

ARTICLE

Special Section: ‘The German Federal Constitutional Court’s PSPP Judgment’

“Simply not comprehensible.” Why?

Sven Simon and Hannes Rathke*

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Abstract

The German Federal Constitutional Court’s ruling of May 5, 2020 on the ECB’s Public Sector Purchase Programme (PSPP) stated, for the first time ever, that some decisions by European institutions are not covered by the competence allocations of the European Treaties and cannot therefore take effect in Germany. This article argues that the judgment came as no surprise, as it is consistent with the principle of conferral of powers. According to this principle the EU and its institutions can only act within the limits of their competences. The German Basic Law prohibits any transfer of sovereign rights whose exercise would confer sua sponte additional competences to the supranational level. Against this background, the Federal Constitutional Court judgment does not seek to limit the ECB’s scope for appraisal and evaluation in the exercise of its monetary policy mandate. It focuses rather on the conditions which legitimize the ECB’s leeway. The issue in this case is not the applicability of the proportionality principle as a criterion governing the delimitation of powers, but the different reference points for the assessment of proportionality. In this regard the CJEU had failed to discuss whether monetary policy and the effects on economic policy are proportionate by themselves. Hence, in constitutional terms, the CJEU’s interpretation was found to be “arbitrary”, since the German Constitutional Court defined arbitrariness as jurisprudence that “in a reasonable reading . . . [appears] unintelligible and clearly untenable.” In other words, it is “simply not comprehensible.” Despite the harsh words of the German Constitutional Court, the authors argue that the judgement in the end can help to create a European legal culture that will strengthen the European Union in the long term if, in future, the CJEU engages more constructively with criticisms from Member State courts.

Keywords: Federal Constitutional Court; European Central Bank; conferral of powers; competences; proportionality

A. Introduction

Seldom has a judgment handed down by the Federal Constitutional Court been met with such loud and sustained public objections as the ruling of May 5, 2020¹ on the Public Sector Purchase Programme carried out by the European Central Bank (ECB). For the first time ever, a German court has ruled that acts and decisions by European institutions are not covered by the European system for the allocation of competences and cannot therefore take effect in Germany. The judgment came as no surprise. It is consistent with the principle of the conferral of powers, in accordance with which the EU and its institutions can act only within the limits of their competences.² If the principles protected by Article 1 and Article 20 in conjunction with Article 79(3) of the Basic Law (Grundgesetz)

*Professor Dr Sven Simon holds the chair for international law and European law with public law at the Philipps University Marburg and is a member of the European Parliament. Dr Hannes Rathke, LL.M. works for the administration of the German Bundestag; the article only reflects his personal opinion. This article was previously published in German in *EuZW* 12/2020.

¹Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 859/15, (May 5, 2020), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html [hereinafter *Judgement of May 5*].

²Treaty on the Functioning of the European Union art. 5(1), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

are infringed, the Federal Constitutional Court must show that this is the case. The moral hazard that might be created for other legal systems is obvious, but in a constitutional state this is not an argument for waiving control or not applying the law in a certain way in accordance with perhaps contentious³ but nonetheless settled case-law.

B. Basis for the Validity of Union Law

The first point of conflict in the bodies of case law of the two courts is the different understanding each has of the basis for the validity of Union law. Since *Costa v. ENEL*, the CJEU has held that Union law takes precedence over national legal provisions by virtue of the Union's independence.⁴ It emphasizes the autonomous nature of Union law and maintains that it takes precedence over any provision of national law, including constitutional law.⁵ Otherwise, the requirement that Union law should apply in the same way throughout the Union could not be guaranteed. Primacy of application is an essential basis and condition for European integration, enabling the Union to be fully effective as a "new legal order in international law."⁶

In principle, the Federal Constitutional Court has recognized the primacy of Union law as developed by the Union courts, but which has not yet been codified in primary law.⁷ However, in the opinion of the Federal Constitutional Court, primacy is not absolute or intrinsic to Union law, but is enshrined in, and therefore also circumscribed by, constitutional law.⁸ The national order to apply the Union law contained in the act of ratification is the basis for the validity of Union law in Germany, but at the same time the integration program thus accepted imposes a limit on that validity. That legitimizing basis for—and restriction on—the primacy of application is, with certain minor differences, part of the constitutional structures of the Member States and not specific to German constitutional law on EU integration.⁹

C. Constitutional Court Scrutiny of the Exercise of Competences

Scrutiny by the Federal Constitutional Court is based on the democratic substance of the right to vote guaranteed in Article 38(1), second sentence of the Basic Law and the inalienable principle of democratic self-determination under Article 20(1) and(2) in conjunction with Article 79(3) of the Basic Law as part of the integration-proof constitutional identity of the Federal Republic of Germany.¹⁰ Accordingly, the Basic Law prohibits any transfer of sovereign rights whose exercise can independently justify the conferral of additional competences to the supranational level.

The transfer of competences to an independent central bank is acceptable in constitutional law in view of the bank's specific monetary policy responsibilities. However, the reduced democratic legitimization that this entails is only acceptable if it is offset by special precautions.¹¹ Democratic legitimization is guaranteed by the fact that the ECB is bound in the performance of its functions by the

³See SVEN SIMON, GRENZEN DES BUNDESVERFASSUNGSGERICHTS (2016).

⁴Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585 (1964). For settled case-law, see also ECJ, Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECLI:EU:C:1978:49 (Mar. 9, 1978), <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=89693&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7262471>.

⁵ECJ, Case 11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114 (Dec. 17, 1970), para. 3, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=88063&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8290487>.

⁶ECJ, Case C-26/62, *Van Gend en Loos v. Administratie der Belastingen*, ECLI:EU:C:1963:1 (Feb. 5, 1963), 25, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=87120&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7274126>.

⁷Whereas an express primacy rule was laid down for the first time in Article I-10 of the draft Constitutional Treaty, no such rule was included in the Lisbon Treaty and the Final Act of the Lisbon Treaty contained only a declaration on primacy, which is not legally binding. It can be used as an aid to interpretation but is not an integral part of the Treaties.

⁸See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 2015, 140 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 317, 334 et seq., para. 36 et seq.; Andreas Voßkuhle, *Der europäische Verfassungsgerichtsverbund*, 2010 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 1, 6 et seq.; STEFAN HAACK, VERLUST DER STAATLICHKEIT 158 (2007).

⁹See HANNES RATHKE, SONDERVERTRÄGLICHE KOOPERATIONEN 11 (2019).

¹⁰Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 30, 2019, 140 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 202, 286 para. 119.

¹¹*Id.* at 328, para. 209.

principles of the conferral of powers¹² and proportionality¹³ and by the Charter of Fundamental Rights.¹⁴ Judicial review of the mandate is also needed as a constitutional safeguard.¹⁵

In the present case, the Federal Constitutional Court did not scrutinize the specific action by the ECB or the “correct” distinction between economic and monetary policy, but the transparency and, hence, the amenability to review the ECB measures on the basis of the grounds given by the ECB for its decision. The Federal Constitutional Court judgment does not seek to limit the ECB’s scope for appraisal and evaluation in the exercise of its monetary policy mandate or even to replace ECB decision-making with a judicial appraisal. It focuses on the conditions which legitimize the ECB’s margin for maneuver, on the transparency of the actions taken independently and hence on how judicial scrutiny of the aims and means can be provided for in the first place. It is thus concerned, for the purposes of judicial review, with the ECB’s actions and obligations to state decisions, in order to impose restrictions on ECB programs which are potentially unlimited in scope and have an operational effect on economic policy and thereby guarantee the degree of legitimization in the implementation of Union law required by the constitution.

D. Different Criteria

Against this background, the second point of conflict in the divergent case law lies in the different application of the proportionality principle laid down in Article 5(4) TEU, which sets limits on the admissibility of the means employed by the ECB.

I. Proportionality as a Criterion for Assessing Competence

A range of ideas on the application of the proportionality principle as a criterion for the delimitation of competences in connection with the principle of the conferral of powers can be found in the literature.¹⁶ However, the differences in approach are not the problem in this instance, since in the *Gauweiler* case the Court of Justice already established that, in accordance with the principle of conferral of powers, the ESCB must act within the limits of the powers conferred on it by primary law and cannot therefore validly adopt and implement a program which falls outside the scope of monetary policy as established by primary law.¹⁷ The indirect effects of a measure did not in themselves call its status as monetary policy action into question. As regards the means employed, however, this applied only to the extent that the program is “implemented only in so far as is necessary for the maintenance of price stability.”¹⁸ Thus, the issue in this case is not the applicability of the proportionality principle as a criterion governing the delimitation of powers,¹⁹ but the different reference points for the assessment of proportionality.

II. Proportionality Reference Point

The CJEU conducts a proportionality assessment in paragraphs 71 to 100 of the *Weiss* judgment, considering the question of whether the *monetary policy* measures taken are proportionate to the *monetary policy* objectives pursued. However, in using proportionality between monetary policy and support for economic policy in the Union as a criterion to determine competence, the aim is not to compare the objectives cited by the institution taking the action with the means chosen to achieve them. In this

¹²Treaty on European Union arts. 5(1), 5(2), Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

¹³TEU, arts. 5(1), 5(3).

¹⁴140 BVERFGE 202 at 329, para. 212.

¹⁵*Id.* at 328, para. 211.

¹⁶Christian Callies, *Art. 5 TEU, in EUV/AEUV MIT EUROPÄISCHER GRUNDRECHTECHARTA* (Christian Callies & Matthias Ruffert eds. 2016); Stefan Kadelbach, *Art. 5 EUV, in EUROPÄISCHES UNIONSRECHT* (Hans von der Groeben, Jürgen Schwarze & Armin Hatje eds., 2015).

¹⁷ECJ, Case C-62/14, *Peter Gauweiler and Others v. Deutscher Bundestag*, ECLI:EU:C:2015:400 (June 16, 2015), para. 41, <http://curia.europa.eu/juris/liste.jsf?num=C-62/14>.

¹⁸*Id.* at para. 64.

¹⁹See Koen Lenaerts & Moritz Hartmann, *Der europäische Rechtsprechungsverbund in der Wirtschafts- und Währungsunion*, 72 JURISTENZEITUNG [JZ] 321, 329 (2017).

regard, an assessment has to be made as to whether *monetary policy* measures are proportionate to their effects on *economic policy* and the ESCBs corresponding ability to support the general economic policies in the Union.²⁰ In the PSPP judgment, the proportionality assessment is clearly intended to identify the effects of the exercise of monetary policy competence on areas for which no such competence has been transferred to the Union, namely economic and fiscal policy.²¹ The classic dispute as to whether economic and monetary policy can be separated from each other at all certainly informs that attempt at delimitation. For that reason, the ECB has a wide margin of discretion both in the choice of measures and in the evaluation of secondary effects on economic policy, in particular since it is required to support economic policy in the Union. But the application of the proportionality principle is no longer comprehensible when it is not the relationship between monetary policy and economic policy which is being assessed, but rather the relationship between the monetary policy measures and the monetary policy objectives, and when the relationship between the monetary policy measures and the economic policy effects is then nonetheless assessed. The shift in the line of demarcation from that of the Union institutions being bound by Union objectives²² to that of the institutions having the power to set objectives made it possible for the latter to decide independently on the scope of the competences the Member States have granted them.

The issue with the CJEU judgment of December 11, 2018²³ is that the CJEU did not discuss whether monetary policy and the effects on economic policy are proportionate. Since the ECB had not entered a submission on that point, the CJEU also had no evidence on which to judge whether the ECB had complied with the delimitation of competences. It is “simply not comprehensible” to the Federal Constitutional Court that the CJEU nevertheless concludes that there is no problem with regard to competences. The ECB is independent in its exercise of monetary policy and has a wide margin of discretion. The CJEU can confine itself to scrutinizing the evidence. However, it cannot completely disregard the question of competences. The proportionality assessment failed to take even the most basic account of questions of competence. By simply citing the aims and means set out by the ECB and not requiring the ECB to provide a full explanation for its action, the CJEU fails in its responsibility to oversee the application and interpretation of the Treaties in accordance with Article 19(1), second sentence, TEU. In treating the proportionality principle as a “legally binding control criterion,”²⁴ the CJEU renders the principle of the conferral of powers²⁵ as a corrective measure to protect Member States’ powers completely meaningless. It thus fails in its responsibility to monitor the exercise of competences and thus itself acts *ultra vires*.

E. Convincing as an Outcome, But Not Properly Substantiated?

However, that finding by the Federal Constitutional Court alone does not mean that the CJEU judgment is not effective in Germany. If every Member State were to claim that its own courts should decide on the validity of Union legal acts, the uniform application of Union law could no longer be guaranteed, undermining the existence of the Union as a legal entity. In fact, in the *Honeywell* case the Federal Constitutional Court expressly acknowledges that it is not incumbent on it to substitute its own understanding of the law for that of the CJEU.²⁶

²⁰See Letter from the ECB President to Mr. Sven Simon, MEP, on Monetary Policy (June 29, 2020), https://www.ecb.europa.eu/pub/pdf/other/ecb.mepletter200629_Simon~ec6ead766.en.pdf. See also TEU, art. 127(1).

²¹*Judgement of May 5*, at para. 138 et seq.

²²TEU, art. 13(1).

²³ECJ, Case C-493/17, Heinrich Weiss and Others, ECLI:EU:C:2018:1000 (Dec. 11, 2018), <http://curia.europa.eu/juris/liste.jsf?num=C-493/17> [hereinafter Weiss].

²⁴Lenaerts & Hartmann, *supra* note 16, at 330.

²⁵TEU, arts. 5(1), 5(2).

²⁶Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 6, 2010, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 286, 307.

I. Convincing as an Outcome

In constitutional terms, however, a limit is reached when a decision is completely unjustifiable as regards the methodology used to arrive at it. In the present case that means that the Federal Constitutional Court can only issue an *ultra vires* ruling where the CJEU's interpretation is found to be "arbitrary" and a court can be said to be acting arbitrarily when the interpretation of jurisdiction rules "in a reasonable reading . . . [appears] unintelligible and clearly untenable."²⁷ In other words, it is "simply not comprehensible." In that event, the principles set out in Article 20(1) of the Basic Law have been infringed. That is the real issue at stake in the present case: The protection of constitutional identity against the exercise of uncontrolled arbitrary power.

It is a central function of Article 23 of the Basic Law to establish that the level of democratic legitimization and the stringency of the constitutional criteria employed and the measures taken to protect fundamental rights at European level must be essentially similar, but not identical, to those which apply at the national level in Germany. However, if the breach of constitutional principles is so flagrant that the interpretation of the law is logically incomprehensible, then the point at which Article 79(3) of the Basic Law takes effect has been reached. Even the legislator amending the constitution cannot order the level of constitutional protection lowered in that way.

Constitutionally, the power of review transferred to the CJEU in the second sentence of Article 19(1) TEU must be restricted if the *ultra vires* action identified by the Federal Constitutional Court at the same time leads to a breach of constitutional identity,²⁸ i.e. if the CJEU's interpretation not only does not meet the methodological requirements of the Federal Constitutional Court, but is also clearly untenable in that the supranational court is acting arbitrarily. The Federal Constitutional Court is then raising an objection to a Union legal act that is incompatible with inalienable principles of the Constitution.

II. . . . But Not Properly Substantiated

In its OMT judgment, the Federal Constitutional Court treated *ultra vires* control as a sub-category of constitutional identity control, in that an arbitrary interpretation of Union law is at the same time contrary to the very essence of the idea of democracy.²⁹ Since not every instance of a mandate being exceeded is also a breach of constitutional identity, the criteria "manifest and structurally significant exceeding of competences" serve to restrict the *ultra vires* control on the basis of Article 79(3) of the Basic Law to extreme exceptional cases. There might have been less scope for criticism if the Federal Constitutional Court had emphasized more clearly in its grounds the way in which the CJEU had acted arbitrarily. It set out to examine the proportionality of A and assessed B.

The outcome would ultimately have been no different, but it would have been much less severe in its implications if the judgment had been based more clearly on a breach of constitutional identity. That would have avoided a conflict of interpretation with the CJEU on the final binding interpretation of Union law. Furthermore, there is a Union law counterpart in the Treaty. The emergency mechanism laid down in Union law in Article 4(2) TEU did not operate in the PSPP case. There is still speculation as to why the CJEU did not seek to analyze whether the monetary policy measures were appropriate given the effects on economic policy. There is no doubt that the ECB consistently makes such an assessment, and providing an explanation would have as little to do with disclosure of its "trade secrets" as with encroachment on its sphere of independence. The Federal Constitutional Court was only concerned with the question of whether a basis existed at all for the assessment of competences. Without such a basis, no constitutional substantiation could be provided for a judgment and in a constitutional state an unsubstantiated judgment is not a judgment but an arbitrary statement, since "judicial power is substantiating power . . . An unsubstantiated independent

²⁷Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 13, 1970, 29 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198, 207; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 31, 1990, 82 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 159, 194.

²⁸For details see also SIMON, *supra* note 2, at 213, 234, 267.

²⁹Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 21, 2016, 142 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 123, 149, 161.

ruling tends to be arbitrary.³⁰ The recognized methodological standards are open to debate. It is difficult to secure a consensus on this point even at national level, and the way considerations are weighed up can also produce different results. However, the limit has been reached when there is no weighing up at all, when no reasons whatsoever are given. That was what happened—intentionally or unintentionally—with the CJEU judgment.

F. Outlook – Openness to Dialogue in Constitutional Court Cooperation

The CJEU itself stresses that “the responsibility for ensuring judicial review in the EU legal order [is entrusted] not only to the Court of Justice but also to national courts” and that the national courts, in collaboration with the Court of Justice, fulfil a duty “entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed.”³¹ Here the CJEU is referring to cooperation on the effective creation of a system of legal remedies and proceedings in which the national courts, as “ordinary Union courts,”³² in collaboration with the Court of Justice, ensure that the law is observed in the application and interpreting of the Treaties.³³ That cooperation on the implementation of Union law is supplemented in European constitutional law by the responsibility of national constitutional courts to safeguard national constitutional identity. There is tension between the two functions, and if they are both to be exercised the question of the requisite forms of constructive cooperation must be addressed, especially if courts are apparently talking at cross-purposes or the much-touted dialogue is somewhat one-sided.

One aspect of the supervisory power to be exercised is the obligation to refer, by means of which the CJEU is given the opportunity to review whether a Union legal act has an adequate basis in Union law on the conferral of powers, or if it contravenes Union law. The Federal Constitutional Court initially complied with its obligation to refer. In its PSPP judgment, the CJEU decision is also declared inapplicable in Germany and thus a further independent act of Union law. A further referral could therefore have been made for a preliminary ruling on the CJEU judgment itself before it was found to be inapplicable.³⁴

The CJEU, for its part, did not take the opportunity to discuss the considerations set out in its decision. It also makes clear in its press release on the Federal Constitutional Court’s PSPP judgment³⁵ that there would be no point in a further referral. If in the future the CJEU engages more constructively with criticisms from Member State courts, and establishes a level of control for questions of competence that is consistent with the democratic and constitutional structure of the Union, that might minimize the reservations expressed by national courts and, in particular, help to create a European legal culture³⁶ that will strengthen the European Union in the long term.

³⁰Paul Kirchhof, *Chance für Europa*, FRANKFURTER ALLGEMEINE (May 26, 2020), <https://www.faz.net/aktuell/politik/staat-und-recht/nach-dem-etz-urteil-chance-fuer-europa-16777586.html>.

³¹ECJ, Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117 (Feb. 27, 2018), para. 32 et seq., <http://curia.europa.eu/juris/liste.jsf?num=C-64/16>.

³²ECJ, Case 1/09, *Opinion pursuant to Article 300(6) EC*, ECLI:EU:C:2011:123 (Mar. 8, 2011), para. 80, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80233&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8298309>.

³³ECJ, Case 244/80, *Foglia v. Novello*, ECLI:EU:C:1981:302 (Dec. 16, 1981), para. 14 et seq., <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=91130&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8298651>; ECJ, Case C-50/00P, *Unión de Pequeños Agricultores*, ECLI:EU:C:2002:462 (July 25, 2002), para. 41, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=47107&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8298839>; *Associação Sindical dos Juizes Portugueses*, C-64/16 at 33.

³⁴See, to that effect, 126 BVERFG 286 (330) (dissenting opinion by Judge Landau).

³⁵Press Release, Court of Justice of the Eur. Union, No. 58/20 (May 8, 2020) (on file at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf>).

³⁶See Sven Simon, *Rechtskulturelle Differenzen in Europa*, 143 ARCHIV DES ÖFFENTLICHEN RECHTS [AÖR] 597 (2018).