

**THE JUDGMENT OF THE GERMAN FEDERAL CONSTITUTIONAL  
COURT AND THE COURT OF JUSTICE OF THE EUROPEAN UNION –  
JUDICIAL COOPERATION OR DIALOGUE OF THE DEAF?**

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**1. What is at stake?**

1. The judgment of the German Federal Constitutional Court (“*Bundesverfassungsgericht*”, hereafter referred to as “GCC” or “*BverfG*”), rendered by the Second Senate on 5 May 2020 concerning the PSPP – *Public Sector Purchase Programme* of the European Central Bank (ECB), sent shock waves throughout Europe – even beyond the usual legal circles – and, in addition to many different institutional reactions, unleashed a lively debate in the media and amidst a public opinion worried about the future of the European Union (EU).

And for good reason: the jurisdictional debate between the GCC and the Court of Justice of the EU (hereafter referred to as “CJEU” or “Court of Justice” or “Court”) inevitably raises the central issue of how can the risk of constitutional disaggregation of the EU be avoided.

As a former judge of the CJEU, I have the utmost respect for the GCC – as I have for any other constitutional court of any Member State of the EU governed by the rule of law. It is however indispensable to agree on the respective role and mission assigned by the Treaties to each of the players in a world in permanent change, in which some lines cannot be crossed, if we are to preserve the essential elements of the European project, democratically chosen by the electorates of all the Member States.

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It would therefore be a mistake to consider this episode as a minor issue, which would quickly pass away without leaving a trace. What we are dealing with now is the European project not as it has been conceived and implemented after the Second World War, but as it evolved over time in shape and strategic direction to meet the new challenges as they have arisen.

Be that as it may, I frankly think that, this time, the *BVerfG* chose to fight the wrong war at the wrong time.

## **2. The dynamic role of the constitutional dialogue in the EU and the step forward made by the GCC**

In the absence of a written catalogue of fundamental rights in the EC Treaties, the GCC played in the past a major role by fostering developments in the case-law of the Court of Justice, which contributed to strengthen the foundations of the Union's legal order. It was indeed as a result of some well-known decisions of the *BverfG*<sup>1</sup> – and also of the Italian *Corte Costituzionale*<sup>2</sup> – that the CJEU developed and consolidated, during last century's 60s and 70s, its “fundamental rights jurisprudence”,<sup>3</sup>

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<sup>1</sup> Decision of 18.10.1967, and judgment of 29.5.1974, *BverfG* 37, para. 271 (known as *Solange I*), in *Europarecht*, 1975, pp 150 e fl., as well as judgment of 22.10.1986, *Solange II*, *BverfG* 73, para. 339. In substance, the *BverfG* held that as long as (“*Solange*”) the EU legal order did not dispose of a democratically elected parliament, with legislative and political control powers, as well as of a catalogue of fundamental rights guaranteeing German citizens, within the framework of Community law, an equivalent level of protection, the GCC would reserve itself the right to make its own control of the compatibility with the German Constitution of the rules of EC law. The evolution of the case-law of the Court of Justice allowed the GCC to conclude, appeased, in *Solange II*, that while the Court of Justice continued to ensure the adequate level of protection of rights, it would refrain from exercising its own constitutional control.

<sup>2</sup> Judgment n. 183, *Frontini*, 27.12.1973, in *Foro Italiano*, 1974, I, col. 8 et seq., and judgment n. 170, *Granital*, in *Foro Italiano*, 1984, I, col. 2077 et seq. In these judgments, the Italian CC reserved for itself the possibility to reexamine the constitutionality of the law approving Italy's participation in the Communities where the European legislation could be in breach of fundamental rights. Yet, the *Corte Costituzionale* stated that it did not want to use, in practice, such prerogative of control, as a tribute to the quality of the human rights jurisprudence of the Court of Justice and as long as the degree of protection of fundamental rights in the EU conformed with the parameters of the Italian Constitution (judgment of 21.4.1989, n. 232).

<sup>3</sup> The landmarks of this jurisprudence are, in the initial “negation” period, cases *Stork v. High Authority ECSC*, 1/58, 4.2.1959, *Sgarlata v. Commission*, 40/64, 1.4.1965, and, in the “revision” period, cases

based on the idea that such rights, generally recognised in the constitutions of the Member-States,<sup>4</sup> constitute general principles of European law, whose respect it must uphold.

Such an evolution culminated in the adoption of the Charter of Fundamental Rights of the EU,<sup>5</sup> to which the Lisbon Treaty has recognized the same legal value as the Treaties.<sup>6</sup>

The happy ending of this story was the result of a **creative** tension and a virtuous *cross-fertilization process* between the CJEU and national constitutional courts. However, the tension becomes **destructive** when each one's missions and competences are no longer respected.

With its judgment of 5 May 2020, the GCC has taken an unfortunate step forward as compared with its own Maastricht<sup>7</sup> and Lisbon Treaty<sup>8</sup> case-law, as this time it was not examining the compatibility with its Constitution of a law ratifying or approving any Treaty amendments on a preventive basis.

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*Stauder*, 29/69, 12.11.1969, *Internationales Handelsgesellschaft*, 11/70, 17.11.1970, *Nold*, 4/73, 14.5.1974, and, later, *Rutili*, 36/75, 28.10.1975, and *Hauer*, 44/79, 13.12.1979.

<sup>4</sup> And included in international law instruments for the protection of human rights, notably the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>5</sup> Proclaimed by the EP, the Council and the Commission at the occasion of the European Council of 7.12.2000 in Nice, as adapted at Strasbourg on 12.12.2007. The Charter was preceded by the adoption of various documents and European institutions declarations, namely the Joint Declaration of the EP, the Council and the Commission of 5.4.1977 - OJ C103/1, the Declaration of Rights and Fundamental Freedoms, of the EP - OJ C120/51, 12.4.1989, and the Charter of the Fundamental Social Rights of Workers (European Social Charter), adopted by the European Council of December 1989 in Strasbourg.

<sup>6</sup> See Article 6(1) TEU. Protocol No. 30 attached to the Lisbon Treaty introduced restrictions to the application of the Charter in Poland and the UK.

<sup>7</sup> When examining the constitutionality of the German law ratifying the Maastricht Treaty in 1992, the GCC, though accepting the primacy of Union law, held that it was dependent on the respect of the limits of the Treaty provisions approved by that law, in conformity with the principles of conferral, subsidiarity and proportionality.

<sup>8</sup> By decision of 30.6.2009, the GCC examined the German law ratifying the Lisbon Treaty in the light of the German Constitution. It then required several modifications to the powers of control of the Federal Parliament and announced that it would intervene to prevent any manifest non-compliance with the limits of the powers conferred to the EU institutions, in case they acted "ultra-vires" or in breach of the essential core of the "constitutional identity" of the German Fundamental Law. It also pointed out that any progress in the European integration should keep within the limits of a Union of sovereign States and thus respect their economic, social and cultural identity in such a way that a possible transformation of the Federal Republic in a mere "Land" would require a constitutional change.

What is at stake now goes much further: the GCC acted *ultra vires*, taking on powers that the Treaties (by the will of each and every Member State) confer solely to the judicial body they created to say the law, in the last resort, in this legal and political area, the CJEU. In so doing, the GCC is undermining the very foundations of a legal and political democratic order of integration that has been built over the past 70 years.

This being a question of constitutional respectability, some **red-lines** should not be crossed if mutual respect is to be kept.

### **3. Red-lines: please do not cross**

#### **a. Exclusive competences of the CJEU and the binding character of its judgments**

To ensure that “the law is observed” in the “interpretation and application of the Treaties” (see Article 19(1) of the Treaty on European Union - TEU), the Member-States established a judicial system adapted to the characteristics of the Union legal order (the then “Community legal order”), based upon a system of **judicial cooperation** within the framework of the *preliminary ruling mechanism*, established and regulated in general terms in Article 267 of the Treaty on the Functioning of the European Union (TFEU).

Such a system can only function if the respective competences and role of each player is scrupulously respected.

Within this framework, the competence of the CJEU to interpret Union law in last resort and to declare, where appropriate, the invalidity of its provisions, is *exclusive* and cannot be *delegated or shared* with any other court. Otherwise, it would neither be possible to ensure the autonomy of EU law and its effective and uniform application throughout its entire territory, nor to prevent any discrimination between nationals of or residents in different Member States. That would inevitably occur if different courts

were called upon to give final judgment on the content and scope of individual rights and obligations resulting from Union law.

This **exclusive competence of the CJEU** is a *first red line* that cannot be crossed by any authority or judicial body of a Member State without jeopardising the ability of that Court to carry out its mission of safeguarding the *integrity of the EU legal order* and the *specific structure of the EU judicial system*. This has already been considered by the Court of Justice to form part of the very foundations of the Union, that cannot be called into question even by a Treaty revision.

The inevitable consequence of such understanding is that, in the exercise of its judicial responsibilities and competences, the CJEU does not give opinions or mere advices: its preliminary ruling judgments are mandatory to all addressees, to begin with the referring national court, upon which it is incumbent to apply the EU law to the dispute at stake, with the meaning given to it by the Court of Justice.

All this has been reiterated, in substance, by the Court, in its only public reaction to the *BVerfG*'s ruling, in a press release of 8 May 2020.

**b. The problem: the boundaries of competences between the EU and the member States and the need for an impartial, independent and equidistant arbiter**

Of course a problem may occur when it is necessary to determine, in a given case, the scope of the powers of the Union and its institutions against the competences claimed by a constitutional body of a Member State.

The GCC did not reinvent the wheel when it recalled that the delimitation of powers of the Union is determined by the **principle of conferral**, as it is laid down in Article 5(1) TEU and regularly and consistently interpreted by the CJEU.

On the other hand, as set forth in Article 4(2) TEU, the Union shall respect the **national identities** of Member States, inherent in their *fundamental structures*, political and constitutional.

It must be kept in mind that from the moment that such notion of national or constitutional identity was enshrined in the Treaty, it became a **common notion** whose interpretation is the sole responsibility of the ultimate impartial, independent and equidistant arbiter, the Court of Justice of the EU, which alone is entitled to do it in such a way that the *integrity* and the *autonomy* of the Union's legal order are preserved.

This is no surprise, and could not be otherwise, as the Court of Justice is the sole judicial body set up by the Treaties whose DNA guarantees that, in decisions of a constitutional nature, the majority if not the whole of the legal orders and traditions of the Member States, and related sensitivities, are represented. Moreover, its working is based on a permanent dialogue with the courts of all Member States, in a continuous effort, within or without the preliminary ruling framework, to build a “constitutional culture community”<sup>9</sup>.

Such a message is therefore addressed to both sides. In any border dispute, no solution can be reached if both parties are not able to listen to the other's reasons.

A recent and striking example of open-minded attitude as regards interinstitutional relationships is given by the sequence of two judgments known as the “Taricco saga”,<sup>10</sup> where the CJEU brought about a subtle adjustment in its (not necessarily wrong) initial position to accommodate the fact that the statute of limitation in Italian criminal law is of a substantive, not merely procedural, nature thus impacting on the protection of individuals against the retroactive application of incriminating rules in case of serious breach of the VAT rules involving fraud against the financial interests of the EU in the field of its own resources. This was the first reference for preliminary ruling from the Italian *Corte Costituzionale*, and it refrained therein from drawing any “nuclear threat” from its *controlimiti* doctrine.

By contrast, the *BverfG*, by announcing in its reference for preliminary ruling that whatever the decision of the CJEU would be it reserved itself the right to submit

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<sup>9</sup> To use the expression of Advocate General Pedro Cruz Villalón, in case C-62/14, *Gauweiler*, par. 61, quoting Andreas Voskuhle, until very recently (6 May) the president of the *BVerfG*.

<sup>10</sup> Judgments of 8.9.2015, *Taricco e.a.*, C-105/14, EU:C:2015:555, and of 5.12.2017, *M.A.S and M.B. (Taricco II)*, C-42/17, EU:C:2017:936.

the ECB's action to its constitutionality control, appears to forget that genuine respect must be mutual, without which it turns unacceptably into **arrogance** against required **subservience** from the other party – if not institutional isolationism capable of drying up all life in and around.

After having acknowledged the competence of the CJEU to interpret EU law, this amounts to throw a stone and hide the hand behind your back, as an old Portuguese saying has it.

One thing is sure: an exclusive competence conferred to a court of law does not cease to exist simply because another court of law with territorially limited powers does not agree with a judgment which it asked for. But refusing recognition of such exclusive competence is bound to have a destabilising impact on the integrity and the functioning of the EU legal order.

### **c. Direct effect and primacy of EU law; the principles of sincere cooperation and of equality between Member States**

Of course, if ideological *a priori* visions and dogmatism must be given limited recognition in public life, so does institutional relativism. The ultimate limit in this regard is respect for common principles and values that underpin European integration amongst 27 sovereign States and 450 million people.

In this context, a *second red line* should not be crossed: the **autonomy of the Union's legal order** cannot be called into question unilaterally by any of its creators, possibly angry with itself.

The principles of **direct effect** and **primacy** are the legal tools that have secured such outcome for more than 60 years since *Van Gend en Loos*, 26/62, 5.2.1963, *Costa/ENEL*, 6/64, 15.7.1964, and *Simmenthal*, 106/77, 9.3.1978, have laid the foundations of the Community legal order and given support to its very existence.

In a complex institutional structure such as the EU – a sort of pluralistic constitutionalism at various levels – there can be no competing “constitutional courts”

in the same area without turning the Union into a variable geometry construction in a semi-permanent state of institutional chaos.

Neither is it possible to select which “national identities” must be safeguarded, or to recognise a privileged status to a given national constitutional court or even to assign to one of them the role of representing all the others. The real challenge here is to find out how is it possible to accommodate, within the specific EU constitutional framework, the various identities concerned while respecting the **principle of equality between Member States** as set out in Article 4(2) TEU, having in mind the **principle of sincere cooperation** between the Union and the Member States in view of assisting each other in the fulfilment of the obligations arising out of the Treaties and facilitating the achievement of the Union’s tasks, as laid down in Article 4(3) TEU.

#### **4. On the merits**

The above considerations concern the *hardware* of the problem, which is, in my view, what lies at the core of the constitutional debate here.

Nevertheless, the substantive issues that have been raised by the GCC in its references for preliminary ruling provide an excellent opportunity to clarify a number of issues, which are key to the very survival of the Union, not only of its legal order.

The CJEU addressed those issues, in identical or complementary terms, in the two cases concerning the purchase of public debt in the secondary market by the European Central Bank System (ECBS): *Gauweiler* –OMT programme,<sup>11</sup> and *Weiss* – the PSPP<sup>12</sup>.

Some remarks must be made as regards those decisions.

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<sup>11</sup> Judgment of 16.6.2015, *Peter Gauweiler e.a. c. Deutscher Bundestag*, C-62/14, EU:C:2015:400.

<sup>12</sup> Judgment of 11.12.2018, *Heinrich Weiss e.a.*, C-493/17, EU:C:2018:1000. In its Judgment, the Court followed in general the lines of reasoning proposed by Advocate General Melchior Wathelet in his Opinion of 4.10.2018, on the basis of an extensive analysis of, among others, the objective of and the instruments used by the PSPP, the relationship between monetary policy and economic policy and the proportionality of the PSPP.

**a. The boundaries of monetary policy and its impact on economic policy**

They concern, in the *first place*, the relationship between **monetary policy**, an exclusive competence of the EU for the Member States whose currency is the euro, and **economic policy**, a competence of the Member States, which they shall conduct with a view to contributing to the achievement of the objectives of the Union and which they shall regard as a matter of common concern and coordinate within the Council, as determined by Articles 120 and 121 TFEU:

- (i) In the absence in the Treaty of a definition of monetary policy, it is by reference to its **objectives** – to maintain price stability and to support the general economic policies in the Union – and to the **tasks** to be carried out that the CJEU controls the respect of the limits of that policy;
- (ii) The **objectives** aimed at by the ECB programs fit into that framework: they are intended to preserve the unity of the monetary policy for the whole euro zone and to secure a correct transmission to the economy of the measures taken;
- (iii) **A measure of monetary policy does not become an economic policy measure** just because it may have effects on the stability of the euro area – any monetary policy disconnected from its impact in the economy is useless as these are not closed compartments;
- (iv) The **means** that have been used by the ECB (*open market operations*) are classical in monetary policy and are provided for in EU primary law: any expert in monetary policy will easily explain that they are crucial to the effectiveness of a central bank intervention on the financial markets, when confronted with asymmetrical shocks, especially within the framework of a common currency of 19 sovereign States with distinct economic structures and policies and at different levels of development. No central bank can manage a single currency for a major part of a

multinational continent with its hands tied by a national or regional central bank;

- (v) Lastly, as long as disturbances in the transmission mechanism may result from the specific situation of some economies, it is impossible not to adjust the intervention to those specificities, taking in consideration, where appropriate, the macro-economic adjustment programs they may be submitted to.

#### **b. The proportionality test**

In the *second place*, the GCC raised the conundrum of the **proportionality test**. Actually the CJEU has carried out that test in both judgments, which allowed it to conclude that the measures adopted conformed with its requirements.

Not surprisingly, the Court applied its settled case law according to which, whenever an institution or body, like the ECB or the ESCB, when preparing and implementing an open market operations programme, is required to make choices of a technical nature and to undertake complex forecasts and assessments, it must be allowed a broad discretion.<sup>13</sup> Judicial control is then focused on the duty to state reasons, the need to examine all the relevant facts and circumstances as well as on whether the measures at stake are suitable for attaining the legitimate objectives pursued, without going beyond what is necessary, and is intended to prevent any manifest error of assessment.

Regarding in particular such delicate and controversial matters as those involved in the definition and application of monetary policy or competition policy, the CJEU has always rightly refused, in the absence of a manifest error, to substitute its own assessment for the one made by the competent body, adequately equipped with the

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<sup>13</sup> *H. Weiss*, C-493/17, para. 72, 73; *Gauweiler*, C-62/14, para. 67, 68.

necessary expertise and technical resources, which allow it to properly fulfil its mandate.

I believe this attitude of restraint is required by the basic constitutional principle of the **separation of powers**. Provided that the objectives and limits laid down in the Treaties for an action of an EU institution or body within the field of an EU policy are respected, the judicial mandate conferred to the Court of Justice does not allow it to encroach upon the ambit of competences of the executive branch in complex technical matters, beyond the case of manifest error of appreciation.

Nevertheless, the GCC appears to lean towards a tighter scrutiny, however sometimes in a rather incomprehensible way.

Paragraph 139 of the judgment of 5 May provides an example of that attitude and of the perplexities it raises.

First and foremost, the GCC purports to apply the principle of proportionality to the distinction between monetary policy (an exclusive competence of the Union as regards the “euro-area”) and economic policy (competence, in principle, of the Member States) and, more generally, to the delimitation of the competences of the Union. This amounts to a manifest error of law since, according to Article 5(1)(2) and (4) TEU, the limits of the Union competences are governed by the principle of conferral (as decided by the Member States in the Treaties) and the principle of proportionality applies only to the use of the competences conferred therein!<sup>14</sup>

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<sup>14</sup> As already noted by Jacques Ziller, « L’insoutenable pesanteur du juge constitutionnel allemand », available at <https://blogdroiteuropeen.com/> (in English: <https://ceridap.eu/the-unbearable-heaviness-of-the-german-constitutional-judge-on-the-judgment-of-the-second-chamber-of-the-german-federal-constitutional-court-of-5-may-2020-concerning-the-european-central-banks-pspp/>). On the same topic, in general, see also: Diana-Urania Galetta, “Karlsruhe über alles? Il ragionamento sul principio di proporzionalità nella pronuncia del 5 maggio 2020 del BVerfG tedesco e le sue conseguenze”, [https://www.federalismi.it/nv14/articolo-documento.cfm?hpsez=Primo\\_Piano&content=Karlsruhe%2B%C3%BCber%2Balles%3F%2BII%2Bragionamento%2Bsul%2Bprincipio%2Bdi%2Bproporzionalit%C3%A0%2Bnella%2Bpronunzia%2Bde%2Bil%2B5%2Bmaggio%2B2020%2Bdel%2BBVerfG%2Btedesco%2Be%2Ble%2Bsue%2Bconseguenze&content\\_auth=%3Cb%3EDiana%2DUrania%2BGaletta%3C%2Fb%3E&Artid=42380](https://www.federalismi.it/nv14/articolo-documento.cfm?hpsez=Primo_Piano&content=Karlsruhe%2B%C3%BCber%2Balles%3F%2BII%2Bragionamento%2Bsul%2Bprincipio%2Bdi%2Bproporzionalit%C3%A0%2Bnella%2Bpronunzia%2Bde%2Bil%2B5%2Bmaggio%2B2020%2Bdel%2BBVerfG%2Btedesco%2Be%2Ble%2Bsue%2Bconseguenze&content_auth=%3Cb%3EDiana%2DUrania%2BGaletta%3C%2Fb%3E&Artid=42380) (in English: <https://ssrn.com/abstract=3598873> or <http://dx.doi.org/10.2139/ssrn.3598873>; Miguel Poiars Maduro, “Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court”, at <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/>; Inês Quadros, “O braço de ferro do Tribunal Constitucional alemão”, at

This should suffice to dismiss the argument as manifestly unfounded. Nevertheless, the GCC goes much further in drawing inferences from its understanding of the principle of proportionality.

Indeed, it requires the CJEU (and not only the ECB and the ESCB) to conduct its review of proportionality in a way that takes account of the effects that the PSPP might have on, for example, public debt, personal savings, pension and retirement schemes, real estate prices and the keeping afloat of economically unviable companies! Apart from the question of whether and to what extent is it possible to carry out such a review in the context of a reference for preliminary ruling without substituting its assessment to that of the ECB, one wonders how would it be possible, as the GCC is also inviting the CJEU to do, to weigh such *effects* against the monetary policy *objective* that the PSPP aims to achieve!

What is more, as Jacques Ziller has also observed,<sup>15</sup> the GCC goes as far as to require that the Court of Justice assesses its own competence “according to recognized methodological principles” – in fact the GCC’s own principles, considered as unique and universal -, which is tantamount to submit the methods of legal interpretation used by the CJEU to the “Solange reservation”!

Anyway, the CJEU concluded, at the end of its detailed analysis, that the contentious programme was subject to appropriate conditionality and to preventive and monitoring measures intended to circumscribe the risk of losses for the ESCB, to limit its exposure in the event of a default and to prevent the position of a central bank of one Member State from being weakened in the event of an issuer in another Member State failing to make a repayment.<sup>16</sup>

Moreover, the Court emphasized that under the PSPP the ESCB is not entitled to purchase bonds directly from public authorities and bodies of the Member States, but

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<sup>15</sup> See J. Ziller, cit.

<sup>16</sup> *H. Weiss*, C-493/17, paras. 71-100.

can only do it indirectly, on the secondary markets, so that the intervention by the ESCB provided for by that programme cannot be equated with a measure granting financial assistance to a Member State, in breach of Article 123(1) TFEU, or reducing the impetus of the Member States concerned to conduct a sound budgetary policy.<sup>17</sup>

**c. The independence of the ECB and the ESCB, including the *Bundesbank***

It is true - and this is my *third observation* - that the GCC has recognized that it was not competent to directly control the validity of a legal act of an EU institution. However, it used instruments of an equivalent effect to reach the same result, by requiring the Federal Government and the German *Bundestag* to take steps seeking to ensure that the ECB conducts a proportionality assessment and to use the means at their disposal to ensure that the ESCB stays within the limits of its mandate.

Furthermore, the GCC ordered the *Bundesbank*, following a transitional period of no more than three months, to no longer participate in the implementation and execution of the ECB decisions at issue, unless the ECB Governing Council adopted a new decision complying with the requirements laid down by the *BVerfG* itself in its Weiss decision.

It is impossible not to see in this assertiveness a skewed way of declaring the invalidity of an act of an EU institution for being contrary to the constitutional concepts prevailing within a given Member State, as interpreted by its Constitutional Court. The institutional perversity of such a position becomes clear when we realize that the GCC is concerned only (within the national limits of its jurisdiction and mandate) with the domestic impact of what it considered to be an *ultra vires* action. In the GCC's own words, the act in question is not to be applied in Germany and would have no binding effect in relation to German constitutional organs, administrative authorities and courts.

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<sup>17</sup> See *H. Weiss*, C-493/17, paras. 101-158.

One would hardly find a way to better illustrate how to turn the Treaties into a kind of constitutional Swiss cheese full of jurisdictional holes.

Another important consequence of the judgment of 5 May seems to have escaped the GCC's attention.

It follows from Article 130 TFEU that the ESCB and its members exercise their powers and carry out the tasks and duties conferred upon them by the Treaties and the Statute **in full independence**. Indeed, neither the ECB nor a national central bank, nor any member of their decision-making bodies shall seek or take **instructions** from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. In the same vein, the Union institutions and bodies as well as the governments of the Member States shall undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks (see also Article 7 of the Statute of the ESCB and of the ECB).

Moreover, according to Article 14.3. of the Statute of the ESCB and of the ECB, the national central banks are an integral part of the ESCB and, in that capacity, they shall act in accordance with the guidelines and instructions of the ECB.

None of this was invented by the Court of Justice in its case-law: insofar as the Member States do not renege on their commitments under the Treaties, this is the constitutional law in force in the EU.

By inciting an institution of the Union and its integral parts to act in breach of the Treaties, the *BVerfG* is paying lip service to the rule of law in Europe.

## **5. Immediate implications and constructive suggestions**

Faced with the above described situation, doomsayers would see no way out, whereas optimists or cynics may pretend the implications of the 2nd Senate decision not to be very significant.

In my view, it is fair to say that we have here a serious problem of principle, which has imminent practical and political implications. The first of these is expressed in the immediate announcement by the Prime Minister of Hungary that he would refuse to abide by the judgments of the CJEU that he will consider to be contrary to the Hungarian Constitution.

The second implication is also in sight: the constitutional appeals of Messrs. Weiss, Gauweiler and others aim at promoting a nationalistic, sovereigntist, ultra-conservative and euro sceptical political agenda, to which the GCC judgment have given strength. Since they are far from having won the war against the European institutions and the European project, they will certainly return to the charge, taking as a pretext e.g. the ECB program designed to respond to the COVID-19 pandemic emergency or the measures that are awaiting the European Council's approval next week, following the Commission's proposal and the initiative of the French and German leaders, involving the use of the Union's budget or any kind of common debt issuing (or of debt risk sharing), whatever the final outcome may be and even in the absence of moral hazard.

All this seems to show that the current controversy is not, strictly speaking, a mere legal one. It is more fundamentally rooted in perceptions, cultural beliefs and ideology.<sup>18</sup> Judge Peter Meier-Beck did not hesitate in labelling the judgment of the 2<sup>nd</sup> Senate as “an attack on the European Union as a legally constituted community of European democracies”.

It is a cynical view to pretend that such obstinate opposition to the exercise of the competences of the CJEU stems from the protection of democracy and the sovereignty of the people in Europe, when at stake is the scrupulous respect for the powers and responsibilities entrusted to the EU institutions by all the Member States in

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<sup>18</sup> Surprisingly enough, while advocating a stricter judicial control of the limits of monetary policy and of the proportionality principle, the GCC claims that the “distinction between economic policy and monetary policy is a fundamental political decision with implications beyond the individual case” (Judgment of 5 May, paragraph 159).

the Treaties that they unanimously signed and ratified “to attain objectives they have in common” (Article 1 TEU).

It is my firm belief that the full compliance with the rules and principles of delimitation of constitutional competences coupled with the effective use of the existing procedural mechanisms, all of which are inherent in the structure of the legal and judicial system that provides support to the European integration agenda from the very inception of the European Communities, shall be sufficient in the future to ensure that the obstacles that may result from the distinct perceptions and conceptions existing at different institutional levels in the EU are avoided or overcome.

The President of the EU Commission has threatened legal action before the CJEU against Germany for infringement of EU law attributable to the GCC, and I think she is right.<sup>19</sup> That said, I do not think she will go on to the end and it very likely will not be necessary. Nevertheless, this would not be the first time, as it successfully happened two years ago against France concerning some decisions of the French *Conseil d’État*.<sup>20</sup> After all, respect for the equality between Member States before the Treaties is a fundamental principle of EU law, as enshrined in Article 4(2) TEU alongside the respect for their national identities.

Moreover, it should be noted that, in case of doubt or disagreement, the GCC has always the right to refer a new question for preliminary ruling on the same or similar issues, based on new arguments or considerations. This would have been indeed the right path to take.

In addition, according to media reports, “a pragmatic and reasonable appeasement solution” seems to be in sight. The ECB could agree to communicate to the president of the *Bundesbank* complementary non-published documents demonstrating that the ECB has complied with the proportionality principle in the

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<sup>19</sup> On this issue, see Daniel Sarmiento, “An Infringement Action against Germany after its Constitutional Court’s ruling in Weiss? The Long Term and the Short Term”, at <https://eulawlive.com/op-ed-an-infringement-action-against-germany-after-its-constitutional-courts-ruling-in-weiss-the-long-term-and-the-short-term-by-daniel-sarmiento>

<sup>20</sup> Judgement of 4.10.2018, *Commission v. France (précompte immobilier)*, C-416/17, EU:C:2018:811.

adoption of its PSPP decision. The new member of the *BVerfG*, Judge Astrid Wallrabenstein, who replaced the retired judge and former president Andreas Vosskuhle, has even expressed publicly her views in favour of such pragmatic solution.

Nonetheless, different suggestions have been put forward in favour of setting up appropriate mechanisms intended to accommodate frictions or tensions and to replace, where needed, unilateral demonstrations of force with a common effort of understanding within the framework of a formal procedure.

Daniel Sarmiento and Joseph Weiler<sup>21</sup> proposed the establishment of a new appeal jurisdiction within the Court of Justice, strictly and narrowly confined to *Weiss* type cases, where at issue would be the delineation of the jurisdictional line between the Member States and the EU.

Of course, other alternative remedies could be envisaged, such as a type of pre-judicial dialogue Forum between the CJEU and the national constitutional and supreme courts, kind of **informal alert mechanism** analogue to the one that exists for national Parliaments on the subsidiarity principle. If adequately organised having regard to the judicial and constitutional nature of the matter, such mechanism could play a constructive role on a preventive basis, affording the Court of Justice the possibility of hearing the voices of a representative number of constitutional and supreme courts before taking its decision on important and delicate constitutional issues, without weighing heavily on an already complex institutional machinery.

There is no urgent need, but I do not exclude that it might be worth reflecting on it in the future.

*(Translated into English from the original Portuguese version and updated on June/July 2020)*

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<sup>21</sup> “The EU Judiciary after Weiss – Proposing a new mixed chamber of the Court of Justice”, at <https://verfassungsblog.de/the-eu-judiciary-after-weiss/>