Symposium: PSPP (*BVerfG*, 5 May 2020) and the Future of the European Integration

Editorial

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Abstract

While introducing the participants to the *Symposium*, the *Editorial* aims to highlight the main consequences of the PSPP judgment as regards the future inter-institutional activity at the national and supranational levels and offers a key to ease the troublesome communication between the German Federal Constitutional Court and the Court of Justice. Particularly, the authors suggest that the two courts speak two different languages when it comes to a judicial review of the conferral: Luxembourg refers to proportionality, whereas Karlsruhe has actually in mind an essentiality scrutiny. Essentiality is a concept that, despite looking quite anew in the European legal discourse, is not unknown at all to judicial reasoning at German and at the EU level, and may help strengthening the communicative bridges between the national courts and the Court of Justice.

I. Introduction

Welcoming fellow colleagues who have taken the trouble to participate in the *Symposium* organized by *The Italian Law Journal* is as gratifying as it is challenging. Diversity in contributions is what was sought, and diversity has come, in the form of four parallel works to which our own, presented hereinafter, only pretends to be a complement.

First, a brief presentation of the participants offers both an introduction and the occasion to warmly express our gratitude, both personal and on behalf of the *Journal*, for their commitment.

Francesca Bignami wonders whether the German court has acted beyond the limits of what a court should do: the fact that non-elected, isolated judges, on the basis of a solely German conceptual architecture, have taken a decision with innumerable consequences on the economy of other States and on the Eurozone as a whole is the point of departure of her criticisms. Andrea Guazzarotti builds on the PSPP rationale to draw conclusions about the role the ECB is called on to play in the overall EU economic governance – on one hand,

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a *sui generis* position based on the Treaties, on the other hand the mismatch with a non-finished political Union, which requires national economies to adjust to a framework that may not suit them well. Finally, Claudia Amodio analyzes the PSPP in context and delves into the conceptual tools that have shaped the journey from statehood to Europeanisation in Germany and France. The comparison, while offering a further prism to look into the effects of the *BVerfG*'s stance, unveils certain peculiarities of both positions that would have perhaps gone unnoticed otherwise.

To introduce one's own work sounds perhaps naïve, and self-assuming for sure; hence, it may be not the politest action, particularly when dealing with a hotly disputed matter. Then, asking for pardon beforehand, we hope that it will be useful to set the scene of a debate whose implications have not been fully enumerated.

II. Walking on the Rope: Between the Old Abyss and a New Dawn

The ruling of the *Bundesverfassungsgericht* (*BVerfG*) on the Public Sector Purchase Programme (PSPP)[1] has broken loudly into the European scene. While eventually absolving the *Quantitative Easing*, albeit with a slight penance imposed on the European Central Bank (ECB), it leaves shrouded in mist the destiny of the future measures aimed at recovering the economy from the Covid-19 shock. Considering the overall circumstances, this alone would largely suffice for the case to secure a landmark status in the history of the European integration. The result would be utter misfortune, should it certify the Union's fall into the abyss of confirmed inequality – which would render the project unsustainable in the medium-long run and virtually guarantee its demise. Or, perhaps, the result would be providential: the reasoning the judgment conveys points to a Euro-unitary constitutional balance and offers arguments for the political actors involved to endorse it – actually, it urges them to do so – and to take responsibility for their actions.

Thus, the over-used metaphor of a rope over the abyss is to be once more deployed to account for the situation that Europe – as a political entity, a legal order and a social community – is faced with today. Should the old cleavages – creditor-debtor, North-South, frugality-lavishness, and the like – eventually prevail in the political bargain, PSPP would have marked the last stage of an ill-fated common destiny. Else, a more profound reading of the arguments the *BVerfG* strives to construe would help drive Europe beyond its own constitutive restraints, towards a shining dawn. Another over-used metaphor, one may say; but, again, a well-fitting one. To be sure, the new day could also entail a firm halt at the

[1] Bundesverfassungsgericht, Judgment of the Second Senate, 5 May 2020, 2 BvR 859/15 (2020).

European integration; but it would do so on the basis of mutual respect for equal States and citizens, as the Europe's constitutional path requires.

Hence, it seems appropriate to target the immediate political consequences of the PSPP judgment and then to analyze the apparently convoluted reasoning that may contribute to, rather than jeopardize, the European project.

The events are well-known. In *Weiss*,[2] the Court of Justice (ECJ) pursuant to a preliminary question referred to by the *BVerfG*,[3] held the PSPP compatible with the ban on monetary financing (the *no-bailout* clause: Art 123 TFEU); however, according to the Karlsruhe judges, Luxembourg failed to perform a sufficiently solid proportionality scrutiny[4] and only offered an 'objectively arbitrary'[5] interpretation of the Treaties, thereby exceeding its powers. As a result, the *Weiss* ruling was held to be *ultra vires*, and declared non-binding within the German legal system. Against this legal background, the *BVerfG* set a three-month period 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';[6] meanwhile, the domestic institutions concerned, including the *Bundesbank*, should refrain from implementing the programme.

The European Commission felt the need to issue a statement in the immediate aftermath of the judgment to declare that 'the rulings of the European Court of Justice are binding on all national courts' and '[t]he final word on EU law is always spoken in Luxembourg, nowhere else'. President Ursula von der Leyen went as far as to declare that she could not rule out the possibility of launching an infringement procedure against Germany.[7] The German Government[8] and the *Bundesbank*,[9] as well as the ECB's Governing Council, promptly assured that they would take the ruling into due account.[10] As the Italian Minister of Economy Roberto Gualtieri predicted,[11] it is highly likely that the clarifications requested by the Karlsruhe court will quickly reach the German institutions and the *Bundesbank* will continue to take part in the PSPP; all the more so, if one considers the paradoxical consequences that would arise should the ECB fail to provide a satisfactory reply, or a reply at all. According to the PSPP judgment, the *Bundesbank* would have to stop participating in the programme, and also to

[2] Case C-493/17, *Weiss*, Judgement of 11 December 2018, available at www.eurlex.europa.eu.

[3] Bundesverfassungsgericht, Order of the Second Senate, 18 July 2017, 2 BvR 859/15 (2017).

[4] Bundesverfassungsgericht n 1 above, 140.

[5] ibid 118.

[6] ibid 232.

[7] Statement 20/846, https://tinyurl.com/y58td6j8 (last visited 27 December 2020) issued by the President of the EU Commission Ursula von der Leyen, 10 May 2020.

[8] See reports at https://tinyurl.com/y3e2ob2w (last visited 27 December 2020).

[9] See the Statement of the Bundesbank President Jens Weidmann, 5 May 2020, available at https://tinyurl.com/y3re2262.

[10] See https://tinyurl.com/y9fjto9n (last visited 27 December 2020) - Press Release of the ECB Council of Governors, 5 May 2020.

[11] See 'Bce, Gualtieri: "Sentenza della Corte costituzionale tedesca non ha conseguenze sul piano di acquisto di titoli di Stato"' *Il Fatto Quotidiano*, 5 May 2020.

sell the 'illegitimately acquired' bonds held in portfolio (which the Italian newspaper *MilanoFinanza* estimates at 533 billion euros).[12] This could eventually cause a price decrease of the German bonds, a possible increase in the (currently negative) yields and a reduction in the spread with the bonds of other Member States – all such consequences looking highly undesirable for Germany.

Rather, it seems arguable that the real target of the *BVerfG*'s ruling was not the PSPP as such, but the new purchasing programmes, including those designed to tackle Covid-19. It is, ultimately, the ECB's *independence* – which in the ECJ's view leads to an entirely teleological, self-asserted reading of the Bank's mandate – that is at stake.

The ECB's press release mentioned above appears to confirm this claim by a twofold statement. On the one hand, it emphasizes that the ECB respected the *Weiss* rationale and acted within its mandate as defined thereby; on the other hand, it reaffirms the Bank's full commitment to doing 'everything necessary' ('whatever it takes' in more modest clothes?) to ensure that inflation rises to levels consistent with its medium-term objective (under 2%) and that the monetary policy actions aimed at ensuring stability are 'transmitted to all parts of the economy and to all jurisdiction of the euro area'. How could one explain this outspoken claim since the *BVerfG* asked for explanations only about past operations? It is apparent that the ECB intended to comfort financial operators and to prevent turbulence on public debt bonds and on the ever-more-heated debate on measures of financial support put in place to overcome the Covid-19 crisis.

Paras 217 ff of the judgment supply further evidence of this claim. The *BVerfG* lists the elements that should be taken into account concerning the PSPP's compliance with the ban on monetary financing. These elements are: 1) previous determination of the purchase volume; 2) distribution of that volume according to the key for the subscription of the ECB's capital; 3) limit of 33% for purchases of a particular issue of bonds of a government of a Member State, as identified by international securities identification number (ISIN). It is easy to verify that such elements are nowhere to be found in the Pandemic Emergency Purchasing Programme (PEPP).[13] Thus: while ordering the Government to question the PSPP, Karlsruhe *de facto* anticipates that the PEPP is highly suspected to be incompatible with the *Grundgesetz*.

Such constraints are formulated as paradigms for all ECB's measures of financial aid; in this light, they offer *ex ante* criteria for a 'dialogue', or rather a thorough confrontation, with the ECJ. The *BVerfG*, in fact, imposes on the ECB constitutional constraints that would be enforceable even in the case – as the PSPP – of a previous ECJ judgment taking a diverging view. It will always be

[12] See E. Dal Maso, 'Che cosa accade se la Bundesbank è costretta a vendere 533,9 miliardi di Bund' *MilanoFinanza*, 6 May 2020.

[13] See details at https://tinyurl.com/y3eyqbyx (last visited 27 December 2020).

possible for the *BVerfG* to declare that the Luxembourg Court has operated in breach of the principle of conferral should ECB's financial support programme be found compatible with EU law without a thorough review being carried out on the basis of such constraints.

Against this background, the PEPP could be a target for likely successful constitutional complaints before the *BVerfG*, which obviously increases uncertainty about the ECB's powers to embrace debtor States with its safety net. This could fuel the widespread political hostility towards both Eurobonds and a solidarity-driven use of the Euro-budget; consequently, it seems highly likely that debtor States would be prompted to resort to the ESM as the only available *parachute* – to be sure, one that comes with strict conditions.

To sum up: the *BVerfG*'s judgment influences the political bargaining in a twofold respect. First: it ties the ECB's mandate to its own constitutional review, as any ECJ judgment could be declared *ultra vires* if deemed inadequately motivated. Second: it puts a leash on forthcoming monetary operations aimed at tackling the Covid-19 crisis. Then, the ESM – with the 'strict conditionality' envisaged in Art 136 TFEU – becomes the most likely accessible solution for the States most severely hit by the pandemic. To say it brutally: the *BVerfG* paves the way for *Troika* to kick in.

Indeed, the letter sent on 7 May from Commissioners Dombrovskis and Paolo Gentiloni to the Eurogroup President Mario Centeno seems to ward off the risk, proposing to scrap usual conditions for using the ESM in recovering economies from Covid-19.[14] It states, in fact, that the only requirement to access ESM funds devoted to Pandemic Strategic Support will be for euro-area Member States

> 'to use this credit line to support domestic financing of direct and indirect healthcare, cure and prevention related costs due to the COVID-19 crisis'.

Additionally,

> 'there is no scope for activating Articles 3(3) and 3(4) of Regulation (EU) No. 472/2013, relating to additional reporting and information on the financial system'

and the Commission

> 'will not conduct *ad hoc* on-site missions in addition to the standard ones that take place regularly within the framework of the European Semester'.

[14] See it at https://tinyurl.com/yyw5hl93 (last visited 27 December 2020).

Yet, the wording of the ESM Treaty itself, and the spectre of another *BVerfG*'s judgment that may oppose such a soft, 'de-conditionalised' version of the ESM, do not guarantee that a political agreement of this sort matches the German standards for constitutional legality.

These remarks do not come free from a taste of inconsistency: a programme awaited as the ultimate chance to rescue Europe from the abyss is eventually held illegal under either national constitutional law or Union law altogether. One senses that a way out exists, and can be found in the very reasoning of the *BVerfG*, which, although far from flawless, contains a set of useful guidelines for a refreshed understanding not only of the PSPP case, but of the crisis as a whole[15] – a constitutional crisis, an economic crisis and a 'crisis of mind'.[16]

The argument we seek to offer here can be reported as follows: what the *BVerfG* basically did is overlap loose proportionality and embryonal 'essentiality'. Keywords and the conceptual framework of a well-known type of scrutiny (the proportionality test) that proves to be unsuitable for this case replace keywords and the conceptual framework of a largely unknown type of scrutiny that yet amounts to what the *BVerfG* (and the Union, perhaps) needs. Poor links between the two are unavoidable, and neither the assertive tones used by the *BVerfG* nor the laconic statements delivered by the ECJ help clarifying the issues at stake and clearing out the scene for debate. Thus, an effort to disentangle the knots of an uneven dialogue could be useful in this respect.

In the first place, it is necessary briefly to introduce the concept of 'essentiality'.

Essentiality comes from the *Vorbehalt des Gesetzes* (*riserva di legge*, *reserve de loi,* due legal basis) under German constitutional law, and leads to an essentiality theory (*Wesentlichkeitstheorie*) that sets requirements for a legislative delegation lawfully to empower a delegated secondary act.[17] Such requirements are laid down in Art 80 *Grundgesetz*: content, purpose, extent (*Inhalt*, *Zweck*, *Ausmaß*). A legislative authorization (*Ermächtigungsgesetz*) must match these requirements in such a way as to possess an adequate normative density (*Regelungsdichte*) *vis-à-vis* the secondary act. Consequently, if the legislative authorization fails to meet the essentiality threshold, the delegation is invalid; likewise, if the secondary act goes too far in interpreting the mandate laid down in the legislative authorization, then the respective legislative density becomes too low and the secondary act is invalid as adopted *ultra vires*.[18]

[15] A.J. Menéndez, 'The Existential Crisis of the European Union' 14:5 *German Law Journal – Special Issue: Regeneration Europe*, 453 (2013).

[16] I. Pernice, 'Multilevel Constitutionalism and the Crisis of Democracy in Europe' 11:3 *European Constitutional Law Review*, 541, 547 (2015).

[17] J. Staupe, *Parlamentsvorbehalt und Delegationbefugnis* (Berlin: Duncker & Humblot, 1986), 27.

[18] F. Ossenbühl, 'Vorrang und Vorbehalt des Gesetzes' in J. Isensee and P. Kirchhof eds, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, V (Heidelberg: Müller Verlag, 2007) 183-222.

As a parameter for judicial scrutiny, legislative density is by no means a rigid threshold but a highly dynamic, mutable one – which explains the harsh criticism raised in the German constitutional scholarship.[19] Yet, suitable indicators can be derived from the pertinent *BVerfG*'s case-law: whereas subjective criteria stem from an interpretation of the legal text(s) concerned, objective criteria are to be found in the interferences with the area of fundamental rights.[20]

In other words, essentiality in German constitutional law gives rise to a criterion for judicial review that matches an evaluation of the sensitivity of a matter to be regulated with an interpretation of the legislative basis that supports the regulation – sensitivity being crucially understood as interference with fundamental rights.[21]

A combination of *Grundgesetz* articles works as a positive constitutional anchorage for this theory: 1(1) – the untouchable human dignity; 19(2) – the essential content of the rights to be protected by the public authorities; 20 – people's sovereignty; 38(1) – right to vote; and 79(3) – the eternity clause. A systematic reading of all these provisions leads to the conclusion that, in the name of human dignity (understood as individual and collective self-determination), it is for the sovereign people (by means of parliamentary representation, and through the other ways provided for in the constitution) to set the essential content of the rights to be protected by German authorities, so that these rights are genuinely recognized by public bodies and not merely conceded (*octroyés*) by authorities whose activity is immune from the public control.[22] Eventually, under Art 79(3), this idea becomes a supreme principle of the German Basic Law, meaning that it cannot be overthrown unless the entire *Grundgesetz* is deemed replaced by a new political-legal order.

This criterion builds on a doctrine of the constitution as a whole that calls into question both the people's sovereignty and the judicial adjudication – separation of powers and protection of rights.[23] Interestingly, this very background is displayed in the celebrated formula that enshrined the relationships between the newborn European Union and the Member States, thereby pointing to a Euro-unitary cornerstone of constitutional balance.

Article F of the Maastricht Treaty stated as follows:

[19] A review thereof in G. Scaccia, *La riserva di legge nell'esperienza tedesca* (Roma: Al.Sa., 2002) 101.

[20] See, in particular, *BVerfG*, 49, 89 – *Kalkar I*, 8 August 1978, §§ 72-73; updates in G. Vosa, ' "Nuovi elementi essenziali", ovvero del posto della normativa delegata nella sistematica delle fonti del diritto europeo' *Rivista Italiana di Diritto Pubblico Comunitario*, 682, 707 (2014).

[21] More references in G. Vosa, Il principio di essenzialità. Profili costituzionali del conferimento di poteri tra Stati e Unione europea (Milano: Franco Angeli, 2020), 218.

[22] See C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013), 51, 106.

[23] See A. Ruggeri, 'L'integrazione europea, attraverso i diritti, e il "valore" della Costituzione', in A. Ciancio ed, *Nuove strategie per lo sviluppo democratico e l'integrazione politica in Europa* (Roma: Aracne, 2014), 473-496.

> 1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
>
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Respect for each State's self-government by democratic principles matches compliance with the equivalent standards for fundamental rights that the *BVerfG* itself raised in *Solange II* as a condition for Community law to enjoy 'priority in application' (*Anwendungsvorrang*) over national law, even of a constitutional rank.[24] Noteworthy, in this light, the divide between economic and monetary policy is tracked in wholly ordoliberal terms: the former is political, and is left to the Member States, the latter is unpolitical[25]– presumptively non-sensitive for all Member States – and is entrusted to an independent body endowed with the necessary technical expertise.[26]

This assumption seemingly confirms that essentiality lies at the ground not only of the German constitution, but eventually of the Euro-unitary constitutional balance underpinning the newborn European Union. [27]

Whereas Lisbon confirmed that Union law respects the equality among citizens (Art 9 TEU) and among Member States as regards their 'fundamental political and constitutional structure' (Art 4(2) TEU),[28] the Maastricht constitutional balance holds presumptively valid for all Member States that ratified the relevant Treaty; thus, the *BVerfG* is led to argue that any measure developing and implementing the EMU amounts to a constitutionally compatible development or implementation of such equilibrium on both a German and Euro-unitary level. Karlsruhe is prompted to do so until evidence to the contrary arises that directly affects the German constitutional order; in fact, as far as the *réseau judiciaire euro-unitaire*[29] encompassing the ECJ and the national courts is concerned, the *BVerfG* would intervene to defend Germany only if the *Grundgesetz* were directly threatened by any EU law measure affecting

[24] See J. Kokott, 'Report on Germany' in A.-M. Slaughter, J.H.H. Weiler and A. Stone Sweet eds, *European Courts and National Courts. Doctrine and Jurisprudence* (Oxford: Hart Publishing, 1997), 77-131.

[25] L. Buffoni, 'La politica della moneta e il soggetto della sovranità: il caso 'decisivo'' 2 *Rivista AIC*, 1-33 (2016).

[26] O. Chessa, La Costituzione della moneta. Concorrenza, indipendenza della banca centrale, pareggio di bilancio (Napoli: Jovene, 2016), 61.

[27] Reference in G. Vosa, *Il principio di essenzialità* n 21 above, 204, 370.

[28] L. Besselink, 'National and constitutional identity before and after Lisbon' 6:3 *Utrecht Law Review*, 36-49 (2010).

[29] A. Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur* (Bruylant: Bruxelles, 2009), 341.

sensitive national interests. Nevertheless, when defending Germany, the *BVerfG* looks at Germany as an EU Member State: a tile in the Europe's *constitutional mosaic*[30] whose lynchpin is the constitutional balance just described.

In this vein, the *BVerfG*'s case-law on the EMU unveils more profound implications. The ESM and the implementation thereof do not jeopardize the Maastricht equilibrium so long as the *BVerfG* finds that no legal rule restrains the *Bundestag*'s budgetary sovereignty: hence, the 'rescue under conditionality' model introduced as a response to the 2008 crisis is presumptively compatible with the *Grundgesetz* as far as the (executives of the) Member States agree to it, which led the *BVerfG* to uphold the ESM Treaty's constitutionality in the first place. Conversely, *Gauweiler* signposts the end of such a presumption, for that equilibrium is clearly disrupted: an independent ECB enters the realm of economic policy to violate the *no-bailout* clause, thereby affecting the interests of Germany as a Member State on an equal footing with the others.

In this line, one is prompted to delete the image of a *BVerfG* merely defending Germany's domestic ordoliberal commitment and replace it with an image of a *BVerfG* imposing Germany's ordoliberal commitment on the whole Union. Three key reasons suggest such a Euro-unitary perspective.

First: the arguments the *BVerfG* deploys are ultimately grounded on the concept of human dignity, hence, obviously *universalisable*[31] – ie valid for all Member States on an equal footing – in line with a pluralistic vision of the Union.[32] These arguments point to a general principle of EU law stemming from German constitutional law and, as far as the *reserve de loi* is concerned, from the constitutional traditions common to Member States – which would make essentiality a principle of *European constitutional law* in the strictest sense.[33]

Second: Karlsruhe showed readiness to depart from the orthodox ordoliberal moorings already in the ESM judgment, as it highlighted that 'not all the *Stabilitätsgemeinschaft* expressions are covered by the eternity clause'.[34] The *BVerfG* expressly pointed out that there can be other ways to shape the EMU that would be compatible with the *Grundgesetz*, provided that the bodies endowed with the 'responsibility for the integration'[35] take the necessary political initiatives

[30] N. Walker and S. Tierney, 'A Constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism', in N. Walker, J. Shaw, S. Tierney eds, *Europe's Constitutional Mosaic* (Oxford: Hart Publishing, 2011), 1-18.

[31] M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker ed, *Sovereignty in Transition* (Oxford: Hart Publishing, 2003), 501-538.

[32] M. Goldoni, 'Constitutional Pluralism and the Question of the European Common Good' 18 *European Law Journal*, 385-406 (2012).

[33] M. Fichera and O. Pollicino, 'The Dialectics Between Constitutional Identity and Common Constitutional Traditions. Which Language for Cooperative Constitutionalism in Europe?' 20:8 *German Law Journal*, 1097-1118 (2019).

[34] *Bundesverfassungsgericht* 12 September 2012, 2 BvR 1390/12, 118 (2012).

[35] '*Integrationsverantwortung*' in light of Art 23(1) *Grundgesetz*: see *Bundesverfassungsgericht* 30 June 2009, 2 BvE 2/08, 236 (2009).

and modify Union law. To be sure, the German judges did not *ex ante* request a Treaty amendment (or a constitutional reform as a support in national law) for such a modification to comply with the *Grundgesetz*. However, they did offer a criterion to figure the rank and wording of the positive laws that would be requested: the *irreversibility* of the commitment Germany would subscribe to. In this light, an irreversible commitment would be the highest burden for Germany's sovereign autonomy, and would require a change of the constitution.[36] In other words: the more intense the burden placed on the German sovereign autonomy, the more solid in rank and content the legal basis underpinning such burden must be.

This line of reasoning underpins the concept of *structurally significant violations of the conferral* – ie interpretations of the mandate provided for in the Treaties that are not supported by a sufficiently solid legal basis in the Treaties – which was introduced in *Honeywell*[37] and is clear-cut in *OMT-II*[38] where the Karlsruhe judges explain both the universalizable value of the 'fundamental democratic content of the right to vote'[39] backed by human dignity and the necessity to provide sufficient democratic legitimation for acts based on 'legitimation strands'[40] other than unanimity, hence requiring careful account of their parliamentary support in order for the Treaty provisions not to amount to a 'blanket authorization'.[41]

If the 'essentiality prism' is deployed to look at the ECJ and at the *BVerfG* reasoning simultaneously, their misunderstandings can be detected and named as communicative problems between two different conceptual schemes – so that the real political issues are unveiled and duly, openly debated.

Having this framework in mind, some apparently insurmountable disagreements between the two courts can be reconciled, or at least explained.

In the *BVerfG*'s view, the principle of proportionality is respected when the monetary policy objective and the economic policy effects are 'identified, weighed and balanced against one another'; it is instead violated when the monetary policy objective is pursued 'unconditionally' and economic policy effects are 'ignored'.[42] From the ECJ's viewpoint, a comparison with *Gauweiler* reveals a contradiction: in the OMT referral,[43] the *BVerfG* held that the ECB would act beyond its mandate should the frontier of economic policy be trespassed, whereas in PSPP the ECB is requested to 'identify, weigh and balance' the economic policy effects stemming from the carried monetary operations to

[36] Bundesverfassungsgericht n 34 above, 119.
[37] *Bundesverfassungsgericht* 6 July 2010, 2 BvR 2661/06 (2010).
[38] *Bundesverfassungsgericht* 16 June 2016, 2 BvR 2728/13 (2016).
[39] ibid 123.
[40] ibid 131.
[41] ibid 134.
[42] Bundesverfassungsgericht n 1 above, 165.
[43] *Bundesverfassungsgericht* 14 January 2014, 2 BvR 2728/13 (2014).

prove that the conferral has not been violated. Therefore, one may wonder whether the *BVerfG* considers an ECB measure entering economic policy as a *per se* violation of the conferral, or if a proportionality assessment must be carried out to 'identify, weigh and balance' the effect of such measures and the benefits they entail. The object of the balancing is problematic: to which extent should the conferral – ie the penetration in the economic policy realm – be taken into account? In other words: if the measure were in itself proportionate as regards its content, could it be declared disproportionate anyway due to the violation of the conferral, or is the latter assessment absorbed in the former? The question goes to the core of the proportionality test: Can a measure be subjected to balancing when the rights and interests as stake are far from tangibly appreciable[44] – as is the case when 'sovereignty' comes under scrutiny via the concept of conferral?

The essentiality prism makes it apparent that the point is simply ill-formulated, under the perspective of Karlsruhe. The *BVerfG* identifies the threat to the *Grundgesetz* in the abrupt political sensitivity of the ECB's activity, which would undermine the ordoliberal architecture set in Maastricht without a sufficiently solid anchoring in the Treaties (and in German law, should it be the case). This is why there seems to be discontinuity from the OMT referral to the PSPP judgment. In the former, the *BVerfG* is still led to presume the compatibility of the EMU's 'rescue under conditionality' developments with the *Grundgesetz*, and asks the ECJ to confirm it; in the latter, what it needs is a proof of such a compatibility, which can be no longer presumed. In *OMT*, the *BVerfG* asks the ECJ – with vaguely peremptory tones – to confirm that the ECB cannot enter the economic policy domain. In *Weiss* the question is slightly different: the ECJ is called to confirm that either the ECB does not enter economic policy by violating the *no-bailout* clause, or at least it does so in a manner that proves proportionate with regard to the effects sought. To put it clearly: in *Weiss*, the *BVerfG* asks the ECJ to offer a solid motivation on whose grounds Karlsruhe could argue that the burden placed on the German sovereign autonomy, yet existing, is acceptable in comparison to the benefits achieved. The amount of this burden is clear-cut: the deviation from the Maastricht constitutional balance ratified by the *Bundestag*, which goes – *in parte qua* – to the detriment of the German ordoliberal approach. In the *BVerfG*'s view, a

[44] See V. Kosta, 'The Principle of Proportionality in EU Law: An Interest-Based Taxonomy', in J. Mendes ed, *EU Executive Discretion and the Limits of Law* (Oxford: Oxford University Press, 2019), 198-219; T. Endicott, 'Proportionality and Incommensurability', in G. Huscroft, B.W. Miller and G. Webber eds, *Proportionality and the Rule of Law. Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2016), 311, 317, who distinguishes incommensurability from incomparability and define the latter 'the impossibility of finding rational grounds for choosing between two alternatives'. A distinguished critic to the incommensurability of 'apples and oranges', can be found in the concurring opinion of Justice Antonin Scalia: US Supreme Court, *Bendix Autolite Co* v *Midwesco Enters*, 'Scotus', 486 US 888 (1988).

motivation of this sort would make less invasive the new task carried out by the ECB, based on the mandate provided in the Treaties and confirmed by the *Grundgesetz*. This would lower one of the steps of the essentiality review, which could lead the *BVerfG* to conclude that no *structurally significant* violation of the principle of conferral occurred. However, this motivation must be all the more convincing, due to the remarkable political dissent caused by the extraordinary monetary operations carried out by the ECB – a point that the *BVerfG* specifically underscores in the OMT referral as revealing the no-longer-unpolitical nature of those measures, and that the ECJ explicitly downgrades in *Gauweiler*.[45]

This passage explains why the *BVerfG* censures as 'not comprehensible'[46] and 'arbitrary from an objective perspective' the proportionality assessment performed by the ECJ[47] and detects a lack of 'the minimum democratic legitimacy necessary'.[48] Obviously, phrased as such, the passage looks like a mere substitution of one's own standard for another as a yardstick for Union law review. For that reason, the passage has attracted numerous, well-founded criticisms, as the *BVerfG* appears to arbitrarily claim the last word on the interpretation of the Treaties from a self-assessed 'objective perspective',[49] although the Treaties themselves provide otherwise. However, if the essentiality perspective is embraced, the picture is rather different: the ECJ implements a loose proportionality scrutiny in order to leave a broadened margin for discretion to the ECB, but it does so precisely when the *BVerfG* requires strict scrutiny, and a thorough motivation in support thereof.

In this line, the mismatch is obvious. Luxembourg deploys proportionality in reviewing both the formal and the substantive legality of the measures, with the clear-cut objective of leaving the ECB with broad margins for discretion. From the ECJ's standpoint, no breach of Union law takes place, as Art 5 TEU makes proportionality applicable to the exercise of the conferred powers and not to the conferral as such. Yet, seen from Karlsruhe's perspective, this looks like an odd confusion purposely carried out to pre-empt both scrutinies at once: proportionality is rendered 'meaningless'[50] while no review is carried to measure the adequacy of the legal basis with regard to the intensity of the effects sought. In this light, the respective positions unveil the hidden question: whether the ECB is to be allowed discretion in light of its independence even though the Maastricht pillar thereof – the presumed unpolitical nature of the activities performed – has been crushed. This is a highly political question, which – this

[45] Case C-62/14, *Gauweiler et al v Deutscher Bundestag*, Judgment of 16 June 2015, available at www.eurlex.europa.eu.

[46] Bundesverfassungsgericht n 1 above, 140, 116.

[47] ibid 112.

[48] ibid 113.

[49] In Hegelian philosophy, 'objective thinking', in the full sense, amounts to God: G.W.F. Hegel, *Enciclopedia delle scienze filosofiche* (Roma-Bari: Laterza, 2002) § 1, 3.

[50] Bundesverfassungsgericht n 1 above, 127.

is the *BVerfG*'s point – must be addressed by the political bodies bearing responsibility for the integration.

Eventually, the *BVerfG* strives to soften the most severe consequences of the declared unconstitutionality and resorts to the *Solange II* doctrine as for the notion of 'lawful judge'[51] under the *Grundgesetz* – a qualification given to the ECJ on the condition that the Community respect equivalent standards in the protection of fundamental rights.[52] Yet, the link between proportionality and the *ultra vires*/identity review leads nowhere, given the differences in scope between the two instruments. Proportionality questions whether a legitimate authority has duly justified its actions, whereas the *BVerfG* seeks to challenge the very same ECB's authority in the plural Euro-unitary constitutional mosaic – and, consequently, the authority of the ECJ to the extent that the latter jeopardizes the balance undergirding that mosaic.

In short, the conflict paints the picture of a struggle between two judges that are part of an 'alliance'[53] among supreme courts – to quote the President of the *BVerfG* himself[54] – and both bring arguments to defend positions whose political sensitivity exceeds the attitudes of the multilevel judicial circuit.[55] The ECJ seems willing to stretch the boundaries of the Union's legality to maintain that the turn from the Maastricht equilibrium to the 'rescue under conditionality' approach complies with the Euro-unitary constitutional balance;[56] yet the *BVerfG* appears utterly reluctant to do so. In the latter's view, this turn implies a departure from the equality of citizens and States as to their ability to fix the content of substantive rights.

Austerity measures have indeed caused a by-product of that sort: whereas 'creditor States' force their taxpayers to throw money in the rescue funds with little guarantee of return, which entails increasing domestic inequalities, 'debtor States' force their taxpayers to accept austerity policies resulting in increasing domestic inequality, too. One may argue, with Wolfgang Streeck[57] and Agustín Menéndez,[58] that such a scenario fosters a switch from the social-democratic

[51] *Bundesverfassungsgericht* 22 October 1986, 2 BvR 197/83, 56 (1986).

[52] E.R. Lanier, '*Solange*, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge' 11 *Boston College International & Comparative Law Review*, 1, 30 (1988).

[53] J. Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' 23 *European Journal of International Law*, 335, 348 (2012).

[54] A. Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*' 6 *European Constitutional Law Review*, 175, 198 (2010).

[55] M. Dani, J. Mendes, A.J. Menéndez, M.A. Wilkinson, H. Schepel and E. Chiti, 'At the End of the Law. A Moment of Truth for the Eurozone and the EU', in https://tinyurl.com/yxrzzs2r, (last visited 27 December 2020).

[56] M.A. Wilkinson, 'The Euro is Irreversible! …Or is it? On *OMT*, Austerity and the Threat of "Grexit"' 16:4 *German Law Journal*, 1049, 1072 (2015).

[57] W. Streeck, 'The Rise of the European Consolidation State' *MPIfG – Max Planck Institute for the Study of Societies, Discussion Paper* 1/2015, 1, 14.

[58] A.J. Menéndez, 'The Crisis of Law and the European Crises: From the Social and

State to a *Konsolidierungsstaat*; and add that this switch is the result of genuine executive-driven actions[59] relentlessly underpinned by a narrative of 'moral hazard'.[60] As a result, political radicalization keeps on intensifying, which makes it difficult to gain a comprehensive understanding of the overall scenario.

To be sure, the *BVerfG* is the constitutional court of *one* of the Member States. Therefore, it cannot stand against inequalities that impinge on other Member States' sovereign autonomy but respect Germany's own. It must declare itself satisfied if the Maastricht conditions are met for Germany and cannot react should such conditions be violated for Member States other than Germany.[61] This might be perhaps a case calling for the ECJ intervention.[62] However, the universal value of the arguments Karlsruhe puts forward when called on to defend Germany as a Euro-Member State allows all Member States to claim an equal treatment *vis-à-vis* their peers and the institution of the Union, so that a more reasonable compromise can be attained with the suitable display of political responsibility from all sides. The German legal hegemony in European law[63] would entail, in such a case, a positive effect: strengthening the constitutional anchorage for democratic law-making.

If this is the outcome of the know-it-all European lesson coming from Karlsruhe, then the perceived arrogance and one-sidedness of the ruling might really lead Europe to a new beginning, whether or not helpful to an even closer Union. In light of the current negotiations aiming at a common recovery from the economic and social outcomes of the pandemic, there is enough room to hope that the blow suffered gives the chance for a better mutual understanding.

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[59] S. Fabbrini, 'Intergovernmentalism and its Limits: Assessing the European Union's Answer to the Euro-Crisis' 46 *Comparative Political Studies*, 1003, 1029 (2013).

[60] M. Fourcade, P. Steiner, W. Streeck and C. Woll, 'Moral Categories in the Financial Crisis' *MaxPo – Max-Planck-Sciences-Po Discussion Paper* 13/1, 1, 27 (2013).

[61] The striking comparison with the judgment on the ESM Treaty delivered by the Estonian Supreme Court is significant in this respect: see C. Ginter, 'Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty' 9 *European Constitutional Law Review*, 335, 354 (2013).

[62] D. Curtin, 'Challenging Executive Dominance in European Democracy' 77 *Modern Law Review*, 1, 32 (2014).

[63] See the debate opened by Armin von Bogdandy, at https://tinyurl.com/y3ddq43q (last visited 27 December 2020).