

Balancing Competences? Proportionality as an Instrument to Regulate the Exercise of Competences after the *PSPP* Judgment of the Bundesverfassungsgericht

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Analysis of proportionality in the context of Article 5 TEU after the *PSPP* judgment – Bundesverfassungsgericht challenging Court of Justice to control European Central Bank’s motives – Doctrinal tradition of ‘smoking out’ illicit motives through proportionality – Article 5(4) TEU: proportionality of *exercise* of competences, primarily safeguarding member states’ autonomy – Court of Justice case law on proportionality: deferential standard of review towards measures of EU institutions – Bundesverfassungsgericht case law on federal competences and municipal autonomy: less deferential but still respectful standard of review – *PSPP* inconsistent with case law and with Article 5 TEU – Balancing-stage of proportionality unsuitable for motive control

INTRODUCTION

The *PSPP* judgment of the German Federal Constitutional Court, the Bundesverfassungsgericht,¹ has drawn a lot of attention.² Most of the comments

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¹BVerfG, 5 May 2020, 2 BvR 859/15, *PSPP II*.

²See, e.g., F.C. Mayer, ‘The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court’s *PSPP* decision of 5 May 2020’, 16 *EuConst* (2020) p. 733 (with further references); A. Bobić and M. Dawson, ‘Making sense of the “incomprehensible”: The *PSPP*

European Constitutional Law Review, 17: 314–334, 2021

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doi:10.1017/S1574019621000201

on the judgment focused on its defiance of the Court of Justice, the consequences for the relationship between the two courts, as well as on possible spillover effects for judicial dialogue in Europe. However, the decision has also put the spotlight on the proportionality test as an instrument to delimit competences. While proportionality is explicitly mentioned in Article 5(1) TEU as a condition for the exercise of Union competences, the specific competence-dimension of proportionality has received limited attention in the legal literature.³ Most analyses of proportionality in EU law focus on the general application of the test.⁴ Consequently, we want to take a closer look at proportionality as an instrument to control the exercise of competences in EU law. Our analysis proceeds in four steps.

The first part sketches the emergence of proportionality as an instrument of judicial review. We show that one of the historic functions of proportionality was controlling the motives behind administrative and legislative acts and ‘smoking

Judgment of the German Federal Constitutional Court’, 57 *Common Market Law Review* (2020) p. 1953; N. Petersen, ‘The PSPP Decision of the German Federal Constitutional Court and Its Consequences for EU Monetary Policy and European Integration’, 2 *Revue Trimestrielle de Droit Financier* (2020) p. 28; U. Haltern, ‘Revolutions, real contradictions, and the method of resolving them: The relationship between the Court of Justice of the European Union and the German Federal Constitutional Court’, 19 *International Journal of Constitutional Law* (2021) p. 208; K.J. Alter, ‘When and how to legally challenge economic globalization: A comment on the German Constitutional Court’s false promises’, 19 *International Journal of Constitutional Law* (2021) p. 269; S. Egidy, ‘Proportionality and procedure of monetary policy-making’, 19 *International Journal of Constitutional Law* (2021) p. 285.

³For notable exceptions, see T. Tridimas, *The General Principles of EU Law*, 2nd edn. (Oxford University Press 2006) p. 175-180; J. Saurer, ‘Der kompetenzrechtliche Verhältnismäßigkeitsgrundsatz im Recht der Europäischen Union’, 69 *Juristenzeitung* (2014) p. 281; M. Goldhammer, ‘Kritik und Rekonstruktion kompetenzbezogener Verhältnismäßigkeit im Unionsorganisationsrecht’, in B. Baade et al. (eds.), *Verhältnismäßigkeit im Völkerrecht* (Mohr 2016) p. 125.

⁴See, e.g., G. de Búrca, ‘The Principle of Proportionality and Its Application in EC Law’, 13 *Yearbook of European Law* (1993) p. 105; T. Tridimas, ‘The Principle of Proportionality in Community Law: From Rule of Law to Market Integration’, 31 *Irish Jurist* (1996) p. 83; O. Koch, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (Duncker & Humblot 2003); Tridimas, *supra* n. 3, p. 136-174; A. von Arnould, ‘Theorie und Methode des Grundrechtsschutzes in Europa: am Beispiel des Grundsatzes der Verhältnismäßigkeit’, 43 *Europarecht* (2008) p. 41; T.-I. Harbo, ‘The Function of the Proportionality Principle in EU Law’, 16 *European Law Journal* (2010) p. 158; V. Trstenjak and E. Beysen, ‘Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung’, 47 *Europarecht* (2012) p. 265; A. Portuese, ‘Principle of Proportionality as Principle of Economic Efficiency’, 19 *European Law Journal* (2013) p. 612; W. Sauter, ‘Proportionality in EU Law: A Balancing Act?’, 15 *Cambridge Yearbook of European Legal Studies* (2013) p. 439; T.-I. Harbo, *The Function of Proportionality Analysis in European Law* (Brill Nijhoff 2015).

out' the illicit ones.⁵ Indeed, in its *PSPP* judgment, the Bundesverfassungsgericht suggested that the public sector purchase program's (PSPP) explicit goal to fight deflation was only a pretext.⁶ Thus, the use of proportionality in *PSPP* appears *prima facie* to continue this doctrinal tradition. But, as our analysis will show, this appearance is deceptive.

To lay the ground for our argument, the second part turns to the conceptual preliminaries of the competence-focused proportionality test. Proportionality in Article 5 TEU addresses the exercise of EU competences and is designed to protect the member states' autonomy, but not necessarily their competences. Instead, whether a measure is within an EU competence depends on the prior definition of the competence's scope.

The third part, then, discusses the case law on proportionality and puts the Bundesverfassungsgericht's argument in *PSPP* into perspective. To this end, we first look at the case law of the European Court of Justice. Our analysis shows that the Court of Justice does not clearly distinguish between proportionality as an instrument to protect member states' autonomy and an instrument to protect individuals. In both cases, it applies a rather deferential standard when analysing the legality of measures of EU institutions. We contrast this analysis with a comparative examination of the case law of the Bundesverfassungsgericht regarding the delimitation of federal competences and the protection of municipal autonomy. While less deferential than the European Court of Justice, the Bundesverfassungsgericht also grants discretion to the authorities exercising their competence. Thus, the fallout between the Bundesverfassungsgericht and the Luxembourg Court in *PSPP* cannot be explained by differing standards for reviewing the exercise of competences.

Against this backdrop, the fourth part zooms in on the *PSPP* judgment and its inconsistency with the conception of Article 5 TEU and the case law on the exercise of competences. While the Bundesverfassungsgericht framed the proportionality analysis as a means to 'smoke out' illicit motives, the analogy is ill-conceived. The second-order review of illicit motives is traditionally located in the suitability or necessity-stages of the proportionality test. By contrast, the balancing stage is unsuitable for such an analysis. Instead, the Bundesverfassungsgericht utilises balancing to determine the scope of the European Central Bank's competence for

⁵The term 'smoking out' illicit motives stems from the discussion on the functions of strict scrutiny in U.S. constitutional law, see S.A. Siegel, 'The Origin of the Compelling State Interest Test and Strict Scrutiny', 48 *American Journal of Legal History* (2006) p. 355 at p. 398; J. Mathews and A. Stone Sweet, 'All Things in Proportion? American Rights Review and the Problem of Balancing', 60 *Emory Law Journal* (2011), p. 102 at p. 116-117; N. Petersen, 'Legislative Inconsistency and the "Smoking Out" of Illicit Motives', 64 *American Journal of Comparative Law* (2016) p. 121 at p. 123-125.

⁶BVerfG, 5 May 2020, 2 BvR 859/15, para. 137.

monetary policy. Yet, this runs counter to the conception of Article 5 TEU, according to which proportionality only guides the exercise of competences.

PROPORTIONALITY AS AN INSTRUMENT TO ‘SMOKE OUT’ ILLICIT MOTIVES

Proportionality is usually seen as a requirement of the rule of law.⁷ The ideas that the state should not go further in restricting competing rights and interests than necessary to achieve a certain goal, and that the means should not be out of proportion to the aims to be achieved, seem to be fundamental elements of justice.⁸ However, there is another, less obvious function of proportionality that is rarely addressed in legal scholarship – the aim to ‘smoke out’ illicit motives. When ‘smoking out’ illicit motives, courts try to identify and prevent administrative or legislative acts that follow a motivation that is not covered by the official reasoning and that is normatively or legally dubious. We find this function at several crucial junctions when tracing the historical development of the proportionality test. For our context, this is all the more important as the Bundesverfassungsgericht alluded to potential illicit motives of the European Central Bank in its *PSPP* judgment.

The modern proportionality test as a legal instrument has its origins in the jurisprudence of the Prussian Supreme Administrative Court.⁹ When reviewing measures of the police, the Prussian court gradually introduced elements of proportionality in order to limit the discretion of the police. Because proportionality was not explicitly mentioned in the legal basis for police action under the Prussian General Law of 1794 (*Preußisches Allgemeines Landrecht*), the court needed a different justification for reviewing the proportionality of police action.¹⁰ For this reason, it initiated a motive review in order to strike down police measures that were arbitrary or transgressed the discretion of the police because of illicit motivation.¹¹ However, the court did not directly review the motives of the administration, but relied on proportionality elements as an indicator of illicit motives: if a

⁷See D.M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004) p. 163; A. Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) p. 3; H. Schulze-Fielitz, ‘Art. 20 (Rechtsstaat)’, in H. Dreier (ed.) *Grundgesetz: Kommentar, Band II: Artikel 20-82*, 3rd edn. (Mohr Siebeck 2015) para. 179.

⁸E. Engle, ‘The General Principle of Proportionality and Aristotle’, in L. Huppel-Cluysenaer and N. Coelho (eds.), *Aristotle and The Philosophy of Law: Theory, Practice and Justice* (Springer 2013) p. 265.

⁹A. Stone Sweet and J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’, 47 *Columbia Journal of Transnational Law* (2008) p. 72 at p. 98-102.

¹⁰U. Held-Daab, *Das freie Ermessen* (Duncker & Humblot 1996) p. 189-192.

¹¹*Ibid.*

measure was not suitable to achieve the pursued aim, this was an indication that the police had pursued aims other than addressing a danger to public security.¹²

From German administrative law, the proportionality test migrated to German constitutional law after the Second World War.¹³ In this context, we can, again, observe a utilisation of the test as an instrument to ‘smoke out’ illicit motives in the early case law of the Bundesverfassungsgericht.¹⁴ The most prominent example is the pharmacy case, which is often referred to as the birthplace of proportionality in German constitutional law.¹⁵ The pharmacy case dealt with a licensing requirement for pharmacies in Bavaria, according to which a licence for operating a pharmacy in a specific municipality could only be granted if the number of pharmacies per inhabitant was below a certain threshold. Such a scheme has obvious protectionist and anti-competitive effects: it protects the incumbent pharmacies against new entrants.¹⁶ The Bundesverfassungsgericht saw this danger clearly. It argued that:

[t]here is a significant danger of [the legislative decision] being influenced by *illicit motives*; in particular, it seems likely that the access restriction is supposed to protect those who are already part of the profession against competition – a motive that, according to common opinion, cannot ever justify an infringement of the freedom of profession.¹⁷

However, the Court did not directly analyse the motivation of the legislature. Instead, it reverted to the formal proportionality test and found that the Bavarian licensing scheme was not necessary to achieve the legislative aim because

¹²Ibid.

¹³See Stone Sweet and Mathews, *supra* n. 9, p. 104-111; F. Michl, ‘Das Sondervotum zum Apothekenurteil: Edition aus den Akten des Bundesverfassungsgerichts’, 68 *Jahrbuch des öffentlichen Rechts* (2020) p. 323 at p. 332.

¹⁴See, generally, N. Petersen, ‘The German Constitutional Court and Legislative Capture’, 12 *International Journal of Constitutional Law* (2014) p. 650 at p. 664-668.

¹⁵On the pharmacy case as the origin of the proportionality test in German constitutional law, see E. Grabitz, ‘Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts’, 98 *Archiv des öffentlichen Rechts* (1973) p. 568 at p. 569-570; K. Stern, ‘Zur Entstehung und Ableitung des Übermaßverbots’, in P. Badura and R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens* (C.H. Beck 1993) p. 165 at p. 172; D. Grimm, ‘Proportionality in Canadian and German Jurisprudence’, 57 *University of Toronto Law Journal* (2007) p. 383; Stone Sweet and Mathews, *supra* n. 9, p. 107.

¹⁶Michl, *supra* n. 13, p. 340-345.

¹⁷BVerfGE 7, 377 at 408 (emphasis added) (translation by the authors: The German original reads as follows: ‘Die Gefahr des Eindringens sachfremder Motive ist daher besonders groß; vor allem liegt die Vermutung nahe, die Beschränkung des Zugangs zum Beruf solle dem Konkurrenzschutz der bereits im Beruf Tätigen dienen – ein Motiv, das nach allgemeiner Meinung niemals einen Eingriff in das Recht der freien Berufswahl rechtfertigen könnte’).

there would have been less restrictive alternatives. Yet, as Fabian Michl has shown in a recent study of the Court's archival records, the protectionist nature of the Bavarian regulation had a central place in the deliberations of the Court.¹⁸ While the Court did not analyse the issue directly in its reasoning, it served as a motivation for a strict scrutiny of the legislative measure.¹⁹

Proportionality made it to the legal system of the European Communities in the 1950s.²⁰ From the 1970s, the Court referred to proportionality in its case law on the EU fundamental freedoms.²¹ Again, the function of 'smoking out' illicit motives played a prominent role in the initial case law. The free movement of goods was supposed to reduce protectionism in the EU. At the same time, the Court of Justice had to be mindful not to restrict the legitimate regulatory authority of member states. The lack of suitability or necessity of a measure could again be an indication that the challenged measure had a concealed protectionist aim.²² Yet, justifying a judgment against a member state in the technical terms of the proportionality test relieved the court from the burden of openly accusing a member state of protectionism. Consequently, it is not surprising that the necessity test of the European Court of Justice regarding member states' measures is rather strict.

The intent to 'smoke out' illicit motives was picked up by the Bundesverfassungsgericht in its *PSPP* judgment. The context was different from that in the EU fundamental freedom cases. Furthermore, the German Court mainly relied on the balancing stage of the proportionality test instead of the suitability or necessity stages. Yet, the argumentation showed strong similarities. In particular, the Bundesverfassungsgericht feared that the European Central Bank was pursuing other aims than the monetary policy goals which explicitly justified the *PSPP* program.²³ Consequently, it required the Court of Justice to weigh the economic effects of the measure against the monetary policy goal.²⁴ Furthermore, it argued that the lack of such a proportionality assessment on the part of the European Central Bank was an indication that the *PSPP* program was not just a monetary policy measure.²⁵

While the Bundesverfassungsgericht's use of the proportionality test in *PSPP* contains some similarities to the use of the test as an instrument to 'smoke out' illicit motives, we will show in the following that the analogy is not convincing. There

¹⁸Michl, *supra* n. 13, p. 347-352.

¹⁹A.-B. Kaiser, 'Das Apothekenurteil des BVerfG nach 50 Jahren: Anfang oder Anfang vom Ende der Berufsfreiheit?', 30 *Juristische Ausbildung* (2008) p. 844 at p. 850; Petersen, *supra* n. 14, p. 668.

²⁰ECJ 16 July 1956, Case 8/55, *Fédération Charbonnière de Belgique*.

²¹Stone Sweet and Mathews, *supra* n. 9, p. 140-141.

²²*See de Búrca, supra* n. 4, p. 148-149; N. Petersen, 'Gesetzgeberische Inkonsistenz als Beweiszeichen', 138 *Archiv des öffentlichen Rechts* (2013) p. 108 at p. 124-127.

²³BVerfG, 5 May 2020, 2 BvR 859/15, *PSPP*, para. 137.

²⁴*Ibid.*, para. 139.

²⁵*Ibid.*, para. 176-177.

are certain characteristics of the review of institutional competences that make balancing an unlikely candidate for properly delimiting competing competences.

PROPORTIONALITY IN ARTICLE 5 TEU: SOME CONCEPTUAL PRELIMINARIES

The central norm for determining the EU's competences is Article 5 TEU. According to this norm, the test for whether an EU measure was within the EU's competences consists of two steps. The first step concerns the definition of the competences. The Union can only act on the basis of a competence that has been conferred upon it in the EU treaties: Article 5(2) TEU. This definition of competences has a binary character: the EU either has a competence or it does not have a competence.²⁶ Second, even if the Union has a competence, the *use* of this competence is limited by the two principles of subsidiarity and proportionality: Article 5(1) TEU.

The principle of proportionality is specified in Article 5(4) TEU: 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. The necessity-element of the proportionality test is closely connected to the principle of subsidiarity.²⁷ According to Article 5(3) TEU, 'the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States'. The principle therefore asks which level of government is better suited to resolve a specific problem. In areas in which the EU does not have exclusive competence, it can only exercise its competence if it can show that the legislative aim can be achieved more effectively through legislation at the EU level.

If proportionality is understood to differ from subsidiarity, it cannot refer to the division of the exercise of competences between the EU and the member states. The necessity-element of that relationship is already covered by the principle of subsidiarity. Moreover, the possible role for a proportionality test *stricto sensu* seems very limited. Proportionality *stricto sensu* usually involves a balancing of competing values. Certainly, it is not limited to the comparison of mere abstract values. Instead, it also takes into account the extent to which a measure restricts one value and the effectiveness with which it supports the competing value, i.e. the effects of the measure in question.²⁸ Yet, a mere

²⁶See Goldhammer, *supra* n. 3, p. 136-137; Egidy, *supra* n. 2.

²⁷Tridimas, *supra* n. 3, p. 176.

²⁸On the structure of the balancing test, see B. Schlink, *Abwägung im Verfassungsrecht* (Duncker & Humblot 1976) p. 128-134; R. Alexy, 'On Balancing and Subsumption: A Structural Comparison', 16 *Ratio Juris* (2003) p. 433 at p. 443-448; P.-E.N. Veel, 'Incommensurability, Proportionality, and Rational Legal Decision-Making', 4 *Law & Ethics of Human Rights* (2010) p. 177; C. Engel, 'Öffentliches Wirtschaftsrecht aus Sicht der ökonomischen Theorie', in D. Ehlers et al. (eds.), *Besonderes Verwaltungsrecht, Vol. 1: Öffentliches Wirtschaftsrecht*, 4th edn. (C.F. Müller 2019) ch. 2, para. 51 ff.

comparison of effects is not possible without at least implicitly attributing a specific weight to the corresponding value that is subject to a comparison in the balancing test.²⁹

However, a comparison of competing values is already difficult when proportionality is applied in its original context, as part of the fundamental rights analysis, because the values that are compared are usually incommensurable.³⁰ However, while it is theoretically possible to attribute values to rights and public interests, competences do not have an inherent value so it is impossible to compare the importance of competences.³¹ It is, therefore, no accident that Article 5(4) TEU does not mention the balancing stage.³²

This indicates that proportionality has to have a function that is distinct from the principle of subsidiarity and that avoids the problem of comparing the relative importance of competences. The Protocol on Subsidiarity and Proportionality provides a starting point. According to Article 5 of that Protocol, draft legislative acts ‘shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved’. Even though the provision explicitly only mentions draft legislative acts, we can observe a general direction: proportionality as a limit to the exercise of competences tries to minimise financial and administrative burdens on member states and the national economy. Therefore, it takes member states’ interests into account, but only specific ones. It is not concerned with the protection of member states’ competences³³ – that is the aim of the principle

²⁹N. Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press 2017) p. 49.

³⁰On the incommensurability challenge in the proportionality test, see *ibid.*, p. 38-59 (with further references regarding the debate).

³¹This was underlined – albeit in a different context – in a prominent dissenting opinion of Justices Mahrenholz and Böckenförde to a judgment of the Bundesverfassungsgericht from January 1985, see BVerfGE 69, p. 1 at p. 60 (dissenting opinion Justices Mahrenholz and Böckenförde).

³²Editorial Comments, ‘Not mastering the treaties: The German Federal Constitutional Court’s PSPP judgment’, 57 *Common Market Law Review* (2020) p. 965 at p. 972. But see also S. Kadelbach, ‘Artikel 5 [Subsidiaritäts- und Verhältnismäßigkeitsgrundsatz]’, in H. von der Groeben et al. (eds.), *Europäisches Unionsrecht*, 7th edn. (C.H. Beck 2015) para. 49 (arguing that proportionality *stricto sensu* is contained in the term ‘necessary’ in Art. 5 TEU).

³³But see E. Pache, ‘Artikel 5 EUV [Grundsatz der begrenzten Einzelermächtigung, Subsidiaritätsprinzip, Verhältnismäßigkeitsgrundsatz]’, in M. Pechstein et al. (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Mohr Siebeck 2017) para. 149 (arguing that the balancing test should primarily focus on the balancing of competences).

of subsidiarity – but with non-competence related aspects of the member states' autonomy.³⁴

This argument is reinforced by the fact that subsidiarity is only applicable if the Union has a non-exclusive competence. In case of a shared competence, member states have an interest in their competences in the same field not being implicated more than necessary. However, in the case of an exclusive competence, such concerns are not justified. Certainly, member states do not want their other competences to be affected when the Union exercises an exclusive competence. But this is a matter for the definition of competences, not for proportionality, which focuses on the exercise of the competence.

HOW COURTS USE PROPORTIONALITY FOR REGULATING COMPETENCES – A COMPARATIVE ANALYSIS

This section analyses how courts use proportionality as an instrument for regulating the use of competences in practice. First, we will examine the case law of the European Court of Justice. We will see that the Court usually has recourse to proportionality as a general principle of EU law and does not clearly distinguish between the competence-dimension of proportionality and other functions, such as the protection of individual rights. In any case, the Court of Justice applies a rather deferential standard when applying the proportionality test to measures of EU institutions. In a second step, we will contrast the European experience with the case law of the Bundesverfassungsgericht in order to see the standards which that Court applies *within* the German federal state. Elements of proportionality are used in two instances. On the one hand, the Court has established a necessity-test when delimiting the competences of the federal state from the competences of the individual *Länder*. On the other hand, the Court applies a full proportionality analysis when reviewing whether state laws violate the principle of municipal autonomy, which is guaranteed by Article 28 of the German Constitution. Nonetheless, the differences between the Bundesverfassungsgericht and the European Court of Justice are not significant enough to explain the fallout in the *PSPP* judgment.

The case law of the Court of Justice

Despite Article 5(1) TEU, the Court of Justice has never developed a specific doctrine to use proportionality as an instrument to regulate the use of competences.

³⁴On member states' autonomy as the value protected by Art. 5(4) TEU, see R. Schütze, 'EU Competences: Existence and Exercise', in D. Chalmers and A. Arnall (eds.), *The Oxford Handbook of European Union Law* (2015) p. 75 at p. 97; J. Bast, 'Art. 5 EUV [Prinzipien der Kompetenzordnung]', in E. Grabitz et al. (eds.), *Das Recht der Europäischen Union, Band I: EUV/AEUV*, 71st edn. (C.H. Beck 2020) para. 66.

Instead of referring explicitly to Article 5 TEU, the Court usually refers to the proportionality principle as a general principle of EU law.³⁵ This principle has a double dimension in the case law of the Court: it protects, on the one hand, the subjective rights of individuals, and, on the other hand, the autonomy of the member states.³⁶ In some cases, the proportionality test focuses on the financial interests of the specific member state or other autonomy aspects.³⁷ For example, in *Germany v Council*, the Court took into account the financial burden that was imposed on member states by requiring them to produce certain statistical data.³⁸ In *Slovak Republic and Hungary v Council*, it analysed the proportionality of the member states' obligation to accept a specific number of refugees under the EU's refugee re-allocation scheme.³⁹ In *Weiss*, the Court looked at potential losses that national Central Banks incurred under the European Central Bank's monetary policy.⁴⁰ Finally, in *Poland v Parliament and Council*, it dealt with the proportionality of national obligations to reduce carbon dioxide emissions.⁴¹

In other cases, the Court analyses the burden that an EU measure imposes on individuals, even if these cases are brought by member states claiming the violation of EU competences.⁴² These concern, for example, the financial burdens imposed on commercial banks through deposit protection schemes,⁴³ or on

³⁵See ECJ 5 May 1998, Case C-157/96, *National Farmers' Union*, para. 60; 12 March 2002, Joined Cases C-27/00 and 122/00, *Omega Air*, para. 62; 10 December 2002, Case C-491/01, *British American Tobacco*, para. 122; 12 December 2006, Case C-380/03, *Germany v Parliament and Council*, para. 144; 10 January 2006, Case C-344/04, *IATA and ELFAA*, para. 79; 21 July 2011, Case C-15/10, *Etimine*, para. 124; 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council*, para. 206.

³⁶Saurer, *supra* n. 3, p. 285; Schütze, *supra* n. 34, p. 96.

³⁷See, e.g., ECJ 9 November 1995, Case C-426/93, *Germany v Council*, paras. 36-51; 22 October 1998, Joined Cases C-36/97 and C-37/97, *Kellinghusen and Ketelsen*, paras. 33-34; 14 April 2005, Case C-110/03, *Belgium v Commission*, paras. 59-69; 9 March 2010, Case C-518/07, *Commission v Germany*, para. 55; 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council*, paras. 206-310; 11 December 2018, Case C-493/17, *Weiss*, paras. 94-99; 13 March 2019, Case C-128/17, *Poland v Parliament and Council*, paras. 94-118.

³⁸ECJ 9 November 1995, Case C-426/93, *Germany v Council*, paras. 36-51.

³⁹ECJ 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council*, paras. 206-310.

⁴⁰ECJ 11 December 2018, Case C-493/17, *Weiss*, paras. 94-99.

⁴¹ECJ 13 March 2019, Case C-128/17, *Poland v Parliament and Council*, paras. 94-118.

⁴²See, e.g., ECJ 13 May 1997, Case C-233/94, *Germany v Parliament and Council*, paras. 50-58; 12 November 1996, Case C-84/94, *United Kingdom v Council*, paras. 50-67; 12 December 2006, Case C-380/03, *Germany v Parliament and Council*, paras. 144-158; 7 September 2006, Case C-310/04, *Spain v Council*, paras. 95-135; 4 May 2016, Case C-358/14, *Poland v Parliament and Council*, paras. 78-104.

⁴³ECJ 13 May 1997, Case C-233/94, *Germany v Parliament and Council*, paras. 50-58.

companies through worker protection regulations.⁴⁴ In *Spain v Council*, the European Court of Justice found an infringement of the principle of proportionality because an EU regulation had disproportionately affected the competitiveness of the Spanish cotton industry.⁴⁵ These latter cases show that member states' interests can be understood in a broad sense: they not only encompass financial or administrative burdens directly imposed on the member states themselves, but also considerations related to the national economy and important economic actors. This is also consistent with Article 5 of the Protocol on Subsidiarity and Proportionality, which explicitly mentions economic actors and citizens. Therefore, it is not surprising that the European Court of Justice does not explicitly distinguish between member states' interests and the interests of individuals in its proportionality analysis,⁴⁶ because these are not as clearly distinguishable as it might appear, *prima facie*.

When it comes to the structure of the proportionality test, the analysis of the European Court of Justice consists of three elements: the Court reviews whether a measure pursues a legitimate aim; whether it is suitable to achieve this aim; and whether it is necessary, i.e. whether there is no potential alternative measure that would be less restrictive, but equally effective as the challenged measure.⁴⁷ The fourth step of the proportionality analysis, proportionality *stricto sensu*, is not explicitly analysed in the majority of cases.⁴⁸ Nevertheless, the European Court of Justice is not averse to balancing.⁴⁹ Instead, it sometimes performs a balancing test – either explicitly or implicitly.⁵⁰ For example, in *Fedesa*, the Court used a balancing consideration in its reasoning, arguing that 'the importance of the objectives pursued is such as to justify even substantial negative financial consequences for certain traders'.⁵¹ Furthermore, in *Poland v Parliament and Council*, it analysed whether the measure in question had 'disproportionate effects'.⁵²

When reviewing the proportionality of a challenged measure, the European Court of Justice usually grants the EU institutions a rather broad discretion at

⁴⁴ECJ 12 November 1996, Case C-84/94, *United Kingdom v Council*, paras. 50-67.

⁴⁵ECJ 7 September 2006, Case C-310/04, *Spain v Council*, paras. 95-135.

⁴⁶On the lack of an explicit distinction, see Saurer, *supra* n. 3, p. 285.

⁴⁷See, e.g., ECJ 20 February 1979, Case 122/78, *Buitoni*, para. 16; 13 November 1990, Case C-331/88, *Fedesa*, para. 13 (arguing that an EU measure has to be appropriate and necessary in order to achieve the objectives legitimately pursued by the measure in question).

⁴⁸Trstenjak and Beysen, *supra* n. 4, p. 269-270; Sauter, *supra* n. 4, p. 445; C. Calliess, 'Art. 5', in C. Calliess and M. Ruffert (eds.), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 5th edn. (C.H. Beck 2016) para. 44.

⁴⁹Bast, *supra* n. 34, para. 71.

⁵⁰Trstenjak and Beysen, *supra* n. 4, p. 270.

⁵¹ECJ 13 November 1990, C-331/88, *Fedesa*, para. 17.

⁵²ECJ 4 May 2016, Case C-358/14, *Poland v Parliament and Council*, para. 97.

all stages of the test.⁵³ The justification for this discretion depends on the circumstances. The Court is deferential when a measure ‘entails political, economic and social choices on its part’ and when it involves ‘complex assessments’,⁵⁴ or in the context of ‘risk management measures’.⁵⁵ Likewise, the European Court of Justice has also granted a broad discretion to European System of Central Banks in the field of monetary policy because the Central Bank has ‘to make choices of a technical nature and to undertake forecasts and complex assessments’.⁵⁶ Due to this deferential standard of review, the European Court of Justice limits itself to analysing whether a measure was ‘manifestly inappropriate’⁵⁷ or whether it contained a ‘manifest error or constitutes a misuse of power or whether the authority in question clearly exceeded the bounds of its discretion’.⁵⁸

In order to review measures of EU institutions under this deferential standard, the Court of Justice predominantly relies on a procedural approach.⁵⁹ Under this approach, the Court examines whether the decision-making procedure has taken

⁵³Tridimas, *supra* n. 3, p. 178-180; Calliess, *supra* n. 48, para. 51; Pache, *supra* n. 33, para. 151; G. Lienbacher, ‘Artikel 5 [Subsidiaritätsprinzip]’, in J. Schwarze et al. (eds.), *EU-Kommentar*, 4th edn. (Nomos 2019) para. 41; Bast, *supra* n. 34, para. 73.

⁵⁴ECJ 10 December 2002, Case C-491/01, *British American Tobacco*, para. 123; 14 December 2004, Case C-210/03, *Swedish Match*, para. 48; 12 December 2006, Case C-380/03, *Germany v Parliament and Council*, para. 145; 10 January 2006, Case C-344/04, *IATA and ELFAA*, para. 79; 7 July 2009, Case C-558/07, *SPCM*, para. 42; 21 July 2011, Case C-15/10, *Etimine*, para. 125; 17 October 2013, Case C-203/12, *Billerud Karlsborg*, para. 35.

⁵⁵ECJ 9 June 2016, Case 78/16, *Pesce*, para. 49.

⁵⁶ECJ 16 June 2015, Case C-62/14, *Gauweiler*, para. 68. It is interesting to note that this deferential standard only applies to the field of monetary policy. With regard to banking supervision, the ECJ applies a stricter standard of scrutiny, see M. Lehmann, ‘Varying standards of judicial scrutiny over central bank actions’, in European Central Bank (ed.), *Shaping a New Legal Order for Europe: a Tale of Crises and Opportunities* (2017) p. 112 at p. 119-123.

⁵⁷ECJ Case C-380/03, 12 December 2006, *Germany v Parliament and Council*, para. 145; 10 January 2006, Case C-344/04, *IATA and ELFAA*, para. 79; 7 July 2009, Case C-558/07, *SPCM*, para. 42; 11 June 2009, Case C-33/08, *Agrana Zucker*, paras. 32-33; 22 December 2010, Case C-77/09, *Gowan Comércio Internacional*, para. 82; 21 July 2011, Case C-15/10, *Etimine*, para. 125; 17 October 2013, Case C-203/12, *Billerud Karlsborg*, para. 35; 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council*, para. 207.

⁵⁸ECJ 12 March 2002, Joined Cases C-27/00 and 122/00, *Omega Air*, para. 64; 14 April 2005, Case C-110/03, *Belgium v Commission*, para. 68.

⁵⁹On this procedural approach, see J. Rivers, ‘Proportionality and Variable Intensity of Review’, 65 *Cambridge Law Journal* (2006) p. 174; J. Rivers, ‘Proportionality, Discretion and the Second Law of Balancing’, in G. Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007) p. 167; J. Corkin, ‘Science, Legitimacy and the Law: Regulating Risk Regulation Judiciously in the European Community’, 33 *European Law Review* (2008) p. 359; P. Popelier, ‘Preliminary Comments on the Role of Courts as Regulatory Watchdogs’, 6 *Legisprudence* (2012) p. 257; I. Bar-Siman-Tov, ‘Semiprocedural Judicial Review’, 6 *Legisprudence* (2012) p. 271; Goldhammer, *supra* n. 3, p. 135.

all relevant factors into account. One central factor in the analysis is whether the legislation or decision in question was based on the recommendations of an impact assessment⁶⁰ or on scientific data.⁶¹ If the legislature did not follow the recommendations of the impact assessment, the Court requires a proper justification of deviations.⁶² Finally, the Court also examines whether the EU institutions discussed the issue with the relevant stakeholders,⁶³ took into account all interests at stake and tried to reconcile them,⁶⁴ and whether they gave reasons for their decisions.⁶⁵ Despite this deferential standard, the European Court of Justice's review is not toothless. Instead, the Court of Justice has found violations of proportionality by EU institutions in several instances.⁶⁶

Proportionality and the regulation of competences in Germany

The Bundesverfassungsgericht argued in several decisions in the late 1980s and early 1990s that the proportionality test did not apply to the delimitation of competences between the federal state and the individual *Länder*.⁶⁷ Nevertheless, we can find elements of proportionality in the competence-related case law of the Bundesverfassungsgericht. This concerns, on the one hand, the regulation of the use of legislative competences between the federal state and the *Länder*. Here, the exercise of federal competences is limited by a necessity requirement enshrined in Article 72, para. 2 of the Basic Act. On the other hand, the Bundesverfassungsgericht has applied proportionality as an instrument to protect municipal autonomy against limitations by state legislation.

⁶⁰See, e.g., ECJ 8 June 2010, Case 58/08, *Vodafone*, para. 55; 12 May 2011, Case C-176/09, *Luxembourg v Parliament and Council*, para. 65; 4 May 2016, Case C-358/14, *Poland v Parliament and Council*, para. 101; 13 March 2019, Case C-128/17, *Poland v Parliament and Council*, paras. 109-112; 4 May 2016, Case C-547/14, *Philipp Morris*, para. 189.

⁶¹See, e.g., ECJ 9 June 2016, Case 78/16, *Pesce*, paras. 71-73; 4 May 2016, Case C-547/14, *Philipp Morris*, paras. 207-208; 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council*, paras. 222, 242, 272.

⁶²See ECJ 4 May 2016, Case C-477/14, *Pillbox 38*, paras. 65-66.

⁶³See, e.g., ECJ 21 July 2011, Case C-15/10, *Etimine*, para. 127; *Pillbox 38*, *ibid.*, para. 66.

⁶⁴See, e.g., ECJ 16 December 2008, Case C-127/07, *Société Arcelor Atlantique et Lorraine*, para. 59; 8 July 2010, Case C-343/09, *Afton Chemical*, paras. 60-64; 4 May 2016, Case C-358/14, *Poland v Parliament and Council*, para. 102; 9 June 2016, Case 78/16, *Pesce*, para. 74; 12 July 2012, Case C-59/11, *Association Kokopelli*, para. 40; 4 May 2016, Case C-547/14, *Philipp Morris*, paras. 185-187.

⁶⁵See, e.g., ECJ 16 June 2015, Case C-62/14, *Gauweiler*, paras. 69-70.

⁶⁶See, e.g., ECJ 6 December 2005, Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA*; 7 September 2006, Case C-310/04, *Spain v Council*.

⁶⁷BVerfGE 79, 311, 341 – *Budget Act 1981*; 81, 310, 338 – *Kalkar II*.

The constitutional technique of regulating the exercise of competences between the German federal state and the individual *Länder* is similar to the one applied in the EU, even if the terminology differs. According to Article 70 of the Basic Act, the *Länder* have an all-encompassing legislative competence except if the Constitution has attributed the legislative competence to the federal state. The Constitution distinguishes between exclusive legislative competences of the federal state (Articles 71, 73 of the Basic Act) and concurrent legislative competences (Articles 72, 74 of the Basic Act). According to Article 72, para. 2 of the Basic Act, some of the concurrent legislative competences contained in Article 74 of the Basic Act may only be exercised by the federal state if their exercise is necessary to ensure equivalent living conditions within the federal territory or to maintain legal or economic unity.

This necessity-requirement resembles the subsidiarity principle in EU law, which – as we have seen – is similar to the necessity stage of the proportionality test.⁶⁸ Similar to subsidiarity in Article 5 TEU, Article 72, para. 2 of the Basic Act also does not include a balancing stage. In its early case law, the Bundesverfassungsgericht was extremely deferential when applying Article 72, para. 2 of the Basic Act, so that federal legislation never failed the test.⁶⁹ However, this changed after a constitutional amendment of the provision in 1994.⁷⁰ While the Bundesverfassungsgericht still allows a margin of appreciation to the federal legislature whether legislation on the federal level is indeed necessary to achieve equivalent living conditions or legal or economic unity, the Court is now much less deferential.⁷¹

In the majority of cases, federal legislation that has been challenged before the Bundesverfassungsgericht on competence grounds has passed the test under Article 72, para. 2 of the Basic Act.⁷² However, there are a few decisions in which the Court has found a violation of the provision. When the federal legislature tried to introduce a mandatory assistant professorship, effectively trying to abolish the traditional German requirement of a postdoctoral thesis as a precondition for professorial appointments, the Bundesverfassungsgericht argued that the issue should

⁶⁸On the similarity between the necessity test in Art. 72 of the Basic Act and necessity as part of the proportionality test, see M. Kenntner, 'Der Föderalismus ist (doch) justiziabel! Anmerkungen zum "Altenpflegegesetz-Urteil" des BVerfG', 22 *Neue Zeitschrift für Verwaltungsrecht* (2003) p. 821 at p. 823-824; H.P. Aust, 'Grundrechtsdogmatik im Staatsorganisationsrecht?', 141 *Archiv des öffentlichen Rechts* (2016) p. 415 at p. 437.

⁶⁹See F. Wittreck, 'Art. 72', in H. Dreier (ed.), *Grundgesetz: Kommentar, Band II: Artikel 20-82*, 3rd edn. (Mohr Siebeck 2015) para. 3.

⁷⁰Seminally BVerfGE 106, 62, 142-143 – *Old Age Care Act*.

⁷¹See BVerfGE 106, 62, 149-150 – *Old Age Care Act*; 111, 226, 255 – *Assistant Professorship*; 125, 141, 154 – *Trade Tax*; 138, 136, 177 – *Inheritance Tax*; 140, 65, 94-95 – *Child Care Allowance*.

⁷²See, e.g., BVerfGE 106, 62 – *Old Age Care Act*; 125, 141 – *Trade Tax*; 138, 136 – *Inheritance Tax*.

have been left to the individual *Länder*.⁷³ It also held that federal legislation on child care allowance had not passed the competence-related necessity-test.⁷⁴ The federal legislature had granted an allowance of €150 to all parents who did not send their children into daycare subsidised by public funds. Again, the Bundesverfassungsgericht argued that it was not necessary for the federal legislature to regulate this issue as the *Länder* were well capable of finding individual solutions.

While Article 72, para. 2 of the Basic Act only contains a necessity test, the Bundesverfassungsgericht has applied a full proportionality test when dealing with the protection of municipal autonomy. Municipal autonomy is guaranteed by Article 28, para 2 of the Basic Act. According to this provision, municipalities must be guaranteed the right to regulate all local affairs in their own responsibility within the limits prescribed by the laws. In the German constitutional order, this guarantee of municipal autonomy is an institutional guarantee, which has some structural similarities to fundamental rights. In particular, it can be directly invoked by municipalities before the Bundesverfassungsgericht according to Article 93, para. 1 No. 4b of the Basic Act.

In the seminal *Rastede* decision from 1988, the Bundesverfassungsgericht refused to apply the proportionality principle to municipal autonomy.⁷⁵ Instead, it established a core of municipal competences⁷⁶ that was to be determined according to historical attributions of municipal tasks.⁷⁷ However, the German Court did not reduce municipal autonomy to this core. Instead, it argued that even outside the core, the legislature had to reconcile administrative efficiency with municipal autonomy.⁷⁸

While the Court avoided the proportionality terminology in *Rastede*, it has explicitly applied the proportionality test to reconcile administrative efficiency and municipal autonomy in its more recent case law.⁷⁹ In this proportionality test, the Bundesverfassungsgericht has recourse to all four steps, including the balancing stage, in which the Court compares the importance of the aim for the restriction and its effectiveness to the extent to which municipal autonomy is restricted. Nevertheless, there is a difference between the protection of municipal autonomy and the delimitation of competences between the federal level and the individual states. In the latter case, we have explicit lists of competences, i.e. the Constitution attributes these competences explicitly to the federal level. This is different in the case of municipal autonomy, which is only protected in the

⁷³BVerfGE 111, 226 – *Assistant Professorship*.

⁷⁴BVerfGE 140, 65 – *Child Care Allowance*.

⁷⁵BVerfGE 79, 127 – *Rastede*.

⁷⁶BVerfGE 79, 127, 143.

⁷⁷BVerfGE 79, 127, 146.

⁷⁸BVerfGE 79, 127, 147-148.

⁷⁹BVerfGE 125, 141, 167 – *Trade Tax*; 147, 185, 245-251; BVerfG, 7 July 2020, 2 BvR 696/12, *Municipal Education Measures*.

abstract without listing specific competences that belong exclusively to the municipal authority. Consequently, there is a certain danger that municipal autonomy is hollowed out through state legislation. The Bundesverfassungsgericht has reacted to this danger in *Rastede* by defining a core of municipal autonomy. Next to this core of municipal competences, the balancing stage of the proportionality test plays only a minimal role. There is, as yet, not a single case, in which the Court has found a violation of proportionality *stricto sensu*.⁸⁰

Conclusion

At first sight, there seem to be significant differences between the approaches of the Court of Justice and the Bundesverfassungsgericht. In particular, the latter appears less deferential when reviewing the exercise of competences. In the case of concurrent federal competences, the German Court occasionally strikes down federal measures because they were not necessary to ensure equivalent living conditions. In the case of municipal autonomy, it constructed an absolute core of municipal competences. By contrast, the Court of Justice usually grants EU institutions a broad discretion when it comes to assessing the proportionality of EU measures.

Nevertheless, this does not mean that the *PSPP* judgment is just a necessary consequence of differing standards of review. The review of the Court of Justice is not toothless. Rather, it takes a procedural approach to determining the limits of institutional discretion and has struck down EU measures for lack of proportionality. At the same time, the Bundesverfassungsgericht's approach in its *PSPP* judgment differs considerably from its traditional approach to the delimitation of competences. In particular, the Bundesverfassungsgericht does usually not rely on balancing when determining the limits of competences. In the case of federal competences, the test that the German Court applies is a mere necessity test, which does not involve proportionality *stricto sensu*. In the case of municipal autonomy, balancing is part of the proportionality analysis. However, there is not a single case in which the Bundesverfassungsgericht has found a violation of municipal autonomy based on an analysis of proportionality *stricto sensu*. Consequently, the fallout between the Bundesverfassungsgericht and the European Court of Justice in the *PSPP* judgment cannot be explained merely by differing standards for reviewing the exercise of competences.

PROPORTIONALITY IN THE *PSPP* JUDGMENT

The proportionality analysis of the Federal Constitutional Court establishes a link between proportionality and a potential illicit motive of the European Central Bank. It suggests that the European Central Bank might have had an economic

⁸⁰See BVerfGE 125, 141, 173 – *Trade Tax*; 147, 185, 245-251.

instead of a monetary motivation for establishing the PSPP program. The implicit allegation was that the PSPP program was established to prop up the economies of Southern European member states. The Bundesverfassungsgericht explicitly argues that the monetary aim of the PSPP might have been a mere pretext.⁸¹ Consequently, it criticised the Court of Justice for accepting the monetary purpose of the PSPP without second-guessing it.⁸² Instead, the Court of Justice should have used the corrective function of proportionality *stricto sensu* by taking into account the economic effects of the PSPP program.⁸³ By failing to do so, the Court of Justice was unable to prevent a potential ‘abuse of rights’.⁸⁴

However, while requiring the Court of Justice to apply a strict balancing test, the Bundesverfassungsgericht refrained from engaging in such an analysis of the proportionality *stricto sensu* itself. Instead, the Court argued that the balancing test of the Court of Justice was insufficient for two reasons: First, the Court of Justice did not take the potential economic effects sufficiently into account;⁸⁵ and second, its standard of scrutiny when applying the proportionality test was too deferential.⁸⁶ The lack of balancing thus rendered the *Weiss* judgment *ultra vires*. The Bundesverfassungsgericht showed a similar argumentation pattern when it turned to reviewing the decision of the European Central Bank. Again, it focused its criticism not on the disproportionate nature of the PSPP, but on the lack of a proportionality analysis.⁸⁷ However, contrary to the case of the European Court of Justice, the Bundesverfassungsgericht gave the European Central Bank the opportunity to remedy the situation by providing a post hoc proportionality assessment within three months.⁸⁸

⁸¹BVerfG, 5 May 2020, 2 BvR 859/15, para. 137.

⁸²Ibid., para. 134.

⁸³Ibid., para. 133.

⁸⁴Ibid., para. 137.

⁸⁵Ibid., paras. 138-145.

⁸⁶Ibid., para. 156.

⁸⁷Ibid., paras. 176-177.

⁸⁸Ibid., para. 235. Some commentators have – rightly – pointed out that the Bundesverfassungsgericht should have given the same opportunity to the ECJ by initiating a second preliminary reference procedure: see H.-J. Hellwig, ‘Das Bundesverfassungsgericht hätte vorlegen müssen’, *Frankfurter Allgemeine Zeitung*, 12 May 2020, (<https://www.faz.net/-irf-9zd1w/>), visited 21 June 2021; D. Sarmiento and J.H.H. Weiler, ‘The EU Judiciary after Weiss: Proposing a New Mixed Chamber of the Court of Justice’, (<https://verfassungsblog.de/the-eu-judiciary-after-weiss/>), visited 21 June 2021; O. Garner, ‘Squaring the PSPP Circle: How a declaration of incompatibility can reconcile the supremacy of EU law with respect for national constitutional identity’, (<https://verfassungsblog.de/squaring-the-pspp-circle/>), visited 21 June 2021. See also Bobić and Dawson, *supra* n. 2, p. 1986-1987; Opinion by AG Tanchev in Case C-824/18, *A.B. and others*, delivered on 17 December 2020, para. 81. This post hoc proportionality assessment by the European Central Bank has been subject to an implementation procedure before the Bundesverfassungsgericht. However, the Bundesverfassungsgericht rejected the implementation application as inadmissible and unfounded, see BVerfG, 29 April 2021, 2 BvR 1651/15 and 2 BvR 2006/15.

At first sight, the proportionality analysis of the Bundesverfassungsgericht seems to be in line with the traditional function of the proportionality test, to 'smoke out' illicit motives as discussed above.⁸⁹ Nevertheless, even from this perspective, the judgment of the German Constitutional Court is surprising. The only evidence that the Bundesverfassungsgericht provides for potential illicit motives is the economic effects of the policy of the European Central Bank. Strikingly, it requires these economic effects to be taken into account in the balancing test. However, balancing has never been the traditional place for a second-order review of potential illicit motives. Indications for the latter are rather the lack of suitability or necessity or the absence of a means-ends-fit.⁹⁰ In other cases, courts might also use consistency considerations.⁹¹

Indeed, courts have good reasons for avoiding the balancing stage. In *PSPP*, the Bundesverfassungsgericht requires a traditional weighing of competing values. But this weighing of competing values is frequently criticised in legal scholarship because it requires the comparison of incommensurable values.⁹² Even in the traditional domain of balancing, fundamental rights analysis, apex courts rarely engage in the freewheeling weighing of competing values that the Bundesverfassungsgericht suggests in its *PSPP* judgment.⁹³ Instead, they rather review the means-ends-fit or

⁸⁹See *supra* nn. 7-25 and accompanying text.

⁹⁰Petersen, *supra* n. 14, p. 664.

⁹¹See Petersen, *supra* n. 5.

⁹²See, e.g., Schlink, *supra* n. 28, p. 134-135; T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing', 96 *Yale Law Journal* (1987) p. 943 at p. 972-976; J. Habermas, *Between Facts and Norms* (Polity Press 1996) p. 259; W. Leisner, *Der Abwägungsstaat: Verhältnismäßigkeit als Gerechtigkeit?* (Duncker & Humblot 1997) p. 74; S. Woolman, 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution', 13 *South African Journal on Human Rights* (1997) p. 102 at p. 114-121; L. Blaauw-Wolf, 'The balancing of interests with reference to the principle of proportionality and the doctrine of *Güterabwägung*: a comparative analysis', 14 *SA Public Law* (1999) p. 178 at p. 210; F. Raue, 'Müssen Grundrechtsbeschränkungen wirklich verhältnismäßig sein?', 131 *Archiv des öffentlichen Rechts* (2006) p. 79 at p. 85; R. Christensen and A. Fischer-Lescano, *Das Ganze des Rechts: Vom hierarchischen zum reflexiven Verständnis deutscher und europäischer Grundrechte* (Duncker & Humblot 2007) p. 357; S. Tsakyrakis, 'Proportionality: An Assault on Human Rights?' 7 *International Journal of Constitutional Law* (2009) p. 468 at p. 471; G.C.N. Webber, *The Negotiable Constitution* (Cambridge University Press 2009) p. 92-93; C. Hillgruber, 'Ohne rechtes Maß? Eine Kritik der Rechtsprechung des Bundesverfassungsgerichts nach 60 Jahren', 66 *Juristenzeitung* (2011) p. 861 at p. 862; R. Camilo de Oliveira, *Zur Kritik der Abwägung in der Grundrechtsdogmatik* (Duncker & Humblot 2013) p. 205-210; P. Sales, 'Rationality, Proportionality and the Development of the Law', 129 *Law Quarterly Review* (2013) p. 223 at p. 236. For a detailed discussion of this critique, see Petersen, *supra* n. 29, p. 40-54.

⁹³Petersen, *supra* n. 29, p. 158-182.

consistency of a measure, engage in financial burden-shifting, and correct cases of individual hardship.⁹⁴ This also applies for the Bundesverfassungsgericht itself.⁹⁵

The weighing of the factors proposed by the Bundesverfassungsgericht in its *PSPP* judgment would have required a commensuration of incommensurate values. Even though the mentioned factors are economic factors, they cannot be translated into quantitative indicators with a common denominator. It would have required a comparison of the positive effects of the European Central Bank's policy for reaching its inflation target and the overall economic performance of the Euro-zone with the negative effects on house prices and interest rates for saving accounts pointed out by the Bundesverfassungsgericht in its decision.⁹⁶ Consequently, balancing the competing factors would have required a complex political assessment.

Certainly, the mere fact that balancing requires a commensuration of incommensurable values does not necessarily disqualify it as a technique of legal argumentation.⁹⁷ Indeed, comparisons of incommensurable values are quite common in legal decision-making.⁹⁸ Yet, the question boils down to a question of competence: which institution is the appropriate institution to make a choice between incommensurable values.⁹⁹ When comparing different economic effects of the European Central Bank's economic policy, it is not quite clear why courts would be in a better position than the Bank to carry out such an assessment.¹⁰⁰ To put it briefly: not by abstaining from such an assessment, but by undertaking it, would

⁹⁴Ibid., p. 165-177 for an analysis of the balancing jurisprudence of the Bundesverfassungsgericht.

⁹⁵Ibid.

⁹⁶On these potential negative effects, see BVerfG, 5 May 2020, 2 BvR 859/15, para. 139.

⁹⁷Petersen, *supra* n. 29, p. 50.

⁹⁸J. Hänni, 'Rechtskonflikte, Wertefolgen und Inkommensurabilität', in E. Schramm et al. (eds.), *Konflikte im Recht – Recht der Konflikte* (Franz Steiner Verlag 2010) p. 173 at p. 180. See also C.R. Sunstein, 'Incommensurability and Valuation in Law', 92 *Michigan Law Review* (1994) p. 779 at p. 793; P. Craig, 'The Nature of Reasonableness Review', 66 *Current Legal Problems* (2013) p. 131 at p. 163.

⁹⁹See F. Schauer, 'Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture', in G. Nolte (ed.), *European and US Constitutionalism* (Cambridge University Press 2005) p. 49 at p. 64.

¹⁰⁰See M. Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Review', 15 *German Law Journal* (2020) p. 265 at p. 269-272; H. Sauer, 'Doubtful it Stood . . . : Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment', 16 *German Law Journal* (2015) p. 971 at p. 979-980; A. Lang, 'Ultra vires review of the ECB's policy of quantitative easing: An analysis of the German Constitutional Court's preliminary reference order in the *PSPP* case', 55 *Common Market Law Review* (2018) p. 923 at p. 950; (arguing that courts do not possess the necessary legitimacy or expertise for such an analysis); Lehmann, *supra* n. 56, p. 117 ('a judge should [. . .] never substitute his own economic assessment for that of the monetary authority'). See also P. Bofinger et al., 'Gefahr für die Unabhängigkeit der Notenbank', *Frankfurter Allgemeine Zeitung* (29 May 2020) p. 18.

the Court of Justice have stretched the limits of its competences.¹⁰¹ For this reason, the deferential standard of review that the Court of Justice applies seems justified.¹⁰²

Rather, one gets the impression that the Bundesverfassungsgericht wants to use the proportionality test for a different purpose. Instead of using it as an instrument to limit the *exercise* of competences, it tries to use it as an instrument to *determine* the *scope* of EU competences.¹⁰³ The Court at times explicitly refers to the ‘delimitation’ of monetary and economic policy.¹⁰⁴ Furthermore, it alludes to this purpose when it argues that a valid proportionality review can ‘compensate’ to a certain extent for a generous interpretation of the competence itself¹⁰⁵ or when it holds that proportionality has a ‘corrective function’ in order to protect member state competences.¹⁰⁶ But this understanding runs counter to Article 5(1) TEU, according to which proportionality only applies to the exercise, but not to the definition of competences.¹⁰⁷

CONCLUSION

With its bold application of proportionality *stricto sensu* when reviewing the competences of the European Central Bank for monetary policy, the Bundesverfassungsgericht has entered new territory. However, it is doubtful that the application of the balancing test for regulating the use of competences will set

¹⁰¹ See also Mayer, *supra* n. 2, p. 751 (‘This is not judicial law-making. This is judicial self-restraint’).

¹⁰² Of course, one can argue that the Bundesverfassungsgericht did not require the Court of Justice to perform its own balancing exercise, but merely to exercise a procedural control to determine whether the European Central Bank had taken all important factors into account in its decision. Unfortunately, the judgment is not clear in this respect – it seems that the German Court requires the Court of Justice to perform a substantive test, while applying itself a procedural test to the decision of the Bank. But even if one wants to interpret the *PSPP* judgment procedurally with regard to the Court of Justice, who determines which are the decisive factors that have to be taken into account by the European Central Bank? E.g., is the survival of economically not viable companies indeed a decisive factor, as the Bundesverfassungsgericht suggests?

¹⁰³ See Mayer, *supra* n. 2, p. 754 (arguing that there is a ‘confusion of an *ultra vires* act in the narrow sense and an *ultra vires* act in a broader sense’).

¹⁰⁴ BVerfG, 5 May 2020, 2 BvR 859/15, paras. 127, 139 (‘Abgrenzung zwischen Währungs- und Wirtschaftspolitik’).

¹⁰⁵ *Ibid.*, para. 128.

¹⁰⁶ *Ibid.*, para. 133.

¹⁰⁷ M. Wendel, ‘Paradoxes of Ultra-Vires Review: A Critical Review of the *PSPP* Decision and Its Initial Reception’, 21 *German Law Journal* (2020) p. 979 at p. 986; J. Ziller, ‘The unbearable heaviness of the German constitutional judge: On the judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 concerning the European Central Bank’s *PSPP* programme’, (<https://ceridap.eu/the-unbearable-heaviness-of-the-german-constitutional-judge-on-the-judgment-of-the-second-chamber-of-the-german-federal-constitutional-court-of-5-may-2020-concerning-the-european-central-banks-pspp/>), visited 21 June 2021; Editorial Comments, *supra* n. 32, p. 970; Bobić and Dawson, *supra* n. 2, p. 1975.

standards that will be followed by other courts. The inconsistencies are too obvious. The Bundesverfassungsgericht's approach is neither in line with the existing case law of the Court of Justice, nor inspired by its own approach regarding the delimitation of competences on the domestic level. While the Bundesverfassungsgericht follows a less deferential approach than the European Court of Justice, the balancing test does not play a more significant role in the German context than in the EU case law.

Other justifications also fail. In its reasoning, the Bundesverfassungsgericht suggests that the monetary aim of the PSPP program was a mere pretext.¹⁰⁸ This alludes to a traditional function of the proportionality test – the 'smoking out' of illicit motives. However, and for good reasons, the second-order review of institutional motivation usually forms part of the suitability or necessity stages of the proportionality test. Proportionality *stricto sensu* seems to be ill-suited for such an analysis. Instead, the Bundesverfassungsgericht appears to use the balancing test as an instrument to determine the content of the European Central Bank's competences. However, this clearly runs counter to the conception of Article 5(1) TEU, according to which proportionality is only a means to restrict the *exercise* of competences.

With its requirement of balancing in the *PSPP* judgment, the Bundesverfassungsgericht exposes itself to the incommensurability critique. According to this critique, balancing is problematic because it requires the comparison of incommensurable values. In its fundamental rights jurisprudence, the Court has painstakingly tried to avoid the critique by refraining from freewheeling balancing.¹⁰⁹ However, balancing is not any less problematic when applied as a check to competences. Consequently, as balancing itself is routinely considered to be an expression of judicial activism,¹¹⁰ it seems somewhat ironic if the Bundesverfassungsgericht is accusing the Court of Justice of judicial activism precisely because the latter refrained from applying a strict standard of scrutiny and a balancing of competences.



¹⁰⁸BVerfG, 5 May 2020, 2 BvR 859/15, para. 137.

¹⁰⁹See *supra* nn. 93-95 and accompanying text.

¹¹⁰See U. Haltern, 'Integration als Mythos: Zur Überforderung des Bundesverfassungsgerichts', 45 *Jahrbuch des öffentlichen Rechts* (1997) p. 31 at p. 69; Leisner, *supra* n. 92, p. 170, 173; R. Christensen and K.D. Lerch, 'Dass das Ganze das Wahre ist, ist nicht ganz unwahr', 62 *Juristenzeitung* (2007) p. 438 at p. 440; J.Z. Benvindo, *On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism* (Springer 2010) p. 31-81; C.D. Classen, 'Das Prinzip der Verhältnismäßigkeit im Spiegel europäischer Rechtsentwicklungen', in M. Sachs and H. Siekmann (eds.), *Der grundrechtsgeprägte Verfassungsstaat: Festschrift für Klaus Stern zum 80. Geburtstag* (Duncker & Humblot 2012) p. 651 at p. 653; G. Huscroft, 'Proportionality and Pretense', 29 *Constitutional Commentary* (2014) p. 229 at p. 255.