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The Bundesverfassungsgericht in *PSSP*: A Legal and Practical Assessment with a View to the Future

Richard Avinesh Wagenländer*

Abstract

This article will examine the reasoning of the Bundesverfassungsgericht's *PSPP* ruling in which the court, for the first time in its history, overruled a CJEU judgment. It will outline how, whilst the ruling is based on an unconvincing interpretation of EU law and a strained proportionality analysis, it highlights deficiencies of the CJEU's general methodology and standard of review. After examining solutions to tackle this specific issue within monetary policy, it will evaluate potential reforms that prevent or reduce the risk of judicial clashes between the CJEU and Member State courts. Specifically, it will argue for the introduction of both preventive and reactive mechanisms that allow ex-post and ex-ante assertions of constitutional concerns by national courts without undermining the EU legal order.

Keywords: EU law, EU constitutional law, PSPP, ultra-vires, doctrine of supremacy

I. Introduction

On 5 May 2020, the Bundesverfassungsgericht, Germany's Federal Constitutional Court (FCC), overruled a judgment of the European Court of Justice ('CJEU') and declared it to be *ultra vires.* The historically unprecedented ruling concerned

* BA Jurisprudence Candidate at Somerville College, University of Oxford, richard.wagenlaender@some.ox.ac.uk. I am grateful to the anonymous reviewers for their comments on earlier drafts. Thanks are also due to my tutor Dr. Julie Dickson for providing invaluable insight into European Union Law and the encouragement to pursue my own interests and passions. Any errors that remain are my own.

the 2018 CJEU judgment in *Weiss and Others*,[1] in which the CJEU found that the European Central Bank's ('ECB') Public Sector Asset Purchase Programme ('PSPP') conformed with EU law. The FCC held that whilst the programme itself was not in breach of EU law, both the decision-making process of the ECB and the CJEU judgment lacked an appropriate proportionality analysis.[2] Using a sharp tone, the German court found the CJEU's ruling to be methodologically incomprehensible,[3] "objectively arbitrary",[4] and thus *ultra vires*. The decision made headlines across the world, with some speaking of an outright "declaration of war"[5] endangering the Euro and the European Union as we know it. Currently, the situation seems to have been defused, as the three-month period the FCC granted for conducting a more thorough proportionality assessment has passed: the Bundestag, reviewing ECB documents, came to the conclusion that the FCC's requirements had been met, thus allowing the Bundesbank to continue to participate in the PSPP.

Despite the alleviation of the immediate situation, the historic novelty and impact which this judgment could or is said to have on the EU legal order warrants further analysis and examination, especially with regard to the characterisation and future of the EU legal order. In the first part, this article will comprehensively examine the reasoning of this ruling both in legal and practical terms and the possible impact it may have for the future development of EU law. It will argue that the reasoning of the FCC was based on a strained proportionality analysis as well as a generally incorrect application of EU case law. The ruling will, however, be shown to be based on justified concerns in light of an expanding role of the ECB, highlighting potential deficiencies of the CJEU's review standards and the EU's division of competences. The article will then evaluate potential solutions to the specific area of monetary policy. The second part will focus specifically on the ruling's impact on the doctrine of supremacy as espoused by the CJEU in *Costa v ENEL*.[6] It will then proceed to outline possible reforms that reduce the risks of constitutional norm clashes, such as those witnessed in the German *PSPP* ruling,

1 Case C-493/17, *Heinrich Weiss and Others v Bundesregierung and Others* [2018].
2 BVerfG 32/2020 [138].
3 ibid [153].
4 ibid [112].
5 Financial Times, 'German court calls on ECB to justify bond-buying programme' (5 May 2020) <https://www.ft.com/content/a1beda5e-5c2d-429e-a095-27728ed2d72b> accessed 25 December 2020.
6 C-6/64, *Costa v ENEL* [1964] ECR 585.

by channelling such tensions in a way that does not undermine the coherence and long-term sustainability of EU law.[7]

II. The FCC's Ruling and Reasoning in *PSSP*

To understand both the CJEU's as well as the FCC's reasoning, it is first necessary to understand what the PSPP actually is and how it was said by the plaintiffs in *PSPP* to affect both German constitutional norms and EU law. The PSPP, introduced in 2015, is a programme that allows the ECB and national central banks of the Euro Area to buy government bonds and other euro-based debt instruments issued mainly by Member States of the Eurozone. This is done to ease monetary and financial conditions for the monetary union.[8] In simple terms, the programme allows the ECB and national central banks to lend money to the Eurozone's members to increase the supply of money. According to the ECB, this helps achieve the desired target inflation rate of 2% and secure price stability.[9]

The complainants in *PSPP*, a group of more than seventeen hundred German citizens, argued that the PSPP constituted monetary financing of Member States in breach of Articles 123(1) and 125 of the Treaty of the Functioning of the European Union ('TFEU'). This was because the mass-scale lending of monies essentially assumes responsibilities of Member State governments without them providing any mutual financial guarantees for the received financial support.[10] The complainants also argued that this assumption of Member States' fiscal responsibilities had violated the German Basic Law's minimum standard of democratic legitimation, which requires Germany's overall budgetary responsibility to lie with the German legislature: under Article 20 of the Basic Law, "[a]ll state authority is derived from the people", as exercised through democratic elections. Thus, the purchase of sovereign debt by the *Bundesbank* under the PSPP, without control or authorisation from the German parliament, would "essentially amount

[7] I shall refer to the Bundesverfassungsgericht's ruling as '*PSPP*' and to the CJEU ruling as '*Weiss*'.

[8] European Central Bank, 'Implementation aspects of the public sector purchase programme (PSPP)' (22 January 2020) <https://www.ecb.europa.eu/mopo/implement/app/html/pspp.en.html> accessed 25 December 2020.

[9] ibid.

[10] *Heinrich Weiss* (n 1) [13]–[16].

to an assumption of liability for decisions taken by third parties with potentially unforeseeable consequences, which is impermissible under the Basic Law".[11]

A. The courts' respective judgments

The CJEU, as it had done in its earlier decision in *Gauweiler*,[12] dismissed the arguments based on EU law,[13] as well as the constitutional concerns noted in the preliminary reference.[14] It reiterated the ECB's contentions that the PSPP did not amount to an intrusion on fiscal policy as it was subject to a purchase limit of 33% of a particular bonds issue or outstanding securities of a Member State.[15] In addition, purchases were limited to the secondary markets as Article 123 TFEU prohibits direct purchases.[16] Furthermore, the distribution of purchases followed a capital key that prevented selective favouring of individual Member States and the ESCB[17] from becoming the majority creditor of one Member State.[18] Finally, the CJEU also found that the ECB enjoys "a broad discretion"[19] which entails that measures intended to have general application did not give rise to a duty to give reasons for "each of the technical choices made".[20]

In the FCC judgment, the German court concurred with the complainants' notion that Article 38(1) of the German Basic Law guaranteed citizens' right to democratic self-determination, not only with respect to the federal state power but also with regard to European institutions. It described how the Basic Law "protects against a manifest and structurally significant exceeding of competences by institutions, bodies, offices, and agencies of the European Union".[21] Specifically, "the Basic Law does not authorise the German state organs to transfer sovereign powers to the European Union in such a way that the European Union were authorised […] to create new competences for itself".[22]

The German court then proceeded, interestingly, to concur with the CJEU by stating that the PSPP itself does not constitute monetary financing or "pose a

[11] BVerfG 32/2020 [227].
[12] A case concerning a similar monetary programme to the PSPP: C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag* [2015] electronic Reports of Cases.
[13] Specifically Arts 123(1) and 125 TFEU.
[14] *Heinrich Weiss* (n 1) [14].
[15] ibid [124].
[16] ibid [155].
[17] Short for European System of Central Banks.
[18] *Heinrich Weiss* (n 1) [140].
[19] *Heinrich Weiss* (n 1) [30].
[20] ibid [32].
[21] BVerfG 32/2020 [98].
[22] ibid [101].

risk to the overall budgetary responsibility of the Bundestag".[23] However - and this is the core of the FCC judgment - it found that both the CJEU and the ECB had failed to properly apply the proportionality principle under Articles 5(1) and (4) TEU.[24] Thus, whilst the PSPP was not *ultra vires*, the way the ECB assessed the PSPP and the manner in which the CJEU policed the ECB's mandate under Article 127 TFEU were. With regard to the ECB, the FCC argued the EU body should have conducted a balancing test between the fiscal and monetary effects of its programmes, which, according to the FCC, was not done adequately.[25] With regard to the CJEU, the FCC found its review standard excessively deferential and "no longer tenable from a methodological perspective".[26] This approach, the German court found, exceeded the CJEU's mandate conferred in Article 19(1) TEU and resulted "in a structurally significant shift in the order of competences to the detriment of the Member States".[27]

B. The judgments' merits

The FCC's accusation that the ECB did not conduct an assessment and balancing test of the monetary and fiscal effects of the PSPP is rather misguided. As the CJEU noted in its 2018 ruling, the

> "decisions of the ECB relating to the PSPP have consistently been clarified by the publication of press releases, introductory statements of the President of the ECB at press conferences […] and by the accounts of the ECB Governing Council's monetary policy meetings, which outline the discussions within that body".[28]

These accounts, according to the CJEU, "show, in that context, that the potential side effects of the PSPP, including its possible impact on the budgetary decisions of the Member States concerned, were taken into account".[29]

It is, however, true that the CJEU did not adopt a particularly strict proportionality review following its finding that the ECB must be afforded a broad discretion,[30] and that the CJEU essentially reiterated the data and analysis provided for by the ECB without much scrutiny. In this light, it is understandable why the

[23] ibid [116].
[24] ibid [138].
[25] ibid [165].
[26] ibid [116].
[27] ibid [119].
[28] *Heinrich Weiss* (n 1) [37].
[29] ibid [38].
[30] ibid [30].

German court reached the conclusion that this light-touch proportionality review "affords the ECB a (limited) competence to decide on its own competences",[31] essentially allowing the ECB "to conduct economic policy as long as the ECB asserts that it uses the means set out or provided for in the ESCB Statute",[32] in pursuit of the inflation target fixed by the ECB.

Contrastingly, most of the remainder of the FCC's proportionality analysis is not only unconvincing but itself "methodologically incomprehensible". In its analysis, the German court first set out the principle of proportionality as found in Article 5 TEU, followed by an outline of the three-stage proportionality test as found in German law.[33] In Germany, the proportionality test is based on elements of suitability, necessity and appropriateness, an approach which the FCC contended is followed similarly in Spain, Italy and other states including the United Kingdom.[34] This reference to other European countries seems to be the basis for finding that the CJEU exceeded its mandate, as the FCC contended the CJEU did so by manifestly disregarding "the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States".[35]

This reasoning and analysis of the FCC is strained for two reasons. Firstly, its mention of other Member States' use of the proportionality doctrine is arguably overstated and, in part, simply incorrect. This is because other states' use of the proportionality doctrine significantly differs in degree and scope from the German doctrine, which is applied far more strictly. As Spieker notes, whilst "the French, Belgian and Spanish review mechanisms tend towards soft-conflict identity reviews, it is especially the German and Hungarian doctrines which reveal a strong tendency towards the hard-conflict type".[36] Given these differences, it is not clear how exactly the mere usage of a doctrine with the same name justifies the FCC's contention that the CJEU ought to adopt a stricter proportionality test. This would bring the CJEU's test closer to the German doctrine but would be inconsistent with the approaches of the other mentioned jurisdictions. It is also unclear why the FCC made reference to the United Kingdom, given that it withdrew from the EU on 31 January 2020 and thus arguably had no bearing for this case. Indeed, even if the UK had continued its EU membership, the FCC's mention of it would

[31] BVerfG 32/2020 [136].
[32] ibid [133].
[33] BVerfG 32/2020 [124]–[125].
[34] ibid [125].
[35] ibid [112].
[36] L Spieker, 'Framing and managing constitutional identity conflicts: How to stabilize the modus vivendi between the Court of Justice and national constitutional courts' (2020) 57 Common Market Law Review 361, 396.

be incredibly misleading, given the UK Supreme Court recently refused to adopt proportionality as a general review test in *Keyu v Foreign Secretary*.[37] It would therefore seem that the FCC's attempt at a comparative law analysis failed, making any legal relevance of this examination doubtful.

Similar observations can be made for the examination of the proportionality test as applied within EU law that followed the court's comparative law analysis. Here, the FCC first noted that the test in EU law differs from "German terminology and doctrine" and that the CJEU often "limits its review to whether the relevant measure is manifestly inappropriate having regard to the objective pursued".[38] Nonetheless, it found that the CJEU ruling in *Weiss* "contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law".[39] This is quite surprising given, as noted by de Búrca, that "when action is brought against the Community in an area of discretionary policy-making power, a looser form of the proportionality inquiry is generally used".[40] This is supported in the opinion of Advocate General Mischo in *Fedesa,* where he noted that in "complex economic and political situations" the CJEU "traditionally allows […] a wide area of discretion".[41] It is consequently not surprising that the same approach was followed when reviewing ECB action and monetary policy, which should have been more than clear after the judgment in *Gauweiler*.[42]

In light of the FCC's awareness of these varying levels of deference, it is indeed somewhat remarkable that the German court found *Weiss* to be inconsistent with prior CJEU case law, especially since the court itself cited *Fedesa* in its analysis.[43] A possible reason for doing so, perhaps on principle, can be found in paragraph 142 of the judgment. Here, the FCC set out the normative reasons for the stricter proportionality test it proposed, albeit in descriptive terms:

> "where fundamental interests of the Member States are affected, as is generally the case when interpreting the competences conferred upon the European Union as such and its democratically legitimated European integration agenda (*Integrationsprogramm*), judicial review may not simply accept positions asserted by the

[37] *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69, [2015] 3 WLR 1665.

[38] BVerfG 32/2020 [126].

[39] ibid [146].

[40] Grainne de Búrca, 'The principle of proportionality and its application in EC law' (1993) Yearbook of European Law 105, 146.

[41] C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health* [1990] ECR I-04023, Opinion of AG Mischo [11].

[42] C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag* [2015] electronic Reports of Cases.

[43] BVerfG 32/2020 [126].

ECB without closer scrutiny".[44]

In other words, the FCC argued that the principle of conferral and the division of competences as found in the treaties are essentially superfluous when this division is not judicially monitored in a meaningful way. Indeed, it found that "it is imperative that adherence to the limits of the ECB's competence be subject to full judicial review".[45]

This assessment is again based on a descriptively incorrect examination of EU law. It has long been questionable to what extent, if at all, the principle of conferral is substantively monitored by the CJEU, especially given its bias towards further integration. The high level of deference afforded to EU institutions is, for example, evident in the monitoring of Article 114 TFEU. This provision allows measures to be taken provided they improve the functioning of the internal market. As Wyatt illustrates, the way in which Article 114 TFEU has been applied often leads to decisions arguably in breach of the EU's division of competences if read following the FCC's strict approach.[46] This is because improving the internal market under Article 114 automatically meets the requirements of Article 5(3) TEU, allowing EU bodies to legislate on measures that concern areas actually reserved for the national Member State level such as health.[47] This is the case even where such actually reserved interests are the predominant focus of a measure. Furthermore, in most cases, the CJEU rarely applies the constraining elements of subsidiarity and proportionality in a meaningful way, as the court does not actually examine the merits of measures' objectives and their impact on the national autonomy of States who do not wish to implement the measure.[48] Therefore, it is, again, surprising that the German court relied on Article 114 TFEU as evidence for the CJEU having conducted more thorough legal review in the past.[49]

In summary, the CJEU ruling in *Weiss*, albeit concerning monetary policy rather than Article 114 TFEU, does not indicate a shift in the court's methodology. It would seem the FCC overstepped the line between descriptive and normative analysis in its ruling and attempted to describe what it believed *ought* to be an appropriate review standard, rather than describing what the standard actually *is*. Indeed, more convincing reasoning would have been available to the German

44 ibid [142].

45 ibid [143].

46 Derrick Wyatt, 'Community Competence to Regulate the Internal Market' (2007) SSRN Electronic Journal.

47 Article 168(5) TFEU.

48 See C-210/03, *The Queen, on the application of Swedish Match AB, Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR I-11893 [31]; see also C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.* [2002] ECR I-11453 [62].

49 BVerfG 32/2020 [152].

court: it could, according to Garner, have argued that Article 4(2) TEU, which requires EU bodies to respect national and constitutional identity, was severely impacted by the PSPP, necessitating a second and more stringent review by the CJEU that went beyond its usually deferential approach.[50] However, whilst this analysis would have been based on a somewhat more accurate version of EU law, it is questionable to what extent it would have changed anything about the CJEU's first ruling and indeed any subsequent decisions. It was more than evident from the preliminary references in *Gauweiler* and *Weiss* that the constitutional court found its norms under attack by the ECB, concerns which were, nonetheless, dismissed by the CJEU.[51]

C. The justifiability of the FCC's concerns regarding the ECB's mandate

Even though CJEU ruling in *Weiss* was, as illustrated, not a "structurally significant shift",[52] the question is posed whether, in normative terms, the FCC judgment warrants further consideration. One can indeed contend that if proportionality is never applied strictly when concerning EU bodies, this risks jeopardising proportionality's function as a way to avoid national constitutional review trumping EU law, as illustrated by the clash in *PSPP*. Furthermore, there are indicators that stricter review of the boundary between monetary and economic policy may be warranted, especially given the latter is primarily reserved for the Member States.[53]

As noted by Högenauer and Howarth, the ECB has, since the outbreak of the sovereign debt crisis, gradually expanded its range of policies and pushed its role well beyond the role originally envisaged by the EU treaty provisions. As they point out, the purchase of sovereign debt, even limited, was incredibly controversial and led to an inherent politicisation of the ECB. Several members of the ECB Governing Council expressed concerns with the "nonconventional monetary policies", which for them stretched the boundaries of the ECB's

[50] Oliver Garner, 'Squaring the PSPP Circle: How a 'declaration of incompatibility' can reconcile the supremacy of EU law with respect for national constitutional identity' (2020) *VerfBlog*, 2020/5/22 <https://verfassungsblog.de/squaring-the-pspp-circle/> accessed 25 December 2020.

[51] For further discussion of the preliminary references and the indications of the collaborative relationship between FCC and CJEU eroding post-Gauweiler see Mark Dawson and Ana Bobić, '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.

[52] BVerfG 32/2020 [154].

[53] Article 5 TFEU.

mandate. Indeed, Bundesbank President Axel Weber and ECB Chief Economist Jürgen Stark resigned because of their opposition to these measures.[54]

The strongest indication that the FCC's concerns are justified is that Mario Draghi himself, the former ECB President, initially insisted that quantitative easing programmes were not legally permitted by the ECB's mandate. Not long before introducing exactly such measures, he responded to a question on the ECB's past refusal to engage with quantitative easing with the following:

> "[E]ach central bank has its institutional set-up, within which it operates. The ECB operates within the limits of the Treaty, and I said a moment ago what our primary mandate is, and especially what the Treaty says the ECB cannot do. I think any central bank is constrained by its institutional set-up. In the United States, as you know, the primary mandate of the Federal Reserve is completely different from ours. And the same is true of the Bank of England".[55]

In addition to this, whilst the ban on direct purchases of sovereign debt evaded scrutiny of Article 123 TFEU, Tuori rightly points out that the outcome of the PSPP is essentially the same as if the ECB had lent money directly: the "Eurosystem is now the largest holder of Member States' government bonds".[56] This may give rise to future conflicts of interest between the ECB's pursuit of its monetary aims, seeing as it is now inextricably tied to Member States' fiscal policy as a main creditor.[57] Such observation would seem to counter criticism made by Waltraud Schelkle, who noted that it is ironic that the FCC is questioning the limits of the ECB's independence – a principle which the German government had originally insisted upon.[58] This criticism becomes somewhat obsolete given that the ECB, as outlined, has moved beyond the original vision of its mandate,

[54] Anna-Lena Högenauer and David Howarth, 'Unconventional Monetary Policies and the European Central Bank's problematic democratic legitimacy' (2016) 71 Zeitschrift für öffentliches Recht, 438.

[55] Mario Draghi and Vítor Constancio, 'Introductory statement to the press conference (with Q&A)', (ECB press conference, 8 December 2011), <https://www.ecb.europa.eu/press/pressconf/2011/html/is111208.en.html> accessed 25 December 2020.

[56] Klaus Tuori, 'The ECB's quantitative easing programme as a constitutional game changer' (2019) 26(1) Maastricht Journal of European and Comparative Law 94–107.

[57] For further possible ramifications see ibid 104–107.

[58] Waltraud Schelkle, 'Who said Germans have no sense of irony?' (LSE Blog, 19 May 2020) <https://blogs.lse.ac.uk/europpblog/2020/05/19/who-said-that-germans-have-no-sense-of-irony/> accessed 25 December 2020.

making it questionable whether the depoliticisation of monetary policy as originally proposed by the German government is still "democratically viable".[59]

D. The practical impacts of the ruling and possible reasons for its outcome

Despite the fact that the FCC's concerns might be correct in principle, it did not, as noted, find the PSPP itself *ultra vires*, but agreed that its limits were sufficient to not constitute a breach of Articles 123 and 125 TFEU. One might question why, given the strong reservations and justifiable concerns articulated in the preliminary reference in *Gauweiler* as in *Weiss*, the FCC did not follow through on these concerns and force the Bundesbank to remove itself from the PSPP. Arguably, the FCC would have issued an injunction on the programme if it had been in the position of the CJEU in 2015.

If the FCC had, however, found the PSPP fully *ultra vires* and forced the Bundesbank to exit the programme at the time of its ruling in May 2020, it would have very likely risked the functioning of the Eurozone and the single currency. This is especially so given the COVID-19 pandemic had just begun, necessitating a whole new range of both monetary and fiscal policies. The judgment in May could have thus been the FCC's way of voicing disapproval of the ECB's policies and the lax monitoring of its mandate, without actually finding a result that could easily spell the end of the European Union. Under this view, even though the ruling initially seems to be a 'bite' rather than a 'bark' at the CJEU's methodology, it does not fully leave "the path of judicial rapprochement".[60] It could instead stand for a desire for increased transparency of ECB programmes, as well as a judicial review standard that gives actual meaning to the division of competences in EU law.

Speaking on the issue of conferral generally, a stricter review standard may indeed be warranted when EU law clashes with fundamental constitutional norms of national legal systems. Otherwise, the principle of conferral and the division of competences as found in the treaties are essentially meaningless. In relation to this, the FCC is correct in stating that the CJEU has itself "repeatedly emphasised the legitimizing function of judicial review",[61] which is why it might be valuable to

[59] Anna-Lena Högenauer and David Howarth, 'The democratic deficit and European Central Bank crisis monetary policies' (2019) 26(1) Maastricht Journal of European and Comparative Law 81–93.

[60] Andrej Lang, 'Ultra vires review of the ECB's policy of quantitative easing: An analysis of the German Constitutional Court's preliminary reference order in the PSPP case' (2018) 55 Common Market Law Review 923, 950.

[61] BVerfG 32/2020 [145]; see also C-518/07, *European Commission v Federal Republic of Germany* [2010] ECR I-01885 [42].

adopt a less deferential approach to treaty interpretation in the future. Craig has discussed how this could be done and, although his suggestions provide a valuable starting point in going forward, this article shall focus more on the specific area touched on in the *PSPP* ruling.[62]

With regard to the specific policy area of the case, namely monetary policy, Öberg suggests that a possible solution would be to give the ECB a wide discretion that does not impede its treaty-based independence, whilst also not granting an essentially limitless discretion. This would be in the form of a 'medium intensity' review standard, sitting between the deferential "manifestly inappropriate" test in *Phillip Morris Brand* and the very strict review standard in *Pfizer*.[63] However, while the FCC's concerns may be correct in principle, the CJEU is currently ill-suited to properly police the mandate of an institution such as the ECB. For example, as Lang correctly notes, the treaty provisions simply do not give much guidance on the scope of the ECB's mandate, and lack "the necessary tools to handle a sovereign debt crisis".[64] In addition, the disagreement within even the Governing Council of the ECB about the appropriate boundaries of monetary policy highlights the impossible task of objectively determining where the boundary between monetary and economic policy lies. Notwithstanding the constitutional implications that may arise from acknowledging this, it is simply not an objective and value-free question.[65]

Attempting to judicially review such questions regardless could indeed amount to the CJEU conducting essentially a second policy assessment, which would paradoxically reinforce criticisms of it as a 'policy-making' court with inherent biases.[66] This is especially likely in a supra-national context, where there are no agreed views on economic and monetary theory. Instead, as Maduro notes, *PSPP* suggests that the only way to avoid further constitutional clashes in relation to monetary policy is to strengthen European risk sharing and debt mutualisation via

[62] See Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395.

[63] C-547/14, *Phillip Morris Brands SARL and Others v Secretary of State for Health* [2016] electronic Reports of Cases; T-13/99, *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-03305; Jacob Öberg, 'The German Federal Constitutional Court's PSPP Judgment: Proportionality Review Par Excellence' (European Law Blog, 2 June 2020) < https://europeanlawblog.eu/2020/06/02/the-german-federal-constitutional-courts-pspp-judgment-proportionality-review-par-excellence/> accessed 25 December 2020.

[64] Tuori (n 55).

[65] For further discussion see Anne Marieke Mooij, 'The Weiss judgment: The Court's further clarification of the ECB's legal framework' (2019) 26(3) Maastricht Journal of European and Comparative Law 449, 465.

[66] As famously done by Hjalte Rasmussen in *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Kluwer Academic, 1986).

a strong fiscal union. Here, one could share risk "on the basis of limited liabilities",[67] authorised by national governments rather than the ECB. Crucially, this would be compatible with the FCC's requirements. Avbelj would support this notion as it reduces the need for the ECB to "[venture] with its monetary mechanisms into fiscal and hence democratic domains, for which it is neither competent nor accountable".[68]

It would seem that the ruling's true value, even if based on strained reasoning, is to illustrate the "shaky constitutional foundations on which the post crisis settlement rests".[69] Indeed, the case's "implicit call for a stronger economic pillar"[70] has arguably paved the way for exactly this fiscal union to emerge, irrespective of whether this was intentional or incidental. Since *PSPP*, there has been more impetus for EU Member States to adopt common fiscal approaches, witnessed in the ground-breaking Recovery fund agreement in July 2020, which shares risks under a scheme totalling €1.82 trillion.[71] Crucially, the ruling may have formed part of Angela Merkel's reasons for overstepping the traditional caution in German politics of introducing a fiscal union at the European level, in combination with the imminent need to handle the COVID-19 pandemic.

Simultaneously, the ECB has adopted a cautious approach, possibly in recognition that greater transparency and self-scrutiny may be advisable following the FCC's harsh criticism of its seemingly limitless mandate. For instance, it has followed its capital key on purchases under the new Pandemic Emergency Purchase Programme quite strictly, even though this programme has more flexible purchasing limits than the PSPP.[72] It has pursued the key limitations and others even more strictly than under the PSPP, which often missed these requirements,

[67] Miguel Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' (2020) *VerfBlog*, 2020/5/06 <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/> accessed 25 December 2020.

[68] Matej Avbelj, 'The Right Question about the FCC Ultra Vires Decision' (2020) *VerfBlog*, 2020/5/06 <https://verfassungsblog.de/the-right-question-about-the-fcc-ultra-vires-decision/> accessed 25 December 2020.

[69] Paul Dermine, 'The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union' (2020) European Constitutional Law Review 525, 551.

[70] ibid 551.

[71] Special meeting of the European Council (17, 18, 19, 20, and 21 July 2020) – Conclusions, EUCO 10/20.

[72] Jan von Gerich, 'ECB Watch: Was the ECB bluffing?' (Nordea Corporate, 2 June 2020) <https://corporate.nordea.com/article/57914/ecb-watch-was-the-ecb-bluffing/research/topic/en-majors> accessed 25 December 2020.

again indicating that it may have changed its buying patterns in light of the FCC ruling.

III. The *PSPP* Ruling and the Doctrine of Supremacy

Irrespective of the FCC's justifiable concerns and the positive developments since its *PSPP* ruling, its decision is nonetheless a direct attack on the CJEU's self-understanding as the final arbiter of EU law disputes and norm interpretation. This notion of the CJEU's well-known doctrine of supremacy was made clear both in *Costa v ENEL*[73] and in *Foto-Frost*,[74] and was hastily reiterated by the CJEU in a press release addressing the German court's judgment.[75]

A. The emboldening of autocratic states: hungary and poland examined

One specific danger in relation to the FCC attacking the CJEU's doctrine of supremacy was suggested by former Advocate General Maduro, who argued that the ruling would directly lead to the emboldening of autocratic states such as Hungary and Poland.[76] For Iñiguez, this potential risk indicates a strong need for the Commission to begin infringement proceedings against Germany under Article 258 TFEU, to find Germany in breach of EU law.[77] I would argue in response to Iñiguez that it is now unnecessary to issue infringement proceedings, given the situation has subsided. It is questionable why one would further test where the loyalties of the German institutions and public lie should a full-on clash arise, given that the response to this may not be favourable to the CJEU.

Equally questionable is Maduro's fear that the decision "may open the doors for open revolt" by Hungary and Poland. As noted by von Bogdandy and Spieker,[78] since 2012, multiple Hungarian laws "amounting to a larger illiberal turn" have been passed, including laws restricting academic freedom and framing institutions such as the Open Society Foundation or the Central European University as

[73] *Costa* (n 6) 593.

[74] 314/85, *Foto-Frost v Hauptzollamt Lübeck Ost* [1987] ECR 04199 [14]–[15].

[75] Court of Justice of the European Union, 'Press release following the judgment of the German Constitutional Court of 5 May 2020' (8 May 2020) Press Release No 58/20.

[76] Maduro (n 66).

[77] Guillermo Íñiguez, 'The Commission must bring enforcement proceedings against Germany' (The New Federalist, 7 May 2020) <https://www.thenewfederalist.eu/the-commission-must-bring-enforcement-proceedings-against-germany?lang=fr> accessed 25 December 2020.

[78] Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silence of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 406.

"enemies".[79] On the Polish side, similar observations are warranted: despite the CJEU's clear willingness to sanction Member State actions under Article 2 TEU, as witnessed in *Commission v Poland*,[80] the current Polish government has not stopped dismantling the independence of its judiciary – a process it started in November 2015.[81] In light of this, it is both illogical and far-fetched to suggest that the FCC's ruling substantively adds to already existing developments in both of these countries – developments which very much began and would have continued irrespective of the German court's findings.

B. *PSPP*'S TRUE IMPACT AND HOW THE EU MUST RESPOND

It is worth noting that the FCC is not unique in directly overruling a CJEU judgment, as the Danish court in *Ajos*[82] and the Czech court in *Landtová*[83] have shown. However, the ruling in *PSPP* could have, as noted, been more far-reaching by endangering the entire monetary union and consequently the EU as a whole. This can be distinguished from the rather minor policy areas dealt with in the Danish and Czech cases. This illustrates that the risk of "judicial Armageddon",[84] as feared by Dyevre back when *Landtová* was decided, is not over. Consequently, in addition to changes to the CJEU's review standard, different steps to those outlined in Section II.D. for the area of monetary policy are needed to resolve future clashes within the overall framework of EU law. Merely continuing the dialogue - albeit often interactive - between the CJEU and constitutional courts is not enough.

Arguably, the key to sustaining the coherence and consistent application of EU law will be to channel any constitutional tensions that might result in such cases into an orderly resolution mechanism, as well as to prevent, as far as possible, such tensions from initially arising. This is because, as Raz notes, the degree to which two legal systems can coexist depends on these systems not "containing too many conflicting norms",[85] or in this case even interpretations. One possible solution, recently proposed by Weiler and Sarmiento, is to create a mixed CJEU chamber

[79] European Parliament, Resolution of 17 May 2017 on the situation in Hungary, 2017/2656(RSP).

[80] C-619/18, *Commission v Poland* [2019] not yet published.

[81] 2020 Rule of Law Report, Country Chapter on the rule of law situation in Poland, European Commission, page 2, 30.09.2020; note also the Polish government's refusal to comply with the Court of Justice's interim relief order in Commission v Poland (C-791/19 R), the third time the CJEU granted interim measures to preserve the rule of law in Poland.

[82] C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* [2016] electronic Reports of Cases.

[83] C-399-09, *Marie Landtová v Česká správa socialního zabezpečení* [2011] ECR I-05573.

[84] Arthur Dyevre, 'The Czech Ultra Vires Revolution: Isolated Accident or Omen of Judicial Armageddon?' (2012) *VerfBlog*, 2012/2/29 <https://verfassungsblog.de/czech-ultra-vires-revolution-isolated-accident-omen-judicial-armageddon/> accessed 25 December 2020.

[85] Joseph Raz, *The authority of law: Essays on law and morality* (Oxford University Press, 1979), 118–119.

consisting of judges of the CJEU and of national constitutional courts to avoid clashes (as occurred in *PSPP*).[86]

This is, however, a rather protracted and bureaucratic option that would involve the creation of a new appellate body, which would be less politically feasible in light of the CJEU's emphasis on its status as the ultimate body for references and appeals.[87] A better solution can be found in Garner's proposal to introduce a mechanism that allows constitutional courts to issue declarations of incompatibility with CJEU interpretations and rulings, for which they could utilise the preliminary reference procedure, relying on Article 4(2) TEU.[88] As noted, this Article requires EU law to respect national identity and constitutional principles. Whilst it was argued in II.D. that this option would not necessarily lead to better results in the area of monetary policy, it provides the best option for the broader framework of EU law. This is because doing so would allow the CJEU to potentially revisit its rulings where such a declaration is made, thus more successfully preserving its supremacy claim whilst simultaneously giving weight to the considerations of national courts. Should the CJEU retain its initial interpretation, the declaration could, as Garner notes, trigger legislative procedures under Article 288 TFEU or amendments under Article 48 TEU.

Another possible benefit of such declarations, not discussed by Garner, is that they would simultaneously highlight a potential need for constitutional amendment within the concerned Member State, should the State be unable to garner support for EU legislative change or limited derogations. For instance, the (now) former President Voßkuhle of the FCC, who presided over the *PSPP* ruling, noted extrajudicially in 2010 that the German constitution would arguably need amendment for any further European integration, illustrating that national constitutional norms should not be taken as static when discussing constitutional clashes and the issues they give rise to.[89]

One issue not discussed by Garner is the question of liability for parties' legal costs as well as any particular losses they suffer from a national court's declaration of incompatibility, should the CJEU decline to reconsider its rulings. A simple solution to this might be to afford the CJEU a damage compensation

[86] Daniel Sarmiento and Joseph Weiler, 'The EU Judiciary After Weiss: Proposing A New Mixed Chamber of the Court of Justice' (2020) *VerfBlog*, 2020/6/02 <https://verfassungsblog.de/the-eu-judiciary-after-weiss/> accessed 25 December 2020.

[87] See *e.g.* CJEU's opinion on ECHR accession: Opinion 2/13.

[88] Garner (n 49).

[89] Andreas Voßkuhle in 'Mehr Europa lässt das Grundgesetz kaum zu' (Frankfurter Allgemeine Zeitung, 25 September 2011) <https://www.faz.net/aktuell/wirtschaft/konjunktur/vosskuhle-mehr-europa-laesst-das-grundgesetz-kaum-zu-11369184.html?printPagedArticle=true#pageIndex_3> accessed 25 December 2020.

scheme which would use the relevant Member State's EU budget to mitigate the impact the divergence of the national legal order has on litigants: the plaintiffs would receive damages from the CJEU, which would cover all cases in which monetary losses occur or where non-monetary losses can adequately be remedied by monetary compensation. Notably, this should not require additional costs and proceedings against Member States as in the case of *Francovich*-type liability, since a clear, intended, and explicit divergence from CJEU rulings arguably constitutes a 'sufficiently serious' breach of EU law on its own.

In addition, one could secure preventive rather than reactive mechanisms by introducing a type of pre-judicial dialogue forum between the CJEU and national constitutional and supreme courts, as suggested by former CJEU Judge da Cruz Vilaça.[90] This would be analogous to the Early Warning System that exists for national parliaments and allows for political monitoring of the subsidiarity principle.[91] It would provide "a constructive role on a preventive basis, affording the Court of Justice the possibility of hearing the voices of a representative number of constitutional and supreme courts before taking its decision on important and delicate constitutional issues".[92]

IV. Conclusion

This article has shown that the FCC's overruling of *Weiss* was based on an unconvincing and in part simply false comparative law analysis, as well as a descriptively incorrect analysis of European case law on proportionality. However, the case did outline justified concerns regarding the ECB's mandate. These concerns cannot be resolved by stricter judicial review, but rather by strengthening a fiscal union at the European level. The ruling has arguably paved the way for this constitutionally sound option to proceed, making the ECB's intrusion on fiscal policy less likely in future.

With regard to the doctrine of supremacy, it is undeniable that the ruling attacks the absolute supremacy claim of the CJEU as espoused in *Costa v ENEL*. To reduce the risk of constitutional clashes, a preventive forum as well as reactive declarations of incompatibility should be introduced, providing a comprehensive framework that channels any potential for constitutional clashes into an orderly resolution system. This should be done whilst simultaneously securing an

[90] José Luís da Cruz Vilaça, 'The Judgment of the German Federal Constitutional Court and the Court of Justice of the European Union – Judicial Cooperation or Dialogue of the Deaf?' (5 August 2020). <https://www.cruzvilaca.eu/en/news/The-judgment-of-the-German-Federal-Constitutional-Court-and-the-Court-of-Justice-of-the-European/99/> accessed 25 December 2020.

[91] See Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[92] European Commission (n 90).

appropriate degree of legal certainty for litigants by virtue of a new compensation scheme, tied to Member States' budgets. Such a framework would allow the CJEU to maintain a mostly uniform application of EU law and insist on its supremacy claim on paper, whilst not ignoring the potential for future constitutional clashes with national courts.