The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020

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Sometimes, a dissenting opinion turns out to be a prophecy. Arguably, this is true for Judge Lübbe-Wolff's assessment of the Federal Constitutional Court's *OMT reference*: 'In an effort to secure the rule of law, a court may happen to exceed judicial competence'.[1] This warning of judicial overconfidence, addressed to the Federal Constitutional Court's Senate majority in 2014, easily extends to the Federal Constitutional Court's *PSPP* judgment of 5 May 2020.[2] In this judgment, for the first time, the Second Senate of the Federal Constitutional Court declared certain acts of EU institutions to be outside the scope of EU powers – '*ultra vires*'.

The judgment immediately turned out to be highly controversial both within Germany and outside Germany. The sheer number of – mostly critical – reactions within just four months is stunning. The *PSPP* case is also a fascinating example of how the legal-academic news cycle operates nowadays.

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[1]BVerfG 14 January 2014, 2 BvR 2728/13 et al., *OMT (reference)*, BVerfGE vol. 134, p. 366 at p. 420 ff, para. 106-133 (dissenting opinion Lübbe-Wolff). OMT stands for Outright Monetary Transactions.

[2]BVerfG 5 May 2020, 2 BvR 859/15 et al., *PSPP*, ⟨www.bverfg.de/e/rs20200505_2bvr085915.html⟩, visited 14 December 2020. An English translation is available on the English language website of the Court ⟨www.bundesverfassungsgericht.de/EN/Homepage/home_node.html⟩, visited 14 December 2020. PSPP stands for Public Sector Purchase Programme.

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The first reactions were published in the blogosphere as of 5 May 2020.[3] *Verfassungsblog.de* alone published 35 (!) contributions between 5 May and 5 June 2020.[4] Then, a public hearing in the EU affairs committee of German Parliament on the *PSPP* ruling on 25 May 2020 led to a set of more comprehensive analyses published as Committee documents.[5] As of June and July 2020, law journal editorials and shorter articles emerged.[6] There was also an entire special issue of the *Europäische Zeitschrift für Wirtschaftsrecht*.[7] Over the summer, longer comprehensive articles were written: at the end of August

[3]E.g. on ⟨eulawlive.com⟩ by D. Sarmiento; H. Sauer; N. Arriba-Sellier. *See also* J. Ziller, 'L'insoutenable pesanteur du juge constitutionnel allemand', 8 May 2020, ⟨blogdroiteuropeen.com⟩; an early in-depth analysis was A. Champsaur, 'The German Constitutional Court has fallen into its own trap', 15 May 2020, ⟨iflr.com⟩; and a rather exceptional blog entry was an acting judge of the German Supreme Court (*Bundesgerichtshof*) harshly criticising the judges of the Constitutional Court in P. Meier-Beck, 'Ultra vires?' 11 May 2020, ⟨d-kart.de/blog/2020/05/11/ultra-vires/⟩. All websites in this footnote and the following ones visited 14 December 2020.

[4]In chronological order: A. Thiele; B. Wegener; M. Maduro; A. Steinbach; M. Kottmann and R. Sangi; M. Avbelj; A. Lang; M. Wilkinson; A. Brade and M. Gentzsch; T. Marzal; K. Alter; O.W. Lembcke; A. Farahat; F. Fabbrini; M. van den Brink; I. Pernice; C. Möllers; H. Kube; S. Leuschner; F. Strumia; A. Guazzarotti; J. Jahn; K.F. Gärditz; F. Bignami; O. Garner; C. Krenn; András Jakab and Pál Sonnevend; R.D. Kelemen, P. Eeckhout, F. Fabbrini, L. Pech and R. Uitz writing for 32 scholars of EU law; triggering a response by M. Baranski, F.B. Bastos and M. van den Brink; C. Walter; D. Sarmiento and J.H.H. Weiler; A. Zhang; R.A. Miller; A. Hatje. My contribution here was F.C. Mayer, 'Auf dem Weg zum Richterfaustrecht?', 7 May 2020, ⟨verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/⟩.

[5]EU affairs committee, Committee documents 19(21)97 (C. Walter), 99 (B. Wegener), 100 (C.-D. Classen), 101 (C. Calliess) and 103 (F.C. Mayer). Some of these experts went on to publish their statements in law reviews, *see* B. Wegener, 'Karlsruher Unheil', 55 *Europarecht* (2020) p. 347; C. Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH?', 39 *Neue Zeitschrift für Verwaltungsrecht* (2020) p. 897; F.C. Mayer, 'Der Ultra vires-Akt', 75 *Juristenzeitung* (2020) p. 725.

[6]T. Ackermann, 'Not Mastering the Treaties: The German Federal Constitutional Court's PSPP judgment', 57 *CMLR* (2020) p. 965; U. Karpenstein, 'Zu Nebenwirkungen und Risiken: Das EZB-Anleihenkaufprogramm vor dem BVerfG', 31 *Europäische Zeitschrift für Wirtschaftsrecht* (2019) p. 705; D. Grimm, 'Eine neue Superinstanz in der EU?', 53 *Zeitschrift für Rechtspolitik* (2020) p. 129; G. Krings, 'Die Kompetenzkontrolle der EU – einer muss es ja machen' 53 *Zeitschrift für Rechtspolitik* (2020) p. 160; W. Kahl, 'Optimierungspotenzial im "Kooperationsverhältnis" zwischen EuGH und BVerfG', 39 *Neue Zeitschrift für Verwaltungsrecht* (2020) p. 824; M. Nettesheim, 'Das PSPP-Urteil des BVerfG – ein Angriff auf die EU?', *Neue Juristische Wochenschrift* (2020) p. 1631; F. Schorkopf, 'Wer wandelt die Verfassung?', 75 *Juristenzeitung* (2020) p. 7.

[7]*See* 12 *Europäische Zeitschrift für Wirtschaftsrecht* (2020) p. 489 ff.) with short contributions by K. Barley; H. Siekmann; S. Simon and H. Rathke; T. Möllers; K. F. Gärditz; I. Pernice; P. Meier-Beck; M. Ludwigs; F. Kainer; A. Geiger and J. Bartels; M. Pießkalla; S. Wernicke and a critical commentary by J. Dietze, M. Kellerbauer, M. Klamert, L. Malferrari, T. Scharf, D. Schnichels, signed by J. Basedow, P. Behrens, G. Berrisch, J. Ceyssens, S. Griller, H. Hofmann, S. Kalss, K. Langenbucher, L.D. Loacker, T. Öhlinger, I. Pernice, J. Schmidt, F. Schurr, G. Schwendinger, D. Thym, A. von Bonin and R. van der Hout.

2020, just three months after the ruling, the *German Law Journal* dedicated a special section to the ruling, containing a vast array of views.[8]

In a parallel development, competing with the blogosphere to some extent, longer commentaries were also published in the traditional media.[9] From the outset, the *Frankfurter Allgemeine Zeitung* was particularly active, in part with a certain pro-court bias, defending the ruling in the '*Staat und Recht*' section.[10] Then – arguably due to concurring forces within that newspaper – as of June 2020 more critical texts were published.[11]

Right from the outset the judges responsible for the decision apparently felt that they had to turn to the media to explain the ruling.[12] This rather unusual step – aren't judges

[8] *See* 21 *German Law Journal* (2020) p. 944 ff with a vast array of views by D. Grimm; F. Schorkopf; I. Feichtner; K. Schneider; M. Goldmann; M. Wendel; N. Petersen; S. Simon and H. Rathke; T. Violante; J. Lindeboom; M. Avbelj; V. Perju. My contribution there was F.C. Mayer, 'To Boldly Go Where No Court Has Gone Before', 21 *German Law Journal* (2020) p. 1116 ff.

[9] *See* e.g. H. Prantl, 'Der Staat Europa', *SZ*, 9 May 2010 p. 5; W. Schroeder, 'Karlsruher EZB-Urteil: Rechthaberei mit Folgen', *Der Standard*, 11 May 2020; C. Landfried, 'Verfassungsgerichte sind nicht da zur Korrektur der Europapolitik', *NZZ*, 18 June 2020 p. 8.

[10] The tone was set the day after the ruling by R. Müller, 'Die Gefolgschaft verweigert', *Frankfurter Allgemeine Zeitung*, 6 May 2020 p. 1 and online-only commentaries on ⟨faz.net/einspruch⟩ by F. Schorkopf, 'Antwort auf eine entgrenzte Politik', 8 May 2020 and M. Ludwigs, 'Zeit für Ehrlichkeit', 15 May 2020. Then followed D. Grimm, 'Jetzt war es so weit', *Frankfurter Allgemeine Zeitung*, 18 May 2020 p. 9 and P. Kirchhof, 'Chance für Europa', *Frankfurter Allgemeine Zeitung*, 20 May 2020 p. 6, albeit on the same page with critical comments from former German ECJ judge G. Hirsch, 'Zwei Wächter in Schilda', and former German ECHR judge A. Nussberger, 'Die Crux des letzten Wortes', ibid. Critique of the ruling was voiced in the economic section of the *Frankfurter Allgemeine Zeitung*, though: *see* P. Bofinger, M. Hellwig, M. Hüther, M. Schnitzer, M. Schularick and G. Wolff, 'Gefahr für die Unabhängigkeit der Notenbank', *Frankfurter Allgemeine Zeitung*, 29 May 2020 p. 18. The '*Staat und Recht*' section fired back with twice as many professors, albeit mostly *emeriti*, and not exactly all of them legal experts, in C.-W. Canaris, O. Höffe, W. Kahl, P. Graf Kielmansegg, G. Kirchhof, A. Rödder, S. Röser, R. Schmidt, E. Schmidt-Aßmann, H.-W. Sinn, T. Vesting, N. von Bomhard and F.-C. Zeitler, 'Auf die europäischen Grundlagen besinnen', *Frankfurter Allgemeine Zeitung*, 4 June 2020 p. 7.

[11] *See* J.A. Kämmerer, 'Ein problematisches Urteil', 6 June 2020 on ⟨faz.net/einspruch⟩; and finally, in July, a critique of the ruling by a group of younger law professors written weeks earlier found its way into the *Frankfurter Allgemeine Zeitung*, *see* H.P. Aust, M. Bäcker, M. Hailbronner, C. Herrmann, J.A. Kämmerer, M. Kotzur, A.K. Mangold, M. Payandeh, H. Sauer, A. v. Ungern-Sternberg and M. Wendel, 'Wider die Angst', *Frankfurter Allgemeine Zeitung*, 2 July 2020 p. 7. The series concluded with a private law *emeritus* – defending the Court, C.-W. Canaris, 'Ohne demokratische Legitimation', *Frankfurter Allgemeine Zeitung*, 27 August 2020 p. 6.

[12] *See* P.M. Huber, 'Das EZB-Urteil war zwingend' (Interview), *Frankfurter Allgemeine Zeitung*, 13 May 2020, p. 2; P.M. Huber, 'Spieler auf Augenhöhe' (Interview), *SZ*, 13 May 2020, p. 5; A. Voßkuhle, 'Erfolg ist eher kalt' (Interview), *Die Zeit*, 14 May 2020, p. 6. *See also* the statements by judge rapporteur Huber in a webinar available on YouTube, below, n. 108 and the account of Judge Maidowski trying to explain and defend the ruling in a meeting of the German-Polish judges' association 26 May 2020, 'Verfassungsrichter Dr. Ulrich Maidowski erklärt: Anders als die polnische Regierung will das Bundesverfassungsgericht mehr Kontrolle durch den Europäischen Gerichtshof, nicht weniger', ⟨dprv.eu⟩. And of course, *see also* former judges D. Grimm and P. Kirchhof, *supra* n. 10, in defence of their colleagues.

supposed to speak through their decisions? – is just another indication that *PSPP* is a landmark ruling that requires further analysis, in spite of the volume of writing produced in the immediate aftermath of 5 May 2020.

I will first place the judgment in the context of the general discussion about European powers and competences and how to control them. Against this background, it is the judgment of the Federal Constitutional Court that appears to be an *ultra vires* act itself. This and the various points of criticism of the ruling lead to the question of possible solutions to the problem caused by the *PSPP* judgment and to a reflection on what future developments and long-term consequences could look like.

The judgment of 5 May 2020

On 5 May 2020, the Federal Constitutional Court's Second Senate delivered its 7 to 1 decision[13] on constitutional complaints (*Verfassungsbeschwerden*) against the PSPP that had been pending since 2015. The judgment followed the second preliminary question ever submitted by the Federal Constitutional Court to the European Court of Justice.[14]

The failure of German Parliament and the German government: inaction

In the dispositive part of the judgment, the Court simply stated that the German government and German Parliament violated the German Constitution, the Basic Law. The provision in question is Article 38 Basic Law, which on its surface deals with the status of members of parliament and electoral principles. The Court has interpreted this provision extensively,[15] though, as an article that actually

[13]The dissenting judge did not file a dissenting opinion and he or she is not known. There was some speculation that the dissent came from the group of dissenters in the UPC case (BVerfG, 13 February 2020, 2 BvR 739/17, *Unified Patent Court Agreement*), decided earlier in 2020. In that case three judges (Maidowski, König, Langenfeld) were prepared to put an end to the never-ending expansion of standing in EU-related cases, based on Art. 38 Basic Law. Considering extra-judicial statements by judges (*supra* n. 12) most observers seem to believe that most likely the dissent came from Judge König or Judge Langenfeld, but again, this is just a speculative theory. Note that with the departure of Judge Voßkuhle in July 2020 and the new judge, Astrid Wallrabenstein, presenting herself at least not as a eurosceptic (*see* the quotes in 'New Kids in Karlsruhe', *FAS*, 21 June 2020 p. 6), majorities may shift in the Second Senate.

[14]The European Court of Justice had already been called upon by the Second Senate in 2014 with regard to the European Central Bank's OMT programme. In a broader sense, both programmes are measures in the Euro crisis, but they differ significantly: while Outright Monetary Transactions were limited only to Member States in crisis, the PSPP as 'Quantitative easing' is not limited to these states and is part of the more traditional repertoire of central bank tools.

[15]*See* e.g. *Unified Patent Court Agreement*, *supra* n. 13.

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contains[16] the principle of democracy, including its unchangeable core as protected under Article 79 Basic Law.[17]

The actual violation was in omitting to take appropriate measures against the Governing Council of the European Central Bank who 'neither assessed nor substantiated'[18] that the measures taken (the PSPP) were in accordance with EU law. The suspicion of the German court was that PSPP is not compatible with the principle of proportionality in Article 5(1) Sentence 1 and Article 5(4) TEU. Nevertheless, the European Central Bank, the European Court of Justice and the Bundesbank acting within the European System of Central Banks are not directly addressed in the dispositive part of the judgment. This is, in fact, not too surprising, as the realm of the German Constitutional Court is, primarily, the German Constitution, and not European law.

Beyond that, the constitutional complaints remain without success, in particular with regard to the argument submitted by the plaintiffs that the European Central Bank engaged in prohibited monetary financing of Member States. The German court stressed 'considerable concerns'[19] with regard to the way the European Court of Justice dealt with this issue, though.

[16]It is worth looking at the wording of Art. 38 Basic Law in order to understand to what extent the interpretation given to this provision by the German Constitutional Court in the context of standing is far-fetched: '(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.

(2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.

(3) Details shall be regulated by a federal law'.

[17]Again, the wording of Art. 79 Basic Law gives no indication of such a far-reaching scope of application: '(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty regarding a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.

(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 [inter alia the principle of democracy] shall be inadmissible'.

[18]All English language citations are taken from the English language version of the ruling published on the website of the Federal Constitutional Court, *supra*, n. 2.

[19]BVerfG, *supra*, n. 2, para. 184.

The failure of the European Court of Justice – too little is too much

In the grounds as well as in the headnotes (*Leitsätze*), the judgment is far more multifaceted than in the dispositive part (*Tenor*).[20] The Senate majority had doubts about the compatibility of the PSPP with European Union law. However, this compatibility had already been confirmed by the European Court of Justice in *Weiss et al.*[21] in 2018 – upon a preliminary question submitted by the Federal Constitutional Court. But in order to be able to make EU law determinations itself, the Senate majority first had to get the contrary ruling by the European Court of Justice out of the way. In a schoolmasterly manner ('interpretation of the Treaties is not comprehensible'; 'arbitrary from an objective perspective'), the Second Senate explained to the European Court of Justice that it had not properly assessed the European Central Bank's exercise of competences and has, therefore, exceeded its own competences. The allegation is that by not doing something, the European Court of Justice did too much – it acted *ultra vires*.[22]

Economic policy or monetary policy: the European Central Bank acting ultra vires

Having neutralised the judgment of the European Court of Justice, the Federal Constitutional Court could do the job the European Court of Justice had allegedly failed to do and review the European Central Bank's proportionality assessment, applying its own concept of proportionality. In doing so, the Senate majority detected a 'lack of balancing and lack of stating the reasons informing such balancing' which led it to declare another *ultra vires* act.[23] The core of the argument here is that the European Central Bank did not sufficiently document and communicate that it takes into consideration its programmes' effects in a process of balancing. That is how the Second Senate responded to the fundamental controversy that has been dividing jurists and economists for quite some time: 'is quantitative easing effectuated by means of PSPP still to be considered monetary policy (permitted) or is it already economic policy (prohibited)?' The answer: if the European Central Bank neatly processes the economic effects (applying the Federal Constitutional Court's categories) in its proportionality assessment, then the measure is still to be considered monetary policy.

[20]Note, though, that headnotes are technically not part of the judgment and are not legally binding; they may best be explained as some kind of executive summary provided by the court for the hasty reader.

[21]ECJ 11 December 2018, Case C-493/17, *Weiss et al.*, EU:C:2018:1000.

[22]BVerfG, *supra*, n. 2, paras. 162, 163.

[23]BVerfG, *supra*, n. 2, paras. 176, 177.

Limited immediate consequences of the ruling – destruction suspended

It is only in the reasons and not in the dispositive part of the judgment that the Federal Constitutional Court explicitly addressed the German Central Bank, the Bundesbank, stressing that it is no longer allowed to take part in bond purchasing and that, with regard to bonds already purchased and held in its portfolio, it must ensure that the bonds 'are sold'[24] because, according to the Federal Constitutional Court, PSPP as a legally inexistent *ultra vires* act cannot bind or entitle German institutions. Because of that, even a voluntary participation in *ultra vires* acts is prohibited.

However, none of this applies if within three months the Governing Council of the European Central Bank adopts 'a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the European Central Bank are not disproportionate to the economic and fiscal policy effects resulting from the programme'.[25]

Some historical background: the debate on competences and categories of competences

To better understand the judgment, it is helpful to look back at the long-standing history – in Germany – of debating European competences and their scope, and how to effectively control them.

Origins – the German debate on the scope of European competences

Since the late 1980s, the claim that the European level is stretching or even exceeding its competences has come up on a regular basis,[26] especially[27] in Germany.

Arguably, the initial impulse for this was the internal market programme introduced under the Delors commission, which triggered the debate, in combination with a small but significant treaty amendment which was part of the 1986 Single European Act: the shift to majority voting in the Council in the area of

[24]BVerfG, *supra*, n. 2, para. 235.

[25]BVerfG, *supra*, n. 2, para. 235.

[26]*See* in greater detail F.C. Mayer, 'Die drei Dimensionen der europäischen Kompetenzdebatte', 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2001) p. 577.

[27]For a French example which is also interesting because of the strategy of using a national parliament to voice competence concerns, *see* the Debré proposal in the French National Assembly 'Proposition de loi portant rétablissement de la souveraineté de la République en matière d'énergie nucléaire', AN (Sixième législature, Deuxième session extraordinaire de 1978-1979), Document No. 917; *see* in that context also the editorial 'Quis custodiet the European Court of Justice?', 30 *CMLR* (1993) p. 899.

internal market legislation.[28] With a reinvigorated internal market concept, European legislation became much more relevant. Across political party lines, the German *Länder* took a particularly critical stance in the German EU debate and emerged as the driving forces behind all kinds of demands.[29] Apart from the introduction of the Committee of Regions in 1994, an institution that never really met the high competence-limiting expectations the *Länder* had of an institutional presence in the law-making process in Brussels, it was a better definition of competences that was a constant request in the German debate. It may not be such a coincidence that a former *Länder* prime minister and a former *Länder* minister can be found among the judges responsible for the *PSPP* judgment.[30]

Over time, there have been typical recurring misunderstandings on competences. One of them is the idea of an unlimited scope of European competences – often confusing legislative powers and the fact that all kinds of areas may be affected by European prohibitions to discriminate on the grounds of nationality or restrictions from EU state aid control. Take the example of the European prohibition of discrimination based on nationality. Not being allowed to bar access to, say, higher education depending on the nationality does not amount to a general European legislative competence for higher education. Some public powers, e.g. the competence to regulate access to higher education by using the criteria of nationality, are simply inaccessible for any public power in the EU, Member States and EU institutions. They do not exist anymore. They are thus not taken away from the Member States to feed the powers of the EU. This phenomenon is well captured in the French term *compétences abolies*,[31] and it must not be confused with a limitless scope of EU powers.

On a more general note, the claim of an unlimited scope of European competences is typically made in a political context and is not backed up by substantive legal arguments. Note that even the review of the European allocation of competences conducted by the British government in the context of Brexit ('Balance of Competences Review'[32]), ultimately, after more than two years,

[28] *See* on this and the following account, in particular the role of the German *Länder*, Mayer, *supra* n. 26, p. 577 ff, with further references. There is some evidence that the *Länder* concern is, in reality, not about EU legislation, but mostly about regional economic policy. Besides European structural policy, it is the state aid control by the Commission which – from a *Länder* point of view – threatens to cut off one of the few areas of leeway to be economically competitive as a region by offering incentives for investment etc.

[29] *See* on this F.C. Mayer, 'Competences reloaded', 3 *ICON* (2005) p. 493 at p. 504 ff.

[30] Former *Ministerpräsident* Peter Müller from Saarland and former Minister of the Interior of Thuringia Peter Huber who also served as the judge rapporteur in the *PSPP* case.

[31] This could be translated as 'vanished powers': D. Simon, *Le système juridique communautaire*, 3rd edn. (PUF Droit 2001) p. 83 ff with reference to V. Constantinesco, *Compétences et pouvoirs dans les Communautés européennes* (LGDJ 1974) p. 231 ff and p. 248.

[32] *See* UK Government Services, 'Review of the balance competences', ⟨www.gov.uk/guidance/review-of-the-balance-of-competences⟩, visited 14 December 2020.

did not find any indication of a European pretension of competences – despite a contrary search request specifically aiming for retransfers of competences.

Finally, in the German competence debate, there is the recurring spectre of an unlimited scope of European competences with a competence exceeding European level – overpowering the Member States, and Germany in particular. This ignores the fact that nothing substantial happens in Brussels without the approval of Member States' governments, and certainly not against the will of the biggest Member State – Germany.[33]

The 'ultra vires control' established in 1993 by the German Federal Constitutional Court

Against the background of a growing debate about the scope of European powers and competences, with the debate about a – perceived – European usurpation of competences becoming louder and louder, the Second Senate of the Federal Constitutional Court established a domestic constitutional law reserve on EU competences with the Maastricht decision of 12 October 1993.[34] The general context of the debate on competences at that time suggests that this reserve was mainly targeting European legislation. But the wording used in the judgment, 'legal acts', covers decisions of the European Court of Justice and other EU players, too.

Note that the actual case was about the Maastricht Treaty, which was held to be compatible with the German Constitution. Everything the Court stated about *ultra vires* was an *obiter dictum*, addressing a hypothetical development. The Court's starting point was the rather unspectacular claim that facing a potential *ultra vires* act, it would only be interpreting the German Basic Law and that it would only determine the scope of the 'Act of consent', the ratification statute, for a given treaty with regard to Germany's participation in the EU. The primacy of EU law over Member State law is not relevant at that point, as primacy requires valid EU law. The question of whether there is EU law at all, and if there was a valid transfer of sovereign rights, precedes the primacy question. However, interpreting the Act of consent allows the interpretation of European law – through the back door. But the authoritative interpretation of EU law is a legal task attributed to the European Court of Justice in the Founding Treaties. By looking at EU law though the lens of German Constitutional

[33]*See* for more detail on this F.C. Mayer, *Die Europäische Union als Präsidialregime* (forthcoming).

[34]BVerfG 12 October 1993, 2 BvR 2134, 2159/92, *Maastricht*, BVerfGE vol. 89, p. 155 at p. 188. *See* on this H. Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen* (Springer 2008) p. 179 ff. For an overview of the case law of the BVerfG in European matters *see also* F.C. Mayer, 'Judicial Power and European Integration. The Case of Germany', in C. Landfried (ed.), *Judicial Power* (Cambridge University Press 2019) p. 183. For a recent comprehensive comparative study *see* A. Lang, *Die Verfassungsgerichtsbarkeit in der vernetzten Weltordnung* (Springer 2020).

Law, the Federal Constitutional Court creates an alternate legal universe with a 'German version' of European law (the 'German-Constitutional-law-version' of EU law). That leads to the Federal Constitutional Court determining whether acts at the European level conform to the boundaries set to the EU.

After 1993, the Federal Constitutional Court's jurisprudence on the matter remained in the realm of the hypothetical and did not change for 16 years, even though there were several attempts to get the Federal Constitutional Court to declare *ausbrechende Rechtsakte*,[35] for instance with regard to the European Court of Justice's *Alcan* judgment.[36] Only after the judge rapporteur of the *Maastricht* judgment, Paul Kirchhof, had left the Court, did the Federal Constitutional Court clarify in 2000 that the European Court of Justice's *Alcan* judgment was not *ultra vires*.[37] In the same year, the decision on the European banana regulation was another deescalating decision in relation to EU law, this time in the field of fundamental rights protection.[38]

In 2009, with the Federal Constitutional Court's *Lisbon* judgment, 16 years after the *Maastricht* decision, things changed. The '*ultra vires* control' was reactivated,[39] without any specific reason, and placed next to an 'identity control'[40] in an effort to stress the final word of the German Constitution – and its interpreters – on Germany's course in Europe. In order to depict the limits of European integration not only in terms of abstract principles but also in concrete and tangible policy areas, the *Lisbon* decision also contained a list of EU law resistant matters, a catalogue of subjects and policy areas that must not be ceded to the EU, as the German court considers them essential for the democratic and political organisation of economic, cultural and social living conditions in the Member States.[41]

[35]Literally: 'acts breaking out'.

[36]For the argument that the ECJ's *Alcan* decision (ECJ 20 March 1997, Case C-24/95, *Land Rheinland-Pfalz* v *Alcan Deutschland* (1997) ECR I-1591) was an *ultra vires* act *see* R. Scholz, 'Zum Verhältnis von europäischem Gemeinschaftsrecht und nationalem Verwaltungsverfahrensrecht', 51 *DÖV* (1998) p. 261. Another example is the *ultra vires* critique of the ECJ's case law on the precedence of EU law over national administrative court procedures by F. Schoch, 112 *Deutsches Verwaltungsblatt* (1997) p. 289 at p. 294 ff.

[37]BVerfG 17 February 2000, 2 BvR 1210/98, *Alcan*, 53 *Neue Juristische Wochenschrift* (2000) p. 2015.

[38]BVerfG 7 June 2000, 2 BvL 1/97, *Banana regulation*, BVerfGE vol. 102, p.147.

[39]BVerfG 30 June 2009, 2 BvE 2/08 et al., *Lisbon*, BVerfGE vol. 123, p. 267 at p. 353 ff.

[40]On this *see* F.C. Mayer, 'Multilevel Constitutional Jurisdiction', in A. von Bogdandy et al., *Principles of European Constitutional Law*, 2nd edn. (Hart Publishing 2010) p. 399 at p. 431; *see also* F.C. Mayer, 'Rashomon in Karlsruhe – A Reflection on Democracy and Identity in the European Union', 9 *ICON* (2011) p. 757.

[41]*Lisbon*, *supra* n. 39, at p. 358 para. 249. In the words of the Court this list includes 'citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights [. . .]. These important areas also include cultural issues such as the disposition of language, the

Probably as a reaction to the extensive criticism of the attitude in the *Lisbon* judgment, which was perceived as excessively EU hostile, the Second Senate rowed back a year later in its *Honeywell* decision[42] and, against strong objections from within the Senate[43], raised the bar for an *ultra vires* determination considerably (*see* below), while insisting on the possibility of an '*ultra vires* control'.

Also in 2010, the focus of the Federal Constitutional Court decisions shifted to the Euro crisis. In that context, with numerous cases throughout the decade, the *ultra vires* argument was submitted on a regular basis[44] and it also played a certain role in the legal proceedings that emerged as of 2016 concerning EU free trade agreements such as CETA and EUSFTA.[45] However, *ultra vires* was initially not the main constitutional law argument in Euro-related cases. Most of the time, the Federal Constitutional Court's Euro crisis case law was built on the idea that the participation of German Parliament in the process was mandatory to uphold democracy: as long as the Bundestag has to give the green light to any measures related to Euro rescue instruments by a plenary vote, the argument goes, the requirements of the German constitution's democracy principle are satisfied.[46] This approach, obviously, reached its limits as soon as the European Central Bank took the driver's seat in mid-decade in the efforts to protect the Euro with enhanced central bank activities such as the Outright Monetary Transactions programme or quantitative easing (PSPP). European Central Bank action cannot be subordinated to a single national parliament's approval because of its legal independence, enshrined in the Treaties (Article 130 TFEU) and even in the German Constitution (Article 88 German Basic Law). Turning to the European

shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology'.

[42]BVerfG 6 July 2010, 2 BvR 2661/06, *Honeywell*, BVerfGE vol. 126, p. 286 at p. 303 ff On this ruling *see* F.C. Mayer and M. Walter, 'Die Europarechtsfreundlichkeit des BVerfG nach dem Honeywell-Beschluss', 33 *Jura* (2011) p. 532 with further references. The case had been pending for four years; the plaintiffs argued that the 2005 *Mangold* decision of the ECJ (22 November 2005, Case C-144/04, *Mangold* (2005) ECR I-9981) was *ultra vires*.

[43]*See* the dissenting opinion by Judge Landau, who accused the Senate majority of setting the bar for *ultra vires* acts too high, and of departing from the *Lisbon* decision in that respect: *Honeywell*, *supra* n. 42, at p. 318.

[44]*OMT (reference)*, *supra* n. 1, at p. 392 ff and BVerfG 21 June 2016, 2 BvR 2728/13 et al., 2 BvE 13/13, *OMT*, BVerfGE vol. 142, p. 123 at p. 199 ff. On new nuances of the *ultra vires* doctrine of the Court *see* M. Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes Ultra-vires-Vorlage an den EuGH', 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2014) p. 615 at p. 627 ff.

[45]The cases are still pending: 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvE 3/16 and, separately, 2 BvE 4/16 on CETA; 2 BvR 882/19 and 2 BvR 966/19 on EUSFTA.

[46]BVerfG 7 September 2011, 2 BvR 987/10 et al., *Greece and EFSF*; BVerfGE vol. 129, p. 124 ff; BVerfG 28 February 2012, 2 BvE 8/11, *Committee of Nine*, BVerfGE vol. 130, p. 318 ff; BVerfG 19 June 2012, 2 BvE 4/11, *ESM*, BVerfGE vol. 131, p. 152 ff; BVerfG 12 September 2012, 2 BvR 1390/12 et al., *ESM and Fiscal Compact*, BVerfGE vol. 132, p. 195 ff.

Parliament in order to assure democratic oversight for the European Central Bank – an idea suggested by Article 284 TFEU – was not an option for the Federal Constitutional Court anymore, as it had effectively destroyed the democratic credibility of the European Parliament in two decisions on its elections (five-percent electoral threshold and three-percent electoral threshold[47]), where the European Parliament came across as some kind of pseudo-parliament.[48] Hence, there were not many options left for the Court, apart from turning to the *ultra vires* control.

During the Second Senate's decade of assiduous Euro crisis jurisprudence, the First Senate of the Federal Constitutional Court committed itself to the *ultra vires* control in an *obiter dictum*, too. The *ultra vires* issue has generally been in the purview of the Second Senate. Thus, statements of the First Senate on *ultra vires* control are few and far between. For this reason alone it is worth having a closer look at the wording of a 2013 decision on an anti-terror database in Germany, a threatening criticism of the European Court of Justice's *Åkerberg Fransson* judgment. And this closer look reveals that in this 2013 decision it actually remained unclear how exactly the First Senate understood the *ultra vires* reservation and if there was a divergence from the rather strict *Honeywell* criteria established by the Second Senate.[49] In the event of a divergence between the senates, there is a procedure to be followed. It is the plenary of the Federal Constitutional Court, with all 16 judges participating, that decides.[50] Arguably, the Second Senate should have submitted the *ultra vires* issue to the plenary before its *PSPP* judgment. The divergence could have been construed with a view to the *Åkerberg Fransson* judgment and would have been justified, from a legal realist's perspective, with a view to the foreseeable shockwaves that an *ultra vires* statement would produce. Arguably, there is also another, quite recent, point of – potential – divergence because of the First Senate's realignment of its fundamental rights jurisprudence.[51] Departing from the established *Solange II* approach, the new approach is bound to lead to the

[47]BVerfG 9 November 2011, 2 BvC 4/10 et al., *Five-Percent-Threshold*, BVerfGE vol. 129, p. 300 ff and BVerfG 26 February 2014, 2 BvE 2/13 et al., 2 BvR 2220, 2221, 2238/13, *Three-Percent-Threshold*, BVerfGE vol. 135, p. 259 ff.

[48]Note that this had been quite different in the *Maastricht* decision, where the Court saw the European strand of democracy, embodied by the directly elected European Parliament, on an equal footing with the Member State mechanisms of democracy and legitimacy: 'provision of democratic legitimacy via the European Parliament, elected by the citizens of the Member States': *Maastricht*, *supra* n. 34, at p. 185.

[49]BVerfG 24 April 2013, 1 BvR 1215/07, *Anti-terror database*, BVerfGE vol. 133, p. 277 at p. 316.

[50]*See* on that the relevant provisions in Section 16 of the Statute on the Federal Constitutional Court, the *Bundesverfassungsgerichtsgesetz*.

[51]BVerfG 6 November 2019, 1 BvR 16/13 and 1 BvR 276/17, *Right to be forgotten I and II*, 73 *Neue Juristische Wochenschrift* (2020) p. 300 and 314.

frequent submission of preliminary questions to the European Court of Justice, which in turn implies a willingness on the part of the Federal Constitutional Court to respect and implement the preliminary rulings of the European Court of Justice. But with the *PSPP* decision, the Second Senate has just loosened significantly the binding nature of preliminary rulings for the Federal Constitutional Court. That means that, currently, the binding force of European Court of Justice rulings appears to be understood differently in the two Senates.[52]

Ultra vires – the term, the concept and the final word

As the *PSPP* judgment raises – and answers – an ancient question, it appears helpful to clarify what '*ultra vires*' is actually all about.[53]

The question of who has the final word on the scope of powers and competences in multilevel systems is much older than the *Maastricht* judgment. It is a longstanding topic of federal theory. In Germany, doctrinal reflection on this issue goes back to the 19th century and the *Kaiserreich*. It is in that context that the concept of *Kompetenz-Kompetenz*[54] emerged, a term that neatly captures the question of who has the competence to determine the 'if' and the 'how' of competence, and which also serves as code for sovereignty, implying that whoever determines *Kompetenz* is also the ultimate bearer of sovereignty. Speaking of courts in particular, the concept later morphed into 'judicial *Kompetenz-Kompetenz*'[55] which was meant to depict the court that has the final say on the reach of competences. Other terms used to name the question of who has the 'final say'[56] were '*quis judicabit*,[57] '*quis interpretabitur*',[58] '*quis custodiet*'[59]

[52]In the ECJ proceedings, the Italian government even argued that the German preliminary reference in the *PSPP* case was inadmissible, because – in their view – the German court indicated that it was not prepared to accept an ECJ decision as binding, insisting on a final decision-making power, *Weiss et al.*, *supra* n. 21, para. 18.

[53]*See* F.C. Mayer, *Kompetenzüberschreitung und Letztentscheidung* (C.H. Beck 2000) passim; Mayer, 'Multilevel Constitutional Jurisdiction', in von Bogdandy et al., *supra* n. 40, p. 400 ff.

[54]According to M. Usteri, *Theorie des Bundesstaates* (Schulthess 1954) p. 96 para. 56, the term can be traced back to C. Böhlau, *Competenz-Competenz?* (Veit 1869).

[55]J.H.H. Weiler, 'The State "über alles"', in O. Due et al. (eds.), *Festschrift für Ulrich Everling* (Nomos 1995) p. 1652: 'judicial competence-competence'.

[56]Former German ECJ judge G. Hirsch, 'Europäischer Gerichtshof und Bundesverfassungsgericht - Kooperation oder Konfrontation?', 49 *Neue Juristische Wochenschrift* (1996) p. 2457.

[57]C. Tomuschat, 'Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts', 20 *EuGRZ* (1993) p. 489 at p. 494.

[58]B. Kahl, 'Europäische Union: Bundesstaat – Staatenbund – Staatenverbund?', 33 *Der Staat* (1994) p. 241 at p. 243.

[59]D. Chalmers, 'Judicial Preferences and the Community Legal Order', 60 *Modern Law Review* (1997) p. 164.

and the right to discard.[60] The 'umpiring' of legal relationships[61] is a term that originates in the US debate about 'states' rights', the 'nullification doctrine' and 'interposition',[62] the latter was used as 'interposition claim of the Federal Constitutional Court' in German doctrinal writings, too.[63]

The Federal Constitutional Court initially used the term '*ausbrechender Rechtsakt*'[64] (literally acts breaking out, *see supra*). However, since the *Lisbon* judgment this has become '*ultra vires* control'[65].

'Ultra vires'?

What exactly qualifies as an *ultra vires* act at the European level depends on the understanding of competences. There are at least[66] two categories that may be distinguished.

To the extent that competences are attributed as specific areas or objectives, competences are exceeded when the criteria that define those areas or objectives are not met. Then, there is no legal basis. In multilevel systems, this will typically correspond to the entire level not having the competence (lack of *Verbandskompetenz*).[67] And the classical example here will be legislation in an area or with a view to an objective outside the competences attributed. Consider the famous *Lopez* case decided by the US Supreme Court as an example: there was simply no federal competence to regulate gun-possession in schools in the US

[60]H.D. Jarass, 'Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und den Mitgliedstaaten', 121 *AöR* (1996) p. 173 at p. 198 ff.

[61]K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *American Journal of Comparative Law* (1990) p. 205 at p. 253 with reference to P.A. Freund, 'Umpiring the Federal System', 54 *Columbia Law Review* (1954) p. 561.

[62]*See* for this Mayer (2000), *supra* n. 53, p. 283 ff.

[63]H. Steinberger, 'Die Europäische Union im Lichte der Entscheidung des Bundesverfassungsgerichts vom 12. Oktober 1993', in U. Beyerlin et. al. (eds.), *Festschrift für Rudolf Bernhardt* (Springer 1995) p. 1330.

[64]BVerfG 12 October 1993, 2 BvR 211 BvR 16/13 and 1 BvR 276/1734, 2159/92, *Maastricht*, BVerfGE vol. 89, p. 155 at p. 189; the term 'ausbrechen' was already used in BVerfG 8 April 1987, 2 BvR 687/85, *Kloppenburg*, BVerfGE vol. 75, p. 223 at p. 242.

[65]*Lisbon*, *supra* n. 39, at p. 353.

[66]*See* Mayer (2000), *supra* n. 53, p. 26, regarding *ultra vires* acts by courts and the distinction between level-immanent and level-transcendent *ultra vires* acts, which – as far as the term is concerned – draws on the distinction between constitution-immanent and constitution-transcendent limitations to constitutional amendment, *see* for this P. Pernthaler, *Der Verfassungskern* (Manz 1998) p. 4 with further references, in particular to A. Merkl, 'Das Problem der Rechtskontinuität und die Forderung des einheitlichen rechtlichen Weltbildes', 5 *Zeitschrift für öffentliches Recht* (1926) p. 497.

[67]There is an established distinction in German Federal theory between *Verbandskompetenz* (the powers attributed to a level of public authority) and *Organkompetenz* (the powers attributed to an institution of that level).

constitution – the attempt to use the federal competence to regulate interstate commerce, arguing that guns can be traded in interstate commerce, was just too implausible.[68] The lack of competence for an area is the standard case of exceeding of competences (*ultra vires* act *stricto sensu*, in a narrow sense).

On the other hand, any overstepping of legal boundaries, any violation of formal or material limits set to public authority, may be considered an exceedance of competences in the broader sense. From this perspective, no public authority is entitled to generate illegal acts. Examples of such *ultra vires* acts in the broader sense are acts outside the (territorial) jurisdiction of an institution, the wrong instance (in a vertical sense) acting, the wrong institution (in a horizontal sense) acting, and generally acts with functional deficiencies; procedural errors in the broadest sense as well as the violation of higher-ranking principles of law, especially breaches of fundamental rights. The difference from *ultra vires* acts *stricto sensu* is that the competence in terms of area or topic is generally not contested for the legal act in question.[69]

It is not difficult to explain that an *ultra vires* control by the Federal Constitutional Court based on an understanding of *ultra vires* act in the larger sense would correspond to a domestic court claiming the right to effectuate a comprehensive general judicial review of EU law.

The judgment of 5 May 2020 – an *ultra vires* act

The judgment of 5 May 2020 exceeds both the limits set by EU law and self-imposed limits at the level of German constitutional law.

Overstepping the boundaries set by EU law

As stated in Article 344 TFEU, the Member States promised each other to not 'submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'. According to Article 19 TEU[70] and Article 267(3) TFEU, the Court of Justice of the European Union is entrusted with the task of ensuring that the law is observed when the Treaties are being interpreted and applied. Thus, it is the competent court for questions concerning the interpretation and validity of EU law. The

[68]US Supreme Court, *United States* v *Alfonso Lopez Jr.*,115 S. Ct. 1624.

[69]Of course, there may be a case where an act cannot be based on competence in the narrow sense and in addition turns out to be formally deficient, violating higher law etc.

[70]For details in this respect *see* F.C. Mayer, 'Article 19 TEU', in E. Grabitz et al. (eds.), *Das Recht der Europäischen Union* (C.H. Beck 2019) supplement no. 66.

European Court of Justice does not claim a monopoly on interpreting EU law, though. But for reasons of coherence, unity of law and legal certainty, the European Court of Justice does insist that it has a monopoly on declaring EU law void.[71] That is its role and function. And this was actually a German concern,[72] outlined in the negotiations concerning the establishment of the European Communities, to create a 'genuine court' – in contrast to the French proposals, which would have preferred more conventional diplomatic mechanisms of dispute settlement in international law.

A plain analysis from an EU-law standpoint determines that with the decision of 5 May 2020, the Federal Constitutional Court violates Article 267(3) TFEU and Article 19 TEU, the fact that the European Court of Justice is not mentioned in the dispositive part of the decision notwithstanding. Arguably, there is also a violation of the provisions ensuring the independence of the European Central Bank (Article 130 TFEU), considering that the Federal Constitutional Court explicitly calls upon the German government and German Parliament to address the European Central Bank.

It was no surprise that the European Commission immediately considered launching an infringement procedure against Germany because of the *PSPP* judgment.[73] With such a blatant violation of EU law, coming from the largest Member State, infringement procedures appear to be inevitable.[74] It is respect for the principle of *pacta sunt servanda* that is at stake here. The problem is illustrated by the simple question 'What if each Member State did that and claimed the right to review EU competences?'[75] The way the judges of the Second Senate conceptualise their *ultra vires* control of EU action is simply contrary to the fundamental principles of reciprocity and, ultimately, fairness between the Member States.

[71]ECJ 22 October 1987, Case 314/85, *Foto-Frost* v *Hauptzollamt Lübeck-Ost* (1987) ECR 4199 at p. 4230 ff.

[72]C.F. Ophüls, 'Juristische Grundgedanken des Schumanplans', 4 *Neue Juristische Wochenschrift* (1951) p. 289 at p. 291; C.F. Ophüls, 'Zur ideengeschichtlichen Herkunft der Gemeinschaftsverfassung', in E. von Caemmerer et al. (eds.), *Festschrift für Walter Hallstein* (Vittorio Klostermann 1966) p. 387 at p. 390, 396.

[73]European Commission, 10 May 2020, statement by President von der Leyen, ⟨ec.europa.eu/commission/presscorner/detail/en/statement_20_846⟩, visited 14 December 2020.

[74]*See* B.-O. Bryde, 'Transnationale Rechtsstaatlichkeit', in C. Hohmann-Dennhardt et al. (eds.), *Festschrift für Renate Jaeger* (N.P. Engel Verlag 2011) p. 65 at p. 70 'the Federal Republic would have to be condemned'; T. Giegerich, 'The Federal Constitutional Court's Judgment on the Treaty of Lisbon: The Last Word (German) Wisdom Ever Has to Say on a United Europe?', 52 *German Yearbook of International Law* (2009) p. 9 at p. 25; C. Hillgruber, 'Grenzen der Rechtsfortbildung durch den EuGH – Hat Europarecht Methode?', in T. von Danwitz et al. (eds.), *Auf dem Wege zu einer europäischen Staatlichkeit* (Boorberg 1993) p. 45 fn. 40 ('final decision of the ECJ inevitable').

[75]Mentioned even in *Honeywell*, *supra* n. 42, at p. 303.

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A treaty infringement procedure is not necessarily going to reach the European Court of Justice, though.[76] With a view to the independence of courts, the Commission used to refrain from bringing infringement proceedings to the European Court of Justice when domestic courts were involved. Instead the Commission would typically not go beyond letters of formal notice, voicing disapproval.[77] This has changed.[78] Cases are still not frequent, but nowadays, even large Member States are being sued when their courts violate EU law. A recent example is the sentencing of France in 2018 because of the Conseil d'État decision in the *Accor* case.[79] If a treaty infringement persists – in the present context that could mean confirming and upholding a ruling[80] in subsequent decisions – the Member State may even be fined. An infringement procedure on the *PSPP* ruling could offer the opportunity for the European side to suggest its own criteria for *ultra vires* acts – after all, the possibility of *ultra vires* acts cannot be denied in principle. This is what happened in the *CLIFIT* case,[81] where the European Court of

[76]Another path to the ECJ leads via a state liability procedure in the German civil courts, the competent courts for state liability in the German legal order, in which the plaintiff sues Germany for damage caused by the qualified breach of European law by the Federal Constitutional Court, the qualified breach being the disregarding of the preliminary decision of the ECJ. *See* for EU law-induced state liability for the domestic court's failure to respect EU law, ECJ 30 September 2003, Case C-224/01, *Gerhard Köbler* v *Republik Österreich* (2003) ECR I-10239; ECJ 13 June 2006, Case C-173/03, *Traghetti del Mediterraneo* v *Repubblica italiana* (2006) ECR I-5177.

[77]An example is the *Hendrix GmbH (Pingo-Hähnchen)* case. Following a non-reference by the *Bundesgerichtshof*, the German supreme court on private law, BGH, 11 May 1989, I ZR 163/88, the Commission initiated preliminary proceedings according to Art. 169 EC (A/90/0406), then issued a formal notice (3 August 1990, SG (90)/D/25672 figure V). There, acknowledging judicial independence, the Commission requested the promotion of its legal interpretation among the respective courts and called for legislative measures in case of repeated non-referral. The case ended there. *See* for some background G. Meier, 'Zur Einwirkung des Gemeinschaftsrechts auf nationales Verfahrensrecht im Falle höchstrichterlicher Vertragsverletzungen', 2 *Europäische Zeitschrift für Wirtschaftsrecht* (1991) p. 11 with further references; J. Sack, 'Verstoßverfahren und höchstrichterliche Vertragsverletzungen. Eine Klarstellung', 2 *Europäische Zeitschrift für Wirtschaftsrecht* (1991) p. 246. The Commission's earlier perspective is captured in an answer to a Parliamentary question in 1983, [1983] OJ C 268, p. 25.

[78]*See* ECJ 9 December 2003, Case C-129/00, *Commission* v *Italy* (2003) ECR I-14637. *See also* the infringement procedure against Sweden, 2003/2161, C (2004) 3899, and before that the formal notice by the Commission dated 1 April 2004 (SG (2004) D/201417). No further steps were taken after an amendment of the Swedish laws.

[79]ECJ 4 October 2018, Case C-416/17, *Accor*, ECLI:EU:C:2018:811.

[80]Note that Art. 131 TFEU requests every Member State to ensure that, as to the European Central Bank, its national laws are in line with the Treaties. This could affect the statute that defines e.g. standing of plaintiffs, the Statute on the Federal Constitutional Court, the *Bundesverfassungsgerichtsgesetz*.

[81]ECJ 6 October 1982, Case 283/81, *CILFIT* (1982) ECR 3415.

Justice developed its own conception of an *acte clair*, a concept initially used by the French Conseil d'État in order to avoid the obligation to submit a preliminary reference to the European Court of Justice.

Ignoring Honeywell? The transgression of self-imposed constitutional limits

There is no provision, not even in the German constitution, that expressly confers a competence upon the Federal Constitutional Court to declare the illegality of European legal acts. Arguably, the claim by the Federal Constitutional Court to have that right appears to be a transgression of national constitutional court jurisdiction. Put differently, one might ask whether the *ultra vires* control is in itself an *ultra vires* act.[82]

In the *Honeywell* decision in 2010, it became quite clear that the judges of the Second Senate had realised that they were walking on thin ice. There, the Court limited the scope of the *ultra vires* review in a way that minimised potential damage to the European legal order.[83] In the words of the Court:

> 'The tensions, which are basically unavoidable according to this construction, are to be harmonized cooperatively in accordance with the idea of European integration and relaxed through mutual consideration'.[84]
>
> The 'ultra vires review may only be exercised in a manner which is open towards European law'.[85]

The *ultra vires* test is then summarised as follows:

> 'Ultra vires review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences'.[86]

[82] *See* Bryde, *supra* n. 74, p. 71, at fn. 23: 'The 'actio popularis' introduced in the *Maastricht* decision and extended in the *Lisbon* decision can indeed be seen as such a transgression of competences'.

[83] *Honeywell*, *supra* n. 42, at p. 303.

[84] Ibid. I am quoting from the translation available at the website of the Federal Constitutional Court, see *supra* n. 2.

[85] *Honeywell*, *supra* n. 42, at p. 303.

[86] Ibid., at p. 286.

And, de-escalating the potential friction with the European Court of Justice:

> 'Prior to the acceptance of an ultra vires act, the Court of Justice of the European Union is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen'.[87]

Measured by these standards, the *ultra vires* verdict of the Senate majority of 5 May 2020 is simply not tenable.

Judicial law-making?

As far as the European Court of Justice is concerned, the question is whether in its assessment of European Central Bank action in the *Weiss* ruling, answering the preliminary question submitted by their German colleagues, the European judges engaged in the type of wild judicial activism targeted in the Federal Constitutional Court's 2010 *Honeywell* decision.[88] I don't think so. In *Weiss*, the European Court of Justice first looked at the content of Article 296(2) TFEU, according to which any European institution has the obligation to state the reasons on which legal acts are based. Then, the Court turned to the European Central Bank action in question and stressed that the European Central Bank's decisions are systematically explained by means of press releases, introductory remarks by the President of the European Central Bank at press conferences, with answers to questions from the press and summaries of the monetary policy meetings of the European Central Bank's Governing Council, which describe the discussions held in this body.[89] This is not judicial law-making. This is judicial self-restraint.

The core issue is the interpretation of Article 119(2) and Article 127(1) TFEU with Article 5(4) TEU. There, the European Court of Justice confirmed that a bond purchasing programme which is part of monetary policy required that the measures which it covers be proportionate to the objectives of that policy.[90] With regard to the limits of judicial review, however, the European Court

[87]Ibid., and at Headnote 1.
[88]*Honeywell*, *supra* n. 42, at p. 306.
[89]*Weiss et al.*, *supra* n. 21, para 37.
[90]Ibid., para. 71.

of Justice emphasised that the European System of Central Banks must be granted a wide margin of appreciation as it must adopt decisions of technical nature and make complex predictions and assessments.[91] Again, one may not like the outcome, but this is not activist judges rewriting the treaties with a completely new legal concept. A similar argument on complexity and the limits of legal predictions – in particular in economic settings – is well established in the German legal order. By contrast, it is rather judicial review of central bank action that qualifies as bold judicial law-making. Note that this step, which was already taken by the European Court of Justice some time ago,[92] is a step which the Federal Constitutional Court was never prepared to take in relation to the Bundesbank. There is no case of judicial review of Bundesbank action.

A clear and obvious transgression?

Among the *Honeywell* criteria, there is also a requirement that the Federal Constitutional Court will only query the actions of the European Court of Justice if the transgression is obvious. The Senate majority in *PSPP* insisted that the European Court of Justice 'manifestly exceeds the mandate conferred upon it in Article 19(1) second sentence TEU'.[93] Re-reading the *Weiss* judgment over and over again, I still cannot see the alleged blatant breach of competences in the decision. The Senate majority claimed that the restrained way – judicial self-restraint – in which the European Court of Justice addressed the control of the European Central Bank 'is simply not comprehensible'[94], 'simply untenable'[95], 'no longer tenable from a methodological perspective'[96] and 'not comprehensible from a methodological perspective'[97]. At one point, the German judges even speak of a 'simply not comprehensible and thus objectively arbitrary'[98] interpretation suggested by the European Court of Justice. Considering the fact that there were 15 lawyers in the Grand Chamber of the European Court of Justice who decided the *Weiss* case, an obvious methodological deficit seems, from the very outset, rather unlikely. It is also worth noting that the doctrinal writings on the European Court

[91]Ibid., para. 73.
[92]ECJ 10 July 2003, Case C-11/00, *Commission* v *ECB*, EU:C:2003:395, para. 134.
[93]BVerfG, *supra*, n. 2, para. 119.
[94]BVerfG, *supra*, n. 2, para. 116.
[95]BVerfG, *supra*, n. 2, para. 117.
[96]BVerfG, *supra*, n. 2, para. 119.
[97]BVerfG, *supra*, n. 2, para. 153.
[98]BVerfG, *supra*, n. 2, para. 118.

of Justice judgment,[99] even when critical, did not notice any blatantly arbitrary aspects of the ruling.

In fact, the majority of the Senate did not engage with the reception of the European Court of Justice judgment in the doctrinal writings at all.[100] Based on the general methodological rules of the legal profession, it is this that appears methodologically inacceptable.

As far as the European Central Bank action is concerned, this is declared as an *ultra vires* act[101] without even addressing the self-imposed precondition of an obvious *ultra vires* act.

Lack of European competence – what competence?

According to the Federal Constitutional Court, the alleged transgression of competences lay, for the European Central Bank, in the insufficient proportionality test and, for the European Court of Justice, in the failure to intervene against the transgression of competences by the European Central Bank.

This can be related to categories of powers and competences. There is an established distinction in European constitutional law between the *competence as such* and

[99]The ECJ judgment *Weiss et al.* has been widely discussed, *see* R. Broemel, 'Unionsrechtlicher Rahmen währungspolitischer Maßnahmen des ESZB', 35 *Zeitschrift für Gesetzgebung* (2019) p. 276; C. Dornacher, 'Schlusskapitel oder Zwischenakt?', 54 *Europarecht* (2019) p. 546 (this author stresses that the ECJ standard is 'correct'); F. Heide, 'Anmerkung, EuGH, Urteil v. 11. 12. 2018 – C-493/17 H. Weiss u. a.', 74 *Juristenzeitung* (2019) p. 305; M. Ludwigs, 'Das PSPP-Urteil des EuGH als Provokation der Eskalation', *EWS* (2019) p. 1; P.-C. Müller-Graff, 'Anmerkung, EuGH: Bank- und Kapitalmarktrecht: Anleihenkaufprogramm der EZB zulässig', 30 *Europäische Zeitschrift für Wirtschaftsrecht* (2019) p. 172 (who argues that the ECJ's generous proportionality test can be justified by the ECJ's duty to respect the treaty's choice to attribute the primary political responsibility to the institution which also has expertise, the European Central Bank); M. Dawson and A. Bobić, 'Quantitative Easing at the Court of Justice – Doing whatever it takes to save the Euro: Weiss and Others', 56 *CMLR* (2019) p. 1004 (despite a critical reading of the ECJ's proportionality approach – which I don't find convincing– the authors don't see arbitrariness in the ECJ decision); A. Mooij 'The Weiss judgment: The Court's further clarification of the ECB's legal framework', 26 *Maastricht Journal of European and Comparative Law* (2019) p. 449; F. Martucci, *Décisions et commentaires* (Bruylant 2019) p. 1009 at p. 1033; B. Raganelli 'Acquisto di titoli del debito sovrano sui mercati secondari, mandato della BCE e diritto dell'Unione. Nota a Corte di giustizia dell'Unione europea, sentenza 11/12/2018, n. C-493/17', 144 *Il Foro italiano* (2019) p. 172; J. Calvo Vérgez, 'La aprobación de la Directiva (UE) 2017/952, por la que se modifica la Directiva antielusión fiscal, y su proyección sobre los llamados mecanismos híbridos', 46 *Revista Aranzadi Unión Europea* (2019) p. 27.

[100]There is only a reference to the mostly critical article on *Weiss* by M. Dawson and A. Bobić. A sound methodological assessment of the literature would have required the Senate to address the question why *ultra vires* was not a widespread critique in academic writing on the case.

[101]BVerfG, *supra*, n. 2, para. 178.

the *exercise* of the competence, between the 'if' and 'how' of legal power. The proportionality principle is a rule on the exercise of competence. It requires the existence of a competence in the first place. In substance, the Senate majority claimed that deficiencies in the exercise of competences (the 'how' of competence) can morph into a deficit concerning the 'if' of competences. Without a proportionality test, acts of monetary policy (without any doubt an EU competence) turn into economic policy (which is a Member State competence). Conceptually, this confusion of an *ultra vires* act in the narrow sense and an *ultra vires* act in a broader sense (*see supra*) is simply not convincing. Consider the wide range of potential *ultra vires* deficits in a broader sense, from formal and procedural errors in voting or in the promulgation of a legal act, respective errors in an European Court of Justice judgment, to substantive grounds of illegality such as the violation of EU fundamental rights. The idea that each and every conceivable *ultra vires* deficit in a broader sense could be reviewed by a Member State court, the Federal Constitutional Court, does not live up to the philosophy underlying the German constitution, which is openness and friendliness towards European integration and – arguably the more tangible argument – it is plainly contrary to Germany's treaty obligations. And it is not compatible with the moderate, Europe-friendly position of the Federal Constitutional Court on display in the *Honeywell* case, where the Federal Constitutional Court stressed the necessity for self-restraint, for protecting the European Court of Justice and its function, for accepting the specific methodology of EU law, and for *Europarechtsfreundlichkeit* as a constitutional principle.

But let us assume, for the sake of the argument, that when it comes to proportionality of EU action, things are somehow different. Perhaps proportionality is exactly the tool that allows to capture gradual shifts with regard to competences and competence creep. To take a hypothetical but clear cut example: if a European Central Bank bond purchase programme led to the destruction of the foundations of the pension system of a given Member State, and if this was foreseeable in advance, the benefits of the programme would clearly be disproportionate in relation to the devastating consequences in that Member State. Now, if the European Central Bank, irrespective of the consequences, put that programme into action, monetary policy would not become economic policy. It would be a case of disproportionate monetary policy, but ultimately still monetary policy.[102]

But perhaps the argument of the Senate was just a very general argument: perhaps the Court was trying to say that in the absence of a proportionality test, it is simply not possible to determine whether the European Central Bank is pursuing economic policy or not. In that case, however, this would still be about an

[102]The expectation that the ECJ should intervene in such a case is a different discussion to the one at stake here, which is about a national court basically substituting itself for the ECJ.

insufficient rationale for an act, rather than on acting *ultra vires*, which is the reproach addressed to the European Central Bank.[103] None of this makes sense, unless one insists that the Federal Constitutional Court has the power to control European *ultra vires* acts in a broader sense (*see supra*). The *Honeywell* decision certainly does not provide a basis for such a far-reaching claim to power.

No matter how one twists and turns the matter, the Senate majority went well beyond its own *Honeywell* categories, taking up the role of a *de facto* comprehensive supervisory body regarding European Court of Justice rulings and EU actions.

Structural shift?

According to the *Honeywell* test, not all transgressions of competences may be considered as *ultra vires* acts. There needs to be a transgression of the borders of competence that amounts to a qualified, structural shift affecting the entire architecture of competences, tilting the balance of the entire system.[104] It is hard to see how this condition is met in the present case. Once more, the fact that the Senate majority confused the different categories affected the soundness of the argument. The question of proportionality as a rule about the exercise of competence – the 'how' of competence – can, by definition, only be raised with a view to a specific, individual case; this makes the structural argument inaccessible. And the fact that the judges of the Senate majority themselves implied that the lack of competence can somehow be 'repaired' within three months is not compatible with the assumption of a structurally significant shift affecting the entire competence architecture, as required by the *Honeywell* test.[105] It also remains unclear which competence is actually structurally affected 'to the detriment of the Member States'[106] – remember, this case is about the proper exercise of powers in an area of uncontested exclusive EU competence – monetary policy. The entire question only makes sense if one starts with the underlying assumption that the PSPP is economic policy, which is what the actual controversy is all about. In the Federal Constitutional Court's preliminary reference to the European Court of Justice, a structural dimension of the transgression of competence was construed in view of the substantial volume of the PSPP programme, and its assumed considerable influence on the refinancing

[103]BVerfG, *supra*, n. 2, para. 178: 'The ECB's actions must therefore be qualified as an ultra-vires act'.

[104]BVerfG, *supra*, n. 2, paras. 157, 178.

[105]For a similar view *see* A. Champsaur, 'Opinion: The German Constitutional Court has fallen into its own trap', *IFLR*, 15 May 2020, ⟨www.iflr.com/Article/3932835/Opinion-The-German-Constitutional-Court-has-fallen-into-its-own-trap.html⟩, visited 14 December 2020.

[106]BVerfG, *supra*, n. 2, para. 110.

conditions of Member States.[107] This was simply not plausible, though, as the effects of refinancing conditions would by definition only be temporary and would disappear once the programme in question ended or was adapted.

What happened to interjudicial self restraint, leeway for errors of the European Court of Justice and the necessity to submit a preliminary reference question?

Numerous elements of the *Honeywell* decision indicate that in 2010, the judges of the Second Senate knew quite well that they were dealing with a highly explosive question. One of the inbuilt defusing mechanisms of *Honeywell* was a self-commitment of the German court to refer the matter to the European Court of Justice before declaring a European act *ultra vires*. This was not properly done in the present case, unless you consider the entire interaction between the Federal Constitutional Court and the European Court of Justice on European Central Bank action one single case-complex. In that view, the Federal Constitutional Court submitted a critical question on the legality of European Central Bank action for the first time in the *Gauweiler* case (*OMT*), accepted grudgingly the – in the eyes of the Senate majority inadequate – response at first (*OMT* judgment), re-submitted the same question again on PSPP, and now no longer accepts the same inadequate answer given by the European Court of Justice in *Weiss*.[108] This version of the story does not hold water because of the implicit equation of the two European Central Bank programmes. Note also that the Federal Constitutional Court did not say much about proportionality and the economic policy effects in its first preliminary reference concerning Outright Monetary Transactions in 2014. It was Advocate General Cruz Villalón who brought up the proportionality aspect with regard to the European Central Bank bond purchase programmes in his opinion in the *OMT* case in 2015.[109]

However, taking *Honeywell* seriously would have required another preliminary reference to the European Court of Justice before an *ultra vires* finding was declared, specifically pointing to the alleged transgression of competences by the European Court of Justice.

Honeywell also contained this idea of interjudicial self restraint, admitting that courts can fail and that the European Court of Justice is entitled to some leeway

[107]BVerfG 18 July 2017, 2 BvR 859, 1651, 2006/15, 980/16, *PSPP (reference)* BVerfGE vol. 146, p. 216 at p. 261 ff.

[108]That's also how the judge rapporteur in the case tells the story: P.M. Huber, 'Nach dem EZB-Urteil des Bundesverfassungsgerichts: Ist die europäische Rechtsgemeinschaft in Gefahr?', The Greens/EFA in the EP, Webinar 18 June 2020, ⟨www.youtube.com/watch?v=dxtMK3XaZlM⟩, visited 14 December 2020.

[109]AG Cruz Villalón 14 January 2015, Case 62/14, *Opinion 62/14 Gauweiler et al. – OMT*, EU:C:2015:7, para. 159 ff.

for errors (*Fehlertoleranz*). *Fehlertoleranz* is not addressed in the *PSPP* judgment; it appears briefly in the descriptive part of the judgment where the *Honeywell* criteria are reiterated.[110]

Why would a court disregard its own criteria?

It turns out that by the Federal Constitutional Court's own criteria, the *ultra vires* verdict of the Senate majority does not hold up. But maybe that is not what this was all about. Doubts as to whether the *Honeywell* criteria were seriously relevant are supported by extra judicial remarks made by the judge rapporteur, explaining that if the court had argued in a more friendly manner, the criteria for an *ultra vires* act would not have been met.[111] The good news is that this statement seems to imply that the *Honeywell* criteria are not openly called into question. It is worth recalling the fact that the *Lisbon* judgment and the *Honeywell* decision declared *Europarechtsfreundlichkeit*, literally friendliness towards European law, to be a constitutional law obligation under the German Basic Law. But first and foremost, the statement is stunning because one should not determine the result of a test before applying the test. And this appears to be the case here: according to that reading, the majority of the judges wanted to declare an *ultra vires* act, thus, the criteria – which did not quite fit – had to be stretched. What is quite clear is that motives and motivations beyond the *PSPP* case seem to have played a role. In a webinar held in mid-June 2020, the judge rapporteur made further comments on the *PSPP* ruling. According to him, the *Weiss* response of the European Court of Justice was disappointing and came across as quite harsh ('*relativ barsch*'). After a lengthy and deep reflection on the issue in the Second Senate, the answer by the European Court of Justice was perceived as the answer the lowest court in the system would get after a superficial reference question.[112] To be fair, decisions from the Luxembourg Court never use more words than necessary and are certainly not known for the warmth of their language. But the disappointment is comprehensible to some extent, and to openly admit to this kind of human reaction commands respect. However, expectation management also matters. Apparently, the judges of the Federal Constitutional Court do not want to be treated like all the other courts who submit a reference to the European Court of Justice, and insist on a more prominent role for themselves. This might be the source of a misunderstanding.

[110]BVerfG, *supra*, n. 2, para. 112.

[111]P.M. Huber, Interview, *Süddeutsche Zeitung*, 13 May 2020, p. 5 In German: 'Wenn wir freundlicher argumentiert hätten, hätten die Tatbestandsvoraussetzungen für einen Ultra vires-Akt nicht vorgelegen'.

[112]In German: Eine Antwort 'wie man sie auch dem Amtsgericht Buxtehude auf eine schnell gemachte Vorlage geben würde', Webinar of 18 June 2020, *supra* n. 108, at 0:20:45 and 2:21:05.

Limits of multilevel cooperation of European Constitutional Courts

Andreas Voßkuhle, the President of the Federal Constitutional Court until mid-2020, who chaired the Second Senate for most of the big EU-related cases since the *Lisbon* case 2008/2009, published an article right after the *Lisbon* decision in 2010 where he coined the term *Verfassungsgerichtsverbund*,[113] literally translated as 'compound of constitutional courts'.[114] In an English version of this article, in this journal, the concept was paraphrased as 'multilevel cooperation of the European Constitutional Courts'.[115] The core idea is that Member State constitutional courts are at eye level with the European Court of Justice. Much of this sounds a lot like constitutional pluralism. But it is not pluralism if the purpose of the term is to cover up that ultimately, the Federal Constitutional Court always ends up being right and must prevail. In all fairness, there are elements of the *PSPP* decision that may serve as proof for the Federal Constitutional Court's will for cooperation with the European Court of Justice: the judgment's second area of conflict beyond the *ultra vires* issue deals with the question of supposedly hidden – prohibited – monetary financing by means of the PSPP.[116] Here, the Federal Constitutional Court remains sceptical, but ultimately accepts the European Court of Justice's result – there is no monetary financing – despite 'considerable concerns'. And arguably, it is the scepticism of the German court that led the European Court of Justice to carve out legal criteria for monetary financing in the first place. Nevertheless, trashing the Luxembourg Court's *Weiss* decision as *ultra vires* the way the Senate majority did flies into the face of constitutional pluralism. My reproach is that they tried to 'win' – they tried unilaterally to decide the open question of European constitutional law on who has the final word. This should never have happened. So far, that question had been kept in abeyance, which, from a constitutional pluralism perspective, was mutually beneficial. Submitting and re-submitting preliminary

[113]A. Voßkuhle, 'Der europäische Verfassungsgerichtsverbund', 29 *Neue Zeitschrift für Verwaltungsrecht* (2010) p. 1.

[114]The concept refers to the *Verfassungsverbund-Staatenverbund* controversy. *Staatenverbund* is the language of the Federal Constitutional Court in the 1993 *Maastricht* decision, emphasising the *Staat*. The term *Verfassungsverbund* with an emphasis on constitution was coined in response by I. Pernice, 'Bestandssicherung der Verfassungen', in R. Bieber and P. Widmer (eds), *L'espace constitutionnel européen* (Schulthess 1995) p. 225 at p. 261 ff. Both concepts are difficult to translate. The term multilevel constitutionalism captures only a part of the concept, *see* I. Pernice, 'Constitutional Law Implications for a State Participating in a Process of Regional Integration', in E. Riedel (ed.), *German Reports. XV. International Congress on Comparative Law* (1998) p. 40 ff; for a French version of the concept as *constitution composée*, *see* I. Pernice and F.C. Mayer, 'De la constitution composée de l'Europe', 36 *Revue trimestrielle de droit européen* (2000) p. 623 ff.

[115]A. Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts – Der europäische Verfassungsgerichtsverbund', 6 *EuConst* (2010) p. 175.

[116]BVerfG, *supra*, n. 2, para. 180 ff.

questions to the European Court of Justice again, fighting fiercely for dialogue between the courts, that would have been the right thing to do. After all, no other court within the EU looks at the European Court of Justice and the European Central Bank as critically as the Federal Constitutional Court.

In a constitutional law state of suspension, the possibility – or threat – of an *ultra vires* verdict may even serve as a stabiliser for the overall structure, with a chilling effect on any European institution to respect the limits of EU powers. But this pluralist interpretation of *ultra vires* review ultimately rests on the condition that the sword of Damocles never gets dropped.[117]

I still insist, though, that from the perspective of EU law, ultimately, Member State concerns and reserves are better processed by means of a constitutional 'identity control' (*Identitätskontrolle*), as the Federal Constitutional Court puts it.[118] Here is why: invoking national constitutional identity against EU law will always be about the bilateral relationship between a single given Member State's legal order and the EU legal order. The *ultra vires* reproach of a transgression of European competences cannot be limited to this bipolar relationship, though. It necessarily affects EU law in relation to all the other Member States as well, as EU law cannot be *ultra vires* only with respect to one Member State. In simpler words, the *ultra vires* verdict is a one-sided reproach towards the European Court of Justice: 'You guys got it wrong'. Identity control, which defends a specific – albeit not necessary unique – national constitutional law position, without underlying reproach addressed to European law, is probably best captured in the famous Lutheran sentence: 'Here we stand. We cannot do otherwise'. And that is an entirely different attitude.

Nevertheless, with respect to the proper functioning of a multilevel transnational legal system, national courts claiming to be the final arbiter is problematic either way: if each and every Member State comes up with *ultra vires* and constitutional identity reserves all the time, we can wave a single coherent European legal order goodbye. For this reason, even identity control objections must remain exceptional, used with utter restraint; any proliferation would kill that instrument. If everything is national constitutional identity, nothing is. Ultimately, there is no way around a civilised conversation between the courts – and with that, there is no way around constitutional pluralism.

[117]I explored this some time ago in my *Staatsrechtslehrervortrag*: F.C. Mayer 'Verfassung im Nationalstaat: Von der Gesamtordnung zur europäischen Teilordnung?', 75 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2016) p. 7.

[118]*See* on national constitutional identity Mayer (2000), *supra* n. 53, p. 341 ff. Looking at the certification procedure established in the US between US Supreme Court and State Supreme Court, I discuss the possibility of introducing a similar bi-directional consulting mechanism on identity issues between the ECJ and the highest national courts, p. 312 and 340; discussed in more detail in Mayer, *supra* n. 26, p. 591 ff.

Further critique

There are numerous other points of critique which cannot be explored in detail here.[119]

It is almost certain that the judgment is going to harm German interests and German standing in the EU political arena. There will be doubts about Germany's reliability. After all, the European Central Bank's functional independence[120] was initially a German idea,[121] – and is even enshrined in the German constitution.[122] And now it is the German Constitutional Court that calls this independence into question. The irony here is that an independent constitutional court and an independent central bank are both equally democratically precarious counter-majoritarian institutions,[123] which is not mentioned at all in the judgment. It is the schoolmasterly attitude (coming across as 'let's teach the European Court of Justice a lesson on proportionality') and the – sporadic – brutality of the language ('arbitrary'[124]) that is going to damage Germany's standing all over the EU. It will do major harm to German interests in the EU because, in the eyes of some, Germany is under a general suspicion of openly or covertly longing for hegemony in Europe anyway, which is not that difficult to argue, considering the history of the 20th century.

A related problem is the very German perspective adopted in the context of the considerations which the German court wants to see addressed in the proportionality test. As the European Central Bank's proportionality test is considered to be insufficient, the German judges present their view of how proportionality should have been dealt with. It is quite telling that the balancing the court suggests

[119]The following elements of critique are explored in greater detail in F.C. Mayer, 'Auf dem Weg zum Richterfaustrecht?', *Verfassungsblog*, ⟨verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht⟩, visited 14 December 2020 (English version: F.C. Mayer, 'To Boldly Go Where No Court Has Gone Before', 21 *German Law Journal* (2020) p. 1116 ff), and Mayer, 'Stellungnahme zur Öffentlichen Anhörung', *supra* n. 5, Committee Document 19(21)103.

[120]About the legal control and limits of legal independence of the European Central Bank *see Commission* v *ECB*, *supra* n. 92, para. 134.

[121]*See* the detailed account at H. James, *Making the European Monetary Union* (Belknap Press of Harvard University Press 2012) passim, in particular p. 187, 265 ff, 270 ff.

[122]That was a last minute amendment to Art. 88 Basic Law, introduced in the Legal Affairs Committee of the German Bundestag, Bundestag Drucksache 12/3896, p. 21 ff. *See* in that context also BVerfG 31 March 1998, 2 BvR 1877/97 and 50/98, *Euro*, BVerfGE vol. 97, p. 350 at p. 372, para. 89.

[123]*See* A. Bickel, *The Least Dangerous Branch* (Yale University Press 1962).

[124]Even if the Court refers to a rather technical understanding of arbitrariness (*Willkür,* BVerfG, *supra*, n. 6, para. *Judgment of May 05, 2020* at Headnote 2, paras. 112, 118) within the framework of an established case law on constitutional law limits for courts, the detrimental linguistic effect of a literal translation of the term *Willkür* should have been taken into consideration. German recent history has seen *Willkürgerichte*, arbitrary courts. The ECJ is no such arbitrary court.

seems to be limited to aspects in sight of Karlsruhe's worm's-eye view. The judges refer to low interest rates for the savings accounts of the average German or the development of real estate – elsewhere, there may be different or additional concerns. And what about positive effects, such as the enhanced accessibility of credit-financed home building, that could compensate for the negative effects put forward by the Federal Constitutional Court? This part of the *PSPP* judgment mirrors the one-sided selection of experts invited to the hearing on the *PSPP* case, where the German banking and insurance industry was over-represented, with basically no non-German European expertise in the room.

Note in that context that the emphasis the Court puts on the balancing aspect of the German style proportionality test appears quite odd from a German constitutionalist's perspective: this is the part of the proportionality test which is actually considered the most problematic part in the German doctrinal debate on proportionality as a constitutional law principle.[125]

Competence also means expertise,[126] and arguably the lack of expertise of a group of lawyers on the matters at stake in the *PSPP* case should already have led the court towards judicial self-restraint. It appears rather far-fetched to imply that the European Central Bank does not consider in great detail the possible effects and consequences of its measures. But in doing so, the European Central Bank adopts a European perspective, taking into consideration all kinds of aspects and concerns in various countries, with a view to a European common good.

Finally, one of the decision's worst collateral effects – intended or not[127] – is its impact on the rule of law crisis in Poland, Hungary and elsewhere. It appears to give a blueprint to all those governments and, more generally, all political forces who are seeking to escape their obligations under

[125] *See* on this the leading textbook on fundamental rights law in Germany, T. Kingreen and R. Poscher, Grundrechte. *Staatsrecht II*, 35th edn. (C.F. Müller 2019) para. 344: 'Daher läuft die Prüfung der Verhältnismäßigkeit im engeren Sinne stets Gefahr, bei allem Bemühen um Rationalität die subjektiven Urteile und Vorurteile des Prüfenden zur Geltung zu bringen'. [Therefore, the test of proportionality in the narrower sense – that is the balancing test at a third level of scrutiny, which comes after the first level question on the suitability of a measure to reach an objective and the second level question on the necessity of a measure to reach an objective – always runs the risk, in all efforts to achieve rationality, of emphasising the subjective judgments and prejudices of the examiner.]

[126] *See* the rather harsh commentary on the Court's *OMT* decision: 'very amateuristic course in monetary politics', C. Secondat et al., 'The German Constitutional Court's Decision about the European Central Bank's OMT Mechanism: A Masterpiece of Judicial Arrogance', *European Policy Briefs No. 30* (April 2014) p. 4.

[127] *See supra* n. 12, Judge Maidowski explaining this aspect of the ruling to Polish colleagues.

European law.[128] Following the European Court of Justice's decisions is not mandatory – that is the message.

What next?

The future of the European Central Bank's asset purchase programmes

It is not quite clear what exactly follows from the *PSPP* decision in strictly legal terms.[129] The technically enforceable part of the decision of a German court of law is the dispositive part (the *Tenor*), at the very beginning of the decision.[130] This is why the wording of the dispositive part matters. In the *PSPP* verdict, one does not find much that is enforceable by an order of the court ('*Vollstreckungsanordnung*'). The *Tenor* states that the German government and the German Bundestag omitted to take not further specified 'suitable measures'. The German Bundesbank is not even mentioned. If the Bundesbank were to be subject to an order by the Court to take action, it would face conflicting obligations from EU law (as a member of the European System of Central Banks) and German national law. This would most likely lead to a European Court of Justice case. The President of the European Court of Justice, Koen Lenaerts, has already made it clear that in his eyes the *Weiss* case is still valid.[131] It is quite likely that the European Court of Justice would instruct the Bundesbank to comply with the European Central Bank, clarifying that the Bundesbank is a European institution in the context of the monetary union with EU-only competence in this matter. That scenario would not defuse the tension between the courts.

The Senate majority set a three-month deadline to somehow solve the detected problem in the *PSPP* decision. Different options were discussed in the aftermath of the judgment. With a view to Article 284 TFEU, turning to the European Parliament could have been a solution. In that scenario, the European Central Bank would have released a progress report on PSPP to the responsible European

[128] *See* S. Detjen, 'EZB-Urteil des Bundesverfassungsgerichts: Gefährliche Textbausteine aus Karlsruhe'. Comment 5 May 2020, *Deutschlandfunk*, ⟨ondemand-mp3.dradio.de/file/dradio/2020/05/05/gefaehrliche_textbau-steine_aus_karlsruhe_dlf_20200505_1907_5edbc2aa.mp3⟩, visited 17 December 2020. The Polish Prime Minister Morawiecki described the BVerfG's judgement as one of the most important in the history of the EU, 'EU droht Deutschland mit Verfahren', *Frankfurter Allgemeine Zeitung*, 9 May 2020, ⟨www.faz.net/aktuell/politik/eu-droht-deutschland-mit-vertragsverletzungsverfahren-16762097.html⟩, visited 14 December 2020.

[129] Judge Lübbe-Wolff saw this coming in her dissenting opinion on the *OMT reference*: 'Walking in the desert', Anticipated in *OMT (reference)*, *supra* n. 1, at p. 426 (dissenting opinion Lübbe-Wolff).

[130] *See* Section 35 Statute on the Federal Constitutional Court, *Bundesverfassungsgerichtsgesetz*.

[131] President Koen Lenaerts, 'Europese Hof komt meer center stage' (Interview), *NRC Handelsblad*, 17 May 2020, ⟨www.nrc.nl/nieuws/2020/05/17/president-koen-lenaerts-europese-hof-komt-meer-center-stage-a4000000⟩, visited 14 December 2020.

Parliament Committee. The Bank ultimately did not take any detour. After the European Central Bank Council had re-evaluated PSPP in its session of 3 and 4 June 2020,[132] the European Central Bank Council took a formal decision at the end of June 2020 to make seven documents that prove the continuous scrutiny of the effects of PSPP by the European Central Bank accessible to the German government and German Parliament, under the condition that classified parts are not publicly available. On the basis of the documents submitted, the German Parliament concluded that the European Central Bank had sufficiently explained the proportionality considerations and thus met the demands of the Federal Constitutional Court in the *PSPP* decision.[133] The Federal Government and the Bundesbank concurred.

So that was it? A superficial observer could reach the conclusion that ultimately, nothing happened. This view ignores the fact that the *PSPP* case is not yet settled for good. The plaintiffs in the case, who did not have access to the classified European Central Bank material, filed a request for an order to implement the decision under Section 35 of the Federal Constitutional Court Act in August 2020, after the three-month period set out in the verdict had expired. This case is pending.[134]

Then, more generally speaking, it is still uncertain what impact the judgment will have on future European Central Bank action, in particular the Pandemic Emergency Purchase Programme (PEPP), established in the context of the Corona crisis.[135] The parallels between PSPP and PEPP are obvious, thus it is quite likely that another constitutional complaint to the Federal Constitutional Court will be filed against PEPP. At least Article 122 TFEU will play a role then, which addresses special circumstances, and the Federal Constitutional Court would have the opportunity to correct its *PSPP* ruling. It is clear the *PSPP* judgment, and the 'messages'[136] the judgment intended, were drafted prior to the outbreak of the coronavirus crisis. It may well be that the changed circumstances will lead the German court to be more constructive when looking at European Central Bank action. The way the legal

[132]See ⟨www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html⟩, visited 14 December 2020.

[133]Bundestag Drucksache 19/20621.

[134]With a new judge on the bench, the majorities on EU-related cases in the Second Senate may change, *see supra* n. 13.

[135]Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17).

[136]Huber, *supra* n. 111. For a critical analysis of the PSPP interviews given by BVerfG-Judges Voßkuhle and Huber and further by ECJ President Lenaerts, *see* 'Verfassungsrichter in der Defensive', *Verfassungsblog*, 21 May 2020, ⟨verfassungsblog.de/verfassungsrichter-in-der-defensive/⟩, visited 14 December 2020.

limitations on monetary financing were carved out together with the European Court of Justice show that the Federal Constitutional Court can play a constructive role.

Finally, the perception that actually nothing happened and nothing changed is inaccurate because the *PSPP* decision will of course remain as a precedent for all kinds of real or imagined *ultra vires* arguments.

Solving the ultra vires problem once and for all? Legal limits/limits of the law

Since 1993, numerous attempts have been made to solve the *ultra vires* issue by means of a constitutional law,[137] EU law[138] or even public international law[139] reasoning, with a view to falsifying either the Federal Constitutional Court's or the European Court of Justice's position. This is futile, if – as seen in the present case – neither the Federal Constitutional Court nor the European Court of Justice can be persuaded by the other court's legal position.

The ultra vires problem as a political problem

If both the European Court of Justice and the Federal Constitutional Court are arguing from legal positions that are coherent in the respective legal system, this can – in terms of legal theory – be conceptualised as a conflict of *Grundnormen* in the Kelsenian sense, for which no further legal solution is available.[140] From this point of view, the European Court of Justice and the highest national courts and tribunals could be considered *Grenzorgane*, or borderline institutions, in the Verdrossian sense: that is, institutions bound by law, but not subject to any legal control, so that the resolution of a conflict

[137]G. Hirsch, 'Europäischer Gerichtshof und Bundesverfassungsgericht - Kooperation oder Konfrontation?', 49 *Neue Juristische Wochenschrift* (1996) p. 2457.

[138]*See* for example C. Tomuschat, 'Die Europäische Union unter der Aufsicht des BVerfG', 20 *Europäische Grundrechte-Zeitschrift* (1993) p. 489 at p. 494 ff; G. C. Rodríguez Iglesias, 'Zur 'Verfassung' der Europäischen Gemeinschaft', 23 *Europäische Grundrechte-Zeitschrift* (1996) p. 125 at p. 127. Further references in Mayer (2000), *supra* n. 53, p. 117.

[139]T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', 37 *Harvard International Law Journal* (1996) p. 389; *see also* A. Paulus, 'Kompetenzüberschreitende Akte von Organen der Europäischen Union', in B. Simma and C. Schulte (eds.), *Akten des 23. Österreichischen Völkerrechtstages* (Linde Verlag 1999) p. 49 and Bryde, *supra* n. 74, p. 70 ff.

[140]*See* for example M. Heintzen, 'Die "Herrschaft" über die Europäischen Gemeinschaftsverträge – Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?', 119 *Archiv des öffentlichen Rechts* (1994) p. 564; N. MacCormick, 'The Maastricht-Urteil: Sovereignty Now', 1 *European Law Journal* (1995) p. 259.

is merely a political or sociological matter,[141] and at the end of the day a 'question of power'.[142]

Institutional solutions

For that reason, institutional solutions ultimately would have only a limited problem-solving capacity. There is no lack of proposals to introduce a competence court (for example a Union Court of Review,[143] a Constitutional Council,[144] a European Conflicts Tribunal,[145] a Subsidiarity Committee[146] or a Common Constitutional Court bringing together members of 'the Member State constitutional courts'[147]). Judges of the Federal Constitutional Court have suggested this repeatedly.[148] But it cannot be stressed enough that there already is a court of competence – the European Court of Justice,[149] even though it cannot be denied that there are examples of the ECJ not hesitating to stretch its competences for the purpose of securing its own institutional power.[150] A judicial dialogue – the continuous conversation between the courts of the different levels – is already a reality; it is what Article 267 TFEU is all about. Until recently, further considerations to introduce another institution to deal with the competence issue seemed unnecessary, as the Federal Constitutional Court had found a modus vivendi for the competence issue by means of the *Honeywell*

[141]*See* on this A. Verdross, *Völkerrecht*, 2nd edn. (Springer 1950) p. 24 ff, with reference to H. Kelsen.

[142]J. Isensee, 'Vorrang des Europarechts und deutsche Verfassungsvorbehalte', in J. Burmeister et al. (eds.), *Festschrift für Klaus Stern* (C.H. Beck 1997) p. 1265.

[143]*A Proposal for a European Constitution* (European Constitutional Group 1993) p. 13.

[144]J.H.H. Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals', 22 *European Law Review* (1997) p. 150 at p. 155; *see also* J.H.H Weiler et al., 'European Democracy and its Critique', 18 *West European Politics* (1995) p. 4 at p. 38.

[145]P.L. Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community, 99 *Columbia Law Review* (1999) p. 628 at p. 731 ff.

[146]I. Pernice, 'Kompetenzabgrenzung im Europäischen Verfassungsverbund', 55 *Juristenzeitung* (2000) p. 866 at p. 874 and p. 876.

[147]Mayer (2000), *supra* n. 53, p. 337.

[148]*See* S. Broß, 'Bundesverfassungsgericht – Europäischer Gerichtshof – Europäischer Gerichtshof für Kompetenzkonflikte', 92 *VerwArch* (2001) p. 425; U. Di Fabio, 'Ist die Staatswerdung Europas unausweichlich?', *Frankfurter Allgemeine Zeitung* (2001) p. 8. For more details on the different proposals *see* Mayer, *supra* n. 26, p. 606 ff.

[149]German ECJ Judge Colneric once presented a detailed account of the court's jurisprudence in the field of control of competences which explains how the European Court of Justice embraces this role and why perceptions of the ECJ on that matter may be different: N. Colneric, 'Der Gerichtshof der Europäischen Gemeinschaften als Kompetenzgericht', 13 *Europäische Zeitschrift für Wirtschaftsrecht* (2002) p.709.

[150]*See* the second Opinion of the ECJ regarding an accession of the EU to the ECHR, ECJ 18 December 2014, Case 2/13*, Opinion 2/13 (ECHR-Accession),* EU:C:2014:2454.

decision, and other Member States' constitutional law limits on European integration are mostly[151] not designed as *ultra vires* dissents.

With the possibility of interpreting the *ultra vires* question as being a political question –unresolvable on a legal level, with the potential to have a major impact on the EU interests of Germany and the existence of the EU itself – it makes sense to encourage the German Parliament to reclaim responsibility for the *ultra vires* question, which would also exonerate the Federal Constitutional Court in this matter. Let me stress that I would not recommend enshrining such a solution into a statute or even the Constitution. Openly formalising a Member State claim to declare EU acts *ultra vires* would inevitably lead to an infringement proceeding against Germany. The German Parliament could – at most – pass a resolution, insisting on a political *ultra vires* control with a view to the hypothetical case of a total meltdown of competence control at the EU level, if a transfer of competences to the EU level or amending the German constitution are not options to solve the conflict,[152] as a measure of last resort before a German exit from the EU under Article 50 TEU became inevitable.

Ways out of the European constitutional law dead end and the German constitution's commitment to a unified Europe

The Second Senate's case law on European integration, with all its procedural and substantive restrictions and path dependencies, is increasingly at odds with the solemn assignment laid down in the German constitution to pursue the constitutional law objective of a unified Europe. Democratically legitimised political majorities at the European and national level working towards this objective find themselves more and more barred by a few German judges of the Federal Constitutional Court. Nothing in the founding of the German constitutional

[151]Several Member States have voiced constitutional reservations with regard to EU law. But there are only two examples known of *ultra vires* findings by national courts (Czech Constitutional Court 31 January 2012, Case Pl. ÚS 5/12, *Slovakian Pensions – Landtová*; and Danish Højesteret 6 December 2016, Case 15/2014, *Ajos*). Essentially, the first one was the result of a domestic conflict between the highest Czech courts, for more detail on that *see* F.C. Mayer and M. Wendel, 'Die verfassungsrechtlichen Grundlagen des Europarechts', in *Enzyklopädie des Europarechts*, vol. 1, 2nd edn. (Nomos 2021) para. 246 ff. The second one expresses a reluctance which might endanger the unity of EU law, *see* in detail M. Madsen, 'Legal Disintegration?', *Verfassungsblog*, 30 January 2017, ⟨verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos⟩, visited 14 December 2020. In neither case, however, did the courts aspire to literally take over the role and function of the ECJ as court of last resort on EU law, as the Federal Constitutional Court does in the present case.

[152]This solution to a conflict between domestic constitution and EU law is suggested by the Polish Constitutional Tribunal in its decision on EU membership, 1 May 2005, Case K 18/04, *Accession Treaty of Poland*, Headnote 1.

order in 1949 nor in the constitutional amendment following German reunification 1993 justifies this development towards a court with unrestricted power.[153] The Court's more than generous admissibility construct (based on Article 38 Basic Law[154]), which gives almost anyone standing in EU matters at the Federal Constitutional Court, combined with the extensive substantive proportionality control introduced in the *PSPP* decision, indicates that the Federal Constitutional Court positions itself as an essential player of European politics. The core problem here is that the Second Senate links far-reaching statements concerning European integration to the eternity clause of the German constitution, Article 79(3) Basic Law, which establishes the concept of amendment-proof elements of the constitution. Thus, even supermajorities in German Parliament cannot correct decisions of the Constitutional Court. This is a European constitutional law dead end: because of the path dependency of the case law, there is an increasing risk of being stuck in a situation where the German constitution, as interpreted by the Federal Constitutional Court, does not allow certain EU action. At the same time, constitutional amendment is not available, as the Federal Constitutional Court is in the realm of the eternity clause, which leaves as the only and unlikely option a completely new German constitution. Many years ago, it was stated from the bench that it is not without bitter irony that the eternity clause is being played off against the objective of a unified Europe in the German constitution: 'Article 79(3) of the Basic Law, as the constitutional limit of European integration, has rightly been applied with care in this decision [the *Maastricht* decision] because the meaning of this provision is to exclude our country relapsing into dictatorship and barbarism, and nothing serves this aim with higher probability than Germany's integration into the European Union'.[155] It is also increasingly clear that even the part of the case law that does not invoke the eternity clause and that allows certain EU developments to take place, on the condition that it produces the qualified majority of two-thirds normally required for constitutional amendment under Article 79(2) Basic Law, is tantamount to a European constitutional law dead end.[156] This is the case because of the increasing diversity and complexity of the German political party system,

[153]For a substantive critique of this general tendency to 'de-limitation' (*Entgrenzung*) *see* M. Jestaedt et al., *Das entgrenzte Gericht* (Suhrkamp 2011).

[154]*See* on this the critique of C. Schönberger, 'Die Europäische Union zwischen "Demokratiedefizit" und Bundesstaatsverbot. Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts', 48 *Der Staat* (2009) p. 535 at p. 539 ff.

[155]BVerfG 18 July 2005, 2 BvR 2236/04, *European Arrest Warrant*, BVerfGE vol. 113, p. 273 at p. 336 (dissenting opinion Lübbe-Wolff).

[156]The scope of application of the two thirds majority was extended by the court in the UPC case (*Unified Patent Court Agreement*, *supra* n. 13), with three judges dissenting.

which makes it more and more difficult – if not close to impossible – to secure a two-thirds majority in both chambers of parliament.[157]

It is high time to ensure – if necessary through amending the constitution – that the democratically legitimised Parliament is in control of Germany's path in European integration and that Parliament takes responsibility for the German constitution's assignment to reach for the constitutional law objective of a unified Europe. This would require a more limited reading of the eternity clause and a mechanism to overcome a court veto based on that provision, for example by referendum. A clarification by constitutional amendment on the EU-related issues that really should require the two-thirds majority would also be helpful.

Concluding thoughts

The core critique of the *PSPP* judgment is that it disregards an ancient rule of wisdom: 'What if everyone did that?' Following the judgment's logic, every member state's supreme courts, parliaments and similar institutions could suggest their own view on the proportionality of measures by the European Central Bank and others. And taking the Senate majority's requirements for a proportionality test of EU action seriously, all kinds of EU law obligations could be called into question, ranging from competition and state aid law up to environmental legislation or even the EU rules on the European Single Market.[158] This has the potential to destabilise European law as a whole.

The relative calm in the immediate aftermath of the decision can be deceiving. The decision has set a precedent that will not simply go away. What is at stake with this precedent is nothing less than the European community of law,[159] a unique achievement in dealing with diverging interests on the European continent. Without the underlying fabric of a nation state and the binding forces that

[157]Political parties hostile or sceptical on European integration combined with a two-thirds majority requirement leads to small opposition parties in the role of veto players in the Bundestag. In the Bundesrat, majorities depend on the agreements the coalition governments at the Länder level have on voting on European affairs in the Bundesrat. The debate on the majority required to ratify the NextGenerationEU-approach in Germany is a recent example for the difficulties in that context. *See* the hearing in the European Affairs Committee of the Bundestag held on 26 November 2020, ⟨www.bundestag.de/dokumente/textarchiv/2020/kw44-pa-europa-eigenmittelsystem-799448⟩, visited 14 December 2020.

[158]*See* the harsh critique from the world of private law, pointing to the risk of serious damage for the functioning of competition law: T. Ackermann, 'Das europäische Wettbewerbsrecht als Kollateralschaden des PSPP-Urteils des Bundesverfassungsgerichts?', 8 *Neue Zeitschrift für Kartellrecht* (2020) p. 281.

[159]*See* F.C. Mayer, 'Die Europäische Union als Rechtsgemeinschaft', 70 *Neue Juristische Wochenschrift* (2017) p. 3631.

come with it, this construct still is extremely fragile. Its central components remain on the one hand the European Court of Justice, a unique transnational court both from a historical and a comparative perspective, despite its deficiencies. On the other hand, the peculiar European community of law rests on the mutual trust of all courts in the EU in the fact that EU-related rulings will be respected by all players in the EU, in particular by the courts.

If this vanishes, over time – and this may take many years – the entire system risks winding down towards some kind of judicial rule of the jungle: the rule of the strongest court. In that world, things would be sorted out along the parameters of size, power, political influence and economic weight of the respective Member State. For Germany, this might not even be too disadvantageous in the short term. But with such a development, ultimately, the core idea of European integration – safeguarding peace in Europe through law and legal equality – would be dismantled.

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