WHAT FUTURE FOR THE EUROZONE AFTER KARLSRUHE?

ALBERT HENKE,
University of Milan (Milan, Italy)

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The paper analyzes the decision of the German Federal Constitutional Court rendered on 5 May 2020 (2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15), wereby the latter heavily criticized the "democratic" legitimacy of the Public Sector Purchase Program of the European Central Bank (aimed, by purchasing negotiable debt securities issued by governments, public agencies and international institutions located in the euro area, to support the economy of the Member States and to increase the eurozone's inflation rate up to 2%), de facto disapplying the judgment of the CGEU of 11 December 2018, by which that Program had been instead previously "validated." The author places the decision in the context of the long-standing and conflicting relations, on the one hand, between Member States and European institutions and, on the other hand, between national constitutional courts and the Court of Justice of the European Union, outlining the possible repercussions of the decision on a legal, economic, political and institutional level and, ultimately, on the very survival of the eurozone.

Keywords: European Central Bank; Public Sector Purchase Program; German Federal Constitutional Court; Court of Justice of the European Union; principle of conferral; monetary policy; democratic self-determination; ultra vires; constitutional identity.

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Introduction

On 5 May 2020, the German Federal Constitutional Court (hereinafter also "*Bundesverfassungsgericht*" or "*BverfG*") ruled on the so-called *Public Sector Purchase Program* (hereinafter "PSPP" or "PSP Program"),[1] the ECB's monetary stimulus program launched in 2015 and aimed, through the purchase of government bonds of the eurozone, to support the economies of EU Member States and raise inflation to the 2% threshold (i.e. the famous Mario Draghi's "whatever it takes"). The ruling, due to its impact at legal, economic, political and institutional level, risks to seriously jeopardize the already fragile holding of the Euro area. Indeed, by totally disavowing a previous ruling of the Court of Justice of the European Union (hereinafter also "CJEU"), which had previously deemed said program legitimate, Karlsruhe raised

[1] The official text of the decision (in German, with an official translation in English) is available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html. *See, ex multis*, Marco Dani et al., *At the End of the Law: A Moment of Truth for the Eurozone and the EU*, VerfBlog, 15 May 2020 (Nov. 2, 2020), available at https://verfassungsblog.de/at-the-end-of-the-law/; Jérôme Soibinet, *Legal and Political Significance of Decisions of the Karlsruhe Court. The EU in Search of its Legitimacy*, Institut Thomas More (May 2020) (Nov. 2, 2020), available at http://institut-thomas-more.org/2020/05/20/legal-and-political-significance-of-decisions-of-the-karlsruhe-court/; Jacques Ziller, *L'insopportabile pesantezza del giudice costituzionale tedesco: Sulla sentenza della Seconda Sezione della Corte costituzionale federale tedesca del 5 maggio 2020 relativa al programma PSPP della Banca centrale europea*, 2 AISDUE 1 (2020) (Nov. 2, 2020), also available at https://www.aisdue.eu/web/wp-content/uploads/2020/05/Post-Jacques-Ziller-rev.pdf; Diana Urania Galetta, *Karlsruhe über alles? Il ragionamento sul principio di proporzionalità nella pronunzia del 5 maggio 2020 del BVerfG tedesco e le sue conseguenze*, 14 *Federalismi.it – Rivista di diritto pubblico italiano, comunitario e comparato* 165 (2020); Giuseppe Tesauro & Patrizia De Pasquale, *La BCE e la Corte di giustizia sul banco degli accusati del Tribunale costituzionale tedesco*, Osservatorio Europeo (May 2020) (Nov. 2, 2020), available at http://images.dirittounioneeuropea.eu/f/sentenze/documento_DWGpl_DUE.pdf; Sara Poli, *The Ruling of the German Federal Court of 5 May 2020: A Crisis Within the Crisis or a Window of Opportunity for Further Reforms in the EU?*, Eurojus, 11 June 2020 (Nov. 2, 2020), available at http://rivista.eurojus.it/the-german-federal-court-and-its-first-ultra-vires-review-a-critique-and-a-preliminary-assessment-of-its-consequences/.

doubts, heavy as boulders, on the traceability of the PSPP within the limits of the ECB's mandate, as defined by the EU treaties and, indirectly, on its compatibility with fundamental provisions of the German *Grundgesetz*. At the same time, the ECB was given an *ultimatum* (albeit indirect, as addressed, in the first instance, to the government, the parliament and the *Bundesbank*) to provide, within three months, detailed evidence of the proportionality of its actions, failing which the *Bundesbank* would quit that program.

1. The ECB's *Public Sector Purchase Program* and its Previous "Validation" by the Court of Justice

The *Public Sector Purchase Program*, launched by the ECB with the decision of 4 March 2015[2] (then amended with subsequent decisions), is part of the so-called *Expanded Asset Purchase Program* (hereinafter "EAPP" or "EAP Program"), a framework program for the purchase of assets on the financial market, aimed at increasing the eurozone's money supply and supporting consumer spending and investments, and, ultimately, at stabilizing inflation around the 2% threshold. On the basis of it, the Frankfurt Institute and the central banks of EU Member States proceeded to purchase (according to their respective stakes in the ECB's share capital[3]) government bonds or other negotiable debt securities issued by EU Member States, by certified public agencies, by international organizations, as well as by multilateral development banks located in the Euro area.

With four separate *Verfassungsbeschwerden* (later joined[4]) to the German Federal Constitutional Court, a series of applicants, including several German jurists, economists and politicians, complained about the ECB's action in relation to the PSP Program, qualified as *ultra vires* for excess of mandate and in breach of the division of competences between European institutions and Member States, challenging, morevoer, its being in conflict with the *Grundgesetz* (the German Constitution) for violation of the "democratic principle."

By order of 18 July 2017, the *BverfG* referred the matter to the CJEU for a preliminary ruling.[5] It pointed, in particular, to the potential violation of Art. 123, paras. 1 and 2 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") (which

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[2] *See* Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) (Nov. 2, 2020), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2015_121_R_0007.

[3] It is the so-called *Capital Key*, with the lion's share reserved for the *Bundesbank*, which holds about 20% of the ECB's share capital, compared, for example, to the 12% held by the Bank of Italy. The PSP Program represented the largest share of the total value of the securities purchased under the EAPP.

[4] Submitted, respectively, by Heinrich Weiss et al., Bernd Lucke et al., Peter Gauweiler and Johann Heinrich von Stein et al.

[5] Order of 18 July 2017, in the joined cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (Nov. 2, 2020), available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-070.html.

prohibits direct monetary financing of the budgets of Member States), both in relation to ECB's purchases on the primary market[6] and on the secondary market[7], as well as to the possible violation of Arts. 119, 127 of the TFEU and Arts. 17–24 of Protocol No. 4 on the Statute of the European System of central banks and of the ECB, alleging the encroachment of the ECB actions (the mandate of which is limited, by the European treaties, to the area of *monetary policy*) on the area of *economic policy* (reserved, instead, to the exclusive competences of the EU Member States) and, in general, a lack of proportionality between the goal pursued and the measures adopted, as well as a lack of adequate reasons. In the end, according to the *BverfG*, if the process of European integration (I*ntegrationsverantwortung*) endorsed an overrun by the European institutions of their respective competences, as defined by the European treaties, Art. 38(1), first part, of the German Constitution, which affords German citizens, to the extent provided for by Art. 79(3), a "right to democratic self-determination," would be violated. It would therefore be the responsibility, on the one hand, of the German constitutional bodies to use all the means at their disposal to ensure that this process is carried out in compliance with the prerogatives of the EU Member State and, on the other hand, of the Federal Constitutional Court to monitor compliance with the *limes* between competences, respectively, of the Union and the German State, "disapplying" acts of the European institutions affected by manifest excess of mandate (*ultra vires*) or, in any case, prejudicial to the so-called "Constitutional identity" of the German legal system.

With a well-articulated decision, rendered on 11 December 2018, the CJEU concluded that the PSP program did not exceed the mandate of the ECB, nor did it violate any rule or principle of the European treaties regarding the prohibition of direct monetary financing.[8] Specifically, after rejecting a series of objections of inadmissibility of the application, raised, among others, by the Italian government,[9] it ruled that the ECB had fulfilled the obligation to justify its decisions[10] (clearly

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[6] Essentially due to a communication of the details of the purchases such as to, *de facto*, generate the certainty that the ECB would directly purchase part of the bonds issued by Member States, bonds held to maturity and therefore effectively withdrawn from the market and, and purchase negotiable debt securities with a negative yield to maturity.

[7] Essentially due to the absence of sufficient guarantees to ensure compliance with the prohibition of direct monetary financing and due to the impossibility of verifying compliance with certain minimum periods between the issuance of debt securities on the primary market and the purchase of the related securities on the secondary market.

[8] Court of Justice, *Heinrich Weiss and others*, Case 493/17, 11 December 2018, ECLI:EU:C:2018:1000.

[9] According to the Italian Government, the questions submitted by the referring court amounted, on the basis of the latter's previous statement that it would not consider the CJEU's response to be binding, to an inadmissible request for an opinion instead of a decision, given that it would have ultimately been in the national court to decide on the validity of the ECB's decisions, and not on the national measures implementing those decisions.

[10] However, this obligation does not rest on the precondition, in case of institutions that enjoy a wide discretion, for there to be a need to identify every relevant point of fact and law (*see* Court of Justice,

giving account of its intent to deal with persistently low levels of inflation and of the need to resort to different and innovative tools other than "ordinary" ones to cope with particularly adverse economic conditions), and that the PSP Program should certainly qualify as a "monetary policy" action. According to the CJEU, the authors of the Treaties did not intend to make a clear and rigid separation between "monetary policy" and "economic policy," also due to the physiological suitability of the first type of actions to affect interest rates, bank refinancing conditions and, indirectly, the budgets of the EU Member States:[11] a monetary policy measure could not therefore be qualified as an (*inadmissible*) economic policy measure for the sole fact of producing effects on the latter (otherwise the ECB would be prevented from availing of any means made available to it by the Treaties[12]). In assessing the proportionality between the goals pursued and the measures adopted, the CJEU then recalled that, according to the principles already enucleated by its case law, the broad discretion granted to certain European institutions (including the ECB) should be taken into account, along with the technical nature of the decisions to be taken and the complexity of the related assessments.[13] In light of the economic analysis carried out by the ECB,[14] the particular economic context (characterized by persistently low inflation, which risked triggering a cycle of deflation), as well as the limits and restrictions which the PSP Program was from the very beginning subject to,[15] the Court ruled out any manifest errors of assessment on the part of the ECB or any manifest violations of its mandate.

Commission/Council, Case C-63/12, 19 November 2013, para. 98), nor, in the case of measures intended to have general scope, a need for a specific reason justifying each of the technical choices adopted (*see* Court of Justice, *American Express*, Case 304/16, 7 February 2018, ECLI:EU:C:2018:66, para. 76). According to the CJEU, moreover, from the substantial documentation relating to the various decisions adopted (press releases, introductory statements by the President, reports of the Governing Council meetings), it emerged that the ECB had carried out in-depth economic analysis, clearly highlighting the various options considered and the reasons for their adoption, as well as the assessment of the potential side effects of the PSP Program.

11 *See* Court of Justice, *Gauweiler et al*., Case C-62/14, 16 June 2015, ECLI:EU:C:2015:400, paras. 10, 78 and 108.

12 *See* Court of Justice, *Pringle*, Case C-370/12, 27 November 2012, ECLI:EU:C:2012:756, para. 56; Court of Justice, *Gauweiler et al*., para. 52.

13 *See* Court of Justice, *Gauweiler et al*., para. 68 and the case law referred to therein.

14 Suitability of the PSP Program, in the monetary and financial conditions of the Euro area, to contribute to the achievement of the objective of maintaining price stability.

15 Temporariness; limited volume of purchases through the setting of a monthly amount; priority given to bonds issued by private operators; limit on the ESCB's exposure in the event of issuer insolvency; establishment of suitable guarantees.

2. The Decision of the *Bundesverfssungsgericht* of 5 May 2020: The "Disapplication" of the Decision of the Court of Justice and the Review, *on the Merits*, of the ECB's Decisions

After the CJEU's ruling, the question of the legitimacy of the conduct of an independent European institution like the ECB should have been considered definitively settled. The CJEU is the top judicial authority within the European legal system: its decisions cannot be subject to any further appeal and they are final and binding for all authorities (not only judicial) of the Member States. Yet, just over a year after that ruling, the *BVerfG* not only questioned everything, but did so with a decision destined to have very heavy repercussions on the fragile equilibrium on which the European Union's architecture is based. Two aspects of the decision are especially disconcerting at first reading. On the one hand, the decision entails a disavowal – almost a "delegitimization" – of the Court of Justice, whose decision of 11 December 2018 is branded as "*aus methodischer Sicht unhaltbar*" (unsustainable from a methodological point of view (!)), "*nicht nachvollziehbar*" (incomprehensible (!)) and "*objektiv willkürlich*" (objectively arbitrary (!)), criticising it not so much for alleged violations of the *Grundgesetz*,[16] but, mostly, and much more impertinently, on methodological grounds and is, eventually, *de facto* "disapplied," in what appears to be a surprising subversion of the hierarchical relationship between the CJEU and national judicial authorities. On the other hand, the decision reviews, on the merits, the conduct of an independent European institution, with a strong stigmatization of its actions and decisions.

In respect of the first aspect, quite disruptive appear to be the passages in the reasons where *BverfG* addresses the issue of the relationship between the roles and functions of the CJEU and those of national courts, especially in relation to disputes involving the limits of the respective competences between European institutions and Member States. As we know, the European legal system is based on the principle of conferral,[17] according to which the European institutions can legislate or adopt other measures only within the scope of their competenceand according to the procedures conferred on them by European treaties.[18] Another fundamental

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[16] Which, however, are not lacking, but appear almost in the form of an outline and are recalled almost exclusively to shore up the legitimacy of the Court to rule on the constitutional complaint.

[17] Codified in Art. 4, paras. 2, 3 and 5 of the TEU. According to said provision, all the competences of the EU derive from a conferral expressly made by the Member States. Having no "original" competences, the EU can only act within the specific competences outlined in the treaties; in the absence of specific conferral, the competence remains with the Member States. On the topic, *see* August Reinisch, *The Division of Powers Between the EU and Its Member States "After Lisbon"* in *International Investment Law and EU Law (European Yearbook of International Economic Law)* 99 (Marc Bungenberg et al. eds., 2011).

[18] In principle, the competences of the Union are divided into *exclusives* (within which only the EU can legislate and adopt legally binding acts, while the Member States can act only if authorized by the Union, or to implement the acts of the Union), *concurrent or shared* (within which both the EU and

principle is the uniform interpretation and application of EU law, guaranteed by the Court of Justice in constant dialogue with national judges, according to the rules and principles that emerge from the combined provisions of Art. 119 of the Treaty on European Union (hereinafter "TUE"),[19] Arts. 267[20] and 344 of the TFUE.[21] According to the German Constitutional Court, the CJEU, in exercising of its functions, should comply, *inter alia*, with the principles and standards based on the legal (constitutional) traditions common to the Member States[22] (as emerging from the case law of the top courts of the Member States and of the European Court of Human Rights), which also include the principle of proportionality.[23] In line with this premise, the decision of the CJEU of December 2018 is criticized for the "formalistic" approach adopted in maintaining the ECB's conduct compliant with its mandate. Such an approach did not allow an effective scrutiny of the ECB's actions (in particular, in relation to the impact and the effects of the PSP program on the overall economic policy of the Euro area), debated the importance of the principle of proportionality, and emptyed the principle of conferral, which requires an *actual* supervision of the conduct of European institutions, in order to prevent expansions *contra legem* of their fields. The conclusion is *tranchant*: due to its "methodological errors," the decision of the Court of Justice represents an undue crossing of its mandate and an excess of power in breach of Art. 19, para. 1 of the TEU. Since, from the point of view of the German legal system, it lacks the necessary "democratic legitimacy," it cannot therefore bind the German Constitutional Court,[24] leaving the latter free to independently and autonomously assess the validity of the PSP program. The challenge launched by Karlsruhe to Luxembourg is "spectacular": never in history has a decision of the CJEU been "disapplied" by a national constitutional court because it was deemed *ultra vires*.[25] Rather than merely assessing the conformity of the ECB's policies with the German Constitution, the *Bundesverfassungsgericht* arrogated to itself the right to assess whether the actions of a European institution comply with the European

the Member States can legislate and adopt legally binding acts; in this case the Member States can exercise their competence only if the EU has not already exercised its own, or has decided to cease *tout court* to exercise it) and *coordination* (essentially aimed at coordinating the actions of the Member States, without the possibility of leading to harmonization measures).

19 The article defines the scope of the jurisdiction of the Court of Justice.

20 The article governs the mechanism of referral for a preliminary ruling to the CJEU.

21 The provision states that Member States undertake not to submit disputes concerning the interpretation or application of the European treaties to any mechanism or body not covered by the treaties.

22 *See* Art. 6, para. 3 of the TEU and Art. 340, para. 2 of the TFEU.

23 The principle is codified in Art. 5, paras. 1, 2 and 5 of the TEU.

24 Pursuant to the combined provisions of Art. 23, para. 1, Art. 20, paras. 1 and 2 and Art. 79, para. 3 of the German *Grundgesetz*.

25 *See* R. Daniel Kelemen et al., *National Courts Cannot Override CJEU Judgments*, Verfblog, 26 May 2020 (Nov. 2, 2020), available at https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/.

Treaties, an area explicitly reserved to the exclusive competence of the CJEU, thus literally taking its place. In fact, the judgments of the CJEU are sources of EU law, because they are incorporated into the interpreted rules, integrating precepts with immediate binding effect:[26] a binding effect that represents the reflection, and at the same time the footing, of the primacy of the European Union law over national law.[27] By escaping the constraint of the CJEU's decision, therefore, the *BVerfG* effectively denied the primacy of European law over national law.

With reference to the second aspect (direct review, *on the merits*, of the ECB's action), the German Court did insinuate (leaving the benefit of the doubt, which was however to be resolved within a period of time which in itself, although indirectly, consisted in imposing an ultimatum on the ECB) that the decisions taken by the ECB under the PSP program[28] were *ultra vires*, i.e. beyond its mandate. According to the *BVerfG*, a program of the magnitude of the PSP has a huge impact on the eurozone as a whole and on an infinite variety of stakeholders, to the extent that, it allows to improve the refinancing conditions of Member States – easing the raising of capital – while also affecting the capitalization and functioning of the banking system. Lastly, it affects the financial situation of the generality of European citizens in the various roles respectively covered (shareholders, owners, investors, savers, policyholders). For this very reason, it would have required a precise, detailed and explicit weighting of its overall economic effects, by balancingthe monetary policy's objectives – falling within the mandate of the ECB – with the overall impact on economic and fiscal policies – which, conversely, fall within the competence of Member States. According to the *Bundesverfassungsgericht,* neither at the time when the program was launched, nor at any later time during its implementation, were weighting and balancing ever been adequately carried out by the ECB. Hence, the alleged manifest violation of the principle of proportionality and, consequently, the violation of the limit of its mandate.

If the assessment of the ECB's action by the German Constitutional Court appears to be sligthly condescending, the *ultimatum* addressed to it[29] is even less accomodating, as it is in clear conflict with the independence enjoyed by the ECB.

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[26] In relation to the Italian legal system, the principle has been reaffirmed on several occasions by the Constitutional Court and the Court of Cassation. *See, ex multis*, It. Const. court, 19 April 1985, No. 113; It. Const. court, 4 July 1989, No. 389; Supreme Court (criminal division), 2 April 2009, No. 13810.

[27] Affirmed as of the famous judgments of the CJEU, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, Case C-106/77, 9 March 1978, ECLI:EU:C:1978:49 and *Fratelli Costanzo SpA v. Comune di Milano*, Case C-103/88, 22 June 1989, ECLI:EU:C:1989:256.

[28] Specifically, that of 4 March 2015 No. 2015/774 and subsequent Nos. 2015/2101, 2015/2464, 2016/702 and 2017/100.

[29] The *ultimatum* is rather impressive for its tone ("Following a transitional period of *no more than three months* ..."; "... unless the ECB Governing Council adopts a new decision that demonstrates *in a comprehensible and substantiated manner* ...") and for the methods it suggests for its implementation (it is not the German constitutional bodies that have to demonstrate the absence of proportionality of the ECB's actions, but it is the latter that has to demonstrate the proportionality of its own actions).

The arguments used by the German Court are essentially based on a clear demarcation between "monetary policy" and "economic policy"[30] which, although easy to outline in the abstract, is much less intuitive when it is put into reality. This demarcation, as already pointed out by the CJEU, disregards the physiological (and unavoidable) suitability of monetary policy decisions to have an economic impact (especially in the case of large volumes of purchase of securities).[31] Moreover, it does not take into account that the competences in matters of economic policy, while strictly not falling within the shared competences referred to in Art. 4 of the TFEU, are also competences of the Union, since, as recalled by Art. 5 of the TFEU, the Council – a EU institution – is competent to adopt measures aimed at coordinating the economic policies of the Member States. That distinction, in addition, although originally contemplated by the treaties, has gradually lost its meaning, as a result of a large-scale monetary policy, which has increasingly brought the roles and functions of the ECB closer to those typical of modern central banks: from the fight against inflation to the prevention of deflation, from the exclusive purpose of maintaining price stability to the role of lender of last resort, with the aim of stabilizing the flow of guarantees and, ultimately, supporting the entire system financial. The argumentative short circuit also appears rather paradoxical: the ECB allegedly violated its mandate, limited to the monetary policy sector, for not having assessed the impact of this on the economic and fiscal policies of the eurozone, i.e. *on sectors that fall beyond his mandate*!

3. The *Ultra Vires* Acts of the European Institutions and the Prerogatives of the National Constitutional Courts

The complaints of the *BVerfG* have their roots in the theory of *ultra vires* acts, according to which the constitutional courts of the Member States cannot be deprived of the prerogative of being involved when the "exorbitant" nature of acts committed by EU institutions is contested, because the foreclosure, *ab origine*, of any possible scrutiny on their part would imply the attribution, to those same institutions, of an exclusive authority on the treaties – which are in fact *legibus soluta* -, even legitimizing the latter's unilateral amendments or expansions of the institutions' respective competences, thus ousting the Member States and their prerogatives.

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[30] Such demarcation is inspired by one of the central dogmas of the German economic school known as "*ordoliberalism*," which tends to confine the role of central banks to the control of price stability, relegating to the background other possible objectives, such as the pursuit of full employment or support to economic growth.

[31] Musso, *Ribellione tedesca: la sentenza di Karlsruhe si abbatte su Bce, Trattati e Corte di giustizia Ue*, Atlantico Quotidiano, 6 May 2020 (Nov. 2, 2020), available at http://www.atlanticoquotidiano.it/quotidiano/ribellione-tedesca-la-sentenza-di-karlsruhe-si-abbatte-su-bce-trattati-e-corte-di-giustizia-ue/, rightly observes: "... *everyone knows that monetary policy cannot, but must, have effects on states-banks-savers-businesses. But, on closer inspection, the limitation applies only to the expansion phase, not to the recessive one. Thus, according to Karlsruhe, the policy of a central bank is 'monetary' only when recessive; when it is expansive, however, no, it becomes 'economic' policy, it is 'ultra vires.'*"

This drift is prevented by the principle of conferral, by no mean affected by the Treaty of Lisbon, which, on the contrary, reiterated the principle according to which: "*... the Member States remain the 'Masters of the Treaties' and the EU has not evolved into to federal state*."[32] The German Constitutional Court directly contributed to the development of this theory with its ten-year jurisprudence,[33] in the wider context of the attempts of the constitutional courts of various Member States (in the wake, above all, of the Italian Constitutional Court, with the formulation of the so-called "theory of the counter-limits,"[34] and of the German Constitutional Court itself, both with the theory of *ultra vires* acts[35] and with the theory of "constitutional identity of

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[32] *See BVerfG*, 05.05.2020 – 2 BvR 859/15, Rn. 123, 267, 370 and 371.

[33] *See BVerfG*, 29.05.1974 – 2 BvL 52/71 (so-called *Solange I*), in which, for the first time, the principle of the primacy of fundamental rights of the German *Grundgesetz* over Community law was stated; BVerfG, 22.10.1986 – 2 BvR 197/83 (so-called *Solange II*, on which *see* Jochen A. Frowein, *Solange II (BVerfGE 73, 339). Constitutional complaint Firma W.*, 25(1) C.M.L. Rev. 201 (1988)), where, acknowledging the development of a consistent case law of the CJEU on the subject of fundamental rights (ultimately protected in the same way as in the German legal system) and an increase in the "democratic nature" of EU institutions, the German Constitutional Court ruled that it would no longer review the validity of the acts and provisions of European institutions (recognizing, for those cases, the exclusive competence of the CJEU). Following the entry into force of the Maastricht Treaty, however, new tensions emerged between the CJEU and the *BverfG*. In the decision of 12.10.1993 – 2 BvR 2134/92 (known as *Solange III*, on which *see* Jacques Ziller, *Solange III: ovvero la Europarechtsfreundlichkeit del Bundesverfassungsgericht: a proposito della sentenza della corte costituzionale federale tedesca sulla ratifica del Trattato di Lisbona*, 5 Riv. it. dir. pubbl. com. 973 (2009)), the *BverfG*, while giving the green light to the ratification of the treaty, affirmed the principle according to which the Member States are the "Masters of the Treaties," also clarifying that the European integration process cannot escape its constitutionality scrutiny and its right to "disapply" the *ultra vires* acts of the EU (*ausbrechender Gemeinschaftsakt*). That principle was reaffirmed in the judgment on the constitutionality of the Lisbon Treaty (*BVerfG*, 30.06.2009 – 2 BvE 2/08, on which *see* Anna M. Russo, *Il BundesVerfassungsGericht in "difesa della normalità": la "Lissabon Urteil" (30 giugno 2009) e le tendenze alla 'rigermanizzazione*,' 23 Civitas Europa 123 (2009)). On this jurisprudential evolution *see* Peter Hilpold, *Solange I, BverfGE 37, 291, 29 May 1974; Solange II, BverfGE 73, 339, 22 October 1986; Solange III, BverfGE 89, 155, 12 October 1993; and Solange IV, BverfGE 102, 147, 7 June 2000* in *Judicial Decisions on the Law of International Organization* 170 (Cedric Ryngaert et al., 2016).

[34] The term "counter-limits" was coined by the eminent scholar Paolo Barile, *Ancora su diritto comunitario e diritto interno* in *VI Studi per il XX anniversario dell'Assemblea costituente* 45 (1969). For an application of such theory *see* It Const. Court, 27 December 1973, No. 183 (*Frontini*), which stated the principle according to which the institutions of the (then) European Community do not have the power to violate neither the fundamental principles of the Italian legal system, nor any inalienable human rights, claiming their power to judge and possibly repair such a hypothetical violation. For a critique of the counter-limit theory, based on the assumption that the EU, as well as the communities that preceded it, would form a "true" independent legal system, common also to the founding Member States, *see* Ezio Perillo, *Noterelle sparse sulla teoria dei contro-limiti, sul Procuratore europeo, sulla Carta dei diritti fondamentali e la Convenzione europea dei diritti dell'uomo, e sullo Spazio di libertà, sicurezza e giustizia*, 53(5) Dir. com. e scambi int. 491 (2014). For Perillo, from the moment in which Member States give up part of their sovereign powers and confer new legislative or governmental responsibilities to the Union (or strengthen those it already had): "*... a precise limit is created on the autonomy of individual action of the Member States … any 'counter-limits' affecting the rules of the European Union cannot be subsequently reintroduced at national level through the case law formulated only in some Member States, because the competences in question have been finally and definitely transferred to the Union and its institutions*."

[35] Enucleated for the first time by the *BverfG*, 12.10.1993 – 2 BvR 2134/92 (so-called *Solange III*, *see* Ziller 2009). If the theory of counter-limits prevents the EU from "invading" the core of the constitutional order of its Member States, the *ultra vires* theory applies when the EU institutions "go beyond the boundaries of their competences."

the Member States"[36]), to set impassable limits to the principle of the primacy of EU law, aimed at protecting the fundamental constitutional values of the respective legal systems.[37] On the contrary, the Court of Justice has always firmly defended the principle according to which the validity of an EEC/EU measure, or its effects, within the jurisdiction of a Member State, cannot be called into question by the latter by alleging a conflict with fundamental rights codified by its own constitution, as this would imply the questioning of the "*legal basis of the Community itself*."[38]

In practice, however, the radicalism of the positions of the national constitutional courts has been considerably "softened" by a series of concomitant factors; firstly, the limitation of the inviolability of national constitutions only to some fundamental constitutional values;[39] secondly, the conviction that the power to "filter" the application of EU law in light of national constitutional principles, albeit a monopoly of the constitutional courts (as both the German Constitutional Court[40]

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[36] Under the theory of "constitutional identity," the constitutional identity of a Member State encompasses the fundamental principles and values of national constitutions, in particular the protection of human rights and what is part of it cannot be transferred to the EU. This theory marks the boundary of the powers that can be transferred to (and exercised by) the EU, while at the same time acting as a counter-limit to the potential violation of the inalienable constitutional values of a Member State. *See BverfG*, 14.01.2014 – 2 BvR 2728/13 (*Gauweiler-OMT*); *BVerfG*, 15.12.2015 – 2 BvR 2735/14 (*Identitätskontrolle*).

[37] Some constitutional courts have ruled on the constitutionality of international treaties relating to the process of European integration: this is the case of the Spanish Constitutional Court, with the declaration of 13 December 2004, No. 1 on the treaty adopting a Constitution for Europe. Other courts have ruled in the context of "ordinary" proceedings, in which the correct application of European law was at stake: in this sense *see, ex multis*, the decisions of the *Conseil constitutionnel*, respectively, of 10 June 2004, 2004-496 DC (*Economie numerique*) and of 27 July 2006, 2006-540 DC (*Droit d'auteur*). For further information *see VI Handbuch Ius Publicum Europaeum* (Armin von Bogdandy et al. eds., 2016); Salvatore Aloisio, *Sul ruolo della Corte Costituzionale nel processo costituzionale europeo* in *La Corte Costituzionale e le Corti d'Europa – Atti del seminario svoltosi a Copanello (CZ) il 31 maggio – 1 giugno 2002* 375 (Paolo Falzea et al. eds., 2003); Jan Komárek, *The Place of Constitutional Courts in the EU*, 9(3) Eur. Const. L. Rev. 420, 433 (2013).

[38] Court of Justice, *Internationale Handelsgesellschaft*, Case C-11/70, 17 December 1970, para. 3. In the famous decisions *Van Gend & Loos* (1963) and *Costa ENEL* (1964), the Court of Justice had stated that the European treaties are *sui generis*, which imply the supremacy of European law over all the internal law of the Member States, including constitutional law.

[39] *See*, in particular, *BVerfG*, 15.12.2015 – 2 BvR 2735/14 (*Identitätskontrolle*), para. 41, where it is established that the primacy of EU law is limited by the constitutional identity of the Basic Law which, pursuant to Art. 23, sec. 1, sentence 3, in conjunction with Art. 79, sec. 3 GG, resists and prevails over any constitutional amendment and the process of European integration itself.

[40] In the *Lissabon-Urteil* (*BVerfG*, 30.06.2009 – 2 BvE 2/08, in particular at para. 241, the prerogative of the Federal Constitutional Court to review the *ultra vires* acts of the European institutions and to assess any possible violation of the constitutional identity is deemed functional to preserve the "vitality" of the European legal order and at the same time to ensure the application of constitutional law not conflicting with it; *see also BVerfG*, 06.07.2010 – 2 BvR 2661/06 (*Honeywell*), paras. 66 and 68; *BVerfG*, 15.12.2015 – 2 BvR 2735/14 (*Identitätskontrolle*), para. 43. The monopoly of the Federal Constitutional Court also serves to prevent individual national courts from "disapplying" or ignoring EU law, because this would jeopardize the very integrity of EU law.

and the Italian Constitutional Court, for example in the Taricco case,[41] reiterated on several occasions), must be exercised with self-restraint, as an *extrema ratio*,[42] in order to minimize cases of truly irreconcilable conflict between EU law and national constitutional rights;[43] thirdly, the need for the "disapplication" of an EU provision or act to take place only after the Court of Justice has had the opportunity to rule on the issue;[44] fourthly, the idea, which has recently emerged, that it would be the European treaties themselves that protect the constitutional identity of the Member States, as both national constitutions and such treaties are based on the sharing of identical founding values, making it difficult to hypothesize a violation of the former that does not simultaneously integrate a violation of the latter.[45]

This would result in "converting" the power of scrutiny over EU law, in light of the fundamental constitutional principles, from a national "act of rebellion" to no more than an obligation arising from the treaties, the observance of which should be directly guaranteed by the Court of Justice itself (on the basis of Art. 4, para. 2 of the TEU), with all due respect to the monopoly of the national constitutional courts.[46]

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41 *See* It. Const. Court, 26 January 2017, 24/2017 (*Taricco*), para. 6 and, previously, It. Const. Court 13 July 2007, No. 284, 22 October 2014, No. 238 and 28 December 2006, No. 454.

42 For the Czech Constitutional Court, for example, the potential clashes between EU law and the Czech constitutional order would be "exceptional" and "highly improbable" (*Ústavní soud*, judgment of 3 May 2006, 66/04, para. 53) and the revision of the European *ultra vires* acts according to the German approach would be more of a "warning," but should never be used in practice. For comments, *see* Jan Komárek, *Playing with Matches: The Czech Constitutional Court's Ultra Vires Revolution*, Verfassungsblog, 22 February 2012 (Nov. 2, 2020), available at https://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/; Takis Tridimas, *The ECJ and the National Courts: Dialogue, Cooperation, and Instability* in *The Oxford Handbook of European Union Law* 421 (Damian Chalmers & Anthony Arnull eds., 2015).

43 Also because of the similarity (if not identity) of the values on which both the EU treaties and national constitutions are based. *See BVerfG*, 06.07.2010 – 2 BvR 2661/06 (*Honeywell*), para. 57, which calls for the use "… *with moderation and openness to European law*" of the "national" powers to review European acts.

44 *See BVerfG*, 06.07.2010 – 2 BvR 2661/06 (*Honeywell*), para. 60; *BVerfG*, 15.12.2015 – 2 BvR 2735/14 (*Identitätskontrolle*), para. 46. Principle disregarded by the *BVerfG* in the decision of 5 May 2020: it is indeed true that the German Constitutional Court had previously seized the CJEU with a request for preliminary ruling, but then, not agreeing with its response, it decided to arrogate to itself the right to scrutinize the validity of the conduct of an independent European institution, without involving the CJEU to, for example, solicit clarifications on the controversial issue of the application of the principle of proportionality, which the Italian Constitutional Court had conversely done, in the context of a different dispute, in the *Taricco* case (Court of Justice, *M.A.S. and M.B.*, Case C-42/17, 5 December 2017).

45 According to the Polish Constitutional Court, the notion of national identity would represent an equivalent of the notion of "constitutional identity in the primary law of the EU": Trybunał Konstytucyjny ruled along the same lines in its judgment on the Lisbon Treaty (on which *see* Oreste Pollicino, *Qualcosa è cambiato? La recente giurisprudenza delle Corti costituzionali dell'est* vis-à-vis *il processo di integrazione europea*, 17(4) Il diritto dell'Unione Europea 765 (2012)).

46 On these issues, *see* Mónica Claes, *National Identity: Trump Card or up for Negotiation?* in *National Constitutional Identity and European Integration* 109 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013), according to whom, by virtue of Art. 4, para. 2 of the TEU, it would be up to the CJEU to decide whether or not the claims of a Member State based on its own Constitution should be classified

Through a rather questionable as well as unilateral drawing of the economic policy choices of the Member States limited to the narrow circle of the fundamental constitutional rights, intended as an unavoidable *limes* to the interference of European law, the verdict of Karlsruhe of 5 May 2020 seems to have swept away a balance that had been laboriously achieved over the years in the relations between the CJEU and national judges, ending up betraying the spirit of loyal collaboration,[47] codified under Art. 4, para. 3 of the TEU (which the *BverfG* itself referred to on several occasions[48]), which obliges Member States to refrain from any measures that could jeopardize the achievement of EU objectives. The German judges also seem to have completely obliterated the dimension of law as a "social science," which arose: "*... on the basis of a conscious effort to understand society or, better, human societies*."[49] Indeed, such heavy criticism of the ECB's action, in the midst of an unprecedented economic crisis in European and world history, risks (should the *Bundesbank* really quit the PSPP program and, consequently, the Pandemic Emergency Purchase Program or "PEPP", which shares the structure and purpose of the former[50]) to have devastating economic and social effects for all member countries, in particular for those (including Italy) which are most affected by the pandemic.

In addition to the inopportune timing, the *BverfG*'s decision is also striking for its profound hypocrisy. Indeed, the problems of lack of "democratic" legitimacy of European institutions and, in particular, of the ECB (which, shielding behind the principle of independence, has in fact held the reins and directed the monetary and economic policy of the eurozone in the last decade), are certainly nothing new;

as "matters of EU law." However, this outcome has been opposed by both the Italian Constitutional Court (*see* It. Const. Court, 26 January 2017, 24/2017 (*Taricco*), para. 6) and the German Constitutional Court, which, in the *Gauweiler-OMT – BverfG* case (14.01.2014 – 2 BvR 2728/13, para. 29), underlined the persistent difference between the notion of "constitutional identity" enshrined in the European treaties and the notion enshrined in the German Constitution, and the difference between the scrutiny of the Federal Constitutional Court and the review conducted by CJEU pursuant to Art. 4, para. 2 of the TEU. For comments *see* Franz C. Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15(2) German L.J. 111, 123–124 (2014).

47 On which *see* Voir Constantinesco, *L'article 5 CEE, de la bonne foi à la loyauté communautaire* in *Du droit international au droit de l'integration: Liber amicorum Pierre Pescatore* 97, 108–109 (Francesco Capotorti et al. eds., 1987); Eleftheria Neframi, *La force intégrative du statut de l'Etat membre sur la fonction juridictionnelle* in *Le statut d'Etat membre de l'Union européenne: Quatorzième Journées Jean Monnet* 333, 334 (Laurent Potvin-Solis ed., 2018).

48 *See, e.g.*, *BVerfG*, 21.06.2016 – 2 BvR 2728/13 (*Gauweiler-OMT*), para. 140, in which it was established that the coordination between the protection of common fundamental values and the respect for national peculiarities passes only through the cooperation between the CJEU and national constitutional courts, without which the process of European integration would be at risk.

49 *See* Pietro Rossi, *Scienze Sociali* in *Il Enciclopedia delle Scienze Sociali* (1997) (Nov. 2, 2020), available at http://www.lasocietainclasse.it/letture/01.

50 The PEPP, in fact, launched by the ECB precisely to cope with the economic consequences of the pandemic, has in principle the same characteristics as the PPSP, and is even more "flexible," to the extent that it is released from the need to comply with the "capital key" criterion.

never, however, had the judges of Karlsruhe felt so strongly the need to stand as champions of the "democratic principle" as an unavoidable limit to the process of European integration (perhaps because, in previous instances, it was the German legal system that was the direct beneficiary of certain unlucky EU initiatives[51]).

4. A "Nationalistic" Approach to the Principle of Proportionality

Equally questionable and "forced" appears the reconstruction carried out by the Karlsruhe judges of the principle of proportionality, whose allegedly erroneous interpretation and application by the CJEU and the ECB have worked as a sort of workaround passkey to first escape the constraint of the decisions of the former and later claim the right to review, *on the merits*, the decisions of the latter.

By adopting, even in this case, a very uncooperative and pro-European approach, that principle is reconstructed not as a general principle of European law, nor is it interpreted in light of the Court of Justice's case law, – as it would have been logical to expect in the case of a review of the conduct of a European institution – but is rather intended "in the German style," in terms of *Verhältnismäßigkeitsgrundsatz*.[52] In other words, behind the criticisms of superficiality, lacunae and abstractness leveled at the judgment of the CJEU, what emerges is the conviction and the claim that the assessment of the existence of a proportionality between the objectives pursued by the PSP Program and the tools availed of should have been conducted according to German standards and criteria (which, however, are not always easy to isolate within the German doctrine and jurisprudence themselves[53]), these being only ones considered solid, reliable and probative.

Beyond the evident institutional "bullying," this approach does not take into account that the drafting style of the decisions of a supranational judicial body such as the CJEU cannot be the same as that of a national judge: the lean, concise and dry style of the CJEU's rulings partly derives from the impossibility of citing legal doctrine in their text to support the conclusions reached (unlike what happens for a national

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[51] Karlsruhe, for instance, did not take a similar stand on the ECB's decisions adopted in 2008 and 2011 to raise interest rates at a time when the European economy was sliding into a first and then a second recession, which turned out to have destabilizing effects, especially to some Southern European countries. For references *see* Roberto Cisotta, *Financial Stability and the Reconstruction of the EU Legal Order in the Aftermath of the Crisis* in European Central Bank, *From Monetary Union to Banking Union, on the Way to Capital Markets Union: New Opportunities for European Integration*, ECB Legal Conference 2015 (December 2015), at 283, 284 (Nov. 2, 2020), available at https://www.ecb.europa.eu/pub/pdf/other/frommonetaryuniontobankingunion201512.en.pdf.

[52] Galetta 2020, at 167.

[53] On the German standards of the principle of proportionality *see* Peter Lerche, *Übermass und Verfassungsrecht: zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismässigkeit und der Erforderlichkeit* (1961); Walter Leisner, *Der Abwägungsstaat*: *Verhältnismäßigkeit als Gerechtigkeit* (1997).

judge and for the German constitutional judge in particular).[54] On the other hand, the EU and the CJEU itself are the result of a mediation between different legal traditions and cultures, so that the principles "borrowed" from a given system and referred to by the CJEU must necessarily be adapted to the needs of an enlarged Union of States, thus acquiring their autonomy and becoming "general principles of EU law"; as such, they require independent interpretation and application with respect to national practices, also because they must be coordinated with the entire *acquis communautaire* and with the EU law provisions applicable in each specific case.

5. The Reactions and the Elapse of the Deadline of 5 August 2020

The "destabilizing" impact of the *Bundesverfassungsgericht*'s ruling obviously could not go unnoticed. In an unusual press release by the Directorate for Communication of the Court of Justice,[55] issued only three days after the *BverfG*'s ruling,[56] it was reiterated that a judgment issued by the CJEU within a preliminary ruling's procedure binds the national judge in respect of the decision to be adopted in the main "ordinary" proceedings and that, in order not to endanger the uniform interpretation and application of EU law, *only the Court of Justice had jurisdiction* to declare invalid or without effect the act(s) of a European institution to the extent it breaches EU law; entrusting national judicial authorities with the task and power of deciding the issue of its (their) validity would jeopardize the unity of the EU legal system and legal certainty.[57] For its part, the European Commission, through an official statement from its President,[58] issued in response to the decision of the *BverfG*, reaffirmed three fundamental principles: that the monetary policy of the Union is a matter of *exclusive competence* of the ECB; that European law takes precedence over national law; that the judgments of the Court of Justice are binding on all judicial authorities of the Member States. Above all, he envisaged the possible opening of an infringement procedure against Germany, if the

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54 Galetta 2020, at 169.

55 This was unusual because, as mentioned in the statement itself: "*The departments of the institution never comment on a judgment of a national court*."

56 *See* Press Release No. 58/20 – Luxembourg, 8 May 2020.

57 In a public statement, shared with the *Politico* magazine, M. van der Woude, President of the General Court of the European Union, qualified the decision of the German Constitutional Court as undue national interference in the functioning mechanisms of the European legal system, potentially capable of dismantling the rule of law in EU and to determine a "disguised" exit from the EU, without the formal application of the withdrawal clause provided for by Art. 50 of the TEU. Hans von der Burchard, *German Court Ruling Could Tear EU Apart, Warns Senior Judge*, POLITICO, 6 May 2020 (Nov. 2, 2020), available at https://www.politico.com/news/2020/06/05/german-court-ruling-could-tear-eu-apart-warns-senior-judge-304373.

58 *See* the Statement by President von der Leyen of 10 May 2020.

implementation of the Karlsruhe verdict would result in a violation of European law.[59] In order to examine the content and effects of the *BverfG*'s decision, the ECB convened an urgent Governing Council's meeting, following which all the Karlsruhe complaints were "returned to the sender." In fact, President Lagarde stated not only that the ECB is accountable only to the European Parliament and operates under the sole jurisdiction of the CJEU and that the ruling of the German Constitutional Court is directed solely at the German parliament and government, but, above all, that it will do "whatever it takes" within its mandate to support the economic recovery of the Eurozone and pursue price stability: in short, Karlsruhe was completely ignored.[60] These words were followed by facts: with the decision of 4 June 2020,[61] the volume of security purchases under the PEPP went from 750 billion Euro to 1.350 billion Euro, with duration extended to June 2021 and renewal of the purchase of state' bonds maturing at least until the end of 2022 (in other words, an almost unlimited and perpetual support to the government bond market).

However, not only the European institutions, but the entire political, economic and legal world of the Eurozone went into fibrillation after the Karlsruhe verdict (as evidenced by the reactions of approval or criticism, at all levels[62]) and, above all, so did

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[59] The prospect of an imminent infringement procedure has however been fading, both because of the need to make all the appropriate assessments, and because it would not in any case lead to the annulment of the Karlsruhe verdict. For comments on a possible infringement action, *see* Daniel Sarmiento, *An Infringement Action Against Germany After its Constitutional Court's Ruling in Weiss? The Long Term and the Short Term*, EU Law Live, 12 May 2020 (Nov. 2, 2020), available 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/. For more references *see* Maciej Taborowski, *Infringement Proceedings and Non-Compliant National Courts*, 49(6) C.M.L. Rev. 1881, 1911 (2012).

[60] The concept was reiterated by President Lagarde during a subsequent hearing in the European Parliament, where she affirmed that, despite being willing, when asked, to give all the necessary support to a member of the Governing Council, "*... we will never negotiate on our independence*" and that the ruling only concerns the PSPP – already "validated" by the 2018 CJEU's ruling, – and not the PEPP. Along the same lines, *see* the statements issued to "*La Repubblica*" by Isabel Schnabel, member of the ECB Executive Board, on 11 May 2020, according to whom: "*... we are undeterred in our willingness and ability to act. We will continue to conduct the PSPP and the pandemic emergency purchase program (PEPP), as well as our other monetary policy measures*"; as well as the statement by Philip R. Lane to *El Pais* on 18 May 2020, where he affirmed that: "*… we remain focused on our mandate … We are an independent central bank*." According to Pablo H. de Cos, Chair of the ESRB Advisory Technical Committee, "*The decision (from the German court) is not, and will not be affecting ECB decisions at all*." Jesús Aguado & Emma Pinedo, *ECB's de Cos Says German Court Ruling on Debt Buying Won't Affect Policy*, Reuters, 1 July 2020 (Nov. 2, 2020), available at https://www.reuters.com/article/us-ecb-policy-de-cos-idUSKBN2425E1.

[61] ECB Governing Council's meeting – Monetary policy decisions – 4 June 2020.

[62] For example, Polish Prime Minister Mateusz Morawiecki hailed the Karlsruhe ruling as "*... one of the most important rulings in the history of the European Union*"; for Clemens Fuest, Director of the IFO Economic Institute of Munich, the "disapplication" of the previous decision of the CJEU by the German Court: "*... reads like a declaration of war*." The Governor of the Bank of France Villeroy and the French Minister of Economy Le Maire spoke of a "*Useless and dangerous attack*." Claudio Paudice, *Reazione francese. Parigi durissima contro l'offensiva tedesca alla Bce*, HuffPost, 6 May 2020 (Nov. 2, 2020), available at https://www.huffingtonpost.it/entry/reazione-francese-parigi-durissima-contro-loffensiva-tedesca-alla-bce_it_5eb2c360c5b6114948120daf. For Erik Nielsen, chief economist at UniCredit, who expressed himself a few days before the decision, in the event that Constitutional Court would censure the

Germany, directly invested with the dangerous "conflict of attribution" between the European institutions and its highest constitutional bodies.[63] The *Bundestag*, called into question by the decision, set up a commission composed of eminent German jurists and economists to tackle the institutional impasse, in particular to understand how to fulfil the *BverfG*'s decision (unanimously considered *unavoidable)* without "embarrassing" the ECB (as would happen by forcing it to submit to the *diktats* of a national judge, with the consequent risk of creating a dangerous precedent), while at the same time without violating the independence of the *Bundesbank* which, by constitutional dictates, cannot receive indications from the German government and parliament.

The "helping hand" came from the ECB, which, after declaring its willingness to provide the German authorities with all the relevant documents[64] (many of which already filed with the CJEU on the occasion of the previous preliminary ruling procedure), – an action that did not however amount, to "issuing a new decision" as requested by Karlsruhe, – published a very detailed report of the Governing Council's meeting of 3–4 June 2020 (formally concerning the decisions relating to the EPP Program, though packed with references to the PSPP launched by Draghi[65]), aimed at *indirectly* responding to the request for "clarification" raised by Karlsruhe (as can be seen by the significant attention dedicated to the issue of proportionality[66]). The *Bundestag* and the German government were quick to state that, for them,

ECB's action, as later happened, "*... a chaos of unprecedented proportions will fall on Europe*." Elena Dal Maso, *Unicredit: la Corte tedesca domani può cambiare il destino dell'Europa*, Milano Finanza, 4 May 2020 (Nov. 2, 2020), available at http://app.milanofinanza.it/news/unicredit-la-corte-tedesca-domani-puo-cambiare-il-destino-dell-europa-202005040951068909.

63 For Wolfgang Schäuble, President of the *Bundestag*, the verdict would be "difficult to refute" (because independent institutions which are not democratically legitimized – and "controlled" – (such as the ECB) must remain strictly within the limits of their mandate), even if it risks to create a dangerous precedent which, if followed by other constitutional courts, could threaten the very survival of the Eurozone. Chancellor Merkel, in an interview given to 6 European newspapers (*The Guardian*, *Süddeutsche Zeitung*, *Le Monde*, *La Vanguardia*, *La Stampa*, *Polityka*), while hoping for a composition of the clash, did not fail to affirm that the essence of the European project lies in the transfer of powers to the EU by Member States and that, at present, a Member State will always be able to claim particular powers unless all powers are transferred to the European institutions: "*…which is surely not going to happen*." Philip Oltermann, *'For Europe to Survive, its Economy Needs to Survive': Angela Merkel Interview in Full*, The Guardian, 26 June 2020 (Nov. 2, 2020), available at https://www.theguardian.com/world/2020/jun/26/for-europe-survive-economy-needs-survive-angela-merkel-interview-in-full.

64 Balazs Koranyi & Francesco Canepa, *ECB to Release Documents to Defuse German Court Challenge*, Reuters, 24 June 2020 (Nov. 2, 2020), available at https://www.reuters.com/article/uk-ecb-policy-court-idUKKBN23V2VH: "*The European Central Bank agreed to give vital documents to German authorities to prove the proportionality of ECB policies, two sources said, in a step to defuse a challenge threatening to undermine its powers to keep the euro zone together*."

65 Where it is stated that extensive literature and factual evidence have shown that the PSPP has had a positive impact on the macroeconomic results and on the overall economic situation of the Euro area, confirming the effectiveness of the program in pursuing an increase in inflation.

66 With expressions such as "*... the PEPP and the APP were proportionate measures under the current conditions for pursuing the price stability objective, with sufficient safeguards having been built into the design of these programs to limit potential adverse side effects, including risks of fiscal dominance, and to address the monetary financing prohibition*."

the documentation was satisfactory,[67] passing the ball, for the final assessment of proportionality, to the *Bundesbank*[68] (which, ironically, had been, during Draghi's tenure, the most bitter antagonist of the PSP Program). President Weidmann, likely induced to milder advice by the pressure received to settle the conflict, finally declared that the documentation provided met the requirements requested by Karlsruhe, thus putting an end to the dispute.

In short, a "pragmatic, sensible"[69] and "elegant"[70] way out was found (even though, for some, the ECB has not answered at all[71] and the whole procedure has been a farce[72]); the feeling, however, is that the problem, far from having been definitively resolved, has simply been postponed.

6. Future Scenarios

Undoubtedly, the decision of the German Constitutional Court calls into question a multiplicity of issues relating to the process of European integration, from a legal point of view (the relationship between national constitutions and European treaties,[73] as well as the relationship between the Court of Justice and national

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67 *See* German Lawmakers Conclude ECB Has Met Court Requirement on Stimulus: Draft Document, US News Money, 29 June 2020 (Nov. 2, 2020), available at https://money.usnews.com/investing/news/articles/2020-06-29/german-lawmakers-conclude-ecb-has-met-court-requirement-on-stimulus-draft-document. According to Minister of Finance Olaf Scholz, who sent directly to Karlsruhe a positive opinion that the *Bundesbank* continues to participate in the acquisitions of Eurosystem bonds, the proportionality test of the ECB's performance had been successfully passed.

68 As confirmed by a statement by the German Constitutional Court, according to which it was eventually for the *Bundesbank* to decide, independently, if the Karlsruhe verdict could be considered fulfilled as to the compliance with the principle of proportionality, after the relevant documentation was sent by the ECB: "*The Federal Constitutional Court is no longer involved*" (Judge Peter Huber at the FAZ). *See* Bundesbank Must Decide on ECB Bond Purchases, Top Court Judge Says, Reuters, 28 June 2020 (Nov. 2, 2020), available at https://www.reuters.com/article/uk-germany-court-ecb/bundesbank-must-decide-on-ecb-bond-purchases-top-court-judge-says-idUKKBN23Z0U9.

69 Olli Rehn, Governor of the Finnish Central Bank to the German newspaper *Handelsblatt*. Governor Olli Rehn: Interview in Handelsblatt, Suomen Pankki, 1 July 2020 (Nov. 2, 2020), available at https://www.suomenpankki.fi/fi/media-ja-julkaisut/puheet-ja-haastattelut/2020/governor-olli-rehn-interview-in-handelsblatt-1-july-2020/.

70 Carsten Brzeski, economist of ING-Bank.

71 Christian Siedenbiedel, *EZB-Rat gibt Weg für Kompromiss mit Verfassungsgericht frei*, Frankfurter Allgemeine Zeitung, 25 June 2020 (Nov. 2, 2020), available at https://www.faz.net/aktuell/wirtschaft/ezb-rat-gibt-weg-fuer-kompromiss-mit-verfassungsgericht-frei-16832513.html, according to whom the ECB allegedly: "*… badly ignored the sentence*."

72 Jürgen Stark, former chief economist of the ECB at the *Frankfurter Allgemeine Zeitung*, 26 July 2020, according to whom, given the short period of time between the arrival of the documentation and the formation of the positive opinion, no actual examination has ever been carried out by the government and the *Bundestag.* Along the same lines, *see* Prof. Murswiek, legal counsel representing one of the successful applicants on 5 May 2020 (*see infra* note 86).

73 For references *see* Enzo Cannizzaro, *EU Law and National Constitution: A Pluralist Constitution for a Pluralist Legal Order?: National Report – Italy* in 1 *F.I.D.E. XX Congress, London, 30 October – 2 November 2002* 134 (Gordon Slynn & Mads T. Andenæs eds., 2003).

judicial authorities), a political-institutional point of view (the principle of the ECB's independence and the plausibility of an allocation of competences between the EU and the Member States based on the distinction between "monetary" and "economic" policies) and from an economic perspective (the very survival of the Eurozone). More generally, it resurrects the age-old question of the *purely intergovernmental* or *truly supranational nature* of the complex European architecture. Although questionable for its timing and methods (this being far from the best time to proceed with a rethinking of such complex balances, with the EU facing the most serious health and economic crisis in its history on one hand and Brexit on the other, and facing geopolitical tensions on various fronts, including the relationship between the USA and China, the conflict between Greece and Turkey, etc.). The decision, nevertheless, has the merit of having brought back to the center of the debate the most decisive (and undoubtedly most thorny) issue concerningthe European integration process, the solution of which, too often postponed due to opportunism, conflicts of interests or "quiet living," is perhaps no longerdeferrable.

The first problem is the question of independence of the ECB.[74] The "classic" paradigm, which emerged from the collapse of the Bretton Woods system and the need to anchor prices during the Great Inflation of the 1970s, has now been shattered.[75] When it arose, it was mainly aimed at removing the determination and control of monetary policy from the grip of politicians, excessively conditioned by short-term concerns (strengthening consensus through policies aimed at full employment, at the expense of containing inflation). The independence of central banks then had the purpose of "protecting" them from the influence and interference of the legislative and executive powers, giving them a status aking to that of the judiciary, in order to allow them to set monetary policies in a "counter-majority" and long-term perspective, so as to establish a permanent climate of confidence in monetary stability. The main goal was to keep inflation low. Over the years, however, the need to address new and different priorities (low economic growth, unemployment, deflation, instability of the financial system, poor success of governmental fiscal initiatives) has seen an exponential growth of their interventionism (with significant repercussions to the

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[74] On this issue *see* René Smits, *The European Central Bank's Independence and Its Relations with Economic Policy Makers*, 31(6) Fordham Int'l L.J. 1614, 1624 (2017); Matthias Goldmann, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, 15(2) German L.J. 265 (2014); Stefanie Egidy, *Judicial Review of Central Bank Action: Can Europe Learn from the United States?* in European Central Bank, *Building Bridges: Central Banking Law in an Interconnected World*, ECB Legal Conference 2019 (December 2019), at 53 (Nov. 2, 2020), available at https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf?258d648ffcf1be39f9d927e5c13f393f; Lars Bay Larsen, *Legal Bridges over Troubled Waters? Standard of Review of ECB Decisions by EU Courts* in *Id.* at 47; Chiara Zilioli, *The Standard of Review of Central Banks Decision: An Introduction* in *Id.* at 23.

[75] Adam Tooze, *The Death of the Central Bank Myth*, Foreign Policy, 13 May 2020 (Nov. 2, 2020), available at https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/.

level of prices and incentives, the public debt market, social redistribution, market competitiveness and so on),[76] which, however, was not matched by an increase in their "democratic legitimacy." Central banks are the true "demiurges" of the economic system, but they are not-elected bodies, removed from any control or supervision, *on the merits*, of their action.[77]

The question posed by Karlsruhe is all here: if European economic policy is, *de facto*, determined by the ECB, not elected and not controlled by any higher authority, what is the point of talking about "*sovereignty that belongs to the people*," who exercise it in the forms provided for by national constitutions? To "normalize" this situation, sporadic actions to increase the transparency of its decisions will not be satisfactory. It would be necessary to start considering a substantial reform of the treaties (amending, to begin with, Art. 130 of the TFEU), to lay the foundation for a "financial constitution," with the introduction of mechanisms capable of democratically legitimizing the ECB (a different role of the European Parliament, the possible creation of an EU Finance Minister, etc.).

With this, we come to the perhaps most challenging question raised (indirectly) by the Karlsruhe judges: what the EU wants to become "when it grows up." In the long term, lingering in the current institutional limbo seems no longer sustainable: either Member States opt for a real monetary union (which would, however, imply a "Copernican revolution" of the eurozone, with fiscal transfers, mutualisation of debt, common taxation, a central bank lender of last resort ...), or, at the opposite end, opt for an orderly and coordinated dismantling of the single currency, with the return to the pre-Maastricht situation (and, for individual states, to their respective monetary sovereignty).[78]

The first option appears, at present, to be illusory. Beyond the slogans about the "European dream and family," many Member States have mutually irreconcilable interests (and needs). There has been, since the time of Helmut Kohl,[79] a traditional German hostility towards any hypothesis of mutualisation of debt. On the other hand, it is undeniable that, at the moment, Member States need different monetary

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[76] As regards the ECB specifically, for example, the single supervisory mechanism created in 2013 has expanded its functions, giving it a sort of *implicit* mandate (because based on a forcibly expansive reading of Art. 127, para. 6 of the TFEU) for the pursuit of financial stability. In addition, through long-term refinancing operations (LTROs and TLTROs) and other securities purchase programs, launched from 2011 to stabilize the financial markets during the banking crisis that hit the eurozone, the ECB has been playing an increasingly important role in the allocation of credit.

[77] Unlike the Ministries of the Treasury, whose action in the fields of taxation and public spending is limited, conditioned and monitored by the respective parliaments, according to the principle of "no taxation without representation."

[78] *See* Marco Dani et al., *supra* note 1.

[79] Helmut Kohl had overcome the Germans' reluctance to abandoning the Deutsche Mark in favour of the Euro by promising that the ECB would never directly finance the public debts of Member States and that there would never be a mutualisation of debt.

policies.[80] After years of trade surplus and rates close to zero (if not negative), Germany and its satellite states need to inflate their economy, to reverse the negative yields for government bonds, savings deposits, pension funds, real estate and equity speculative bubbles; therefore, they'd need more stringent monetary rules and a self-restraint of purchases by the ECB. Conversely, countries such as France, Italy and Spain need more flexibility and an expansive policy from the ECB: high interest rates would mean, for these states, an explosion of public debt and even the risk of default.[81]

In this context, in the absence of an imminent (and completely unlikely) amendment of the treaties, what scenarios are on the horizon after the ruling of the German Federal Constitutional Court of 5 May 2020? Although the ECB-*Bundesbank* conflict has been, for the moment, "diplomatically" defused, the principle enshrined in the *BverfG*'s decision remains fully in force: the German constitutional bodies are called upon to constantly monitor the ECB's actions, and the *Bundesbank* has a sort of (indirect) veto power within the ECB, to be exercised (through the threat of an exit from the program) whenever those actions appear "disproportionate" or in conflict with the German Constitution: in short, timer for the explosion of the eurozone activated. A progressive alignment of the ECB to the "restrictive" positions invoked by Karlsruhe, with consequent compression of purcahse volumes, would be fatal for many states (including Italy), which would be forced, in order to remain in the Euro area, to resort to much more expensive forms of financing (placing their securities on the market at consistently higher rates, with relative harm to their public finances, or submitting to programs with heavy conditionality – *Troika à la grecque*, so to speak, – which could even contemplate debt restructuring, with unpredictable social effects); or, alternatively, to abandon the eurozone, with consequences that are difficult to imagine, in order to regain monetary sovereignty and use internal monetary leverage to proceed with expansive economic policies aimed at reviving their economy.

If, on the other hand, the ECB decides to continue undaunted on the path of unlimited purchase of public debt securities (i.e. at present the most probable

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[80] As recently stated by François Villeroy de Galhau, Governor of the Bank of France, on the occasion of an online speech at *France's Société d'économie politique*. Some Euro Zone Central Banks Need to Do More, Others Less: ECB's Villeroy, Reuters, 25 May 2020 (Nov. 2, 2020), available at https://www.reuters.com/article/us-ecb-policy-villeroy/some-euro-zone-central-banks-need-to-do-more-others-less-ecbs-villeroy-idUSKBN2311UG.

[81] Indeed, twenty years after the introduction of the single currency, the economic differences between Member States, which it was hoped would be reduced over time, have instead increased. This was recently highlighted by Klaas Knot, Governor of the Dutch Central Bank, during a HJ Schoo lecture "'Emerging from the Crisis Stronger Together' – How We Can Make Europe More Resilient, Prosperous and Sustainable," held in Amsterdam on 1 September 2020 (Nov. 2, 2020), available at https://www.bis.org/review/r200922c.pdf. According to Knot, the absence of an exchange rate between Euro countries proved to be an advantage for stronger economies (thanks to an increase in exports, an increase in trade surplus, higher operating profits for companies and the consequent increase in tax revenues for the state), but a disadvantage for weaker economies.

option, according to its most recent monetary policy decisions[82]), a future exit of the *Bundesbank* from the ECB's programs (after the disposal of the bonds already purchased) cannot be excluded, which would likely lead, in the long term,[83] to the break-up of the eurozone[84] and to the possible creation, even within a persistent single market, of two distinct monetary areas (on the one hand, Germany and satellite states with the "strong" Euro; on the other, France, Italy and "southern" states, with a "weak" Euro), among which the first thing to be abolished would be the free movement of capital,[85] which represents both the essence and the goal of a single currency; in any event, it would be the end of the Euro as we know it.

Finally, the question remains of how Karlsruhe will react to the umpteenth appeal filed by the successful claimants on 5 May, understandably dissatisfied with the turn taken by the Karlsruhe-ECB clash.[86] It is unlikely that the German Constitutional Court, after the agreement found by all the German constitutional bodies on the same "compromise solution," will be willing to question everything, having already declared that the last word on the passing or failing of the proportionality test would in any case belong to the *Bundesbank*.[87]

Anyway, Pandora's box has now been opened and it is perhaps only a matter of time for the Gordian knot of the unresolved relations between the European Union and the Member States to be finally untied.

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[82] *See* Christine Lagarde & Luis de Guindos, *Introductory Statement – Press Conference*, European Central Bank, 16 July 2020 (Nov. 2, 2020), available at https://www.ecb.europa.eu/press/pressconf/2020/html/ecb.is200716~3865f74bf8.en.html: "*We will never let capital key convergence that will take place at some stage impair the efficiency of the monetary policy that we have to deploy*."

[83] Because, in principle, in the short term, the purchase plan could continue with a takeover by the other central banks in the purchases made by the *Bundesbank*. But it is clear that a "*BuBa* exit" would be politically disruptive.

[84] During one of the many meetings that took place at the *Bundestag* after the ruling of 5 May 2020, answering the precise question posed by a M.P. on what would happen to the Euro if the *Bundesbank* were to withdraw from the ECB's public bond purchase programs, Prof. D. Meyer (Helmut-Schmidt-Universität, Universität der Bundeswehr in Hamburg) replied, *apertis verbis*, that the single currency would simply no longer exist.

[85] This is because the *Bundesbank* could not accept to suffer the effects of a monetary policy (i.e. accepting Euro circulated by other central banks) to which it remained extraneous, and would very likely proceed to regulate and/or limit the entry of capital fleeing from Southern European countries into Germany of, in order to avoid speculative bubbles and allow a rise in rates in Germany.

[86] The request, already submitted, for access to the documents (in relation to part of the documentation made by the ECB available to the *Bundestag*, the government and the *Bundesbank* by the ECB, but classified for the applicants), will probably be followed by an application for an executive order of the decision of 5 May (*Vollstreckungsanordnung*). As stated on several occasions by Prof. D. Murswiek, legal counsel representing one of the applicants, no proportionality test according to the parameters indicated by the Federal Constitutional Court has ever actually been carried out by the ECB. According to Murswiek, in the documentation sent by the ECB there is no quantification, or even an approximate indication, of the order of magnitude of the advantages and disadvantages of the PSP Program. In the absence of any quantification, no real and actual weighting of the proportionality of the ECB's action could be possibly carried out.

[87] *See supra* note 68, statement by Judge P. Huber, according to whom: "*The Federal Constitutional Court is no longer involved*."

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Information about the author

Albert Henke (Milan, Italy) – Aggregate Professor of Transnational Commercial Litigation and International Commercial and Investment Arbitration, University of Milan (7 Via Festa del Perdono, Milano, 20122, Italy; e-mail: Albert.Henke@unimi.it).