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Position Paper concerning the *Bundesverfassungsgericht*s PSPP ruling of 5 May 2020 prepared for the standing committee of the House of Representatives of the Netherlands

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I have been asked to provide opinion on the recent ruling of the German Federal Constitutional Court (*Bundesverfassungsgericht*, further BVerfG), which found the ECB's Public Sector Purchase Programme (PSPP), and the judicial review by the European Court of Justice (further ECJ) thereof, incompatible with certain provisions of the German Basic Law concerning the transfer of sovereign powers to the EU and their exercise by EU institutions.[1]

As is widely known, in its judgment of 5 May 2020, the BVerfG's Second Senate found

> that the Federal Government of Germany and the German Bundestag violated the rights under Article 38(1) first sentence [elections] in conjunction with Article 20(1) and (2) [constitutional principles concerning democracy and sovereignty] in conjunction with Article 79(3) of the Basic Law [the so called "Eternity Clause"]. The violation occurred by failing to take suitable steps challenging that in the ECB's decisions that established (and subsequently amended) the Public Sector Asset Purchase Programme the Governing Council of the European Central Bank neither assessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality.[2]

As I am sure such opinion has been sought from other experts, I will present the BVerfG's ruling (and its context) very briefly (section 1). I will concentrate on the key issues raised by the judgment and its constitutional and political implications (sections 2-4), also with regard the limited scope of this paper.

1. The judgment and its context

The case was brought to the BVerfG already in 2015, shortly after the ECB launched the PSPP in March 2015. In the course of the proceedings (July 2017), the BVerfG decided to submit preliminary reference to ECJ, according to Article 267 TFEU.[3] The tone of the reference gave rise to doubts as regards whether the BVerfG was ready to accept the binding effects of the

[1] BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, paras. 1-237, http://www.bverfg.de/e/rs20200505_2bvr085915en.html, further referred to as BVerfG, Weiss.
[2] This quote paraphrases the operative part of the judgment.
[3] BVerfG, Order of the Second Senate of 18 July 2017 - 2 BvR 859/15 -, paras. 1-137, http://www.bverfg.de/e/rs20170718_2bvr085915en.html.

eventual ECJ's ruling.[4] The ECJ delivered its ruling in December 2018, the present decision by the BVerfG therefore comes after more than one year, when it was eagerly awaited.

There have been several issues raised by the BVerfG in its reference, which can be summarized as follows (as they remained relevant for the present decision):

First of all, there was a question of the ECB's competence to launch a programme as the PSPP, as it may have exceeded its mandate in the realm of monetary policy and encroach upon economic policy, which is in principle left to the Member States; the EU has a coordinating competence (Article 119 TFEU).[5] This has been the central problem of all three "big cases" concerning the new legal infrastructure of the Eurozone, established in the course of the Eurocrisis (besides *Weiss* it was *Gauweiler* from June 2015[6] and *Pringle* from November 2012[7]). It is caused by the limitations imposed by the EU Treaties on the mutualisation of public debt and deeper fiscal integration (most importantly the prohibition on monetary financing of the public debt, Article 123(1) TFEU, and the so called "no bail out clause", Article 125(1) TFEU), and of course, political disagreement among the Member States – some benefiting from the current structure of the EMU, some being permanently disadvantaged.[8]

Other issues raised by *Weiss* concerned the compatibility of the PSPP with the prohibition on monetary financing of the public debt (Article 123 TFEU) and the prohibition on the redistribution of sovereign debt (of the Member States), enshrined in Articles 123, 125 TFEU just mentioned (and Article 4(2) TEU, concerning Member States' constitutional identity). The BVerfG did not find these provisions to be violated (despite some concerns raised); I will therefore concentrate on the first issue – why the BVerfG found that the PSPP (or better put, its justification by the ECB) violated the limits of the ECB's mandate. It gave rise to several concerns, which may have implications beyond the execution of the PSPP (and similar programmes), as they reach the deeper infrastructure of the EU and its economic constitution. They are the following:

(1) The authority of the ECJ vis a vis national constitutional courts (and the primacy of EU law over national laws, including national constitutions);

(2) The (un)sustainability of the current economic constitution of the EU;

(3) The range of possible reactions to the BVerG's ruling.

I take each in turn below.

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[4] See ECJ (Grand Chamber), Judgment of 11 December 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000, further referred to as ECJ, *Weiss*, paras. 17-26 (Italian Government questioning the admissibility of the reference, given the BVerfG did not seem to accept the binding effect of the ECJ's ruling).

[5] There is a question, however, how much this is true in the light of all measures adopted – without Treaty change – in response to the Eurocrisis: see Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis – A Constitutional Analysis* (CUP 2014).

[6] ECJ (Grand Chamber), Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400. This was the first ever preliminary reference submitted by the BVerfG. It concerned the legality of the ECB's Outright Monetary Transactions Programme.

[7] ECJ (Grand Chamber), Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, on the compatibility with EU law of the Treaty establishing the European stability mechanism and the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 TFEU.

[8] For a short and accessible analysis see Paul de Grauwe, 'Design Failures in the Eurozone: Can They Be Fixed?' *LEQS Paper* No. 57, https://ssrn.com/abstract=2215762.

2. The challenge to the authority of the ECJ and the primacy of EU law

One of the most intriguing aspects of the case – from the legal perspective – concerns the principle object of the BVerfG scrutiny, which is not the ECB's decisions establishing the PSPP per se, but the ECJ's review of their compatibility with EU law, as originally requested by the BVerfG in its July 2017 reference.[9]

The BVerfG finds the ECJ's ruling in *Weiss* 'not comprehensible, so that, to this extent, the judgment was rendered ultra vires'.[10] In BVerfG's view, the ECJ

> manifestly exceed the judicial mandate conferred upon the CJEU in Art. 19(1) second sentence TEU … and result in a structurally significant shift in the order of competences to the detriment of the Member States. In this regard, the aforementioned judgment thus constitutes an ultra vires act that is not binding upon the Federal Constitutional Court.[11]

The key concern for the BVerfG was how the ECJ conducted proportionality review of the ECB's decision. This was for three reasons:

- The ECJ did not examine *actual* effects of the contested measures and limited itself only to the review of the form of measures and their stated objectives;
- The economic policy effects – which the BVerfG admits are inevitable, but apparently must be limited to the necessary minimum – were not explicitly mentioned at all and thus not balanced against the monetary objective of the PSPP, leaving therefore the proportionality review meaningless;
- The proportionality review was not consistent with the ECJ's own methodological approach set out in its previous case law.

Early commentators criticized each of the three stated reasons.[12] Some suggested that the BVerfG adopted a very parochial standard of proportionality, which does not reflect how proportionality review is being conducted in Europe.[13] Others opined that it is the BVerfG's conduct of proportionality review, which is not comprehensible and list reasons why proportionality is not a suitable instrument to be used in the review of competences.[14]

I tend to disagree with such views.

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[9] N. 3.
[10] BVerfG Weiss, para. 116.
[11] BVerfG, Weiss, para. 154.
[12] See particularly the debate on the Verfassungsblog, where many reputable (but also less reputable) academics have debated the decision: https://verfassungsblog.de/tag/pspp/.
[13] See particularly, Pavlos Eleftheriadis, 'Germany's Failing Court', VerfBlog, 2020/5/18, https://verfassungsblog.de/germanys-failing-court/ and Diana Urania Galetta, 'Karlsruhe über alles? The reasoning on the principle of proportionality in the judgment of 5 May 2020 of the German BVerfG and its consequences', https://ceridap.eu/karlsruhe-uber-alles-the-reasoning-on-the-principle-of-proportionality-in-the-judgment-of-5-may-2020-of-the-german-bverfg-and-its-consequences/.
[14] See Toni Marzal, 'Is the BVerfG PSPP decision "simply not comprehensible"?: A critique of the judgment's reasoning on proportionality', VerfBlog, 2020/5/09, https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/.

First of all, the BVerfG bears the ECJ to the latter's own standards and requires that the ECJ explains why it departed from them. The extensive overview of the ECJ's case law concerning proportionality shows that the BVerfG did not formalistically apply its own methodology, but rather engaged with the ECJ's own, to find that the ECJ did not use methodology consistent with its own approach.[15]

It is also important to note that some commentators observed by right after the ECJ had rendered its preliminary ruling in *Weiss*, that the standard of proportionality review adopted was not adequate.[16] This is mostly because the ECB is made to be independent from political interference and the only way to make it accountable is to conduct a more rigorous review of its measures. The ECJ in *Weiss* has however done the exact opposite – a point to which I return in the following section 3.

I also find it problematic to doubt the utility of the very principle of proportionality in the competence review – if it is one of the criterions stated in the EU Treaties (Article 5 (4) TEU).

Declaring the ECJ's decision ultra vires is not without precedent: the Danish Supreme Court refused to follow the ECJ's ruling in *Ajos* in 2016,[17] while in 2012 the Czech Constitutional Court was the first to declare the ECJ's judgment (in *Landtová*) to be ultra vires (moreover, in a similarly harsh language as the present decision).[18] Neither case however concerned one of the policy areas that are key to the EU's survival; the particular importance of this decision is also due to the BVerfG's standing amongst European highest courts. One commentator viewed the judgment

> as a violation of the unwritten "code of professional ethics" that binds European judges as a *corps*. It is their duty and responsibility to continuously reassure the legal actors and the general public that while we might not always agree with the outcomes that they reach, they reach them in conformity with the rules of law and using the accepted and acceptable judicial tools lege artis. In other word, that they know what they are doing, and that they are doing their job up to a (professional) standard.[19]

She however concludes that 'maybe the judgment of the FCC is a desperate cry for more methodological integrity and if it is, we should be willing to go along with the argument'. I tend to agree with such view, even if it can mean that occasional disobedience by national courts will become more usual than is tenable for the legal system of the EU to operate. Commentators

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[15] BVerfG Weiss, paras. 146-152.
[16] See Mark Dawson and Ana Bobic, 'Quantitative Easing at the Court of Justice – Doing whatever it takes to save the euro:Weiss and Others', (2019) 56 *Common Market Law Review* 1005–1040, 1022-1028.
[17] Danish Supreme Court, Judgment of 6 December 2016, Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A*; ECJ (Grand Chamber), Judgment of 19 April 2016 in Case C-441/14 *DI*, EU:C:2016:278; see Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, 'Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS', VerfBlog, 2017/1/30, https://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/.
[18] See Czech Constitutional Court, Judgment of 31 January 2012, Pl. ÚS 5/12 (N 24/64 SbNU 237); ECJ (Fourt Chamber), judgment of 22 June 2011, C-399/09 *Landtová*, EU:C:2011:415; see Jan Komárek, 'Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution', VerfBlog, 2012/2/22, https://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/.
[19] Urška Šadl, 'When is a Court a Court?', VerfBlog, 2020/5/20, https://verfassungsblog.de/when-is-a-court-a-court/.

were fast to observe that it gives ammunition to actors in Poland and Hungary, to attack the ECJ's judicial integrity and its very competence.[20]

On this point I would stress that it is the responsibility of us, legal academics, to point to the fundamental differences between the functioning constitutional democracy of the Federal Republic of Germany, whose independent constitutional court has conducted what it considered to be its job – to protect the constitution, and the former countries, which have been subject to international criticism from many sides. It may even undermine the efforts to protect the rule of law in Europe, if 'the German democratic branches of government to take measures to contain the overreach of the BVerfG'[21] – as if the same BVerfG was not part of what makes the Republic democratic.

This results from the very nature of the EU's constitutional order, which is not federal, but pluralist in the sense that while there is an obligation on the EU and its Member States to preserve the Union, each does so from the perspective of its own constitution, which remains supreme for each of them. For the ECJ it is the EU treaties, which protect national identities (Art. 4(2) TEU), for national constitutional courts it is their constitutions and respective provisions concerning membership in the EU (such as Article 23 of the Basic Law).[22]

3. The *Weiss* decision only shows the unsustainability of the current economic constitution of the EU

In short, the EU's economic constitution does not allow for fiscal transfers within the Union and the Union itself has only limited capacity for resource redistribution. While the Maastricht Treaty established a strongly centralised monetary union (further reinforced by the measures taken in response to the Eurocrisis), it has left *economic integration* without adequate redistributive competences. As a result, the economic and social misbalances, which result from such imperfect union, cannot be properly addressed either by the EU or the Member States. The ECB is then called upon to find means how to make the monetary union sustainable – even if it entails 'doing whatever it takes', to paraphrase the famous statement of the ECB's President Mario Draghi from September 2012.[23]

While it is possibly not the aim of the BVerfG's decision, it may lead to some fundamental rethinking of the economic constitution of the EU – particularly the unsustainability of using the ECB to adopt measures are meant to safe the Eurozone, including its economy, which would otherwise be responsibility of a democratically accountable government. Miguel Poiares Maduro, the former Advocate General of the ECJ (from 7 October 2003 to 6 October 2009) e.g. argued that

> There is, however, a silver lining. This may be the final wake up call for the importance to deal with risk sharing through genuine EU own resources (as I've been arguing for long). The only way to avoid the debt mutualisation constitutional and political trap is to move to a genuinely European approach to risk sharing. One

[20] See especially R. Daniel Kelemen, Piet Eeckhout, Federico Fabbrini, , Laurent Pech, Renáta Uitz, 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order', VerfBlog, 2020/5/26, https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/.
[21] Federico Fabbrini, 'Suing the BVerfG', VerfBlog, 2020/5/13, https://verfassungsblog.de/suing-the-bverfg/.
[22] For various perspectives on constitutional pluralism see e.g. Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in Europea and Beyond* (Hart 2011).
[23] See de Grauwe, n 8.

> where such risk is shared on the basis of limited liabilities that are guaranteed by resources that do not depend on the States but are genuinely European. In this case the liabilities of the different European's peoples will not go beyond what they may be required to pay for those own resources as citizens of the Union. Their democracies will not be liable for the other European peoples decisions. This judgment demonstrates again the soundness of the call for new genuine own resources as the basis on which to support whatever EU action may be necessary and to define in that way how – and to what extent – risk is shared in the EU. This may provide a solution to the ongoing discussions in the EU, one that will also be compatible with the German's Constitutional Court requirements.[24]

The necessary reform may not go as far as he suggests (since it seems he would want to give the EU a more significant taxing capacity) and the recent Franco-German proposal on a European Recovery Fund may present an alternative.[25]

4. Possible reactions to the decision

What remains is therefore to consider the possible reactions to the judgment. As the BVerfG makes clear, 'constitutional organs have a duty to take active steps against the PSPP given that it constitutes an ultra vires act'.[26]

Besides requiring the ECB to issue a new decision, which will comply with the BVerfG's requirements regarding the principle of proportionality, one positive thing about the judgment is that the Court did not find the violation of the constitutional identity – which leaves scope for amending the EU Treaties in the way in order to make the PSPP (or a similar programme) compatible with them. It is however an open question whether this would be politically feasible and whether it would not change the economic constitution of the EU so fundamentally that constitutional identity review by the BVerfG would be triggered nevertheless.

Lastly, some commentators suggested that the Commission initiates infringement procedure against Germany.[27] While this is legally certainly possible, I would find this course of action utterly irresponsible, leading to a further escalation of the constitutional conflict.

Prague, 5 June 2020

Jan Komárek

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[24] Miguel Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court', VerfBlog, 2020/5/06, https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/.

[25] Dolores Utrilla, 'A way out of the crisis? The Franco-German proposal for a 500 billion-euro European Recovery Fund' EU Law Live!, 2020/5/19, https://eulawlive.com/a-way-out-of-the-crisis-the-franco-german-proposal-for-a-500-billion-euro-european-recovery-fund/.

[26] BVerfG Weiss, para. 230.

[27] E.g. Eleftheriadis, n 13 or Fabbrini, n 21.