ARTICLES

PROPORTIONALITY IN THE *PSPP* SAGA: WHY CONSTITUTIONAL PLURALISM IS HERE TO STAY AND WHY THE FEDERAL CONSTITUTIONAL COURT DID NOT VIOLATE THE RULES OF LOYAL CONDUCT

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ABSTRACT: In May 2020, for the first time in its history, the Federal Constitutional Court (FCC) of Germany declared Union acts as being *ultra vires*. According to the FCC, the European Central Bank (ECB) and the Court of Justice of the European Union (CJEU) had acted beyond their mandates because they did not apply strong proportionality standards to the ECB's Public Sector Purchase Programme (PSPP). The resulting stalemate within constitutional pluralism has revived the discussions about loyalism within constitutional pluralism and about the possible introduction of an appeal court with the "final say" over constitutional conflict. This *Article* shows that, contrary to the assessment of some critics, the controversial ruling of the Federal Constitutional Court was within the bounds of loyal behavior within constitutional pluralism. As the analysis of the PSPP conflict also shows, a European super-judicial authority would reach its limits the more we move from the surface to the core of the struggles between European and national constitutional law. The different readings of proportionality are difficult to bridge, and the mutually exclusive claims about the nature of the supremacy of European law are not accessible to compromise at all. We should therefore not expect too much from an appeal court, if it were introduced.

KEYWORDS: constitutional pluralism – supremacy – proportionality – European Central Bank – *PSPP* – *Weiss*.

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I. Introduction: when European and constitutional law collide

On May 5, 2020, the Federal Constitutional Court (FCC) of Germany handed down its judgment on German participation in the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB).[1] According to the Court's decision, two Union institutions had been acting outside of their mandates (*ultra vires*). The ECB, the Second Senate ruled, had overstepped its mandate by failing to document the proportionality of the PSPP. In addition, the FCC found the *Weiss* judgment by the European Court of Justice (CJEU), which had confirmed the legality of the PSPP without applying strong proportionality standards on ECB actions, likewise to be *ultra vires*.[2] Never before had the FCC declared a legal act of an EU institution lacking binding force at the national level. To that extent, the judgment can indeed be described as historic.

Although the ruling provoked all kinds of reactions, the critical reactions outweighed the affirmative ones.[3] For the critics, the main problem was not, however, practical damage done to the monetary operations of the ECB. With regard to the PSPP programme, the conflict was quietly solved with the German Bundestag president's and the finance minister's declarations, both at the end of July 2020, that the proportionality documents, which the Bundesbank had in the meantime handed over to them, met the criteria defined by the FCC; in May 2021, the FCC announced that there will be no further constitutional check of the documents.[4] Given the almost trivial conclusion of the practical side of the conflict,[5] it is fair to concede that the FCC did not do harm to the PSPP.

Also, the ruling includes hardly any clearly defined limits for the present Pandemic Emergency Purchase Programme (PEPP) and future asset purchase programmes. This holds true for the symmetry of the purchases (symmetry in accordance with the shares in the ECB's capital) as much as for possible purchase limits. Going further than the

[1] German Federal Constitutional Court judgment of 5 May 2020 2 BvR 859/15 *PSPP* ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

[2] Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

[3] See, for example, the fifteen reactions in issue 5/2020 of the *German Law Review*. Among them, four can be classified as decisively negative and one as slightly negative, compared to only one that can be classified as decisively positive and two as slightly positive. The other seven reactions are neutral or refrain from a respective positioning.

[4] German Federal Constitutional Court judgment of 18 May 2021 2 BvR 1651/15 ECLI:DE:BVerfG:2021:rs20210429.2bvr165115.

[5] AJ Perkins, 'The Legal and Economic Qustions Posed by the German Constitutional Court's Decision in the Public Sector Purchase Programme (PSPP) Case' (2021) Athens Journal of Law 399, 409; LP Feld and V Wieland, 'The German Federal Constitutional Court Ruling and the European Central Bank's Strategy' (2021) Journal of Financial Regulation 217, 220; J Basedow, J Dietze, S Griller, M Kellerbauer, M Klamert, L Malferrari, T Scharf, D Schnichels, D Thym and J Thomkin, 'European Integration: Quo Vadis? A Critical Commentary on the PSPP Judgment of the German Federal Constitutional Court of May 5, 2020' (2021) ICON 188, 205; G Anagnostaras, 'Activating Ultra Vires Review: The German Constitutional Court Decides Weiss' (2021) European Papers www.europeanpapers.eu 801, 819.

PSPP with regard to one or more of such criteria does not necessarily make purchase programmes illegal because, as headnote 7 states, it always depends on an "overall [...] appraisal". Note also that the ruling applies for, the same headnote says, "a programme *like the PSPP*" (my emphasis). A programme with other objectives or under other conditions, we can conclude, would need to be assessed in a different way. If this seems like a pedantic interpretation, it is worth recalling the judicial reviews of the Outright Monetary Transactions (OMT) programme from 2012. This programme aimed at minimizing spreads, that is, at controlling the refinancing conditions of the euro Member States. There was no purchase limit, because it was all about the threat of unlimited central bank intervention: "whatever it takes". Nor were any symmetric purchases involved. The OMT programme nevertheless successfully passed scrutiny by the CJEU *and the FCC alike*. The *PSPP* ruling lacks any indication that the FCC aimed at correcting its *OMT* decision from June 2016.[6]

Yet the implications of the *PSPP* ruling go beyond the practical impact on asset purchase programmes. Most critics were much more worried about the damage done to the integrity of the European legal order. By dissenting a CJEU ruling and thereby questioning the supremacy of European law, the FCC has, according to this view, granted itself a power of review to which it was not entitled.[7] As one of the founding members of the European Economic Community and the largest EU country today, Germany has in addition sent a potentially dangerous signal to the highest courts of other member countries.[8] If the supremacy of European law could be questioned by anyone who dislikes some of its parts, the European legal order would effectively suffer if not even die off, the critics argued. Consequently, some of the critics of the FCC asked the Commission to open an infringement procedure against Germany,[9] and asked the executive,

[6] German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13 ECLI:DE:BVerfG:2016:rs20160621.2bvr272813.

[7] Since its *Lisbon* decision from 2009 (German Federal Constitutional Court judgement of 30 June 2009 2 BvE 2/08 *Lisbon* ECLI:DE:BVerfG:2009:es20090630.2bve000208), the FCC distinguishes between two control reservations: it controls whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (*ultra vires* control), and it reviews whether the inviolable core content of the constitutional identity is respected (identity control).

[8] See DR Kelemen, P Eeckhout, F Fabbrini, L Pech and R Uitz, 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' (26 May 2020) Verfassungsblog verfassungsblog.de and FC Mayer, 'To Boldly Go Where no Court Has Gone before: The German Federal Constitutional Court's Ultra Vires Decision of May 5, 2020' (2020) German Law Journal 1116.

[9] On June 9, 2021, the Commission initiated infringement proceedings against Germany and sent a letter of formal notice, expressing its legal opinion that the PSPP ruling of the FCC qualified as an infringement. The Federal Government responded by letter dated August 3, 2021, stating that Germany recognized the primacy of application of Union law and proposing measures for legal dialogue between the CJEU and the FCC. In addition, the government assured that it would use all means at its disposal to ensure compliance with the principles of autonomy, primacy of application, and effectiveness and uniform application of Union law. On December 2, 2021, the Commission announced its decision to close the infringement proceedings. According

legislative, and judicial branches of the Member States to ultimately accept the supremacy of European law.[10]

However, the assumed solution of an unconditional acceptance of European supremacy on the side of all constitutional bodies throughout the EU is remarkably naive because it would presuppose constitutional change in almost all Member States. It is true that supreme courts at Member State level have only rarely declared Union acts as nationally non-binding. This holds true for the Czech Republic (2012) [11] and Denmark (2016)[12] before the German PSPP ruling and Poland (2021)[13] afterwards. A recent judgment of the French Conseil d'État (2021) can be counted as a borderline case (on the Italian Taricco case, see section VI.[14] This modest number of cases, however, must not be confused with the number of highest Member State courts which insist on their final authority to scrutinize the constitutionality of European acts.

Such an insistence is present among almost all of the highest courts of the EU-27. As an expression of their integration friendliness, all supreme courts at Member State level have accepted the supremacy and direct effect of European law, although never written into the Treaties, wherever competences have been delegated to the Union level.[15] The other side of the coin is their readiness to control the limits within which the supremacy

to the Commission's communication, the Federal Government had given an *undertaking* to the Commission that it would use all means at its disposal *to actively avoid further ultra vires findings on the part of the GCC*.

[10] For example, see S Poli and R Cisotta, 'The German Federal Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission' (2020) German Law Journal 1078.

[11] J Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires. Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII' (2012) EuConst 323; M Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) EuConst 54; AJ Perkins, 'The Legal and Economic Questions Posed by the German Constitutional Court's Decision in the Public Sector Purchase Programme (PSPP) Case' cit. 404 ff.

[12] SA Mair and U Sadl, 'Mutual disempowerment: Case C-441/14 Dansk industri, Acting on Behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) Acting for Ajos A/S v the Estate Left by A' (2017) EuConst 347; E Gualco, '"Clash of Titans 2.0". From conflicting EU General Principles to Conflicting Jurisdictional Authorities: the Court of Justice and the Danish Supreme Court in the Dansk Industri Case', (2017) European Papers www.europeanpapers.eu 223; AJ Perkins, 'The Legal and Economic Questions Posed by the German Constitutional Court's Decision' cit. 404 ff.

[13] S Biernat and E Łętowska, 'This Was Not Just Another Ultra Vires Judgment!: Commentary to the statement of retired judges of the Constitutional Tribunal' (27 October 2021) Verfassungsblog verfassungsblog.de; The Committee on Legal Sciences of the Polish Academy of Sciences, 'Resolution 04/2021 of 12 October 2021 in regard to the ruling of the Constitutional Tribunal of October 7, 2021' (15 October 2021) Verfassungsblog verfassungsblog.de.

[14] Compare P Cassia, arguing that the decision violates the primacy of European law, with J Ziller, arguing that the Conseil d'Etat refused to do that. P Cassia, 'Le Frexit sécuritaire du Conseil d'Etat' (23 April 2021) Le Club de Mediapart blogs.mediapart.fr; J Ziller, 'The Conseil d'Etat refuses to follow the Pied Piper of Karlsruhe' (24 April 2021) Verfassungsblog verfassungsblog.de.

[15] D Grimm, *The Constitution of European Democracy* (Oxford University Press 2017) 25-28.

of European law shall operate: where competences have not been delegated, supremacy shall not apply.[16] The unconditional acceptance of absolute supremacy would imply a European competence-competence, that is, the competence to unilaterally extend the list of supranational competences. This, the highest courts argue, cannot be the content and purpose of the integration programme, at least as long as the EU is not a federal state. The primacy of European law, according to this view, can only be *relative* primacy, subject to certain constitutional control limits.[17]

The matter is worth a closer look, given the lack of awareness of the large number of supreme courts that define limits to European supremacy. In the late 1990s, Slaughter, Stone Sweet, and Weiler carried out comparative research on the respective rulings of six of the then-existing 15 highest courts within the EC:[18] Belgium, France, Italy, Germany, the Netherlands, and the UK. They found some forms of constitutional control reservations in all the countries analyzed. Mayer enlarged the picture by examining all 15 EC Member States.[19] According to his findings, only three highest courts had clearly refrained from defining limits to supremacy: those of Luxembourg, the Netherlands (in contradiction to Slaughter *et al*.), and Finland. Two other cases, Portugal and the UK, were unclear; in the other 10 cases, constitutional control reservations were present. More recently, Lindner analyzed a sample of nine countries that also included four Eastern European cases: Latvia, Hungary, Poland, and the Czech Republic.[20] He confirmed the presence of control reservations for all his cases.[21]

Limits to the unconditional acceptance of supranational supremacy – of European *monism*, in the terminology of Kumm[22] – are, as we see, the rule rather than the exception. It is very unlikely that this will change in the near future. "National Courts Cannot Override CJEU

[16] A Stone Sweet, 'Constitutional Dialogues in the European Community' in AM Slaughter, A Stone Sweet and JHH Weiler (eds) *The European Court and National Courts: Doctrine & Jurisprudence. Legal Change in Its Social Context* (Oxford Hart 2000) 319; D Grimm, *The Constitution of European Democracy* cit. 54; U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them: The Relationship Between the Court of Justice of the European Union and the German Constitutional Court' (2021) ICON 208, 213.

[17] See D Grimm, 'A Long Time Coming' (2020) German Law Journal 944.

[18] See the contributions to the edited volume AM Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts: Doctrine & Jurisprudence: Legal Change in Its Social Context* (Oxford Hart 2000).

[19] See FC Mayer, *Kompetenzüberschreitung und Letztentscheidung: das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra-vires-Akte in Mehrebenensystemen* (Beck 2000).

[20] T Lindner, 'Richter der Integration: eine rechtsvergleichende Studie über die verfassungsrechtlichen Positionen ausgewählter Mitgliedstaaten zur europäischen Integration' (PhD Dissertation: Universität Hamburg 2015) ediss.sub.uni.

[21] See also A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) CMLRev 1417, 1433-1434.

[22] M Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) CMLRev 351, 353-362.

Judgments", as a group of 27 European lawyers put it in reaction to the *PSPP* decision,[23] can therefore only be understood as the *normative* expression of a view on how national courts *shall* behave. It is not a clarification of the *status quo* and cannot solve the conflict at hand. There is an alternative, however: a supranational appeal court could reconcile the conflicts between the CJEU and supreme courts if they agree to disagree. The idea has been revived in the aftermath of the judgment from May 5, 2020. In this *Article*, we will use the PSPP conflict to carefully think the value-added to this idea through.

The idea of the appeal court will be introduced in more detail in section II, along with a brief introduction to the normative strand of the debate about constitutional pluralism. In section III, I will turn to the prehistory of the *PSPP* ruling and make clear that the concept of proportionality was at the center of the conflict. The concept will therefore be revisited (section IV) before I will analyze its use in the *PSPP* ruling of the FCC (section V). In section VI, I will discuss the persuasiveness of the ruling and defend it against the view that Karlsruhe violated the imperatives of "good", cooperative conduct within constitutional pluralism. Afterwards, by dividing the PSPP conflict into its components, section VII will examine the potential value-added of a legal super-authority. Such an institutional reform, I will argue, would not make the multipolar structure of the European legal order disappear.

II. Constitutional pluralism and the idea of an appeal court

The PSPP conflict is an expression of the nonhierarchical judicial order of the EU, a multipolar order in which both the CJEU and highest courts at Member State level claim the "last word" about constitutional conflict. The judicial literature discusses this lack of a final arbiter as "constitutional pluralism" that allows for multiple, unranked, sometimes inconsistent legal sources and rules of recognition.[24]

The lively debate about constitutional pluralism has an empirical and a normative dimension.[25] Empirically, scholars analyze the functioning of non-hierarchical legal orders. Normatively, they wonder both about the desirability of such pluralism (an idea that Kelemen and Pech, for example, strictly oppose)[26] and about the imperatives for "good"

[23] RD Kelemen, P Eeckhout, F Fabbrini, L Pech and R Uitz, 'National Courts Cannot Override CJEU Judgments' cit.

[24] Among others: N Walker, 'The Idea of Constitutional Pluralism' (2002) ModLRev 317; N Walker, 'Constitutional Pluralism Revisited' (2016) ELJ 333; M Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe?' cit.; NW Barber, 'Legal Pluralism and the European Union' (2006) ELJ 306; A von Bogdandy and S Schill, 'Overcoming Absolute Primacy' cit.

[25] K Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014); L Pierdominici, 'The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?' (2017) Perspectives on Federalism 119.

[26] RD Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) CYELS 59. According to Kelemen and Pech, constitutional pluralism is an abnormally dangerous product: "It is time for scholars of constitutional pluralism to issue a recall on the dangerous product they released into the marketplace for ideas."

conduct within it, if present. Constitutional pluralism, the proponents argue, can work well if the signals which both sides send to each other lead to a productive, innovative constitutional dialogue.[27] Opponents put forward that pluralism is prone to misuse by autocrats,[28] and that pluralist legal systems run a risk of constitutional crisis if both sides hand down inconsistent instructions and stick to their respective perspectives.[29]

Both objections from the side of the *monists* have to be taken seriously. Autocrats can misuse the idea of constitutional pluralism in order to justify crude violation of European (or other international) rules indeed. However, the threat of misuse shapes monism as much as pluralism. Unconditional acceptance of supremacy would imply doing away with remaining legal checks and balances and would thereby open the door for (even more) competence drift, with negative consequences for democracy at the Member State level.[30] But this clarification does not make pluralism's problem disappear: obviously, the productive, innovative potentials of constitutional pluralism, if present anyway, rely on compliance with implicit norms of "good" behavior within it, in order to minimize potential misuse and crisis due to stalemate.[31]

Flynn has recently made proposals for specification of such rules.[32] According to him, defections from the side of Member State level supreme courts do not violate the rules *per se*, but can be expressions of legitimate, loyal opposition if they meet certain criteria. He suggests a two-tiered legitimacy test. First, he asks about the legitimacy of the court in question, that is, whether it is really an independent body. Second, he asks about the quality and coherence of the respective judicial reasoning: whether it is grounded in solid engagement with common European standards; whether there is serious engagement with the point of view of the CJEU; whether there are good faith attempts to enter into dialogue with the CJEU; and whether it respects the equality among the Member States of the EU.

Interestingly, Flynn doubts that the FCC's *PSPP* ruling meets these criteria, mainly for two reasons: due to the lack of a further (second) referral to the CJEU and due to

See also RD Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone' (2016) Maastricht Journal of European and Comparative Law 136.

[27] See in particular NW Barber, 'Legal Pluralism and the European Union' cit. 328-329.

[28] RD Kelemen, 'On the Unsustainability of Constitutional Pluralism' cit.; RD Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism' cit.; M Ovádek, 'Constitutional Pluralism between Normative Theory and Empirical Fact' (23 October 2018) Verfassungsblog verfassungsblog.de; H Canihac, 'Is Constitutional Pluralism (Il)liberal? On the Political Theory of European Legal Integration in Times of Crisis' (2021) German Law Review 491.

[29] NW Barber, 'Legal Pluralism and the European Union' cit. 306.

[30] M Baranski, FB Bastos and M van den Brink, 'Unquestioned Supremacy Still Begs the Question' (29 May 2020) Verfassungsblog verfassungsblog.de.

[31] L Viellechner, 'Nach den großen Erzählungen: Möglichkeiten und Grenzen von Verfassungspluralismus in der Krise der Europäischen Union' in C Franzius, FC Mayer and J Neyer (eds), *Die Neuerfindung Europas: Bedeutung und Gehalte von Narrativen für die europäische Integration* (Nomos 2019) 179, 185; T Flynn, *The Triangular Constitution – Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart Publishing 2019) 204 ff.

[32] T Flynn, 'Constitutional Pluralism and Loyal Opposition' (2021) ICON 241.

the FCC's use of the concept of proportionality, that is, due to the FCC's attempt to impose its own standard of proportionality upon European law.[33] I will engage with these arguments in more detail in the course of this *Article*. My conclusion will differ from the one put forward by Flynn. In particular, I will argue that Karlsruhe's complaint about the CJEU's use of proportionality was legitimate and coherent, and did not confuse proportionality as a concept about the *exercise* of competences with a concept that aims at the *demarcation* of competences.

Returning to the downsides of constitutional pluralism as such: is there really only the choice between unconditional acceptance of absolute supremacy, which would basically abandon the remaining shields against competence creep, and insistence on rules of "good" conduct within pluralism, rules which autocrats may nevertheless not be willing to follow? Some scholars propose a third way. They suggest constitutional reform of the European legal order: an additional "Constitutional Council",[34] "European High Court",[35] or "Court of Appeal"[36] could complement the European judiciary and ultimately decide constitutional conflict.

The most prominent proposal originates from Weiler.[37] According to him, the new court shall have jurisdiction over issues of competence only. Any EU institution, including the European Parliament, and any Member State shall be allowed to refer cases to it. The president of the CJEU shall act as the president of the appeal court and its judges shall be sitting members of the highest courts of the Member States. The appeal court would be superior to the CJEU and shall hence be able to revoke the CJEU's rulings. The idea has proponents in remarkably different camps. Weiler is a European law expert who is concerned about potential blockades when the views of the CJEU and supreme courts collide. Other supporters of the reform idea, such as Herzog and Gerken, are CJEU critics who seek to restrict the European highest court in its role as the "engine of integration".[38] Still others, such as the rather reluctant proponent Mayer, are decided pro-Europeans.[39]

The heterogeneity of the proponents becomes less puzzling if one takes a closer look at the suggested composition of the new body. Hatje, for example, suggests an appeal

[33] T Flynn 'Constitutional Pluralism and Loyal Opposition' cit. 257 ff. Without explicit reference to constitutional pluralism, a further critique is that the FCC ruled against its self-imposed integration friendliness; for example, see G Anagnostaras, 'Activating Ultra Vires Review: The German Constitutional Court Decides Weiss' cit. 818.

[34] JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press 1999) 322.

[35] T Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (Cambridge University Press 2018) 282.

[36] K Weber and H Ottmann, *Reshaping the European Union* (Nomos 2018) 180-181.

[37] See JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?"* cit.

[38] R Herzog and L Gerken, 'Stoppt den Europäischen Gerichtshof' (8 September 2008) Frankfurter Allgemeine Zeitung docplayer.org.

[39] FC Mayer, *Kompetenzüberschreitung und Letztentscheidung* cit. 337.

court not composed of representatives from the Highest National Courts alone, but composed of an equal number of both national and CJEU judges.[40] This sounds fair, given that the aim is to address conflicts between these two sides. Actually, however, such composition would change the nature of the game, compared to Weiler's original proposal. Imagine a situation in which Member State judges argue that the CJEU has overstepped its mandate. Even if all national judges close ranks, now the maximum they can achieve is stalemate if the European judges stick to the solution proposed by the CJEU. Such a stalemate would most likely be insufficient to overrule the CJEU, implying that the judges from the Member States' highest courts can never succeed against the CJEU's opposition.

Recently, in reaction to the PSPP conflict, Weiler and Sarmiento have updated the original Weiler proposal.[41] The authors suggest a new appeal procedure within the province of the CJEU, with a "Mixed Grand Chamber" being composed of six CJEU judges and six judges from the highest courts of the Member States and presided over by the CJEU president. As in the earlier proposal, the new chamber shall only deal with conflicts over the distribution of competences. But here, a decision *validating* a contested Union measure would have to be supported by at least eight or nine judges. This idea circumvents the structural disadvantage of the national representatives that the parity solution would otherwise bring about.

In the remainder of this *Article*, I will analyze the PSPP conflict in detail, in order to review whether the FCC's complaint about the CJEU's use of proportionality violated the norms of cooperation and in order to think through the potential added value of the appeal court idea.

III. From Karlsruhe to Luxembourg and back: OMT and PSPP

Wherever principals delegate competences, the limits of the agents' mandates are prone to conflict.[42] Yet it is more than coincidental that the first case in which the FCC classified a Union act as *ultra vires* concerned the monetary union and the mandate of the ECB in particular. There were always tensions within the EU's legal order, but monetary union brought *particular* tension. This is due to the extraordinary dynamism of the European Monetary Union (EMU), and central banking beyond the EMU, on the one hand, and the stasis of the contractual basis of the EMU, on the other.[43] The concurrence of stasis and

[40] See A Hatje, 'Gemeinsam aus der Ultra-vires-Falle: Plädoyer für einen "Gemeinsamen Rat der obersten Gerichtshöfe der Europäischen Union"' (4 June 2020) Verfassungsblog verfassungsblog.de.

[41] D Sarmiento and JHH Weiler, 'The EU Judiciary After Weiss' (2 June 2020) Verfassungsblog verfassungsblog.de.

[42] See MC Jensen and WH Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) Journal of Financial Economics 305.

[43] Arts 119–127 TFEU assign monetary policy to the European System of Central Banks, while economic policy, including budgetary policy, is to remain with the Member States. Art. 282(2) TFEU defines maintaining price stability as the "primary goal" of the European System of Central Banks. Art. 123(1) TFEU prevents fiscal policy from being pursued through monetary instruments (prohibition on the monetary financing of state budgets). Art. 125(1) TFEU is the no-bailout clause.

dynamism opens room for conflict about the narrowness of the reading of the contractual basis and the strictness of judicial scrutiny.

The euro area was created by countries that blatantly contravened the conditions of an "optimal currency area".[44] The necessary convergence did not occur during the first ten years of the euro either. This first decade ended with the financial crisis spilling over from the US, putting the eurozone under maximum stress. With the ensuing euro crisis came a range of rescue measures, such as the introduction of the European Financial Stability Facility (EFSF) (and later the European Stability Mechanism, ESM) and the OMT programme, none of which were envisaged in the Treaties.[45] Even more, in the meantime, central bank policies had changed worldwide, due to the *quantitative easing* operations responding to secular stagnation and deflationary tendencies, of which the PSPP programme is part.[46]

In January 2014, for the first time in its history, the FCC stayed proceedings in order to refer questions on the interpretation of European law to the CJEU in Luxembourg under the preliminary ruling procedure.[47] At issue were the criteria for determining whether the ECB was operating within the scope of the Treaties with its OMT programme. It was aimed at shielding risk premia on government bonds from uncontrolled increase, an aim obviously different from inflation steering. According to the ECB, the programme was nevertheless in line with its mandate because it aimed at protecting the transmission mechanism of monetary policy.

Luxembourg responded with its *Gauweiler* judgment of June 2015.[48] The CJEU discussed separately whether the CJEU blurred the line between monetary and economic policy, whether the OMT programme was an unlawful circumvention of the ban on monetary finance in art. 123 TFEU, and whether the OMT programme was proportional. With regard to the boundary between monetary and economic policy, the CJEU confirmed the necessity of sheltering the functioning of the transmission of monetary policy by the

[44] A Johnston and A Regan, 'European Monetary Integration and the Incompatibility of National Varieties of Capitalism' (2016) JComMarSt 318; FW Scharpf, 'There Is an Alternative: A Two-Tier European Currency Community' (MPIFG Discussion Paper 18/7-2018); M Höpner and M Lutter, 'The Diversity of Wage Regimes: Why the Eurozone Is Too Heterogeneous for the Euro' (2018) European Political Science Review 71.

[45] G Anagnostaras, 'Activating Ultra Vires Review' cit. 826.

[46] S Saurugger and F Terpan, 'The Court of Justice of the European Union, Conflicts of Sovereignty and the EMU Crisis' (2019) Journal of European Integration 903 is an excellent overview of EMU-related case law of the CJEU before the PSPP conflict.

[47] German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13 cit.

[48] Case C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400. See A Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union. European Court of Justice, Judgment of 16 June 2015, Case C-62/14 Gauweiler and others v Deutscher Bundestag' (2015) EuConst 563; V Borger, 'Outright Monetary Transactions and the stability mandate of the ECB: Gauweiler' (2016) CMLRev 139; T Tridimas and N Xanthoulis, 'A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict' (2016) Maastricht Journal of European and Comparative Law 17; C Joerges, 'Pereat Iustitia, Fiat Mundus: What is Left of the European Economic Constitution after the Gauweiler Litigation?' (2016) Maastricht Journal of European and Comparative Law 99.

means of differential bond acquisition.[49] With regard to the supposed circumvention of the ban on direct state finance, it referred to a number of characteristics that, according to the CJEU, prevented the OMT programme from implying such circumvention, in particular the fact that the number of bonds allowed to be acquired was delimited; that the ECB did not acquire bonds directly from the issuing finance ministries; that the ECB did not intend to announce the amounts of bonds to be acquired *ex ante*; and that holding to maturity would remain an exception to the rule.[50] In addition, the CJEU performed a proportionality test. It pointed out that the ECB had a wide discretion[51] and found no "manifest error[s] of assessment"[52] in the ECB's written assessment that the programme was both appropriate and limited to what was required.[53]

The FCC accepted the CJEU decision in its *OMT* judgment from June 2016 and thus dismissed the complaints.[54] Interestingly in the context of this analysis, scholars disagree on whether the *OMT* saga was an expression of the productive functioning of constitutional pluralism, that is, of legitimate and loyal behavior within it. Simon as well as Bobić affirm this, given that the FCC and the CJEU engaged in a dialogue that ended without contradictive instructions given to politicians.[55] Kelemen (an opponent of constitutional pluralism anyway) as well as Franzius, however, raise doubts because the FCC claimed the "last say" on the matter for itself.[56] For them, not only every defection on the side of Member State level supreme courts, but also every expression of a respective threat is a violation of the implicit rules of legitimate behavior within pluralism. But this sets the bar unreasonably high: if constitutional pluralism is to be a meaningful concept, it must grant a wider discretion to supreme courts than just behave *as if* they operated within monism. On this I side with Flynn,[57] who argues that potential or actual defection can be legitimate

[49] *Gauweiler and Others* cit. paras 46-65.

[50] *Ibid.* paras 93-127.

[51] *Ibid.* para. 68.

[52] *Ibid.* para. 74 and para. 81.

[53] *Ibid.* paras 66-92.

[54] German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13 cit. See M Starita, 'Openness Towards European Law and Cooperation with the Court of Justice Revisited: The Bundesverfassungsgericht Judgment of 21 June 2016 on the OMT Programme' (2016) European Papers www.europeanpapers.eu 395; F Heide, 'Quo vadis Ultra-vires? – Das abschließende Urteil des Bundesverfassungsgerichts in Sachen OMT-Programm' (2016) Zeitschrift für Europarechtliche Studien 479; M Payandeh, 'The OMT Judgment of the German Federal Constitutional Court. Repositioning the Court within the European Constitutional Architecture' (2017) EuConst 400.

[55] S Simon, 'Konturen des kooperativen Verfassungspluralismus in Europa' (2016) Zeitschrift für Staats- und Europawissenschaften 378, 400; A Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice' (2017) German Law Journal 1395, 1427.

[56] RD Kelemen, 'On the Unsustainability of Constitutional Pluralism' cit. 146; C Franzius, 'Verfassungspluralismus – Was bedeutet das konkret?' (2016) Rechtswissenschaft 62, 77.

[57] T Flynn 'Constitutional Pluralism and Loyal Opposition' cit. 245 ff.

behavior within pluralism if substantive criteria of coherence, good faith attempts to enter into dialogue, and serious engagement with CJEU jurisprudence are met.[58]

We now approach the PSPP conflict. The ECB adopted the PSPP by decisions taken in the fall of 2014. In contrast to OMT, the programme is part of *quantitative easing*, which is, according to the ECB, designed to return (in this case, raise) the rate of inflation to the target of below, but close to two per cent. Once again, complaints were lodged with the FCC in Karlsruhe, with in essence the same objections as in the *OMT* case, and once again Karlsruhe decided to make a referral to the CJEU.[59] The FCC explicitly, in three of its questions, wondered about the proportionality of the measure (questions 3c, 3d, and 4). In particular, in question 3c, the German highest court asked whether the programme "on account of its strong economic policy effects [...] violated the principle of proportionality".[60]

The CJEU's response came with the *Weiss* judgment of December 2018.[61] According to the ruling, as in the *OMT* case, the programme was not an illegal circumvention of the ban on state finance.[62] The CJEU again emphasized the wide discretion of the ECB[63] and performed a proportionality test on the basis of the search for manifest assessment errors in the written ECB statements.[64] It concluded that the programme was an appropriate measure in order to bring inflation back to the target and did not go beyond what was necessary.[65] The Second Senate of the FCC, however, perceived the *Weiss* ruling to be superficial in substance and ungracious in tone. A particular source of displeasure was the handling of question 5, which related to risk sharing in the event that a Eurosystem central bank had to be recapitalized. Luxembourg refused to give an answer because the question, it said, was hypothetical.[66] At the hearing in the *PSPP* case on July 30 and 31,[67] 2019, the sense of frustration among the Karlsruhe justices about the response was clearly visible.[68]

[58] One can also put this in game-theoretic language: as Axelrod has shown, the readiness to defect can stabilize cooperation. See R Axelrod, *The Evolution of Cooperation* (Basic Books 1984).

[59] German Federal Constitutional Court judgment *PSPP* cit.

[60] Goldmann accuses the FCC of not having "even put much weight on the proportionality principle" in its referral: M Goldmann, 'The European Economic Constitution After the PSPP Judgment: Towards Integrative Liberalism?' (2020) German Law Journal 1058, 1074.

[61] *Weiss and Others* cit. AAM Mooij, 'The Weiss Judgment: The Court's Further Clarification of the ECB's Legal Framework: Case C-493/17 Weiss and Others, EU:C:2018:1000' (2019) Maastricht Journal of European and Comparative Law 449; M Van Der Sluis, 'Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in Weiss (C-493/17)' (2019) LIEI 263; C Dornacher, 'Schlusskapitel oder Zwischenakt? Anmerkung zum Urteil des EuGH v. 11.12.2018, Rs. C-493/17 (Weiss u.a.)' (2019) EuR 546.

[62] *Weiss and Others* cit. paras 102-108.

[63] *Ibid.* para. 73.

[64] *Ibid.* paras 24, 56, 78–81, 86, 91–93.

[65] *Ibid.* paras 71-97.

[66] *Ibid.* para. 165.

[67] The author attended the hearing.

[68] AAM Mooij, 'The Weiss Judgment: The Court's Further Clarification of the ECB's Legal Framework' cit. 459; W Kahl, 'Optimierungspotenzial im "Kooperationsverhältnis" zwischen EuGH und BVerfG, 39' (2020) Neue Zeitschrift für Verwaltungsrecht 824, 826.

And so Karlsruhe's *PSPP* judgment came about.[69] The FCC rejected that the PSPP was covert monetary financing of the participating countries. In this respect, the Second Senate raised serious concerns against the interpretation of their Luxembourg colleagues, but argued that their assessments were at least comprehensible and therefore not *ultra vires.*[70] However, Karlsruhe objected to the way the CJEU had tested the proportionality of the intended monetary effects of the measure, on the one hand, and the unintended side effects on economic policy in competence of the Member States, on the other. Karlsruhe therefore declared the CJEU's earlier *Weiss* judgment to be incomprehensible, objectively arbitrary, and as such an *ultra vires* act not applicable to Germany.

Thus, the concept of proportionality was at the center of the struggle between the CJEU and the FCC. We will trace the reasoning of the FCC in more detail in section V, but beforehand revisit proportionality in theoretical terms and recognize that its application across jurisdictions is far from uniform.

IV. The many faces of proportionality

Proportionality is among the most common legal concepts that courts use to rationalize judicial decision making, here in particular to supervise political authority.[71] According to the concept, all kinds of actions of public authorities that affect citizens' fundamental rights[72] are only lawful if they are proportional, that is, if they pass a special proportionality test. The concept was first developed by German administrative courts in the late 19th century and served as a constraint to police action.[73] It spread to many countries and international orders in the course of the 20th century.[74] The EU is among such orders: according to art. 5(1) TEU, "The use of Union competences is governed by the principles of subsidiarity and proportionality".[75] In its rulings introduced in section III, the CJEU

[69] German Federal Constitutional Court judgment *PSPP* cit.

[70] See in particular German Federal Constitutional Court judgment *PSPP* cit. para. 184.

[71] TI Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) ELJ 158, 160.

[72] At first glance, the PSPP dispute in which public authorities are not conflicting with individual rights but with other public authorities within the same multilevel system falls out of this category. The FCC nevertheless reconstructed the conflict as a fundamental rights conflict: In its view, disproportional interference with the matters of the Member States translates into interference with the citizens' individual right to democracy, as the FCC had famously declared in its *Lisbon* decision from 2009 (*Lisbon* cit. para. 177) and re-emphasized in its *OMT* judgment (German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13 cit. para. 83). In this respect, therefore, the *PSPP* judgement brought no news.

[73] M Cohen-Eliya and I Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) ICON 263, 271-276.

[74] See S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) ICON 468; A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012); M Klatt and M Meister, 'Verhältnismäßigkeit als universelles Verfassungsprinzip' (2012) Der Staat 159, 160-162; W Sauter, 'Proportionality in EU Law: A Balancing Act?' (TILEC Discussion Paper 003-2013).

[75] Note that art. 5 TFEU does not narrow the applicability of proportionality down to situations in which public actions interfere with fundamental rights.

has confirmed that the range of applicability of the concept also encompasses actions of the ECB, such as their bond purchase programmes. The struggle between the FCC and the CJEU is about how the proportionality test shall be performed in such cases.

The test consists of four stages: one pre-stage and three main stages.[76]

i) Most jurists describe the proper purpose test as a necessary step before the actual proportionality test begins. The Court asks whether the legislator has a mandate for legislation in the respective field, and whether the act under review pursues a legitimate, lawful aim.

ii) The first main stage is about suitability (alternative terms: appropriateness, rational connection). The Court asks whether the act is capable of achieving its legitimate aim.

iii) The second stage is about necessity. The Court asks whether the act does not go beyond what is necessary, in other words: whether it is minimally intrusive. An act is less intrusive the less it interferes with the constitutionally protected rights of the persons affected.

iv) The third stage is about the balance between cost and benefit (terms: adequateness, appropriateness, proportionality *strictu sensu*). The Court weights the reduction in enjoyment of rights against the gain achieved. In the light of this part of the test, a measure is only proportional if its urgency outweighs the infringement on the side of the persons affected. The Court asks, in the words of Lübbe-Wolff: is it worth this?[77]

The third stage – proportionality in the narrow sense – is the contested part, as two examples shall illustrate. The first example is from Grimm, a proponent of testing proportionality in the narrow sense.[78] Imagine a law that allows the police to fatally shoot someone if this measure is the only way of preventing them from harming another's property. Because property is constitutionally protected in almost all countries and because the aim of the act is therefore lawful, it will pass the pre-test. Shooting the person will in fact prevent him from vandalizing property, therefore the act passes stage one as well. Since shooting him to death is the only possible measure to prevent him from harming property in our thought experiment, and since the measure does not go beyond that, the act also passes the second stage of the test. Without the third stage, the test would be finished now and the act would have passed the test. Only the third stage brings about

[76] Among others: E Grabitz, 'Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts' (1973) Archiv des öffentlichen Rechts 568, 571–586; R Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) Ratio Juris 131, 135-136; T Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 139; J Rivers, 'Proportionality and Variable Intensity of Review' (2006) CLJ 174, 181; A Barak, *Proportionality: Constitutional Rights and Their Limitations* cit.

[77] G Lübbe-Wolff, 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court' (2014) HRLRev 12, 17.

[78] D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) University of Toronto Law Journal 383, 396.

what most certainly every reader thinks is right: the hypothetical act is unlawful because the price of shooting the person in question and killing them is out of proportionality.

The second example comes from Tsakyrakis, a critic of the proportionality test in the narrow sense.[79] In the 1950s, the US Supreme Court decided a number of landmark cases on ethnic desegregation in schools, according to which the segregation of black school children was unlawful. All readers will agree that the Supreme Court did the right thing: it protected the constitutional rights of people of color. Rephrased in the language of proportionality, the Supreme Court argued that telling black children they cannot be educated together with white children is brutally offensive to their dignity in a way that forcing whites to share their classrooms accordingly is not.

So far, so good. But now imagine whites being so passionately racist and the pain they would feel if their children were co-educated with black children so overwhelming that it outweighs the gain on the side of the children of color or their parents. If that were true, should the US Supreme Court, in the light of the last stage of the proportionality test, have decided differently? Obviously not. The thought experiment, according to Tsakyrakis, reveals a fundamental problem of the proportionality test: it trades moral considerations, which are at the heart of human rights, against a utilitarian perspective.[80]

Khosla has argued that Tsakyrakis' racism example is misleading because even if the US Constitutional Court had fully decided the case on the basis of proportionality (which it did not) and even if the amount of racism among the white persons involved was as overwhelming as assumed in the thought experiment, the decision of the Supreme Court would have nevertheless been the same, because the act in question would not have passed the pre-stage of the test: the aim of the act in question was unconstitutional in the first place.[81] The proportionality test as a whole, Khosla argues, must not be confused with its final balancing stage. Nevertheless, the objection that balancing is misleading because it tends to treat all interests involved with equal legitimacy and thereby deprives fundamental rights of their normative power is widespread and a matter of ongoing controversy. A famous proponent of this line of critique is Habermas.[82]

Another line of objection to balancing is that it assumes that costs and benefits of public actions come in a common currency and can therefore be objectively weighted by judges. What judges really do when they balance, according to this critique, is deciding which of the interests involved *shall* weigh more. Such decisions, however, are inherently

[79] S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' cit. 487-488.

[80] *Ibid*.

[81] M Khosla, 'Proportionality: An Assault on Human Rights? A Reply' (2010) ICON 298, 305.

[82] J Habermas, *Faktizität und Geltung: Beiträge zur Dsikurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992) 312. See also Alexy (R Alexy, 'Constitutional Rights, Balancing, and Rationality' cit. 134), Barak (A Barak, *Proportionality: Constitutional Rights and Their Limitations* cit. 488-490) and Grimm (D Grimm, 'Justiz und Gesetzgebung: Zur Rolle und Legitimität der Verfassungsrechtsprechung' in P Koller and C Hiebaum (eds), *Jürgen Habermas: Faktizität und Geltung* (De Gruyter 2016)), who respond to Habermas.

political. In this view, balancing is a tool that enables courts to overstep their mandate to the disfavor of democracy. Elected politicians, rather than judges, according to this perspective, should ask and answer the question "Is it worth this?", and take on the responsibility for their answers vis-à-vis their electorates. In Germany, scholars such as Böckenförde and Hillgruber conform to this line of critique.[83] Schlink famously asked the FCC to stick to the proportionality test but to abandon its final stage.[84]

Our snapshot of the judicial debate makes clear that the proportionality test is far from uncontroversial. It does therefore not come as a surprise that the actual use of the tool differs widely.[85] German and Israeli courts, for example, put much weight on the final balancing stage,[86] while French and Canadian courts use the test more reluctantly.[87] Nowag argues that proportionality poses a "lost in translation" problem to jurists: the widespread use of the term hides that the legal concepts behind it are significantly different.[88] It follows from this that the ways the FCC and the CJEU understand and use proportionality are not necessarily the same, too.

V. Proportionality in the *PSPP* decision of the FCC

The background knowledge provided in the last section enables zooming into the details of the *PSPP* decision with particular emphasis on the use of proportionality. Remember that the plaintiffs accused the ECB of, first, having circumvented the ban on the use of the central bank for the purpose of monetary finance in art. 123 TFEU and, second, of having overstepped its monetary policy mandate by having intervened in the economic policy matters of the Member States in too intrusive a way. Likewise, they accused the CJEU of having acted *ultra vires* by not having intervened.

With regard to the first objection, the FCC expresses "serious concerns"[89] against the way the CJEU reviewed the matter, but eventually argues that the CJEU's conclusions are

[83] EW Böckenförde, 'Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik' (1990) Der Staat 19-20; C Hillgruber, 'Ohne rechtes Maß? Eine Kritik der Rechtsprechung des Bundesverfassungsgerichts nach 60 Jahren' (2011) Juristenzeitung 861, 862.

[84] B Schlink, *Abwägung im Verfassungsrecht* (Duncker & Humblot 1976) 152-153. Barak (A Barak, *Proportionality: Constitutional Rights and Their Limitations* cit. 481-492), a proponent of the proportionality test, categorizes and extensively discusses criticisms.

[85] See C Knill and F Becker, 'Divergenz trotz Diffusion? Rechtsvergleichende Aspekte des Verhältnismäßigkeitsprinzips in Deutschland, Großbritannien und der Europäischen Union' (2003) Verw 447.

[86] A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) ColumJTransnatlL 72, 163.

[87] See G De Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) Yearbook of European Law 105, 110; D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' cit. 393.

[88] See J Nowag, 'The BVerfG's Proportionality Review in the PSPP Judgment and Its Link to Ultra Vires and Constitutional Core: Solange Babel's Tower Has Not Been Finalised' (2020) LundLawEUWP 11.

[89] German Federal Constitutional Court judgment *PSPP* cit. para. 184.

comprehensible.[90] The second objection is where different readings of proportionality come in. In direct contradiction to the CJEU in *Gauweiler* and *Weiss*, Karlsruhe points out that the ECB's mandate is *narrowly* defined.[91] Side effects of its decisions on economic policy, the FCC argues, are unavoidable, but have to remain proportional as they affect the citizens' individual right to democracy.[92] Constitutional supervision over proportionality is therefore essential, but the CJEU, the argument of the FCC goes, did not go beyond a search for manifest assessment errors in the written statements of the ECB and therefore refused to apply a meaningful proportionality test.

Proportionality, the FCC makes clear, is among the general principles of EU law[93] and usually consists of three main steps, in accordance with what we have seen in the previous section: suitability, necessity, and appropriateness.[94] This, according to the FCC, holds true not only for Germany, but for many other Member States as well, such as France, Spain, Sweden, Italy, Austria, Poland, Hungary, and the UK.[95] The FCC goes on to argue that the CJEU, when it tests the proportionality of acts of EU institutions, uses the concept differently: it tests whether the acts in questions are appropriate for attaining the legitimate objective pursued (pre-test and main stage one), thereby frequently limiting its review to whether the relevant measures are manifestly inappropriate; and it tests whether they do not manifestly exceed the limits of what is appropriate and necessary in order to achieve the objectives (stage two). But "little to no consideration", the FCC complains, "is given to whether the measure is actually proportionate in the strict sense … As a general rule, the CJEU refrains from reviewing proportionality in the strict sense".[96]

In what follows, the FCC recapitulates the CJEU's proportionality test step by step and finds that the specific manner in which it was applied in *Weiss* "renders that principle meaningless"[97] for two reasons. First, the application of *all stages* of the test lacked severity because it did not go beyond the search for manifest errors of assessment on the side of the ECB.[98] According to the Karlsruhe judges, the CJEU refrained from seriously questioning the aim and necessity of the programme. "As a result", the FCC says, "the CJEU allows asset purchases even in cases where the purported monetary policy objective is possibly only invoked to disguise what essentially constitutes an economic fiscal policy agenda".[99] This

[90] The official English version of the decision is to be found here: www.bundesverfassungsgericht.de.
[91] German Federal Constitutional Court judgment *PSPP* cit. para. 143.
[92] *Ibid*. para. 160.
[93] *Ibid*. para. 124.
[94] *Ibid*. para. 125.
[95] *Ibid*.
[96] *Ibid*. para. 126.
[97] *Ibid*. para. 127.
[98] *Ibid*. para. 156.
[99] *Ibid*. paras 137 and 142.

standard of review, the FCC says, "is by no means conducive to restricting the scope of the competences conferred upon the ECB".[100]

Second, the Second Senate criticizes the lack of test stage three and thereby "the complete disregard of the PSPP's economic policy effects".[101] The decisive sentence reads as follows: "[T]he review of proportionality is rendered meaningless, given that suitability and necessity of the PSPP are not balanced against the economic policy effects [...] arising from the programme to the detriment of Member State's competences, and that these adverse effects are not weighted against the beneficial effects the programme aims to achieve".[102]

Proportionality *strictu sensu* balances cost and benefit. Which side effects of the PSPP need to be considered, according to the FCC, in order to assess its proportionality? The Highest Court of Germany lists the refinancing conditions of the Member States,[103] the stability of the banking sector, real estate and stock market bubbles and the survival of economically unviable companies under conditions of dysfunctionally low interest rates. The FCC also makes clear that these side effects are examples and that it is not for the FCC to decide how such concerns are to be weighted. Rather, "the point is that such effects, which are created or at least amplified by the PSPP, must not be completely ignored".[104]

The FCC emphasizes, as we have already seen, that the balancing stage of the test is not a German peculiarity but known and practiced in many Member States. It does not necessarily follow that the CJEU has to apply the test accordingly, too. How does the FCC justify its view that the CJEU's softer testing of proportionality is illegitimate?[105] "[C]ompletely disregarding the economic policy effects of the PSPP", Karlsruhe argues, "contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law", the FCC argues.[106] Now the Second Senate uses much space for extensive references to other decisions in which the CJEU performed much harder proportionality tests, including attention to practical effects. The references encompass judicial fields such as fundamental rights protection, indirect discrimination, the common market rules, and state aid, among others. We will come back to this differential application of the proportionality test below.

The lack of a serious test, Karlsruhe argues, "allows the ECB to expand ... its competences on its own authority" and "paves the way for a continual erosion of Member State competences".[107] It concludes that the ECB, insofar as it did not document the proportionality of its PSPP programme on the basis of a serious test, acted *ultra vires*, as much

[100] *Ibid*. para. 156.
[101] *Ibid*. para. 133.
[102] *Ibid*.
[103] *Ibid*. paras 170-175. The idea that the *improvement* of refinancing conditions could be a disproportional interference into the economic matters of the Member States is surely among the most obscure aspects of the *PSPP* ruling.
[104] *Ibid.* para. 173.
[105] *Ibid*. paras 146-152.
[106] *Ibid*. para. 146.
[107] *Ibid*. para. 156.

as the CJEU did when it abstained from asking the ECB for a respective documentation and from performing a meaningful proportionality test on its part.

VI. Discussion

In *Gauweiler* and *Weiss*, the CJEU tested the proportionality of ECB actions differently from how German constitutional lawyers would have most likely done it. This alone can hardly justify Karlsruhe's *ultra vires* verdict. As we have seen in sections IV and V, the concept is contested and its application differs among jurisdictions. The EU, consisting of twenty-seven different jurisdictions, has developed its own way of applying legal concepts such as proportionality. Also, while the FCC restricts the proportionality test to interference with human rights, art. 5(1) TFEU states that the use of *all Union competences* is governed by proportionality. It must not come as a surprise that the differing ranges of application come with a different application mode. None of the respective applications are "right" or "wrong" *per se*. Critics accordingly accused the FCC of having illegitimately insisted on "a very German understanding of proportionality";[108] in fact, this line of critique has been made by almost all opponents of the *PSPP* ruling.[109] The critics have a valid point: the FCC cannot impose its own proportionality standards upon the CJEU, at least not without manifestly violating the rules of cooperative behavior within constitutional pluralism.

Therefore, if the FCC had stopped here, its *PSPP* decision would lack persuasive power indeed. But this is not what the FCC did. Karlsruhe went further and gave the argument a particular twist. First, it accused the CJEU not only of a differing but also of a *differential* use of proportionality. Critics may object that such differential use is not necessarily "wrong" per se either: why not test public interference with human rights differently from interference with, say, fundamental freedoms? Tridimas[110], for example, ar-

[108] J Nowag, 'The BVerfG's Proportionality Review in the PSPP Judgment and Its Link to Ultra Vires and Constitutional Core' cit. 9; see also I Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) German Law Journal 1090, 1097; V Perju, 'Against Bidimensional Supremacy in EU Constitutionalism' (2020) German Law Journal 1006, 1020.

[109] For example, see I Kucina, 'The German Constitutional Court's Challenge to the Court of Justice of the European Union – Problems, Consequences, Possible Solutions: The PSPP Judgment of the German Constitutional Court of 5 May 2020' in G Barrett, JP Rageade, D Wallis and H Weil (eds), *The Future of Legal Europe: Will We Trust in It?: Liber Amicorum in Honour of Wolfgang Heusel* (Springer 2021) 431, 441; N Petersen and K Chatziathanasiou, 'Balancing Competences? Proportionality as an Instrument to Regulate the Exercise of Competences After the PSPP Judgment of the Bundesverfassungsgericht' (2021) EuConst 314, 320 and 333; J Basedow, J Dietze, S Griller, M Kellerbauer, M Klamert, L Malferrari, T Scharf, D Schnichels, D Thym and J Thomkin, 'European Integration: Quo Vadis?' cit. 199; O Scarcello, 'Proportionality in the PSPP and Weiss Judgments: Comparing Two Conceptions of the Unity of Public Law' (2021) European Journal of Legal Studies 45, 58; G Anagnostaras, 'Activating Ultra Vires Review' cit. 812-814 and 822.

[110] T Tridimas, *The General Principles of EU Law* cit. 193-194.

gues that it makes sense to differentiate between proportionality as the guardian of individual rights and proportionality as a tool of market integration. "As a result", he says, "the intensity of review varies considerably".[111]

One may therefore again wonder about the legitimacy of the FCC's objection: even the differential use of proportionality can hardly be wrong *per se*. But second, the FCC accused the CJEU of a *specific form* of differential use of proportionality: a form that over time systematically enlarges the discretion of EU institutions to the disfavor of Member State institutions, by the means of systematically applying a softer proportionality test against measures of the former and a harder test against measures of the latter institutions. In the *PSPP* case, according to the FCC, the differential use of the concept resulted in the lack of meaningful judicial control whatsoever, at the cost of disproportional interference with the economic matters of the Member States. This is a legitimate objection, at least from the point of view of national constitutional law.

The differential application of proportionality has been acknowledged by European law scholars for a long time. The FCC could have made its point even more persuasive if it had referred to this literature strand more extensively. According to De Búrca, for example, the CJEU performs a quite rigorous and searching examination of justifications whenever measures at Member State level have been challenged; when action is brought against the Union, by contrast, a looser proportionality test is generally used.[112] As Harbo puts it, proportionality in the narrow sense is applied "whenever the Court finds it suitable in order to promote the desired outcome": more integration.[113]

Particularly enlightening is Sauter, who identifies three parallel standards of proportionality in the jurisprudence of the CJEU: against private parties under competition law, the Court performs a least restrictive means test and engages in the balancing of costs and benefits (proportionality *strictu sensu*, that is, test stage three); against Member State measures, the Court applies a least restrictive means test; and against Union-level institutions, it runs a manifestly inappropriate test only.[114] Harbo wonders about the softness of the test if it is applied against EU institutions and asks whether it should be called a proportionality test after all since it, according to him, "is in fact a reasonableness test in disguise".[115] And Tridimas states that the proportionality requirement has turned out to be an unreliable ground on the basis of which to tame Union competences.[116] The FCC's objection therefore has a solid ground in the literature.

[111] *Ibid.* 137.

[112] G De Búrca, 'The Principle of Proportionality and Its Application in EC Law' cit. 111, 146; O Scarcello, 'Proportionality in the PSPP and Weiss Judgments' cit. 51.

[113] TI Harbo, 'The Function of the Proportionality Principle in EU Law' cit. 172. See also C Knill and F Becker, 'Divergenz trotz Diffusion?' cit. 463-469.

[114] See W Sauter, 'Proportionality in EU Law' cit.

[115] TI Harbo, 'The Function of the Proportionality Principle in EU Law' cit. 172. See also C Knill and F Becker, 'Divergenz trotz Diffusion' cit. 184.

[116] T Tridimas, *The General Principles of EU Law* cit. 180.

From the perspective of national constitutional law, this specific form of differential use of the concept is hard to accept. This also holds true for a number of possible justifications of the view put forward by the CJEU. The differential use of the test could be easier to justify if the criterion for differentiation was the policy field only. But the actual criterion is the *addressee*, rather than the policy field: proportionality, as the CJEU uses it, constrains EU action systematically less than Member State action, *independently from the kind of action*. The fundamental freedoms illustrate this point nicely, as the CJEU performs a softer proportionality test when the Union lawmaker interferes with fundamental freedoms, compared to situations in which lawmakers at Member State level interfere accordingly.[117]

Another justification could be that the Union lawmaker needs particular discretion in order to make European democracy work. But the same could be said about national democracy: democratic elections become less meaningful *wherever* the discretion among elected politicians shrinks, at the European as well as at Member State level. Above all, the democratic necessity argument would fail to justify the soft test of ECB action: in the *PSPP* case, democracy is affected by the side effects (the cost), rather than by a too narrow room of discretion on the side of the ECB (if it is affected at all).

The most straightforward justification of the biased application of proportionality would be to approve it as an expression of the Court's dedication to the goal of an "ever closer Union".[118] This, however, is precisely the heart of the problem. Meinel, for example, puts forward that the FCC blurred the line between proportionality as a means to control the *exercise* of competences and proportionality as a means to *demarcate* competencies.[119] Analytically, competence exercise and competence demarcation are different things indeed. But the exercise of competences often has side effects on other policy fields and is therefore prone to competence creep. The clear distinction between exercise and demarcation breaks down if one level's exercise of competeces – the boundary of a given competence – within a multivel system is *systematically more tightly controlled* than the other level's. Who would deny that the proportionality test, when differentially applied this way, systematically paves the way for competence drift to the disfavor of the Member State level?[120] Complaining about this and arguing that competence drift shall

[117] See M Höpner and SK Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review' (2020) CYELS 182, 202; M Höpner, 'Ist der Unionsgesetzgeber an die Grundfreiheiten gebunden?' (2022) EuR (forthcoming).

[118] Critically C Knill and F Becker, 'Divergenz trotz Diffusion?' cit. 468.

[119] F Meinel, 'Verhältnismäßig grenzenlos' (2020) Merkur 43, 48. See also HJ Hellwig, 'Die Verhältnismäßigkeit als Hebel gegen die Union: ist die Ultra-vires-Kontrolle des BVerfG in der Sache Weiss noch mit dem Grundsatz der Gewaltenteilung vereinbar?' (2020) NJW 2497, 2498 and M Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) German Law Review 979, 985-986.

[120] In the words of U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them' cit. 226: "The problem of competences is really a problem of how they are exercised: competence creep exists because of the way competences are being used."

be *equally controlled in both directions* can hardly be a violation of reasonable rules of legitimate and cooperative behavior within constitutional pluralism.

Critics of the *PSPP* ruling (and also some of its defenders) have also argued that the FCC should at least have asked the CJEU for another preliminary ruling before its *ultra vires* verdict.[121] They argue that the FCC should have followed the example of the Italian Constitutional Court (ICC) in the *Taricco* saga from 2015-2018. In this criminal law case, a CJEU judgment[122] in answer to an Italian referral led to a clash between EU law and Italian constitutional law. The *Corte Costituzionale* could have responded by activating its *controlimiti* doctrine, a control reservation similar to German constitutional identity.[123] But the ICC opted for a further referral.[124] In its *Taricco II* ruling, the CJEU addressed the Italian concerns and therefore avoided defection on the side of the ICC;[125] some argue that *Taricco II* was an essentially political decision, aiming at preserving constitutional peace at all costs.[126] According to this view, the *Taricco* saga shows that the CJEU is listening to courts at Member State level, willing to correct previous rulings, and willing to avoid conflict.[127] But second referrals may from time to time be necessary to activate such willingness on the side of the CJEU – an opportunity which the FCC missed.

My objection is that the scholars quoted above overstate the difference between the approaches chosen by the Italian and German constitutional courts. First, we should consider that the ICC actually made *one* referral to the CJEU in the *Taricco* saga, given that the first preliminary reference came from a first-instance criminal jurisdiction, the District Court of Cuneo, and not from the *Corte Costituzionale*.[128] Second, the FCC's preliminary reference that led to *Weiss* was already the second referral – if we count the referral on the very similar

[121] For example, S Simon and H Rathke, '"Simply Not Comprehensible." Why?' (2020) German Law Review 950, 955; J Basedow, J Dietze, S Griller, M Kellerbauer, M Klamert, L Malferrari, T Scharf, D Schnichels, D Thym and J Thomkin, 'European Integration: Quo Vadis?' cit. 204; G Anagnostaras, 'Activating Ultra Vires Review' cit.

[122] Case C-105/14 *Taricco and Others* ECLI:EU:C:2015:555.

[123] F Fabbrini and O Pollicino, 'Constitutional Identity in Italy: European Integration as the Fulfillment of the Constitution' (EUI Department of Law Research Paper 06-2017) 9; R Bruggeman and J Larik, 'The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity' (2020) Utrecht Journal of International and European Law 20, 23.

[124] F Carelli, 'The Judicial Dialogue in the CJEU and the Fake Contradiction of the Taricco Saga' (2020) Trento Student Law Review 37; T Flynn 'Constitutional Pluralism and Loyal Opposition' cit. 248.

[125] Case C-42/17 *M.A.S and M.B* ECLI:EU:C:2017:936 (*Taricco II*).

[126] C Peristeridou and J Ouwerkerk, 'A Bridge Over Troubled Water – A Criminal Lawyers' Response to Taricco II' (12 December 2017) Verfassungsblog verfassungsblog.de; M Gappa, 'Der Schutz der mitgliedstaatlichen Verfassungsidentität im Unionsrecht anhand der "Taricco Saga": C-105/14 (Taricco u.a.) und C-42/17 (M.A.S. u.a. –"Taricco II")' (2020) Zeitschrift für Europarechtliche Studien 641, 666.

[127] D Burchardt, 'Belittling the Primacy of EU Law in Taricco II' (7 December 2017) Verfassungsblog verfassungsblog.de; D Thym, 'Friendly Takeover, or: The Power of the 'First Word'. The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review' (2020) EuConst 187, 204.

[128] T Capeta, 'The Weiss/PSPP Case and the Future of Constitutional Pluralism in the EU' ssrn.com11.

OMT case. At least, it is fair to argue that the CJEU should have been sufficiently warned.[129] Third, we should also not ignore that the second Italian referral clearly threatened activation of the *controlimiti* doctrine – an approach which, according to some scholars, already violates the rules of loyal behavior in constitutional pluralism (a view which I do not share).

It is difficult to determine why Karlsruhe opted against a further referral on the *PSPP* case, in order to at least give each side a chance to rethink their points of view. The CJEU's handling of referral question 5 in *Weiss* at least did not encourage further dialogue. In my view, in order to decide whether the FCC did wrong, the decisive question should be whether there was need for further substantial clarification of matters.[130] With regard to the CJEU's understanding of the proportionality of ECB actions, however, everything had been said after *Weiss*. The CJEU had already insisted on a wide mandate of the ECB, implying soft scrutiny in the form of a manifest-errors-of-assessment test only, as much as the FCC had already insisted on a narrow mandate of the ECB, implying hard, "meaningful" proportionality requirements. In this regard, Karlsruhe's "final say" did not bring any surprise.

Therefore, both the CJEU and the FCC had made their perspectives clear before they provided their "final says". One may sympathize with one perspective more than the other, but it is fair to concede that both views are, within their respective European law and constitutional law contexts, legitimate, clear, and logically comprehensible. Remember now that the PSPP dispute has revived the discussion about a European appeal court as a possible way out of the stalemate that can occur when the judicial dialogue results in disagreement. Imagine such an appeal court after the contradicting *Weiss* and *PSPP* decisions and their different interpretations of proportionality. Which value-added could the appeal court have offered?

VII. Conclusion: A Way Out of Constitutional Pluralism?

We can use the discussion in the previous sections to decompose the PSPP conflict and to question the potential value-added of a legal super-authority step by step. Imagine first that the FCC had exclusively insisted that the proportionality of Union-level actions shall be fully tested German-style, or that the CJEU had openly excluded the ECB from the proportionality requirement laid down in art. 5(1) TFEU. If that were true, an appeal court could have corrected the mistakes made by either of the courts. It could have done so by strictly sticking to the judicial code. Given that even highest courts can make manifest mistakes, an appeal court can be of help if they occur. But this is not the constellation of the PSPP conflict. The views put forward by both courts were comprehensible and legitimate within their own legal contexts.

[129] U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them' cit. 218.
[130] *Ibid.* 227.

An appeal court could also easily have mandated a practical solution of the kind the practitioners came up with in July 2020: it could have asked the ECB to make its proportionality assessment of the PSPP transparent to the public, or to confidentially pass it on to the governments and parliaments of the Member States of the eurozone. That would have been of help. With an appeal court, the judiciary would have not left politicians alone with two contradicting instructions, one indicating the legality and another indicating the unconstitutionality of the PSPP.

Consider, however, the political nature of such conflict resolution.[131] Moderation between the contradicting instructions of both sides must not be confused with the finding of justice on a common legal basis because a guiding hyper norm above both European and national constitutional law does not exist. This does not imply that an appeal court is a bad idea: judicial decisions often are political compromises in disguise (remember the critics of *balancing* in section IV). But the architects of a new judicial conflict resolution body should be aware of the political nature of the task, even if they ask jurists to do the job.

The more we move from the surface to the deep structure of the PSPP conflict, however, the less the matters become accessible to compromise. This holds true for the differing readings of the proportionality requirement, and the softer test that European law runs against Union-level institutions in particular. The differing readings among the two courts can hardly be bridged without suspending long lines of jurisprudence on both sides. An arbitration that successfully overrides one or both of these lines is hard to imagine and most certainly impossible.

Fully non-accessible to compromise is the very core of the PSPP conflict: the claim of an unconditional supremacy of European law, on the one hand, and of constitutional control reservations at national level, on the other.[132] In the perspective of the CJEU, a denial of full supremacy would undermine the uniformity of Union law application. This is something the CJEU cannot accept. Likewise, the affirmation of unconditional supremacy would be unconstitutional in the perspective of most supreme courts within the EU.

But isn't the struggle over supremacy precisely what would disappear if an appeal court were to be introduced? Certainly not. Imagine an appeal court's arbitration that asks a constitutional court such as the FCC to accept a European measure that, from the national highest court's point of view, interferes with a highly ranked, constitutionally protected human right, or that manifestly overstretches the European competence order. In the view of the affected court, such an arbitration outcome would be no less unconstitutional and therefore nationally non-applicable than the European measure before the arbitration. Everything else would imply asking supreme courts to accept that the EU has a competence-competence, that is, a competence to unilaterally enlarge its list of competences, as long as a new European institution – the Appeal Court – agrees. It would

[131] N Sölter, 'Ein Schiedsgericht für die Gerichte?' (15 June 2020) Verfassungsblog verfassungsblog.de.

[132] U Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' (2020) Neue Zeitung für Verwaltungsrecht 817, 819.

therefore be naive to expect all national-level control reservations to vanish after the introduction of an appeal court.

In sum, an appeal court could offer help in some constellations. But we should not expect too much from it. Even leaving aside all problems related to its composition, the supermajority required for validating contested Union measures,[133] and the necessary treaty change, the value-added of such a constitutional reform may remain modest. In particular, the multipolar structure of the European legal order that constitutes the EU's constitutional pluralism would still persist. Even with an appeal court, that order would sometimes confront politicians with inconsistent instructions.

There is therefore no alternative to constitutional pluralism, at least not in the foreseeable medium term. The monists' scandalization of Member States' constitutional review reservations ("National courts cannot override CJEU judgments")[134] do not point the way out of it, nor does the reform idea of an appeal court. Living with this state of affairs is unlikely to get any easier in the future, as stress in the European legal system increases. On the one hand, the CJEU's differential application of the proportionality test, which was the focus of this *Article*, is biased in favor of "more Europe", as is, for example, the CJEU's extensive reading of European fundamental freedoms.[135] On the other hand, the call for more flexibility within the more heterogeneous EU is growing louder and the tacit acceptance of "integration by stealth" is declining. One will therefore have to be prepared for more conflict within constitutional pluralism.

Legal scholarship can show ways to deal with these conflicts. But it is not helpful to draw the corridor of cooperative and loyal behavior within constitutional pluralism so narrowly that it ends up being almost indistinguishable from an appeal to subservience, rather than leaving room for necessary correctives that may – hopefully – encourage the CJEU to rank calls for effective autonomy protection higher than in the past. I hope to have convinced at least some readers that Karlsruhe's complaint about the differential application of the proportionality test was well-founded and coherent enough to be covered by a reasonable set of rules of loyal conduct within constitutional pluralism.

[133] See D Grimm, 'Eine neue Superinstanz in der EU?' (2020) Zeitschrift für Rechtspolitik 129.

[134] DR Kelemen, P Eeckhout, F Fabbrini, L Pech and R Uitz, 'National Courts Cannot Override CJEU Judgments' cit.

[135] M Höpner and SK Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining?' cit.