



## **Saar Expert Papers**

*Thomas Giegerich*

Putting the Axe to the Root of the European Rule of Law – The Recent Judgment of the German Federal Constitutional Court on the Public Sector Asset Purchase Programme of the European Central Bank

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## **Preface**

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## A. The Judgment of the German Federal Constitutional Court in Brief

On 5 May 2020, the German Federal Constitutional Court (FCC) in Karlsruhe gave judgment in the constitutional complaint proceedings concerning the programme for the purchase of public sector securities (PSPP) of the European Central Bank.<sup>1</sup> In essence, it has decided,

- that the ECB had neither examined nor demonstrated that its measures complied with the principle of proportionality, with the result that the PSPP was an *ultra vires* act from a procedural perspective;
- that the judgment of the European Court of Justice to the contrary<sup>2</sup> was based on an interpretation of the Treaties that was patently untenable, *i.e.* objectively arbitrary, and was therefore not binding as an *ultra vires* act;
- that the German Federal Government and Parliament, by failing to take appropriate measures to remedy the situation, disregarded their constitutional responsibility with regard to European integration and violated the complainants' right under the first sentence of Art. 38 (1) in conjunction with Art. 20 (1) and 20 (2) in conjunction with Art. 79 (3) of the German Basic Law (BL);
- that German constitutional bodies, authorities and courts were prohibited from participating in the implementation of the PSPP;
- that this applied also to the German Federal Bank "after a necessary transitional period of no more than three months for coordination within the European System of Central Banks", "unless the Governing Council of the ECB demonstrates in a new decision in a comprehensible manner that the monetary policy objectives pursued with the PSPP are not disproportionate to the associated economic and fiscal policy effects";
- that the German Federal Bank was obliged to ensure that the public sector securities holdings were reduced in a coordinated manner within the framework of the ESCB – also on a long-term basis – in view of the purchases made under the PSPP.

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<sup>1</sup> 2 BvR 859/15 etc. (English translation available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505\\_2bvr085915en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html)).

<sup>2</sup> ECJ, judgment of 11 December 2018 (C-493/17), ECLI:EU:C:2018:1000.

The FCC dismissed the further challenge to the PSPP based on Art. 123 (1) TFEU (prohibition of monetary financing of Member States by the ESCB), reluctantly following the ECJ in this regard.

This judgment marks a low point in the changeful relationship between the FCC and the ECJ<sup>3</sup> and threatens the survival of the European Union as a union based on law because it is based on a deliberate breach of EU law which the FCC justifies by reference to allegedly overriding *jus-cogens*-elements of the German constitution.

## **B. Evaluation from an EU Law Perspective**

### **I. Delimitation of Competences in the European Economic and Monetary Union**

The European Economic and Monetary Union has been a source of controversy from the outset in 1993, in particular in Germany which had always been so proud of its strong and stable Deutsche Mark currency and was very reluctant to transfer monetary sovereignty to the EU. Measures taken to overcome the Euro crisis since 2010, which ultimately include the PSPP programme that is the subject of the FCC procedure at hand, have been particularly controversial.

In pursuit of its objective to maintain price stability, the ECB defines “price stability” as an inflation rate of approximately 2%. Since the Euro crisis, the inflation rate in the Euro zone has been much lower than 2 % and the ECB feared deflation with ensuing business failures, unemployment and other negative effects. In order to pump money into the market and increase the inflation rate, the ECB first gradually lowered the base interest rate down to 0 %, in parallel with other central banks around the world. Thereafter, and again in parallel with many other central banks, the ECB started the PSPP programme, purchasing public sector securities (*i.e.* government bonds issued by EU Member States) on a massive scale on the secondary market.<sup>4</sup> The compatibility of that programme with the Treaties and the German Constitution was the main issue of the FCC proceedings.

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<sup>3</sup> See Giegerich, Zwischen Europafreundlichkeit und Europaskepsis – Kritischer Überblick über die bundesverfassungsgerichtliche Rechtsprechung zur europäischen Integration, ZEuS 19 (2016), 3 ff.

<sup>4</sup> See margin notes 2 ff. of the FCC judgment.

The exact delimitation of the exclusive EU competence for the monetary policy of the Euro States (Art. 3 (1) lit. c TFEU) and the competence for economic and fiscal policy, which has remained predominantly, but by no means exclusively, with the Member States (Art. 119 ff. TFEU), is a matter of considerable dispute. The same applies to the legal assessment of the PSPP programme. Therefore, everything ultimately depends on who is called upon to make this assessment. There can be no serious doubt about that: It is the ECJ – the court common to all the nineteen Euro States –, and not the FCC as the court of a single Member State.

## **II. Patent Violation of Art. 267 (3) TFEU by FCC**

The FCC's refusal to follow the ECJ with regard to the compatibility of the PSPP with EU law patently violates Art. 267 (3) TFEU. As a last instance court, the FCC was obliged to refer relevant questions concerning the ECB's powers to the ECJ which it did.<sup>5</sup> The ECJ's preliminary ruling binds the referring court.<sup>6</sup> If the latter is dissatisfied because it finds that not all its questions have been answered exhaustively, it must make a new reference. There is no other way to preserve legal unity in Europe, and without the uniform and effective enforcement of Union law, the EU cannot survive, because it is a Union based on law.

The Luxembourg Court may well be criticised for not taking the doubts of the FCC concerning the proportionality of the PSPP more seriously and dispelling them by more thorough reasoning. Perhaps it misunderstood the FCC's approach. Yet, this does not legitimise the FCC's refusal to abide by that judgment and least of all the brutal dressing-down of the ECJ in the German court's reasoning. On a side note, I wonder whether the aggressive language is a sign of the FCC's strength or rather its weakness *vis-à-vis* European developments that decrease the influence of national courts in favour of the ECJ, in parallel to the growing influence of EU law.

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<sup>5</sup> BVerfGE 146, 216, English translation available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718\\_2bvr085915en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718_2bvr085915en.html).

<sup>6</sup> See the ECJ's Press Release No. 58/2020 of 8 May 2020 with further references.

### **III. Potential Misreading of Art. 127 (1) TFEU and Art. 5 (4) TEU**

The FCC's application of substantive EU law is far from obvious. The FCC criticises the ECB and the ECJ for having misapplied the principle of proportionality when delimiting the monetary powers of the ESCB in relation to the competences of the Member States with regard to economic and fiscal policy. In particular, the FCC finds fault with the ECB's and the ECJ's failure to balance the positive effects of the PSPP on price stability with its potential negative effects on Member States' economic and fiscal policies.

The FCC's criticism of the ECB and the ECJ may well be based on a misreading of both Art. 127 (1) TFEU and Art. 5 (4) TEU. According to Art. 127 (1) TFEU, the primary objective of the ESCB shall be to maintain price stability. "Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Art. 3 of the Treaty on European Union." The provision could be read to authorise the ECB to maintain price stability regardless of cost – no matter what consequences that may have for the economic and fiscal policies of the EU and Member States. The ECB's commitment to the primary objective of price stability was indeed enshrined in the TFEU on German insistence. It is accordingly questionable whether the ECB is even permitted to undertake the balancing required by the FCC, not least because that would empower it to make a political decision on the relative importance of certain positive and negative consequences even though it is independent and not subject to much democratic control by the European Parliament or national parliaments.<sup>7</sup>

Art. 5 (4) TEU, which defines the principle of proportionality in its function as an instrument for governing the use of EU competences, does not include any requirement of balancing of competing policy goals either. It only says that "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." This differs significantly from the definition of the principle of proportionality in its function as a limitation on governmental interferences in fundamental rights in Art. 52 (1) sentence 2 of the EU

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<sup>7</sup> See in this sense Bofinger and others, Gefahr für die Unabhängigkeit der Notenbank, Frankfurter Allgemeine Zeitung, 29 May 2020, 18; Schelkle, Auf Wüstenwanderungen, Frankfurter Allgemeine Zeitung, 18 June 2020, 6. But see Lucke, Kritiker des EZB-Urteils sollten die Logik achten, Frankfurter Allgemeine Zeitung, 16 June 2020, 18.

Charter of Fundamental Rights (CFR). According to the latter provision, limitations of fundamental rights will only be proportionate if they are “necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.” This formulation indicates the need to balance competing interests or rights in addition to demonstrating the necessity of the fundamental rights limitation.

In other words, the FCC’s own approach to delimiting the ECB’s powers and obligations is questionable. It may or may not be correct, but it is certainly not sound enough to accuse the ECJ of arbitrariness for not having used that same approach. I will return to this issue later.

## **C. Evaluation from a German Constitutional Law Perspective**

### **I. Admissibility Stage: Overextension of Art. 38 (1) BL Impedes European Integration**

To readers who are not familiar with the intricacies of German constitutional procedure, it may seem extraordinary that the FCC considered as admissible constitutional complaints by individuals which are essentially directed against ECB decisions on general monetary policy in the Euro area that affect millions of European, but no individual in particular. Yet that result is based on settled FCC case law. For many years, the FCC has permitted all persons eligible to vote in German federal elections to lodge constitutional complaints based on the argument that a certain EU measure was *ultra vires*, that the German government and parliament had not reacted properly and failed to implement the principle of conferred powers (Art. 5 (2) TEU) *vis-à-vis* such *ultra vires* acts, in violation of their constitutional responsibility with regard to European integration, and that in order to uphold that principle the challenged EU act was inapplicable in Germany and must not be implemented by German authorities.<sup>8</sup>

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<sup>8</sup> In a similar case concerning Outright Monetary Transactions of the ECB, two dissenting judges in 2014 argued that the constitutional complaints were inadmissible (BVerfGE 134, 366 [419 ff.]; English translation available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114\\_2bvr272813en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html)). These two judges have meanwhile retired. The judgment of 5 May 2020 reveals that it was adopted by 7:1

That case law has practically opened the floodgates to all German Eurosceptics for constitutional complaints about each and every step toward deeper integration and transformed the FCC into a general supervisory authority of German and European integration policy decisions. The basic idea is that each and every decision-making power either transferred to or wrongly exercised at EU level diminishes the powers of the German parliament and thereby devalues the right to vote for that parliament enshrined in Art. 38 (1) BL. The right to vote has thus been transformed from a right to participate in general, free, fair and equal federal elections into a substantive claim for preserving the powers of the elected parliament *vis-à-vis* supranational authorities.

This amounts to an overextension of Art. 38 (1) BL which has deliberately been turned into an obstacle to European integration and a source of enormous powers for the FCC which functions as the gatekeeper. It is worthwhile remembering that the first case in which Art. 38 (1) BL was thus extended in 1993 concerned the Treaty of Maastricht by which Germany transferred its monetary sovereignty to the EU.<sup>9</sup> The establishment of a monetary union of the Euro States has ever since been challenged by a vocal minority in Germany whose criticism has been met with open ears in Karlsruhe.<sup>10</sup>

## II. Merits Stage: *Ultra Vires* Review of ECJ Decisions

### 1) Misapplication of the FCC's Own Review Standard

The FCC has long claimed the power of *ultra vires* review of EU acts, including decisions of the ECJ,<sup>11</sup> and now for the first time actually used that purported competence to overrule a judgment of the Luxembourg Court. The FCC's claim of that review power is based on a specific interpretation of the German constitution with which I will deal in the next paragraph of my presentation. Before, however, I want to show that the Court misapplied its own review standard which necessitated a

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votes (margin note 237). The anonymous dissenting judge did not write an opinion so that we do not know the reasons for his or her dissent.

<sup>9</sup> BVerfGE 89, 155.

<sup>10</sup> See BVerfGE 142, 123; English translation available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621\\_2bvr272813en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html).

<sup>11</sup> See in particular BVerfGE 126, 286; English translation available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706\\_2bvr266106en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html).

showing that the pertinent ECJ judgment was based on an interpretation of the Treaties that was patently untenable, *i.e.* objectively arbitrary, and obviously exceeded the mandate given to it in Art. 19 (1) sentence 2 TEU and caused a structurally significant shift of competences from the Member States to the EU.

As I've already explained, the FCC's bone of contention is the ECJ's failure to determine whether the ECB balanced the positive effects of the PSPP on price stability with its potential negative effects on Member States' economic and fiscal policies. The FCC reproached its EU counterpart for not having used the same standard of proportionality review in a case of competence delimitation in the quasi-federal system of the EU that is commonly used in cases of interference in fundamental rights. In the eyes of the FCC this was methodologically totally unsound.

But was it? As a matter of fact, according to the FCC's own case law which it forgot to cite in this judgment, the principle of proportionality is completely inapplicable in cases concerning the delimitation of powers between the Federal Government and the constituent States in Germany because of the major differences between those cases and cases concerning interferences in fundamental rights.<sup>12</sup> On the EU level, however, the FCC wants the principle of proportionality to be applied in exactly the same way in both types of cases, despite their differences, despite the different wording of Art. 5 (4) TEU and Art. 52 (1) sentence 1 CFR and without giving any explanation for treating EU quasi-federalism differently from German federalism. Doesn't this expose the FCC's own method as untenable, arbitrary and irrational?

Above I've already explained that the FCC's criticism of the ECB and the ECJ may well be based on a misreading of both Art. 127 (1) TFEU and Art. 5 (4) TEU. It is not necessary to enquire further into the proper reading of these two provisions. It is sufficient to demonstrate that the application favoured by the ECJ is not patently untenable and utterly arbitrary and irrational, in contrast to the assertion of the FCC. I believe that I have been able to demonstrate as much. And as I've already stated, the FCC could have made another reference to the ECJ in order to obtain further clarifications on the operation of the principle of proportionality in the case at hand if it considered that to be necessary. This would of course have further delayed the proceedings, but they were of no particular urgency, having already lasted five years. It would also have been required by the constitutional principle of friendliness towards

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<sup>12</sup> BVerfGE 81, 310 (338) and headnote 5.

EU law.<sup>13</sup> Did the FCC refrain from a second reference because they were waiting for an opportunity to bash the Luxembourg Court and demonstrate to everyone that Karlsruhe is a force to reckon with at EU level?

## 2) Incorrectness of the FCC's Review Standard from a Constitutional Point of View

I now turn to the construction used by the FCC to derive its power of *ultra vires* review from the German Constitution. In a simplified version, the FCC proposes that the German Constitution prohibits the incorporation of Germany into a European federal State. From that presupposition the FCC concludes that German institutions, deriving their democratic mandate from the German people, must always have the final say on the extent of EU competences which supplant German competences. Therefore, ECJ decisions on the delimitation of competences between the EU and Member States must be subject to final review by the FCC. Yet, neither the FCC's proposition nor its conclusion is correct from a constitutional point of view.

Contrary to the FCC's proposition, the dream of the founding generation of the Federal Republic of Germany that put the BL in force in 1949 was the establishment of the "United States of Europe". The authors of the BL wanted to make German participation in that European unification project as easy as possible. They thus authorised the legislature in Art. 24 (1) BL to transfer sovereign powers on intergovernmental entities by a simple majority in order to realise the goal enshrined in the preamble – that the German people (not: State!) would serve the peace of the world as an equal member in a united Europe. On that basis, the German Parliament in 1950 almost unanimously proposed the conclusion of a European Federal Pact in order to bring to an end the "fragmentation of Europe into sovereign States".<sup>14</sup>

The FCC invented its own proposition that the BL prohibited Germany from becoming part of a federal Europe only in 2009.<sup>15</sup> The Court did so when it was called upon to decide about the constitutionality of the Treaty of Lisbon which obviously and admittedly did not establish a European federal State. Wasn't that a judicial *ultra vires*

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<sup>13</sup> For that principle, see BVerfGE 123, 267 (347).

<sup>14</sup> Bundestags-Drucksache 01/1193 of 19 July 1950, available at <http://dipbt.bundestag.de/doc/btd/01/011/0101193.pdf>.

<sup>15</sup> BVerfGE 123, 267.

act – basing a judgment on a constitutional interpretation not required by the facts of the case and turning that interpretation into the *ratio decidendi*?

But even if one assumes that the FCC's proposition is correct, in other words that the BL does indeed prohibit German participation in a European federal State, its conclusion that German courts always need to retain the final say on the extent of Germany's European and international obligations simply does not follow. On the contrary, the BL expressly provides that Germany "accede to agreements providing for general, comprehensive and compulsory international arbitration" for the settlement of international disputes (Art. 24 (3) BL). Quite obviously, this obligation includes Germany's subjection to final decisions by international courts on the extent of its international obligations without any possibility of review by German courts.

Not even the alleged democratic deficit of the EU in general or the ECB in particular can mitigate the power usurpation by the FCC,<sup>16</sup> because European monetary policy "made in Karlsruhe" may have serious effects outside Germany, but it definitely has no democratic legitimacy whatsoever beyond German borders. From the perspective of other Member States, the FCC's case law may well be interpreted as an attempt at establishing German hegemony over the EU. The FCC's claimed review competences do not even promote democracy in Germany, because they extend its own judicial powers at the expense of the powers of the elected German parliament.

### **III. No Possibility of Correction by Constitutional Amendment**

The most disconcerting problem with the FCC's erroneous constitutional proposition and conclusion is that they cannot even be corrected by constitutional amendment because the FCC bases them on a wrong interpretation of the constitutional principle of democracy which is not subject to constitutional amendments, pursuant to Art. 79 (3) read together with Art. 20 (2) BL. In other words, the FCC's self-made position as the ultimate arbiter of German and European integration policy decisions is unchangeable by any means short of the making of an entirely new constitution for Germany. Yet, the FCC went further by indicating without deciding that even the German *pouvoir constituant* could be prevented from permitting the transfer of German sovereignty to a European federal state.<sup>17</sup> That interpretation of the

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<sup>16</sup> But see Grimm, Jetzt war es soweit, Frankfurter Allgemeine Zeitung, 18 May 2020, 9.

<sup>17</sup> BVerfGE 123, 267 (343) margin note 217.

unchangeable principle of democracy is false because the Court pretends that principle to enshrine German sovereign statehood which the BL wanted to overcome in favour of a new model of statehood open to supranational integration in a democratic form.

The gist of the matter is that the FCC treats the EU as a threat to German constitutionalism that needs to be held at bay. The Court should rethink that approach and rather qualify European constitutionalism as a chance to consolidate the constitutional values shared by the Member States, including democracy and the rule of law, and jointly protect and promote them in Europe and the wider world. Today, it is more urgent than ever for the friends of constitutionalism to join forces transnationally.

## **D. Potential Collateral Damage Caused by FCC Judgment**

### **I. Undermining the Authority of the ECJ: Likely Repercussions**

By reproaching it with a perversion of justice, the FCC has undermined the authority of the ECJ on which the survival of the EU as a union based on the rule of law depends. There will almost certainly be imitators, first and foremost in Poland where the independence of the judiciary has been under mounting threat from the political majority. In that ongoing constitutional crisis in Poland, the last bastion of hope for the defenders of judicial independence has so far been the ECJ.<sup>18</sup> I suspect that the Polish constitutional court will shortly declare the decisions of the ECJ in support of the Polish judges to be *ultra vires* and non-binding. That would deal a severe blow to the constitutional value basis of the European Union. It would at the same time raise questions with regard to the constitutional precepts of Germany's EU membership which require that the EU "is committed ... to the rule of law" (Art. 23 (1) sentence 1 BL).

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<sup>18</sup> ECJ, Case C-619/18, ECLI:EU:C:2019:531; Case C-192/18, ECLI:EU:C:2019:924; Case C-791/19 R, ECLI:EU:C:2020:277.

## **II. Possible Infringement Procedure against Germany (Art. 258, 259 TFEU)**

Either the Commission or another Member State may well consider initiating an infringement procedure against Germany because they find the prospect of European monetary policy being made by a German court unacceptable. If the Polish Constitutional Court follows the FCC's *ultra vires* review in the matter of judicial independence, the Commission will have no choice but filing suit against both Germany and Poland in order to protect the authority of the ECJ on which the effectiveness of EU law is based. Otherwise it would abandon its obligation "to ensure the application of the Treaties" (Art. 17 (1) sentence 2 TEU). Undoubtedly, the ECJ would convict a Member State whose courts openly defied its preliminary rulings. But would that contribute to a settlement of the dispute between the European and national judiciaries or rather exacerbate it?<sup>19</sup> The national courts might feel inclined to invoke national constitutional identity pursuant to Art. 4 (2) TEU as justification for their refusal to follow the new ECJ judgment despite Art. 260 (1) TFEU. The Commission would then consider enforcement action under Art. 260 (2) TFEU – how far would the escalation spiral go? Would infringement procedures promote or rather impede future cooperation between the national courts and the ECJ?

## **III. FCC Cuts the Ground under Its Own Feet**

If judgments of the ECJ can be classified as non-binding *ultra vires* acts, can the same not also be done regarding decisions of the FCC? Does the FCC feel so secure in its authority that it does not see the danger of becoming the target of its own weapon one day? That it had better do at a time when the independence of the courts worldwide is under attack from populist forces. Instead of cutting the ground under each other's feet, the national constitutional and supreme courts, the ECJ and the European Court of Human Rights should join forces to preserve democracy and the rule of law in Europe.

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<sup>19</sup> See Calliess, *Äpfel und Birnen*, *Frankfurter Allgemeine Zeitung*, 18 June 2020, 6.

## **IV. Positive Consequence: Amount and Severity of Criticism of the FCC Judgment Inside and Outside Germany**

The FCC judgment has met with approval, but also provoked criticism in Germany and other European States which is unusual both in its amount and severity.<sup>20</sup> If that induces the FCC henceforth to use a more cautious approach to the European rule of law, the damage it has inflicted may ultimately be mitigated to a certain extent. That criticism may also help to discourage other national courts from following the FCC down the slippery slope to national cherry-picking of EU law obligations.

## **E. Is there a Way Out of the German Federal Bank's Dilemma?**

The German Federal Bank now finds itself in a dilemma, being subject to incompatible legal obligations.<sup>21</sup> Pursuant to EU law, it is bound to participate further in the PSPP in its capacity as a member of the ESCB (Art. 282 TFEU). As a German national institution, it is bound by the FCC judgment<sup>22</sup> that prohibits it from fulfilling its EU law obligations. We know that EU law claims primacy over national law,<sup>23</sup> but the German constitution, as interpreted by the FCC, denies that primacy in the concrete case, allegedly for the sake of maintaining the principle of democracy in Germany, in reality for the sake of reinforcing FCC guardianship over European integration.

Is there a way out of the German Federal Bank's dilemma in this particular case?

Yes, probably, if all involved keep their nerves, first and foremost the FCC that cast the first stone.

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<sup>20</sup> For a sample, see the contributions in *Europäische Zeitschrift für Wirtschaftsrecht*, issue 12/2020, 29 June 2020 (forthcoming). See also Kyriazis, *The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango*, *European Law Blog*, 6 May 2020; Mayer, *Auf dem Weg zum Richterfaustrecht?*, *Verfassungsblog*, 7 May 2020; Davies, *The German Federal Supreme Court Decides Price Stability May Not Be Worth Its Price*, *European Law Blog*, 21 May 2020; Kelemen and others, *National Courts Cannot Override CJEU Judgments*, *Verfassungsblog*, 26 May 2020; Baranski and others, *Unquestioned supremacy still begs the question*, *Verfassungsblog*, 29 May 2020; Nettesheim *Das PSPP-Urteil des BVerfG – Ein Angriff auf die EU?*, *NJW* 2020, 1631; Öberg, *The German Federal Constitutional Court's PSPP Judgment: Proportionality Review Par Excellence*, *European Law Blog*, 2 June 2020.

<sup>21</sup> Jakab and Sonnevend, *The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundesverfassungsgericht*, *Verfassungsblog*, 25 May 2020.

<sup>22</sup> § 31 (1) BVerfGG (Act on the Federal Constitutional Court).

<sup>23</sup> See Declaration (no. 17) concerning primacy annexed to the Final Act of the Intergovernmental Conference of Lisbon (13 December 2007), OJ 2012 C 326, 337.

## **I. ECB Council Will not Make New Decision to Please FCC**

As a precondition for the German Federal Bank's continued participation in the PSPP, the FCC expressly demanded that within three months "the Governing Council of the ECB demonstrates in a new decision in a comprehensible manner that the monetary policy objectives pursued with the PSPP are not disproportionate to the associated economic and fiscal policy effects". Pursuant to Art. 127 (4) TFEU, the ECB "may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence." On that basis, it could submit its opinion on the proportionality of the PSPP to the German authorities, as prescribed by the FCC. Yet, the ECB Council will probably not make a new decision on the proportionality of the PSPP just to please the FCC. This could be interpreted as submission of an EU institution to the jurisdiction of a national court in violation of the independence guarantee enshrined in Art. 130 TFEU and the exclusive jurisdiction of the ECJ pursuant to Art. 35.1 of the Statute of the ESCB and the ECB. Perhaps the ECB Council would be ready to refer the German Federal Government and Parliament to its past published or unpublished decisions in this regard. It is uncertain but not unlikely that the FCC would consider that as sufficient to fulfil its own precepts.

## **II. Can the German Federal Bank Act as Proxy or Liaison of the ECB?**

Currently, there are discussions whether the German Federal Bank which is both part of the ESCB and a German institution at the same time, could, with the explicit or implicit approval of the ESCB, serve as a proxy or liaison in explaining the proportionality of the PSPP to the German Federal Government and Parliament.<sup>24</sup> If the latter find that the explanation is sufficient, the German Federal Bank could continue to participate in the PSPP. It is again uncertain but not unlikely that the FCC would accept that solution.

## **III. Can the European Parliament Help?**

According to Art. 284 (3) TFEU, the ECB is answerable to the European Parliament. It presents an annual report to the Parliament and the ECB President as well as other

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<sup>24</sup> See Calliess (note 19).

members of the executive board of the ECB may be heard by the competent committees of the European Parliament. There are also currently discussions on whether the ECB could explain the proportionality of the PSPP to the European Parliament, one of its committees or even individual MEPs from Germany who would then refer the explanation to the German Parliament.<sup>25</sup> Again, it remains to be seen whether the FCC would accept that substitute solution.

#### **IV. New FCC Proceedings Are Practically Inevitable**

Whatever the ECB or the German authorities do in this case, there will certainly be new constitutional complaints, not least because the FCC practically invited them in the judgment of 5 May 2020.<sup>26</sup> There the FCC indicated that it would thoroughly review the compatibility of the PSPP with Art. 127 (1) TFEU after the Governing Council of the ECB had delivered the missing explanation of that programme's proportionality. It is unlikely but by no means impossible that the FCC will dismiss the ECB's explanation, declare the PSPP to be *ultra vires* in substance and definitely determine that the German Federal Bank must no longer participate in the PSPP. That would terminate the practical effectiveness of that programme and constitute an instance of European monetary policy made in Karlsruhe.

#### **F. Conclusion: Establishing a New Mixed Appellate Mechanism within the ECJ?**

Even if there is a way out for the German Federal Bank in this particular case, it will be much more difficult to find a way out of the antagonistic approach of the FCC towards its Luxembourg counterpart. The problem may resurface with regard to the proposed corona recovery fund. In a press statement regarding the judgment of 5 May 2020, the FCC underlined that “[t]he decision published today does not concern any financial assistance measures taken by the European Union or the ECB in the context of the current coronavirus crisis.” This is technically correct. But whatever measure the EU or the ECB take to cushion the economic and financial impacts of the corona pandemic will definitely be referred to the FCC: As I said, the gates of the

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<sup>25</sup> Id.

<sup>26</sup> Margin note 179.

Karlsruhe Court are wide open to each and every German voter dissatisfied with European integration. Decisions on the fate and perhaps the survival of the European Union will henceforth be made in Germany, and more specifically in Karlsruhe. Democracy and the rule of law in Europe will be replaced by the rule of the majority of eight justices of the German FCC – for the sake of democracy and the rule of law in Europe, of course.

But let's remain serious: There has long been distrust of the ECJ regarding its willingness to strictly guard the boundaries of EU competences, in particular among those who want to keep European integration small and national sovereignty undiminished. Should the ECJ in case of doubt decide against EU competences to maintain its credibility with Eurosceptics ("mission impossible" anyway) or rather for EU competences to promote the effectiveness of the European integration process? The ECJ's decision-making guideline should be to maintain a proper federal equilibrium in the EU which describes itself as a union in which decisions are taken "as closely as possible to the citizen" (Art. 1 (2) TEU). The ECJ has not failed to adhere to that guideline, in view of the great influence which Member States still have on the EU decision-making process. In the large majority of cases, EU acts are adopted either by consensus of the Member States or by a very large majority of them. The search for consensus even where it is not required by the Treaties makes the EU decision-making process rather cumbersome. Accordingly, one does not have the feeling that the EU pushes around the Member States, quite the contrary. In my view, a proper federal equilibrium would require the EU to cut the cord from the Member States to a much greater extent than today.

In any event, there are long-standing proposals to replace the ECJ as a competence court by a new court consisting entirely of national judges with exclusive powers to decide on competence conflicts between the EU and Member States. In reaction to the FCC judgment of 5 May 2020, Sarmiento and Weiler<sup>27</sup> have adapted those proposals to the new situation of conflicting decisions by the ECJ and a national supreme court or constitutional court on competence delimitation. They propose the establishment of a new appeal procedure within the ECJ. The appellate jurisdiction would be exercised by a kind of Mixed Grand Chamber composed six judges of the

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<sup>27</sup> See Sarmiento and Weiler, *The EU Judiciary After Weiss*, *Verfassungsblog*, 2 June 2020. See also Hatje, *Gemeinsam aus der Ultra-vires-Fall*, *Verfassungsblog*, 4 June 2020; Sölter, *Ein Schiedsgericht für die Gerichte?*, *Verfassungsblog*, 15 June 2020.

ECJ and an equal number of judges from constitutional or supreme courts of Member States in a predetermined order of rotation. Judges directly involved in the conflicting decisions would be disqualified from sitting. The ECJ President would act as chairperson and have no vote in order to maintain parity of European and national judges. In order to enhance credibility, a qualified majority would be necessary to validate a contested EU measure in order to ensure that a number of national judges are also convinced that it is *intra vires*. That Mixed Grand Chamber could be seised by a national supreme court or constitutional court contesting an ECJ preliminary ruling that has confirmed the validity of the challenged EU act.

The realisation of that proposal would require an ordinary Treaty revision pursuant to Art. 48 TEU that would have to be ratified by all Member States. It could be one element in a general reform of the Treaties as a result of the impending conferences on the future of Europe. From a German perspective, such an amendment would only mitigate but not definitely solve the problem of conflicting decisions, as long as the German FCC insists on having the last word in all competence delimitation cases and bases its position on the immutable core values of the German Constitution. However, it would at least offer the FCC a face-saving way out of the self-made quagmire.