

# Clash of the titans: the impact of weiss on the future of judicial conflicts in the eu

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CLASH OF THE TITANS: THE IMPACT OF *WEISS* ON THE FUTURE OF JUDICIAL  
CONFLICTS IN THE EU

Master Thesis

Mentor: prof. dr.sc. Iris Goldner Lang

Zagreb, 2023

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A handwritten signature in black ink, appearing to read 'Luka Orešković', is written over a horizontal line.

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## 1. Introductory remarks

In this article, I will look at the recent decision of the *Bundesverfassungsgericht* or the German Federal Constitutional Court (FCC) in *PSPP*,<sup>1</sup> which it issued as a response to the decision of the CJEU in the *Weiss*<sup>2</sup> case.<sup>3</sup> The FCC decided to exercise its previously proclaimed competences and declared the CJEU's judgment and the European Central Bank's decisions establishing the Public Sector Purchase Programme (PSPP) as *ultra vires*. This time, unlike before, the difference of opinions of the two courts did not end as a dialogue, but as an open conflict, endangering the main principles of the EU legal order. The doctrine of supremacy or primacy<sup>4</sup> implies that the CJEU is the final arbiter of the meaning and validity of EU law. This has been questioned by a number of Member States' courts, which did not accept unlimited supremacy, but have tried to establish themselves as the final authority in some areas of law. This is the main reason for the development of the idea of constitutional or legal pluralism, as a concept which stipulates the existence of two separate legal systems – the EU and the national one – which coexist and if necessary work together in order to resolve potential disputes arising from their inherent differences in a tolerant spirit which helps to evade constitutional conflicts rather than resolve them.<sup>5</sup> The problem which this concept leaves open is that it does not offer a way of resolving such conflicts if they are not successfully avoided. Although the EU has some federal elements, the EU legal system and the legal systems of Member States are in a specific relationship different from all other complex systems. In other federal systems, as, for example, the US, it is clear that the federal Supreme Court resolves competence disputes. In the EU, however, both the CJEU and national courts claim authority to resolve competence issues. This has resulted in a continuous battle of the courts for the title of final arbiter of EU law.<sup>6</sup>

The impact of the *PSPP* decision on the future of judicial conflicts, and, through them, conflicts between the EU and Member States, is dichotomous. The *PSPP* decision not only

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<sup>1</sup> Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15 (hereinafter *PSPP*).

<sup>2</sup> Case C-493/17 *Weiss* (2018) ECLI:EU:C:2018:1000 (hereinafter *Weiss*).

<sup>3</sup> In this article, since there is no universal name for these two cases yet, I will use the name *Weiss* when referring to the judgment of the CJEU, and the name *PSPP* when referring to the FCC's judgment.

<sup>4</sup> Some believe that primacy is a better expression than supremacy for this doctrine. See Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Hart Publishing 2010) 55-60. For more on the different meaning of these two expressions, see Matej Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17(6) *European Law Journal* 744.

<sup>5</sup> Tamara Čapeta and Siniša Rodin, *Osnove prava Europske unije* (3rd rev edn, Narodne novine 2018) 83-84.

<sup>6</sup> Mehrdad Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 *Common Market Law Review* 9, 11.

strikes a blow to the authority of the CJEU, but can also give rise to similar decisions of courts of Member States in which the rule of law is compromised.<sup>7</sup> On the other hand, this decision can be the push the Union needs to finally implement new mechanisms through which these conflicts could be resolved more efficiently.

The aim of this paper is to show that the *PSPP* decision has seriously disturbed the fragile balance of the EU constitutional order and to discuss a way out of this judicial crisis.

The paper is divided into three main parts. The first part, providing the background necessary to understand the *Weiss/PSPP* conflict, gives an overview of the relevant case law leading to it. It will, thus, briefly analyse cases from *Solange I* to *Gauweiler*. The second part will deal with the *Weiss* case of the CJEU and the FCC's response in *PSPP*. Alongside this, a brief overview of the competence issue in the field of economic and monetary policy will be provided to better understand the judgments. Finally, the third part will discuss the proposed solutions for the future resolution of conflicts between the CJEU and national courts.

## 2. Context of the decision

In 2017, the FCC referred to the CJEU asking whether the Decision of the ECB establishing the Public Sector Purchase Programme (PSPP) was *ultra vires*. The Public Sector Purchase Programme (PSPP) is a programme under which the central banks of the Eurosystem are able to buy eligible marketable debt securities, under specific conditions on the secondary market, and from eligible counterparts,<sup>8</sup> established through decisions of the ECB. The reason for the reference was that the FCC was not sure that the PSPP even constituted a measure of monetary policy. Because the FCC doubted the measure's accordance with the principle of proportionality, it wanted the CJEU to conduct a proportionality test, on whose results depended the validity of the PSPP.<sup>9</sup> To put it simply, the FCC believed that there is a high chance that the PSPP would not pass a new proportionality test as a measure of monetary policy. If that were actually the case, and the programme could not be seen as a measure of

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<sup>7</sup> Tamara Čapeta, 'Rat europskih sudova u jeku Covid krize: Njemački ustavni sud protiv Suda Europske unije' (*Euractiv*, 6 May 2020) <[www.euractiv.jutarnji.hr/EiG/financije/rat-europskih-sudova-u-jeku-covid-krize-njemacki-ustavni-sud-protiv-suda-europske-unije/10278085](http://www.euractiv.jutarnji.hr/EiG/financije/rat-europskih-sudova-u-jeku-covid-krize-njemacki-ustavni-sud-protiv-suda-europske-unije/10278085)> accessed 28 July 2020. Similarly, R Daniel Kelemen and others, 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' (*Verfassungsblog*, 26 May 2020) <[www.verfassungsblog.de/national-courts-cannot-override-cjeu-judgments](http://www.verfassungsblog.de/national-courts-cannot-override-cjeu-judgments)> accessed 7 August 2020.

<sup>8</sup> Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (ECB/2020/9) [2020] OJ L39, Art 1.

<sup>9</sup> BVerfG, Order of the Second Senate of 18 July 2017, 2 BvR 859/15, fourth question referred to the CJEU.

monetary policy and would be outside the competence of the ECB; in other words, it would be *ultra vires*.

About a year later, at the end of 2018, the CJEU reached a decision in the *Weiss* case as a response to the reference of the FCC. And as the FCC wanted, the CJEU did apply the proportionality test, but found the measure to be proportional, while also being within the competences of the ECB, confirming the validity of the decision and the programme it established.<sup>10</sup>

The story however did not end there. On 5 May 2020, in the middle of the coronavirus pandemic, the FCC reached a decision in *PSPP* as a response to the CJEU's *Weiss* decision. The decision, at least so far, seems to have caused an open conflict by pronouncing the decisions of the ECB establishing the PSPP and the judgment of the CJEU as *ultra vires* acts.<sup>11</sup> Although the decision came as a surprise to most, it cannot be said that it was completely unexpected. The FCC has had a long history of dialogue with the CJEU, but it never actually provoked a direct conflict.<sup>12</sup> This is precisely why it has caused such a stir amongst legal experts all over Europe. However, in order to understand the position and the reasoning of the FCC better, I will first provide an overview of its previous dialogue with the CJEU. Under the following headings, I will briefly explain three different types of review of EU law – fundamental rights review, *ultra vires* review and constitutional identity review,<sup>13</sup> which the FCC has developed.

### **3. The predecessors of the PSPP decision**

#### ***3.1. The beginnings of court dialogues: the Solange case law and fundamental rights review***

Although the CJEU developed the doctrine of the supremacy of EU law as one of its first and most important achievements, it was not accepted immediately. Established through its case law<sup>14</sup> in the 1960s, the principle came into question because there was no charter of

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<sup>10</sup> *Weiss* (n 2) paras 27-158.

<sup>11</sup> *PSPP* (n 1) paras 117 and 119.

<sup>12</sup> At least not a conflict in an intensity previously seen – in this case EU institutions needed to act in order to address the issues raised connected to a specific case, not at a general level, as for example in *Solange I*.

<sup>13</sup> Although these three types of review need to be distinguished, it must not be forgotten that there is a certain connection between them, with similarities especially visible in the *ultra vires* and constitutional identity review. See Payandeh (n 6) 37-38.

<sup>14</sup> See Case 26/62 *Van Gend en Loos* (1963) ECLI:EU:C:1963:1; Case 6/64 *Costa v ENEL* (1964) ECLI:EU:C:1964:66; Case 11/70 *Internationale Handelsgesellschaft* (1970) ECLI:EU:C:1970:114; and Case 106/77 *Simmenthal* (1978) ECLI:EU:C:1978:49.

fundamental rights in the EU. This meant that the courts of the Member States were afraid that EU law, which did not include protection of fundamental rights, could overpower domestic constitutional values. In this way, citizens could remain without fundamental rights guarantees provided by domestic constitutions. At the end of the decade, questions regarding the protection of fundamental rights started appearing more often before the CJEU. The first major case in which the CJEU explicitly mentions ‘fundamental human rights enshrined in the *general principles of Community law*’ was the *Stauder* case.<sup>15</sup> However, the CJEU only created the concept, without actually developing it in detail. It can rightly be said that this area represented a legal vacuum in the EU legal order.

Meanwhile in Germany, in the Federal Republic of Germany, the protection of fundamental rights was enshrined in the *Grundgesetz* as a constitutionally important value. Its constitution, the Basic Law or the *Grundgesetz*, contained a list of basic rights in its first section.<sup>16</sup> The lack of legal certainty caused concern in Germany about whether some rights would be protected as efficiently at the EU level. Ultimately, the *Verwaltungsgericht* (Administrative Court), Frankfurt-am-Main, decided to send a preliminary reference to the CJEU. In the *Internationale Handelsgesellschaft* case,<sup>17</sup> it requested the assessment of the conformity of an EU legal act with fundamental rights. Unsatisfied with the CJEU decision, it decided to send the case to the FCC which then decided the famous *Solange I* case.<sup>18</sup>

*Solange I* serves as the first example of almost direct conflict with the CJEU. The FCC stated the following:

(...) as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as

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<sup>15</sup> Case 29/69 *Stauder* (1969) ECLI:EU:C:1969:57 (emphasis added).

<sup>16</sup> These rights for example are: human dignity, freedom of expression, arts and sciences, freedom of assembly, freedom of association, privacy of correspondence, right to life and personal integrity. See Basic Law for the Federal Republic of Germany, Art 1-19, English translation available at <[www.gesetze-im-internet.de/englisch\\_gg/](http://www.gesetze-im-internet.de/englisch_gg/)> accessed 31 July 2020.

<sup>17</sup> *Internationale Handelsgesellschaft* (n 14).

<sup>18</sup> BVerfGE 37, 271 2 BvL 52/71 *Solange I*-Beschluss (English translation available at <<https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>> accessed 31 July 2020.



inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Basic Law.<sup>19</sup>

What has this meant from the perspective of judicial conflicts? On the one hand, this could be seen as a direct warning to the CJEU because in essence it states that the FCC was generally dissatisfied with the level of protection of fundamental rights in Europe at that point in time. But, on the other hand, another paragraph of the decision gives an additional dimension to the decision. The FCC decided that in the case at hand, the Basic Law did not pose an obstacle for the application of the challenged rules of EU law.<sup>20</sup> In short, the FCC proclaimed that it had the authority for a so-called fundamental rights review, but avoided the conflict in the specific case. It is important to emphasise that this is the tone which the FCC adopted and used in all other conflict situations,<sup>21</sup> until *PSPP*. Therefore, it can be said that *Solange I* is the archetype of all other conflicts between the FCC and the CJEU. Finally, the FCC decided to offer a conciliatory explanation of conflicts – that it sees them not as violations of the Treaties, but as a trigger to set in motion a mechanism of the Treaty in EU institutions which then resolves these conflicts at the political level.<sup>22</sup> This is how most conflicts are resolved even today.

The process of creating a more complete system for the protection of human rights in Europe continued. Just a few weeks before the FCC reached a decision in the *Solange I* case, the CJEU decided another important case involving fundamental rights – *Nold*. In *Nold*, the CJEU implicitly defined the fundamental rights which it mentioned in *Stauder*, by stating that in establishing these rights, the CJEU must take into consideration two sources – the constitutions of Member States (fundamental rights recognised and protected by them) and international treaties whose signatories are the Member States (alluding to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe).<sup>23</sup> It thus sent the message that it would respect, to the highest extent possible, the constitutions of the EU Member States.

Judicial protection of fundamental rights at the EU level was strengthened gradually. The FCC could have seen this as a signal of the success of the *Solange I* decision because its

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<sup>19</sup> *Solange I* (n 18) para I. 7.

<sup>20</sup> *ibid*, para III. 5.

<sup>21</sup> The FCC has always adopted certain limitations in the concept of EU law supremacy in three different areas: fundamental rights, the *Kompetenz-Kompetenz* question or *ultra vires* review, and finally constitutional identity review. The FCC basically implies that it still is the main guardian of the Basic Law, but does not exercise this power if it does not find it necessary (as for example in *Solange II*) or if it does, it just about manages to avoid an open conflict (as for example in *Gauweiler*).

<sup>22</sup> *Solange I* (n 18) para I. 2.

<sup>23</sup> Case 4/73 *Nold* (1974) ECLI:EU:C:1974:51, paras 12-13.

warning was taken seriously, and protection increased. This enabled the 1986 decision in the *Solange II* case. The FCC now believed that, at the EU level, there was protection of fundamental rights which was substantially similar to that guaranteed by the Basic Law. Consequently, the FCC decided that it:

will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law.<sup>24</sup>

Thus, the FCC kept its power of review of constitutionality of EU acts, but decided not to use it. In the same decision, the FCC also gave an explanation as to why it believed it had the authority to review EU acts – the application of the principles of representative democracy, the rule of law, respect for human rights and social justice (to which the Heads of States or Governments committed themselves in the Copenhagen Declaration) is what constitutes a political system of pluralist democracy in which the freedom of expression within the constitutional organisation of powers is necessary in order to provide protection of human rights and the system as a whole.<sup>25</sup> The FCC views the EU as a system of pluralist democracy, and finds that by exercising this review, it actually contributes to the system as a whole, at least by augmenting the protection of fundamental rights. In making this contribution, the FCC finds authority to review EU acts.

Later developments helped to shape the FCC's fundamental rights review into its current form. In this respect, the *Banana Market* and *European Arrest Warrant* (2005) cases introduced and confirmed that the FCC would only review the protection of fundamental rights by EU institutions generally, meaning that it would not review single acts.<sup>26</sup> To conclude, the *Solange* case law can be seen as a move forward with regards to the protection of fundamental rights at the EU level.

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<sup>24</sup> BVerfGE 73, 339 2 BvR 197/83 *Solange II*-decision, para II. 1.

<sup>25</sup> *ibid*, para II. 2.

<sup>26</sup> *Ibid*, 13-14 with reference to Order of the Second Senate of 7 June 2000, 2 BvL 1/97 (*Banana Market*) and Order of the Second Senate of 18 July 2005 - 2 BvR 2236/04 (*European Arrest Warrant*).

### 3.2. *Ultra vires review – the next limit imposed by the FCC on EU law supremacy*

After the FCC proclaimed its authority to review EU acts in regards to the protection of fundamental rights as guaranteed by the Basic Law, the next major step was taken in the early 1990s. Europe needed a new treaty, one that would satisfy the needs of changing times. This ultimately resulted in the Treaty on European Union, better known as the Maastricht Treaty, which was signed in 1992 and came into force in 1993.

Before its entry into force, the question of the compliance of the Maastricht Treaty with the Basic Law was initiated by a group of German citizens in front of the FCC. In 1994, the FCC reached a decision in *Manfred Brunner and Others v The European Union Treaty*, usually referred to as the *Maastricht* decision.<sup>27</sup> The court ruled on multiple points – the transfer of powers of the *Bundesbank* to the European Central Bank, fundamental rights, judicial review, sovereignty and the allocation of powers, and more. Fundamental rights review, which was explained earlier, was influenced by this decision, too, with the FCC stating that it would exercise its authority of review along with the CJEU, strengthening its position.<sup>28</sup> The *Maastricht* decision, however, was more important for introducing another type of review – the *ultra vires* review. Although the FCC has a long history of claiming that it would review EU acts if a question whether EU institutions have acted beyond their competences is raised, it was the *Maastricht* decision where it openly and directly for the first time announced that it would review EU acts to check whether they are adopted within the competences conferred on the EU.<sup>29</sup>

The next significant development in relation to the *ultra vires* review came about in the *Lisbon* case, in which the FCC ruled on 30 June 2009.<sup>30</sup> In it, the FCC placed restrictions on this review, consequently weakening its own position. It expressed its wish to restrict the application of review on whether a decision is or is not *ultra vires* only to cases where the transgression of competences of EU institutions is obvious.<sup>31</sup> It also explained that only it can perform this review, and that other German courts do not have the authority to do so. Further, the FCC made it clear that the *ultra vires* review would be used only subsidiarily – if legal protection cannot be achieved at the Union level.<sup>32</sup> If the FCC finds an act to be *ultra vires*, it

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<sup>27</sup> 2 BvR 2134/92 & 2159/92 Brunner v European Union Treaty (*Maastricht*).

<sup>28</sup> Payandeh (n 6) 13.

<sup>29</sup> *Ibid*, 14.

<sup>30</sup> Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08 (hereinafter: *Lisbon*).

<sup>31</sup> *ibid*, para 240.

<sup>32</sup> *ibid*, paras 240-41.

will be declared as inapplicable in Germany.<sup>33</sup> And, just as before, although the FCC stated that it had this competence, it did not exercise it in a way which would prevent further European integration – it accepted the constitutionality of this Treaty while at the same time ‘asserted its intention to increase its control over the application of the principle of conferral by the EU institutions’.<sup>34</sup> This case also marks the beginning of a new type of review – constitutional identity review, which we will look at in the next section.

Before we move on chronologically to the *Honeywell* decision, we have to go back a few years to give a short review of the *Mangold* case. It is one of the most disputed decisions of the CJEU, where the CJEU was accused of judicial activism. This happened because the CJEU's reasoning for establishing the principle of non-discrimination on the grounds of age<sup>35</sup> was that this stems from the constitutional orders of the Member States, when in reality the constitutions of only two Member States mention it.<sup>36</sup> What is more, the CJEU asserted that national courts need to guarantee full effectiveness of the principle of non-discrimination, even before the expiration of the transposition period for the directive establishing it.<sup>37</sup> This conclusion was not backed by EU law at the time for three additional reasons: 1. the TFEU (ex TEC) did not contain an explicit prohibition of the discrimination on the grounds of age; 2. the Charter of Fundamental Rights did, but it became legally binding only after the Treaty of Lisbon came into force; 3. the Directive in question prohibited this type of discrimination, but the implementation period had not yet passed.<sup>38</sup> All of this allowed for the conclusion that the CJEU's decision was an *ultra vires* act. However, this was not what the FCC believed – five years later, it would reach a decision in the *Honeywell* case, as an answer to the CJEU's decision in *Mangold*, rejecting the idea that the *Mangold* decision was *ultra vires*. It explained this in the following way:

With the disputed general principle of the prohibition of discrimination based on age derived from the constitutional traditions common to the Member States, however, *neither a new field of competences was created for the Union to the detriment of the Member States, nor was an existing competence expanded with the weight of a new establishment.*<sup>39</sup>

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<sup>33</sup> *ibid*, para 241.

<sup>34</sup> Asteris Pliakos and Georgios Anagnostaras, ‘Who Is the Ultimate Arbiter? The Battle over Judicial Supremacy in EU Law’ (2011) 36(1) *European Law Review* 109, 109-10.

<sup>35</sup> Case C-144/04 *Mangold* (2005) ECLI:EU:C:2005:709 paras 74-75.

<sup>36</sup> Pliakos and Anagnostaras (n 34) 113.

<sup>37</sup> *Mangold* (n 35) para 78.

<sup>38</sup> Payandeh (n 6) 19-20.

<sup>39</sup> Order of the Second Senate of 6 July 2010, 2 BvR 2661/06 (hereinafter: *Honeywell*) para 78 (emphasis added).

In essence, the FCC clarified what it meant by using the term ‘obvious’ transgression of competences. As long as the competences of EU institutions have not been expanded into a completely new area or at least not in a significant manner, it would not declare an act as *ultra vires*.<sup>40</sup>

*Honeywell* can be seen as a culmination<sup>41</sup> of the process of creating competence for the *ultra vires* review.<sup>42</sup> Payandeh identifies three stages in the FCC’s process of creating procedures for the review of EU law: firstly, proclamation – the FCC establishes itself as an important judicial and political organ in a specific area; secondly, substantiation – it places certain restrictions on threats made in the previous stage; finally, consolidation – consolidation of the restrictive approach developed in the previous stage.<sup>43</sup> What started with the *Maastricht* decision seemingly reached its final form in *Honeywell*. From the theoretical perspective, two different forms of restrictions can be distinguished.<sup>44</sup> Procedurally, the FCC, being the only German court with this power, can exercise the *ultra vires* review only after the CJEU has had the chance to give its opinion on the subject matter of the case.<sup>45</sup> Substantively, a gradation is visible. In *Maastricht*, the FCC set no limits; in *Lisbon*, it stated that the transgression needs to be obvious; finally, in *Honeywell*, it proclaimed that this transgression needs to be sufficiently serious and lead to a ‘structurally significant shift’ in the allocation of competences to the detriment of the Member States.<sup>46</sup>

That said, we can move on to the next decision connected with the *ultra vires* review – *Gauweiler/OMT*.<sup>47</sup> The *Gauweiler* case was brought before the CJEU as a reference for a

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<sup>40</sup> The decision in *Honeywell* was not unanimous. Justice Landau published a dissenting opinion in which he expressed his belief that the CJEU went beyond the competences conferred to it (‘With its judgment in the case of *Mangold*, the Court of Justice manifestly transgressed the competences granted to it to interpret Community law with the *Mangold* judgment and acted *ultra vires*’) *ibid*, para 105.

<sup>41</sup> The decision in *Weiss/PSPP* has potentially changed this – see section 4.3 Consequences of the decision.

<sup>42</sup> Payandeh (n 6) 29-30.

<sup>43</sup> Payandeh also sums up the final stage perfectly: ‘While it does not fully renounce its competence to review, it becomes highly unlikely that it will activate its review function and actually declare an EU legal act inapplicable’. See *ibid*, 28.

<sup>44</sup> *ibid*, 24.

<sup>45</sup> *Honeywell* (n 39) para 60.

<sup>46</sup> *ibid*, para 61.

<sup>47</sup> Even before the CJEU decided the *Gauweiler* case, the FCC reached a decision in which the majority of the Justices found OMT to be *ultra vires*, but Justice Lübke-Wolff and Justice Gerhardt disagreed and published dissenting opinions. They argued that the ECB’s declaration that this is a measure of monetary policy cannot be invalidated, while also understanding that this is a highly sensitive *political* question and stating that this is the reason why the FCC should not become involved in it. See Franz C Mayer, ‘Rebels Without a Cause? A Critical Analysis of the German Constitutional Court’s OMT Reference’ (2014) 15(2) German Law Journal 111, 115. Cf Order of the Second Senate of 14 January 2014, 2 BvR 2728/13.

preliminary ruling by the FCC as the first reference made by this court.<sup>48</sup> The applicants argued that the Outright Monetary Transactions (OMT) decisions are *ultra vires* acts because they are not within the mandate of the European Central Bank. Why? Because they believed that OMT is a measure of economic and not monetary policy, while also infringing Article 123 of the TFEU.<sup>49</sup> To add to this, they argued that they are not compatible with the German constitutional identity because of the breach of the principle of democracy, one of the main principles of the *Grundgesetz*.<sup>50</sup> Due to the sensitivity of this subject and the proclamation by the FCC that it would give the CJEU a chance to give its opinion on whether disputed acts are in fact *ultra vires* before the FCC itself renders a ruling, as stated in *Honeywell*,<sup>51</sup> the FCC decided to send a reference to the CJEU.<sup>52</sup> The main question it wanted answered was whether or not the decision of the Governing Council on the OMT constituted an *ultra vires* act, and whether it was incompatible with the prohibition of monetary financing established by Article 123 TFEU.<sup>53</sup> The governments of numerous states decided to join in and give their own opinions; however, the opinion of one stands out – that of the Italian Government. It surprisingly stated that the CJEU may not examine the reference for a preliminary ruling because the FCC has historically shown that it does not accept the binding effect of the CJEU's decisions, or, more precisely, the FCC believes that it is the final instance, or the final arbiter, in rulings concerning the validity of EU decisions in the light of the *Grundgesetz*.<sup>54</sup> The CJEU replied to the Italian submission.<sup>55</sup> It invoked the *Kleinwort Benson* case, in which it established that it cannot respond to references made by courts which are not bound by its decisions.<sup>56</sup> However, it further concluded that the circumstances of the *Kleinwort Benson* case were sufficiently different from those in the *OMT* case. In *Kleinwort Benson*, the reference was for an interpretation of EU law so that the national court would be able to decide on the application of national law;<sup>57</sup> in the *OMT* case, the question was strictly connected with the application of EU law and consequently the decision of the CJEU would have binding effect on the FCC.<sup>58</sup>

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<sup>48</sup> Asteris Pliakos and Georgios Anagnostaras, 'Saving Face? The German Federal Constitutional Court Decides Gauweiler' (2017) 18(1) German Law Journal 213, 215.

<sup>49</sup> Case C-62/14 *Gauweiler* (2015) ECLI:EU:C:2015:400 (hereinafter: *Gauweiler*) para 6.

<sup>50</sup> *ibid*, para 6.

<sup>51</sup> *Honeywell* (n 39) para 60.

<sup>52</sup> For an analysis of the *ultra vires* review of the FCC in the *Gauweiler/OMT* saga before the CJEU decided the *Gauweiler* case, see Jürgen Bast, 'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review' (2014) 15(2) German Law Journal 167.

<sup>53</sup> *Gauweiler* (n 49) para 10.

<sup>54</sup> *ibid*, para 11.

<sup>55</sup> *ibid*, para 12.

<sup>56</sup> Case C-346/93 *Kleinwort Benson* (1995) ECLI:EU:C:1995:85 paras 23 and 24.

<sup>57</sup> *Gauweiler* (n 49) para 13.

<sup>58</sup> *ibid*, para 14.

Although the CJEU was simply stating the facts here, it certainly seized the opportunity to emphasise its authority over the FCC, at least in this subtle manner. In the following paragraphs, the CJEU talks about the reference for a preliminary ruling as a mechanism for its cooperation and communication with courts of the Member States, and it stresses the binding effect of its decisions, further strengthening its previous argument.<sup>59</sup> In the end, the CJEU reached a decision that the articles of the TFEU and Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank in question need to be interpreted in a manner which permits the ESCB to adopt a programme for the purchase of government bonds on secondary markets. This meant that the OMT decisions were not *ultra vires* acts.<sup>60</sup>

The FCC issued a response in the form of the decision in *OMT*. And just as all of its previous decisions, the FCC did not attack the CJEU, but agreed with its decision. In essence, the FCC determined that the policy decision on the OMT does not manifestly exceed the competences attributed to the ECB and does not explicitly exceed the prohibition of monetary financing of the budget, but only if it is interpreted in the light of the preliminary ruling of the CJEU.<sup>61</sup> However, if we read between the lines, it is possible to see that the FCC did indirectly state that it believes that the OMT programme is *ultra vires*, at least that it was in its original form. However, it stated that it would consider it as a valid act since the CJEU gave a restrictive interpretation – one that would be in accordance with what it believed would need to be fulfilled if the programme were to be *intra vires*.<sup>62</sup> Still, this is not what happened in reality. What really occurred can be described as a compromise between these two institutions, with the CJEU on the winning side – the CJEU did interpret the OMT by applying the test of proportionality, but in a non-restrictive manner, and the FCC expressed its satisfaction with this interpretation,<sup>63</sup> a far more generous one than what the FCC originally intended.<sup>64</sup> This was possibly done in

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<sup>59</sup> *ibid*, paras 5-17.

<sup>60</sup> *ibid*, para 128.

<sup>61</sup> Pliakos and Anagnostaras (n 48) 214.

<sup>62</sup> Judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13 (hereinafter *OMT*) para 190.

<sup>63</sup> Although the CJEU did apply the proportionality test and in that way clarified the limits of the OMT, it actually did not impose any new restrictions proposed by the FCC; it merely stated the existing ones. The CJEU believed that the ECB would respect the limits and restrictions of its own competences in applying the OMT programme; therefore, it did not impose any new restrictions. See *Gauweiler* (n 49) paras 105-108.

<sup>64</sup> There were six criteria for the FCC to recognise OMT as valid: 1. bond purchases must not be announced in advance; 2. the volume of purchases needs to be limited from the outset; 3. a minimum period is observed between the issue of government bonds and their purchase by the ESCB that is agreed upon from the outset; 4. the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds; 5. purchased bonds are only in exceptional cases held until maturity; 6. purchases are terminated, and purchased bonds are remarketed if continuing the intervention becomes unnecessary (*OMT* (n 62) para 206).

order to prevent an institutional conflict which the FCC could no longer win.<sup>65</sup> According to Anagnostaras, this cannot be seen as a failure of the FCC – it did not simply concede, but it made a wise move which represents an open discussion with the CJEU.<sup>66</sup> The FCC did try to make it seem that the CJEU actually did impose some new restrictions, mainly those of a quantitative nature.<sup>67</sup> In reality, the ECB was still basically free to do what it wanted, meaning it could freely decide on the quantity of purchases within the OMT programme.<sup>68</sup>

The FCC still criticised the legal reasoning of the CJEU in two ways, the first of which is directly related to the Weiss decision. Firstly, it does not independently check the nature of the OMT, but it simply accepts it as a measure of monetary policy based on the criteria of the ECB – this lack of judicial review can result in EU institutions widening their competences beyond what is conferred on them.<sup>69</sup> Secondly, it did not provide an answer as to whether the independence of the ECB leads to a reduction in the democratic legitimation of its actions.<sup>70</sup> Pliakos and Anagnostaras believe that the first criticism is not justified because, in its preliminary reference, the FCC completely disregarded the objectives of the OMT set by the ECB and decided to replace them with its own understanding,<sup>71</sup> basically ignoring the importance of the communication and cooperation that it itself had proclaimed in many decisions. There is also a theory that the FCC started this procedure not because of legal reasoning, but to support the *Bundesbank*, which was the only institution that voted against the decision establishing the OMT programme.<sup>72</sup> Regarding the second criticism, the independence of the ECB is explicitly stated in the Treaties as a means of preventing any dangerous influence over the policies which the ECB creates. In addition, the CJEU is a judicial organ, not specialised in economics and finance, and therefore it would have to employ experts in that field which would ultimately lead to decisions whose objectivity could be disputed.<sup>73</sup>

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<sup>65</sup> Pliakos and Anagnostaras (n 48) 216.

<sup>66</sup> *ibid*, 216.

<sup>67</sup> The FCC explicitly stated that contrary to the original decision, '[t]he volume of future purchases must be mandatorily fixed from the outset and may not exceed the amount necessary for restoring the transmission mechanism. Neither the decision to actually effectuate bond purchases, nor the predetermined volume of the intended purchases may be announced prior to the purchases', and then explaining that this 'reduces the risk of Member States of the euro area issuing bonds with the sole purpose of having them purchased by the European System of Central Banks'. See *OMT* (n 62) para 195.

<sup>68</sup> Pliakos and Anagnostaras (n 48) 222-23.

<sup>69</sup> *OMT* (n 62) paras 182-86.

<sup>70</sup> *ibid*, paras 187-89.

<sup>71</sup> Pliakos and Anagnostaras (n 48) 223.

<sup>72</sup> Carsten Gerner-Beuerle, Esin Küçük and Edmund Schuster, 'Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial' (2014) 15(2) German Law Journal 281, 302.

<sup>73</sup> Matthias Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' (2014) 15(2) German Law Journal 265, 271-72.



The actions of the FCC should also be criticised. The FCC threatened to declare the decision as *ultra vires* if the CJEU did not impose new restrictions. However, it failed to take into consideration two things. Firstly, the FCC failed to detect that the case could not meet the strict *ultra vires* criteria of the *Honeywell* case in that a new area of competences for the Union to the detriment of Member States was not created, and the existing competences were not expanded in a significant enough manner. Secondly, the FCC underestimated the political sensitivity of the case – if the FCC really did declare this decision as *ultra vires*, it would have potentially revived the euro zone crisis and questioned the independence and work of the CJEU; additionally, not one government stood with the FCC, and therefore it did not want to challenge democratically elected governments by explicitly disagreeing with them.<sup>74</sup> In order to deal with this situation, the FCC decided that the best way of resolving it without damaging its reputation was to interpret the CJEU's ruling in a manner which would make it seem as though it had influenced the CJEU's decision, while, in reality, the CJEU basically confirmed the decision in its already existing form.<sup>75</sup> Not wanting to give up entirely, the FCC added that German institutions (the Federal Government and the *Bundestag*) need to control the implementation of the OMT programme, with respect to European integration,<sup>76</sup> while the FCC would intervene only if other institutions failed to do their job,<sup>77</sup> which could be seen as a formulation similar to the one in *Solange II*.<sup>78</sup> Another reason for the FCC to deliver this type of judgment is that it was a way of forming peaceful dialogue between the two courts, respecting each other's authority.<sup>79</sup> The case also indirectly enabled the ECB to function as before – thanks to which the ECB could launch the Quantitative Easing programme,<sup>80</sup> which has since become one of the most important measures in the battle against the economic repercussions of the COVID-19 virus, but was challenged before the CJEU in *Weiss*, and declared *ultra vires* in *PSPP*.

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<sup>74</sup> Pliakos and Anagnostaras (n 48) 226-27.

<sup>75</sup> *ibid*, 228.

<sup>76</sup> *OMT* (n 62) para 220.

<sup>77</sup> Pliakos and Anagnostaras (n 48) 228, with reference to *OMT* (n 62) para 169.

<sup>78</sup> See section 3.1 The beginnings of court dialogues – the *Solange* case law and fundamental rights review, n 21.

<sup>79</sup> Pliakos and Anagnostaras (n 48) 228-31.

<sup>80</sup> *ibid*, 231.

### 3.3. A third type of review of the FCC – constitutional identity review

Chronologically speaking, this is the last type of review the FCC established.<sup>81</sup> As mentioned earlier, the *Lisbon* case was important for the *ultra vires* review, but also serves as the first case in which the FCC began to shape its competence to review acts of EU institutions in the light of the concept of constitutional identity.<sup>82</sup> Constitutional identity can be understood as a ‘protected domain of Member States which is guaranteed by its constitutional judiciary’<sup>83</sup> or as a ‘domain of constitutional law of every state in which that state retains primacy’.<sup>84</sup>

Returning to the *Lisbon* case, it is possible to see that the FCC does not really speak much about this review. This is in accordance with the early stages of other types of reviews. What it does question, however, is ‘whether the inviolable core content of the constitutional identity of the Basic Law is respected’.<sup>85</sup> The FCC further states:

The concept of Verbund covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States, remain the subjects of democratic legitimation.<sup>86</sup>

Although not explicitly stated, the FCC here emphasises that the whole EU legal order and the whole Union depend on Member States, and, through them, the peoples of Europe. Since it is widely accepted that the whole constitutional order, and therefore identity, is based on the concept of popular sovereignty, this paragraph implicitly states that the constitutions of Member States are the grounds for the creation and existence of the EU. Accordingly, it later

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<sup>81</sup> There is another important European Arrest Warrant case for constitutional identity review, decided in the Order of the Second Senate of 15 December 2015, 2 BvR 2735/14. Some have gone so far as to name it *Solange III*. In this case, the FCC uses its constitutional identity review and finds that human dignity itself was not violated, but that there is ‘a violation of the right to human dignity as part of that constitutional identity which is protected as unamendable by the constitution-amending legislature and as untransferable to the European Union’. See Mathias Hong, ‘Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court’ (*Verfassungsblog*, 18 February 2016) <[www.verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court](http://www.verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court)> accessed 16 September 2020. Cf BVerfG, Order of the Second Senate of 15 December 2015, 2 BvR 2735/14, para 35. Some believe that while this is not another *Solange*, it raises another problem by establishing two different systems of protection of human dignity – European and German. See Julian Nowag, ‘A New Solange Judgment from Germany: Or Nothing to Worry About?’ (*Völkerrechtsblog*, 22 March 2016) <[www.voelkerrechtsblog.org/a-new-solange-judgment-from-germany-or-nothing-to-worry-about](http://www.voelkerrechtsblog.org/a-new-solange-judgment-from-germany-or-nothing-to-worry-about)> accessed 1 August 2020.

<sup>82</sup> Payandeh (n 6) 9.

<sup>83</sup> Branko Smerdel, *Ustavno uređenje Republike Hrvatske* (Narodne novine 2013) 231.

<sup>84</sup> *ibid*, 233.

<sup>85</sup> *Lisbon* (n 30) para 240.

<sup>86</sup> *ibid*, para 229.

asserted that this unification of sovereign states cannot be achieved in a way which would prevent Member States from making political decisions in areas such as economics, social policies and culture.<sup>87</sup> Still, the FCC takes an open and reconciliatory approach, expressing that it will use this review only in a very small number of cases.<sup>88</sup> Interestingly enough, the FCC never explicitly states that it will review EU acts on this basis, but only that German institutions will not transfer the authority to regulate certain areas to EU institutions. Still, this can be interpreted from its decision.<sup>89</sup>

Since the decision is also important for the *ultra vires* review, it needs to be emphasised that the *ultra vires* review is different from the constitutional identity review. Constitutional identity is a second, additional, control standard, separate from the *ultra vires* review.<sup>90</sup> Payandeh argues that this review has an advantage over the *ultra vires* one – if the FCC declares an act as *ultra vires*, it puts Germany in violation of EU law and in a conflict of jurisdictions; a constitutional identity review would not create such a conflict.<sup>91</sup> In a way, this could be seen as a ‘safer’ way for Member States to contradict the CJEU and could therefore provide a wider platform for national courts to assert their views. However, it cannot be said that this does not provoke conflicts. Since the CJEU has shown in multiple decisions that it does respect values which are part of the constitutional identity of a Member State,<sup>92</sup> while it has only once declared an EU act as *ultra vires*,<sup>93</sup> it can be argued that at least the magnitude of the possible conflict is not as great when exercising the constitutional identity review – this is precisely why it could be considered a safer alternative. More chances of conflicts are therefore created, but, as mentioned earlier, these conflicts are not necessarily negative. Since it is a safer option than the *ultra vires* review because it potentially does not put Member States in violation of EU law directly in all cases, and since the concept of constitutional identity is widely accepted, it can be expected that it will be the dominant type of review in the future.

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<sup>87</sup> *ibid*, para 249.

<sup>88</sup> ‘It does not in any case factually contradict the objective of openness towards European law, ie to the participation of the Federal Republic of Germany in the building of a united Europe, if exceptionally, and under special and narrow conditions, the Federal Constitutional Court declares European Union law inapplicable in Germany.’ See *Lisbon* (n 30) para 340.

<sup>89</sup> Payandeh (n 6) 16-17.

<sup>90</sup> Daniel Thym, ‘In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court’ (2009) 46(6) *Common Market Law Review* 1795, 1806.

<sup>91</sup> Payandeh (n 6) 17.

<sup>92</sup> See, for example, Case C-159/90 *Grogan* (1991) ECLI:EU:C:1991:378 and Case C-36/02 *Omega* (2004) ECLI:EU:C:2004:614.

<sup>93</sup> See Case C-376/98 *Tobacco Advertising* (2000) ECLI:EU:C:2000:544.

#### **4. *Weiss* – judicial blockage of the process of European economic integration?**

In this section, I will look at the *Weiss* and *PSPP* decisions. The importance of the *PSPP* decision is without precedent, since it is the first time the FCC explicitly countered a CJEU ruling. However, before we continue with the study of these two cases, I need to briefly explain the development of European economic and monetary union. The conflict in *Weiss* has as its theme the differences and overlaps between economic and monetary policy. The former is still in the hands of the Member States, while the latter is under the exclusive competence of the EU (at least for the Eurozone countries). The process of the creation of an EU economic and monetary union is still going on, and in its past developments it has had numerous ups and downs. For now, the process has culminated in the introduction of the Euro as a common currency of the Member States of the Eurozone, thus creating a monetary union, whereas an economic union is still lacking. Further development in this policy area is one of the most politically sensitive issues in today's EU.

##### **4.1. *History of economic integration – time for a common economic policy?***

Although economic cooperation was the stimulus for the creation of a community of European states, the first real progress in achieving economic integration as we know it today, meaning the Economic and Monetary Union (EMU), was made in the late 1970s, mostly with the creation of the European Monetary System, but also with the creation of the so-called 'snake in the tunnel', or simply 'the snake', after the Werner Report of 1971. Its main goal was to keep the fluctuations of national currencies of Member States within margins narrower than those within the Bretton Woods system.<sup>94</sup> The snake failed when Member States did not work together in strengthening it – France advocated for it the longest, but in 1976 it, too, decided to give up on the idea.<sup>95</sup> After the fall of the Bretton Woods System<sup>96</sup> as the main international monetary system, European states wanted to find a new way of integration. In 1979, the European Monetary System (EMS) was created, but without a common strategy or tactic, which is why the ultimate goal of European monetary stability was not achieved.<sup>97</sup> In the first few years following the establishment of the system, policies were diverging, which almost led

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<sup>94</sup> André Szász, *The Road to European Monetary Union* (Macmillan Press 1999) 36.

<sup>95</sup> *ibid*, 51.

<sup>96</sup> For a detailed analysis of the deterioration and ultimately fall of the Bretton Woods System, see Robert Leeson, *Ideology and the International Economy: The Decline and Fall of Bretton Woods* (Palgrave 2003).

<sup>97</sup> Szász (n 94) 64-65.

to its dissolution. From 1983 to 1987, the system stabilised, mostly thanks to compromises made by France and the acceptance of consistent tactics by the central banks of Member States (the so-called Basle-Nyborg Agreement).<sup>98</sup> Soon, new problems began to emerge. After the fall of the Berlin Wall, the question was how to make the process of German integration go as smoothly as possible. East and West Germany had completely different economic structures. The process of restructuring resulted in many consequences, including social ones, but macroeconomically the question of the exchange rate of the deutschmark arose.<sup>99</sup> Macroeconomic imbalances in Germany, as the largest economy of the Community, could have easily extinguished the idea of further monetary cooperation. Given all these circumstances, Member States decided to act upon the new needs of the times and agreed upon the amendments to the EC Treaty, as it then was. In 1993, the Maastricht Treaty entered into force. In the Preamble, it stated that the Member States had decided to ‘achieve the strengthening and the convergence of their economies and to establish an *economic and monetary union* including, in accordance with the provisions of this Treaty, a single and stable currency’.<sup>100</sup> With it, the grounds for introducing the Euro as a common currency were set.

In Maastricht, states did not want to give up their economic policies. Consequently, the EU does not have competence for the creation of a common economic policy, although there is an obligation for Member States to coordinate their economic policies in a way beneficial for all.<sup>101</sup> In order for this to function properly, a mechanism known as the European semester was introduced in 2010, as a ‘cycle of economic and fiscal policy coordination within the EU’ acting as a central element of an economic governance framework.<sup>102</sup> Through these means, EU institutions analyse the economic and budgetary policies of the Member States, based on which they issue tailored recommendations which Member States should follow.<sup>103</sup> However, these recommendations are not obligatory, except those which are issued as a part of the Macroeconomic Imbalance Procedure and the Excessive Deficit Procedure.<sup>104</sup> This shows the

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<sup>98</sup> *ibid*, 66-67.

<sup>99</sup> Wolf Schäfer, ‘German Unification and the External Value of the Deutschmark’ in A Ghanie Ghaussy and Wolf Schäfer (eds), *The Economics of German Unification* (Routledge 1993) 123.

<sup>100</sup> Treaty on European Union [1992] OJ C191, Preamble (emphasis added).

<sup>101</sup> Sanja Tišma, Višnja Samardžija and Krešimir Jurlin (eds), *Hrvatska i Europska unija: Prednosti i izazovi članstva* (IRMO 2012) 102.

<sup>102</sup> European Council, ‘European Semester’ <[www.consilium.europa.eu/en/policies/european-semester](http://www.consilium.europa.eu/en/policies/european-semester)> accessed 4 August 2020.

<sup>103</sup> European Commission, ‘The European Semester Timeline’ <[www.ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/european-semester-timeline\\_en](http://www.ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/european-semester-timeline_en)> accessed 4 August 2020.

<sup>104</sup> Višnja Samardžija, Krešimir Jurlin and Ivana Skazlić, ‘Europski semestar’ in Višnja Samardžija (ed), *Izazovi provedbe europskih politika u Hrvatskoj* (IRMO 2018) 21, 29.

helplessness of EU institutions in most decision-making in this area. In the future, it can be expected that the EU will push for an expansion of its competences in this field. Crises,<sup>105</sup> such as the one from 2008 and the most recent one caused by the coronavirus pandemic, have shown that stronger cooperation is necessary to achieve a faster and more uniform response. This further emphasises the importance of common fiscal and, through the work of the ECB, monetary policies. However, fiscal independence is one of the most guarded parts of national sovereignty. This conflict of interests – on one hand, the need for closer cooperation to speed up the response to crisis, and, on the other hand, the freedom to make independent decisions tailored to the needs of a specific Member State, prevents efficient dialogue at the political level. Ultimately, this conflict spread to the judicial sphere<sup>106</sup> through the *Weiss* and *PSPP* cases, the subjects of interest of the next section.<sup>107</sup>

#### **4.2. Weiss – the PSPP as the CJEU's or ECB's proportionality mistake?**

In its decision on a secondary markets public sector asset purchase programme, through which the PSPP was established, the ECB expressly stated that the programme was a ‘proportionate measure for mitigating the risks to the outlook on price developments, as these programmes further ease monetary and financial conditions, including those relevant to the borrowing conditions of euro area non-financial corporations and households’,<sup>108</sup> which ‘has a greater impact on longer-term rates than interest rate policy’.<sup>109</sup> The latter is exactly what led to the FCC's reference to the CJEU. In its decision of 18 July 2017 by which it referred the case to the CJEU, the FCC wanted to know whether the decisions of the ECB regarding the PSPP

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<sup>105</sup> For more on the topic of the Eurozone crisis, see Giuseppe Celi and others, *Crisis in the European Monetary Union: A Core-Periphery Perspective* (Routledge 2018); Nazaré da Costa Cabral, José Renato Gonçalves and Nuno Cunha Rodrigues (eds), *The Euro and the Crisis Perspectives for the Eurozone as a Monetary and Budgetary Union* (Springer 2018).

<sup>106</sup> For more detail on the judicialisation of monetary policy of the ECB, see Antoine de Cabanes and Clément Fontan, ‘La Cour de la Justice face à Gauweiler: La mise en récit de l’indépendance de la BCE’ in Antoine Bailleux, Elsa Bernard and Sophie Jacquot (eds), *Les récits judiciaires de l’Europe: concepts et typologie* (Bruylant 2019) 170, 178-79.

<sup>107</sup> These are, of course, not the only cases in which a conflict regarding economic policies arose. This happened, for example, in *Gauweiler* and *Pringle* as well. The *Pringle* case (Case C-370/12 *Pringle* (2012) ECLI:EU:C:2012:756) went to the CJEU on a reference by the Irish Supreme Court and concerned the validity of European Council Decision 2011/199/EU of 25 March 2011 which amended the TFEU to enable the functioning of the European Stability Mechanism (ESM), as well as the principle of legal certainty (as in *Taricco*). Ultimately, the CJEU decided that the aforementioned decision was valid. The CJEU decided this case as a full court in an accelerated procedure, highlighting its importance. Consequently, it is strange why the CJEU adopted, as some say, a lenient approach in *Weiss*. However, these cases are the most recent, while also being those in which the conflict reached an all-time high.

<sup>108</sup> Decision (EU) 2020/188 on a secondary markets public sector asset purchase programme, Preamble, recital 6.

<sup>109</sup> *ibid*, Preamble, recital 5 (emphasis added).

violate the TFEU and the Protocol on the Statute of the European System of Central Banks and of the European Central Bank by exceeding the ECB's mandate.<sup>110</sup> In other words, it wanted to know whether the PSPP decisions were *ultra vires*. Their validity, in the opinion of the FCC, depended on the proportionality of the measure – the FCC argued that '[t]hey are likely to be considered proportionate only if it can be ascertained that the ECB did *weigh these monetary effects against the economic policy effects* of the PSPP',<sup>111</sup> but that this is exactly what the ECB disregarded – that the effects of the PSPP on economic policy outweighed those on monetary policy. This, according to the FCC, meant that the PSPP was actually a measure of economic policy, outside the ECB's mandate.

The CJEU, however, confirmed that the PSPP decisions of the ECB were in fact in accordance with the TFEU and that the ECB acted within its monetary competences. The CJEU separated the question of competences from the question of the proportionality of the measure. It first reviewed the question of competences, and concluded that the programme was, given its aim and the instruments used, indeed a part of monetary, and not economic, policy.<sup>112</sup> Only after that did the CJEU carry out a test of proportionality, and found that the decision establishing the PSPP did not infringe it, as it was suitable and necessary for the achievement of the proclaimed monetary goal (of reaching an inflation rate target of close to 2%).<sup>113</sup> The CJEU's proportionality test usually consists of three different subtests. The first is a test of *suitability* – in it, the CJEU decides whether the measure actually helps in achieving a specific objective; the second is a test of *necessity* – the CJEU decides 'whether an alternative measure is realistically available to protect the Member State's legitimate interests just as effectively, but would be less restrictive'; and, finally, a test of *proportionality stricto sensu* – the measure will be considered valid by the CJEU, but the degree of restrictions would have to be altered, albeit not in a way which would make the measure pointless.<sup>114</sup> One important factor to keep

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<sup>110</sup> Order of the Second Senate of 18 July 2017, 2 BvR 859/15, third question referred to the CJEU.

<sup>111</sup> *ibid*, para 122 (emphasis added).

<sup>112</sup> *Weiss* (n 2) paras 52 and 108.

<sup>113</sup> *ibid*, paras 71-100. The Court concluded that 'it does not appear that the ESCB's economic analysis — according to which the PSPP was appropriate, in the monetary and financial conditions of the euro area, for contributing to achieving the objective of maintaining price stability — is vitiated by a manifest error of assessment' (para 78) and that 'in view of the foreseeable effects of the PSPP and given that it does not appear that the ESCB's objective could have been achieved by any other type of monetary policy measure entailing more limited action on the part of the ESCB, it must be held that, in its underlying principle, the PSPP does not manifestly go beyond what is necessary to achieve that objective' (para 81).

<sup>114</sup> The structure of the CJEU proportionality test was explained in detail in the Opinion of Advocate General Poiares Maduro in Case C-434/04 *Ahokainen and Leppik* (2006) ECLI:EU:C:2006:462 paras 24-26.

in mind is that the CJEU rarely utilises the third test – it mostly relies on the first two.<sup>115</sup> This will later be disputed by the FCC, and will be the *meritum* of its decision.

The Court also concluded that the PSPP does not infringe Article 123(1) TFEU, which imposes two demands – the ESCB’s intervention cannot have ‘an effect equivalent to that of a direct purchase of bonds from the public authorities and bodies of the Member States’, and it needs to ‘build sufficient safeguards into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123 TFEU’.<sup>116</sup> The Court found that this needs to be assessed *in concreto*,<sup>117</sup> meaning from case to case, which it does in the next paragraphs, concluding that these demands were met in the case of the PSPP.<sup>118</sup> To sum up, the CJEU stated that the decisions of the ECB establishing the PSPP were valid acts, as they were adopted by the ECB within the scope of monetary competences, and were proportionate in relation to their monetary goals.

The FCC, however, believed differently. On 5 May 2020, it made a decision in the *PSPP* case, which would come as a shock to the academic community.<sup>119</sup> The FCC declared the decisions as *ultra vires*,<sup>120</sup> and ‘[a]s a result, the *ultra vires* act is not to be applied in Germany, and has no binding effect in relation to German constitutional organs, administrative authorities and courts. These organs, courts and authorities may participate neither in the development nor in the implementation, execution or operationalisation of *ultra vires* acts’.<sup>121</sup> However, the FCC in the end did not conclude that the ECB decisions were not proportionate, but only that they were *possibly* not proportionate – this depended on the explanation which the *Bundesbank* needed to ask, by which it would be demonstrated that the economic effects were properly weighted and still the measure could be classified as monetary, and not economic. Before giving this conclusion, the FCC explained that it was aware of the possible detrimental effects of the review on the uniform application of EU law, but that if this ‘weapon’ were not available to national courts, the concept of the EU as a union of *sovereign states* would be diminished. In the words of the courts itself, this means that ‘[i]n principle, certain tensions are thus inherent in the design of the European Union; they must be resolved in a cooperative manner, in keeping with the spirit of European integration, and mitigated through mutual

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<sup>115</sup> *ibid*, para 26.

<sup>116</sup> *Weiss* (n 2) paras 106-07.

<sup>117</sup> *ibid*, para 108.

<sup>118</sup> *ibid*, para 158.

<sup>119</sup> *ibid*, para 97.

<sup>120</sup> *PSPP* (n 1) paras 117 and 119. One judge was against this decision, but unfortunately did not publish a dissenting opinion (para 237).

<sup>121</sup> *ibid*, para 234.



respect and understanding'.<sup>122</sup> Since this decision directly affected the *Bundesbank*, as a main organ for the implementation of this programme in Germany, the FCC prohibited its participation in the implementation and execution of the aforementioned decisions, but also imposed a transitional period of no longer than three months, in which the *Bundesbank* needed to negotiate the criteria for cooperation between it and the ESCB. This would not be necessary if the Governing Council of the ECB adopted a new decision, whose objectives would not be disproportionate to the economic and fiscal policy effects.<sup>123</sup>

Differently from the CJEU, the FCC considered that a proportionality test should be conducted as a method for assessing whether the measure is one of economic or monetary policy. Therefore, according to the FCC, the competence issue depended on the weighting of the economic effects of the measure to its monetary goals. As the CJEU did not do this, but rather accepted the monetary goal as given on the basis of the ECB's statements, the FCC considered the CJEU's decision as non-binding on it in the case at issue. It, therefore, conducted its own proportionality test and reached different results from those of the CJEU. Additionally, it reproached the CJEU for not being faithful to its own methodology. By citing the CJEU's case law, the FCC wanted, as it explained, to show that the proportionality test done in this case, and generally in the area of economic policy, contradicts the methodological approach taken by the CJEU in almost all other areas of law.<sup>124</sup>

The FCC also emphasised that the CJEU had acted *ultra vires* in one other aspect. The CJEU answered the fifth question by giving, in the FCC's view, an answer of purely advisory meaning on an exclusively hypothetical situation, thus breaching the standard it itself had established in the *Kleinwort Benson* case.<sup>125</sup>

### ***4.3. Consequences of the decision***

Immediately after the FCC published its decision, the Euro dropped 0.7% against the US dollar, the week's lowest.<sup>126</sup> However, this short-term effect is the least of our worries. The mid-term effect could have an impact on the monetary policy of the ECB since the FCC directly

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<sup>122</sup> *ibid*, para 111.

<sup>123</sup> *ibid*, paras 234-35.

<sup>124</sup> *PSPP* (n 1) para 146.

<sup>125</sup> *ibid*, para 81, subparagraph 166.

<sup>126</sup> 'German Court Calls on ECB to Justify Bond Buying Program (*FR24 News*, 5 May 2020) <[www.fr24news.com/a/2020/05/german-court-calls-on-ecb-to-justify-bond-buying-program.html](http://www.fr24news.com/a/2020/05/german-court-calls-on-ecb-to-justify-bond-buying-program.html)> accessed 7 August 2020.

stated that the decision of the ECB establishing the PSPP constitutes an *ultra vires* act.<sup>127</sup> This would result in the inability of the *Bundesbank* to buy bonds within the scope of this programme, but would likely not result in its complete collapse. It could, however, damage it, since Germany is economically the strongest Member State. The Quantitative Easing programme was, and still is, one of the most important programmes of the ECB, and most Member States survived the 2008 crisis successfully thanks to it. However, with this decision, the programme was challenged, possibly posing a threat to the process of further economic cooperation. Although the FCC specifically stated that its decision did not concern the Pandemic Emergency Purchase Programme (PEPP),<sup>128</sup> realistically speaking, it is unlikely that the decision would not have any effect on this programme as well,<sup>129</sup> at least as a sign that the ECB needs to be more transparent in its decision-making, which is what EU institutions had already set as one of the most important objectives.<sup>130</sup> Had the ECB sufficiently justified its decisions, the FCC would have potentially seen them to be in compliance with the proportionality principle.<sup>131</sup>

What to fear most are the long-term legal effects. The authority of the CJEU and the idea of the primacy of EU law have taken a significant hit. What took sixty years to build could be changed by a wave of decisions similar to this one. It seems as though the *Bundesverfassungsgericht* simply forgot to take in the bigger picture. Warsaw and Budapest have already cited this decision stating that they would use the same argumentation when necessary, and, taking into account that the rule of law in those two Member States is severely compromised, this could lead to even more problems and provide a push for the rise of authoritarian regimes.<sup>132</sup> Poland has even appointed four new judges to the Supreme Court,

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<sup>127</sup> *PSPP* (n 1) para 165.

<sup>128</sup> The PEPP is a ‘non-standard monetary policy measure initiated in March 2020 to counter the serious risks to the monetary policy transmission mechanism and the outlook for the euro area posed by the coronavirus (COVID-19) outbreak’. A total of EUR 1.350 billion will be available to Member States for help, with the Governing Council terminating net asset purchases once it judges that the crisis phase is over, but in any case not before the end of June 2021. See <[www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html](http://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html)> accessed 7 August 2020.

<sup>129</sup> Dimitros Kyriazis, ‘The PSPP Judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango’ (*European Law Blog*, 6 May 2020) <[www.europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango](http://www.europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango)> accessed 8 August 2020. Cf Press Release No 32/2020 of 5 May 2020.

<sup>130</sup> Elia Cerrato, Federica Agostini and Nicolas Jaberg, ‘Why the PSPP Judgment of the German Federal Constitutional Court Gives the ECB Another Incentive to Integrate Climate Change Considerations into Monetary Policy’ (*European Law Blog*, 27 May 2020) <[www.europeanlawblog.eu/2020/05/27/why-the-pspp-judgment-of-the-german-federal-constitutional-court-gives-the-ecb-another-incentive-to-integrate-climate-change-considerations-into-monetary-policy](http://www.europeanlawblog.eu/2020/05/27/why-the-pspp-judgment-of-the-german-federal-constitutional-court-gives-the-ecb-another-incentive-to-integrate-climate-change-considerations-into-monetary-policy)> accessed 8 August 2020.

<sup>131</sup> *ibid.* The authors also believe that this could be an opportunity for the ECB to take into consideration the effects of its decisions on climate change, which is their obligation under Art 11 TEU.

<sup>132</sup> Zosia Wanat and Lili Bayer, ‘EU Top Court’s Authority Challenged by Poland and Hungary’ (*Politico*, 13 May 2020) <[www.politico.eu/article/ecj-authority-challenged-by-poland-and-hungary](http://www.politico.eu/article/ecj-authority-challenged-by-poland-and-hungary)> accessed 7 August 2020.

referring to the decision of the FCC, while also declaring the CJEU's decisions on Polish judicial reforms as *ultra vires*.<sup>133</sup>

In the section under the title '*ultra vires* review', I explained that this type of review culminated in the decision in the *Honeywell* case. However, this case certainly has the potential to change this, unless the FCC takes the stance that it reacted too harshly and decides not to refer to it in later decisions. This, however, is highly unlikely. Although the FCC uses the same expression as in *Honeywell* – a structurally significant shift in the allocation of competences to the detriment of the Member States, it now gives a different conclusion. What the CJEU actually did is to fail to live up to its own standards, not the standard set by German courts, which is why the FCC declared the decision as *ultra vires*.<sup>134</sup> If we take this as true, then the argument that the FCC acted according to its own, and not EU, standards, is unfounded. We can only speculate on the real reason behind this decision. It is possible that, as some believe was the case in *Gauweiler/OMT*, that the FCC simply wanted to strengthen the position of the *Bundesbank*.<sup>135</sup> Regarding the influence of this decision on the jurisprudence of courts of other Member States, as pointed out by Petrić, the FCC now used a very national-centric approach, by which it indirectly made this type of argument available to basically every national court, and consequently the FCC, and potentially other courts, will accept the CJEU's methodology provided it pays attention to national constitutional traditions and does not arbitrarily disregard them.<sup>136</sup>

Finally, the future of the idea of constitutional pluralism is something that will most likely change.<sup>137</sup> It is still too early to draw any firm conclusions, but it is possible to predict that the radical conception of constitutional pluralism, which stipulates that it is possible for the CJEU to interpret 'Community (now Union) law so as to assert some right or obligation as binding in favour of a person within the jurisdiction of the highest court of a member state, while that court in turn denies that such a right or obligation is valid in terms of the national

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<sup>133</sup> Daniel Sarmiento and Dolores Utrilla, 'Germany's Constitutional Court Has Gone Nuclear. What Happens Next Will Shape the EU's Future' (*Euronews*, 22 May 2020) <[www.euronews.com/2020/05/15/germany-constitutional-court-gone-nuclear-what-happens-next-will-shape-the-eu-future-view](http://www.euronews.com/2020/05/15/germany-constitutional-court-gone-nuclear-what-happens-next-will-shape-the-eu-future-view)> accessed 8 August 2020.

<sup>134</sup> *ibid.*

<sup>135</sup> Gerner-Beurle, Küçük and Schuster (n 72) 302.

<sup>136</sup> Davor Petrić, "'Methodological Solange' or the Spirit of PSPP' (*European Law Blog*, 18 June 2020) <[www.europeanlawblog.eu/2020/06/18/methodological-solange-or-the-spirit-of-pspp](http://www.europeanlawblog.eu/2020/06/18/methodological-solange-or-the-spirit-of-pspp)> accessed 6 August 2020. The author therefore calls this decision 'methodological Solange', emphasising its future importance in EU law.

<sup>137</sup> For a more detailed analysis of three types of constitutional pluralism – radical, international and discursive, and some thoughts on how they can be seen through the *Weiss/PSPP* saga, see Annegret Engel, Julian Nowag and Xavier Groussot, 'Is This Completely M.A.D.? Three Views on the Ruling of the German FCC on 5 May 2020' (2020) 3 *Nordic Journal of European Law* 128, 145-46.

constitution’,<sup>138</sup> will lose its appeal.<sup>139</sup> Still, some believe that the concept of constitutional pluralism will not simply disappear.<sup>140</sup>

What will the EU do? There is always the option of launching infringement proceedings against Germany. In this respect, Ursula von der Leyen said that ‘the Union’s monetary policy is a matter of exclusive competence; that EU law has primacy over national law and that rulings of the European Court of Justice are binding on all national courts. The final word on EU law is always spoken in Luxembourg’, as well as that they ‘will look into possible next steps, which may include the option of infringement proceedings’.<sup>141</sup> So far however, no action has been taken by the Commission.<sup>142</sup> Due to the agreement between the ECB and Germany, which will be assessed in more detail below, most likely no action will be taken at all.

#### ***4.4. Mixed opinions – a welcome change or a danger to the whole EU legal order?***

Shortly after the FCC published its decision, researchers started to flood blogs with their opinions. Although mostly pro-CJEU, mixed views can be seen, at least regarding the consequences of the case. On 26 May 2020, a ‘Joint Statement in Defense of the EU Legal Order’ was published by R Daniel Kelemen, Piet Eeckhout, Federico Fabbrini, Laurent Pech and Renáta Uitz, and signed by 22 legal experts.<sup>143</sup> In it, the authors argue that the decision of the FCC should be forcefully rejected because it directly undermines the whole EU legal order.<sup>144</sup> They also indicate that the concept of constitutional pluralism cannot offer a solution for these types of conflicts in the long run, because sometimes the *Kompetenz-Kompetenz* question does not limit itself only to a dialogue, but transforms into an open conflict – constitutional pluralism in these cases simply does not provide a practical solution.<sup>145</sup> Another take in criticising the FCC’s decision is based on its view of the proportionality test. Although

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<sup>138</sup> Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999) 119.

<sup>139</sup> Engel, Nowag and Groussot (n 137) 149.

<sup>140</sup> *ibid.*, 149.

<sup>141</sup> Saim Saeed, ‘Von der Leyen Considers Infringement Proceedings after German Court Ruling’ (*Politico*, 10 May 2020) <[www.politico.eu/article/vera-jourova-eu-top-court-has-final-word-on-blocs-law](http://www.politico.eu/article/vera-jourova-eu-top-court-has-final-word-on-blocs-law)> accessed 8 August 2020.

<sup>142</sup> Serious repercussions are, however, possible. If the infringement proceeding is not started, this could be seen as a privilege of bigger, more powerful states, dividing EU law into one for the ‘meek’ and one for the ‘rich and powerful’. See Joseph HH Weiler and Daniel Sarmiento, ‘The EU Judiciary After Weiss: Proposing a New Mixed Chamber of the Court of Justice’ (*EU Law Live*, 1 June 2020) <[www.eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler](http://www.eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler)> accessed 8 August 2020.

<sup>143</sup> Kelemen (n 7).

<sup>144</sup> *ibid.*

<sup>145</sup> *ibid.*

it has been accepted by courts of many countries, the FCC has not accepted it in the same form. Different legal systems give different answers as to how this test should be applied. Therefore, the FCC's position that the CJEU, which some believe even popularised the test and made it more accepted,<sup>146</sup> should have applied it in a specific (German) way could be seen as unfounded and wrong.<sup>147</sup> It can also be looked at as a part of domestic administrative law, which German (or any other Member State courts) cannot impose on the CJEU.<sup>148</sup> Had this been a case involving fundamental freedoms or individual rights, the CJEU would probably have conducted all three tests. However, the fact that it did not do a detailed weighting of monetary goals with different possible economic effects in this case does not mean that its decision is *ultra vires* – the CJEU found the programme to be suitable and necessary, so exercise of the third part of the proportionality test, balancing, was not required. Some go as far as to say that the FCC committed an ‘unprecedented act of legal vandalism’.<sup>149</sup> Although the FCC criticises the CJEU for using the proportionality test in an unmethodical and careless manner, the FCC itself uses expressions such as ‘meaningless’, ‘incomprehensible’, and more.<sup>150</sup> This scathing type of language is certainly not what we expect from a court with such a high reputation and prestige. The fact that some believe it committed an act of legal vandalism because it simply did not agree with the CJEU, plus the language used, adds to the crudeness of its argumentation. This is the dominant opinion. However, other opinions cannot be overlooked.

Some authors have already expressed different views, and rightly so. As Bobić and Dawson have pointed out, the FCC’s decision was not as unexpected as one might think, since the legality of the quantitative easing programme has been discussed by Member States’ highest courts for a few years now, insinuating its problematic nature, while correctly predicting that since the PSPP would not satisfy the criteria established by the FCC in *Gauweiler*, it would declare the programme as *ultra vires*.<sup>151</sup> Most contrasting opinions,

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<sup>146</sup> Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) *Columbia Journal of Transnational Law* 47, 68, 140-45.

<sup>147</sup> Toni Marzal, ‘Is the BVerfG PSPP Decision “Simply Not Comprehensible”? A Critique of the Judgment’s Reasoning on Proportionality’ (*Verfassungsblog*, 9 May 2020)

<[www.verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible](http://www.verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible)> accessed 6 August 2020. Cf *PSPP* (n 1) para 138 in which the FCC states that the CJEU failed to make use of the third test – the balancing of conflicting interests.

<sup>148</sup> Pavlos Eleftheriadis, ‘Germany’s Failing Court’ (*Verfassungsblog*, 18 May 2020) <[www.verfassungsblog.de/germanys-failing-court](http://www.verfassungsblog.de/germanys-failing-court)> accessed 4 August 2020.

<sup>149</sup> *ibid.*

<sup>150</sup> *PSPP* (n 1) paras 127 and 153.

<sup>151</sup> Bobić and Dawson identify these criteria as such: ‘(1) a lack of certainty must exist concerning whether, when, which, and for how long the purchases will be made; (2) the buying programme must not disincentivize Member States from following a sound budgetary policy; (3) holding purchased bonds until maturity is allowed only as long as the market operators cannot be certain that this option will be used; and (4) the risk to which the ECB is exposed must be mitigated by the condition of compliance with the European Stability Mechanism financing,

however, derive from the view that the CJEU is becoming increasingly lenient. In *Weiss*, the CJEU based its decision of proportionality exclusively on the documents and evidence provided by the ECB, mostly because it believes that it lacks specific knowledge in the area of economics.<sup>152</sup> However, the FCC saw this as the CJEU's failure even to try to provide a more detailed explanation. This had the effect of making the CJEU look sluggish. It started to back up its decisions with gradually weaker arguments. The FCC used this decision to expose the CJEU's weak reasoning as a 'façade' – its review as simply too permissive.<sup>153</sup> The FCC, if this is actually the reason behind the decision, uses this case as a 'desperate cry for more methodological integrity' to teach the CJEU how to be worthy of the title of final arbiter of EU law, simply because it does not like the CJEU's reasoning.<sup>154</sup> Although crude, this is a feasible argument, even if the rest of the decision is problematic. Regarding the type of proportionality test applied by the CJEU, some emphasise that the FCC did not actually try to impose exactly the same type of test as it had established. Rather, commentators interpret the FCC's wording in a way which only requests the CJEU to pay regard to the proportionality tests applied by courts of the Member States, and not to apply the test in the exact same manner,<sup>155</sup> ultimately making the Court appear not to respect the concepts developed by national courts, knowing that the CJEU has stated in many decisions before that it takes inspiration from national constitutional orders.<sup>156</sup>

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attached to potential purchases'. See Ana Bobić and Mark Dawson, 'COVID-19 and the European Central Bank: The Legal Foundations of EMU as the Next Victim?' (*Verfassungsblog*, 27 March 2020) <[www.verfassungsblog.de/covid-19-and-the-european-central-bank-the-legal-foundations-of-emu-as-the-next-victim](http://www.verfassungsblog.de/covid-19-and-the-european-central-bank-the-legal-foundations-of-emu-as-the-next-victim)> accessed 15 September 2020.

<sup>152</sup> Jacob Öberg, 'The German Federal Constitutional Court's PSPP Judgment: Proportionality Review Par Excellence' (*European Law Blog*, 2 June 2020) <[www.europeanlawblog.eu/2020/06/02/the-german-federal-constitutional-courts-pspp-judgment-proportionality-review-par-excellence](http://www.europeanlawblog.eu/2020/06/02/the-german-federal-constitutional-courts-pspp-judgment-proportionality-review-par-excellence)> accessed 4 August 2020. The author also believes that the CJEU should have requested additional explanations from the ECB concerning the facts on which the ECB adopted these decisions.

<sup>153</sup> Urška Šadl, 'When Is a Court a Court?' (*Verfassungsblog*, 20 May 2020) <[www.verfassungsblog.de/when-is-a-court-a-court](http://www.verfassungsblog.de/when-is-a-court-a-court)> accessed 6 August 2020. This weak argumentation is visible also in the *Taricco* cases, as emphasised in n 156.

<sup>154</sup> *ibid.*

<sup>155</sup> Julian Nowag, 'The BVerfG's Proportionality Review in the PSPP Judgment and Its Link to Ultra Vires and Constitutional Core: Solange Babel's Tower Has Not Been Finalised' (15 June 2020) available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3634218](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3634218)> accessed 20 September 2020.

<sup>156</sup> The most obvious example being the *Stauder* case regarding fundamental rights.

## 5. A new mechanism of resolving judicial conflicts?

Open conflicts between the CJEU and national courts of constitutional jurisdiction are not new. The Supreme Court of Denmark (SCDK) in *Ajos*,<sup>157</sup> the Italian Constitutional Court (ICC) in *Taricco*,<sup>158</sup> and the Czech Constitutional Court (CCC) in *Landtová*<sup>159</sup> had already considered the decisions of the CJEU as *ultra vires* before the FCC did the same. As conflicts were always possible, ideas about a mechanism through which the conflicts of the CJEU and courts of Member States could be resolved were present (although taken not nearly as seriously as now, seeing that many believed that open conflicts would never happen) even before the FCC's decision in *PSPP*. However, since the FCC is widely considered to be one of the most influential courts in the world, the consequences of the *PSPP* decision should be regarded as bearing considerable weight. Therefore, it seems that the time has come to finally stop ignoring the problem, and to design a solution for it.

So far, Weiler and Sarmiento have proposed a solution. It contemplates the establishment of a new Mixed Grand Chamber of the Court of Justice.<sup>160</sup> The procedure would start after the decision of the CJEU in a preliminary ruling if a national Supreme or Constitutional Court, government and/or parliament is dissatisfied with the CJEU's decision. These institutions would have one year from the delivery of the CJEU's judgment to initiate the procedure. The Chamber would consist of thirteen judges, six from the CJEU (not those whose decision is being put into question), six from national supreme or constitutional courts of Member States (a rotational system would be utilised, with the president, or even an ex-president, of the supreme or constitutional court of a Member State which believes the EU act

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<sup>157</sup> In *Ajos* (Case no 15/2014 *Dansk Industri (DI) acting for Ajos A/S vs The estate left by A*), the SCDK, as a response to the CJEU in Case C-441/14 *Dansk Industri v Rasmussen* (2016) ECLI:EU:C:2016:278, essentially stated that Denmark's Act of Accession did not provide the basis for the application of an unwritten principle of EU law, in this case the principle of non-discrimination on the grounds of age, over national legislation in horizontal situations. Since general principles were never conferred on the EU by Denmark, the decision of the CJEU in this case was declared *ultra vires*. See Helle Krunke and Sune Klinge, 'The Danish *Ajos* Case: The Missing Case from *Maastricht* and *Lisbon*' (2018) 3(1) *European Papers* 157, 174; and Ruth Nielsen and Christina D Tvarnø, 'Danish Supreme Court Infringes the EU Treaties by Its ruling in the *Ajos* Case' (2017) 2 *Europaetlig Tidsskrift* 303, 307-308.

<sup>158</sup> For an analysis of the *Taricco* case law, see Chiara Amalfitano and Oreste Pollicino, 'Two Courts, Two Languages? The *Taricco* Saga Ends on a Worrying Note' (*Verfassungsblog*, 5 June 2018) <[www.verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note](http://www.verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note)> accessed 3 August 2020; and Michał Krajewski, 'Conditional' Primacy of EU Law and Its Deliberative Value: An Imperfect Illustration from *Taricco II*' (*European Law Blog*, 18 December 2017) <[www.europeanlawblog.eu/2017/12/18/conditional-primacy-of-eu-law-and-its-deliberative-value-an-imperfect-illustration-from-taricco-ii](http://www.europeanlawblog.eu/2017/12/18/conditional-primacy-of-eu-law-and-its-deliberative-value-an-imperfect-illustration-from-taricco-ii)> accessed 3 August 2020.

<sup>159</sup> See Jan Komárek, 'Playing with Matches: The Czech Constitutional Court's *Ultra Vires* Revolution' (*Verfassungsblog*, 22 February 2012) <[www.verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution](http://www.verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution)> accessed 3 August 2020.

<sup>160</sup> Weiler and Sarmiento (n 142).

is *ultra vires* would always be one of these six justices) and the President of the CJEU presiding over the Chamber (or another justice of the CJEU if the President was part of the chamber whose decision is disputed). The Chamber would deal only with cases questioning whether a measure is within EU competences.<sup>161</sup> What Weiler and Sarmiento also emphasise is the transparency of the work of the Chamber. They argue that the hearings should be streamed live, and written submissions made public.<sup>162</sup> Because these cases are of utmost importance for all Member States and their constitutional orders, at the same time being the most sensitive, transparency would ultimately lead to decisions more widely accepted by all. Greater transparency would also be beneficial to the quality of the decisions, because all relevant material could be analysed by scholars, an unofficial, yet important, mechanism which could be seen as a form of control of the Mixed Chamber's actions. Anything which would prevent mistakes or the lack of argumentation should be seen as a significant improvement. Of course, any new proposals for new mechanisms would be welcome, but so far the Weiler/Sarmiento seems the most promising.

Critics of this model have stated that this should be the solution only if every other proposal fails, to which Weiler and Sarmiento responded by stating that this proposal would strengthen the CJEU and that the current *status quo* has proven to be inefficient.<sup>163</sup> An alternative to the proposed new action is to do nothing – to let time pass so the decision can be forgotten and business as usual can carry on. The EU legal order has been through many crises so far. Although not as serious, in the FCC's previous clashes with the CJEU conflicts were narrowly avoided, while courts of some other Member States declared EU acts as *ultra vires* before the FCC, and it seems that their decisions had more serious consequences on paper than in reality. This decision could suffer the same fate. A denouement came even before the end of the three month period imposed by the FCC in which the *Bundesbank* had to negotiate the criteria for cooperation with the ESCB for when the application of this programme in Germany stopped, which made the whole conflict look as though it had been blown out of proportion – the ECB declassified some documents from 2014 and 2015 which show that the ECB had discussed alternatives to the PSPP before it entered into force, but found that they could not achieve the effect they wanted. This was enough for Germany to accept the ECB's reasoning and proportionality test, concluding that the *Bundesbank* would continue to take part in the

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<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*

<sup>163</sup> *ibid.*



PSPP.<sup>164</sup> However, the story does not necessarily end there since Peter Gauweiler, who has a history of trying to block the augmentation of EU competences at the cost of those of the Member States,<sup>165</sup> has announced that he will once again initiate a procedure before the FCC, challenging Germany's decision to remain within the PSPP.<sup>166</sup> All the cards are still on the table. Although in this specific case the conflict ended on a positive note, the reasoning of the FCC in *PSPP* is what could provoke problems and conflicts in the future. I suspect that this will be a topic of many papers in the coming months and years, and hopefully this academic discussion will be taken into consideration by actors at the political level and yield positive results in the future.

## 6. Conclusion

European integration has been long, and, at times, certainly rocky. The CJEU has played an important role in the whole process, by constitutionalising the EU legal order and deblocking the procedure of integration when other institutions could not. Even nowadays, CJEU's decisions often cause a stir. This is what happened in the cases analysed in the first part of the paper, but these conflicts ultimately never confirmed the saying 'Where there is smoke, there is fire'. National courts backed off at the last minute and never actually exercised their proclaimed competences. The German Federal Constitutional Court, the *Bundesverfassungsgericht*, has in this respect stood out. An overview was given in this paper of the most important cases in order to understand the latest conflict, which could potentially have a lasting impact on the EU legal system. The *ultra vires* review, which the FCC exercised in this case, is only one of three types through which the FCC controls EU law measures. After *Honeywell*, it seemed as though the FCC would exercise it only exceptionally, if at all. Therefore, the *PSPP* decision came as a rude awakening, showing that EU law still constantly changes. In addition, the example of fundamental rights review, being the oldest, indicates that the process of continuously shaping and sculpting the review is a slow process, taking over

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<sup>164</sup> Andreas Rinke, 'ECB Stimulus Plan Meets Court Requirements: German Finance Minister' *Reuters* (29 June 2020) <[www.reuters.com/article/us-ecb-policy-germany/ecb-stimulus-plan-meets-court-requirements-german-finance-minister-idUSKBN2401OX](http://www.reuters.com/article/us-ecb-policy-germany/ecb-stimulus-plan-meets-court-requirements-german-finance-minister-idUSKBN2401OX)> accessed 15 September 2020.

<sup>165</sup> Claire Jones and Stefan Wagstyl, 'The Eurozone: A Strained Bond' *Financial Times* (London, 18 January 2015) <[www.ft.com/content/8b5550ea-9d8d-11e4-8946-00144feabdc0](http://www.ft.com/content/8b5550ea-9d8d-11e4-8946-00144feabdc0)> accessed 15 September 2020.

<sup>166</sup> Christian Rath, 'Freiburger Professor will Europäischer Zentralbank klare Grenzen setzen' *Badische Zeitung* (5 August 2020) <[www.badische-zeitung.de/nachrichten/wirtschaft/der-ezb-die-grenzen-aufzeigen--190657709.html](http://www.badische-zeitung.de/nachrichten/wirtschaft/der-ezb-die-grenzen-aufzeigen--190657709.html)> accessed on 15 September 2020.

thirty years, and perhaps even longer than that.<sup>167</sup> Therefore, we can expect that the *ultra vires* review will continue to change, at least in the next couple of years, encouraged by this decision. It is likely that there will be a similar process of gradual elimination of conflict through cases. However, it is not possible to say this for sure, which is why I will restrain from making predictions lacking firm grounds. Since I am also advocating a new system of resolving conflicts, whether in the form of the Weiler/Sarmiento model or something else, I would prefer this process not to continue in the same way. It is simply an inefficient way of resolving conflicts, indirectly negatively influencing European integration.

Although necessary for further strengthening the position of Europe on the global market, a common monetary policy is still one of the most sensitive areas of cooperation. The FCC finally declared an EU act as *ultra vires*, something that seemed highly unlikely after *Honeywell*. However, the FCC took a different approach in this case, and decided to impose its own standard for the proportionality test, rejecting the CJEU's techniques. Although this could mean better reasoning of the CJEU in the future, it also poses a danger to the EU legal order. The whole scope of policies of the ECB is in danger, possibly resulting in a blockage for closer economic cooperation in times when Europe needs it most. Autocratic tendencies are viewing this decision as a boost, and have already started to take full advantage. The principle of primacy, the idea of constitutional pluralism and the authority of the CJEU are all possible victims of this decision.

The response to it has been mixed – some are completely against the decision, while others indicate that this is a needed shift. The decision has some fair points – we should strive towards a CJEU whose reasonings are well argued, because in this way the quality of EU law will increase – there is always room for improvement. On the other hand, the decision tends to undermine the fundamental principles on which EU law operates, creating a breeding ground for dangerous copycats. Propelled by the CJEU's scant argumentation, the FCC seized the opportunity and decided to finally show its teeth by declaring both the CJEU's judgement and the ECB's decisions introducing the quantitative easing programme as *ultra vires*. What had been brewing for decades, finally happened, and at the most inconvenient time – when Europe was in lockdown.

The *PSPP* decision has provoked many debates on whether the current *status quo* can be sustained. The present situation can be summed up thus: the CJEU's decision prompts a

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<sup>167</sup> In the recent decision in the *Right to be forgotten II* case, decided in 2019, the FCC made itself a 'co-curator of the EU Charter, alongside the CJEU'. See Jud Mathews, 'Some Kind of Right' (2020) 21 German Law Journal 40, 43.

national court to deliver a decision in which it disagrees with the CJEU; later, the conflict is either ignored, or, if serious enough, ‘resolved’ by mostly political means. However, the FCC’s decision in *PSPP* could simply be too much for this. Still, even this decision has not caused much damage in real life. A more intense conflict was prevented by a political discussion between the ECB and Germany’s Finance Minister and the *Bundestag*. It seems as if current mechanisms have successfully brought this crisis to a peaceful end. This does not mean that the future is safe, though. In recent times, courts of other Member States have declared decisions of the CJEU as *ultra vires*. The danger that this will happen again is always present. The current system has done its job well so far, but for how much longer? A new mechanism for resolving conflicts of competence might be necessary. In any case, the political compromise after the PSPP judgment, by avoiding further altercations between the two courts in the *Weiss* saga, has finally inspired discussion, giving us enough time to really think through all the possible options to prevent future conflicts. I believe that the FCC’s decision should be deemed unacceptable, and, if necessary, measures should be taken to make this clear, but at the same time I consider it a threat which could provoke a positive change for the benefit of all. So far, the most promising proposal is that of Weiler and Sarmiento, who advocate a Mixed Grand Chamber of the Court of Justice.

The next few years will be a challenge for the Union like none before. A reform such as the introduction of a new *ad hoc* chamber of the CJEU seems a huge step, but it is one in the right direction. The Conference on the Future of Europe,<sup>168</sup> which should start at the end of 2020 (so far, however, yet another delay seems imminent) and run for about two years, is the perfect opportunity to discuss and make these crucial changes. Whether Europe will seize this opportunity or let it slip through its fingers, as it has already done before, remains to be seen.

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<sup>168</sup> <[www.europarl.europa.eu/news/en/press-room/20200615IPR81226/conference-on-future-of-europe-should-start-as-soon-as-possible-in-autumn-2020](http://www.europarl.europa.eu/news/en/press-room/20200615IPR81226/conference-on-future-of-europe-should-start-as-soon-as-possible-in-autumn-2020)> accessed 9 August 2020.

## 7. Summary

The paper deals with the recent Weiss/PSPP decisions of the Court of Justice of the European Union and the German Federal Constitutional Court, attempting to contextualise these decisions within previous conflicts between these two courts. The FCC's case law is studied through the perspective of three different types of reviews it developed: fundamental rights review, ultra vires review and constitutional identity review. Then, a detailed analysis of the Weiss and PSPP cases is given in order to understand the repercussions of the first case in which the FCC officially exercised its proclaimed competences and declared the CJEU and ECB's decisions as ultra vires, undermining fundamental principles of the EU legal order. This act could potentially lead to significant changes in current mechanisms of resolving disputes between the highest courts of the EU and national legal orders. Finally, the future of judicial conflicts is discussed through the analysis of the Weiler/Sarmiento model and the system (or lack of system) of resolving the conflicts currently in place. The paper concludes by highlighting that the Weiss/PSPP decisions could very well be those that finally stimulate a long-needed solution.

Keywords: judicial conflicts, Bundesverfassungsgericht, judicial review, economic cooperation, Weiss, PSPP.

## 8. Sažetak

Rad se bavi nedavnim odlukama *Weiss*/PSPP Suda Europske unije i Saveznog ustavnog suda SR Njemačke, pri čemu se one pokušavaju staviti u kontekst prethodnih sukoba između ta dva suda. Sudska praksa njemačkog Saveznog ustavnog suda proučava se kroz perspektivu tri različite vrste kontrole koje je razvio: kontrola temeljnih prava, *ultra vires* kontrola i kontrola ustavnog identiteta. Zatim se daje detaljna analiza predmeta *Weiss* i PSPP kako bi se razumjele posljedice prvog slučaja u kojem je njemački Savezni ustavni sud službeno izvršio svoju prethodno proklamirane nadležnost i proglasio odluke Suda i ESB-a kao *ultra vires*, podrivajući temeljna načela pravnog poretka EU-a. Takvo bi postupanje moglo dovesti do znatnih promjena u postojećim mehanizmima rješavanja sporova između najviših sudova EU-a i nacionalnih pravnih poredaka. Naposljetku, o budućnosti pravosudnih sukoba raspravlja se analizom Weiler/Sarmiento modela i sustavom (odnosno nepostojanjem sustava) rješavanja sukoba trenutno na snazi. U zaključku se ističe da bi upravo odluke *Weiss*/PSPP mogle biti one koje konačno potaknu dugo potrebno rješenje.

Ključne riječi: sukobi između sudova, Savezni ustavni sud SR Njemačke, sudska kontrola, gospodarska suradnja, *Weiss*, PSPP.

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