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## *Short Symposium on the PSPP*

# **The German Right to Fiscal Stability and the Counter-Majoritarian Difficulty: The PSPP Judgment of 5 May 2020**

Francesca Bignami\*

### **Abstract**

The PSPP litigation involved the European Central Bank's (ECB's) Public Sector Purchase Programme for the purchase of government bonds on the secondary market with the aim, among others, of combating deflation. Although the Court of Justice of the EU (CJEU) found the PSPP lawful, the German Federal Constitutional Court (FCC) disagreed: On May 5, 2020, the FCC held that the CJEU's judgment was not binding in Germany and that the PSPP was unlawful and required further ECB action to bring it into compliance with German law.

This article contributes to the growing scholarship on the PSPP litigation by analyzing the CJEU and FCC judgments as examples of what I call the 'ordinary politics' of constitutional adjudication—defending constitutional rights and principles while at the same time respecting the constitutional prerogatives of the political branches and successfully navigating the 'counter-majoritarian difficulty'. Based on a careful analysis of the CJEU's and FCC's jurisprudential trajectories in the domain of economic and monetary policy, I argue that the FCC's PSPP judgment is particularly counter-majoritarian. Over the past ten years, the FCC has fashioned, seemingly whole cloth, what I call a 'right to fiscal stability' and this right imposes additional procedural hurdles on the German government domestically that tip the scales in favor of EU austerity politics. My counter-majoritarian argument applies not only to judicial interference with decisions of German elected officials to participate in EU bailout funds; It also applies to judicial interference with the bond-buying programs (eg PSPP) of European central bankers, who enjoy their own form of accountability and legitimacy in the EU and global financial systems. Indeed, because of the decline of the traditional parties of the center-right and the center-left and the fragmentation of the political spectrum, contemporary German politics have become especially vulnerable to this destabilizing, austerity-inducing effect of constitutional law. In response to the pandemic-induced economic crisis, there have emerged a number of promising policy experiments in EU-wide solidarity, supported by the German government as well as the vast majority of Member States. For German constitutional law to operate as a potential barrier to greater EU economic solidarity, above and beyond the incredibly contentious politics, appears to be a particularly acute form of counter-majoritarianism that calls for jurisprudential recalibration.

### **I. Introduction**

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It is a commonplace that constitutional courts are political actors.<sup>1</sup> That is, they are created to settle disputes involving the overtly political institutions of the jurisdiction. They do so based on the supreme law of the constitution, whose guarantees are generally extraordinarily open-textured. The combination of the type of dispute and the type of law, makes it impossible for constitutional courts to rely exclusively on the commonly accepted legal sources and interpretive techniques of their jurisdictions to reach their decisions. Rather, moral and political considerations also figure. The legitimacy of courts derives in large part from their ability to play this role and defend constitutional principles while, at the same time, not usurping the rightful prerogatives of other actors in the constitutional system, most prominently, but certainly not exclusively, the elected legislature. In the American tradition, the delicate task facing constitutional courts comes under the heading of the ‘counter-majoritarian difficulty’,<sup>2</sup> in the French tradition, under the specter of the *gouvernement des juges*.<sup>3</sup>

Beyond what one might call ordinary politics, which are common fare for constitutional courts in any jurisdiction, European courts are also engaged in another type of politics – existential politics. That is, they have been called upon to take sides on the issue of where the ultimate, sovereign authority lies in the European legal system – in the EU Treaties, as interpreted by the EU’s constitutional court (European Court of Justice of the European Union (CJEU)), or in Member State constitutions, as interpreted by their domestic constitutional courts.<sup>4</sup> In the Anglo-American legal tradition, this can be styled as a fundamental debate over Europe’s rule of recognition.<sup>5</sup> In EU law, it can simply be referred to as the supremacy issue. What has priority, a pronouncement of the CJEU, based on the EU Treaties, or a pronouncement of a Member State constitutional court, based on the national constitution? Similar to much of the ordinary politics of constitutional courts, there is no good answer in the positive law to the supremacy question. In many respects, this legal ambiguity is willful, and the EU has thrived on it. For their part, Europe’s constitutional courts have been quite skillful at avoiding the existential question. Yet the very possibility of discord, in what for all intents and purposes, appears to be a relatively well-functioning legal system, has driven an extensive scholarly literature on constitutional pluralism – seeking to explain the very existence of the system, as well as to develop principles rooted in moral and legal commitments to values such as

<sup>1</sup> A. Stone Sweet, ‘Why Europe Rejected American Judicial Review – And Why It May Not Matter’ 101(8) *Michigan Law Review*, 2744-2780 (2003).

<sup>2</sup> A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 2<sup>nd</sup> ed, 1986), 16-17.

<sup>3</sup> E. Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis; l’expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Paris: Giard, 1921).

<sup>4</sup> For purposes of this article, I set aside the difference between concentrated review in a specially designated constitutional court and judicial review by a supreme court of general jurisdiction and used the term ‘constitutional court’ for both the CJEU and Member State courts.

<sup>5</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2<sup>nd</sup> ed, 1976).

pluralism and tolerance, to mediate existential conflicts should they occur.<sup>6</sup>

For the most part, the PSPP litigation has been analyzed as an example of existential politics and constitutional pluralism. As will be familiar to the readers of this article and special issue, the PSPP litigation involved the European Central Bank's (ECB's) Public Sector Purchase Programme for the purchase of government bonds on the secondary market, with the aim, among others, of combating deflation. The German Federal Constitutional Court (FCC) had doubts as to the lawfulness of the PSPP and referred, in July 2017, a series of questions to the CJEU.<sup>7</sup> In the *Weiss* judgment, decided in December 2018, the CJEU gave its preliminary ruling, finding that the PSPP was legal under the EU Treaties in all respects.<sup>8</sup> The FCC, however, disagreed, and in its judgment of 5 May 2020, held that the CJEU's judgment was not binding in Germany and that the ECB's PSPP was unlawful and required further action to bring it into compliance with German law.<sup>9</sup>

It is not hard to understand why this quite spectacular series of judgments has been scrutinized for what it can reveal on the supremacy issue. The *PSPP* litigation represents a rare instance in which the existential question has resulted in direct conflict and where neither the CJEU nor the national court, has backed down. Moreover, it is the only such instance involving the German FCC, probably the most powerful domestically and the most prestigious internationally of Europe's constitutional courts. Last, the PSPP judgment comes at a very bad time for the European judiciary, since the CJEU has been forced to take on a role in policing judicial independence and rule-of-law fundamentals in Hungary and Poland.<sup>10</sup> The PSPP judgment undermines the CJEU's legitimacy and its claim to supremacy. It has already been used by the governments of Poland and Hungary to push back against the CJEU decisions condemning them for rule-of-law violations.<sup>11</sup>

Although the supremacy issue is undoubtedly critical, this article contributes to the debate by shifting attention away from existential politics and toward the ordinary politics of the two constitutional courts in the PSPP litigation. The existential politics lens can sometimes harden positions, in favor of either EU or

<sup>6</sup> See, eg, N. Walker, 'Constitutional Pluralism Revisited' 22(3) *European Law Journal*, 333-355 (2016).

<sup>7</sup> Bundesverfassungsgericht 18 July 2017, 2 BvR 859/15 (hereinafter *PSPP* order), available at <https://tinyurl.com/y6garx3q> (last visited 27 December 2020).

<sup>8</sup> Case C-493/17 *Weiss and Others* (hereinafter *Weiss* judgment).

<sup>9</sup> Bundesverfassungsgericht 5 May 2020, BvR 859/15 (hereinafter *PSPP* judgment), available at <https://tinyurl.com/yyprxyr7> (last visited 27 December 2020).

<sup>10</sup> See F. Bignami, 'Introduction: EU Law, Sovereignty, and Populism', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), 15-20; K. Lane Schepele and R.D. Kelemen, 'Defending Democracy in EU Member States: Beyond Article 7 TEU', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), chapter 15.

<sup>11</sup> S. Biernat, 'How Far Is It From Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland' 21(5) *German Law Journal*, 1104-1105 (2020).

Member State supremacy.<sup>12</sup> Ordinary politics and the ever-present shadow of the counter-majoritarian difficulty can, instead, be a useful alternative yardstick for assessing constitutional judgments. Analyzing how the EU and German courts perform the task of applying constitutional norms while, at the same time, recognizing the constitutional prerogatives of the legislative and executive actors of their respective, and overlapping, constitutional systems, can serve as a helpful vantage point. A fine-grained analysis of their jurisprudence in a specific policy area can reveal how they exercise their powers, indicate whether something has gone wrong in the overall constitutional balance of powers, and suggest how the path can be reversed if need be.

It can be argued that this form of counter-majoritarian analysis and self-correction has already occurred in another EU policy area, the free movement of posted workers. The CJEU's *Viking* and *Laval* judgments<sup>13</sup> came under heavy criticism for their neoliberal bent and the CJEU has since signaled a shift towards greater tolerance for the policymaking prerogatives of the political branches.<sup>14</sup> My argument in this article is that the jurisprudence of the German court on economic and monetary union (EMU) might be ripe for a similar form of recalibration. By establishing what I call a right to (EU) fiscal stability, the German decisional law that culminated in the PSPP judgment has tipped the scales in domestic, German politics in favor of Euroskeptics and against economic solidarity. In light of the importance of Germany in the evolving EU politics on EMU, the result is that the German jurisprudence has tipped the scales at the EU level too. Yet the German right to fiscal stability is based on constitutional and treaty text, and judicial precedents, that are far from unequivocal. When seen from the perspective of the counter-majoritarian difficulty, the German jurisprudence on EMU has come to occupy an outsized domain in the political space of EMU and risks stifling legitimate German and EU debate and undermining the policymaking prerogatives of the other constitutional branches.

The rest of this article proceeds as follows. In the next section, I briefly review the PSPP litigation from the standpoint of existential politics and the supremacy issue. Then I turn to the ordinary politics of constitutional adjudication: In the third section, I analyze the evolving jurisprudence that culminated in the PSPP decisions of the two constitutional courts. In the fourth and concluding section, I suggest that the German *PSPP* judgment together with the earlier judgments on which it rests have expansively pushed the boundaries of German

<sup>12</sup> See generally V. Perju, 'Against Bidimensional Supremacy in EU Constitutionalism' 21(5) *German Law Journal*, 1006-1022 (2020).

<sup>13</sup> Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet*; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*.

<sup>14</sup> U. Öberg and N. Leyns, 'On Equal Treatment, Social Justice and the Introduction of Parliamentarism in the European Union', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), chapter 7.

constitutional law. There is a good argument to be made that this EMU jurisprudence interferes with the constitutional prerogatives of the legislative and executive branches and that it might be time to scale back.

## II. Existential Judicial Politics

Where does the ultimate legal authority in the EU system lie? Early on, in the well-known legal trajectory that began with *Vand Gend en Loos* and *Costa v ENEL*, the CJEU asserted the supremacy of EU law.<sup>15</sup> As might be expected, many Member State constitutional courts have taken the opposite view, and have sided with their national constitutions and national law. There is also a third answer possible, which rests in between the absolutes – constitutional pluralism. This scholarly literature on the dueling supremacies of EU and national law dates mostly to the post-Maastricht era when the expansion of EU competences led to a much greater risk of head-to-head conflict between constitutional courts. Beyond description, the focus has been on working out a set of principles that can serve to mediate and accommodate the contesting supremacy claims of the EU's and the Member States' legal orders – principles such as dialogue, subsidiarity, and participation.<sup>16</sup>

In national constitutional courts, one important strategy for maintaining the supremacy of national law has been to refrain from sending questions to the CJEU through the preliminary reference system (Art 267 TFEU), a procedure that de facto recognizes the authority of the CJEU. This was the approach that was followed by the German FCC for decades. In 2010, however, in the *Honeywell* judgment,<sup>17</sup> the FCC indicated a change of heart, and outlined the procedure by which it would request preliminary rulings under Art 267 TFEU. This is the procedure that it used, for only the second time, in the PSPP litigation. In *Honeywell*, the FCC first repeated the power, established in its *Maastricht*<sup>18</sup> and *Lisbon*<sup>19</sup> judgments, to review EU acts for being in breach of the competences contained in the EU Treaties (ultra vires review) or for infringing the core of German constitutional identity that cannot be assigned to an international organization (identity review).<sup>20</sup> Ultra vires review, the FCC

<sup>15</sup> K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001).

<sup>16</sup> See generally M. Avbelj and J. Komárek eds, *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012).

<sup>17</sup> Bundesverfassungsgericht 6 July 2010, 2 BvR 2661/06 (hereinafter *Honeywell* judgment), available at <https://tinyurl.com/yylaxc2a> (last visited 27 December 2020).

<sup>18</sup> Bundesverfassungsgericht 12 October 1993, 2 BvR 2134/92, 33(2) *International Legal Materials*, 395-444 (1994) (hereinafter *Maastricht* judgment).

<sup>19</sup> Bundesverfassungsgericht 30 June 2009, 2 BvE 2/08 (hereinafter *Lisbon* judgment), available at <https://tinyurl.com/y6lpohk7> (last visited 27 December 2020).

<sup>20</sup> *Honeywell* judgment, para 55.

said, is to be coordinated with the CJEU, by giving the CJEU the first cut at the issue of whether the EU act is compliant with the competences set out in the Treaties.

The *Honeywell* procedure bears some of the marks of constitutional pluralism. First, the FCC acknowledges the CJEU's authority to assess EU law based on the higher law guarantees in the EU Treaties. Second, the FCC indicates a certain amount of deference to the EU legal system while nonetheless reserving its power in the last instance to assert its interpretation of the EU Treaties based on Germany's incorporation of the EU Treaties into domestic law. This EU deference is articulated as an EU act being ultra vires only if the act is

‘manifestly in violation of competences and (...) the impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute (the EU Treaties) under the rule of law (...)’.<sup>21</sup>

More specifically, with reference to an act, ie judgment, of the CJEU, the FCC says that the judgment will be considered ultra vires only after making allowance

‘for the Union's own methods of justice to which the Court of Justice considers itself to be bound and which do justice to the ‘uniqueness’ of the Treaties and goals that are inherent to them (...)’.<sup>22</sup>

Further, the CJEU ‘has a right to tolerance of error’.<sup>23</sup> There are two types of error that the FCC has in mind and that will be tolerated: a doctrinally acceptable, ie among scholars and courts, difference in legal interpretation; or a decision with relatively little significance for competences or fundamental rights.

The *Honeywell* framework is what was used to define the essential procedural and doctrinal steps of the PSPP litigation. When the ECB's PSPP was challenged in a number of individual complaints before the FCC, it suspended the proceedings and referred the questions involving the interpretation of the PSPP and the EU Treaties to the CJEU. Before doing so, the FCC ascertained, following the criteria in the *Honeywell* judgment, that the ECB's alleged violations of law would ‘constitute a manifest and structurally significant exceeding of competences’.<sup>24</sup> The Court also explained, based on the CJEU's earlier *Gauweiler* decision<sup>25</sup> involving ECB competences, why the facts of the PSPP gave rise to ‘strong indications that the PSPP Decision does not fall within the ECB mandate’<sup>26</sup> and,

<sup>21</sup> *Honeywell* judgment, para 61.

<sup>22</sup> *Honeywell* judgment, para 66.

<sup>23</sup> *Honeywell* judgment, para 66.

<sup>24</sup> PSPP order, para 64.

<sup>25</sup> Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* (hereinafter *Gauweiler* judgment).

<sup>26</sup> PSPP order, para 114.

if so, would constitute an ultra vires act under German constitutional law. The CJEU, however, disagreed and found that the ECB had acted within its mandate and had not exceeded its competences.

When the case went back to the FCC, it expressly rejected the CJEU's holding and asserted the supremacy of German law, resulting in the *PSPP* judgment. Again, the FCC's analysis tracked the doctrinal framework set down in *Honeywell*. This time, there were two ultra vires EU acts – the CJEU's judgment, and the ECB's PSPP program. The CJEU's judgment was not simply wrong, but manifestly and structurally significantly wrong. Its proportionality analysis was 'not comprehensible from a methodological perspective',<sup>27</sup> ie manifestly wrong, and because of its failure to cabin in the PSPP program with proportionality, the effects for economic policy resulted in 'a structurally significant shift in the order of competence to the detriment of the Member States'.<sup>28</sup> As for the ECB's PSPP, it too met the standards of manifest and structurally significant exceeding of competences and so it too constituted an ultra vires EU act.<sup>29</sup>

This assertion of German supremacy was not the last word. In a press release issued three days later, the CJEU issued a rebuttal asserting EU supremacy:

'In general, it is recalled that the Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law'.<sup>30</sup>

In short, the *PSPP* litigation was based on a constitutional pluralism framework in which, in the words of the *Honeywell* judgment, the inevitable tensions between the two constitutional courts were to be 'harmonised cooperatively' and 'relaxed through mutual consideration'.<sup>31</sup> In the end of the day, however, the result was competing declarations of supremacy.

The existential politics of the German *PSPP* judgment have provoked a variety of reactions from the legal academy. There are a couple of different strands. There is a direct call for EU supremacy from some EU law scholars, against constitutional pluralism, or at least a version that would not allow for

<sup>27</sup> *PSPP* judgment, para 153.

<sup>28</sup> *PSPP* judgment, para 154.

<sup>29</sup> *PSPP* judgment, para 165.

<sup>30</sup> CJEU, 'Press release following the judgment of the German Constitutional Court of 5 May 2020,' Press Release no 58/20, Luxembourg, 8 May 2020 (citations omitted).

<sup>31</sup> *Honeywell* judgment, para 57.

the FCC to declare a CJEU judgment without binding force in Germany.<sup>32</sup> Probably the more common response, however, is to embrace constitutional pluralism, and to argue for the merits or the demerits of the result that it produced in this particular instance. For instance, Matthias Ruffert argues that, in light of the scarce democratic accountability of the ECB, the FCC's call for a better proportionality assessment of the economic policy effects of its bond-buying program was sound.<sup>33</sup> Others point to a string of legal and political defects that undermine the FCC's final judgment.<sup>34</sup>

### III. Ordinary Judicial Politics

#### 1. Assessing the Counter-Majoritarian Difficulty

The existential judicial politics of the *PSPP* litigation are essential for appreciating both the debate in the legal scholarship and for understanding the procedural and doctrinal tests employed in FCC's *PSPP* judgment. Now, I switch to the specific contribution of this article – unpacking the ordinary politics of the two constitutional courts and their navigation of the counter-majoritarian difficulty. To assess how the FCC and the CJEU exercised their constitutional functions in the concrete domain of economic and monetary policy, it is useful to ask how closely they stuck to the positive law. The more embedded in their legal sources, the less likely that constitutional adjudication intrudes upon the constitutional prerogatives of the political branches, the more expansive their adjudication, the more likely that they trespass on the policymaking functions of the other branches.

The set up for my analysis is obviously, for some perhaps painfully, naïve. But it is useful, particularly in the face of the technical and institutional complexities of the *PSPP* litigation. To be sure, all constitutional courts, almost by definition, can be accused of the counter-majoritarian difficulty.<sup>35</sup> Furthermore, the use of positive law to take the gauge of the acuteness of the difficulty may seem like a futile exercise. Again, almost definition, constitutional courts do not operate with a comprehensive set of written rules or a thick body of case law but rather rely on an open-textured set of sources – the vague written provisions of their respective supreme laws, their decisional law as it has been set down from

<sup>32</sup> R.D. Kelemen et al, 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' *Verfassungsblog* 26 May 2020, available at <https://tinyurl.com/y6d2usgp> (last visited 27 December 2020).

<sup>33</sup> M. Ruffert, 'Seul un contrôle credible et approfondi des fait fondant la politique de la BCE peut engendrer la confiance' *Le Monde*, 13 May 2020.

<sup>34</sup> See, eg, M. Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the *PSPP* Decision and Its Initial Reception' 21(5) *German Law Journal*, 979-994 (2020).

<sup>35</sup> See generally L. Solum, 'Legal Theory Lexicon: The Counter-Majoritarian Difficulty' *Legal Theory Blog*, 9 September 2012, available at <https://tinyurl.com/y6xfuhkx> (last visited 27 December 2020).

case to case, and the scholarship and other writings of their legal establishments. It is therefore undeniable that the line between legitimate adjudication based on positive law and illegitimate displacement of the constitutional functions of the other branches is by no means self-evident. At the same time, it is possible, as I do here, to analyze the output of courts in a specific policy space and assess how closely their judgments are justified by reference to standards of legal reasoning or, instead, appear to tread on the policymaking prerogatives of the political branches.

There is a distinctively American flavor to this concern for the counter-majoritarian difficulty of unelected constitutional judges striking down the policy decisions of legislative and executive actors.<sup>36</sup> At the same time, it is important not to exaggerate the difference. This yardstick for evaluating the judgments produced by constitutional courts is firmly rooted in republican theories of government and constitutional law. The powers of the French courts, including the constitutional court, are more limited than elsewhere because of the centuries-old wariness of the *gouvernement des juges*.<sup>37</sup> Even in jurisdictions like Germany, where the suspicion of constitutional adjudication is decidedly less pronounced, there are numerous legal doctrines for limiting the power of the constitutional court *vis-à-vis* other constitutional bodies.<sup>38</sup> In short, the notion of the need for judicial restraint in constitutional adjudication involving the political branches is not unique to American constitutional law and it is certainly known to the courts involved in the PSPP litigation.

Now for the legal analysis: Proportionality is the legal question at the heart of the *PSPP* judgment. In its *PSPP* judgment, the FCC ruled against the CJEU's proportionality assessment of the economic policy effects of the PSPP, adopted based on the EU's competence for monetary policy. The proportionality test comprised the familiar three steps of (1) *suitability* of the PSPP for accomplishing the monetary policy aims; (2) *necessity* of the PSPP for accomplishing those aims; (3) balancing between the PSPP's monetary policy benefits and its economic impact, to safeguard against a disproportionate burden on the economic competence (*strict-sense* proportionality). Although the FCC was generally critical of the CJEU's proportionality analysis, it found greatest fault with the third prong of the test. It defined the economic competence that was burdened in the narrow, fiscal sense – the balance sheets of countries and commercial

<sup>36</sup> W. Sadurski, 'Constitutional Review in Europe and the United States: Influences, Paradoxes, and Convergence' Sydney Law School Research Paper no 11/15, 2 February 2011, available at <https://tinyurl.com/yyah3xcd> (last visited 27 December 2020).

<sup>37</sup> See, eg, D. Terré, 'Le gouvernement des juges', in Id ed, *Les questions morales du droit* (Paris: Presses Universitaires de France, 2007), 167-191, chapter 2.

<sup>38</sup> See, eg, Bundesverfassungsgericht 9 February 2010, 1 BvL 1/09, available at <https://tinyurl.com/y5bbb558> (last visited 27 December 2020), paras 133, 141 (*Harz IV* judgment); Bundesverfassungsgericht, 2 BvR 2728/13, Dissenting Opinion of Justice Lübbe-Wolff on the Order of 14 January 2014, available at <https://tinyurl.com/yyknkvfa> (last visited 27 December 2020), paras 15-23 (hereinafter *OMT* Order).

banks – and in the broader, economic and social sense – rates of return and risk-taking in pension plans, asset bubbles, and so on.<sup>39</sup> This defect, following the doctrinal test of *Honeywell*, was considered manifest and structurally significant. The result was that the CJEU's judgment upholding the legality of the PSPP was not binding in Germany and that the PSPP was in violation of the principle of proportionality.<sup>40</sup> The remedy ordered was for 'the Federal Government and the Bundestag to take steps seeking to ensure that the ECB conducts a proportionality assessment in relation to the PSPP'.<sup>41</sup> The FCC gave the ECB three months to adopt a decision demonstrating the proportionality of the PSPP. After that time, in the absence of such a decision, the Bundesbank would not be permitted to participate in the bond-buying program.<sup>42</sup>

Why did the CJEU and the FCC take different stands on proportionality? For that, a detailed analysis of their legal doctrine, as it has evolved in the EMU area is necessary. To get a handle on the issue, one good way of focusing the mind is to take a step back and ask a more basic question – why should a proportionality assessment of an instrument of *monetary policy*, which no one doubts is at least in part designed to increase money supply and combat deflation, examine that instrument's effect on *economic policy*? There are two different answers – one under EU law, the other under German law.

## 2. German Law

I start with German law because that is where it all begins. Without the twists and turns of the German jurisprudence discussed below, it is unlikely that the ECB's PSPP would have ever ended up in court, to wit the CJEU. In German law, a proportionality analysis of the ECB's monetary instrument must take into account its economic effects because of the burden that is placed on what I call the 'right to fiscal stability.' Below I demonstrate that over the past decade there has developed in German constitutional law a right to (EU) fiscal stability. This is traceable to the FCC's Lisbon judgment, in which the FCC said that parliamentary control over fiscal policy was one element of the unamendable core of the German Basic Law and that it was not merely a principle, but a fundamental right that could be litigated by individuals in the FCC. The converse, in German constitutional law, is that EMU has been conceptualized as a price and *fiscal* 'stability union',<sup>43</sup> which essentializes the Stability and

<sup>39</sup> *PSPP* judgment, paras 139, 171, 172, 173.

<sup>40</sup> *PSPP* judgment, para 177.

<sup>41</sup> *PSPP* judgment, para 232.

<sup>42</sup> *PSPP* judgment, para 234. In the aftermath of the judgment, the ECB furnished (via the Bundesbank) the German government and Bundestag with a number of documents showing the considerations behind the PSPP, leading to a parliamentary decision saying that the ECB had shown the proportionality of the program. M. Wendel, n 34 above, 981.

<sup>43</sup> Stability is an extraordinarily slippery term. In the CJEU, it is used to refer to *price* stability and, in a new concept introduced in the judgment upholding the ESM, 'the *financial* stability of the

Growth Pact, and creates a very high, German legal hurdle for any EU action that would loosen the austerity character of the EMU.

The German right to fiscal stability has been developed by the FCC in a line of cases that began with the *Lisbon* judgment and then accelerated in a series of judgments addressing different elements of the EU's response to the euro crisis – the Greek Rescue Package and the European Financial Stability Facility (EFSF),<sup>44</sup> decided in 2011, the European Stability Mechanism (ESM),<sup>45</sup> decided in 2014, the Outright Monetary Transactions program (OMT),<sup>46</sup> decided in 2016, and, now, the Public Sector Purchasing Programme (PSPP), decided on 5 May 2020. Some even turn the clock back further, to the *Maastricht* judgment, in which the concept of stability was used to analyze and uphold Germany's conferral of economic and monetary powers in the Maastricht Treaty.<sup>47</sup> There, however, stability was defined primarily as *price* stability, ie monetary policy designed to avoid inflation and, in theory, deflation. The Stability and Growth Pact element of Maastricht Treaty figured in the judgment, but as simply one tool, albeit an important one, for the achievement of *price* stability.<sup>48</sup> My account, therefore, begins with the *Lisbon* judgment.

In the *Lisbon* judgment, the FCC said that because real, viable democracy was only possible at the level of the (German) state, and because democracy was a core and unamenable guarantee of the Basic Law (Art 20, paras 1 and 2, in conjunction with Art 79, para 3), there were constitutional limits on parliament's ability to transfer of powers to the EU, limits which could not be overcome by constitutional amendment.<sup>49</sup> The Court identified five areas as comprising the 'inviolable core content of the constitutional identity of the Basic

euro area as a whole'. Case C-370/12 *Pringle*, para 142. 'The financial stability of the euro area as a whole' means the objective of preventing situations like the freezing up of the banking system, the exit of members from the euro area, and other types of shocks. In the FCC, by contrast, the term indicates price stability and *fiscal* stability, ie the obligation to avoid excessive deficits, in line with the use of the term in the Treaty on Stability, Coordination, and Governance (also known as the Fiscal Compact). See V. Borger, 'The ESM and the European Court's Predicament in *Pringle*' 14(1) *German Law Journal*, 137-138 (2013). When the CJEU wishes to indicate the taxing and spending power, it does not use 'stability' but rather prefers 'sound budgetary policy', *Pringle*, para 143. In the academic literature, the taxing and spending element of EU law has been referred to as the 'disciplinary framework' applicable to the Member States. M. Goldmann, 'The European Economic Constitution after the PSPP Judgment: Towards Integrative Liberalism?' 21(5) *German Law Journal*, 1070 (2020).

<sup>44</sup> *Bundesverfassungsgericht* 7 September 2011, 2 BvR 987/10 (hereinafter *EFSF* judgment), available at <https://tinyurl.com/y6ddj8ef> (last visited 27 December 2020).

<sup>45</sup> *Bundesverfassungsgericht* 18 March 2014, 2 BvR 1390/12 (hereinafter *ESM* judgment), available at <https://tinyurl.com/yddgz6m3> (last visited 27 December 2020).

<sup>46</sup> *Bundesverfassungsgericht* 21 June 2016, 2 BvR 2728/13 (hereinafter *OMT* judgment), available at <https://tinyurl.com/y3843gtp> (last visited 27 December 2020).

<sup>47</sup> See, eg, M. Ruffert, 'The Future of the European Economic and Monetary Union: Issues of Constitutional Law', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), 35.

<sup>48</sup> *Maastricht* judgment, paras 432, 435.

<sup>49</sup> *Lisbon* judgment, para 240.

Law<sup>50</sup> – including, critically for this analysis, ‘fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations’.<sup>51</sup> At the time, there were a number of criticisms that were levelled in the legal scholarship, including the dearth of support, historical or otherwise, for the Court’s singling out of the policy areas that belonged to the inviolable core.<sup>52</sup>

Notwithstanding some of the initial skepticism with which the so-called ‘identity lock’<sup>53</sup> was received in the legal literature, soon thereafter the fiscal identity lock made its first concrete appearance. The occasion was the *EFSF* judgment.<sup>54</sup> At issue were German fiscal transfers to the emergency rescue funds that were created in the early days of the EU’s sovereign debt crisis. To preserve German constitutional identity (and democracy) in the fiscal domain, the FCC held that there were both quantitative and procedural limits on German contributions to the EU rescue funds.<sup>55</sup> On the issue of how much is too much, it was significant that the Court said that there was a limit – but ‘only a manifest overstepping of extreme limits is relevant’ and this had not occurred in the present case.<sup>56</sup> On the procedure, the Court said that the ‘Bundestag must specifically approve every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level’ and that

‘it must be ensured that sufficient parliamentary influence will continue in existence on the manner in which the funds made available are dealt with’.<sup>57</sup>

In the *EFSF* judgment, the FCC not only elaborated on how to preserve constitutional identity in the fiscal arena, but it also, for the first time, articulated

<sup>50</sup> *Lisbon* judgment, para 240.

<sup>51</sup> *ibid* para 252.

<sup>52</sup> See, eg, D. Halberstam and C. Möllers, ‘The German Constitutional Court says “Ja zu Deutschland!”’ 10(8) *German Law Journal*, 1250 (2009).

<sup>53</sup> P. Craig, ‘The ECJ and Ultra Vires Action: A Conceptual Analysis’ 48(2) *Common Market Law Review*, 405 (2011).

<sup>54</sup> See D. Grimm et al, ‘European Constitutionalism and the German Basic Law’, in A. Albi and S. Bardutzky eds, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Report* (The Hague: TMC ASSER PRESS, 2019), 423-26. The authors explain the three types of German constitutional review of EU acts: fundamental rights, ultra vires, and constitutional identity, what is sometimes referred to in the legal literature as ‘identity lock’ review.

<sup>55</sup> Even though I use the term rescue funds for convenience purposes, it should be recalled that all of the EU economic measures discussed here are based on capital contributions from Member States that are used as guarantees for raising funds on the financial markets, which are then distributed as loans to Member States in distress. In other words, these are *not* direct transfers, but must be paid back.

<sup>56</sup> *EFSF* judgment, para 131.

<sup>57</sup> *ibid* para 128.

the implications of this identity lock for its emerging understanding of EMU as premised on EU *fiscal* stability:

‘The treaty conception of the monetary union as a stability community is the basis and subject of the German Consent Act (German law incorporating Maastricht Treaty into German legal system) (...). Further central provisions on the design of the monetary union (beyond those on currency stability) also safeguard constitutional requirements of democracy in European Union law. In this connection, particular mention should be made of the prohibition of direct purchase of debt instruments of public institutions by the European Central Bank, the prohibition of accepting liability (bailout clause) and the stability criteria for sound budget management (...). *Although in this connection the interpretation of these provisions is not essential, it is nevertheless possible to derive from them the fact that the independence of the national budgets is constituent for the present design of the monetary union (...).*’<sup>58</sup>

In other words, German constitutional identity was preserved not simply by virtue of the fact that there were constitutional limitations on how much and through what procedure German fiscal resources could be transferred to EU bodies. Constitutional identity could be considered safe also because the EU Treaties did not admit the possibility of fiscal solidarity among Member States. Under the Treaties, according to the FCC, national budgets had to be independent and the only type of EU fiscal policy contemplated was disciplinary fiscal policy.

Soon afterwards, the same identity lock objections were made to the ESM (and, directly related, the new Art 136, para 3, TFEU). In the *ESM* judgment, the FCC further articulated the constitutional identity limits on the transfer of budgetary powers. On the one hand, the quantitative dimension dropped out of view. On the other hand, the procedural dimension was reinforced: the German government’s participation in the ESM was conditioned on extensive *Bundestag* accountability and every new German contribution to the ESM and new Memorandum of Understanding setting out the terms of a bailout loan was conditional on *Bundestag* approval.<sup>59</sup> As in the *EFSF* judgment, the FCC also took the opportunity to elaborate on the implications for the EU’s (fiscal) stability union. It made clear that the potential for fiscal transfers through the ESM was to be interpreted restrictively and that there remained the (fiscal) ‘stability-directed orientation of the monetary union’.<sup>60</sup>

Both the *EFSF* and *ESM* cases involved the fiscal side of the EU’s response to the euro crisis. In the *OMT* and *PSPP* cases, the monetary side was at issue. Formally speaking, these cases were not constitutional identity challenges, as in the *EFSF* and *ESM* cases, but *ultra vires* challenges: the claim was that the ECB

<sup>58</sup> *EFSF* judgment, para 129 (emphasis added).

<sup>59</sup> *ESM* judgment, paras 135-171.

<sup>60</sup> *ibid* paras 129-134.

exceeded its recognized Treaty competence for monetary policy and interfered with the competence for economic policy.<sup>61</sup> Technicalities aside, however, the German judgments in both cases were shaped by the earlier *EFSS* and *ESM* judgments and the emerging right to fiscal stability.

In the OMT litigation, a number of constitutional complaints were brought against the ECB's OMT program of 6 September 2012. The OMT bond-buying program was one of the ECB programs announced (but not actually implemented) to implement Mario Draghi's famous 'Whatever it takes' speech from earlier that summer.<sup>62</sup> The case was the first to make use of the *Honeywell* framework discussed above for obtaining a preliminary ruling from the CJEU in an ultra vires challenge.<sup>63</sup> In the FCC's order making a preliminary reference to the CJEU, the identity lock for fiscal policy and the corresponding EU (fiscal) stability union were in full view. There it expanded on the logic that was already evident beginning in the *EFSS* judgment.

As the reader will recall, under *Honeywell*, for the FCC to find an EU act to be ultra vires, the EU act must be (1) manifestly so and (2) structurally significantly so. In the *OMT* order, the FCC found in the affirmative on both scores because of the identity lock and fiscal stability. First, on the requirement that the ECB's OMT program be a 'manifest' transgression of monetary competence and an interference with economic competence: As it did in the *EFSS* passage reproduced above, the FCC interpreted the TFEU to preclude any economic competence aside from the Stability and Growth Pact, ie austerity policies.<sup>64</sup> Admittedly, something might be lost in the English translation of the *OMT* order, but this formulation of EU economic policy is more categorical than the actual Treaty articles. Second, and tellingly, was the explanation of why an economic policy dimension to the ECB's program would be structurally significant for Germany:

(Economic policy effects would) lead to a considerable redistribution between the budgets and the taxpayers of the Member States and can thus gain effects of a system of fiscal redistribution, which is not entailed in the integration programme of the European Treaties. On the contrary, independence of the national budgets, which opposes the direct or indirect common liability of the Member States for government debts, is constituent

<sup>61</sup> In the cases and the EU Treaties, the economic competence is generally specified by reference to the fiscal component of economic policy. As will become evident later in the discussion, the FCC in the *PSPP* judgment has recently broadened its understanding to also include the effect that monetary policy has on interest rates, asset prices, and investment choices.

<sup>62</sup> Speech by M. Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012, available at <https://tinyurl.com/qd3hnuc> (last visited 27 December 2020).

<sup>63</sup> I. Pernice, 'A Difficult Partnership between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU' 21(1) *Maastricht Journal of European and Comparative Law*, 3-13 (2014).

<sup>64</sup> *OMT* order, para 39.

for the design of the monetary union (...).<sup>65</sup>

In sum, because fiscal policy is at the core of German constitutional identity, EU monetary policy with economic policy implications that go beyond the fiscal stability variety would be a manifest and structurally significant transgression of EU competences.

In the CJEU's preliminary ruling, issued in the *Gauweiler* judgment, the proportionality principle surfaced for the first time, something that has since become the key to understanding the PSPP litigation. In the FCC's *OMT* order, the preliminary analysis of the ECB's bond-buying program had been based on a center-of-gravity test. The FCC had indicated that it believed that overall the *OMT* program fit more in the economic policy box than it did in the monetary policy box and hence it could potentially be ultra vires.<sup>66</sup> The CJEU, by contrast, did not seek to locate the *OMT* program's center of gravity. Rather, it introduced proportionality, and in particular the last step of strict-sense proportionality, to address the concern of ECB bond-buying veering into the domain of economic policy. This was based on the TEU's principle of conferral (Art 4 TEU), in tandem with the principle of proportionality (Art 5 TEU).

The Advocate General's opinion is most illuminating on how German ultra vires review was accommodated by EU proportionality analysis. First, he considered the elements of the *OMT* program that supported the conclusion that it was specifically and narrowly designed to achieve monetary policy goals. Then, he turned to the strict-sense part of the test and weighed *OMT*'s monetary policy 'benefits' against the 'costs.' On the cost side were all of the dangers to EU (fiscal) stability identified in the FCC order. In the words of the Advocate General:

'it is a measure which exposes the ECB to a financial risk, together with the moral hazard arising from the artificial alteration of the value of the bonds of the State concerned'.<sup>67</sup>

Ultimately, the Advocate General concluded in favor of proportionality. The CJEU followed the Advocate General – although on the strict-sense part of the test, in contrast with the Advocate General, the Court was vague on what the costs were and did not name the effect on ECB solvency and Member State budgetary discipline as something that was suspect.<sup>68</sup> The CJEU therefore avoided entrenching in EU constitutional law the specifically German conceptualization of EU fiscal policy.

<sup>65</sup> *OMT* order, para 41.

<sup>66</sup> *OMT* order, para 69.

<sup>67</sup> Case C-62/14, Opinion of the Advocate General, *Gauweiler and Others v Deutscher Bundestag*, para 186.

<sup>68</sup> *Gauweiler* judgment, para 91.

Back in Karlsruhe, the FCC's final *OMT* judgment followed the CJEU and decided in favor of German participation in the OMT program. In the judgment, however, the FCC criticized what it saw to be the CJEU's lax judicial review.<sup>69</sup> The FCC got around this reservation by codifying into the OMT program the parameters of the proposed bond purchases that the CJEU had taken into account in its proportionality assessment<sup>70</sup> – but that the CJEU did not itself necessarily require in the future implementation of the program should future circumstances change and there be other means of limiting the program.

Before turning to the PSPP litigation, the most recent episode in this saga, it is necessary to cover the admissibility issue in German constitutional law, what can also be called standing. The vast majority of the German constitutional cases discussed so far have been brought through individual constitutional complaints based on the right to vote under Art 38, para 1 of the Basic Law. Ordinarily, in German law, the right to vote does not give rise to an entitlement to bring a constitutional complaint against decisions of parliament or other state bodies. It does not equate to a fundamental right to participate, via parliamentary representatives, in the decisionmaking process of government bodies; consequently, an alleged violation of the right to vote cannot be used to challenge their policy output. However, since the *Maastricht* judgment, this rule has been progressively relaxed in the EU context because of the perceived danger to democracy of transferring powers to the undemocratic EU.<sup>71</sup> The right to vote has been connected to the principle of democratic self-determination in Art 20, paras 1 and 2.<sup>72</sup>

Because of the expanding standard of admissibility, individuals can now challenge EU acts in both constitutional identity review and ultra vires review. So far, the principal example of such litigation has been the EMU cases canvassed in this article. Calling something a 'fundamental right' has implications not only for court access, but also affects the substantive analysis of how (and how much) that 'fundamental right' can be used to push back against government action. It is because of both the court-access and substantive elements of how German constitutional law has evolved in the EMU domain that this article speaks of a 'right' to fiscal stability. The German right gives the democracy principle very significant constitutional bite in the EU arena as compared to the ordinary reach of the principle in German constitutional law on strictly national issues.

And so we arrive at the PSPP litigation. The FCC's initial order requesting a preliminary ruling largely tracked the reasoning of its earlier *OMT* order, just applied to the ECB's new PSPP. For the same reasons relating to the identity

<sup>69</sup> *OMT* judgment, para 181.

<sup>70</sup> *OMT* judgment, para 190 (CJEU's parameters are 'legally binding').

<sup>71</sup> *EFSF* judgment, paras 100-102; *OMT* order (Justice Lübbe-Wolff, dissenting), paras 15-23.

<sup>72</sup> See I. Feichtner, 'The German Constitutional Court's *PSPP* Judgment: Impediment and Impetus for the Democratization of Europe' 21(5) *German Law Journal*, 1092 (2020).

lock over fiscal policy and the right to fiscal stability, it found that if the PSPP were held ultra vires, this would be a ‘manifest and structurally significant exceeding of competences.’<sup>73</sup> The FCC also conducted a preliminary assessment on the PSPP’s impact on economic policy. The Court pointed to the economic policy effects of the ECB’s massive bond buying program:

‘Member states can deliberately use low-yield government bonds as a means of budgetary policy’ and ‘the activities of commercial banks are factually subsidized.’<sup>74</sup>

Such effects, in its view ‘could prove to be disproportionate in relation to the legitimate monetary policy objectives pursued.’<sup>75</sup>

As explained in the introduction, the CJEU responded to the FCC’s preliminary reference in the *Weiss* judgment and found the PSPP to be legal. For the time being, the specifics of the *Weiss* judgment are bracketed, and will be covered in the next section. The focus here is on how the German right to fiscal stability led the FCC to reject the CJEU’s proportionality analysis when the case went back to Karlsruhe.

First, in the *PSPP* judgment, the FCC requires that there be a hard line drawn between monetary policy and economic policy so that the impact of the bond-buying program on economic policy, ie the burden on the German right to fiscal stability, can be assessed.<sup>76</sup> There is an implicit on-off switch in the *PSPP* judgment – exclusive EU competence for monetary policy, virtually no competence for economic policy. This is coherent from the standpoint of the German decisional law canvassed earlier in this section. However, from the perspective of the system of competences in the EU Treaties, it is far from evident that such a hard line can be drawn. That is why the FCC itself waives in how it characterizes EU power over economic policy – from something that ‘in principle remains a competence of the Member States’,<sup>77</sup> to ‘limited conferral upon the EU of the competence to coordinate general economic policies, with the Member States retaining the competence for economic policy at large’,<sup>78</sup> to the assertion that, even though it might not be possible to say exactly how, economic policy must be different from monetary policy since ‘the Union only has an exclusive competence for monetary policy (but not for the matters of economic policy)’.<sup>79</sup>

The fact is that the EU does have extensive power over economic policy – although, to date, it has been economic policy of the austerity variety, which has

<sup>73</sup> *PSPP* order, para 64-68.

<sup>74</sup> *ibid* para 122.

<sup>75</sup> *ibid* para 122.

<sup>76</sup> *PSPP* judgment, para 127.

<sup>77</sup> *ibid* para 120.

<sup>78</sup> *ibid* para 127.

<sup>79</sup> *ibid* para 142.

been applied through the European Semester and which has legal and political bite mostly in debtor Member States.<sup>80</sup> When the FCC says that ECB monetary policy should not have effects on economic policy, it has in mind a specific type of economic policy more in line with Keynesian ideas. The austerity variety of economic policy, by contrast, is fully in line with, and indeed required by, the concept of (fiscal) stability union that we saw in the *EFSSF* judgment, the *ESM* judgment, the *OMT* order, and the *PSPP* order. At the EU level, however, it is hard to see how a general competence analysis can draw a strict line between the two types of economic policy. To be sure, there are the specific Treaty provisions that the FCC relied on to develop its concept of (fiscal) stability union – the provisions that serve as the basis for the European Semester (Art 121 TFEU), that establish the Excess Deficit Procedure (Art 126 TFEU), that bar ECB financing of national debt (Art 123 TFEU), and that prevent the EU and Member States from assuming liability for the debt of other Member States (Art 124 TFEU). But to draw the conclusion, based on these specific Treaty articles, that all other types of EU economic policy are precluded, is an interpretive stretch. It is neither dictated by the Treaty text, nor, to the extent that original meaning serves as an interpretive tool in EU law, the intent of all the Treaty signatories.

Second, in the *PSPP* judgment, the FCC requires that the proportionality test include a full-fledged, strict-sense third step and directs the ECB to furnish one. In the proportionality principle, regardless of whether German or EU law is in play, a full-blown analysis on the third step is generally reserved for important rights or interests that could potentially outweigh what has already been established to be a legitimate and essential public policy measure.<sup>81</sup> Under EU law it is not immediately apparent what that important right or interest would be. But it is under German law – the right to fiscal stability. According to the FCC, on the third step, the economic policy effects, ie the burden on the German right to fiscal stability, must be fully assessed.<sup>82</sup> The assessment of the economic policy burden should be broad-ranging – not just the impact on the debt burden and fiscal liability of governments, but also more generally on social and economic policy. And this economic policy burden must be balanced against the monetary policy benefits of combating deflation.

Certain commentators have taken the FCC's broad definition of economic policy to be a promising sign that the FCC is moving away from a purely austerity-

<sup>80</sup> See P. Tsoukala, 'Post-Crisis Economic and Social Policy: Some Thoughts on Structural Reforms 2.0', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), chapter 3.

<sup>81</sup> See generally R. Stacey, 'The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication' 67(2) *American Journal of Comparative Law*, 435-476 (2019).

<sup>82</sup> *PSPP* judgment, para 139.

oriented vision of monetary union.<sup>83</sup> It should be noted, however, that this more comprehensive balancing, which looks not just at the incentives to run high budget deficits, but also at the effect of low interest rates on different types of investments, is done by necessity from Germany's perspective. What do low or indeed negative interest rates do to the savings of German pensioners? To the prices of real estate in Berlin? And so on. This national perspective is still in tension with an EU-wide economic and monetary policy, which might, say, sacrifice returns on pensioner savings in one country, in order to protect the solvency of governments (and their public pensions plans) in another country. In fact, the broader articulation of economic policy in the *PSPP* judgment can be said to draw on the logic of the identity lock for fiscal policy. The *Lisbon* judgment singled out the social, redistributive dimension of fiscal policy as something that had to remain within the prerogatives of the German parliament and German voters. By requiring that the ECB provide a full statement of the economic consequences of monetary policy to the German government and parliament, the ECB's social and economic trade offs are squarely put in the accountability ambit of German voters and their representatives.

Third, in the *PSPP* judgment, the FCC calls for 'full judicial review' of the impact of the ECB's bond-buying program on economic policy.<sup>84</sup> This standard is required because it is

'imperative that the mandate of the ESCB [European System of Central Banks] be subject to strict limitations given that the ECB and the national central banks are independent institutions which means that they operate on the basis of a diminished level of democratic legitimation'.<sup>85</sup>

Here, the FCC repeats directly parts of its previous OMT judgment in which it was skeptical of the CJEU's light-touched review of the earlier OMT program.<sup>86</sup>

Again, from the perspective of EU law, it is not self-evident that the ECB should be subject to stringent judicial review, since it can be characterized as both a constitutional body – since it is created by the primary law of the EU Treaties – and a technical or administrative body – since its legitimacy derives in large part from the fact that it possesses the economic expertise necessary for monetary policy. Even under German law, it is not immediately apparent why a constitutionally established authority with responsibility for managing a technocratic policy area should be subject to a tough standard of review. There are many examples in German law of relatively independent and technocratic administrative bodies that are subject to deferential standards of review.<sup>87</sup> The

<sup>83</sup> M. Goldmann, n 43 above, 1075.

<sup>84</sup> *PSPP* judgment, para 143.

<sup>85</sup> *ibid* para 143 (citations omitted).

<sup>86</sup> *OMT* judgment, paras 183-89.

<sup>87</sup> See, eg, Bundesverfassungsgericht 12 November 2008, BvR 2456/06 (deference to nuclear

most on point, however, is the Bundesbank before the ECB was established. It was highly independent (albeit as set down by parliamentary law, not expressly guaranteed in the Basic Law) and its policy decisions largely escaped constitutional control.<sup>88</sup>

As with the rigid separation between monetary and economic policy and the strict-sense prong of proportionality, the answer to the question ‘why stringent review’ is to be found in the right to fiscal stability. In the German legal theory known as essentialness (*Wesentlichkeitslehre*), the legislative delegation of power to an administrative body is especially suspicious when a fundamental right might be affected by the exercise of that power.<sup>89</sup> The Parliament is required to carefully set out the content, purpose, and scope of the powers conferred and the courts are to hold administrative bodies to that standard. In addition, as explained earlier, the ability of individuals to litigate constitutional complaints against administrative bodies turns on the violation of a fundamental right – which now exists in the economic policy domain. Before the jurisprudential trajectory that began with the *Lisbon* judgment, central bank operations were not conceived as affecting fundamental rights because the effect on the right to property – the right most obviously impacted by potentially inflationary policies – was considered too remote.<sup>90</sup> Now that there is the right to fiscal stability, the ECB does not enjoy the same freedom from judicial review as did Germany’s central bankers in earlier days. It is important to note that what drives the ‘full judicial review’ standard for the ECB is the right to democratic self-determination *over fiscal matters*, not the right to democratic self-determination *tout court*. Hence the democratizing impetus of this jurisprudence is secondary to the underlying suspicion of EU fiscal policy.<sup>91</sup> There are plenty of highly independent authorities in the EU system, but they have not, or at least not yet, been singled out for stringent judicial review, because they do not operate in the identity lock arena of fiscal policy.

### 3. EU Law

I now turn to CJEU’s *Weiss* judgment. To the frame the analysis, I ask the

waste licensing decision), available at <https://tinyurl.com/y6zsssko> (last visited 27 December 2020).

<sup>88</sup> D. Lorenz, ‘The Constitutional Supervision of the Administrative Agencies in the Federal Republic of Germany’ 53(2) *Southern California Law Review*, 550-551 (1980); R.W. Strohmeier, ‘Das Europäische Währungssystem (EWS) und Seine Auswirkungen auf die Autonomie der Deutschen Bundesbank’ 25 *German Yearbook of International Law*, 352-275 (1982); M. Goldmann, ‘Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review’ 15(2) *German Law Journal*, 267 (2014).

<sup>89</sup> U. Kischel, ‘Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law’ 46(2) *Administrative Law Review*, 231 (1994).

<sup>90</sup> Bundesverfassungsgericht 31 March 1998, 2 BvR 1877/97, para 87; Deutscher Bundestag, Sachstand: Die Verfassungsbeschwerden gegen den “Euro-Reggungsschirm, WD 3-3000-282/11 (2011), 7.

<sup>91</sup> Cf I. Feichtner, above n 72, 1098-99.

same question as in the previous section on Germany: Why, under EU law, should a proportionality assessment of an instrument of monetary policy examine that instrument's effect on economic policy? The positive law background for the case is not simply the earlier *Gauweiler* judgment, narrated in the previous section, in which the CJEU upheld the OMT program. It is also the EU law on judicial review of EU acts generally speaking, outside of the context of an ultra vires challenge to an ECB act. Typically under EU law, and different from the German constitutional analysis, competence and proportionality are separate grounds for challenging the validity of an EU act like the PSPP. In the legal analysis, first comes competence, then proportionality. This doctrinal scheme is a product of the longstanding framework for judicial review of the validity of EU acts contained in Art 263 TFEU. It is also used in adjudicating the more recent principles of conferral and proportionality, first recognized by the Maastricht Treaty (Art 3b EC Treaty) and since elaborated in the Lisbon Treaty (Arts 4 and 5 TEU).

Under EU law, the issue of competence is addressed by examining whether the Treaty provision offered as the legal basis for the act is the proper legal basis. Most often, the litigant challenges the act on the grounds that an alternative Treaty provision and policy objective was applicable—generally a Treaty provision that requires unanimity voting in the Council and therefore one that would stymie action or a Treaty provision that bars the type of act adopted. Very often such litigation involves internal market acts, since the mandate for internal market harmonization is quite broad and involves qualified majority voting in the Council, unlike Treaty provisions in other policy areas that can specifically bar certain types of measures and that can impose significant procedural hurdles to adopting EU acts. The CJEU examines whether the EU's asserted legal basis is supported by the reasons listed in the act's preamble, by the content of the act, by the plausibility (or implausibility) of the connection between objectives and content, and, sometimes, by additional material produced in the litigation.<sup>92</sup> The Court generally does not examine the plausibility of the alternative policy objective and Treaty provision, even in those cases where there is a claim that the EU institution's choice of legal basis was designed to circumvent a prohibition on action contained in another Treaty provision.<sup>93</sup> When examining the EU's asserted legal basis, there is no deference, since assessing whether there is a mandate for action is a pure legal question of interpretation of the Treaty.

In the EU law of judicial review, the competence analysis, also known as legal basis analysis, may be followed by a proportionality test. This test mirrors the proportionality test that has been used for ECB bond-buying programs. The

<sup>92</sup> See, eg, Case C-84/94, *UK v Council*, para 25; Case C-217/04, *UK v European Parliament and Council*, para 42; Case 317/04, *European Parliament v Council*, paras 67-69; Case C-270/12, *UK v European Parliament and Council*, para 113; Case C-358/14, *Poland v European Parliament and Council*, paras 31-70.

<sup>93</sup> See, eg, Case C-376/98, *Germany v European Parliament and Council*, paras 79, 85.

CJEU sometimes follows a two-part scheme (appropriate and necessary), but other times also includes a strict-sense step involving balancing and the requirement that ‘disadvantages caused must not be disproportionate to the aims pursued.’<sup>94</sup> When applying this proportionality test to assess the validity of EU acts, the CJEU generally employs the deferential ‘manifest error’ standard of review.<sup>95</sup>

The *Weiss* judgment follows this classic sequence of first scrutinizing the legal basis of the PSPP and then analyzing its proportionality.<sup>96</sup> The CJEU examines the monetary policy legal basis offered by the ECB. Based on the enumeration of exclusive competences in Art 3 TFEU and the text contained in the specific provisions of the TFEU’s Title on Economic and Monetary Policy, the CJEU concludes that:

the primary objective of the Union’s monetary policy is to maintain price stability. The same provisions further stipulate that, without prejudice to that objective, the ECSB is to support the general economic policies in the Union with a view to contributing to the achievement of its objectives, as laid down in Art 3 TEU.<sup>97</sup>

Thus we see that there is no categorical separation of monetary and economic policy, as the FCC says there should be. There is also no bar on ECB measures aimed at price stability also having indirect effects on economic policy, and in particular, economic policy of the non-austerity variety.<sup>98</sup> But that is because the Treaty text does not contain such a bar, with the exception of Art 123 TFEU prohibiting ECB purchasing of government debt, which the CJEU takes up in a separate portion of the judgment. In short, the CJEU declines to take up the FCC’s invitation to construe EMU as a (fiscal) stability union. Rather, it takes a more open-ended view, as seems appropriate for the EU Treaties, which were signed by the nineteen members of the euro area, and which contain a number of ambiguities as to the exact scope of monetary and economic competences.

To conclude the competence analysis, the CJEU goes on to examine the specifics of the PSPP. It finds that the aims and the substance of the program come within the monetary policy competence. The Court examines the reasons contained in the ECB act to ascertain that it pursues the aim of combating deflation and maintaining an inflation rate at around two percent. It also finds that the purchase of government bonds on secondary markets is a permissible means for accomplishing this end. On this competence step of the analysis,

<sup>94</sup> See, eg, Case C-331/88, *Fedesa*, para 13.

<sup>95</sup> *Fedesa*, paras 15, 16

<sup>96</sup> *Weiss* judgment, paras 46-70 (competence), paras 71-100 (proportionality).

<sup>97</sup> *ibid* para 51.

<sup>98</sup> *ibid* paras 60, 66.

there is no deference to the ECB.

The CJEU then takes up the proportionality issue and analyzes the appropriateness and necessity of the measure, as well as the potential disproportionate disadvantages, ie strict-sense proportionality.<sup>99</sup> In the interest of space, I jump straight to the issue of disproportionate disadvantages, since that is the main bone of contention between the two constitutional courts. On this score, the CJEU relies both on the minutes of ECB Governing Council meetings, incorporating by reference the Advocate General's discussion, and the reasons and requirements contained in the ECB act. The main disadvantage that it considers is the financial exposure of participating central banks and Member States in the event of default on the government bonds held by the ECB.<sup>100</sup> Based on the PSPP requirements that limit the liability of Member State central banks for defaults on debt issued by other Member States, the CJEU finds that exposure is adequately limited and therefore the burdens do not outweigh the benefits to price stability.

The *Weiss* judgment's strict-sense step is fully in line with how the CJEU does proportionality balancing of policy objectives against countervailing economic interests in other cases. The closest analogue is when an EU act aimed at environmental protection or market harmonization is challenged based on the economic burdens for market actors in one of the Member States. The Court generally checks that the EU act is tailored to the policy objective, and then lets it pass.<sup>101</sup> Of course, the FCC's *PSPP* judgment shows how inadequate this analogue is under German constitutional law – the German right to fiscal stability is far weightier than the economic interests of market actors. Further, as the *PSPP* judgment makes clear, the German right to fiscal stability is aimed not only at avoiding financial liability, but also includes interests such as sound budgetary policy in other Member States, interest rates for savers and pensioners, and guarding against potential asset bubbles. However, under the generally applicable standards of EU law, it is difficult to make the case for treating the PSPP's economic implications for one Member State as categorically different from the economic burdens that all Member States experience, at one time or the other, because of common EU policies.

The last thing to note about the CJEU's proportionality analysis is that it applies the familiar 'manifest error of assessment' standard. The rationale for this standard is linked to the technical expertise of monetary institutions.<sup>102</sup> This discretion afforded to the ECB is completely in line with other litigation that has challenged ECB acts in the CJEU.<sup>103</sup> It is also in line with CJEU

<sup>99</sup> *Weiss* judgment, paras 71-78 (appropriateness); 79-92 (necessity); 93-99 (strict sense).

<sup>100</sup> *ibid*, paras 93-99.

<sup>101</sup> See, eg, Case C-86/03, *Greece v Commission*, para 95; Case C-358/14, *Poland v Parliament and Council*, para 102.

<sup>102</sup> *Weiss* judgment, para 25.

<sup>103</sup> *Gauweiler* judgment, para 68; Case T-79/13, *Accortini and Others v ECB*, para 68.

proportionality review of EU acts in a variety of other policy areas. Take one – environmental law. There, the manifest error standard is applied to the (independent) Commission<sup>104</sup> and to the (political) Council.<sup>105</sup> Again, the manifest error standard does not live up to the FCC's call for more rigorous review of the independent ECB. But again, under EU law, it is hard to discern any principled ground for singling out the ECB for stricter judicial review. There are hundreds of public bodies operating in the EU system, all with greater or lesser independence from Member State governments and the EU institutions. Their policy determinations are generally subject to proportionality review based on the manifest error standard. To treat the ECB any different would, from the perspective of EU law, be highly problematic and could itself give rise to a claim of unfounded and lawless adjudication by the CJEU.

#### IV. The FCC's Counter-Majoritarian Difficulty

It is time to return to the counter-majoritarian difficulty. How has the EMU jurisprudence of the two constitutional courts evolved and how are their respective judgments in the PSPP litigation situated in that jurisprudence? How closely do the two courts adhere to their constitutional law sources and, conversely, how ready have they been to push the boundaries of those sources and occupy the policymaking space allocated to the political branches in their overlapping constitutional systems? The answer to these questions can help evaluate how the two courts have navigated the counter-majoritarian difficulty and the ordinary politics of constitutional adjudication.

First the CJEU: Its approach in the *Weiss* judgment to judicial review of the ECB and the PSPP might strike some as light-touched. Yet this approach is squarely within the bounds of its Treaty text and its precedents. The way in which the Court unpacks the legal grounds of competence and proportionality is extraordinarily familiar from its many decades of judicial review of EU acts, both ECB and acts adopted by other EU bodies. The standards of review the Court used to assess the competence and proportionality challenges – no deference on competence and manifest error for proportionality – are also consistent with decades of CJEU decisional law. In *Weiss*, the CJEU performs in classic fashion its constitutional function of policing the boundaries laid down in the Treaties and allocating prerogatives as between the different institutional and Member State actors.

By contrast, the previous section brings to light the expansive nature of German constitutional adjudication. The FCC's bold legal trajectory took just over ten years to culminate in the *PSPP* judgment – from the *Lisbon* judgment's

<sup>104</sup> See, eg, Case T-614/13, *Romonta GmbH v European Commission*, para 63.

<sup>105</sup> See, eg, Case C-86/03, *Greece v Commission*, para 88.

identity lock for fiscal policy, to the *EFSSF*'s concept of EMU as a *fiscal* stability union, to the line of cases working out how to safeguard the identity lock and the corresponding right to fiscal stability in the *ESM* judgment and the (technically speaking, *ultra vires* review) *OMT* and *PSPP* judgments. It might be true that the challenge to German democracy from European integration is unprecedented. The response, however, has been to fashion constitutional rights and remedies seemingly whole cloth, without being able to rely on much by way of conventional legal sources.

In light of this willingness to push the boundaries of German constitutional law, it is fair to ask how acute the counter-majority difficulty has been. How have the FCC's judgments affected the politics of the eurozone and the constitutional prerogatives of the other branches of government? The *Lisbon* and *EFSSF* judgments undoubtedly strengthened Germany's hand in framing the EU response to the euro crisis as bailouts in return for austerity. The ratcheting up of the disciplinary aspect of EMU in the first two years of the euro crisis, culminating in the Fiscal Compact (Treaty on Stability, Coordination, and Governance), bears the unmistakable imprint of the German constitutional jurisprudence.<sup>106</sup> As Nicolas Jabko relates, EU leaders

‘continued to stress its (the Treaty's) ‘no bail out’ provisions – as the German chancellor needed to cover herself from adverse rulings by the sovereignty-conscious German constitutional court’.<sup>107</sup>

As for monetary policy and the ECB's bond-buying programs, it is widely known that top Bundesbank officials and the German member of the Executive Board were opposed to quantitative easing. At least in part, the considerable lag between the US Federal Reserve's adoption of quantitative easing and the ECB's adoption of similar policies can be put down to resistance from German central bankers.<sup>108</sup> While German economic thinking on price stability is separate from the law, the fact is that elements of the economic orthodoxy were transferred to the legal design of EMU and this law, as it played out in the FCC's jurisprudence, was used to influence ECB policy.<sup>109</sup> The aftermath of Draghi's ‘Whatever it takes’ speech vividly illustrates this point: when the Bundesbank lost in the ECB, and the OMT program was announced, it got a second chance to press for stability before the sympathetic FCC in the OMT litigation.<sup>110</sup>

<sup>106</sup> See M. Ruffert, above n 47, 41-42; R. Dehousse, ‘The Euro Crisis and the Transformation of the European Political System’, in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press), 138.

<sup>107</sup> N. Jabko, ‘Politicized Integration: The Case of the Eurozone Crisis’, in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press), 105.

<sup>108</sup> V. Borger, ‘Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler’ 53(1) *Common Market Law Review*, 148 (2016).

<sup>109</sup> M. Goldmann, n 43 above, 1068-71.

<sup>110</sup> V. Borger, n 108 above, 170-73.

Not only does the German jurisprudence impact EU politics, but it also tips the scales internally, in German politics. In the EMU cases, many of the individual complainants have been members of anti-European political parties or party wings.<sup>111</sup> More to the point, the constitutional standards set down in the judgments tip the balance in German political debates towards an austerity version of EMU. The procedural restrictions on fiscal transfers and the suspicion of the ECB's bond-buying activities are unquestionably outcomes that limit EU lending and increase national debt burdens. From a political perspective, it does not come as a surprise that the German legislature and executive would favor limiting intra-EU fiscal transfers and that they would support conditionality. It does not come as a surprise that they might prefer higher interest rates for German pension plans, even though the consequence might be a more punishing debt burden for other Member States. But it does seem strange that a constitutional court would entrench this position as a higher law, constitutional baseline based on the aggressive jurisprudential trajectory chronicled in this article.

The constitutionalization of EU fiscal stability makes it much harder for German political parties and their voters to move away from austerity, towards solidarity, if the circumstances change and their elected leaders come to view it in Germany's best interests. A sympathetic view of the constitutional jurisprudence on the right to fiscal stability and the identity lock might point to the fact that it only requires procedure, not substance – parliamentary participation, not austerity. In important respects, however, process can dictate outcome. The prospect of repeated constitutional litigation, repeated parliamentary votes, and repeated parliamentary scrutiny can easily derail an emerging consensus in such a sensitive policy area. It is also necessary to keep in mind the decline of the traditional parties of the center-right and the center-left and the fragmentation of the political spectrum. This development renders contemporary German politics especially vulnerable to the destabilizing effect of the FCC's EMU jurisprudence.

One possible retort to the counter-majoritarian critique is that it doesn't apply to the German judgments on the OMT and the PSPP. After all, unlike the German government that was involved in deciding on euro crisis bailout funds, the ECB is specifically designed to be counter-majoritarian – independent of elected officials. Still, the ECB is more accountable than the German constitutional court, and accountable in a way that contributes to making good monetary policy. The ECB is the object of a diffuse form of accountability involving many important players, elected and unelected, in the EU and global financial systems.<sup>112</sup> It is embedded in financial policymaking networks that are comprised of a mix

<sup>111</sup> F.C. Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's *ultra vires* Decision of May 5, 2020' 21(5) *German Law Journal*, 1121 (2020).

<sup>112</sup> See generally R.O. Keohane, 'Accountability in World Politics' 20(2) *Scandinavian Political Studies*, 82-84 (2006); D. Zaring, 'The Emerging Post-Crisis Paradigm for International Financial Regulation', in F. Bignami and D. Zaring eds, *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Cheltenham, UK: Edward Elgar, 2016), chapter 19.

of technocratic economists and politically accountable personnel from finance ministries. To go back to the ECB's first foray into unconventional monetary policy, Draghi's July 2012 speech and the OMT program that was subsequently announced, it is difficult to believe that there weren't strong political signals giving the green light for the change in ECB policy. Moreover, the ECB is emmeshed in global networks of central bankers that are critical to its success as one of the central players in global financial markets. In short, the ECB enjoys a distinct form of accountability and legitimacy that deserves consideration in a counter-majoritarian analysis – and therefore deference from a constitutional court.

The EU's response to the coronavirus crisis will be the next test of the German right to fiscal stability and the FCC's counter-majoritarian difficulty. Compared to the euro crisis, the EU response has been remarkably swift. On the monetary side, the policy is consistent with earlier developments. The ECB has undertaken yet another massive bond-buying program, called the Pandemic emergency purchase programme (PEPP). On economic policy, by contrast, there are signs of departure from the disciplinary aspects of the euro crisis years. The proposed Multiannual Financial Framework for 2021-2027, which is being finalized as this goes to press, will be nearly double of what it was in the last MFF cycle, and will include a euro 750 billion Recovery Plan. Unlike the ESM, more than half of the Recovery Plan (euro 390 billion) will be grants and even though grants and loans will be tied to conditions, it will not be the same discipline-driven conditions of ESM loans. Additionally, part of the funding will come from new EU own resources, meaning that the EU will have new direct revenue-raising powers in addition to customs duties – the Financial Transaction Tax and revenue from the Emissions Trading System. Both the PEPP and the Recovery Plan will raise significant issues under the German constitutional law that has been discussed in this article: the PEPP could potentially trigger many of the same objections as the PSPP; the Recovery Plan will add a new twist to German constitutional scrutiny because of the outright fiscal transfers, the looser conditionality, and the new revenue-raising powers.

The nature and the speed of the EU's response to the current economic crisis are promising signs of solidarity in response to the commonly experienced catastrophe of the pandemic. Yet all of these elements of EU coronavirus policy have implications for the German identity lock for fiscal policy and the right to fiscal stability. It appears misplaced, to say the least, for German constitutional law to operate as a hurdle to these experiments in greater solidarity, above and beyond the incredibly contentious EU politics that have always operated as a barrier to greater integration in economic and distributive matters. Should the German government, together with the vast majority of other Member State governments, decide that a more robust, EU economic policy is necessary for EU prosperity and security, which of course is essential to German prosperity and security, then it would seem that constitutional law's rightful role is limited.

Without greater judicial deference to the calculations of the political branches as to what type of economic policy is best for social stability and security, there is the risk of a particularly acute counter-majoritarian difficulty.

In any area of law, the process of reconsidering and recalibrating the jurisprudence of courts must begin somewhere. On this point it seems fitting to conclude with one of the dissenting opinions from the decision to take the OMT case. There, Justice L ubbe-Wolff said:

“That some few independent German judges – invoking the German interpretation of the principle of democracy, the limits of admissible competences of the ECB following from this interpretation, and our reading of Art. 123 et seq TFEU – make a decision with incalculable consequences for the operating currency of the euro zone and the national economies depending on it appears as an anomaly of questionable democratic character.”<sup>113</sup>

Together with other forms of legal reflection, her dissent might serve as a jumping-off point for the future development of the EU’s economic constitution.

<sup>113</sup> *OMT* order (Justice L ubbe-Wolff, dissenting), para 28.