks. The EFSF was then created in June as a temporary crisis resolution mechanism and has provided financial assistance to Ireland, Portugal, and Greece through the issuance of EFSF bonds and other debt instruments on capital markets. It contributed towards attracting investors who were unwilling to lend directly to the countries in crisis, and the ESFS loans provided a slight boost in investor confidence. In November, it was Ireland's turn for their 85 billion bailout. Portugal soon followed, receiving 78 billion euros in financial aid.

In February, the subsequent year, eurozone finance ministers set up a permanent bailout fund – the European Stability Mechanism, worth around 500 billion euros. In June, Greece is put under pressure to impose new austerity measures to receive the next tranche of its loan. Talks of Greece abandoning the EU follow. The Greek parliament then approves a new round of austerity measures the following month. However, the pre-existing package was deemed insufficient, and a second bailout package was agreed upon, worth 109 billion euros, also to avoid contagion amongst the rest of Europe. In a world where trade is ever-growing and borders are ever-shrinking, the interconnectedness of a globalised world's economy is increasingly evident, as reflected by the European sovereign debt crisis' own causing factors.

In June 2012, the Eurogroup decided to grant Spain a financial support package of up to 100 billion euros after its housing bubble burst and after its fourth-largest bank Bankia, had received a 19 billion-euro bailout. The same month, the Cypriot government also requested the ESM for a bailout due to the 22 billion-euro exposure of its banks to the Greek crisis and the downgrading of its economy to junk status by international rating agencies. In March 2013, a ten billion-euro international bailout package was announced.

In 2013, the EFSF was replaced in function by the ESM, a permanent crisis resolution mechanism, leaving the EFSF tasked essentially with receiving loan repayments from beneficiary countries, making interest and principal payments to holders of EFSF bonds, and

rolling over outstanding ones. Albeit different institutions with divergent governance structures, they continue to share the same staff and offices, but most importantly, they partake in the same mission: ensuring financial stability in Europe through financial assistance to eurozone members. Four of the countries that received bailouts were able to exit the EFSF/ESM programmes, but Greece did not share the same success and entered a new programme in 2015.

The economic and political effects of the crisis were devastating for Europe. Austerity measures meant social and political unrest. 10 out of 19 eurozone countries saw a power shift in their government, and an argument can be made that all were partly due to the crisis situation. Unemployment rates skyrocketed in several MS – in countries such as Greece and Spain, unemployment rates reached 27% and 28%, respectively. As a consequence, levels of income inequality and the risk of poverty also worsened.

At the peak of the crisis, in September 2012, Mario Draghi, president of the ECB at the time, stated that: “Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.” The principal manifestation of this sentiment was perhaps the Outright Monetary Transactions programme of the ECB, predecessor to the PSPP. The programme consists of the ECB purchasing in secondary, sovereign bond markets, provided certain conditions are met, bonds issued by eurozone MS. This is relevant to us because it was the programme’s legality which constituted the FCC’s first-ever reference for a preliminary ruling to the ECJ and started a “less accommodating” dialogue between the two courts which led to the verdict subject of this paper. It also illustrates that financial aid given by the EU is not taken lightly by every country, and rightly so. The EU cannot turn into a place where a prodigal some reap the benefits from the work of others, and in this case, the benefits mean money. But it should also not be a Union where its MS turn their back on each other in their time of need. Unfortunately, this sentiment of cleavage between the lenders and the borrowers has become increasingly visible.

Southern Europe continues to struggle in the wake of the crisis, especially Portugal, Italy, Greece, and Spain. Youth unemployment remains a problem, and the risk of poverty is still the highest in these countries. The European sovereign debt crisis contributed to the escalation of the dissent between “the richer and the poorer”, where the first constantly feel like they are being held back. An economic crisis will do that for you: existing wealth

disparity between countries in a conjuncture of subdued economic growth will have people asking questions and pointing fingers. One of the main arguments for Brexit was precisely the excessive level of regulation in EU markets and the high level of integration of the EU's economy, which meant more economic obligations for the British. Add all this to the devastating effects of the coronavirus crisis, and the situation does not look amiable.

Bearing all this in mind, leading up to the *Bundesverfassungsgericht's* decision, Europe's togetherness has been put to the test. A global financial crisis meant that wealthy sovereign states had to reach a financial agreement to help others most in need, several times round, to preserve the common currency and their economies. The nationalist trend capitalised on social and economic unrest, and its actors have made their way into the EP - with a mindset which disrupts the integration process, whereby compromise and solidarity are required. The PSPP ruling was issued at a time where the very backbone of the Union is being hindered, where maybe unity can no longer be found amid increasing diversity.

The Rule of Law across Europe

The rule of law is a fundamental principle of the EU. It is enshrined in article 2 of the Treaty on European Union and represents a shared value across Europe and modern democracies worldwide. According to the European Commission⁷, under the rule of law, “all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes principles such as legality, implying a transparent, accountable, democratic, and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.”. These principles, which flow from the umbrella concept that is the rule of law, have been successively confirmed by the ECJ and the European Court of Human Rights. In essence, the rule of law is a crucial dimension of public governance and a constitutional principle from which no governing body is exempt. The non-observance of this principle would lead to the deteriorating of the legal, political, and social tissue that makes up a modern-day, functioning democratic system - a protector of justice and fundamental rights. As such, it manifests itself across every branch of power (legislative, executive, and judicial), as we could ascertain from the reference made to the EC’s report.

Illustrative of the importance of this principle is the Rule of Law Report, a preventive tool created in 2020, part of the new annual European Rule of Law mechanism. As its name implies, the instrument provides for an annual dialogue between the Commission, the Council, and the European Parliament together with the Member States and national parliaments and civil society to stimulate inter-institutional cooperation regarding the rule of law. The report epitomises this new process and provides a detailed account of the developments and declinations in each MS concerning the upholding of the rule of law.

It is not a mere coincidence that the Union has chosen to create this mechanism at this time. As previously stated, we live in times of economic turbulence and political unrest. It is amidst times like these that the opposers of the European project and the rule of law look to

⁷ European Commission (2020), *2020 Rule of Law Report - Questions and Answers*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757.

strike. The rule of law report was issued in September 2020 and provided an account on all 27 MS in the EU. The cases of Poland and Hungary are the ones who warrant our close attention, for several reasons.

Poland

The Committee on Civil Liberties, Justice and Home Affairs is a committee of the EP responsible for protecting civil liberties and human rights, as listed in the Charter of Fundamental Rights of the European Union. In June 2020, it announced that “overwhelming evidence” of rule of law breaches in Poland were found. Concerns were raised over the functioning of the legislative and electoral system, the independence of the judiciary and the rights of judges, and the protection of fundamental rights.

According to the rule of law report, Poland’s justice reforms since 2015 have been highly controversial. They have impacted all courts that make up their justice system, where there has been an increase of influence of the executive and legislative powers, thereby weakening judicial independence and hindering the separation of powers. This has led the Commission to launch the first-ever procedure under Article 7(1) TEU in 2017, which is still under consideration. The procedure allows the Council to determine the existence of a clear risk of a serious breach by a MS of the values referred to in Article 2 TEU (the rule of law being one of them), after a reasoned proposal by a third of MS, the EP or by the Commission, as was the case. This occurred after dialogue between the EC and the Polish, under the Rule of Law Framework, failed. Moreover, Poland was also subjected to the Council of Europe’s special monitoring procedure “over the functioning of its democratic institutions and the rule of law”⁸ and has also led to a dramatic increase in preliminary ruling requests from Polish courts, raising issues connected to the rule of law crisis.⁹

In June 2017, the Commission launched its first infringement procedure¹⁰ against Poland regarding measures affecting the judiciary, particularly its ordinary courts. The issues

8 Council of Europe (2020), “*PACE decides to open monitoring of Poland over rule of law*”. Available at: <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7766>.

9 Court of Justice of the European Union (2020), Address by the President, Mr Lenaerts, Press release No 1/2020.

10 European Commission (2017), Violation of EU Law by the Law Amending the Law on Ordinary Courts, INFR(2017)2119. &title=courts&submit=Search.

raised concerned the organisation of ordinary courts and the introduction of different retirement ages for male (65 years) and female judges (60 years). This violated Article 157 Treaty on the Functioning of the European Union (TFEU) as well as Directive 2006/54 on gender equality in employment. Further concerns were raised regarding the Minister of Justice's discretionary power to prolong the mandate of judges who have reached retirement age (without an established timeframe to do so), as well as to dismiss and appoint Court Presidents. This greatly hinders the independence of Courts, enshrined in Articles 19(1)/TEU and by Article 47 of the European Charter of Fundamental Rights. In June 2018, a second infringement procedure¹¹ was launched against Poland, this time pertaining to its law on the Supreme Court, lowering the retirement age of Supreme Court judges from 70 to 65. Moreover, the possibility to have their mandate prolonged is subject to the President of the Republic's discretion, with no criteria established nor the possibility of judicial review of his decision. Again, this undermines the principle of judicial independence and the irremovability of judges. Both cases were referred to the ECJ, where the Commission's position was confirmed, and Poland made history by becoming the first MS to be found to have violated the principles of irremovability of judges and judicial independence, twice in a row¹².

Additional concerns were raised in the report, such as ones relating to the independence of anti-corruption institutions, the independence of the media regulators, and expedited law-making procedures that hinder the democratic law-making process. Perhaps the most surprising aspect of Poland's justice system was the fact that the Minister of Justice is at the same time the Prosecutor General. Regarding reforms on the judiciary alone, we can notice a trend shown by the Polish in undercutting the rule of law.

Shockingly, in Case C-791/19 R, Commission versus Poland regarding the seizure of the activities of the Disciplinary Chamber of the Polish Supreme Court, the Polish government had elected a former judge under-secretary of Justice Darkowska to stake its claims. Various judges of the Court asked whether they correctly understood that the Polish executive had chosen a judge to defend it in a case about the rule of law and separation of powers. The Polish went on to present a weak legal defence raising hermeneutical doubts

¹¹ European Commission (2018), Violation of EU Law by the new Law on the Supreme Court, INFR(2017)2121.

¹² See Pech, L. (2020), "Protecting Polish Judges from the Ruling Party's "Star Chamber", *Verfassungsblog*, p. 4.

and confusion amongst judges. As professor John Morijn pertinently notes: “(...) Buying time and smoke-and-mirrors is the name of the autocrats’ game (...). Legal arguments employed by autocrats are not legal arguments but fig-leaves and decoys providing cover to facilitate an undemocratic take-over.”¹³.

In April 2020, the ECJ decided, for the third time, to grant rule of law-related interim measures against Polish authorities, applied for by the Commission to preserve the rule of law from being seriously and irreparably harmed by Polish authorities. In these proceedings, the ECJ ordered the suspension of the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court. It is unprecedented inasmuch as it demanded the immediate suspension, until delivery of the final judgment, of the processing of all disciplinary cases regarding judges, which are pending before a body which has been considered to not be a court by judgments by three chambers of Poland’s Supreme Court. Case C-791/19 constitutes the third infringement action launched by the Commission whereby it considers the new disciplinary regime to violate Article 19(1)/TEU by failing to protect Polish judges from the ruling party’s control.

Shortly after the Court issued its suspensive order, a fourth infringement procedure was launched in April 2020 by the Commission regarding a piece of legislation on the judiciary commonly known as the “muzzle law”, which provides “that, if the validity of judge’s appointment or the legitimacy of a constitutional body is called into question by a court, disciplinary measures will be taken against the judge or judges sitting in that court”.¹⁴ As of the time of writing, the EC has already referred Poland to the ECJ - considering the law on the judiciary to undermine the independence of Polish judges – and has additionally asked that further interim measures be granted, *inter alia*, the suspension of the provision empowering the Disciplinary Chamber of the Polish Supreme Court to decide on requests for the lifting of judicial immunity, as well as on matters of employment, social security and retirement of Supreme Court judges. This was primarily due to the Polish authorities’ cunning interpretation of the ECJ’s most recent order¹⁵ against the Disciplinary Chamber, as we will see.

13 Morijn, J. (2020), “Commission v Poland: What Happened, What it Means, What it Will Take”, *Verfassungsblog*.

14 Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234, para. 25.

15 Order of 8 April 2020, *Commission v Poland*, Case C-791/19 R, EU:C:2020:277.

Given the successive infringement procedures against Poland, it is pertinent to analyse the ECJ's use of Article 19(1)/TEU and how it has evolved. Art. 19 (1) TEU imposes on the Member States obligations regarding the organisation of their judicial systems, even though it leaves them significant discretion in designing specific institutional and procedural arrangements. Notably, the principle of national authorities' procedural autonomy is commonly understood as an expression of national sovereignty.

However, in the *Associação Sindical dos Juizes Portugueses* (ASJP) judgment¹⁶ - a case regarding the reduction of judicial remuneration and its compatibility with EU law, particularly with the independence of judicial bodies -, instead of following the well-established path of Art. 47 of the Charter of Fundamental Rights of the EU, the ECJ surprisingly opted for a novel solution by basing its judgment on Article 19(1) TEU.¹⁷ Looking at the Court's case law at the time, Article 19(1) TEU had never been used as an autonomous standard for the review of national legislation, whereas Article 47 of the Charter had had a prominent role in the Court's case-law. The latter has been interpreted in a way geared towards the protection of subjective rights of individuals. The case law in which it is invoked has shown that the ECJ's scrutiny was necessarily limited to concrete judicial proceedings involving the application of substantive EU provisions. By contrast, Article 19(1) TEU applies to courts and procedures functioning "in the fields covered by Union law". Its application to review the organisation of domestic courts and procedures is, therefore, more abstract. In this case, it is interpreted as a set of obligations regarding judicial independence, fair procedure and access to justice, contrasting with the idea of discretion as an expression of national sovereignty.

In the Court's words, Article 19(1) TEU "gives concrete expression to the value of the rule of law stated in Article 2 TEU"¹⁸. Moreover, and in contrast to the AG's opinion, it held that Article 19 entails an obligation to ensure that national courts adjudicating in the fields covered by EU law meet the requirements of independence and used the Article as the formal point of reference for the assessment of the impugned national measure. This is particularly relevant to our analysis of the rule of law crisis in Europe, as we believe that the case in question has laid the groundwork for the infringement cases against Poland by confirming

¹⁶ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*. Case C-64/16, EU:C:2018:117.

¹⁷ *Ibid.*, cit., para. 34.

¹⁸ *Ibid.*, cit., para. 32.

that Article 19(1) TEU is a justiciable rule of law clause of the EU Treaties. It took advantage of the case to emphasise the potential of EU law to defend rule of law structures in the MS. It enables the Court to scrutinise the framework of a national judicial system as a whole and provides a more straightforward route for the enforcement of European rule of law standards than the one offered by Article 47 and 51 (relating to its scope of application) of the Charter. In other words, Article 19 relieves EU institutions from the formal restraints posed by Article 47 and 51 of the Charter by solely requiring the demonstration, in abstract, potential cases involving the application of EU law are in the jurisdiction of the national courts concerned. Thus, it can serve as an autonomous basis for infringement actions by the EC, as it already has in Case 619/18, the most significant offspring of the ASJP judgment. The ruling regarded the aforementioned Polish law on the Supreme Court and helped clarify Article 19's scope of applicability. It ascertained that legitimate restrictions of judicial independence are always subject to a proportionality test and that even after passing it, the measure should not raise doubts about the appearance of impartiality of the judge, an important European tenet. In addition, Article 19 does not confer a subjective right on individuals; thus, a violation of the right to effective judicial protection in concrete cases can only be assessed by way of Article 47. Nonetheless, Article 19 may be invoked by private parties as a parameter of judicial review to ascertain the compatibility of national law guarantees of judicial independence with EU law. With this, the ECJ intended to elevate the principle enshrined in Article 19 by stating that the Article 47 requirements must be read into the former, thus enabling the principle to shape MS's discretion regarding their judiciaries' organisation and thereby consolidating Article 19 TEU's case law.

In spite of the EC's and ECJ's efforts to effectuate Article 19, sadly, on 27 May 2020, shortly after the PSPP verdict was announced, the Polish Supreme Court press officer Judge Aleksander Stepkowski told journalists that "The CJEU spoke out on disciplinary matters of judges (...) therefore, these are proceedings that are not covered by the freezing order of the CJEU"¹⁹, when asked if the session on the removal of Judge Igor Tuleya's (a vocal defender of judicial independence) immunity should be held. His crime? A judgment he issued in December 2017 in which he overruled a decision by the National Prosecution Office - a body resulting from the merging of the office of Public Prosecutor General with that of the

¹⁹ Jabłoński, M. (2020), "Stepkowski: The case of the Judge Tuleya's immunity is not covered by the CJEU's decision". Available at: <https://ruleoflaw.pl/stepkowski-the-case-of-the-judge-tuleyas-immunity-is-not-covered-by-the-cjeus-decision/>.

Minister of Justice - to discontinue an investigation into the potentially unlawful passing of the government's budget during a session in the lower chamber of parliament whereby members of the ruling party made sure opposition MPs could not take part in a parliamentary debate regarding said budget. The claim that the ECJ order does not cover proceedings relating to the waiving of the immunity of judges is, at a minimum, extremely far-fetched. In its order, the Court's assertion that the EC's claim regarding the lack of a guarantee as to the independence and impartiality of the Disciplinary Chamber appeared, *prima facie*, not unfounded²⁰ should be enough for any rational mind to understand that the Chamber would have to be provisionally disabled in its entirety not in the least because the competence to decide judicial immunity cases is logically part of a broader competence to decide disciplinary cases concerning judges. The same and obvious *rationale* (lack of judicial independence) applies to all areas of adjudication of the illegally constituted chamber and is even more compelling in cases for waiver of immunity - if we're looking to distinguish disciplinary proceedings from criminal ones - as they would lead to more dramatic legal consequences. This blatant disregard of the ECJ's ruling and the EC's actions has to be seen as throwing sand in the eyes of the EU legal order, and more robust measures have to be taken regarding its enforcement, such as the imposition of financial penalties.

On 18 November 2020, the Disciplinary Chamber of the Supreme Court in Poland waived the immunity of Warsaw District Judge Igor Tuleya and suspended him in his judicial duties, cutting his salary by 25% for the time of the suspension. This is not an isolated case, as judges Paweł Juszczyszyn and Beata Morawiec have also been suspended from professional duties for defending the rule of law and European principles. In this sense, it did not come at all as a surprise when the Polish Government issued a statement in reaction to the PSPP decision, explaining that: "The ruling of the German Constitutional Court shows that in the dispute regarding the judiciary system the Polish Government, the Polish Constitution and Member States of the European Union are right. The German Constitutional Court has issued a very important judgment, which also relates to Poland. For several months as the Polish Government, we have been clearly indicating that the EU may not exceed the powers that Member States delegate to it in the Treaties (...)". This statement is very telling: the Polish government has clearly seized the opportunity provided by the Federal

²⁰ Order of 8 April 2020, *Commission v Poland*, Case C-791/19 R, EU:C:2020:277.

Constitutional Court's judgment to attempt to legitimise the reforms carried out in its justice system on the basis of the old caveat that is state sovereignty. But more than that, it has attempted to delegitimise the Union's intervention in what they regard as an exceeding of competences conferred upon it by way of the Treaties.

Hungary

In Hungary, the situation of the rule of law does not look brighter. Over the past years, judicial independence in Hungary has too been called into question by EU institutions, namely by the EP, which initiated the Article 7(1) procedure after the vote in favour by the EP. The Supreme Court of Hungary also raised concerns, notably when it declared unlawful a request for a preliminary ruling to the ECJ²¹. Other issues have arisen regarding the systemic lack of determined action against corruption, the appointment to the Supreme Court of judges who are members of the Constitutional Court, indirect influence by the State over the media, and the novel possibility for public authorities to challenge final court decisions in the Constitutional Court which constitutes a heavy blow to legal certainty.

The Hungarian government reacted to the May Decision, stating that the country is not bound by the ECJ's ruling on ECB bond-buying. In an interview, Hungarian Justice Minister Varga said that "the fact that ECJ has been overruled is extremely important". Gergely Gulyás, Minister of the Prime Minister's office stated that: "We do not think that this court decision is a victory of Central over Western Europeans. But any sovereign state that has joined as a sovereign state can feel itself a winner (...)". Again, the state sovereignty argument at the fore and signs of cleavage between Central and Western Europeans also started showing.

The Commission has brought several infringement proceedings against Hungary in the context of its constitutional reforms, which related to the independence of the Central Bank, the removal of the data protection supervisor and the mandatory retirement of judges. Regarding asylum alone, Hungary has faced five infringement procedures since 2015, which

²¹ Bt.III.838/2019/11. See European Commission (2020), Country Chapter on the rule of law situation in Hungary, p.4. Available at: https://ec.europa.eu/info/sites/default/files/hu_ro_l_country_chapter.pdf.

coincides with the peak of the European migration crisis. The first case pertained to the incorrect implementation of EU Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 and Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 EU, regarding asylum and migration *acquis*. In May 2020, the ECJ ruled that third-country nationals wishing to claim asylum in Hungary "were in practice confronted with the virtual impossibility of making their application" due to national legislation making it mandatory for them to initiate the procedure from a transit zone and an administrative practice "drastically" limiting the number of people allowed to enter these areas every day.

Another infringement case concerned the famous "NGO Law"²², which required civil organisations to disclose foreign donors was the object of one of the procedures, on which the ECJ rendered²³ that it contravened the freedom of movement of capital, the right to respect of private life, the right to protection of data and the freedom of association. It was deemed to have introduced "(...) discriminatory and unjustified restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union."

Moreover, a legislative package dubbed the "Stop Soros Law", in reference to Hungarian-born U.S. billionaire philanthropist George Soros and the liberal NGOs he backs, was the second asylum case subject to infringement proceedings. The law criminalises acts of those who help illegal immigrants stay in Hungary and are liable to prison terms and introduces inadmissibility ground to dismiss all asylum applications without having to examine them. Having been referred to the ECJ in July 2019, the Court is likely to issue a judgment this year.

In April 2020, Poland, Hungary and the Czech Republic were found to have failed to fulfil their obligations under the Council's Relocation Decisions 2015/1601 and 2015/1523. The ECJ, in a judgment²⁴ rendered in April 2020, did not accept a justification of non-compliance based on maintaining public order and national security concerns under Article 72 TFEU. Specifically, the Court found that the MS failed to correctly indicate the number

22 European Commission (2017), *Infringements - European Commission refers Hungary to the Court of Justice for its NGO Law*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5003.

23 Judgment of 18 June 2020, *European Commission v Hungary*, EU:C:2020:476.

24 Judgment of 2 April 2020, *European Commission v Republic of Poland and Others*, EU:C:2020:257.

of applicants of international protection who can be relocated to their territory and to relocate said applicants subsequently. This further confirms the nationalist intents of these eastern European countries and a “less inclusive” approach that is incompatible with the bloc’s core values.

In May of the same year, the Szeged Administrative and Labour Court referred for a preliminary ruling regarding the detention and food deprivation of over 30 detainees in the now abolished Röszke transit zone. The referring court had also requested that the matter be dealt with under the urgent preliminary ruling procedure due to the de facto detainees' precarious conditions. The EC had already launched an infringement procedure²⁵ concerning the non-provision of food to these persons in July 2019. The ECJ, in May 2020, ruled²⁶ that the detention was not in conformity with the Return Directive (Directive 2008/115/EC of the European Parliament and the Council) as the alternatives to it were not examined, so its necessity was not proven, neither was its proportionality and that the illegality of the detention flowed from the lack of proper *habeas corpus* and from the fact that it could exceed 18 months.

In October, the EC launched an infringement procedure²⁷ regarding Hungarian Act LVIII of 2020 and Government Decree 233/2020, which introduced a new asylum system, in response to the coronavirus pandemic. The legislation came as a reaction to the unlawfulness of the detention of asylum-seekers in closed land-border transit zones during the entire asylum procedure, as previously relayed. At the core of the new system is the compulsory precondition for asylum-seekers to lodge a statement of intent at the Hungarian embassy in Belgrade or Kyiv before they are issued with a special travel permit allowing them to travel and submit an asylum application in Hungary – a clear statement of nationalist closure -. The EC considered it to be in breach of Union acquis, namely Directive 2013/32 of the European Parliament and the Council, interpreted in light of the Charter of Fundamental Rights of the European Union.

Furthermore, Viktor Orbán’s party *Fidesz* was decisive in approving a new piece of

25 European Commission (2019), *Commission takes Hungary to Court for criminalizing activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260.

26 Judgment of 14 May 2020, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Joined Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367.

27 European Commission (2020), *October Infringements package: key decisions*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687.

legislation that allows the government to rule by decree without a set time limit, justified by the current pandemic crisis. With the new law, no by-elections can be held, and Orbán's government will be able to suspend the enforcement of certain laws. Furthermore, individuals who publicise what is viewed as untrue or distorted facts — and which could interfere with the protection of the public or could alarm or agitate a large number of people — now face several years in jail. It doesn't take much to realise the final aim pursued by Orbán: the repression of political opposition and the reinforcement of his powers, which reflect an authoritarianist tendency.

The derailing rule of law and democracy situation in Poland and Hungary is further illustrated by the countries' veto of the approval of the EU's budget and the pandemic recovery package over a clause that ties funding with adherence to the rule of law in the bloc. Interestingly, the official reason put forth by the Polish and Hungarian governments for their veto is the Rule of Law mechanism and how it may be used to wage political wars against countries that do not conform to the liberal ideals embraced by the EU. Furthermore, this would give the Union the power, for the first time, to sanction violations of democratic principles by suspending EU funding, in a more expedited manner than it is currently permitted.

On 9 December 2020, EU leaders were able to unblock the budget and the Coronavirus recovery fund after a compromise was reached regarding ways to link EU funds to the respect for Rule of Law. The agreement stated that the Rule of Law conditionality would only be used for the seven-year budget recovery starting in 2021 and for the recovery fund, not payments made from the current budget. Moreover, it was further agreed that any sanctions process could only be triggered by the Commission once the ECJ rules on the new mechanism. Fundamentally, the incisive reprimanding of the Polish and Hungarian governments and their unlawful practices have been delayed, in favour of much needed expeditious financial aid to the European People.

The epitome of the rule of law crisis in Hungary came in March of this year, when Viktor Orbán announced that his party would be leaving the European's People Party's faction in the EP. This followed the agreement amongst EPP leaders on new suspension rules allowing the group to exclude or suspend an entire member party rather than just a single MEP after the EPP sanctioned then Fidesz EP group leader Tamás Deutsch for his critical statement in

which he compared comments made on the rule of law criteria by Parliament group leader Manfred Weber to the slogans of the Gestapo and Hungary's communist-era political police (in our view, a statement reflecting populist tendencies). In a letter to EPP chairman Manfred Weber confirming his party's membership resignation, Viktor Orbán invokes the hostility of the move and how it hinders its MEPs from carrying out their duties. According to independent media network Euractiv, Orbán has already addressed Giorgia Meloni, the president of the European Conservatives and Reformists Group (where we can also find the Polish ruling party *PiS*), which can be seen as an indication of his intent in joining the Eurosceptic group. This constitutes yet another step towards the deepening of the divide between the Visegrád countries and the EU and does not bode well for the upholding of the rule of law within their borders.

The continued unlawful practices will remain. We have concluded that the political, legal, and judicial systems' integrity and compatibility with EU law in Poland and Hungary are in decline. After looking at the reactions towards the FCC's PSPP decision, and their undemocratic trends related to several areas, it is unequivocal that these two countries are a cause for concern. Our European neighbours and their leaders will make use of every opportune political and legal argument they come across to justify their actions towards authoritarianism and national closure. That is why the judgment issued by Europe's most pre-eminent Constitutional Court questioning the primacy of EU law provides a tool for the already dissenting Central European States to inflict further disruption upon the Union and its core values.

Chapter 3

The PSPP Decision

The *Bundesverfassungsgericht*'s Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 was a landmark decision that raised the eyebrows of those who immediately grasped the implications of the 237-paragraph ruling. Some members of EU law academia have labelled it as “having put Europe into turmoil”²⁸, and indeed their concerns are shared by EU lawyers and politicians alike. The decision is significant because it is, in many ways, a novelty. For the first time in its history, the German Constitutional Court, Europe's most influential national court and guardian of the EU's leading economy's Basic Law has “bitten”. It has declared a ruling by the ECJ and the ECB's PSPP programme as *ultra-vires* and therefore not legally binding in Germany. The ongoing tension between national constitutionalism and the EU's *quasi*-constitutional order has finally produced a dramatic outcome, an outcome which will have severe implications for the independence of the ECB, for the EU's legal order and its well-established judicial procedures and for relations between MS and EU institutions.

Background

As previously ascertained, the decision concerns the ECB's Public Sector Purchase Programme, an asset purchase programme, “part of a package of non-standard monetary policy measures (the Asset Purchase Programme) (...) which was initiated in mid-2014 to support the monetary policy transmission mechanism and provide the amount of policy accommodation needed to ensure price stability.”²⁹ In terms of implementation, the ECB “conducts purchases in a gradual and broad-based manner, aiming to achieve market neutrality (...).”³⁰ Based on this, one can infer that the PSPP is a monetary policy tool by which the ECB buys public bonds from banks (known as Quantitative Easing), increasing the price of these bonds and the amount of money in the banking system, which in turn aims

28 Nguyen, H.-T., Chamon, M. (2020), “The ultra vires decision of the German Constitutional Court Time to fight fire with fire?”.

29 European Central Bank (2020), *Asset purchase programmes*. Available at: <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>

30 European Central Bank (2020), *Implementation aspects of the public sector purchase programme (PSPP)*. Available at: <https://www.ecb.europa.eu/mopo/implement/omt/html/pspp.en.html>.

to decrease interest rates and support investment and consumption, with the finality of a return of inflation levels below the 2% threshold. The PSPP is by far the biggest sub-programme of the APP, with purchases under the former accounting for 81.63% of all purchases under the latter, as of November 2019 (para. 8 of the ruling).

At first glance, quantitative easing programmes seem like a fair solution to the problem. Rather than fully mutualise the costs of a crisis through joint debt issuance as was the idea with the corona-bonds (where in practice the fiscal burden of the new debt would fall on all euro area taxpayers), the purchase of sovereign bonds as means of injecting capital into the MS economies (by which the additional debt remains in national books) seems less imposing on the finances of the economic powerhouses in the EU, namely Germany.

However, this was not the first time a non-standard monetary ECB policy measure was challenged. Previous programmes had already faced some resistance. In the *Accorinti Case*³¹, the Securities Market Programme's compliance with the Treaties had been questioned before the General Court, albeit not regarding its validity and where the ECB was granted "broad discretion". In *Gauweiler*³² - at the origin of the FCC's first-ever request for a preliminary ruling by the ECJ - the claimants had asked the Court to declare illegal the ECB decisions which established and implemented the Outright Monetary Transactions programme. The objections raised were very similar to the ones invoked in *Weiss*, at the origin of the FCC's second-ever request for a preliminary ruling, where the validity of the PSPP was also questioned.

In *Weiss*³³, an action against German Constitutional institutions was filed in 2015 by various groups of complainants who claimed, amongst others things, that the PSPP violated democratic principles in the German Constitution, namely because it made it impossible for the German Parliament to exercise control over Germany's public finances. The FCC then referred³⁴ several questions to the ECJ through the preliminary ruling procedure (Article 267/TFEU). The mechanism serves the purpose of promoting healthy dialogue between national and European courts in the absence of a third supranational umpire when push comes to shove. Whilst the Court of Justice of the EU may be the sole guardian of EU

31 Judgment of 7 October 2015, *Accorinti and Others v ECB*, T-79/13, EU:T:2015:756.

32 Judgment of 16 June 2015, *Peter Gauweiler and Others v. Deutscher Bundestag*, Case C-62/14, EU:C:2015:400.

33 Judgment of 11 December 2018, *Heinrich Weiss and Others*, C-493/17, EU:C:2018:1000.

34 BVerfG, Order of the Second Senate of 18 July 2017, 2 BvR 859/15.

primary law (and whilst it may assert the primacy of EU law over national constitutional law), it wouldn't be doing its job correctly if it failed to consider national courts' concerns nor if it didn't follow the substance and procedure enshrined in the treaties. According to this mechanism, it is important to note that the referring national court should ask the ECJ a question pertaining to the interpretation of EU law and has the legal obligation to abide by the judgment rendered by the ECJ. In essence, the FCC did none. Instead, it had taken the opportunity to present the ECJ with its own interpretation of what had happened, followed by the establishment of a three-month transitional period for the ECJ to demonstrate 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". If these demands were not fulfilled by the end of that period, the *Bundesbank* would no longer be able to participate in the execution and implementation of the ECB's PSPP Decisions.

The Court answered in December 2018 (C-493/17, *Weiss and Others*), upholding that the PSPP was still within the ECJ's mandate, according to Articles 123/TFEU and 127/TFEU (regarding the prohibition of monetary financing of MS budgets and the ECB's monetary policy objectives, respectively) and declaring it legal under EU law.

To properly dissect the 237-paragraph ruling, the subsequent analysis will be divided into distinct EU law issues raised by the decision. Moreover, we will also analyse the effects that the FCC's reasoning might produce for future financial assistance programmes of the ECB and possible ways in which we can prevent such issues from arising in the future.

Primacy of EU Law

One of the main reasons I chose this ruling as the subject of this paper was, in great part, due to the fact that never has a court so blatantly clashed against the principle of supremacy of EU law, as the FCC has in its judgment. Conflict between European and national constitutional law is, in some ways, inherent to the very nature of the EU legal order. After all, the primacy of EU law is referred to when a conflict between European law and national law arises. Nonetheless, no EU law expert would have predicted and very less so agreed that the FCC's ruling constitutes healthy judicial dialogue and that its findings are compatible

with EU established case law, particularly on the principle of supremacy. In the present section, we will broach the relevant case law since its inception and how Europe's apex constitutional court has contributed towards the fostering of this principle and how it now may very well be hindering it

In 1964, *Costa v ENEL*³⁵ was the first decision to establish such a principle. The Italian Constitutional Court, whilst recognising that the Constitution allowed for the limitation of sovereignty in favour of the European Economic Community, initially applied the old doctrine of applied repeal - *lex posterior derogat legi anteriori*, upon referral by a lower court in Milan. As the Treaty of Rome had been incorporated in 1958, it could not have prevailed over the national law in question, enacted four years later in 1962. However, the complainant asked a second lower court to recognise his claims and this *Giudice Conciliatore* opted to refer the question to the ECJ. The Court ruled that: "(...) the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.". In essence, the very nature of Community law warranted different treatment from that of national treaty provisions, which signalled a sturdy claim for its preponderance.

In *Amministrazione delle Finanze v Simmenthal SpA*³⁶, the ECJ further confirmed this principle: "(...) in accordance with the principle of the precedence of Community law, the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but (...) also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.". Upon analysis of the two cases as mentioned above, one can infer two postulates imposed upon MS: law stemming from European Treaties, an independent source of law, could not, because of its unique and original nature, be overridden by domestic legal provisions (however framed); and MS must set aside

³⁵ Judgment of 15 July 1964, *Flaminio Costa v ENEL*, Case 6/64.

³⁶ Judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, EU:C:1978:49.

provisions of national law that are incompatible with Union law.

In between these two landmark supremacy cases, the FCC's first judicial challenge to the ECJ's interpretative authority came in the form of the *Solange*³⁷ jurisprudence. The company had claimed that the licensing system established by the Common Agricultural Policy, which permitted exports only by those who obtained an export licence, was a disproportionate violation of their right to conduct business under the German Constitution because it went beyond what was necessary to achieve the public objectives at hand. The German Administrative Court (*Verwaltungsgericht*) then referred the question to the ECJ, and the Court held that: "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law". In other words, the Court ruled that the validity of these measures cannot be challenged on the grounds of national law rules or concepts, even if that is a violation of fundamental human rights provisions in a MS' constitution. Moreover, it stated that European Community law did indeed respect fundamental rights and that no breach had taken place and that this was inspired by common constitutional traditions of MS and guided by the "framework of the structure and objectives of the Community". The *Verwaltungsgericht* in Frankfurt am Main, given the potential conflict it would have faced, proceeded to request a ruling from the FCC.

The *Bunfesverfassugericht*'s reply was, albeit not entirely satisfactory, rather accommodating. It held that so long as fundamental rights protection was evident, it would not scrutinise EU action in detail: "Provisionally, therefore, in the hypothetical case of a conflict between Community law and (...) the guarantees of fundamental rights in the Constitution (...) the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism."³⁸ Fundamentally, the FCC limited supremacy by retaining the right to assess the compatibility of EC law with the fundamental rights of the Basic Law in the case of insufficient protection afforded by EC law. Also, on the facts of the case, it accepted that the Community legislation did not violate German fundamental rights

³⁷ BVerfG, Order of the Second Senate of 29 May 1974, 2 BvL 52/71.

³⁸ *Ibid.* Translated version available at: <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>.

and therefore appeased qualms. A decade later, in *Solange II*³⁹, the Court revised its approach. An EC import licensing system and its protective measures were challenged before the Frankfurt Administrative Court. The application was dismissed. The appellant then entered an interlocutory appeal against that judgment, after which the Federal Administrative Court requested a preliminary ruling⁴⁰. The ECJ held that the adopted regulations⁴¹ were valid. In further proceedings before the *Bundesverwaltungsgericht*, the appellant objected that there had been a breach of several constitutional rules and the case reached the FCC. The court took into consideration that, since the *Solange I* decision, the ECJ had developed the protection of fundamental rights, through its case law and through the adoption of the European Human Rights Convention for legal purposes, to the extent that it satisfied the legal requirements of the *Gundeszets*. In this sense, the FCC went on to declare that as long as the EC ensured adequate fundamental rights protection, the FCC would refrain from assessing the compatibility of EC law with the fundamental rights enshrined in the Basic Law.

A decade later, in 1993, the compatibility of the Maastricht Treaty came to the fore, and the FCC seized the opportunity⁴² to develop its *ultra vires* doctrine position regarding the transfer of powers to the EU. It emphasised that this required approval by the German parliament. Therefore, it retained the right to assess whether EU institutions had exceeded the powers granted to them under the Treaties, in which case their actions would no longer be covered by the German ratification law (adopted by parliament) and would have no binding effect in Germany. In 2009, the Treaty of Lisbon⁴³ and its compatibility with the Basic Law was also contended, whereby the FCC specified that the exercise of some core state functions may not be transferred to the European level and that it retains the right to review EU acts against the inviolable core content of the constitutional identity of the Basic Law.

The following year, in the Honeywell case⁴⁴, the FCC clarified its *ultra vires* doctrine

39 BVerfG, Order of the Second Senate of 22 October 1986, 2 BvR 197/83.

40 Judgment of 6 May 1982, *Wünsche Handelsgesellschaft v Federal Republic of Germany*, Case 126/81, EU:C:1982:144.

41 Commission Regulation (EEC) No 1412/76 of 18 June 1976 fixing for purposes of application of the system of import licences for preserved mushrooms the percentage applicable to the reference quantity and Commission Regulation (EEC) No 2284/76 of 21 September 1976 fixing for the purposes of application of the system of import licences for preserved mushrooms the percentage applicable to the reference quantity.

42 See BVerfG, Order of the Second Senate of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92, 1993.

43 BVerfG, Order of the Second Senate of 30 June 2009, 2 BvE 2/08.

44 BVerfG, Order of the Second Senate of 6 July 2010, 2 BvR 2661/06.

by stating that for it to find an act by EU institutions to be *ultra vires*, the act must constitute a manifest and structurally significant transgression of their competences. This is particularly relevant for our case as the ruling states, in paragraph 154, that the proportionality test undertaken by the CJEU in its Weiss judgment and the determination of the ESCB's mandate based thereon, which confirmed the validity of the PSPP "manifestly exceed the judicial mandate conferred upon the CJEU (...) resulting in a structurally significant shift in the order of competences to the detriment of the Member States (...). Hence, the ECJ judgment thus constitutes an *ultra vires* act that is not binding upon the Federal Constitutional Court. In this sense, it is hard to understand why the *Bundesverfassungsgericht* stated in Honeywell⁴⁵ that it would exercise its *ultra vires* reviews in a EU-friendly (*Europafreundlich*) manner. It did not only state that the ECB acted *ultra vires* but also declared the Weiss⁴⁶ judgment invalid, without fulfilling its promise by providing the ECJ with the opportunity to clarify its decision further. It is important to note that, according to established case law⁴⁷, a national judge can always ask follow-up preliminary questions to the ECJ if deemed unclear (and as long as the national judge does not contest that judgment). In other words, the German Constitutional Court set a very high threshold in its own case law, and it now seems to have fallen victim to its own decision inasmuch as it found itself compelled to use the same language as it did in Honeywell in order to assert the invalidity of the ECJ's and the ECB's acts.

What is curious about the FCC's reasoning is that, by leaving a window of three months for the ECB to justify its decision correctly, it suggests that an identical decision with a more elaborate reasoning might not meet its threshold for an *ultra vires* act. And if this were to be the case, how could that act manifestly go beyond the ECB's mandate? It seems that that is precisely what followed. In July of last year, Yves Mersch, member of the Executive Board of the ECB, delivered a speech entitled "In the spirit of European cooperation"⁴⁸, whereby he reinstated the ECB's position towards cooperating with the MS and announced that it had taken further action regarding the demonstration of a proper proportionality assessment, in order to satisfy the FCC's demands. On the same day, the *Bundestag* voted to accept the explanation provided by the ECB, thus fulfilling the *Bunfesverfassungsgericht's* demand

45 *Ibid.*, paras. 58 et seq.

46 Judgment of 11 December 2018, *Heinrich Weiss and Others*, C-493/17, EU:C:2018:1000.

47 Judgment of the Court of 13 March 1991, *Ann Cotter and Norah McDermott v Minister for Social Welfare and Attorney General*, Case C-377/89, EU:C:1991:116.

48 European Central Bank (2020), *In the spirit of European cooperation*. Available at: <https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200702~87ce377373.en.html>

that it conducted a further review of the PSPP and thereby affirming that “the ECB’s statement to complete a proportionality check as comprehensive. One could dare assume that the PSPP programme is no longer invalid in Germany and that its *ultra vires* nature has been rectified. Nonetheless, it remains surprising how the ECJ’s proportionality tests in *Weiss* and *Gauweiler* went from being methodologically incomprehensible and filled with manifest errors to transforming itself into a satisfactory and substantiated review by disclosing further technical documents and ECB governing council meeting minutes. If we consider the volatility of this line of reasoning, one could potentially say that the FCC’s *ultra vires* doctrine was applied inconsistently or perhaps not applied at all, insofar as the “final” qualification of the relevant European acts are concerned. Some comfort could be found in the fact that, by (erroneously) making the *ultra vires* nature of the acts contingent upon the lack of a more detailed proportionality assessment, it can arguably be said that the German Court ultimately has not bitten but had only threatened to do so, by barking louder.

All things considered, the argument could be made that the judgment was rendered with a political outcome in mind rather than looking to apply the *ultra vires* doctrine and its case law in a stable manner. The assertion of a manifest error in proportionality review and superseding of conferred competences is an issue that should be taken seriously in the context of EU law and the integrity of its judicial system.

According to Article 19(1)/TEU, the CJEU “shall ensure that in the interpretation and application of the Treaties the law is observed”. In order to do so, a system of judicial cooperation catered to the unique nature of the EU legal order was set up. The cornerstone of this system is precisely the preliminary ruling framework, as enshrined in Article 267/TFEU, as mentioned. This mechanism allows for dialogue between national and European courts, which is grounded on the ECJ’s exclusive jurisdiction to give preliminary rulings pertaining to the interpretation of Treaties and the validity of acts of the “institutions, bodies, offices or offices agencies of the Union”. Moreover, according to this system, all preliminary rulings rendered by the CJEU are binding upon all MS. This is so in order to ensure the autonomy of EU law and its effective and uniform application throughout all MS. When this dynamic is hindered, the integrity of EU law is also jeopardised due to the various moving parts that make up the Union. To foster a coherent legal system that is to be indiscriminately implemented across 27 different countries is no easy feat. That’s why the

mere questioning of EU law's authority weakens it - because it is based upon a common understanding which might be felt more vigorously in some cases and less in others.

We might find examples of “less vigorous” stances towards the integrity of the EU judicial system if we look at the Czech Constitutional Court. The *Landtová* case⁴⁹ concerning the compatibility of the Czech pension scheme with EU law was analysed on the basis of the principle of non-discrimination on the ground of nationality. The Czech Court found that the ECJ failed to consider the unique situation of the dissolution of the Czechoslovak state. Having overlooked these facts, the ECJ's decision was deemed as *ultra vires*. In Denmark, the *Ajos* case⁵⁰ concerned the compatibility of a Danish Law - depriving an employee of his entitlement to a severance allowance after having reached a certain age -, with the principle of non-discrimination on the grounds of age. According to the Danish Supreme Court, judge-made principles of EU law and its horizontal effect cannot take precedence over Danish law since they were not written in the Treaties when the Danish Act of Accession was adopted; therefore, the Danish courts themselves cannot disapply national law as adopted by the Danish parliament on such grounds. Whilst these two cases can be a cause for concern, they are fundamentally different from the one subject of our paper.

Firstly, several references have already been made to the geopolitical weight carried by the *Bundesverfassungsgericht* and its impact on EU case law. Its legal framework has had significant influence over several countries' legal orders, other European courts often citing the FCC's case law itself in their own jurisprudence, and it is clear that its *ultra vires* decision lends much more weight to any similar future claims by other countries. Secondly, the difference is not only institutional but also in nature. Whilst the Czech and Danish cases concerned the breach of EU law by national provisions, the PSPP case concerned the (in)validity of an EU act. In this sense, it went much further than its European counterparts, as the conflict cannot be resolved through the amendment of a national provision.

As previously ascertained, this conflict poses a real problem for the authority of EU law and the principle of supremacy. By declaring an EU act invalid, the FCC is blatantly disregarding the well-established case law in *Foto-Frost*⁵¹, whereby it can only rule on the

49 Judgment of 22 June 2011, *Marie Landtová v Česká správa sociálního zabezpečení*, Case C-399/09, EU:C:2011:415.

50 Judgment of 19 April 2016, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, Case C-441/14, EU:C:2016:278.

51 Judgment of 22 October 1987, *Foto-Frost*, Case 314/85, EU:C:1987:452.

invalidity of EU acts if authorised to do so, but also all the jurisprudence mentioned above developing the primacy principle. Furthermore, by disregarding the answer given by the ECJ in *Weiss*, it undermined the whole purpose of the preliminary ruling mechanism, which is to ensure the effectiveness and consistency of EU law through the dialogue and cooperation between national courts and the CJEU. And it did so in a relatively crude manner.

The Federal Constitutional Court's Reasoning: Proportionality and Conferral

The Bundesverfassungsgericht's decision has been widely criticised by EU law scholars and commentators⁵². As we have seen, by questioning the authority of EU law, its ruling and its ramifications also hugely undermined the independence of the ECB by meddling with the decisions which adopt its programmes, pursuant to European monetary policy objectives. However, this is not the only cause for concern raised by the decision. The exclusive jurisdiction of the ECJ as the last and sole interpreter of the validity of EU law – whose supremacy was never unconditionally accepted by the FCC – has also been questioned, which does not favour the effectiveness of the EU legal order and the uniform application of EU law. In the present section, we will analyse the legal arguments put forward by the FCC to justify its “bite” and their underlying issues.

The constitutional complaints lodged by the German citizens in *Weiss* pertained to the illegal circumvention of the prohibition on monetary financing laid down in Article 123/TFEU; the overstepping of the ECB's monetary policy mandate by pursuance of economic policy; and the violation of Germany's democratic principles, namely because it made it impossible for the *Bundestag* to remain in control of German public finances. These complaints culminated in a request to declare the ECB decisions adopting the PSPP to have manifestly and structurally exceeded its conferred competences under the EU Treaties, much in line with the *Honeywell* jurisprudence.

52 See Cruz Vilaça, J. L. (2020). “The Judgment of the German Federal Constitutional Court and the Court of Justice of the European Union: Judicial Cooperation or Dialogue of the Deaf?”, *Cruz Vilaça Advogados*. Available at: <https://www.cruzvilaca.eu/en/news/The-judgment-of-the-German-Federal-Constitutional-Court-and-the-Court-of-Justice-of-the-European/99/>; Ziller, J. (2020). “The unbearable heaviness of the German constitutional judge. On the judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 concerning the European Central Bank's PSPP programme”. Available at: <https://ceridap.eu/the-unbearable-heaviness-of-the-german-constitutional-judge-on-the-judgment-of-the-second-chamber-of-the-german-federal-constitutional-court-of-5-may-2020-concerning-the-european-central-banks-pspp/>

The FCC starts by agreeing with the ECJ insofar as the prohibition on monetary financing is concerned. It found that Article 123 TFEU had not been violated due to it being subject to certain conditions such as setting limits on the volume of purchasable debt (33%) and the carrying out of these purchases in accordance with the capital key of the ECB. Whilst the ECJ may view these conditions as imperative, but only as incentives to sound budgetary policies by the MS, the FCC seems to perceive them as necessary to prevent the incompatibility of the programme with article 123/TFEU. In the words of the *Bundesverfassungsgericht*: “(...) on condition that the “safeguards”, which, according to the CJEU, prevent circumvention of the prohibition of monetary financing, are strictly observed (...), it follows from an overall balancing that a manifest violation of Art. 123(1) TFEU is not ascertainable (...)” (para. 180). This raises concerns regarding the PEPP, mainly because it is devoid of such limitations, an issue regarded by some scholars⁵³ as the most problematic aspect of the decision, which will be broached later.

The complainants further argued that in adopting and implementing the PSPP, the ECB would be overstepping its monetary policy mandate and that the programme would constitute economic policy through the backdoor, which in principle, remains the reserve of the MS. In order to distinguish one from another, the ECJ reaffirmed in *Weiss* that the decisive factors in this exercise were the objectives pursued and the instruments used by the ECB. The Court thereby confirmed that the ECB’s decisions did not cease to constitute monetary policy simply due to the indirect effects on economic policy and refuted the FCC’s claims - dating back to *Gauweiler* - that those effects cannot be qualified as indirect if they are foreseeable with certainty when the decision is adopted and can only be considered as such if they are connected to the challenged measure: “such effects can only be considered *indirect* if they are connected to the challenged measure only through additional intermediate measures” (para. 135). Moreover, the FCC goes on to criticise the ECJ’s standard of review, stating it does not give sufficient consideration to the principle of conferral and the necessity of interpreting the ECB’s mandate in a restrictive manner.

The FCC then proceeds to assert the distinction between economic and monetary policy based on the principle of proportionality. Even though both courts agree that economic effects are natural in a programme pursuing monetary policy objectives, the German Court

53 See Poiares Maduro, M. (2020). “Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court”, *Verfassungsblog*.

states that the ECJ failed to give consideration to the economic and social policy effects of the PSPP and lists examples of negative consequences resulting from it, such as its impact on personal savings and retirement schemes. As pointed out by Professor Poiares Maduro⁵⁴, the FCC's reasoning can be read as quite paradoxical: the *Bundesverfassungsgericht* argues that the ECB can only guide its action by the monetary policy objectives (such as the inflation target) but then demands that it take into account in its analysis possible economic, fiscal and political costs; if this was to be taken seriously, then the potential economic, fiscal and political benefits should also be considered when conducting such balancing exercise. The fact that it skews the argument towards the adverse effects without accounting for the positives screams of methodological inconsistency.

Interestingly, it was the methodologically inconsistent who accused the ECJ of methodological untenability because it did not attach “no legal relevance whatsoever to the effects of the asset purchase programme, neither in determining the objectives pursued by the ESCB nor in reviewing the proportionality of the programme.” (para. 141), which to us, seems quite harsh. Furthermore, it affirms that the ECJ's standard of review fails to give effect to the function of the principle of conferral as a critical determinant in the division of competences and goes on to explain why the level of scrutiny has to be higher and how the ECJ has already done so in other cases but failed to do so now: the standard applied with regard to delimiting the competences for monetary policy and economic policy constituted a different approach and without further reasons provided to justify this path, the ECJ's reasoning was deemed as incomprehensible from a methodological perspective. (para. 153). Therefore, according to the FCC, the interpretation of the principle of proportionality undertaken by the ECJ manifestly exceeded the judicial mandate conferred upon it in Article 19/TEU and resulted in a structurally significant shift in the order of competences to the detriment of MS. Whilst acknowledging that the interpretation and application of EU law is primarily the task of the ECJ, the FCC also retains the responsibility towards the protection of the German Constitution. Under the principle of conferral, the EU's powers are limited to those conferred to it by the MS and hence acts that are well and undoubtedly outside the scope of those competences fall outside the constitutional framework that allows acts of the EU to be binding in Germany. Thus, such acts are to be considered *ultra vires* and

⁵⁴ *Ibid.*

incompatible with the fundamental principles of the *Grundgesetz*, particularly with the principle of democracy and sovereignty of the people. This results from the link made by the German between democracy and fiscal autonomy and responsibility. Decisions taken by the ECB are more prone to claims of lack of democratic legitimation, especially when they carry with them some sort of debt mutualisation – a kind of responsibility for non-German actions, if you may. This is seen by the German Court as an intrusion on their democracy, as they limit their constitutional freedom of democratic deliberation and make them liable for decisions taken by others.

A lot can be said about the FCC's reasoning. Its criticism of the ECJ's proportionality tests in previous decisions seems unfair and exaggerated. Internationally, it is often referred to as one of the courts that have most proactively developed this principle. However, its use varies with the circumstances. Sometimes, it may take into account the mere suitability of measure; in others, it may include its necessity, and, in some instances, it accounts for proportionality *strictu sensu*, by which it balances the benefits against the costs incurred. The FCC reproached the ECJ's proportionality reasoning in *Weiss*, stating that: "The specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principle meaningless to distinguish, concerning the PSPP, between monetary policy and economic policy (...)" (para. 127). Professor Toni Marzal⁵⁵ admits that the FCC made two fundamental mistakes. Firstly, it is not true that the ECJ in *Weiss* appeared to rely on the principle of proportionality to distinguish the monetary from the fiscal. It sought to distinguish two issues: whether the PSPP was indeed a monetary policy measure, where the use of proportionality is not warranted. This principle only gains relevance when ascertaining whether the monetary measure is substantively proportionate, as required by Article 5/TEU. This provision exclusively relates to the manner in which the conferred competences are exercised and not to how they are outlined. Secondly, it is the assumption that this principle can be used for those purposes, which constitutes the second mistake of the German judiciary. The FCC points out that proportionality has been deemed as a good tool across Europe to determine whether a measure is substantively a rational one. However, it is also generally accepted that it is often of very little use for the purpose of allocation of competences.

⁵⁵ See Marzal, T. (2020), "Is the BVerfG PSPP decision simply not comprehensible?" *Verfassungsblog*

Ultimately, the FCC seems to misuse the principle of proportionality to skew the argument in its favour. It disregards the explicit meaning of Article 5/TEU and uses the principle in a way that allows it to criticise the economic drawbacks of the decision without acknowledging its economic benefits. Ironically, the Court itself states in its decision that deference should be afforded to the ECB in the “substantive exercise” of its powers (para. 143). But does it really mean it? It is appropriate when discussing the ECJ’s standard of review to consider the Court’s case law on proportionality review of EU actions and the natural distinction between proportionality review of general EU legislative acts – where the EU institutions hold substantial discretion – and the same review of individual decisions or legislative acts targeted at specific individuals – where discretion is limited. The fundamental rationale for stringent proportionality review in the CJEU’s case law, according to Professor Jacob Öberg, has to do with the fact that the cases concern “individual decisions”. Examples of these decisions are the CFI’s *Tetra Laval*⁵⁶ and *Pfizer*⁵⁷ cases, marked by highly intense judicial review. This finds bearing because when the Commission or EU legislator acts executively rather than legislatively, the effects of annulment are less heavy and because strict review does not encroach upon the legislator’s discretion in making policy choices.

Counter to this, it may be argued that scrutiny in the context of broad EU common policies should be very deferential due to the complexity of the facts (such as those that make up the sovereign debt crisis) since policy choices are made by the EU legislator that require the reconciling of divergent interests (27, at least). We can find examples of said deferential attitudes in *Omega*⁵⁸ and *Phillip Morris*⁵⁹. The FCC seems to demand that the ECJ conduct a review more in line with the ones adopted in *Tetra Laval* or *Pfizer*. Rather than the limited, purposive approach adopted by the ECJ in *Weiss*. As the ECJ pointed out, trying to separate monetary from fiscal effects would make it impossible for the ECB to exercise its competences (an argument that the FCC failed to respond to). In this sense, it employed a deferential approach whilst also considering the appropriateness and necessity of the programme in some detail, heavily relying on the ECB’s expertise and, logically, its discretion. If we look at the contested ECB decisions, we could classify them as an admixture of a general legislative act and an individual decision since they are targeted at specific

56 Judgment of 25 October 2002, *Tetra Laval BV v Commission of the European Communities*, Case T-5/02, EU:T:2002:264

57 Judgment of 11 September 2002, *Pfizer Animal Health SA v Council of the European Union*, Case T-13/99, EU:T:2002:209

58 Judgment of 4 May 2016, *Philip Morris Brands SARL and Others v Secretary of State for Health*, Case C-547/14, EU:C:2016:325

59 Judgment of 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, EU:C:2004:614

addressees such as the Eurozone's national central banks. However, even if the link made between the right to democracy and the ECB's mandate stands, it does not seem to justify a higher degree of scrutiny comparable to the ones adopted in cases where individuals must be protected against discretionary interferences with their fundamental freedoms. The PSPP is part of a broad legal framework of extraordinary monetary measures which provided results that ordinary actions were incapable of producing, given the circumstances of the financial crisis. A sign of conformation to this proposition was how the *Bundestag* promptly accepted the ECB's submission of documents providing further explanation on the reasoning behind its decisions and its proportionality review. In other words, the ECB knows what it's doing, and a higher (and almost irrational) degree of scrutiny would hamper much needed financial aid to the MS' suffering economies.

The ECB and its independence

It is essential to understand that the FCC's decision is, ultimately, about the nature of the European Monetary Union. Ever since the European sovereign debt crisis hit, the powers of the ECB have changed, growing enormously, and the decision is, in part, a reaction to that. Initially set up as a currency union with little solidarity between MS, limited risk-sharing was practised. One of the cornerstones was the principle of national fiscal responsibility, whereby each MS is responsible for its own debt and that neither the other MS nor the EU institutions, the ECB among them, should pay for them. In essence, ECB cannot be a lender of last resort to a MS – which amounts to the prohibition on monetary financing enshrined in the Treaties (Article 123/TFEU). However, due to the economic reforms which were considered politically and economically necessary, in the wake of the crisis, the principle of national fiscal responsibility has been eroded in the past few years (at least at a EU level), and discussion remains on whether we should work towards increased risk-sharing and solidarity in the future.

At its inception, the powers of the ECB were limited, constructed as an apolitical and independent expertise-based entity. This was the arrangement considered palatable to the MS, particularly to Germany and the *Bundesverfassungsgericht* – the framework of an apolitical institution focused on the technical intricacies of monetary policy, whereas the political realm would deal with economic and fiscal policy. In 2014, the ECB assumed

supervision of 120 major euro area banks, deemed by Mario Draghi as the “biggest step of European Economic integration since the inception of the euro.”. The Single Supervisory Mechanism framework, created under Article 127(6)/TFEU, grants the ECB sole licensing authority over all banks in participating EU member states with "close cooperation agreements" and makes it the prudential supervisor of these banks. Within the eurozone, the regulation gives the ECB responsibility for roughly 130 financial institutions with holdings of 85% of the banking assets.⁶⁰ It remains a central pillar of the European banking union and works in conjunction with the Single Resolution Mechanism, directly responsible for the resolution of the entities and groups directly supervised by the ECB.

The ECB declined to appear in the PSPP case, possibly fearing legitimising the idea that the FCC has jurisdiction over it. Nonetheless, it remains the main actor in this case. It was the ECB’s decisions, at the base of the PSPP⁶¹, that were, subjected to judicial review by the FCC. Article 130/TFEU and Article 7/ESCB and ECB Statute clearly state that the exercise of its powers and carrying out of its tasks should be done in total independence. This means that “neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or any other body. In the same spirit, “the Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or the national central banks in the performance of their tasks”. Furthermore, Article 14(3) of the Statute states that “The national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB.”. This constitutes primary EU law, enshrined in the Treaties, ratified by the German government.

If we take a look at the FCC judgment’s findings on the admissibility of the constitutional complaints brought to it by the 1747 individuals in Weiss, some of the applicants sought to challenge the decisions of the ECB and the *Bundesbank* to which the Court replied that, insofar they concerned these two institutions, these constitutional complaints were inadmissible. They were only admissible to the extent that they sought to

60 PwC (2014), EU regulatory outlook (Regulatory Brief). Available at: <https://www.pwc.com/us/en/financial-services/regulatory-services/publications/assets/fs-reg-brief-eu-bonus-cap-crd-iv-emir-aifmd.pdf>

61 ECB Decisions (EU) 2015/774; (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702, (EU) 2017/100

challenge the inaction of the German government and parliament with respect to the PSPP. The ECB and the *Bundesbank* were not parties to the proceedings and solely provided written input as interested third parties. Moreover, the FCC reviewed, arguably only incidentally, whether the ECB acted within its mandate to ascertain if it would be constitutionally appropriate for the German parliament and government not to engage in any action regarding the PSPP. But it did not stop there. The Court went on to find that the decisions of the ECB have no binding effect on Germany's public institutions, including the *Bundesbank*, which, again, was not a party to the proceedings. Furthermore, it declared that it could not participate in the implementation of the programme until the ECB's Governing Council adopts a new decision that includes a proportionality analysis that meets the unique requirements of the FCC, an issue which, as we've seen, has been resolved through the submission of further documentation by the Governing Council, further explaining the reasoning behind its decisions to adopt the PSPP.

Given this context and much in line with Professor Michael Waibel's reasoning⁶², it is, in fact, troubling that the Court fails to consider how the findings regarding third parties to these proceedings, such as the *Bundesbank*, and its barring from participation in the ECB's programme, impact the independence of central banks. The ruling refers to the ECB's independence solely four times, whereby one of which it elects it as one of the prominent reasons why the ECB's mandate needs to be narrowly construed. Not only do we have a jurisdictional problem, but we also find a certain degree of complacency towards another severe issue which is the potential undermining of the autonomy of central banks, particularly the ECB's independent role, as enshrined in the Treaties. This constitutes a novelty when it comes to the FCC's EMU case law and a real cause for concern for the ECB's carrying out of monetary policy in the future, namely the PEPP. The failure to engage with this issue of independence is a significant omission since it's not only guaranteed by EU primary law but is also enshrined in the *Grundgesetz*, from where the FCC derives its powers.

Interestingly, it is ironic to see that the FCC, who amended its Basic Law to be able to constitutionally guarantee an unprecedented degree of independence of the *Bundesbank* and

62 Hinarejos, A., Gehring, M., Waibel, Michael (2020), "Judicial independence under threat: The Court of Justice to the rescue" (Centre for European Legal Studies – University of Cambridge Webinar). Available at: <https://www.youtube.com/watch?v=9vqb9ZgglkM>.

the ECB, mounted the most significant challenge to the ECB's independence up to date. Furthermore, judicial review of monetary policymaking is unusual internationally. We could also argue that the EMU is a unique monetary union. But what's curious, as pointed out by Professor Michael Waibel, is the nature of the remedy that is the constitutional complaint in Germany. Besides the possible abstract violation of their right to democracy as understood in German constitutional law (which will be broached later), the complainants have suffered no injury. Absent *locus standi* restrictions, we face ourselves with a broad remit for judicial review of the conduct of monetary policy in the eurozone, something widely different from what happens with, i.e., the Federal Reserve System, where there are virtually no examples of successful judicial review proceedings concerning monetary policy. Questions have been raised on the extent that the possibility of judicial review helps improve central bank decision making and to what degree we need that possibility of judicial review for the accountability of a central bank in the unique setting that is the EU legal order. German constitutional law's arguably open-door invitation for constitutional complaints to be filed. Bearing this in mind, I reckon it will be likely that a similar action is brought regarding the PEPP programme, as we have seen with the OMT programme and PSPP.⁶³

In conclusion, as a result of the PSPP ruling, the ECB and its independence face possibly damaging consequences. Levels of distrust in the ECB have gone down ever since the start of the crisis, and this sentiment has arrived in Germany – to the point that the stability of what is enshrined in EU and German Constitutional Law is being undermined, albeit in the name of German Constitutional Law. Although one could argue that the ECB and the EMU, in general, has been very successful in tackling the challenges with which it was presented over the last decade, its growing powers are a cause for concern for those who share a more restrictive view on the *Integrationsprogramm* and further highlights the underlying tensions between European and domestic agendas.

63 See *Ibid.*

Risks for Future ECB Programmes

On 18 March 2020, the ECB decided to launch the new Pandemic Emergency Purchase Programme⁶⁴, a temporary non-standard monetary policy measure to “counter serious risks to the monetary policy transmission mechanism and the outlook for the euro area posed by the coronavirus (COVID-19) outbreak”⁶⁵. In a nutshell, it is aimed at ensuring that euro area MS will enjoy low funding costs during the crisis triggered by the pandemic by purchasing private and public sector securities. This extraordinary monetary policy measure is much in line with other non-standard measures adopted by the ECB since 2012 and that have already been mentioned in this paper. These include the SMP, the OMT, and Asset Purchase Programmes package (where the PSPP is included). The current envelope for the programme stands at 1850 billion euros, and all assets categories eligible under the APP are also eligible under the PEPP. Moreover, as Greece regained market access and the country successfully completed its ESM programme in August 2018, a special waiver for Greek securities was granted.

As previously mentioned, the risk of the ECB’s measures being considered tools that circumvent the monetary financing prohibition (set by Article 123/TFEU). As the space for risk-sharing across the eurozone increases due to economic circumstance, the room for political controversy and litigation is equally likely to gain traction. It is inherent to the confederate nature of the EU and to the economic impact that the ECB’s programmes carry with them. This is especially true if those programmes look to alleviate certain limitations present in previous ones, which might reflect a trend of growing flexibility, much to the dismay of orthodox economists and professors. We can find examples of this flexibility in the PEPP: in what concerns the allocation of purchases amongst MS, whilst they are conducted based on each country’s share in the ECB’s capital (capital key), the programme allows for “fluctuations in the distribution of purchase flows over time, across asset classes and among jurisdictions”⁶⁶ According to Professor Annamaria Viterbo, one could presume that this degree of flexibility has been extended to the PSPP. In March, April and May 2020,

64 ECB Decision (EU) 2020/440.

65 European Central Bank (2021), *Pandemic emergency purchase programme*. Available at: <https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html>.

66 ECB Decision (EU) 2020/440.

the Eurosystem's purchases under the PSPP deviated significantly from the capital key, where Italian bonds were purchased above capital key and those of German bonds below⁶⁷, as the spread between Italian and German borrowing costs has widened⁶⁸. Moreover, there are no purchase limits to avoid the Eurosystem becoming a predominant creditor of certain euro area countries, as the PEPP does not contain the issue and issuer limits present in the PSPP.

Since the day that it has been announced, spreads have fallen and a deflationary spiral has been avoided. The PEPP can, in fact, be considered an appropriate tool to respond to the economic crisis caused by the COVID-19 pandemic. However, it is no secret that some of the programme's features seem to clash with the FCC's interpretation of Article 123/TFEU, given in its PSPP ruling. If we read *Gauweiler* and *Weiss*, we can easily infer the interpretative criteria used by the ECJ to assess the compatibility of the PEPP with EU law. Firstly, the programme could not have an equivalent effect to that of a direct purchase of bonds on primary markets. Secondly, sufficient safeguards have to be put in place to ensure that the issuing country maintains the pursuance of a sound budgetary policy. These safeguards include the temporariness and volume of the programme, purchase limits per issue and issuer and the adoption of strict eligibility criteria. However, these limits mentioned in *Gauweiler* and *Weiss* and present in the OMT and PSPP programmes do not amount to necessary requirements and can be relaxed or recombined depending on "particular features of the programme (...) and on the economic context"⁶⁹. Contrastingly, the FCC's view, the only reason why the PSPP does not violate Article 123/TFEU is that those requirements are strictly observed. The effects of this may stiffen the interpretative criteria adopted by the ECJ, which in turn could reduce the ECB's ability to adopt further measures to achieve price stability. For the PEPP specifically, there are no purchase limits, there is evident flexibility in the allocation of purchases according to the capital key and the possibility of granting future *ad hoc* waivers remains. On the other hand, regarding the purchase limits, the FCC affirmed that "only on this condition can it be assumed that the market is not dominated by the Eurosystem" (para.203); concerning the capital key, it states that any departure from that criterion would be an unequivocal signal that bond purchases

67 Data on PSPP monthly net purchases at country level are regularly published by the ECB. Available at: www.ecb.europa.eu.

68 Arnold, M., Stubbington, T. (2020), *German court calls on ECB to justify bond-buying programme*. Available at: <https://www.ft.com/content/a1beda5e-5c2d-429e-a095-27728ed2d72b>.

69 Judgment of 11 December 2018, *Heinrich Weiss and Others*, C-493/17, EU:C:2018:1000, cit., para. 108.

are intended to meet the specific needs of countries in distress; and as far as the eligibility requirements are concerned, the FCC warns that lowering the criteria below a particular credit rating (Credit Quality Step 3) would “no longer meet the standards mentioned above in terms of credit quality assessment” (para. 208).

In conclusion, a new constitutional complaint on the PEPP looks very likely. The FCC’s reasoning in its PSPP ruling and the absence of its specific requirements in the PEPP constitute the perfect opening for further questioning of the ECB’s actions. Its strict interpretation of the ECB’s monetary policy mandate and Article 123/TFEU would likely result in it considering the PEPP as a measure diverting certain countries from pursuing sound fiscal policy, thus violating Article 123/TFEU. This would hamper the ECB’s credibility and its ability to adopt further exceptional measures to pursue its monetary goals. The situation is bound to bring other challenges to EU law and the certainty of the ECB’s programmes, with the markets and interest rates of the sovereign debt of MS likely to suffer as a consequence.

Chapter 4

Concluding Remarks

As previously stated, we believe that the PSPP decision will by no means be the last time we hear the FCC rule on prevailing EU law matters. Illustrative of this was the Court's recent order – issued on 26 March 2020 - to temporarily stop the ratification procedure of the new European Own Resources Decision (by the German constitutional bodies, which would allow the EC to issue bonds on the markets to finance the *NextGenerationEU* programme amounting to 750 billion euros in grants and loans to support MS, part of the MFF for 2021-2027. The Decision provides for a permanent increase in the ceiling of own resources available to the EU, allowing it to accommodate the additional funding obtained from the planned bond issue as well as an additional temporary increase to be employed exclusively for servicing the debt taken on to create the recovery fund. According to the special legislative procedure set out in Article 311 TFEU, the council unanimously adopted the decision after consulting the European Parliament. Before entering to force, the decision has to be approved by each Member State in accordance with their respective constitutional requirements.⁷⁰ On the day the Court's order was issued, the *Bundesrat* approved the decision unanimously, following the vote to ratify by more than a two-thirds majority by the *Bundestag* only to leave the final part of the ratification - the President's signature and promulgation – undone. Questions could be raised on whether or not Union is unduly limited by the unanimity rule or by a national court's blockade in its ability to mobilise resources in emergency situations that require expedited action in the common interest of Europeans. But then again, the EU comprises 27 different MS, each with its own political agenda and constitutional identity. We would argue that this balance should not be tampered with and can be effective amidst cooperation and solidarity.

This came to be after a group of around two thousand German citizens lodged a complaint with the Constitutional Court, arguing that Article 311 TFEU prohibited EU from issuing public debt as it states that “Without prejudice to other revenue, the budget shall be financed wholly from own resources” and that a decision allowing for the issuance of debt

⁷⁰ European Parliament (2021), National ratification of the Own Resources Decision (2021-2027 MFF Briefing). Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690520/EPRS_BRI\(2021\)690520_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690520/EPRS_BRI(2021)690520_EN.pdf).

was, you guessed it, *ultra vires* and in “flagrant violation of the EU Treaty”⁷¹. Moreover, the claimants argued that the approval of the ORD would violate the rights of the *Bundestag* by making Germany liable for the approximately 1 trillion euro in interest and principal that must be repaid. With the PSPP ruling in mind, the fear that both the MFF and the 750 billion euro recovery fund might have been halted, as the Court might have granted the application for a preliminary injunction which would mean a considerable length of time for the conducting of review, which in turn might have involved a referral to the ECJ. We argue that, and much in line with the Commission’s reasoning⁷², Article 311 covers the validity of the decision’s major innovation – borrowing for spending. Article 311(1) states that “The Union is allowed to provide itself with the means necessary to attain its objectives”, whereby a competitive social market economy and solidarity amongst MS can be considered as such. According to the Article’s second paragraph, the financial means come predominantly but not exclusively, from own resources; therefore, some discretion is enjoyed as to the choice of necessary means and borrowing constitutes as such, in order to tackle the exceptional consequences of the crisis in the short-term without compromising national debt levels in the medium to long-term. In the EC’s words, whilst it constitutes non-standard practice regarding Union financing: “It is justified as a temporary and exceptional solution in the context of the current crisis.”.

Thankfully, further claims of validity were not necessary (for the time being) as the Second Senate’s verdict⁷³ soon ensued – on 15 April 2021 – by which it rejected an application for a preliminary injunction against the promulgation of the act ratifying the ORD. The FCC concluded, upon summary examination, that it did not appear highly likely that the Court will find a violation of the principle of budgetary responsibility of the *Bundestag* (Article 79(3) *Grundgesetz*) in the main proceedings and therefore considered that “the consequences that would arise if the preliminary injunction sought were not issued, but the act of approval was later found to be unconstitutional are less severe than the consequences that would arise if the preliminary injunction were in fact issued, but the constitutional complaints lodged by the applicants ultimately turned out to be unfounded in

71 See Cruz Vilaça, J. L. (2021), “The German Constitutional Court calls into question the Recovery and Resilience Plan”. Available at: <https://www.cruzvilaca.eu/en/news/The-German-Constitutional-Court-calls-into-question-the-Recovery-and-Resilience-Plan/138/>.

72 European Commission (2020), *Q&A: Next Generation EU - Legal Construction*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1024

73 BverfG, Order of the Second of 15 April 2021, 2 BvR 547/21, See Press Release No. 29/2021 of 21 April 2021.

the principal proceedings.”⁷⁴

At first glance, the decision appears to be a victory for the EU’s financial recovery and thereby for European solidarity. However, the *Bundesverfassungsgericht* also states that the constitutional complaint “is neither inadmissible from the outset nor clearly unfounded: the applicants have demonstrated that it is at least possible that domestic ratification could encroach upon the constitutional identity of the Basic Law (...) or that the decision to be ratified might exceed the EU integration agenda in a manifest and structurally significant manner.” (Honeywell). It further noted that it would conduct a thorough examination of the constitutional issues raised by the applicants, such as: whether the increase of Germany’s liability for EU debt would go beyond the 190 billion euro threshold set under the ESM; whether the ORD could, in fact, undermine Germany’s budgetary autonomy to the degree that violates the limits set by Article 79 of the Basic Law; and whether the ORD is compatible with the “no bailout clause” (Article 125 TFEU) and the requirements established by Article 311 TFEU. In other words, we are yet to hear the last from Karlsruhe on the matter.

Fundamentally, one could say that common sense has prevailed. The most recent FCC decision, perhaps partly due to its recent change in composition⁷⁵, has unblocked the creation of the EU’s main crisis fighting programme. However, we would be naïve in thinking that the FCC will drastically revert its frugal stance on European financial assistance. According to Professor da Cruz Vilaça: “In a way, the German Constitutional Court has built itself up, in European matters, as a defender of a strict constitutional nationalism, incompatible with Germany’s commitment to European integration.”⁷⁶ The PSPP decision reflects this attitude, and whilst the FCC did not bite (or bite hard, depending on the perspective), it has definitely growled. Even though the submission of documents by the ECB providing further justification for its PSPP programme was deemed satisfactory, it is not clear that this will be enough concerning future monetary policy mechanisms, such as the PEPP, which is different for the reasons we already mentioned.

⁷⁴ *Ibid.*

⁷⁵ Chambers, M., Escrib, T. (2020), “Changing of guard at top German court signals de-escalation for ECB”. Available at: <https://www.reuters.com/article/us-germany-court-ecb-analysis-idUSKBN23S0NS>

⁷⁶ Cruz Vilaça, J. L. (2021), “The German Constitutional Court calls into question the Recovery and Resilience Plan”. Available at: <https://www.cruzvilaca.eu/en/news/The-German-Constitutional-Court-calls-into-question-the-Recovery-and-Resilience-Plan/138/>

By way of conclusion, the PSPP was a landmark decision that, in part, reflected the current state of affairs in Europe. Nationalism is on the rise, the rule of law is being seriously hindered within MS, we're currently amidst a public health and ensuing economic crisis, and the EU's most influential national court issued a verdict claiming that increased solidarity in the form of sovereign bond-buying at the EU level encroached upon the German Constitutional tenets. The *Bunfesverfassungsgericht* has historically reserved itself the last word on the legality of European policy, which should be left to the ECJ. This begs the question: is there an effective primacy of European rules over national rules? And perhaps most importantly: is there a clear boundary between the constitutional integrity of the EU and the constitutional identity (and inherent idiosyncrasies)? We argue that these intrinsic tensions of a *quasi*-federation leave the door open for future contention of EU acts by conflict with the national constitutional and legal order. If constitutional pluralism is to succeed as a model for the European legal order, when faced with competing claims of final authority, both national and European orders must "share the same commitment to a coherent legal order and be willing to adjust their competing claims in accordance with a minimal set of discourse principles",⁷⁷ such as the engaging in a "coherent construction"⁷⁸ of said order. According to Professor Poiares Maduro⁷⁹, by way of preventing constitutional conflicts, EU law must adapt itself to national claims by enhancing national courts' role, higher discretion regarding areas (such as Fundamental Rights), and national courts should, on the other hand, recognize that they won't review the validity of specific EU legal acts in light of national constitutional law (which is what the FCC arguably did). Furthermore, he argues that claims of ultimate authority should only be exercised in the event of a systematic conflict between the integrity of the EU legal order and the integrity of the national constitution, in which case national constitutional courts could still affirm their ultimate sovereign authority either at the moment of constitutional ratification (such was the case with the suspension of the ORD Act) or by creating a situation of constitutional exit (as we've seen with Brexit). Whilst we believe in Germany's commitment to the European project, the constitutional relationship between the EU and its largest contributor has gradually become more delicate over the years, with the PSPP decision signalling the biggest blow to it yet.

77 Poiares Maduro, M. (2003). *Contrapunctual Law: Europe's Constitutional Pluralism in Action, in Sovereignty in Transition* (Edited by Neil Walker), Hart Publishing, cit., p.527.

78 *Ibid.*

79 *Ibid*, cit., pp. 533-534

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