Name: Philipp Rademann

Student Number: RDMPHI002

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A critical reflection on the judgement of the Federal Constitutional Court of Germany on the European Central Bank's Public Sector Purchase Programme: *ultra vires review* and the primacy of European Law.

Supervisor: Nurina Ally

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A critical reflection on the judgement of the Federal Constitutional Court (FCC) of Germany on the European Central Bank's (ECB) Public Sector Purchase Programme (PSPP): *ultra vires review and the primacy of European Law.*

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I INTRODUCTION

After the financial crises in 2008, the European Union (EU) and its fairly young monetary union were facing their first existential monetary crisis. Several Member States predominantly in southern Europe were hit particularly hard. Due to the consequences of the financial meltdown and insufficient funding of public households these Member States were simply unable to receive financing on the capital market. In the so-called sovereign debt crisis some states, first and foremost Greece, ended up practically insolvent.[1] According to Article 127 (2) and Article 1 of the Treaty on the Functioning of the European Union (TFEU), the European Central Bank (ECB) has the sole power to *'define and implement the monetary policy of the Union'* and therefore members of monetary union are prevented from individually 'printing and creating' their own money for servicing financial obligations. Hence in 2010, the ECB started purchasing government bonds issued by distressed Member States.[2] This practice of purchasing government bonds has for a long time been deemed by some voices as transgressing the ECB's competence[3] or at least being on the verge of it.[4]

The TFEU mandates the ECB in Article 127 (1) to *'pursue price stability and, without prejudice to this objective, to also support the general economic policies of the EU.'*[5] Still, the ECB must prioritize price stability over all other macroeconomic policies and must design all of its policies such that they can be accounted for and legitimised with the price stability mandate.[6] Another provision of the TFEU, namely the prohibition of monetary financing in Article 123, constrains the ECB's policies. It states that the ECB is not allowed to grant *'overdrafts or any other type of credit facilities'* to public entities and is also forbidden from directly purchasing *'debt instruments'* from these public entities.[7] Consequently, critics of government-bond purchasing have argued that the practice oversteps the ECB's mandate[8] as well as violates the prohibition of monetary state financing.[9]

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[1] Aneta B Spendzharova & Esther Versluis. *'When 'Good Enough' Does Not Suffice: The Impact of Crisis on Institutional Change in European Financial Sector Governance' Studia Diplomatica*, 67(2), 2014, pp. 7.
[2] On the basis of the Securities Markets Programme (SMP), which ran from May 2010 to September of 2012 and also included private securities.
[3] Dietrich Murswiek, '*ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014*.' German Law Journal, 15(2), 2014, p. 147.
[4] Udo Di Fabio, '*Karlsruhe Makes a Referral*.' German Law Journal, 15(2), 2014, p.110.
[5] Domenico Lombardi & Manuela Moschella, '*The government bond buying programmes of the European Central Bank: an analysis of their policy settings*,' Journal of European Public Policy, 23(6), 2016, p. 855.
[6] Ibid., p. 855.
[7] Art. 123 TFEU; for discussion on Art. 123 TFEU see: Domenico Lombardi & Manuela Moschella (2016) *The government bond buying programmes of the European Central Bank: an analysis of their policy settings*, Journal of European Public Policy, 23(6), 2016, p. 855
[8] Dietrich Murswiek, '*ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014*.' German Law Journal, 15(2), 2014, p. 147.
[9] Ibid., p. 152.

Following the ECB's decision in March of 2015 to continue the purchase of government bonds based on the Public Sector Purchase Programme (PSPP), some particularly vocal critics[10] of the ECB's practice lodged a constitutional complaint against that decision to the German Federal Constitutional Court (FCC).[11] The FCC suspended the proceedings and submitted the case to the European Court of Justice (ECJ), asking for a preliminary decision. In December of 2018, the ECJ ruled that the purchase of government bonds by the ECB conducted on the basis of the PSPP does not exceed its mandate outlined by EU Law.[12] Conversely, in May of 2020, the FCC adjudicated the case and held that the ECB's decision does exceed its competence conferred upon it by EU primary law.[13] The FCC required the Federal Government and the Parliament of Germany to take measures to assure that the ECB conducts an effective proportionality test concerning the PSPP within three months after the judgement.[14] In June of 2020, the ECB did provide a proportionality review as required.[15] The German government and policymakers[16] deemed its merits as sufficient, and the FCC is not expected to comment further on the matter.[17] While most complainants filed an application to obtain the documents revealed to the German Institutions and possibly prepare another lawsuit,[18] this application was dismissed on 29 April 2021. In the decision, the FCC held that no legal consequences are looming because the German government and Parliament substantially assessed and appraised the decisions taken by the ECB Governing Council following the judgement of 5 May 2020.[19] Nonetheless, on 8 June of 2021, the EU started infringement proceedings against Germany.[20]

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[10] Peter Gauweiler, Heinrich Weiss, Dietrich Murswiek, Markus Kerber, Bernd Lucke and Christoph Degenhart are among scholars and former politicians in Germany who have previously sued the ECB on its bond-buying -programme before (in the Outright Money Transactions (OMT) case which will be referred to later) and are partly again participating on the proceedings that ended with the FCC judgement from 5 May 2020.

[11] Constitutional Complaint to the Federal Constitutional Court of Germany of 22 October of 2015, *Gauweiler, Weiss and other v. European Central Bank.*

[12] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17.

[13] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15.

[14] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 232.

[15] Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main on 3-4 June 2020. (https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html).

[16] They accepted the reasons on 2 July 2020; Andreas Rinke, *'ECB stimulus plan meets court requirements: German finance minister'* 29 June 2020, U.S. Markets REUTERS (https://www.reuters.com/article/us-ecb-policy-germany/ecb-stimulus-plan-meets-court-requirements-german-finance-minister-idUSKBN2401OX).

[17] Gunnar Beck, 'The impartial court of the ECJ, the dismantlement of the EU's separation of powers has wider implications, especially for the U.K.', 31. August 2020, The Critic (https://thecritic.co.uk/the-imperial-court-of-the-ecj/) para. 15.

[18] Application for an order pursuant to § 35 BVerfGG (code of procedure for cases before the FCC), 2 BvR 1651/15, Aug. 5, 2020, https://bit.ly/36xv8A3; Stefanie Egidy, *'Proportionality and procedure of monetary policy-making' International Journal of Constitutional Law*, 19(1), 2021, p. 285.

[19] FCC (BVerfG) Order of 29 April 2021, 2 BvR 1651/15, para. 108.

[20] David R Cameron, *'EU starts infringement procedure against Germany over 2020 Court decision'* 10 June 2021, The Whitney and Betty MacMillan Center for International and Area Studies at Yale; 'June infringements package' https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743.

In this paper I explain the background to this unfortunate predicament by setting out the framework of EU primary law in part 1, followed by a broad overview of the economic circumstances of government bonds and the PSPP in part 2, I then proceed, in part 3 to 5, to analyse the judgements of both the ECJ and FCC and its ramifications, with a focus on the question of *ultra vires* and the primacy of European Law. I argue that the high threshold for pronouncing an EU act *ultra vires* established by the FCC was simply not reached in the present case. A threshold that essentially requires a blatant disregard for the pertinent law can hardly be fulfilled by a highly debated and complex issue that scholars have been arguing about for more than a decade. Therefore, I suggest that the FCC chose an unsuited case for affirming the *Ultra Vires* Review (hereinafter referred to as UVR) for the first time. Additionally, the judgement completely disregards the primacy of EU law, and in that not only questions the equality of EU Members but ultimately jeopardises one of the most crucial principles of the Union.

II BACKGROUND

A PRINCIPLES IN EUROPEAN PRIMARY LAW

EU primary law consists of the Treaty of the European Union (TEU) and the TFEU. The *principle of conferral*, fundamental to EU law, as set out in Article 4 (1) TEU and Article 5 (2) TEU. According to this principle, the EU is entitled to exercise only those competences that have been voluntarily conveyed onto it by its Member States.[21] Competences not conveyed to the EU in the Treaties remain with the Member States. The TFEU differentiates between areas of exclusive competence for the EU,[22] as well as sectors of shared competence between the EU and its members.[23] According to Article 3 (1) c and Article 127 (2) TFEU, the EU holds the exclusive competence for monetary policies exercised through the ECB.

The *principle of primacy*, although not explicitly mentioned in the treaties, states that EU law generally takes precedence over conflicting national law.[24] The *principle of subsidiarity* essentially safeguards the ability of Member States to take actions and decisions in areas of

[21] Gerard Conway, '*Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ'*. German Law Journal, 11(9) 2010, p. 966.
[22] Art. 3 TFEU.
[23] Art. 4 TFEU.
[24] Justin Lindeboom, '*Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment'* German Law Journal, 21(5), 2020, p. 1032.

shared competences.[25] According to this principle, the EU may intervene only and insofar as the intentions of an act cannot be adequately accomplished by the Member States, but be better attained on the Union Level, 'by reason of the scale and effect of the proposed action.'[26] The *principle of proportionality* also regulates how the EU exercises its powers; in essence requiring that measures endorsed by EU institutions do not exceed the limits of what is necessary and appropriate to accomplish the Treaties objectives.[27] These principles are a reflection of the will of both the EU and the Member States to ensure the national identity of the Unions members.[28]

Aligned with these principles the ECB's competences are stipulated in Art. 282 and Art. 127 TFEU. Art. 282 (1) first sentence TFEU outlines how the ECB together with the national central banks create the European System of Central Banks (ESCB).[29] According to Article 127 (1) TFEU, *'the primary objective of the ESCB shall be to maintain price stability'* and one of the basic tasks of the ESCB is to *'define and implement the monetary policy of the Union.'* As already mentioned at the beginning of this paper, according to Art. 127 (1) second sentence, the ESCB *'shall also support the economic policies of the Union'*, however *'without prejudice to the objective of maintaining price stability.'* Since the ESCB is primarily tasked with maintaining price stability as the main objective of monetary policy, the question arises whether the purchase of government bonds is aimed at maintaining price stability and thus remains within ESCB's primary mandate.

B THE PSPP – PUSHING THE BOUNDARIES OF MONETARY POLICY?

As a part of the ECB's 'Asset Purchase Programme' (APP),[30] one of many quantitative easing policies by the ECB, the PSPP aimed at purchasing public sector bonds and thus facilitates financial and monetary conditions of the Member States while simultaneously returning to an inflation rate of close to 2%.[31] Whether the PSPP serves as a monetary policy instrument and merely supports economic policy or in fact goes further and is primarily an economic measure has been a key point of tension.

[25] Eeva Pavy 'Fact Sheets on the European Union – The Principle of Subsidiarity' (February 2020); Article 5 (3) TEU.
[26] Ibid.; Art. 5 (1) TEU.
[27] *Case Marine Harvest ASA v European Commission* ECJ (2017), para. 5; Art. 5 (4) TEU.
[28] Art. 4 (2) TEU; cf. the Protocol On The Application Of The Principles Of Subsidiarity And
[29] While the decision-making primarily takes place in the governing council of the ECB, the execution of monetary policies etc. is usually conducted through all the central banks, namely the ESCB.
[30] The Asset Purchase Programme also included the corporate sector purchase programme, the asset-backed securities purchase programme and the third covered bond purchase programme.
[31] Paul Dermine, '*The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union*,' European Constitutional Law Review, 16, 2020, p. 527.

The PSPP was implemented and organised by Decision 2015/774 of the ECB Governing Council.[32] According to the ECB, the APP belongs to an assortment of atypical monetary policy measures.[33] Under the PSPP the Eurosystem carried out net purchases of public sector securities between 2015 and 2019.[34] In contrast to the ECB's Securities Market Programme (SMP) from 2010 to 2012, under the PSPP national central banks only purchase eligible securities of central, regional or local issuers of their jurisdiction and in particular issued by their government.[35] As with the SMP and the Outright Monetary Transaction (OMT) Programme, the PSPP gives full discretion over the design features of the programme to the ECB.[36]

Foremost the PSPP became known for its government bond[37] purchasing programme. Whether the purchase of government bonds is legal under EU law is highly contested, the regulation at the centre of this discussion is Article 123 (1) TFEU, which states:

> *'Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as "national central banks") in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase* ***directly*** *from them by the European Central Bank or national central banks of debt instruments.(Emphasis added)'*

This provision entails the prohibition of monetary state financing, and it explicitly prohibits the direct purchase of government bonds on the primary market.[38] The primary market is where shares or bonds are issued to finance companies or governments.[39] Investment banks buy the securities, with demand determining the quantity of securities.[40] Subsequently, they

[32] Official Journal of the European Union (2015) L121/20.
[33] https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html
[34] Ibid.
[35] Paul Dermine, '*The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union*,' European Constitutional Law Review, 16, 2020, p. 528.
[36] Domenico Lombardi & Manuela Moschella, '*The government bond buying programmes of the European Central Bank: an analysis of their policy settings*,' Journal of European Public Policy, 23(6), 2016, p. 864.
[37] Bonds are one of the most important asset classes on the world's stock exchanges. Bonds are small loans: investors lend capital to a government or a company for a certain period and receive interest in return. Bonds issued by companies are called corporate bonds, while bonds issued by governments are called government bonds.
[38] Silke Tober, '*Monetary Financing in the Euro Area: A Free Lunch?'* Intereconomics Review of European Economic policy, 50(4), 2015, p. 216.
[39] Brian Beers, 'A look at Primary and Secondary Markets', Investopedia < https://www.investopedia.com/investing/primary-and-secondary-markets/> accessed on 28 August 2021.
[40] Ibid.

ensure that the securities are tradable so that investors can subscribe to them - on the secondary market.[41] As soon as the market launch is completed, the actual trading and thus the price adjustment takes place on the secondary market. The prices are set by the initial holders, the banks.

Hence, the dispute about the legal permissibility of a bond purchase program by the ECB and the rationale behind it comes into focus: Prices for securities are determined by supply and demand namely the buying behaviour of investors on the secondary market. If the ECB were now to buy government bonds on the primary market, it would forestall the price-building process, because the natural interplay of supply and demand is taken away. Purchasing government bonds on the primary market would constitute monetary government financing because the government could simply issue their securities, the ECB would purchase them, and the central bank's money would end up in the bank accounts of EU Members. While this practice is forbidden by Art. 123 TFEU, the PSPP practice of secondary market purchases aims at benefitting the Member States through the backdoor. Since an interest rate serves as a remuneration for the risk that the security holder will not get their money's worth and interest rates generally indicate *inter alia* the default risk of a security as well as their transferability, tradeability, and saleability, they are crucially influenced by a bulk buyer on the secondary market. Ultimately, the PSPP significantly increases the likelihood of finding a buyer on the secondary market (most likely the ESCB). Therefore, a government bond becomes less of a risky investment, which lowers the interest rate.[42] This, however, has a knock-on effect on the primary market since the interest rates between the two markets obviously interlink. Vice versa the issuing Member States do not have to pay such high-interest rates in order to find institutional buyers on the primary market because within the capital market these bonds have become a more secure investment. This inevitably pushes down the interest rate on the secondary market. Subsequently, lower interest rates on the secondary market enable a sovereign to offer an equally lower interest rate with new issues on the primary market. To sum up, the PSPP aims at creating a capital market that deems government bonds of EU Member States as a secure investment and therefore enables the Member States to obtain financing for significantly better and cheaper conditions. The entrance of a bulk buyer benefits the Member States without them receiving any direct money from the ESCB.

Since this practice is so influential it is questionable whether the PSPP serves only to support economic policies, as Article 127 (1) TFEU lays out or indeed exceeds the limits of its

[41] Ibid.
[42] This particularly benefits Member States with a high credit rating, meaning whose governments bonds are normally attached with a high interest rate (e.g. Greece, Italy, Portugal or Ireland)

primarily monetary mandate. By buying government bonds from national banks, the ECB increases the amount of money in circulation, raises the inflation rate and therefore acts in the field of monetary policy. However, as described before, governments and companies also benefit economically when the ECB acts as a bulk buyer of their securities on the market, simply because they do not have to offer such high-interest rates and can obtain fresh money rather cheaply. The delimitation between monetary and fiscal (economic) policies calls Article 123 TFEU into play. Certainly, monetary policy cannot exist without fiscal policy side effects; they are like Siamese twins. But even the best monetary policy must be able to defend itself against the accusation that it is disguised state financing. According to the ECJ decisions in Gauweiler[43] and Weiss,[44] a key criterion for the compatibility of monetary policy measures with Article 123 TFEU is the fact that issuers cannot assume with certainty that they will already be able to get rid of their paper to the ECB. In the case of PSPP, the ECB determines certain lock-up periods for the purchase of newly issued paper for this purpose.[45] Since it is crucial for compliance with the ECJ jurisprudence that the lock-up periods remain unknown to the public, which intentionally results in uncertainty about the ability to pass on government bonds to the ESCB, the ECB keeps the duration and the details of the lock-up periods a well-guarded secret.

III THE ECJ AND THE FCC AT ODDS

A THE CONSTITUTIONAL COMPLAINT IN GERMANY

The group of complainants against the PSPP consisted of scholars of law, economics and finance, as well as former and current politicians of conservative and partly right-wing fringe parties, who are all united in scepticism of the EU.[46] The complainants argued that the decision to implement the PSPP[47] amounted to an act *ultra vires* to EU law on the basis that it failed to monitor the distribution of competences between the Union and its members laid out in Art. 119[48] read together with the scope of the ECB's mandate set out in Articles 127 (1), (2) TFEU. The complainants also submitted that the impugned decisions infringed Art. 123 TFEU

[43] *Gauweiler and others v Deutscher Bundestag*, ECJ Judgement of 16 June 2015, Case C-62/14, para. 104.
[44] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17, para. 110.
[45] Recital 4 to the decision of the ECB governing council to implement the PSPP (decision 2015/774).
[46] Heinrich Weiss, Dietrich Murswiek, Markus Kerber, Bernd Lucke and Christoph Degenhart (note 9 above) were again among the complainants; all in all, there were 1.734 complainants participating in these proceedings.
[47] The Complaint was precisely aimed at the ECB's board decision of 22 January 2015 to implement the APP, which contained especially the decision to implement the PSPP.
[48] Which sets out in paragraph 1 *inter alia* as an activity of the EU and its Member States the adoption of an economic policy, which is based on close coordination of the Member States' economic policies; in paragraph 2 *inter alia* the conduct of a single monetary policy, which main objective is supposed to be price stability and, without prejudice to this objective, to support the general economic policies in the Union.

and subsequently violated the *'principle of democracy'* enshrined in Art. 38 of the German constitution (Basic Law) and the constitutional identity of Germany.[49] Since actions of European institutions are not justiciable in German courts, the complainants claimed that the German government was violating the complainants right enshrined in Article 38 Basic Law by omitting to take any actions against the programme, in particular not filing a lawsuit to the ECJ.[50] Since the FCC essentially has no jurisdiction over EU law,[51] claiming a violation of Article 38 Basic Law was the only procedural avenue the complainants could take in order to gain access to the court; absent any merits to this argument, the claim would have probably thrown out as inadmissible.

Although the ECJ has the final say over EU legal matters, the FCC implemented the groundwork for the *'ultra vires'* doctrine in its Maastricht judgment.[52] The doctrine aims at holding EU activities accountable to the provisions of the Treaties.[53] The judgement essentially states that only the EU treaties have been legitimized by national parliaments and therefore any act in violation of the treaties impairs the 'principle of democracy.'[54] The judgement was a ruling on the Maastricht Treaty's (TEU) compatibility with the German Constitution (Basic Law), in which the FCC emphasized that any transmission of power to the EU needs to be ratified by parliament.[55] Hence, the FCC reserves for itself the mandate to evaluate whether EU institutions have overstepped their treaty-given powers.[56] In the latter case, EU actions are no longer encompassed by German ratification law, thus *ultra vires* and ultimately not binding in Germany.[57]

However, according to Art. 263 TFEU the ECJ as the judiciary body of the Union holds the competence and jurisdiction to pronounce on all matters of EU law, including the legality of actions of the ECB. This provision in conjunction with Art. 267 TFEU obliges and entitles domestic courts to refer cases, which require an interpretation of EU law, to the ECJ for a

[49] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17, para. 14.
[50] Ibid., para. 14; *Heinrich Weiss and Others v Germany,* FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 98-105.
[51] Cf. Article 93 Basic Law for the different proceedings the FCC does have jurisdiction on.
[52] *Maastricht* Judgment, FCC (BVerfG) Judgement of 12 October 1993 - 2 BvR 2134/92, 2 BvR 2159/92; Domenico Lombardi & Manuela Moschella, '*The government bond buying programmes of the European Central Bank: an analysis of their policy settings*,' Journal of European Public Policy, 23(6), 2016, p. 861.
[53] Domenico Lombardi & Manuela Moschella, '*The government bond buying programmes of the European Central Bank: an analysis of their policy settings*,' Journal of European Public Policy, 23(6), 2016, p. 861.
[54] Ibid., Headnote 3 a).
[55] Hoai-Thu Nguyen and Merijn Chamon, '*The ultra vires decision of the German Constitutional Court - Time to fight fire with fire?*' Jacques Delors Centre (Hertie School), 2 June 2020, p. 5.
[56] Hoai-Thu Nguyen and Merijn Chamon, '*The ultra vires decision of the German Constitutional Court - Time to fight fire with fire?*' Jacques Delors Centre (Hertie School), 2 June 2020, p. 5.
[57] Ibid., p. 5.

preliminary ruling. Correspondingly, the FCC as the subsidiary judicial body referred the case at hand onto the ECJ and asked *inter alia*[58] the following questions:

(1) 'Does the current version of decision 2015/774[59] *infringe Art. 119 and Art. 127 (1) and (2) TFEU … because it exceeds the monetary policy mandate of the ECB laid down in those provisions and a) for that reason encroaches on the upon the competences of the Member States or b) is disproportionate because of its volume and implementation period?'*

(2) 'Does the decision infringe Art. 123 (1) TFEU?'

B THE ECJ JUDGEMENT OF 11 DECEMBER 2018

On 11 December of 2018, the ECJ ruled on the matter and held that the PSPP programme does not infringe on EU law.[60] The questions raised by the FCC were found not to be affecting the validity of the programme.[61]

The ECJ tackled the key issue regarding the ECB's competences since the FCC had asked whether the PSPP decision remains within the ambit of the ECB' mandate, defined by EU primary law. Firstly, the ECJ laid out the foundation for the power of the ECB.[62] Thereafter, the court emphasised that the TFEU does not clearly define monetary policy but specifies the objectives[63] and the instruments[64] of monetary policy and the instruments available to implement that policy.[65] Although the Treaties do not clarify how that objective is supposed to be concretely expressed and quantified,[66] the court has ruled that to evaluate whether a measure falls in the field of monetary policy one has to assess the objectives of that measure.[67] Correspondingly the ECB had stated in recital 4 to the impugned decision that the primary objective was the contribution to a return of inflation rates to levels below but close to 2%.[68] According to the ECJ, it is not apparent that the specification of the objective of maintaining

[58] While there were various issues referred to the ECJ, this paper is primarily concerned with the matter of decision 2015/774 potentially exceeding competences, the proportionality of the decision and the prohibition of monetary financing.
[59] Decision 2015/774 is the name of the decision of the ECB's governing council to implement the PSPP.
[60] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17.
[61] Ibid., para. 158.
[62] Ibid., paras. 47, 48; according to the Art. 3 (1)(c) TFEU and Art. 282 (1), (4) TFEU the Union/ESCB holds the exclusive competence for monetary policy and is conducting measurements and tasks in accordance with Articles 127 to 133 and Art. 138 TFEU.
[63] Art. 282 (2) TFEU.
[64] Art. 127 (2) TFEU.
[65] Ibid., para. 50; *Pringle v Government of Ireland*, ECJ Judgement of 27 November 2012, Case C-370/12, para. 53; *Gauweiler and others v Deutscher Bundestag*, ECJ Judgement of 16 June 2015, Case C-62/14, para. 42.
[66] Ibid., para. 55.
[67] Ibid., para. 53.
[68] Ibid., para. 54.

price stability was impaired by a *'manifest error of assessment'*[69] and encroaches upon the foundation established by the TFEU[70] and therefore the specific objective established in recital 4 of decision 2015/774 can be linked to the primary objective of the EU's monetary policy.[71] According to the Court, a monetary measure regularly results in economic effects as well, thereby indirect economic side effects cannot lead to a transgression of its mandate.[72]

The ECJ also found the PSPP to be proportionate with the objectives of monetary policy.[73] The principle of proportionality obliges EU acts to be suitable for accomplishing the legitimate goal pursued and should not encroach on what is needed to attain those objectives.[74] Since the ECB generally has to render technical decisions, undertakes complicated projections and evaluations, it must therefore be afforded a wide margin of discretion.[75] The ECJ argued that the ECB has submitted documents concerning decision 2015/774 from which a risk of declining prices and deflation can be deduced.[76] At the time of the decision, the inflation rate was simultaneously far below the fixed target of 2% or even sometimes negative.[77] The ECB has also referred to various other central banks and cited numerous studies, that have *inter alia* indicated that abundant government bonds purchases can contribute to attaining the inflation target set.[78] Therefore, according to the ECJ, the PSPP does not manifestly surpass what is needed to fulfil that objective.[79] Moreover, since the ECB had prior to decision 2015/774 already been purchasing private-sector assets in large numbers, the objective could not have been reached by any other form of monetary measure that involved less action or less ESCB money.[80] Since the ECB had repeatedly extended the PSPP programme after verifying that the objective had not yet been achieved,[81] the ECJ held that the extensions did not go beyond what is needed to attain the objective sought.[82] Furthermore, the court found that the ECB argued plausibly that the efficacy of such a programme depends on its large volume and on the long periods in which the assets are being held.[83] To sum up, by taking all the information provided

[69] Which could have resulted in disproportionality, cf. Ibid. para. 78.
[70] Ibid., para. 56.
[71] Ibid., para. 57.
[72] Ibid., para. 66, 70.
[73] Ibid., para. 70.
[74] Ibid., para. 72; Darren Harvey, *'Federal Proportionality Review in EU Law: Whose Rights are they Anyway?'*, Nordic Journal of International Law, 89(3-4), 2020, p. 307.
[75] Ibid., para. 73; *Gauweiler and others v Deutscher Bundestag*, ECJ Judgement of 16 June 2015, Case C-62/14, para. 68.
[76] Ibid., para. 74.
[77] Ibid., para. 75.
[78] Ibid., para. 77.
[79] Ibid., para. 79.
[80] Ibid., para. 81.
[81] Ibid., para. 85.
[82] Ibid., para. 86.
[83] Ibid., para. 90.

to the court as well as the broad discretion enjoyed by the ECB into account the ECJ concluded that a government bond purchasing programme of '*either more limited volume or shorter duration'* would have not brought about the changes in the inflation rate '*as effectively and rapidly as the PSPP*.'[84]

Moreover, the Court found that the PSPP does not infringe the prohibition of monetary financing in Art. 123 TFEU.[85] While Article 123 TFEU prohibits all kinds of financial assistance to the Member States, it does prohibit the ESCB from buying bonds from creditors of a Member State.[86] The latter, said the ECJ, can simply not be compared with affording financial assistance to a Member State.[87] For the government bond purchasing programme to remain outside of the ambit of Art. 123 TFEU the ECJ itself has set out two limits for the ESCB.[88] First, the ESCB must avoid conditions under which the purchase could effectively be equated to the direct purchase of public bonds.[89] Secondly, the ESCB must implement adequate safeguards to make sure that the intervention does not clash with the prohibition of monetary financing and does not impair the Member States' impetus to follow a sound budget.[90] Regarding the alleged equation of the PSPP and direct government bonds, the ECJ held that the PSPP complies with Art. 123 TFEU as long as potential buyers of government bonds on the primary market could not be sure to find the ESCB as a definitive buyer within a certain period under conditions would '*allow those market operators to act as de facto intermediaries for the ESCB.*'[91] Although certain foreseeability is intended in order to foster the effectiveness and proportionality of the programme,[92] the ECJ emphasised that the ESCB has implemented a blackout period in Article 4 of decision 2015/774 which ensures that bonds emitted by a Member State cannot be immediately purchased.[93] The 'blackout period' describes a minimum stretch of time that has to expire between the primary market emission of a bond and the acquisition of that bond by the ESCB on the secondary market.[94] According to the ECJ, since the duration of that period is not specified and not published it does not give operators the confidence that the ESCB will be conducting purchases very shortly thereafter. [95]

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[84] Ibid., para. 92.
[85] Ibid., para. 158.
[86] Ibid., para. 103.
[87] Ibid., para. 104.
[88] Ibid., para. 105.
[89] *Gauweiler and others v Deutscher Bundestag*, ECJ Judgement of 16 June 2015, Case C-62/14, para. 97.
[90] Ibid., paras. 100 to 102 and 109.
[91] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, C-493/17, para. 110.
[92] Ibid., para. 112.
[93] Ibid., para. 114.
[94] Paul Dermine, '*The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union'*, European Constitutional Law Review, 16, 2020, p. 528.
[95] Ibid., para. 115.

The ESCB has also implemented further safeguards which serve to avert private operators from anticipating PSPP purchases. Although the ESCB publishes the total quantity of bonds purchased by the PSPP, it does not reveal particular numbers for a given month and thereby holders of government bonds cannot be certain to find a buyer on the secondary market in the foreseeable future.[96] Secondly, the PSPP guidelines do not allow a certain deduction of the number of actual purchases assigned to a domestic central bank.[97] Additionally, the PSPP contains purchases of diversified securities which limits the possibility to determine the nature of the purchases conducted by examining the monthly purchase target.[98] Finally, the PSPP stipulate that the ESCB must not buy more than 33 % of a Member State government bonds[99] and hence does not decrease the motivation to follow a sound budgetary policy.[100] The court stated further that an open market operation always affects interest rates and refinancing conditions, which automatically impacts the financing conditions of the Member States.[101] Moreover, the programme is intended only to be implemented until a sustained adjustment is seen in inflation rates[102] and therefore the programme's temporary nature is not likely to lead to unsound budgetary practices or simply not following a sound budget.[103]

In conclusion, the ECJ found no violation of EU law in any of the questions asked by the FCC.

C THE FCC JUDGEMENT OF 5 MAY 2020

In May of 2020, the German Constitutional Court held that the decisions to implement the PSPP, as well as the approving ECJ decision from 2018, were *ultra vires*.[104] In its judgement, the court first undercut the affirmation of the ECB's decision by the ECJ.[105] In terms of rejecting the 'stamp of approval,'[106] the FCC held that the ECJ judgement '*manifestly fails*

[96] Ibid., para. 118
[97] Ibid., para. 120.
[98] Ibid., paras. 121, 122.
[99] Ibid., para. 124.
[100] Ibid., para. 138, 141.
[101] Ibid., para. 130.
[102] Ibid., para. 133.
[103] Ibid., paras. 134, 135.
[104] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 163, 165, 178.
[105] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 119; Dimitrios Kyriazis, '*The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango*', 6 May 2020, https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/.
[106] Dimitrios Kyriazis, '*The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango*', 6 May 2020, https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/.

to give consideration to the importance and scope of the principle of proportionality (Art. 5(1) second sentence and Art. 5(4) TEU), which also applies to the division of competences, and is no longer tenable from a methodological perspective given that it completely disregards the actual effects of the PSPP.'[107] The FCC describes these effects later in the judgement as *'economic and social effects on all citizens, who are shareholders, tenants, real estate owners, savers or insurance policy owners.'*[108] The FCC denounced the ECJ's proportionality review as simply not satisfying the obligations of a coherent and plausible review on whether the ECB abided by the restrictions of its monetary mandate.[109] According to the FCC, by simply accepting the declared objectives of the ECB as the case given without closer examination and regard to economic and fiscal ramifications, the ECJ effectively allows the ECB to 'autonomously' determine the scope of its competences *vis-à-vis* Member States.[110] In doing so, insufficient consideration is given to the *principle of conferral*[111] and the much needed restrictive interpretation of the ECB's mandate.[112] Ultimately the FCC asserted that the ECJ's findings *'manifestly exceed the judicial mandate conferred upon the ECJ in Art. 19 (1) TEU'*[113] thus leading to *'a structurally significant shift in the order of competences to the detriment of the Member States.'*[114] In the end, the FCC ascertained that the ECJ acted *ultra vires* and therefore the judgement constituted a 'breakaway legal act' and is therefore not mandatory in Germany.[115]

After rejecting the ECJ's approach, the FCC conducted its own proportionality review and inferred that as a result of an insufficient proportionality assessment the ECB decisions in question are neither encompassed by the ECB's competence on monetary policy nor by its competence to support the Member States' economic policies.[116] The FCC scrutinised the actions of the ECB by applying a legal test that the ECJ issued in a former decision regarding the PSPP's predecessor, namely the Outright Monetary Transactions (OMT) programme.[117] The ECJ held in its 2015 OMT decision that a bond-buying programme with significant

[107] Ibid., para. 119.
[108] Ibid., para. 173.
[109] Ibid., para. 123.
[110] Ibid., para. 136.
[111] Art. 5 (1) TEU.
[112] *Heinrich Weiss and Others v Germany* FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 136.
[113] Art. 19 (1) second sentence TEU states: '*It (the ECJ) shall ensure that in the interpretation of and application of the Treaties the law is observed*.'
[114] Ibid., para. 154.
[115] Ibid., 163.
[116] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 164 with reference to Art. 127 TFEU.
[117] Ibid., 165; *Gauweiler and others v Deutscher Bundestag*, ECJ Judgement of 16 June 2015, Case C-62/14.

economic policy effects must reconcile with the *principle of proportionality*.[118] Although the language of the ECJ in *Gauweiler* suggested that the ECB has a confined number of options to manoeuvre,[119] the court ultimately employed a 'soft' proportionality test on the ECB as the expert authority on matters of monetary policy.[120] The FCC in *Weiss*, however, applied the high threshold set by the *Gauweiler* wording to the impugned decision and ultimately found that '*by pursuing the objective of monetary policy unconditionally while ignoring the economic policy effects resulting from the programme, the ECB manifestly disregards the principle of proportionality*.'[121] The FCC pronounced further that the infringement of the *principle of proportionality* is '*structurally significant so that the actions of the ECB constitute an ultra vires act*.'[122]

In particular, the FCC pointed out that the ECB decisions lacked a prognosis on the economic effects of the PSPP and also did not entail an evaluation of whether any of these effects were commensurate to the pursued benefits in the field of monetary policy.[123] Moreover, the FCC indicated that the economic effects of the PSPP allow the Member States to obtain better refinancing conditions and thus influence areas of fiscal policies within the field of Art. 123 (1) TFEU.[124] This, the FCC noted, was also due to the effects on the banking sector as the ESCB intakes great amounts of high-risk government bonds into the balance sheets of the Eurosystem which leads to significant improvement of the economic situation and credit rating of these relevant commercial banks and simultaneously stimulates the willingness to give out loans despite low-level interest rates.[125] In summary, it would have been *'incumbent upon the ECB to weigh and balance these economic effects of the PSPP, based on proportionality considerations, against the expected positive contributions to achieving the monetary policy objective the ECB itself has set.'*[126] Due to the limited information provided, the FCC held that it was unable to ascertain whether any sufficient balancing was ever conducted.[127] The apparent

[118] *Gauweiler and others v Deutscher Bundestag*, ECJ Judgement of 16 June 2015, Case C-62/14, para. 66 et seq.; loc. cit., para. 71; According to the FCC, *'this requires that the programme constitute a suitable and necessary means for achieving the aim pursued, it further requires that the programme's monetary policy objective and its economic policy effects be identified, weighed and balanced against one another.'*
[119] Ibid., paras. 66, 67, 69, 70.
[120] Takis Tridimas & Napoleon Xanthoulis, *'A Legal Analysis of the Gauweiler Case'*, in Federico Fabbrini (ed), *'The European Court of Justice, the European Central Bank and the Supremacy of EU Law'* Maastricht Journal of European & Comparative Law 1, 23, 2016, p. 31.
[121] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 165.
[122] Ibid., paras. 165, 178
[123] Ibid., para. 168.
[124] Ibid., para. 170.
[125] Ibid., para. 172.
[126] Ibid., para. 176.
[127] Ibid., para. 176.

lack of balancing in the ECB decisions did indeed lead to an infringement of the *principle of subsidiarity* and *proportionality*[128] because an implausible or incomprehensible assessment results in an exceeding of the monetary policy mandate derived from Art. 127 (1) first sentence TFEU.[129] However, the court did not consider it feasible to evaluate whether it was still commensurate to accept the economic and social policy effects of the PSPP.[130] By applying the threshold set out in the OMT decision[131] the infringement of the *principle of proportionality* was, in the eyes of the FCC, *'structurally significant'*, therefore resulting in an act *ultra* vires.[132] Finally, the FCC stated that it was unable to conclude whether the PSPP is reconcilable with Art. 127 (1) TFEU, since such a verdict is contingent upon a proportionality assessment[133] by the ECB, which must be aligned with plausible reasoning.[134]

Although the FCC went to great lengths to illustrate how flawed the ECJ's line of argumentation with regards to a potential infringement of the prohibition of monetary financing was,[135] it ultimately did not find a qualified violation of Article 123 (1) TFEU.[136] In particular, with regards to the issue of the alleged equivalence of purchases on the secondary market to direct purchases on the primary market, the FCC pointed out that the safeguards in question have to be evaluated individually to conclude whether they suffice in terms of Art. 123 (1) TFEU.[137] This, according to the FCC, was not done by the ECJ.[138] Notably, the FCC did not agree with the ECJ that the sheer existence of a 'blackout period' with its unspecified duration can be sufficient for the PSPP to comply with Art. 123 (1) TFEU.[139] In particular, the FCC also does not comprehend with regards to Art. 296 (II) TFEU,[140] why the ECJ did not hold the ECB to its suggestion to offer further reasoning for decision 2015/774.[141] This *inter alia* leads to a status quo where, due to the lack of scrutinising and testing conducted by the ECJ, a judicial review by the FCC is simply not possible.[142] While the FCC agreed with the ECJ that disclosing

[128] Art. 5 (1) second sentence TEU.
[129] Ibid. Para. 177.
[130] Ibid., para. 176.
[131] Cf. Fn. 81, 82.
[132] Ibid. para. 178.
[133] This very proportionality assessment was ultimately the only obligation to act imposed by the FCC on either the ECB or the German constitutional organs.
[134] Ibid. Para, 179.
[135] Ibid., paras. 182-189.
[136] Ibid., para. 180, 197, 213.
[137] Ibid., para. 183.
[138] Ibid.; para. 184.
[139] Ibid., para. 188, 189; in para. 191 the FCC even stated: *'The criterion of a blackout period, as interpreted and applied by the CJEU (ECJ), is manifestly unsuitable for preventing a circumvention of Art. 123 (1) TFEU.'*
[140] Which says: *'Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.'*
[141] Ibid., para. 188; cf. ECB, Statement of 30 November 2017.
[142] Ibid., para. 184, 189.

relevant information on the 'blackout period' *ex-ante* possibly contradicts the very purpose of that period, the same, in the FCC's view, cannot be said about a publication of the period *ex-post*, the latter more so being a requirement for carrying out a plausible judicial review on whether the PSPP purchases infringe Art. 123 TFEU.[143] To simplify, while the public must not know about the duration of a 'blackout period' in advance there is no reason not to disclose the duration after government bonds have been fully serviced. Even more, according to the FCC, this needs to be done to have a sufficient basis for a judicial review. Ultimately, the FCC held that the impugned decision does not constitute an infringement of Art. 123 (1) TFEU because by properly applying the criteria set up by the ECJ,[144] it is not ascertainable that the PSPP-purchases '*manifestly circumvent the prohibition of monetary financing*.'[145] Although the FCC held *'that the approach taken by the ECJ in Weiss renders some of these criteria meaningless, in an overall assessment the remaining valid criteria still suffice to rule out a manifest circumvention of Art. 123 (1) TFEU'* and thus, in this regard, the ECJ still *'remain[ed] within its judicial mandate deduced from Art. 19 (1) TEU.'*[146] To illustrate this complicated differentiation, some have assessed the FCC's approach as distinguishing between a 'procedural' and a 'substantive' element of proportionality.[147] The German court ruled that the ECB did not substantially validate its proportionality evaluation of the PSPP, thus falling short of the 'procedural' element of proportionality, but without obtaining more insight into the ECB's motivation for implementing the PSPP, the FCC is unable to conduct a substantive balancing test.[148] In brief, although the FCC found that certain details of the ECJ's *Weiss* ruling are a cause for concern, '*the interpretation of Art. 123 TFEU undertaken by the ECJ can still be considered tenable from a methodological perspective.*'[149]

With regards to domestic law, the judgement also interpreted the *'right to democratic self-determination'* in Art. 38 (1), Art. 20 (II) and Art. 23[150] German Basic Law (Constitution) and inferred that it protects against a '*manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union*'[151] and that

[143] Ibid., para. 189.
[144] Cf. paras. 60 – 84.
[145] Ibid., para. 197.
[146] Ibid., paras. 197, 213.
[147] Stefanie Egidy, *'Proportionality and procedure of monetary policy-making'* International Journal of Constitutional Law, 19(1), 2021, p. 286.
[148] *Heinrich Weiss and Others v Germany,* FCC (BVerfG), Judgment of 5 May 2020, Case 2 BvR 859/15, para. 176; Stefanie Egidy, *'Proportionality and procedure of monetary policy-making'* International Journal of Constitutional Law, 19(1), 2021, p. 290.
[149] Ibid., para. 116.
[150] Art. 23 Basic Law enshrines the responsibility of European integration in the German Constitution, which describes a slow, processual process of increasingly intensive and extensive supranational cooperation among EU Members.
[151] Ibid., para. 98.

German institutions who are taking part in the implementation and progress of the integration agenda are obliged to guarantee that its limits are valued and appreciated.[152] The *principle of sovereignty of the people,* as well as the equivalent right of citizens to only be subjected to such acts of public authority,[153] require that such an act is traceable back to the right to vote and is thus legitimised and influenceable by German citizens.[154] Moreover, Art. 23 (1) first and third sentence Basic Law guarantees the *'right to democratic self-determination'*[155] also in relation to the European Integration Agenda.[156] As the FCC stated, '*the democratic legitimation of public authority exercised in Germany belongs to the essential contents of the principle of sovereignty of the people and thus forms part of the Basic Law's constitutional identity and is therefore beyond the reach of European Integration in accordance with Art. 23 (I) Basic Law.*'[157] The constitution does not allow constitutional entities to convey sovereign powers to the EU in a way that would enable the EU to generate new competences for itself; it precludes the EU from transferring onto itself the power to pronounce on its own competence (cf. 'Kompetenz-Kompetenz' in German constitutional law).[158] When sovereign powers are indeed conveyed onto the EU in accordance with Art. 23 (I) Basic Law it must be assured that the German parliament preserves and retains the essential powers of substantial political significance.[159] In terms of the PSPP possibly being a burden on a Member State's budget, the court held that it needs to be the parliament, *'as the organ directly accountable to the people, to determine the overall financial burden imposed on citizens and to decide on the essential expenditure of the state*.'[160] Art. 38 (I) Basic Law affords German voters a right to oblige the Federal Government and Parliament to observe the adherence of the European Integration Agenda by EU institutions and abstain from actions that encroach the limits of that Agenda and, where those actions amount to a '*manifest and structurally significant exceeding of EU competences'*, to work towards upholding the integration agenda and establish an appreciation for its guidelines.[161]

[152] Ibid., para. 106.
[153] Both enshrined in Art. 20 (II) Basic Law.
[154] *Heinrich Weiss and Others v Germany,* FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 99.
[155] Enshrined in Art. 38 (1) and Art. 20 (I), (II) Basic Law
[156] *Heinrich Weiss and Others v Germany,* FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 101; European Integration Agenda stands conceptionally for an *'ever closer union of the European peoples'* (1. Recital of the preamble to the TFEU).
[157] Ibid., para. 101.
[158] Ibid., para. 102.
[159] Ibid., para. 103.
[160] Ibid., para. 104.
[161] Ibid., para. 105.

After reasoning in detail on these issues,[162] the FCC faulted the Federal Government and the Parliament for violating the constitutional rights of the applicants. In terms of the PSPP programme constituting an *ultra vires* act as a result of the ECB's failure to conduct a properly substantiated proportionality assessment of the PSPP, the FCC mandated that the German federal government, as well as the parliament,[163] initiate actions to assure that the ECB subsequently pushes in a proper proportionality evaluation of the programme.[164] Because the ECB is not a German but a European institution, the FCC can only address requirements to it indirectly - via the Federal Government or the Parliament. The Bundesbank,[165] which is not a constitutional body itself, is assigned to the latter. And the Bundesbank carries out the ESCB's monetary policy in Germany, as it were.

IV THE FCC JUDGEMENT AND THE QUESTION OF ULTRA VIRES

A THE ULTRA VIRES REVIEW

To understand the history of the FCC's Ultra Vires Review (UVR) and the significance of the present judgement, it is helpful to have a concise overview of the court's jurisprudence on the relationship of the German Constitution (Basic Law) to European law. When the European Community was first invented as a Union of States with a primarily shared economic interest, the protection of fundamental rights on the union level had not yet been established in the founding Treaties.[166] After World War 2 Germany gave itself a counter-authoritarian Constitution as a response to the horrors that had taken place during the National Socialist regime. Since the protection of fundamental human rights is obviously key to the Basic Law, the FCC had the duty to uphold these rights and to ensure that post-war Germany was founded on values contrary to the nation's horrible past. The court's vigilance in this regard led to two very important judgements concerning the protection of fundamental rights.

In the so-called *'Solange[167] I-decision'* the FCC restricted the scope of European Law[168] and declared that *as long as* the European Community (EC) has not established universal and

[162] Ibid., paras. 98 – 115.
[163] Whose responsibility in this regard results from the European Integration Agenda, which stands conceptionally for an *'ever closer union of the European peoples'* (1. Recital of the preamble to the TFEU)
[164] Ibid., para. 232.
[165] Germany's central bank.
[166] The first European Treaty in 1957 almost exclusively aimed at fostering beneficial economic groundworks but did not include protection provisions for individual rights, see *Treaty of Rome* (1957).
[167] Meaning 'as-long'.
[168] And its primacy, which will be assessed later.

adequate protection of fundamental rights, it will maintain a final say in this regard as well as the right to evaluate whether European Community Law is compatible and reconcilable with the Basic Law in general, and in the event of conflicting laws, the Basic Law would prevail leaving European Law inapplicable in Germany.[169]

Although the EU did not implement fundamental rights into primary law until the *Maastricht Treaty* in 1993, the FCC softened its harsh approach established in *'Solange I'* in *'Solange II'* (1986), and gave itself a high threshold for declaring a European act *ultra vires* with regards to fundamental rights:[170]

> *"**As long** as the European Communities* (today European Union)*, in particular the case-law of the Court of Justice of the Communities (ECJ), generally guarantee effective protection of fundamental rights against the sovereign power of the Communities, which is to be regarded as essentially equivalent to the protection of fundamental rights offered by the Basic Law (German Constitution) as indispensable, especially since it generally guarantees the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction over the applicability of derived Community law which is claimed as the legal basis for conduct by German courts or authorities within the sovereign sphere of the Federal Republic of Germany and will consequently no longer review this law against the yardstick of the fundamental rights of the Basic Law."* [Emphasis added].

To summarise the '*Solange*' jurisprudence, the FCC held that as long as the EU ensures German citizens an equivalent level of fundamental rights and maintained a democratically elected parliament, the court would merely reserve itself the right to consider the compatibility of EC (EU) law with the Basic Law. The ECJ case law protected fundamental rights and the appeased FCC concluded in 'Solange II' that while the ECJ continued to ensure an adequate level of protection of rights, it would refrain from exercising its own constitutional control.[171]

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[169] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, FCC (BverfG) Judgement of 29 May 1974, Case 11/70 (As-long decision I / Solange-Decision I); Hoai-Thu Nguyen & Merijn Chamon, *'The ultra vires decision of the German Constitutional Court - Time to fight fire with fire?'* Jacques Delors Centre (Hertie School), 2 June 2020, p.5.

[170] *Re Wünsche Handelsgesellachaft*, FCC (BVerfG) Judgement of 22 October 1986, Case 126/81, (As-long II / Solange-Decision II).

[171] Hoai-Thu Nguyen & Merijn Chamon, *'The ultra vires decision of the German Constitutional Court - Time to fight fire with fire?'* Jacques Delors Centre (Hertie School), 2 June 2020, p.5; With regards to what counts as fundamental rights, the FCC held in *Weiss* that those are not just human rights but also basic tenets that inform the principle of democracy, the rule of law, the social state, and the federal state within the meaning of Art. 20 Basic Law (para. 115).

Although the FCC has not mentioned the legal doctrine of the UVR in the 'Solange' judgements, the FCC established a legal foundation in its case law to generally assess when the Basic Law is impaired by European actions.

In 1993 the FCC had to pronounce on the constitutionality of the German ratification law to the *Maastricht Treaty* (TEU) and held that any power conferred upon the EU requires ratification by Parliament.[172] At the centre of this judgement was the *principle of democracy* enshrined in Art. 38 Basic Law, because the German ratification law accepting the *Maastricht Treaty* needed to be affirmed by parliament and hence legitimised by German voters.[173] In this context the court emphasised that the *principle of democracy* is impaired when EU institutions do not hold themselves to a strict application of the *principle of conferral* or an area is not clearly defined.[174] Therefore, the FCC maintains the competence to appraise whether EU institutions have complied with the *principle of conferral* for otherwise their actions would transgress the German law, as ratified by parliament, and therefore constitute an act *ultra vires* ultimately not applicable in Germany.[175] The *Maastricht* judgement is therefore the basis of the complainants' argument in the *Weiss* proceedings that there was a violation of Art. 38 Basic Law.

Sixteen years later the FCC had to determine the constitutionality of the law ratifying the *Lisbon Treaty*[176] and specified that some 'core functions' may not be conveyed onto the EU.[177] Aside from reiterating that any EU legal act will be assessed by the FCC with regards to the *principle of conferral*, the judges retained the right to evaluate and gauge EU acts with the 'inviolable core content of the *constitutional identity* of the Basic Law.'[178]

In the *Honeywell* judgement, the FCC outlined the legal criteria for the UVR for the first time.[179] It explicitly held that:

> *'Ultra vires review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is* ***sufficiently qualified****. This is contingent on the act of the authority of the European Union being* ***manifestly in breach of competences*** *and the impugned act leading to a*

[172] *Maastricht* Judgment, FCC (BVerfG) Judgement of 12 October 1993, Case 2 BvR 2134/92, 2 BvR 2159/92, Headnotes 3 a).
[173] Ibid. cf. Headnotes 2,3.
[174] Ibid., Headnote 4, 5, 6.
[175] Ibid., Headnote 5; Hoai-Thu Nguyen & Merijn Chamon, *'The ultra vires decision of the German Constitutional Court - Time to fight fire with fire?'* Jacques Delors Centre (Hertie School), 2 June 2020, p.5.
[176] Which reformed the TEU and TFEU.
[177] *Lisbon* Judgement, FCC (BVerfG) Judgment of 30 June 2009, Case 2 BvE 2/08, Headnote 3; Hoai-Thu Nguyen & Merijn Chamon, *'The ultra vires decision of the German Constitutional Court - Time to fight fire with fire?'* Jacques Delors Centre (Hertie School), 2 June 2020, p.5.
[178] *Lisbon* Judgement, FCC (BVerfG) Judgment of 30 June 2009, Case 2 BvE 2/08, Headnote 5.
[179] *Honeywell* Judgement, FCC (BVerfG) Judgement of 6 July 2010, Case 2 BvR 2661/06, Headnote 1 a).

structurally significant shift to the detriment of the Member States *in the structure of competences.'* [*Emphasis added*].[180]

Procedurally, the court ruled that before an EU act can be declared *ultra vires*, the ECJ needs to be afforded the opportunity to assess the act in question pursuant to Art. 267 TFEU.[181] Essentially, the challenged act must amount to a '*sufficiently qualified breach* of the *principle of conferral*.'[182] This precondition consists of three stages.[183] The FCC ruled in *Honeywell* that the challenged EU act must constitute 'a violation of the Integration Agenda'.[184] Particularly, the violation must amount to a '*transgression of powers*.' Secondly, the contested act has to '*manifestly transgress the conferred powers*.'[185] Finally, and from a *principle of conferral*-perspective, the act must be '*highly significant*', either resulting in an imbalance of powers between the EU and the Member States or in general non-compliance with the rule of law.[186] What type of legal flaws suffice for a 'transgression of powers' is not fully defined.[187] According to the FCC, it certainly involves any violation of the *principle of conferral* as laid out in Article 5 (2) TEU, however not confined to the absence of competence *strictu sensu*.[188] Other Treaty violations, such as infringements of the *principle of subsidiarity*[189] or even of substantive guidelines, as for instance the 'prohibition of monetary financing of the budget', may also constitute a 'transgression of powers.'[190]

After indicating its general will to pronounce the OMT programme *ultra vires* in the *Gauweiler* case,[191] the FCC ultimately held that the OMT programme does not significantly

[180] Ibid., Headnote 1 a).
[181] Ibid., Headnote 1 b).
[182] Ibid. para. 61.
[183] Jürgen Bast, *'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review'* German Law Journal, 15(2), 2014, p. 170.
[184] Ibid., p. 170; *Honeywell* Judgement, FCC (BVerfG) Judgement of 6 July 2010, Case 2 BvR 2661/06, para. 61.
[185] Ibid., p. 170; *Honeywell* Judgement, FCC (BVerfG) Judgement of 6 July 2010, Case 2 BvR 2661/06, para. 61.
[186] Ibid., p. 170; Ibid. para. 61; Franz C. Mayer, *'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020'* European Constitutional Law Review, 16(4), 2020, p. 750.
[187] Franz C. Mayer, *'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020'* European Constitutional Law Review, 16(4), 2020, p. 750, 752.
[188] Jürgen Bast, *'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review'* German Law Journal 15(2), 2014, p. 170; *Honeywell* Judgement, FCC (BVerfG) Judgement of 6 July 2010, Case 2 BvR 2661/06, para. 55.
[189] *Lisbon* Judgement, FCC (BVerfG) Judgment of 30 June 2009, Case 2 BvE 2/08, para. 353.
[190] *Lisbon* Judgement, FCC (BVerfG) Judgment of 30 June 2009, Case 2 BvE 2/08, paras. 392-96; Jürgen Bast, *'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review'* German Law Journal 15(2), 2014, p. 170.
[191] *Gauweiler v Germany*, FCC (BVerfG) Judgment of 21 June 2016, Case 2 BvR 2728/13, Headnote 2, 3; Hoai-Thu Nguyen & Merijn Chamon, *'The ultra vires decision of the German Constitutional Court - Time to fight fire with fire?'* Jacques Delors Centre (Hertie School), 2 June 2020, p.5.

transgress the competences assigned to the ECB.[192] This was the courts first preliminary reference to the ECJ and in the end, the FCC followed the preliminary ruling by the Luxembourg court.[193]

The issue of whether and who should ultimately monitor and check legal actions of EU institutions and in particular judgements by the ECJ is intrinsically enshrined in the federal order of the EU. Unlike domestic legal orders, there is no procedure of successive stages of appeal within the EU. Thus, there may be a need for checks and balances of the ECJ, because, according to some,[194] the ECJ is not an entirely neutral arbitration court but a court 'with one agenda' namely promoting European Integration.[195] Germany has enshrined its commitment towards European Integration in Art. 23 Basic Law. Due to this vacuum of final authority in the EU, the FCC has emphasised quite early in the history of the EU that in certain and rare cases the court itself can regain final say. This historical overview of the FCC's case law regarding the relation of the Basic Law to EU Law illustrates how the court's jurisprudence in a way has led up to the *Weiss* ruling. In a sense, the FCC arrived at a point, which it has prepared for decades.

B HOW THE FCC APPLIED THE UVR IN THE PRESENT CASE

The significance of the FCC ruling in the present case becomes apparent when one recalls that the decision from May of 2020 has been the first time ever that the FCC has used this doctrinal tool and pronounced an allegedly 'erupting'[196] EU legal act *ultra vires*.

The FCC highlights quite early in its examination that pronouncing an EU act *ultra vires* is of an exceptional nature.[197] The chamber then referred to its case law in *Honeywell* and reiterated that an EU act only infringes the *principle of conferral* when European institutions have exceeded their competences in a way that clearly contradicts the *principle of conferral*.[198]

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[192] Ibid., Headnote 4.
[193] Ibid., Headnote 4.
[194] Former president of the FCC **Andreas Voßkuhle** described the ECJ as a court 'with one agenda' in a scientific lecture titled '*constitutional state crises'* at the University of Freiburg on 5 May 2021, the same wording was also used before by former FCC-judge **Dieter Grimm.**
[195] Cf. Fn. 154.
[196] 'Erupting' has been a term used by German scholars to illustrate how an *ultra vires* legal act has erupted out of the legal order; Franz C. Mayer, *'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020'* European Constitutional Law Review, 16(4), 2020, p. 742, who refers to them as *'acts breaking out'.*
[197] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 110.
[198] Ibid., para. 110.

Hence, the violation of competences must be '*sufficiently qualified*.'[199] The act, therefore, needs to '*manifestly exceed EU competences*,' leading to a '*structurally significant shift in the division of competences to the detriment of the Member States.*'[200] '*A structurally significant shift of competences to the detriment of the Member States results where the exceeding of competences has a considerable impact on the principle of conferral and on the extent to which respect for the legal order, as part of the rule of law, is upheld*.'[201] The FCC held that, due to Art. 19 (1) second sentence TEU, an *ultra vires* review must be conducted moderately; yet the mandate conferred in that provision is overstepped where *'general legal principles that are common to the laws of Member States are manifestly disregarded'*.[202] Additionally, the FCC pointed out that as long as the ECJ decisions are not arbitrary and the Luxembourg court applies recognised methodical principles, the FCC has to respect the ECJ's opinion even if against the latter weighty legal arguments could be made.[203]

The FCC then expanded on its case-law established in the *Maastricht* judgement[204] and held that Art. 38 Basic Law serves as a protection for German citizens eligible to vote against a *'transfer of sovereign powers'* beyond areas marked out by the Treaties and *'prevents the implementation of EU legal acts that have an equivalent effect and that de facto amount to a transfer of competences in violation of the Basic Law.'*[205] According to the FCC, Art. 38 Basic Law embodies an actionable right that *'requires constitutional organs to protect and promote the right of the individual.'*[206]

Afterwards, the FCC referred to one of the key aspects of its *Lisbon* judgement,[207] namely that EU actions must not touch on the '*constitutional identity'* of the Basic Law.[208] With regards to the '*constitutional identity'* as well as the *principle of democracy*, it is vital to the FCC that the German parliament retains for itself critical political functions and capacities.[209]

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[199] Ibid., para. 110, *Honeywell* Judgement, FCC (BVerfG) Judgement of 6 July 2010, Case 2 BvR 2661/06, Headnote 1 a).
[200] Ibid., para. 110, *Honeywell* Judgement, FCC (BVerfG) Judgement of 6 July 2010, Case 2 BvR 2661/06, Headnote 1 a).
[201] *Honeywell* Judgement, FCC (BVerfG) Judgement of 6 July 2010, Case 2 BvR 2661/06, para. 61.
[202] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 112.
[203] Ibid., para. 112.
[204] Cf. Fn. 170.
[205] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 114.
[206] Ibid., para. 114.
[207] Cf. Fn. 175.
[208] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 115.
[209] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 115.

Thereupon, the FCC elaborated[210] on the legal criteria it just established.[211] To avoid repetition I will not analyse these merits again. In the end, the FCC affirmed that since the PSPP is an act *ultra vires* it is the responsibility of a constitutional organ like itself to preserve and uphold the right to democracy pursuant to Art. 38 Basic Law.[212] Conclusively, the court obliged the German government and parliament to work towards a sufficient proportionality reasoning as far as the latter has allegedly been omitted by the ECB.[213] To the extent that decision 2015/774 oversteps the limits of the European Integration Agenda in conjunction with the Basic Law the impugned decision does not have any binding authority in Germany, the FCC found.[214]

Over decades the FCC marked out the relationship of the scope of EU and domestic constitutional law. By establishing a high threshold for the UVR the FCC recognised that the EU does not create an imminent threat to the inviolability of the Basic Law. Essentially the court limited the punishable offences to blatant disregards of the *principle of conferral*. By inversing that argument, one could subsume that any common or regular overstepping of competences would be tolerated. Hence, applying the UVR on minor law infringements would be like cracking a nut with a sledgehammer. In the present case, the FCC had to paint the alleged flaws of the PSPP decision as a blatant disregard for the order of competences. I argue that a proportionality assessment that could have had a different outcome as well as the economic allocation of a central bank measure do not easily qualify as blatant disregards of the *principle of conferral.*

C DOES THE HIGHLY-CONTESTED CLASSIFICATION OF THE PSPP AS A MONETARY OR ECONOMIC POLICY (ART. 127 TFEU) SUFFICE TO ESTABLISH A '*MANIFEST EXCEEDING OF COMPETENCES*?

The issue of whether the purchase of government bonds qualifies as a monetary policy and can be delimitated from an economic policy was heavily discussed in *Gauweiler* proceedings[215] as well as in the present *Weiss* case.[216] Aside from the economic scholarly

[210] Ibid., paras. 116 - 229
[211] Cf. Pages 13 – 19.
[212] Ibid., para. 230.
[213] *Heinrich Weiss and Others v Germany,* FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 232.
[214] Ibid., para., 234.
[215] *Gauweiler and others v Deutscher Bundestag,* ECJ Judgement of 16 June 2015, Case C-62/14, paras. 45 – 65; *Gauweiler v Germany,* FCC (BVerfG) Judgment of 21 June 2016, Case 2 BvR 2728/13, paras. 182 – 196;
[216] *Heinrich Weiss and Others v Germany,* ECJ Judgement of 11 December 2018, Case C-493/17, paras. 46 – 70; *Heinrich Weiss and Others v Germany,* FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, paras. 46 – 70.

discussion on this matter,[217] which will not be dealt with in this paper, one gets the impression that clear delimitation is far from easy.

To understand the complexity of the delimitation it is important to keep in mind that economic policy and monetary policy are both directed at running the same economy via different mechanisms and with the use of different instruments. Both policies unavoidably interact and can reinforce and constrain each other.[218] Conversely, a monetary policy that does not impact economic operators and their behaviour would be completely ineffective.[219] Therefore, the TFEU does not entail a provision that prohibits monetary policy from having any effect on economic policy, because such a rule would ultimately emasculate monetary policy and deprive it of having any ability to maintain price stability.[220]

Simultaneously, it is vital to understand why the founders of the Treaties implemented Art. 127 TFEU in the first place. The absolute primacy of price stability follows the idea that central banks are credible in controlling inflation only if they are independent and monothematically focused on this objective - an idea that has traditionally enjoyed particularly strong support among German policymakers and the Bundesbank[221] and was also particularly emphasized by the FCC.[222] But the EU Treaties do not utilise the notion of economic policy to define what is and what is not part of the ECB's competences.[223] In other words, the Treaties do not say what policy areas belong to economic policy or vice versa with regards to monetary policy. Therefore, the allocation of a policy is open to discussion by economic scholars. However, under Article 18.1 of the ESCB Statute, it is incumbent upon the ECB to use monetary policy instruments to back up the economic policies of the EU, which *inter alia* includes purchasing or trading government bonds.[224] In any event, these actions mustn't interfere with the target to maintain price stability. [225]

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[217] See, for example: Lars Feld, Volker Wieland, *'The German Federal Constitutional Court Ruling and the European Central Bank's Strategy'* Journal of Financial Regulation, 20 July 2020, fjab006, https://doi.org/10.1093/jfr/fjab006.
[218] Phedon Nicolaides, *'An Assessment of the Judgment of the Federal Constitutional Court of Germany On the Public Sector Asset Purchase Programme of the European Central Bank'*, Legal Issues of Economic Integration, 47(3), 2020, p. 272.
[219] Ibid., p. 272.
[220] Ibid., p. 272.
[221] German central bank.
[222] *Maastricht* Judgment, FCC (BVerfG) Judgement of 12 October 1993, Case 2 BvR 2134/92, 2 BvR 2159/92, paras. 147f.
[223] Jürgen Bast, *'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review'*, German Law Journal, 15(2), 2014, p. 175.
[224] Jürgen Bast, *'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review'*, German Law Journal, 15(2), 2014, p. 175.
[225] Jürgen Bast, *'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review'* German Law Journal, 15(2), 2014, p. 170; Enshrined in Art. 127 TFEU.

In this regard, the FCC statement by which *'the responsibility for economic policy clearly lies with the Member States'*[226] appears in its absoluteness rather misleading because there are numerous EU competences in the field of economic policies, for example, the internal market powers enshrined in the TFEU[227] and in Art. 18.1 of the ESCB Statute.[228] In this regard, it might be useful to once again shine a light on Art. 2 (1) TFEU, which regulates and delimits the competences of the EU and its Members. While in an area of EU competence a Member State is barred from doing anything in that field, the EU can still act in areas primarily devoted to the Member States.[229] The EU is only barred from acting in a field when a Treaty provision explicitly says so.[230] In fact, this is hardly ever the case in the Treaties and the Treaties surely not ban the EU from the entire field of economic policy.[231] Ultimately, the drafters of the EU Treaties decided to implement an asymmetric component in the European order of competences by necessarily conferring powers on the EU and not the Member States.[232]

By granting the ECB a broad discretion on the technical question of the PSPP,[233] the ECJ appears reluctant to conclusively rule on this technical matter, but at the same time, this may reflect greater awareness of the complexity of the matter than the FCC - as the Luxembourg jurists may have seen themselves unfit in terms of expertise and legitimacy to rule on the nature of a government bond-buying programme.[234] Indeed, there is reason to believe that defining the PSPP as a monetary or economic policy is an assessment that should rather be conducted by economists, not jurists. Considering this highly complex non-legal question, it appears to be almost audacious to pronounce the PSPP a '*manifest breach of competences*' which lead to a '*structurally significant shift to the detriment of the Member States.*'[235]

By comparing the present approach to the guidelines established in *Honeywell,* certain discrepancies are made even more acute. In *Honeywell,* the FCC emphasised that the UVR remedy has to be applied *'reserved'* or *'modest'*.[236] A *'reserved'* or *'modest'* application once

[226] FCC (BVerfG) Referral Order of the *Gauweiler* Case to the ECJ, Order of 14 January 2014, Case 2 BvR 2728/13, para. 39.
[227] Art. 26, 27, 114, 115 TFEU.
[228] Jürgen Bast, *'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review'* German Law Journal, 15(2), 2014, p. 175.
[229] Ibid., p. 176.
[230] Ibid., p. 176.
[231] Ibid., p. 176.
[232] Armin von Bogdandy & Jürgen Bast, '*The Federal Order of Competences'*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, (Armin von Bogdandy & Jürgen Bast eds., 2nd ed. 2010), p. 286; Jürgen Bast, *'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review'* German Law Journal, 15(2), 2014, p. 176.
[233] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17, para. 73.
[234] Ibid., paras. 74-77.
[235] Cf. Fn.178; *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, Headnote 6b), paras. 127, 134.
[236] *Honeywell* Judgement, FCC (BVerfG) Judgement of 6 July 2010, Case 2 BvR 2661/06, para. 66.

again indicates that the FCC saw its sharpest blade as an *ultima ratio* for intolerable violation of the law. The emphasis put on a *'reserved'* or *'modest'* application in *Honeywell* simply does not add up to the present approach and makes the *Weiss* ruling look contradictory, out of place and inconsistent with the court's case law. Finally, it becomes understandable why the FCC had to state that the decision:

> *'manifestly fails to give consideration to the importance and scope of the principle of proportionality (Art. 5(1) second sentence and Art. 5(4) TEU), which also applies to the division of competences, and is no longer tenable from a methodological perspective given that it completely disregards the actual effects of the PSPP.'*[237]

The wording primarily aimed at fulfilling the UVR threshold, but also justified the UV verdict as the PSPP decision constituted such a reprehensible disregard to the rule of law. Although the mandated application as *'reserved'* or *'modest'* did not regard the detailed phrasing of the ruling but more the overall approach, one wonders whether the judges actually consulted the *Honeywell* merits before deciding to affirm the UVR.

D ASSESSING THE APPROACH TO PROPORTIONALITY WITH REGARDS TO THE ULTRA VIRES REVIEW

Since the FCC pronounced the ECJ judgement as well as the ECB decision to be *ultra vires* and justified this with an allegedly flawed proportionality review, it is essential to look at the merits of this classification.[238] For the high threshold established in the UVR criteria, the FCC needed to affirm that the ECJ's and hence the ECB's proportionality constituted the repeatedly cited '*manifest breach of competences causing a structurally significant shift to the detriment of the Member States.*' Essentially it is questionable whether 'proportionality' is the right anchor for adjudicating a decision *ultra vires.* This is because a proportionality review, which requires a nuanced weighing of complicated aspects against one another, does not seem to easily reconcile with the UVR's requirements for a more clear 'manifest breach of competences'.

Art. 5 (4) TEU prescribes that *'under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the*

[237] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 119.
[238] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, paras. 116.

Treaties.' Whether a measure is proportional is assessed concerning its objectives. Correspondingly, the ECJ has defined the *principle of proportionality* numerous times in its case law:[239]

> *'The principle of proportionality, …, requires that measure adopted by Community (EU) institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages must not be disproportionate to the aims pursued.'*

The ECJ has applied case law established in the *Gauweiler* decision to the *Weiss* ruling and held that whenever an EU institution is required '*to make choices of a technical nature and to undertake complex forecasts and assessments, it must be allowed a broad discretion.*'[240] Hence, judicial control can be applied to the stated reasons and whether or not all relevant facts and circumstances have been assessed as well as whether the measures at hand are suitable for attaining the legitimate aims pursued, without exceeding what is necessary.

For an assessment of proportionality on decision 2015/774, the ECJ relied on the information provided by the ECB. The court did not further scrutinize whether any external evidence could be found to individually evaluate the ECB's relevant facts for their decisions. To cite the Luxembourg court *'nothing more can thus be required of the ESCB apart from that it uses its economic expertise and the necessary technical means at its disposal to carry out that analysis with accuracy and care.'*[241] The ECJ simply states that it is not *'apparent that a government-bond purchase programme of either more limited volume or shorter duration would have been able to bring about – as effectively and rapidly as the PSPP – changes in inflation comparable to those sought by the ESCB, for the purpose of achieving the primary Treaty objectives of monetary policy.'*[242]

In its assessment of the ECJ's proportionality check the FCC firstly pointed out that in the German legal concept a proportionality test is to be structured in the elements of

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[239] *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*, ECJ judgement of 5 May 1998, Case C-180/96, para. 96; *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*, ECJ judgement of 13 November 1990, Case C-331/88, para. 13; *Crispoltoni and Others v Fattoria Autonoma Tabacchi and Others*, ECJ judgement of 5 October 1994, Joined cases C-133/93, C-300/93 and C-362/93, para. 41.
[240] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17, para. 72, 73. *Gauweiler and others v Deutscher Bundestag*, ECJ Judgement of 16 June 2015, Case C-62/14, paras. 67, 68,
[241] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17, para. 91.
[242] Ibid., para. 92.

suitability,[243] *necessity,*[244] *and appropriateness* (proportionality *strictu sensu*[245]).[246] Moreover, the court felt the need to emphasise that these steps are also being applied by numerous other constitutional courts in Europe.[247] In this regard, the FCC illustrated that although a similar wording frequently appears in the ECJ jurisprudence, the Luxembourg judges do not tie the same understanding to these expressions as German terminology and doctrine.[248] The ECJ rather confines its assessment to whether the measure at hand is manifestly out of proportion to the pursued targets.[249]

In the *Weiss* case, the ECJ certainly conducted an extensive examination of what would be called 'necessity,' since the chamber expended 60 paragraphs of its judgement on the latter.[250] The four following paragraphs it spent on inspecting the 'suitability' of the programme to achieving the objective of facilitating monetary and financial conditions, on first sight appear scant. However, this actually aligns with the ECJ's aforementioned case law of leaving a broad margin of discretion to the institution whilst not diagnosing a manifestly inappropriate measure. Simultaneously, it is outside of the ECJ competence to look for general alternatives to a government-bond buying programme and as long as there are no grounds for questioning the duration of the volume of the PSPP, the court rightly has no reason to doubt the suitability of the programme.[251]

This aligns with Art. 130 TFEU, which regulates that the ECB and ESCB should not receive or follow orders of any other institution or a Member State. Additionally, the FCC itself has emphasised the significance of the ECB's autonomy in its *Maastricht* judgement.[252] By precisely looking at the role of the ECJ, the court's approach to the critical question becomes obvious. The European Union has several legislative institutions for different areas, the role of the ECJ, however, is to review legislative actions when required, but not to engage in legislation.[253] To a certain extent, the court would engage in legislation, when it would be

[243] The measure under review must advance a legitimate purpose.
[244] The purpose cannot have been attained just as effectively with less costly means
[245] The benefit must be proportionate to the cost incurred.
[246] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, 2 BvR 859/15, para. 125.
[247] Ibid., para. 125, namely France, Spain, Sweden, Italy, Austria, Poland, Hungary or the UK.
[248] Ibid., para. 126.
[249] *Etimine SA v Secretary of State for Work and Pensions*, ECJ Judgement of 21 July 2011, Case C-15/10, para. 125; *The Queen, on the application of: Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, ECJ Judgement of 14 December 2004, Case C-210/03, para. 48; *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd,* ECJ Judgement of 10 December 2002, Case C-491/01, para. 123.
[250] Ibid., paras. 166 – 216.
[251] Cf. Fn. 240.
[252] *Maastricht* Judgment, FCC (BVerfG) Judgement of 12 October 1993, Case 2 BvR 2134/92, 2 BvR 2159/92, paras. 147, 153 – 154.
[253] https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.

searching for alternatives to the PSPP. The primary mandate of the court is to make sure that the decision-maker establishes its findings on relevant facts and sufficiently and plausibly justifies its reasoning. *In casu*, the ECJ was able to ascertain that the ECB's methods and measurements line up with what is conventional in central banking and could formally be justified based on existing laws; for instance, '*recitals to decisions, guidelines, documents by the institutions and various other information before the court*.'[254] This prioritization is aligned with the general task and duties of a court, as described above. Therefore, with the separation of powers within the EU in mind, it is comprehensible that the ECJ accepted the proportionality assessment conducted by the ECB. As it has been pointed out by both courts, institutions, who render technical decisions, must be granted a wide margin of discretion. In cases like these, it is the primary role of a court to bring closure to arguments that cannot be resolved with a scientific method. Finally, the ECJ restraint aligns with the independent role that central banks are intended to have because democratic economies are usually structured in a way that protects central banks from government pressure into firing up the printing press to finance political wishes.[255] In conclusion, there is certainly once again significant doubt as to whether the proportionality assessment of the ECJ constitutes a '*manifest breach of competences'* resulting in a '*significant shift of competences to the detriment of the Member States.*'[256]

Aside from the issue of whether the ECJ's proportionality review can be pronounced *ultra vires*, which I have argued against, there is also the matter of how both courts apply and use the *principle of proportionality.* As mentioned before both courts may in fact have different understandings of what a proportionality assessment procedurally entails. Both understandings may also vary in the scope of relevant aspects. With regards to the judgement at hand, some point out that the FCC was wrong to employ the *principle of proportionality* to the delimitation of competences,[257] hence to the distinction between monetary policy[258] and economic policy,[259] because according to Art. 5 (1) (2) and (4) TFEU the scope and limit of EU competences are determined and regulated by the *principle of conferral*[260] while the *principle of proportionality*

[254] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17, paras. 74-78, 85, 88-90, 92, 95, 96, 99.
[255] Stefanie Egidy, *'Proportionality and procedure of monetary policy-making'* International Journal of Constitutional Law, 19(1), 2021, p. 288.
[256] Cf. Fn. 177.
[257] Jose Luis da Cruz *'The Judgement of the German Federal Constitutional Court and the Court of Justice of the European Union - Judicial Cooperation or Dialogue of the Deaf"* p. 11.; Jacques Ziller *'The unbearable heaviness of the German constitutional judge. On the judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 concerning the European Central Bank's PSPP programme'* 7 May 2020, Nr. 2 paragraph 10.
[258] A competence exclusively held by the EU.
[259] A competence, in principle of the Member States
[260] As the Member States have decided in the Treaties.

administers only to the use of competences conferred therein. In other words, the *principle of proportionality* is supposed to administer, oversee and confine the exercise of EU competences,[261] while their continuation and its boundaries are merely controlled by the *principle of conferral.*[262] Therefore, the ECJ adhered to valid EU law in its *Weiss* ruling when it abstained from applying the *principle of proportionality* to defining the true essence of the PSPP, but merely evaluated the lawful use of its conveyed competences by the ECB,[263] after having ascertained the monetary character of the PSPP.[264] In the *Weiss* judgement, the ECJ conducted a proportionality review by considering '*whether the monetary policy measures are proportionate to the monetary policy objectives pursued*.'[265] The FCC[266] and others,[267] however, demanded that the review assesses whether the *monetary policy measures are proportionate to their effects on economic policy and the ESCB's corresponding ability to support the general economic policies of the EU*.'

Some have critiqued the FCC in this regard for calling for an unfeasible proportionality test.[268] In this regard, it is crucial to mention that the ECJ proportionality test generally does not include the task to look for other options than bond-buying programmes, with potentially less serious economic implications. Ultimately this boils down to the higher German threshold for proportionality. The FCC requires a deep dive into all relevant facts, which, in the eyes of the FCC, would entail an assessment of the economic aspects as well. Still, these different bases on how to conduct the proportionality test might have been a reason why the FCC felt the need to go even that far as pronouncing the PSPP judgement *ultra vires*. While the ECJ in *Weiss 'understands proportionality as the least interventionist means of achieving a certain policy objective*,'[269] the FCC '*defines it as the balancing between conflicting policy objectives which in casu are monetary and economic policy*.'[270] The latter definition of proportionality is supposed to substitute the *principle of conferral* and assess whether the ECB interferes in the

[261] Art. 5 (4) TEU.
[262] Paul Dermine, *'The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union'*, European Constitutional Law Review, 16, 2020, p. 539.
[263] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17, paras. 71-100.
[264] Ibid., paras. 47-70.
[265] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17, para. 71.
[266] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, paras. 138, 139.
[267] Sven Simon & Hannes Rathke, *'"Simply not comprehensible." Why?'* German Law Journal, 21(5), 2020, p. 953.
[268] Jose Luis da Cruz, *'The Judgement of the German Federal Constitutional Court and the Court of Justice of the European Union - Judicial Cooperation or Dialogue of the Deaf'* p. 12.
[269] *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17, para. 72.
[270] Phedon Nicolaides, *'An Assessment of the Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank'*, Legal Issues of Economic Integration, 47(3), 2020, p. 267; *Heinrich Weiss and Others v Germany* FCC (BVerfG), Judgment of 5 May 2020 – Case 2 BvR 859/15, paras. 127, 133.

field of economic policy.[271] However, it appears arguable whether a practice that has been conducted for decades on the grounds of the Basic Law, is reconcilable with the Treaties, as an attempt to balance monetary and economic policy by the ECB, would have likely led to an infringement of Art. 127 (1) TFEU.[272] Since the provision '*requires that the support of economic policy by the ECB is without prejudice to price stability*'[273] (as the objective of monetary policy) the very wording is irreconcilable with the idea of balancing based on proportionality. By requiring that the ECB balances monetary and economic policies, the FCC ultimately called for a practice simply not covered by the Treaties and which would undermine the ECB's primary mandate. In other words, there is some contradiction in the reasoning that on the one hand, the ECB must refrain mainly to a supportive role in economic aspects but at the same time to require a full economic assessment when conducting monetary policies. Such an assessment is simply not part of the job description entailed in Art. 127 TFEU.

Furthermore, monetary policy always attempts to influence the real economy and there is essentially no plausible reason why these economic effects must be in any way proportional to monetary policy.[274] Thus, the ECJ was right not to refer to balancing between different policies or between the effects of different policies. Ultimately, Art. 5 (4) TFEU mandates that a measure needs to be assessed in relation to its objective, which, by looking at the ECJ's definition mentioned above, basically means that the institution merely needs to look for a less interventionistic similarly effective alternative. Thus, the institution does not need to balance one policy option against another policy option. This predicament indicates the complexity of the matter and even shows that the courts do not even agree on what a proportionality review requires. To sum up, considering all these circumstances the FCC's landing on the *ultra vires* result in itself appears disproportionate at least.

V THE FCC JUDGEMENT AND THE PRIMACY OF EU LAW

A THE PRIMACY OF EU LAW

[271] Phedon Nicolaides, *'An Assessment of the Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank'*, Issues of Economic Integration, 47(3) 2020, p. 267.
[272] Ibid., p. 267.
[273] Art. 127 (1) TFEU.
[274] Ibid., p. 281.

While unlike other principles the principle of *primacy of EU law* is not clearly acknowledged in the Treaties, it was established many decades ago by the ECJ[275] and in 2007 it was attached to the Treaty of Lisbon[276] in declaration 17.[277]

Hence, in response to the FCC judgement, the ECJ issued a press statement three days after the judgement due to the *'many enquiries'* it was confronted with.[278] After indicating that the department of the Luxembourg court generally does not comment on domestic judgements of Member States courts, it pointed out that a preliminary ruling has a binding effect for the main proceedings.[279] The court pointed out, '*that in order to ensure that EU law is applied uniformly, the court alone, which was created for that very purpose by the Member States, has jurisdiction to rule that an act of an EU institution is contrary to EU law*.'[280] Thus, discrepancies between courts regarding such acts possibly jeopardise the trust in the European legal order.[281] Finally, the court referred to the fact that, in addition to other authorities, national courts need to guarantee that EU law is fully applied since that is the only way to establish *equality* among the Member States.[282] The press release illustrates the predicament of these two conflicting judgements; since the EU does not have a 'set hierarchy', neither of the two courts can invalidate or reverse the other judgement.[283]

B THE ROLE OF THE COURTS

[275] *Flaminio Costa v E.N.E.L*, ECJ Judgment of 15 July 1964. Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64, Headnote 3; *In the Van Gend en Loos v Nederlandse Administratie der Belastingen,* ECJ judgement of 5 February 1963 - Case 26/62; *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, ECJ Judgment of 9 March 1978 - Case 106/77, Headnote 2, 3.
[276] Which reformed the structure of the EU in 2007 and consolidated the TEU and TFEU.
[277] Official Journal of the European Union C 115, Volume 51, 09/05/2008 P. 0344 – 0344; Declaration 17 reads as follows:
It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 [1] there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.
[1] "It follows (...) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."
[278] ECJ press release following the FCC judgement of 5 May 2020
https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf
[279] Ibid.
[280] Ibid.
[281] Ibid.
[282] Ibid.
[283] Dieter Grimm, *'A Long Time Coming'* German Law Journal, 21(5), 2020, p. 948.

The ECJ's role is primarily laid out in Art. 19 TEU. The court ensures a uniform application of EU law in all Member States and settles legal conflicts between Member States and EU institutions. One way to define the law is through preliminary rulings like in the present case where a domestic court of a Member State has asked the ECJ for clarification.[284] Whenever a Member State or a particular court refers a question to the ECJ it implies that this concerns EU law and therefore the entire Union, may the highest judicial power in the EU be the one to rule on the matter to set precedent for the entire EU and its members. The ECJ's argument in the press release is clear - by referring the questions about the ECB's competences to the ECJ in 2017, the FCC released itself from interpreting European Union law.

The FCC recognised the complicated interaction between two judicial mandates.[285] On the one hand, the EU treaties refer upon the ECJ the competence to define and apply the Treaties while also ensuring consistency and coherence of EU law.[286] Thus, a court of a Member State readily invoking the authority to pronounce on the legitimacy of EU possibly erodes the primacy of EU law and jeopardises its uniform application.[287] On the other hand, in the eyes of the FCC, if domestic courts '*were to completely refrain from conducting any kind of ultra vires review, they would grant EU organs unlimited authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences*.'[288] Moreover, the court held that although '*these cases remain rare due to institutional and procedural safeguards enshrined in EU law, when they do occur the domestic constitutional perspective might not perfectly match the perspective of EU law, given that under the Lisbon Treaty*[289] *the Member States remain the 'Master of the Treaties' and the EU has not evolved to a federal state*.'[290] Henceforth, if the ECJ exceeds that limit, its actions are no longer encompassed and justified by Art. 19 (1) second sentence TEU and the domestic act of approval of the Member State; at least *'with regards to Germany its decision lacks the minimum of democratic legitimation necessary under the German constitution'*.[291]

[284] https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.
[285] *Heinrich Weiss and Others v Germany,* FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 111.
[286] Cf. Art. 19 (1) subpara TEU, Art. 267 TFEU.
[287] *Heinrich Weiss and Others v Germany,* FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 111.
[288] Ibid., para. 111.
[289] A treaty from 2007 that reformed the TEU and TFEU.
[290] *Heinrich Weiss and Others v Germany,* FCC (BVerfG) Judgement of 5 May 2020, Case 2 BvR 859/15, para. 111.
[291] Ibid., para. 113.

C THE MEANING OF THE PRINCIPLE OF PRIMACY FOR THE EU AND ITS MEMBERS

The ECJ held in an early ruling that EU laws must be implemented into the domestic legal orders and therefore mandating the compliance of the Member States.[292] The court, therefore, stipulated the *principle of primacy* and implied that in a Union of states Union-Laws must override domestic law for otherwise the Union would simply lose its very purpose.[293] The common market as one of the EU proclaimed economic benefits could simply not be provided if the Member States would not apply European law uniformly.[294] Each EU Member has implemented its own domestic *principle of primacy*, which generally entails limitations and conditions.[295]

However, since European and national law form different legal systems, the superseded national provisions do not become null and void, they are merely not applied. This primacy of application is a rule of supranational integration that everyone who wants to play the game must accept. This is not unproblematic: in a sovereign constitutional state, the constitution is always the highest source of law; this notion is among the basic ideas of a modern constitutional state. European law taking precedence over the constitution is therefore only possible if the constitution permits it or if it can be inferred from it. The FCC was able to base its decision on the innovative Article 24 (1) Basic Law.[296] The FCC formulated a reservation in its 'Solange decisions.'[297] According to this reservation, the power to transfer sovereign rights does not authorize 'abandoning the identity of the constitutional order in force ... by breaking into its basic fabric, into the structures constituting it.'[298] This view has also become the prevailing (but not unanimous) position of the constitutional courts of other Member States.[299] European

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[292] *In the Van Gend en Loos v Nederlandse Administratie der Belastingen,* ECJ judgement of 5 February 1963 Case 26/62, Headnote 3 and 4.

[293] *Flaminio Costa v E.N.E.L*, ECJ Judgment of 15 July 1964. Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64, para. 10.

[294] Dieter Grimm, *'A Long Time Coming'* German Law Journal, 21(5), 2020, p. 944.

[295] See, e.g. Czech Constitutional Court, Pl. US 5/12, *Slovak Pensions XVII*, Judgement of 31 January 2012; Supreme Court of Denmark, Case No. 15/2014, *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen*, Judgement of 6 December 2016; https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199672646.001.0001/oxfordhb-9780199672646-e-8.

[296] Of which paragraph 1 says: The Federation (Germany) may, by a law, transfer sovereign powers to international organisations.

[297] Cf. Fn. 167, 168.

[298] *Re Wünsche Handelsgesellachaft*, FCC (BVerfG) Judgement of 22 October 1986, Case 126/81, (As-long II / Solange-Decision II), para. 104.

[299] This approach was also expressed in the joint declaration 17 attached to the Lisbon Treaty, cf. fn. 275; see also for example the judgements in Fn. 294.

integration must not interfere with the 'constitutional identity' of the Member States. A 'constitutional identity' usually consists of fundamental values and core principles. For the Basic Law, these are the inviolability of human dignity, including the fundamental effective protection of basic rights, the principles of democracy, the welfare state and the rule of law, and the federal state. According to the FCC, the *principles of democracy* are in jeopardy.
By ruling that the German institutions are not allowed to participate in the PSPP until the ECB has provided a deeper proportionality review, the primacy of EU law is essentially disputed.[300]

Nevertheless, it should be noted that the *principle of primacy* only applies when areas of exclusive competence have been conveyed onto the EU by its Member States. Areas of exclusive competence, already described earlier in this paper, are, for example, the 'Customs Union', the 'Single Market' and famously 'monetary policy' – it does not, however, pertain to areas in which the competences remain with the Member States, *inter alia* namely economic policies.

D THE MATTER OF EQUALITY (ARTICLE 4 (2) TFEU)

The ECJ press release following the FCC judgement contains for the main part quite expectable critique. However, the very last part where the ECJ sees the equality of Member States endangered appears to be of utmost importance.[301] The ECJ rightfully connected the matter of equality among the Member States in the context of primacy, since in a union all its members are equal only if union laws apply uniformly as well. The press release also reveals an inconsistency in the handling of domestic courts rebelling against EU law. In 2012 the Czech Constitutional Court[302] and the Danish Constitutional Court in 2016[303] both ruled that EU law did not take precedence over domestic laws and caused no reaction by the ECJ. Although it must be noted that both cases concerned domestic issues as well and not a supranational matter as the PSPP. Hence, these cases are not comparable to the wider issue of how a contested EU legal act can call the primacy of EU law into question. Therefore, the ECJ might have not felt the same pressure to issue a statement. In any event, one argument for primacy results from the angle of equality among the Member States, because if two or more Member States would be

[300] Thu Nguyen, '*A Matter of Principle: The Commission's Decision to Bring an Infringement Procedure against Germany*,' VerfassungsBlog, 11 June 2021.
[301] ECJ press release following the FCC judgement of 5 May 2020 https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf.
[302] Czech Constitutional Court, Pl. US 5/12, *Slovak Pensions*, Judgement of 31 January 2012.
[303] Supreme Court of Denmark, Case No. 15/2014, Judgement of 6 December 2016.

arguing about an issue, for instance, the legality of the PSPP, they need EU law and ultimately the ECJ to pronounce on that issue, for otherwise they would be stuck in a deadlock. As others have put it, there cannot be a competition among courts.[304] Aligned with Art. 19 TEU the ECJ holds the responsibility to apply and provide a uniform and consistent interpretation of EU law all over the Union. In my view, the primary perspective from which to shine a light on the matter of equality is the issue of enforceability of EU law.

Generally, it must be remembered that the FCC did not reject the primacy of EU law *per se*, but merely challenged the ECJ's exclusive mandate to interpret Union law.[305] However, had the FCC and the German constitutional organs not accepted the proportionality assessment subsequently advanced by the ECB, the judgement would have ultimately placed the threat of exception of non-performance[306] on the table. The ECJ held in an early ruling regarding the issue of 'self-help' countermeasures in the Community legal order that the exception of non-performance does not apply in EU law.[307] Regardless of this judgement, there is no doubt that the FCC's judgement in its legal consequence would have ultimately prevented the German central bank (Bundesbank) from further taking part in the PSPP.[308] Therefore ultimately resulting in the same effect as the exception of non-performance.[309] Essentially, once one Member State indicates non-compliance with EU law, others possibly feel inclined to follow suit and even disregard other EU provisions.

The ECJ, in the 'self-help' ruling,[310] delivered the main line of reasoning for the non-existence of the exception of non-performance by comparing union-law to general international law: While the exception of non-performance deduced its right for existence from the lack of enforcement mechanism in international law, these very mechanisms and institutions very much exist within the union.[311] In this regard, one might argue that the primacy of EU law

[304] Jose Luis da Cruz *'The Judgement of the German Federal Constitutional Court and the Court of Justice of the European Union - Judicial Cooperation or Dialogue of the Deaf'*, p. 7.
[305] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgement of 5 May 2020, Case 2 BvR 859/15, para. 112-113.
[306] Which in International Law allows states to withhold an obligation if another state has also withheld the same or a similar obligation (*Exceptio non adempleti contractus)*.
[307] *Commission of European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium* - joined cases 90/63 and 91/63, ECJ judgement of 13 November 1964, Headnote 1, 2; Justin Lindeboom, *'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgement'*, German Law Journal, 21(5), 2020, p. 1035.
[308] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 235.
[309] *Heinrich Weiss and Others v Germany*, FCC (BVerfG) Judgment of 5 May 2020, Case 2 BvR 859/15, para. 235.
[310] Cf. Fn. 306.
[311] *Commission of European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium* - joined cases 90/63 and 91/63, ECJ judgement of 13 November 1964 at 631.

explains the missing of the exception of non-performance.[312] The ECJ holds the exclusive competence to maintain a uniform interpretation of EU Law, the latter always takes precedence over domestic law and therefore all Members equally comply with EU law, hence there is no need for the exception of non-performance.[313] However, as soon as one of the links in this chain is being called into question, the whole reasoning loses its plausibility and reasonableness. *In casu*, the primacy of EU, as well as the ECJ's competence to provide a uniform interpretation, have been called into question, therefore the interpretation of EU law is not uniform anymore and cannot ensure that all Member States have an equal obligation to follow the law, but rather have a reason to plead exception of non-performance. Hence, the FCC judgement could have potentially broken up jurisprudence that has been in place for decades. With the above reasoning on *ultra vires* merits in mind, one wonders if the German court has conclusively considered every potential chain reaction and if the court had to go down this path.

The argument stated in the press release that the FCC's judgement essentially threatens the equality of all EU members could also be viewed from a different angle, namely by looking at the aftermath of the judgement and the discussed repercussions for Germany. In terms of the legal consequences, the FCC ultimately ruled that after a period of three months the '*German central bank (Bundesbank) may no longer participate in the PSPP unless the ECB Governing Council adopts a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme*.'[314] Simultaneously, the court required the German Federal Government and Parliament *'to take steps seeking to ensure that the ECB conducts a proportionality assessment in relation to the PSPP'*.[315] In short, the ECB should once again set out in a formal decision its reasons why the monetary policy benefits of the PSPP outweigh its economic policy side effects. Expectedly, the ECB did not find this difficult, modeling and weighing the (highly complex) effects of monetary policy decisions is part of the central bank's everyday business.[316] Thus, a couple of weeks later the ECB issued the required decision[317] and the German Government and Parliament was quick to jump on it

[312] Justin Lindeboom, *'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgement'*, German Law Journal, 21(5), 2020, p. 1035.
[313] Ibid., p. 1035.
[314] *Heinrich Weiss and Others v Germany*, FCC (BVerfG), Judgment of the Second Senate of 5 May 2020, Case 2 BvR 859/15, para. 235.
[315] Ibid., para. 232.
[316] Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt on 3-4 June 2020 (https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html)
[317] Ibid.

and fully embraced its reasoning.[318] In this way, the FCC's judgement appears as something of a toothless tiger. Regarding the issue of primacy of EU law and equality among the Member States the reaction of the EU Commission seems interesting.[319] The Commission initiated infringement proceedings against Germany.[320] Because the German government and parliament substantially assessed and appraised the decisions rendered by the ECB Governing Council following the judgement of 5 May 2020,[321] the dispute was likely to just fizzle out.[322] However, the EU arguably did not truly have any other option than to go down that path if it did not want to set a precedent for national special requests. Ultimately, the infringement procedure does not serve to decide whether or not the ECB acted *ultra vires* but to emphasise the primacy of EU law. The EU, after all these Brexit years and repeated provocations from Poland and Hungary regarding EU law primacy, had no other face-saving options than to invoke Art. 258 TFEU and start infringement proceedings. As it stands, prospects for Germany are not positive, since the ECJ has already pronounced the PSPP lawful a conviction in these proceedings appears inevitable. Aside from the fact that the Commission has not initiated infringement proceedings against Denmark and the Czech Republic,[323] the infringement proceedings aim to uphold equality.[324] In general, the Commission has to stick to a line, which it established in cases of the supreme courts of Italy and France overruling EU law.[325] Notably, both pertinent cases did not constitute systemic breaches or a clear and voluntary defiance of the ECJ, so not initiating infringement proceedings in the present case would have been incomprehensible.

Art. 258 TFEU affords the Commission a broad margin of discretion and therefore a uniform application of discretion is an indicator of how the Commission enforces equality among the Member States by holding everyone to the same standard. Uniform infringement proceedings directed at all Member States not upholding EU law could ensure equality although

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[318] Andreas Rinke, *'ECB stimulus plan meets court requirements: German finance minister'* 29 June 2020, U.S. Markets REUTERS (https://www.reuters.com/article/us-ecb-policy-germany/ecb-stimulus-plan-meets-court-requirements-german-finance-minister-idUSKBN2401OX).; This decision will likely be assessed by the FCC when the current Pandemic Programme which also includes government bonds buying parts will end up before the FCC.

[319] David R Cameron, *'EU starts infringement procedure against Germany over 2020 Court decision'* 10 June 2021, The Whitney and Betty MacMillan Center for International and Area Studies at Yale.

[320] David R Cameron, *'EU starts infringement procedure against Germany over 2020 Court decision'* 10 June 2021, The Whitney and Betty MacMillan Center for International and Area Studies at Yale; 'June infringements package' https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743.

[321] FCC (BVerfG) Order of 29 April 2021, Case 2 BvR 1651/15, para. 108.

[322] Thu Nguyen, '*A Matter of Principle: The Commission's Decision to Bring an Infringement Procedure against Germany*,' VerfassungsBlog, 11 June 2021.

[323] Different Judgements of their apex courts breaking with EU law mentioned above, however not regarding matters of *ultra vires*.

[324] Justin Lindeboom , *'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgement'*, German Law Journal, 21(5), 2020, p. 1038.

[325] *Commission v Italy* (Corte Suprema di Cassazione) 24 November 2011, Case C-379/10; *Commission v France* (Conceil d'Etat) 4 October 2018, Case C-416/17.

possibly not as effective as the internal upholding of EU law in every domestic legal order.[326] According to Lindeboom, it is irrelevant whether equality is enforced in a centralised manner through infringement proceedings[327] or through decentralised enforcement within the Member States *'except to the extent that the latter entirely collapses into full effect.'*[328]

Undoubtingly, incidents like the *Weiss* judgement will always pose a severe threat to a union of states, because it is essentially built on the willingness of all members to promote the European agenda. The threat is especially severe when, as has been shown above, the supra-national court's jurisprudence is designed and built on the idea that all Member States follow suit. Whenever the Member States or their institutions are questioning the primacy of EU law, the idea of complete equality among the Members is attacked. However, the possibility of Member States violating European law can, with measures set out by the Treaties, only be met with infringement proceedings. Therefore, as long as the EU exercises its discretion when to initiate infringement proceedings equally, the Member States remain equal at last.

C PRIMACY OF EU LAW AND THE NEED FOR AN IMPARTIAL, INDEPENDENT AND EQUIDISTANT ARBITER

To assure that 'the law is observed' in the 'interpretation and application of the Treaties' as described by Article 19 TEU, the Member States established a judicial system adapted to the characteristics of the EU legal order and based upon a system of judicial cooperation.[329] This system is essentially built around the framework of the preliminary ruling mechanism as described earlier, established and regulated in general terms around Article 267 TFEU.[330]

Many voices see the FCC judgement as crossing a red line, because it substantially undermines the ECJ's sole competence to interpret EU law and as a last resort to declare, where appropriate, the invalidity of EU provisions.[331] Since the judicial system of cooperation relies

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[326] Justin Lindeboom, *'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgement'*, German Law Journal, 21(5), 2020, p. 1038.
[327] In Art. 258-260 TFEU
[328] Justin Lindeboom, *'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgement'*, German Law Journal, 21(5), 2020, p. 1038.
[329] Jose Luis da Cruz *'The Judgement of the German Federal Constitutional Court and the Court of Justice of the European Union - Judicial Cooperation or Dialogue of the Deaf'* p. 4.
[330] Art. 267 TFEU reads: *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: a) the interpretation of the Treaties; b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union …*
[331] Jose Luis da Cruz *'The Judgement of the German Federal Constitutional Court and the Court of Justice of the European Union - Judicial Cooperation or Dialogue of the Deaf'* p. 4; Pavlos Eleftheriadis, '*Germany's Failing Court*', VerfBlog, 2020/5/18, https://verfassungsblog.de/germanys-failing-court/, DOI: 10.17176/20200519-013420-0, paragraph. 3; Daniel Sarmiento & Joseph H. H. Weiler, '*The EU Judiciary After Weiss: Proposing A New Mixed Chamber of the Court of Justice*', VerfBlog, 2020/6/02, https://verfassungsblog.de/the-eu-judiciary-after-weiss/, DOI: 10.17176/20200602-133615-0, paragraph 5.

on the reciprocal and scrupulous respect of competences and roles of each player, the FCC judgement ultimately jeopardises the ability of the ECJ to protect the integrity of the EU legal order.[332]

There are also scholarly voices who argue that as the EU basically constitutes 'constitutional pluralism'[333] the German judgement is not more than an inbuilt systemic feature.[334] This line of argumentation aligns with the one conducted under the aspect of equality. Essentially, the FCC judgement does not have to be cause for concern, because measurements are set in place to deal with such reoccurring events.

Others agree in general with the FCC and see the overall goal to hinder the EU from establishing and affirming its own competence (Kompetenz-Kompetenz) or from infringing the *'constitutional identity'* of the Member States.[335] Since the EU diverts its '*democratic legitimation'* primarily from the Member States there must be a way to safeguard the constitutional structures of its members.[336]

Regardless of who one might tend to agree with, the PSPP ruling has shown that there appears to be a lack of final authority in European jurisprudence. The fact, that the Member States did not enshrine the *principle of primacy* of EU law in the Treaties but only agreed to add it onto the Lisbon Treaty in declaration 17[337] illustrates that there might have been some hesitancy as to fully embrace the primacy of EU law and ultimately the final authority of the ECJ. However, by looking at the conflict of courts at hand, there is not a plausible reason why an impartial, independent, and equidistant arbiter in this area should be a domestic Member State court and not the ECJ to which all Member States agreed and feel represented by and whose competence has been enshrined in Article 267 TFEU. Conversely, the opposing view would argue that since the ECJ is a court 'with one agenda'[338] it cannot possibly be impartial.

While much can be said about how to properly assess and evaluate the FCC judgement, what appears to be more important is where do we go from here and how such a predicament prospectively can be avoided.

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[332] Jose Luis da Cruz *'The Judgement of the German Federal Constitutional Court and the Court of Justice of the European Union - Judicial Cooperation or Dialogue of the Deaf'* p. 5.
[333] Which describes a legal system as a conceptual heterarchy, where no one's system is normatively superior to the other.
[334] Matej Avbelj, *'The Right Question about the FCC Ultra Vires Decision'*, VerfBlog, 2020/5/06, https://verfassungsblog.de/the-right-question-about-the-fcc-ultra-vires-decision/, DOI: 10.17176/20200507-013348-0, paragraph 4.
[335] Dieter Grimm, *'A Long Time Coming'*, German Law Journal, 21(5), 2020, p. 946.
[336] Ibid., p. 946.
[337] As described on page 34.
[338] Cf. p. 23.

Regarding the question of where to go from here, both the proponents of a monopoly of jurisdiction by the ECJ and the representatives of the opposing position, who argue that a final arbiter is best to be placed at a national supreme and constitutional court, have arguments on their side. The PSPP ruling has brought fundamental differences of opinion to light. These fundamental differences point to a deep layer of conflict. At the core of the conflict lies the question of what the European Union actually is today and what it should become in the future. At present, the EU cannot be described with existing international law terminology. On the one hand, it has clearly outgrown the stage of a traditional international organization. And while it now has far-reaching competences, the Union has not yet attained the quality of a state in the sense of state and international law. Whether it will ever develop into the United States of Europe is yet to be seen. How, then, is one to deal with fundamental conflicts between national and European jurisdiction within this entity of its own kind ('sui generis')? Hence, the European Union and the member states might need new organisational forms and procedures for resolving disputes that arise at the interfaces between EU competences and state sovereignty. In concrete terms, this means moderating and arbitrating a legal dispute between supreme courts that otherwise have no means of resolving dysfunctional conflicts in the interests of legal certainty and legal peace.

Scholars like Sarmiento and Weiler have called for a new appeal jurisdiction embedded with the ECJ, limited to adjudicating on *Weiss* type cases.[339] Such a chamber should be composed of sitting ECJ judges next to judges of the domestic apex courts of the Member States and because of its diversified composition, the chamber will be equipped with another level of authority and legitimacy. [340] Sarmiento and Weiler suggest that the composition should be of six judges of the ECJ, who were not involved in the appealed decision, and six judges from apex courts of the Member States, whose selection has been predetermined.[341] Since the Grand Chamber of the ECJ consists of 15 sitting judges, Sarmiento and Weiler believe that at least eight or nine of the judges should validate a challenged EU measure.[342] The proposed 'Mixed Grand Chamber' should only rule whether the EU or the Member States are competent to act in a certain area and the chamber shall be competent to pronounce an EU act that constitutes a severe infringement of the *principle of conferral*, null and void while simultaneously

[339] Daniel Sarmiento & Joseph H. H. Weiler, '*The EU Judiciary After Weiss: Proposing A New Mixed Chamber of the Court of Justice*', VerfBlog, 2020/6/02, https://verfassungsblog.de/the-eu-judiciary-after-weiss/, DOI: 10.17176/20200602-133615-0, paragraph 19.
[340] Ibid., para. 21.
[341] Ibid., para. 22.
[342] Ibid., para. 23.

overturning a decision of the ECJ which validated that act.[343] Comparably to the standard of review the FCC gave itself for the UVR, cases in which the 'Mixed Grand Chamber' will act are limited to 'serious breaches.'[344] The new appeal chamber could be invoked by an apex court of a Member State in a situation similar to the present one, as well as by a government or parliament of a Member State within a year from the ECJ's decision on the validity of the contested EU act.[345] The participating apex court judges would rotate, but the president of the referring court should be part of the 'Mixed Grand Chamber.'[346] Procedurally, the proceedings should grant time for hearings of the concerned Member State and EU Institutions.[347]

A comparable model already exists (coincidentally) in Germany[348] and could be made usable for the EU. According to the cited provision, if the supreme federal courts disagree on a legal matter, a 'Joint Senate of the Supreme Courts' can be convened to make a binding decision on the contentious question.

Why not consider a comparable model for the EU? One could call this institution, similar to the suggestion by Sarmiento and Weiler, something like 'Joint Council of the Supreme Courts of the European Union'. As previously suggested, it should be formed as a special chamber of the ECJ or maybe even as a new institution of the EU. Its task would be to rule on referrals from national supreme and constitutional courts that have fundamental concerns about the legality of a preliminary ruling of the ECJ, by which they are bound in principle. The content of the application would be the annulment of the judgment in question and a new decision by the 'Joint Council', or at least referral back to the ECJ with the proviso that the legal issues be decided anew in the light of the objections raised.

The 'Joint Council' should be composed of judges who are equal in the number of members of the ECJ and representatives of national courts. This ought to ensure a balance between the national and the European perspective. Especially in bilateral issues, a multilateral perspective might be helpful to gain an objective view. Hence, particularly difficult legal questions, such as the scope of the Union's competence or the scope of the reservation of identity under Article 4 (2) TEU, could be dealt with in a perspective-balanced judicial discourse. Moreover, the participation of national and European judges on an equal footing enables a genuine dialogue between the courts. The presidents of the respective institutions

[343] Ibid., para. 22.
[344] Ibid., para. 22.
[345] Ibid., para. 24.
[346] Ibid., para. 25.
[347] Ibid., para. 26.
[348] see Article 95 (3) of the Basic Law in conjunction with the German Constitutional Court Act. Act on the Preservation of the Uniformity of Jurisdiction of the Supreme Courts of the Federation.

should be provided for as representatives of the national courts. The judges should be appointed by mutual agreement of the governments of the Member States, as is the case with the ECJ.

The anchoring of a 'Council of Supreme Courts' in the founding treaties of the EU would not call into question the unity of Union law. Hence the final decision would be attributable to the EU. At the same time, the concerns of national courts and state sovereignty would be sufficiently taken into account. The court making the application would indeed have to submit to a supranational court under certain circumstances. However, it would first be involved in the proceedings with a full right to speak and vote, together with other national courts that also want to see their constitutional limits respected. In return, the Court would also have to accept in principle a change in its initial decision.

A particular problem would be the size of the Joint Council of the Supreme Court. If the Joint Council were formed from the 27 judges of the ECJ and an equal number of judges from the Member States, 54 people would have to decide on a case. The body would certainly be too large to be workable. This is where the suggestion by Sarmiento and Weiler is apt. However, a smaller college is not easy to form, because it would then be necessary to select which judges or courts should belong to the 'Joint Council.' For this purpose, a pre-determined rotation system as suggested by Sarmiento and Weiler is suitable, but it should randomly determine the represented national courts and the representatives of the ECJ. In any case, the applicant court, and the chamber of the court whose judgment is in dispute should be represented on the 'Joint Council.'

VI CONCLUSION

Regardless of what one thinks of the merits and details, in this case, it remains unclear why the FCC did not refer the case to the ECJ for a second time in order to obtain a final decision?[349] One gets the impression that the FCC was far keener on resorting to defiance than conducting a productive judicial dialogue.

Constitutional Courts evidently hold crucial roles in democracies. They are meant to act as a check and balance in the triad of powers in a democracy, alongside the legislative and executive branches. Understandably, a constitutional court that was established in the aftermath of fascism in Germany is particularly vigilant regarding the protection of democratic principles enshrined in its counter-authoritative constitution. Thus, the FCC has applied this very vigilance

[349] Art. 267 TFEU generally puts no limit on the number times a court can address the ECJ for a preliminary ruling.

to the entire founding and development of the European Union. However, since the EU is intrinsically democratic, upholds human rights and aims at bringing Member States closer together,[350] it does not pose a threat like the founding fathers of the Basic Law may have envisaged in post-war Germany. Hence, the FCC has developed a jurisprudence regarding the Basic Law's relationship to the EU that was designed to illustrate both its own vigilance in protecting the constitution while also acknowledging that the democratic foundations on which the EU was built do not pose an imminent threat to the German constitution.[351] While the jurisprudence has evolved over the decades, the FCC has given itself a standard of review by which all EU acts have to prospectively be assessed. Until last year, the criteria for the UVR have not been positively affirmed in the court's case law. Before May of 2020, the possibility of an EU act being declared *ultra vires* was arguably a mechanism for the FCC to maintain the appearance of having the final say. At the same time, the high threshold established by the wording in *Honeywell*[352] did not suggest that a UVR verdict would be likely. After affirming that the present case suffices to fulfil the legal criteria established in *Honeywell,*[353] the FCC has now given life to this very wording. As has been shown in this paper, the FCC chose two points of attack in the *Weiss* ruling, namely the proportionality assessment and the scope of monetary policy. By looking at the FCC's UVR threshold jurisprudence, one assumed that the UVR threshold could only be reached by a blatant disregard for the conferred EU competences. The latter was simply not the case in the *Weiss* saga. I argued that the UVR, as the court's sharpest blade, should have simply not been affirmed on either the technical practice of weighing aspects in proportionality or on delimiting monetary and economic policy. I have contended that the proportionality check, as well as the allocation of the PSPP to either monetary or economic policy, appear too highly debated and complex and therefore unsuited for easily arriving at a *'manifest breach of competences which lead to a significant shift of competences to the detriment of the Member States.'*[354] After analysing the decision in detail, I concluded that the proportionality assessment by the ECB as well as the ECJ, who nodded to the ECB's assessment, did not constitute that '*manifest breach*'. Not only is it difficult for a nuanced proportionality assessment to inevitably have a particular outcome, but the matter of defining the purchase of government bonds as either monetary or economic has at least been disputed since the sovereign debt crises began more than a decade ago. Throughout all these years, the ECJ has consistently found the purchase of government bonds to be reconcilable with the

[350] https://europa.eu/european-union/about-eu/eu-in-brief_en.
[351] Cf. 'Solange'jurisprudence in Fn. 167, 168.
[352] Cf. Fn. 177.
[353] Cf. Fn. 177.
[354] Cf. Fn. 177.

Treaties.[355] Although the Outright Money Transaction (OMT) programme in the *Gauweiler* case differs from the PSPP, the nature of purchasing government bonds in the context of Art. 127 TFEU remained an essential question. In this regard, one wonders how the FCC came to the opposite result four years later.

The history of the FCC's jurisprudence on the relationship between the EU and the Basic Law is influenced by the primacy of EU law. The wording in 'Solange II',[356] for example, was chosen rather modestly and reserved because the FCC recognised the need for EU law to take precedence. In light of the *principle of primacy* of EU law, the FCC has steadily developed jurisprudence on how the Basic Law and EU primary law interact.[357] These judgements have at least partly shown the FCC's awareness of the risk that a denial of primacy may pose for the development of the EU. After upholding primacy for roughly 50 years and after witnessing the chaotic Brexit years, it is astonishing that the FCC chose this case to call primacy into question.

More than a year after the judgement set off shock waves, the matter has for the most part moved out of public interest. The issue, however, will probably once again come to the centre of attention fairly soon. After the pandemic hit the global economy in March of 2020, the EU decided to double down on its ultra-loose monetary policy and implemented the Pandemic Emergency Purchase Programme (PEPP). The PEPP again mainly consists of the purchase of public sector securities.[358] Therefore, it will likely end up challenged before the FCC. At this point, the same questions will be raised again, with an open outcome. How and whether the PEPP will be upheld by the ECJ with regards to Art. 127 TFEU is yet to be seen. At this point, it might seem ironic that a policy that intends to benefit the Member States in a time of need is questioned by one of its members. As I have suggested, in times when the EU laws are also constantly undermined by the Polish and Hungarian governments,[359] a final and decisive arbitration senate consisting of ECJ judges as well as judges from the Member States could be helpful. It could help soften up sometimes hardened fronts and indicate that the only way forward is through dialogue.

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[355] *Gauweiler and others v Deutscher Bundestag*, ECJ Judgement of 16 June 2015, Case C-62/14; *Heinrich Weiss and Others v Germany*, ECJ Judgement of 11 December 2018, Case C-493/17.
[356] Cf. Fn. 168.
[357] Cf. Fn. 167, 168, 170, 175, 177.
[358] https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html
[359] Steven Erlanger and Monika Pronczuk, '*E.U. Slams Poland and Hungary on Rule of Law, but to Little Effect'* 20 July 2021, The New York Times, https://www.nytimes.com/2021/07/20/world/europe/eu-poland-hungary-rule-of-law.html; Jan Strupczewski: 'EU lists rule of law concerns for Hungary, Poland, pivotal in releasing COVID funds' 20 July, 2021, on REUTERS, https://www.reuters.com/world/europe/eu-lists-rule-of-law-concerns-hungary-poland-could-withhold-funds-2021-07-20/; https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668.

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