Common Market Law Review **57**: 965–978, 2020.

EDITORIAL COMMENTS

Not mastering the Treaties: The German Federal Constitutional Court's PSPP judgment

Rarely has a decision of a national court caused so much stir in the EU as the recent *PSPP* judgment of the Second Senate of the German Federal Constitutional Court (FCC).[1] By finding that both the ECB and the ECJ acted *ultra vires*, the FCC put itself in the spotlight of a broad European public, reaching from the blogosphere to the European Court of Justice and the European Parliament. The attention is well deserved: while this is not the first case in which a national court disobeyed the ECJ,[2] it is certainly the most significant one, touching on a politically divisive matter in a field where the EU enjoys exclusive competence. This is, moreover, a strongly-worded decision delivered with all the confidence of members of an institution that would very comfortably accept the compliment of being *primus inter pares* among constitutional courts in Europe and, come to think of it, well beyond. It may not always be possible to live up to such a reputation, but one would assume that methodological rigour and argumentative diligence would be upheld to the highest standards in a ruling that rejects a judgment of the ECJ exactly for the lack of those very judicial qualities. However, as many critical commentators noted, the *PSPP* judgment falls somewhat short of this expectation.[3] We agree. In particular, we are concerned that the FCC's idea of

1. FCC, judgment of 5 May 2020 – 2 BvR 859/15 -, <www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html> (all websites last visited 29 June 2020, except in note 37). The acronym PSPP refers to the Secondary Markets Public Sector Asset Purchase Programme established by Decision (EU) 2015/774 of the ECB, O.J. 2015, L 121/20.

2. See previous decisions by the Czech Constitutional Court, judgment of 31 Jan. 2012, Pl. ÚS 5/12, annotated by Zbiral, 49 CML Rev. (2012), 1475, and by the Supreme Court of Denmark, judgment of 6 Dec. 2016, Case 15/2014, *Dansk Industri (DI) acting for Ajos A/S* v. *the estate left by A*, discussed by Holdgaard, Elkan and Schaldemose, "From cooperation to collision: the ECJ's *Ajos* ruling and the Danish Supreme Court's refusal to comply", 55 CML Rev. (2018), 17.

3. E.g. Champsaur, "Opinion: The German Constitutional Court has fallen into its own trap", <www.iflr.com/article/b1lmsshl7zgn0z/opinion-the-german-constitutional-court-has-fallen-into-its-own-trap>; Galetta, "Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5 May 2020 of the German BVerfG and its consequences", <ceridap.eu/karlsruhe-uber-alles-the-reasoning-on-the-principle-of-proportionality-in-the-judgment-of-5-may-2020-of-the-german-bverfg-and-its-consequences>; Marzal, "Is the BVerfG

ultra vires review, which extends to issues of proportionality, erodes the concept of a Union of democratic States guided by the rule of law to which all Member States, including Germany, committed.

Ultra vires? A misnomer for a review of issues of EU law not permitted by the Treaties

Our concerns start with the concept of the test applied by the FCC in order to determine whether the ECJ acted *ultra vires*. In *Weiss*, the ECJ rendered a judgment on the validity of the PSPP decision of the ECB, as requested by the FCC.[4] The FCC did not claim that the ECJ failed to qualify as an independent court, nor were the European judges accused of corruption or of any other form of perversion of justice in the given case that would fall outside the role of an independent judiciary, which would indeed have had to be considered *ultra vires*.

The charge raised by the FCC was instead that the answer the German judges received from the ECJ was not comprehensible and therefore objectively arbitrary.[5] The question as to whether a judgment rendered by a court is arbitrary is an issue of substantive law and can only be answered on the basis of the law applied by that court.[6] The authority to set aside a judgment for arbitrariness therefore belongs to a superior court within the same legal order. However, the FCC is obviously not in this position *vis-à-vis* the ECJ when it comes to matters of EU law. According to Article 19(1) TEU, the Court of Justice is the final arbiter in matters concerning the interpretation and application of the Treaties. In order to preserve legal certainty and the unity of the legal order of the Union, the ECJ alone has jurisdiction to rule that an act

PSPP decision 'simply not comprehensible'?", <verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/#comments>; Mayer, "Auf dem Weg zum Richterfaustrecht?", <verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht>; Meier-Beck, "Ultra Vires?", <www.d-kart.de>; Wegener, "Karlsruher Unheil – Das Urteil des Bundesverfassungsgerichts vom 5. Mai 2020 (2 BvR 859/15) in Sachen Staatsanleihekäufe der Europäischen Zentralbank", (2020) *Europarecht*, 348. However, numerous authors also spoke out in favour of the FCC, e.g. Grimm, "Jetzt war es soweit", *Frankfurter Allgemeine Zeitung*, 18 May 2020, <www.faz.net/aktuell/feuilleton/debatten/ezb-urteil-jetzt-war-es-so-weit-16773982.html?premium>; Haltern, "Ultra-vires-Kontrolle im Dienst der europäischen Demokratie", (2020) *Neue Zeitschrift für Verwaltungsrecht*, 817; Ruffert, "Europarecht und Verfassungsrecht: Ultra-vires-Kontrolle über EZB-Anleihenkäufe und EuGH-Urteil", (2020) *Juristische Schulung*, 574.

4. Case C-493/17, *Heinrich Weiss and Others*, EU:C:2018:1000.
5. Para 2 of the headnotes and para 118 of the judgment, *supra* note 1.
6. This sets arbitrariness as a standard of review apart from an *ordre public* review, which is a standard of the *lex fori* that courts typically apply when scrutinizing decisions rendered by other courts under a different legal order.

of an EU institution is contrary to EU law and therefore invalid.[7] The Member States secured the ECJ's authority by undertaking not to submit disputes concerning these matters to procedures outside the Treaties (Art. 344 TFEU) and by instructing their courts to seek answers in these matters from the Court of Justice (Art. 267 TFEU). They did not invest their national courts with a power to review the ECJ's decisions as to whether these decisions were wrong, or even manifestly wrong, regarding the interpretation and the application of the Treaties.

By scrutinizing the content of a judgment rendered by the ECJ, and not merely its nature as a judicial decision rendered by an independent and impartial court, under the name of *ultra vires*, the FCC has in fact seized this power and acted as a self-appointed national appeal court placed above the ECJ in matters of EU law. Following a line of precedents established since its *Maastricht* decision,[8] the FCC felt legitimized or even compelled to act in this way under German constitutional law. While in principle recognizing the ECJ's mandate to ensure uniformity and coherence of EU law, the FCC was adamant that its own constitutional mandate required an assessment as to whether this was a case "where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences".[9] Acknowledging that this could lead to a mismatch between the national constitutional perspective and the perspective of EU law, the FCC held that these tensions were nevertheless "inherent in the design of the European Union", reflecting its nature "as a union based on the multi-level cooperation of sovereign States, constitutions, administrations and courts" that, even under the Lisbon Treaty, remained under the control of the Member States as "Masters of the Treaties" and had "not evolved into a federal State".[10]

To be sure, we do not deny the constitutional perspective as such. The Member States transferred limited powers to the EU, and the respective national laws on which this transfer is based remain within the jurisdiction of national courts. Without dwelling on a theoretical discussion of the nature of the Union legal order, its relationship with the Member States' legal orders,

7. Case C-314/85, *Foto-Frost* v. *Hauptzollamt Lübeck*, EU:C:1987:452, para 15. This was recalled in the ECJ's reaction to the PSPP judgment in press release No. 58/20 of 8 May 2020, <curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf>.

8. The incipient stages of *ultra vires* control can be found in FCC, judgment of 12 Oct. 1993 (*Maastricht*), BVerfGE 89, 155, at 210. However, the *ultra vires* doctrine as such was formulated in FCC, judgment of 30 June 2009 (*Lisbon*), BVerfGE 123, 267, at 353–354, modified in a judgment of 6 July 2010 (*Honeywell*), BVerfGE 126, 286, at 304, 309 et seq., and confirmed in a judgment of 14 Jan. 2014 (*OMT*), BVerfGE 134, 366, at 382–384.

9. Para 111 of the judgment, *supra* note 1.

10. Para 111, *supra* note 1.

and the merits of the FCC's opaque concept of *Staatenverbund*, it is also safe to say that the EU is not a federal State, and that the Member States remain Masters of the Treaties. Indeed, if the Member States object to the ECJ's interpretation of a provision of the Treaties they can collectively change the law by amending the relevant provision or by codifying a different interpretation in a protocol, as has happened in the past.[11] If individual Member States disapprove of the legal order of the Union, they are free to withdraw from the Union under Article 50 TEU, as we still vividly remember from the example of the UK. But unless explicitly provided otherwise, they are not free to individually and selectively opt out of rules they have collectively agreed to, including the exclusive jurisdiction of the ECJ over matters of EU law. It is therefore misleading to claim that jurisdictional conflicts are "inherent in the design of the European Union" and to frame this conflict as resulting from a tension between the Union and the Masters of the Treaties – who, from time to time, have to remind the Union that it is nothing but their own creature. A more adequate account of the conflict that became apparent in the *PSPP* case would rather locate its roots in the contrast between the collective decision of the Member States as Masters of the Treaties to give a Union court the final word on the interpretation of the Treaties, and deviating views of courts in individual Member States, such as the German FCC. The real issue is then the FCC's claim that Germany is prevented by the immutable core of its constitution laid down in the "eternity clause" of the Basic Law[12] from fully committing to this collective decision of the Masters of the Treaties.

If anything, the present conflict is therefore "inherent in the design" of the German constitution, or rather, in the interpretation thereof by the Second Senate of the FCC. That interpretation seems rather inward-looking given that, in its preamble, the Basic Law defines the "determination to promote world peace as an equal partner in a united Europe" as *raison d'état* and provides the requisite basis for the transfer of sovereign powers to the EU in its Article 23(1). Incidentally, considering that the FCC's professed concern in the *PSPP* case is the preservation of democratic accountability,[13] it is somewhat ironic that by invoking the "eternity clause" of the Basic Law, the FCC seeks to immunize this position even against a change of the German constitution by a super-majority.[14]

11. See the Protocol concerning Art. 119 of the Treaty establishing the European Community ("Barber protocol") to the Maastricht Treaty on European Union.

12. Art. 79(3) of the Basic Law.

13. Cf. paras. 2 and 3 of the headnotes, paras. 101 et seq. of the judgment, *supra* note 1.

14. The irony has not escaped all members of the FCC, as indicated by the dissenting vote of Justice Lübbe-Wolff in FCC, order of 14 Jan. 2014 – 2 BvR 2728/13 (*Gauweiler*), para 28: "That some few independent German judges – invoking the German interpretation of the

A blind spot: the FCC's conflation of the existence and the exercise of Union competences

By applying the test of arbitrariness to judgments of the ECJ, the FCC designed an instrument that in principle allows it to treat each and every issue of EU law as a matter of constitutional law, provided the German judges feel sufficiently strongly that something went wrong in Luxembourg. There is indeed evidence for such an expansionist tendency of the FCC in its domestic use of this test. As the FCC has no jurisdiction over German law except for federal constitutional law, it developed the standard of arbitrariness from the right to equal treatment under Article 3(1) of the Basic Law, and habitually employs this standard of review as a means to intervene in domestic legal issues of a non-constitutional nature where specific violations of fundamental rights cannot be established, quite evidently not always to the delight of other German apex courts such as the German Supreme Court.[15] This experience of domestic "competence creep", which has quite frequently been criticized,[16] may help explain why the most senior presiding judge of the German Supreme Court is one of the harshest critics of the FCC;[17] but more importantly, this should be a warning of the potential consequences of transferring this test from the domestic arena to the European sphere. Considering that the substantive conditions attached to the *ultra vires* doctrine in the previous *Honeywell* decision played only a marginal role in the *PSPP* judgment,[18] and that the procedural requirement of a prior preliminary ruling by the ECJ, which was also laid down in *Honeywell*, was ignored with regard to the central

principle of democracy, the limits of admissible competences of the ECB following from this interpretation, and our reading of Art. 123 et seq. TFEU – make a decision with incalculable consequences for the operating currency of the euro zone and the national economies depending on it, appears as an anomaly of questionable democratic character."

15. E.g. FCC, order of 1 July 1954 – 1 BvR 361/52, BVerfGE 4, 1, at 7; order of 13 Jan. 1987 – 2 BvR 209/84, BVerfGE 74, 102, at 127; order of 23 Jan. 2017 – 2 BvR 2584/12, NJW 2017, 1731, at 1734. See Walter, "Artikel 93 GG" in Maunz and Dürig (Eds.), *Grundgesetz-Kommentar* (Beck, 2020), para 410.

16. See e.g. Rieble, "Richterliche Gesetzesbindung und BVerfG", (2011) *Neue Juristische Wochenschrift*, 819; Diederichsen, "Das Bundesverfassungsgericht als oberstes Zivilgericht – ein Lehrstück der juristischen Methodenlehre", 198 *Archiv für die civilistische Praxis*(1998), 171. However, it should be stressed that the critical point raised in this editorial comment merely refers to the FCC's case law insofar as judgments of domestic courts are scrutinized under the subsidiary criterion of arbitrariness.

17. Meyer-Beck, op. cit. *supra* note 3.

18. See paras. 155–156 of the judgment, *supra* note 1, on the requirement of a manifest breach, and paras. 157–161 on the requirement of a structurally significant shift.

issue of proportionality,[19] the *PSPP* judgment is an ominous sign that the FCC's idea of a judicial dialogue with the ECJ is not fundamentally different from its occasionally rather intrusive conduct *vis-à-vis* domestic courts. Apparently, the FCC is not really concerned about the fact that, unlike domestic courts, the ECJ is not bound by the provision of the Basic Law from which arbitrariness as a standard of review was originally derived. By choosing this approach, the FCC has in effect created a device that, at its own discretion, transforms every decision of the ECJ with which the German court strongly disagrees into "a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences";[20] it thus extends the *ultra vires* review from a violation of the *limits* of EU competences to the unlawful *exercise* of these competences.

This merging of unlawful measures into *ultra vires* acts by labeling judgments of the ECJ as "not comprehensible and therefore objectively arbitrary" is the background to the FCC's interpretation of the principle of proportionality in Article 5(1) and (4) TEU, which is the bone of contention with the ECJ. According to Article 5(1) TEU, there is a clear distinction between the limits of Union competences, as governed by the principle of conferral, and the use of these competences, as governed by the principles of subsidiarity and proportionality. More precisely, Article 5(4) refers to the "content and form" of Union action as the field of application for the principle of proportionality. To be sure, among the many facets of the principle of proportionality, Article 5 stipulates a specific purpose of this principle by preventing EU institutions from disproportionately curtailing the Member States' autonomy when exercising Union competences, as has been recognized by several advocates general.[21] This has prompted many (predominantly German) scholars to speak of a codification of a competence-related principle of proportionality in Article 5(1) and (4) TEU,

19. The questions referred to the ECJ in the FCC's prior request for a preliminary ruling included proportionality (question (3)(c)), but did not refer precisely to the interpretation of the principle of proportionality, which the FCC only subsequently regarded as pivotal.

20. Para 111 of the judgment, *supra* note 1.

21. Most clearly A.G. Poiares Maduro, Opinion in Case C-58/08, *The Queen, on the application of Vodafone Ltd and Others* v. *Secretary of State for Business, Enterprise and Regulatory Reform*, EU:C:2009:596, para 37; also A.G. Kokott, Opinion in Case C-17/10, *Toshiba Corporation and Others* v. *Úřad pro ochranu hospodářské soutěže*, EU:C:2011:552, para 90; A.G. Trstenjak, Opinion in Case C-539/09, *Commission* v. *Germany*, EU:C:2011:345, paras. 89-90. A closer analysis of the case law is provided by Saurer, "Der kompetenzrechtliche Verhältnismäßigkeitsgrundsatz im Recht der Europäischen Union", (2014) *Juristen-Zeitung*, 281, at 283-6.

as distinct from the fundamental rights-related dimension of this principle demanding the same consideration with regard to individual rights.[22]

However, this does not affect the nature of this principle as a limitation of the *exercise* (and not of the *existence*) of Union competences. A Union act that violates the principle of proportionality, by encroaching either upon individual rights or upon the Member States' autonomy, is certainly an unlawful act under EU law. But this defect alone does not turn it into an act outside the competences of the Union.[23] Taking into account the explanation given by the Member States in the context of the codification of the principle of proportionality in the Maastricht Treaty (ex-Art. 3b EC),[24] there is no indication that the Masters of the Treaties intended anything other than this meaning, which is expressed in the clear wording of Article 5(1) and (4).

For many EU lawyers, including the members of this Editorial Board, it is just baffling that nothing about this can be found in the FCC's judgment. The FCC did not even consider the wording of Article 5, let alone engage in a deeper discussion of the meaning of the principle of proportionality regarding the distinction between the existence and the exercise of Union competences.[25] At this crucial point of the argument, the FCC's reasoning merely alludes to "the notion that a generous interpretation of the specific competence conferred may, to a certain extent, be compensated by a sound proportionality assessment".[26] So the FCC seems to expect the ECJ to make up for its generosity in controlling the principle of conferral by a more rigid examination of the principle of proportionality. Before we turn to the question whether such a trade-off makes sense, it is worth pointing out that even such a link between the principles of conferral and of proportionality would not justify a conflation of these principles, which firmly belong in different categories, as defined in Article 5(1). There appears to be just one explanation for the FCC's striking disregard for the distinction between the limits and the exercise of Union competences: if seen through the lens of an *ultra vires* control that treats arbitrary decisions as transgressions of competence, this distinction is blurred, if not invisible.

22. A clear exposition of this concept in English is given by Bast and Wetz, "System of competences", in Kuijper et al. (Eds.), *The Law of the European Union*, 5th ed. (Wolters Kluwer, 2018), p. 69, at 84.

23. See on this point Champsaur, Marzal and Meier-Beck, op. cit. *supra* note 3.

24. Conclusions of the Edinburgh European Council on 11–12 Dec. 1992, <ec.europa.eu/commission/presscorner/detail/en/DOC_92_8>.

25. In para 126 of the judgment, *supra* note 1, the FCC assembled 34 references to judgments of the ECJ, none of which proves the point that the principle of proportionality refers to the existence of Union competences.

26. Para 128 of the judgment, *supra* note 1.

Should the ECJ apply a more stringent proportionality review?

However, it is legitimate to ask whether, despite overstretching the *ultra vires* doctrine, the FCC had a point in demanding a more stringent proportionality review from the ECJ. In this regard, it is useful to distinguish between *what* should be assessed under the name of proportionality and *how* this should be done.

Article 5(4) TEU provides a rather straightforward answer to the former question by stating that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". In *Weiss*, the ECJ clearly adhered to these requirements by examining whether the ECB's decision on a bond-buying programme was suitable for attaining its monetary policy objective and did not go beyond what is necessary to achieve this objective.[27] Yet, the FCC found that a "key element – the balancing of conflicting interests – is missing" in this assessment.[28] Considering that neither Article 5 nor the Protocol on Proportionality and Subsidiarity mention such a requirement,[29] and neither the ECJ nor national courts in Europe have ever adopted this as a *communis opinio*,[30] it is not easy to ascertain why balancing should be a key element in the assessment of proportionality. It is certainly true that the overall purpose of proportionality under Article 5 is to keep the use of Union competences and its impact on national autonomy in balance. But this leaves the question unsolved why balancing as such should be regarded as an indispensable part of the assessment. The FCC's answer is that without this element, the principle of proportionality is meaningless as a complement to the principle of conferral, because the "the CJEU's approach ultimately entails that the ECB is free to choose any means it considers suitable even if the benefits are rather slim – compared to possible alternative means –, while collateral damage is high".[31]

This is, to put it carefully, a very brief statement of a very ambitious concept. It is of course theoretically possible to use a balancing rule as a substitute for a clear allocation of competences. Courts would then decide on conflicts between different holders of competences by weighing up their

27. Case C-493/17, *Weiss,* paras. 71–100.

28. Para 138 of the judgment, *supra* note 1.

29. Art. 5, 4th sentence, of the Protocol on Proportionality and Subsidiarity merely requires a balancing of financial and administrative burdens for the Union, national governments, regional or local authorities, economic operators and citizens for draft legislative acts.

30. If anything, this is the lesson to be learnt from the avalanche of citations in paras. 124–126 of the judgment, *supra* note 1.

31. Para 140 of the judgment, *supra* note 1. Case C-493/17, *Weiss*, para 93, refers to the weighing up of the various interests involved, but the assessment that follows is not a comprehensive balancing, as envisaged by the FCC.

respective interests. But this rule would put democratically unaccountable judges in charge of discretionary decisions about who should decide what in a multi-level legal order (the notorious *Kompetenzkompetenz*). Therefore, the FCC wisely rejected such a role for the allocation of competences within the German federal order.[32] Against this background, it seems like a tall order to demand exactly this from the ECJ. It may be true that the control of competences conferred on the Union, in particular regarding the internal market, is not the most glorious chapter in the annals of the Court of Justice.[33] However, even so it would not make much sense to cure one evil with another.

In any case, an assessment of proportionality that is restricted to the suitability and the necessity of Union measures as to the attainment of objectives covered by Union competences need not be meaningless. Even if a court does not weigh benefits and harms, proportionality is a suitable test for the consistency of the relation between the stated objective of a measure and the chosen means (the "content and form" of the measure according to Art. 5(4) TEU). The extent to which such an assessment shows teeth depends on how it is implemented by a court, namely the margin of discretion the court grants to the institution whose measure is under scrutiny. In *Weiss* and prior to this in *Gauweiler*, the ECJ deferred to the ECB/ESCB to a considerable degree. As the ESCB "is required . . . to make choices of a technical nature and to undertake complex forecasts and assessments" when preparing and implementing a bond-buying programme such as PSPP, "it must be allowed, in that context, a broad discretion".[34] It is indeed open to dispute whether such broad discretion is justified with a view to palpable distributional effects such a democratically unaccountable institution may cause with its decisions.[35] By demanding a more stringent judicial review, the FCC has in fact formed an unusual alliance with progressive critics of the ECB, while at the same time undermining Germany's ordoliberal orthodoxy for which an independent central bank is the cornerstone of happiness and well-being.[36] Depending on the observer's ideological preferences, this may well be seen as a collateral benefit of the clash between the FCC and the ECJ, even if this merely happened for the instrumental purpose of granting the FCC a territorial

32. FCC, judgment of 22 May 1990 – 2 BvG 1/88, BVerfGE 81, 310, at 338.

33. See Weatherill, "Competence creep and competence control", 23 YEL (2004), 1.

34. Case C-493/17, *Weiss,* para 73, citing Case C-62/14, *Gauweiler and Others*, EU:C:2015:400, para 68.

35. See critical comments on Case C-493/17, *Weiss* by Dawson and Bobic, "Quantitative easing at the Court of Justice – Doing whatever it takes to save the euro: *Weiss and Others*", 56 CMLRev (2019), 1005.

36. See the references to Dawson and Bobic, op. cit. *supra* note 35, in paras. 184, 190 and 215 of the judgment.

advantage in its confrontation with the ECJ. But this will be a poor consolation if the erosion of the rule of law enabled by the *ultra vires* doctrine progresses.

What next? In search of the least bad solution

The immediate consequences of the *PSPP* judgment for the participation of the Bundesbank in the ESCB seem tricky, but will hopefully be manageable.[37] Moreover, plans for a huge European recovery fund have even received an unexpected boost, as the judgment forced the German Government's hand to accept joint debt.[38] Yet, the spectre of *ultra vires* control will not vanish even if problems regarding the Economic and Monetary Union are solved. Much has already been said about the risk that other Member States use this doctrine as a pretext to legitimize violations of EU law, as evidenced by the grateful reception of the *PSPP* judgment in Hungary and in Poland.[39] As long as these States are members of the Union and part of its legal fabric (with all the problems this involves for the EU and its institutions), it is hard to shrug off the exemplary effect of this judgment as the former President of the FCC did: "The Poles do what they do, regardless of what we do."[40] To which outside observers may be tempted to reply: "But what will the Germans do?" The obvious tension between the two Senates of the FCC about the openness of the German constitution to European integration[41] is unlikely to inspire trust in the acceptance of the autonomous legal order of the Union in its biggest Member State. Moreover, by using the *ultra vires* doctrine as an instrument to lecture the ECJ about rather dubious, in any event non-fundamental, aspects of proportionality, the Second Senate of the FCC invited speculation as to when

37. At the time of drafting this text, a solution seems to be a compilation of documents by the ECB in order to demonstrate that issues of proportionality were considered, which would then allow the German government and the German parliament to state that the requirements of the judgment have been met; <www.faz.net/aktuell/wirtschaft/bundesregierung-ezb-hat-urteil-aus-karlsruhe-erfuellt-16837926.html>. This did happen on 2 July 2020, see <www.bloomberg.com/news/articles/2020-07-02/german-parliament-backs-ecb-bond-buying-ending-court-standoff> (last visited 5 July 2020). However, it is as yet unclear whether the original claimants will return to the FCC and argue that this reaction is not in conformity with the judgment.

38. "Coronavirus: Why Merkel may help fund Europe's recovery plan", <www.bbc.com/news/world-europe-52807748>.

39. "Eastern European States sense opportunity in German court ruling", *Financial Times*, 10 May 2020, <www.ft.com/content/45ae02ab-56d0-486e-bea5-53ba667198dc>.

40. Interview with President Vosskuhle, *Die Zeit* No. 21/2020, 14 May 2020.

41. As evidenced by the recent decisions of the First Senate of the FCC, order of 6 Nov. 2019 – 1 BvR 16/13 (*Right to be forgotten I*), <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-083.html>; order of 27 Nov. 2019 – 1 BvR 276/17 (*Right to be forgotten II*), <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-084.html>.

the next confrontation with the ECJ will take place, given that the threshold for rejecting a decision of the ECJ is apparently so low.[42]

The FCC's line of reasoning that without a balancing stage, the principle of proportionality is misconstrued, and that such an interpretation is not comprehensible and thus arbitrary, which in turn renders the measure concerned *ultra vires*, is really a blueprint for further attempts to attack the authority of the ECJ. Given that the principle of proportionality in Article 5(1) and (4) TEU applies to all Union acts and all Union competences, and that no EU institution has ever adopted (or even considered) the concept of proportionality advocated by the FCC, it is not unlikely that applicants will line up before the FCC and demand an *ultra vires* review of competition cases, internal market measures, and generally any EU measure they resent.[43] It can only be hoped that the FCC will resist the temptation to produce sequels in the manner of a judicial "Star Wars" saga, and will find a way to scale back the *ultra vires* doctrine to an instrument of residual control, which it may legitimately be.

Meanwhile, the question remains as to what can be done at the EU level in order to lower the risk of a further erosion of the rule of law in the EU. A brief look at the possible reactions shows that none of them is really good, but hopefully one of them or a combination could be the least worst option. The most obvious is an infringement procedure initiated by the Commission.[44] Apart from a near certainty to win this case, there is a strong political argument for such a procedure, as Germany must never be seen as a Member State that is more equal than others – all the more since after more than 50 years of cautious anticipation, a cruel twist of fate brought a German to the helm of the Commission. However, the drawbacks of an infringement procedure are equally clear: despite spontaneous eruptions of a desire to see the FCC punished or even disempowered, it would be irrational to assume that any EU action would lead to an attempt to curtail the FCCs constitutional position and unrivalled authority within Germany. So any infringement procedure that would require Germany to change the constitutional or statutory bases of the FCC would probably meet with insurmountable

42. See the exchange between van den Brink, "Is *Egenberger* next?", <verfassungsblog.de/is-egenberger-next>, and Heinig, "Why *Egenberger* could be next", <verfassungsblog.de/why-egenberger-could-be-next>.

43. See with regard to competition cases Ackermann, "Das europäische Wettbewerbsrecht als Kollateralschaden des PSPP-Urteils des Bundesverfassungsgerichts?", (2020) *Neue Zeitschrift für Kartellrecht*, 281.

44. Pros and cons are discussed by Pernice (pro), <verfassungsblog.de/sollte-die-eu-kommission-deutschland-wegen-des-karlsruher-ultra-vires-urteils-verklagen-pro> and Möllers (contra), <verfassungsblog.de/sollte-die-eu-kommission-deutschland-wegen-des-karlsruher-ultra-vires-urteils-verklagen-contra>.

resistance and eventually backfire on the EU. Taking this into account, it has been suggested to focus the procedure on the *ultra vires* aspects of the judgment, in particular on the failure of the FCC to make a second preliminary reference to the ECJ.[45] This could indeed serve as a reminder that, even under their own concept of a judicial dialogue developed in *Honeywell*, the German judges should have sought clarification from the ECJ on the interpretation of the principle of proportionality, namely the balancing requirement, which was not subject of the first preliminary reference. However, such a symbolic reproach would not achieve much, and potentially not deter, but even encourage other courts to follow in the FCC's footsteps.

This leads us to possible changes at the Treaty level. Quite naturally, the *PSPP* judgment has prompted European lawyers and politicians to dust off the old idea of a competence court.[46] To be sure, this concept can come in new shapes and colours, such as the suggestion of a Mixed Grand Chamber as part of the Court of Justice, composed of six judges of the Court of Justice and six judges from the constitutional or highest courts of the Member States, presided by the President of the Court of Justice, and requiring a majority of at least eight judges *validating* a contested EU measure.[47] However, the problem remains that a national court with a strong sense of mission may not be swayed by a result that does not conform with its own view. Just consider the *Weiss* scenario: the view that the ECB acted *ultra vires* when starting its bond-buying programmes apparently never had much traction outside Germany. The outcome before a mixed Grand Chamber would therefore probably have been the same as the ECJ's ruling in *Weiss*. But we doubt whether the FCC would have accepted this ruling as binding just because some (possibly only two or three) judges from other Member States joined the verdict. Moreover, as can be seen from the FCC's concept of *ultra vires*, the understanding of what counts as a matter of competence varies considerably, depending on whether the EU or a national perspective is taken. If the jurisdiction of a competence court is narrowly defined in accordance with the limits governed by the principle of conferral, this will not stop national courts

45. Weiler and Sarmiento, "The EU judiciary after *Weiss*", <verfassungsblog.de/the-eu-judiciary-after-weiss >.

46. The proposal of a competence court was already critically discussed by Reich, "Brauchen wir eine Diskussion über ein Europäisches Kompetenzgericht?", (2002) EuZW, 257, and Everling, "Quis custodiet custodes Ipsos? – Zur Diskussion über die Kompetenzordnung der Europäischen Union und ein europäisches Kompetenzgericht", (2002) EuZW, 357.

47. Weiler and Sarmiento, op. cit. *supra* note 45. Another variant of the concept of a competence court (a joint council of the EU's supreme courts) is suggested by Hatje, "Gemeinsam aus der Ultra-vires-Falle", <verfassungsblog.de/gemeinsam-aus-der-ultra-vires-falle>.

from patrolling imaginary borders of competence defined by criteria such as arbitrariness or any other definition of grave injustice they conceive.

One may therefore think of non-judicial solutions to allow Member States to voice their dissent about an overreach by the EU. As far as EU legislation is concerned, the yellow card procedure established by the Protocol on Subsidiarity and Proportionality, which has so far only included infringements of the principle of subsidiarity,[48] could be strengthened and broadened. In particular, it seems rather odd that proportionality, even though closely related to subsidiarity, is not included in this procedure. Admittedly, this would not have helped in the *PSPP* case where no legislation was at stake. However, considering that democratic legitimacy at the EU level is a primary concern of the FCC (and possibly also other national courts), giving national parliaments a voice in these matters may generally curb the willingness of courts to intervene in the name of national autonomy.

While any change of the Treaties remains a long shot, an improvement of the judicial dialogue between the FCC and the ECJ is more conceivable in the near future. As has already been indicated, the FCC could and should have followed up its first preliminary reference in *Weiss* with a second preliminary reference concerning the interpretation and application of the principle of proportionality.[49] On the other hand, the ECJ could have addressed more carefully several details spelled out in the FCC's questions in *Weiss*, instead of dealing with them rather summarily.[50] If another opportunity comes up, both courts will hopefully learn from this experience.

Finally, speaking as the Editorial Board of an academic journal, we believe in the impact of academic criticism. Judges are not immune to boos and applause from their academic audience. So we never give up the hope that our words resonate with our professional brethren in Luxembourg, Karlsruhe, and elsewhere.

48. Arts. 6 and 7 of the Protocol on Subsidiarity and Proportionality.

49. As the Corte costituzionale did in Case C-42/17, *M.A.S.*, EU:C:2017:936, following the ECJ's decision in Case C-105/14, *Taricco*, EU:C:2015:555.

50. In particular, question (3)(c) of the FCC, relating to an infringement of the principle of proportionality on account of the powerful economic policy effects of the PSPP decision, is answered rather superficially in para 93 of Case C-493/17, *Weiss*.