

The *Bundesverfassungsgericht*'s Glaring and Deliberate Breaches of EU Law Based on 'Unintelligible' and 'Arbitrary' Grounds

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The authors believe that the judgment of the German Federal Constitutional Court contains serious breaches of EU law and is manifestly erroneous. The German judges refuse to apply the CJEU's judgment and arrogate the power to assess the legality of European Central Bank (ECB) decisions and to review the reasoning of the CJEU, which they qualify as being 'unintelligible and arbitrary' for the sole purpose of declaring it 'ultra vires'. They use the principle of proportionality in a legally incorrect way, ignoring the difference in scope between the latter and the principle of conferral. They make highly questionable use of the principle of democracy and of economic analysis to assess the merits of ECB decisions. A careful analysis of the judgment leads us to wish for the initiation of an infringement procedure.

Keywords: Breach of EU law by the judiciary conferral, democratic principle, dialogue between courts, EU competences, infringement procedure, manifest error, primacy, proportionality, ultra vires

The *Bundesverfassungsgericht* (Federal Constitutional Court – *BVerfG*), in its judgment of 5 May 2020,¹ declared the CJEU's judgment of December 2018 in *Weiss*² unlawful on the grounds that, by limiting itself to an examination of the manifest error of assessment of the decisions of the European Central Bank (ECB), the Court had exceeded the limits of its jurisdiction (acted ultra vires).

Scholarship of all national origins immediately discussed the judgment, focusing mainly on its consequences for the ECB's action and on the challenge to the primacy of EU law. A relatively small number of commentators, mainly German, immediately pointed out the obvious shortcomings of the reasoning from the point of view of EU law and of German law. Now that the danger of immediate negative consequences for the ECB's action has been overcome, it is all the more important to understand that the reasoning followed by the judges of the

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¹ *BVerfG*, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, [BVerfG.de/e/rs20200505_2bvr085915.html](https://www.bverfgericht.de/e/rs20200505_2bvr085915.html)

² CJEU 11 Dec. 2018, *Weiss*, C-493/17, ECLI:EU:C:2018:1000.

Second Chamber (*Zweiter Senat*) in opposing the CJEU does not hold water: it is based on obvious logical legal errors and on arguments that are essentially more than questionable. Commentators accustomed to German constitutional case-law, even if they were not surprised by the tenor of the arguments used, were shocked, and this is our case, by the poor quality of these reasonings as well as by the obvious desire to clash with the Luxembourg Court at a particularly ill-chosen time, in the midst of the Covid-19 pandemic.

To fully understand the 5 May judgment, one has to know the intellectual mind-set of the German constitutionalist scholarship and the *BVerfG*. And it is precisely in the light of this mind-set that the manifest errors of reasoning relating in particular to the principles of conferral and proportionality are egregious, just as the reasonings of the judges in matters of democracy and economic analysis are unconvincing.

1 THE WEISS CASE AND THE JUDGMENT OF 5 MAY 2020

1.1 WEISS ET AL V. BCE

The judgment of 5 May 2020 is the latest decision on a series of appeals brought in 2015 and 2016 by numerous German savers as well as practising lawyers and Members of Parliament, including the now famous Member of the Federal Parliament [*Bundestag*] Peter Gauweiler, who were joined in the proceedings.³ The appellants asked the *BVerfG* to declare unlawful the decisions of the ECB establishing and implementing, from 2015 onwards, the *Public Sector Purchase Programme* (PSPP) for the purchase of government bonds on secondary markets by the European System of Central Banks (ESCB) in order to meet the liquidity needs of euro area economies. The appeals concerned:

various decisions of the ECB, the participation of the German Central Bank [*Bundesbank*] in the implementation of those decisions or its alleged failure to act with regard to those decisions and the alleged failure of the Federal Government and the [*Bundestag*] to act in respect of that participation and those decisions.⁴

According to the applicants, those decisions went beyond the competences conferred on the ECB by the Treaties: they were ultra vires ‘inasmuch as (1) they fail to observe the division of competences between the European Union and the Member States [...] they do not fall within the ECB’s mandate [...] and (2) they infringe Article 123 TFEU’.⁵ They also argued that these decisions breached the

³ 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.

⁴ See the summary of the CJEU in *Weiss*, C-493/17, paras 13–14.

⁵ *Ibid.*, para. 14.

constitutionally enshrined principle of democracy and thus undermined Germany's constitutional identity.

By order of 18 July 2017, the *BVerfG* suspended the proceedings and submitted five questions for a preliminary ruling⁶ stating that 'if Decision 2015/774 exceeds the mandate of the ECB or infringes Article 123 TFEU, it must uphold these various actions. The same applies if the rules on the sharing of losses stemming from that decision affect the budgetary powers of the [*Bundestag*]'. The first two questions related to the lawfulness of the ECB's decision in the light of the prohibition on debt financing in Article 123 TFEU. The third and fourth questions concerned whether the decisions did not exceed the ECB's monetary policy mandate (Articles 119 and 127(1) and (2) TFEU and Article 123(1) TFEU and Protocol (N° 4) on the ESCB and the ECB) and for that reason encroached on the competence of the Member States, and whether:

on the grounds that its volume and ongoing implementation for more than two years, as well as the economic policy effects stemming from it, call for a change in the assessment of the necessity and proportionality of the PSPP and thus, from a certain point in time, it exceeds the [ECB's] monetary policy mandate.

The fifth was whether the:

unlimited allocation of risks among the national central banks of the Eurosystem in the event of default on the obligations of central governments and assimilated issuers, which the decision in question may have introduced [infringes the prohibition on debt financing] and [the equality between Member States - Article 4(2) TEU], may make it necessary to recapitalise national central banks with budgetary resources.

In the third question, the Court was asked to state whether '[i]s the mandate of the ECB exceeded in particular as a result of the fact that': (a) on the basis of the volume of the PSPP [...] the Decision referred to [...] materially influences the refinancing terms of the Member States?; (b) in view of the improvement in the refinancing terms of the Member States referred to in (a) above and their effect on the commercial banks, the Decision referred [...] has not only indirect economic policy consequences but its objectively ascertainable effects suggest that an economic policy aim of the programme is at least of equal priority as the monetary policy aim? (c) on account of its powerful economic policy effects, the Decision referred to [...] infringes the principle of proportionality? (d) in the absence of a specific statement of reasons during the period of more than two years of implementation, it is not possible to examine whether the Decision referred to '[...] is still necessary and proportionate?'

The German Federal Government and the *Bundesbank* intervened in support of the ECB; the Commission, the ECB itself and the German Government, as well as

⁶ *Ibid.*, paras 15 and 16.

Finland, France, Greece, Italy and Portugal, also submitted observations, primarily to contest the admissibility of the questions referred. By its judgment of 11 December 2018, the Court of Justice gave its answer: in its view, the examination of the first four questions referred for a preliminary ruling had revealed no factor of such a kind as to affect the validity of the ECB's decisions and the fifth question was inadmissible. The judgment answers the four questions referred by grouping them by subject matter, as the Court often does: compliance by the ECB with the obligation to state reasons (paragraph section 29-44); the powers of the European System of Central Banks (ESCB) (Paragraph 46-52); the delimitation of the monetary policy of the Union (Paragraph 53-70) proportionality in relation to the objectives of the monetary policy (paragraph section 71-100); compliance with Article 123(1) TFEU (paragraph section 108-158) – in particular on the alleged equivalence between the PSPP and the acquisition of bonds on the primary markets, the alleged removal of the incentive for Member States in difficulty to conduct a sound fiscal policy, the holding of bonds until maturity and the acquisition of bonds with a negative yield to maturity.

1.2 THE FEDERAL CONSTITUTIONAL COURT'S JUDGMENT OF 5 MAY 2020

One year and five months after the Court of Justice's reply to the reference for a preliminary ruling, the *Zweiter Senat* delivered its final judgment. This is a fairly normal timespan for the German Constitutional Court. President Voßkuhle, whose term of office ended precisely on that date, admitted in several press interviews⁷ that the judgment had in fact been ready two months earlier, without making it clear to what extent the additional two months were due to technical reasons (perhaps linked to the preparation of the partial English translation of the text of the judgment) or to the fact that at the beginning of March the ECB was preparing to announce how it intended to respond to the financial consequences of the Covid-19 emergency. On the latter point, however, both President Voßkuhle and Judge-Rapporteur Huber stressed that judges do not take into account the political context in which they decide.⁸

To fully understand the judgment, one should read the text in German. Apart from being the only authentic version, it contains often peremptory formulations which are not always rendered in the English version. According to the syntax of the German language, the verb is normally placed at the end of the sentence, which weighs on the exposition of the reasoning. In addition, numerous references to scholarship and case-law are included between brackets in the German text of

⁷ Including one on the ARD television channel, 17 May: *Andreas Voßkuhle im Gespräch*, in 17 May 2020 SWR extra SWR Fernsehen, //www.ardmediathek.de/ard/video/swr-extra/andreas-vo-kuhle-im-gespraech/swrfernsehen/Y3JpZDovL3N3ci5kZS9hZXggbzEyNDEwNjI/ (accessed 20 May 2020).

⁸ Interviews of Justice Huber, published on 13 May 2018 by the *Frankfurter Allgemeine Zeitung* and of President Voßkuhle in an interview of the same date, published by *Die Zeit*, N° 21/2020.

the judgment. The reader, even if an experienced jurist with a perfect command of the German language, must reread almost every long sentence more than once. The English version is abbreviated because it omits references and sometimes certain passages of the text, all of which are essential for a proper understanding of the judges' reasoning. The length of the text is usual for a *BVerfG* judgment: one hundred and ten pages, thirty-four of which are devoted to the presentation of the arguments of the applicants and interveners and to quoting extracts from the CJEU judgment in the *Weiss* case.

It is the practice of the *BVerfG* to present the *Leitsätze* (maxims of the judgment, which refer to the relevant points of the grounds)⁹ before the actual judgment. The *Leitsätze* are useful for specialists, as they underline what the judges consider to be a specific contribution to their case-law. They may be confusing for the inexperienced reader as they are not a summary of the judgment. They often say little or nothing about the content of the operative part and are only a selection of the arguments developed in the reasons. In the present case, the *Leitsätze* highlight the main arguments in the grounds and the obligations incumbent on the German institutions. Four of them are devoted more specifically to Germany's participation in the EU as a *Staatenverbund* (see II C below), to the participation of German legislative bodies in the decision-making process of the EU institutions, to the need to leave the Member States sufficient room for manoeuvre in implementing their political choices in the economic, cultural and social fields and to the competence of the *BVerfG* to monitor compliance with Germany's constitutional identity in accordance with the principle of the *Europafreundlichkeit* [sic] (see II C below).

It should be noted that the *BVerfG* is composed of two Chambers (*Senat*), each composed of eight judges. The First Chamber is in principle competent to review the constitutionality of laws and the protection of fundamental rights on the basis of an appeal for unconstitutionality (*Verfassungsbeschwerde*). The Second Chamber is competent for disputes between federal institutions, between the Federation and the *Länder* and in a number of other matters, including those relating in particular to international law. It goes without saying that, as is the case in most courts composed of different formations, there are differences in the orientation of the jurisprudence of the two Chambers, which are well known to German scholarship.¹⁰ There is, however, no plenary assembly, so that one

⁹ V. *Motivation et justice constitutionnelle: le modèle allemand*, in *Nouveaux cahiers du Conseil constitutionnel*, 2017/2-3 (N° 55-56), at 2.

¹⁰ The differences of assessment between the Judges of the two chambers are clearly apparent in the interview given by former Justice Johannes Masing to the *Frankfurter Allgemeine Zeitung* on 16 July 2020, where, without explicitly criticizing the judgment, he argues that there may be different but equally legitimate approaches between courts and points to a contradiction between the judgment itself and the press statements made by members of the *Zweiter Senat*.

Chamber always decides on behalf of the entire Court. The judgment of 5 May 2020 was adopted by a majority of seven votes out of eight. The judge who voted against is in the habit of not publishing a separate opinion, unlike most of the judges of the *BVerfG*, and the reasons for her vote are therefore not known.

As stated above, the applicants requested the *BVerfG* to declare the ECB's decisions on the PSPP unlawful. On this point, the applications were dismissed: The Court acknowledges that it is not a judge of the legality of EU institutions', bodies', offices' and agencies' acts.

The applicants asked the *BVerfG* to condemn the *Bundestag* and the Federal Government, as well as the *Bundesbank*, for not having done everything possible to prevent the Governing Council of the ECB from taking the incriminated decisions. They also requested that the *BVerfG* issue injunctions requiring these institutions to take all necessary measures to thwart the ECB's action. Those requests were granted, albeit partly on different grounds from those put forward by the applicants.

Finally, the applicants requested the *BVerfG* to order the *Bundesbank* to stop purchasing securities on the secondary markets under the PSPP programme. The latter request was granted with, however, a period of grace. The *BVerfG* prohibited the *Bundesbank*, as an institution of the Federal Republic of Germany, from making such purchases unless the ECB had convincingly demonstrated within three months that the decisions taken under the PPSP programme complied with the principle of proportionality.

Moreover, as it appears from the grounds of the judgment, the judges of the *Zweiter Senat* refuse to apply the *Weiss* judgment of the CJEU of 11 December 2018 and on the contrary overrule it on the grounds that the Court, by limiting itself to verifying the manifest error in its examination of the decisions of the ECB, would have exceeded the limits of its competence (*ultra vires*). They thus put into effect a threat that had been implicitly contained in the case-law of the *Zweiter Senat* for at least a decade, if not more.

2 UNDERSTANDING THE JUDGMENT OF 5 MAY 2020: DOGMATIK, 'LIMITED INDIVIDUAL DELEGATION OF POWER', AND SOLANGE

Before commenting on the judgment of 5 May, it is useful to underline that it is the illustration of two typical obsessions of German public law scholarship (*Staatsrechtslehre*): *Dogmatik* and the German understanding of the principle of conferral (*Grundsatz der begrenzten Einzelermächtigung*). It is also necessary to recall the evolution of the *Solange* case-law relating to the primacy of EU law in Germany.

2.1 DOGMATIK AND PRAGMATISM

In German-speaking countries, *Dogmatik* refers to the exegetical examination of legal rules by which legal scholars and practitioners reconstruct the principles applicable to a given subject, with the primary objective of ensuring legal certainty and the predictability of court decisions. The principles are usually those identified by the most recognized scholarship – i.e., in Germany the prevalent scholarship – which is why the judgments of the *BVerfG* abound in references to, or even quotations from, scholarship. The method applied by German jurists is the legacy of the work of the *Pandektisten* of the nineteenth century, which led to the drafting of the German Civil Code, the *Bürgerliches Gesetzbuch* (*BGB*) of January 1900. *Dogmatik* is of fundamental importance for the first part of the code (*Erster Teil*), which sets out the general principles of civil law that apply to the interpretation of the *BGB* and its application by courts. On the model of this first part, German legal scholarship generally attempts to identify general principles, even in matters where there is no codification comparable to that of the *BGB*, particularly in administrative law. It may be noted that Italian legal scholarship also devotes considerable effort to the identification of principles – particularly in administrative law.

This method is different from that of French civil law scholarship, which traditionally did not go beyond a commentary on the provisions of the Civil Code of 1804 in the light of case-law, with a limited effort of theoretical reconstruction. As for traditional French administrative scholarship, it is traditionally limited to the reconstruction of the case-law of the *Conseil d'État*. This results among others, in a different conception of general principles of law, which are not a scholarly elaboration but tools for judicial adjudication.¹¹

Such indications about the methodology of public law, and in particular that of administrative law, would be of little relevance had it not been for the initial influence of the *Conseil d'État* on the procedure of the ECJ, first by the relevant provisions of the European Coal and Steel Community (ECSC) Treaty of 18 April 1951, drafted by Maurice Lagrange, member of the *Conseil d'État*, and by his opinions as first Advocate General at the Court of Justice from 4 December 1954 to 8 October 1968. It should be recalled that Lagrange concluded in *Costa v. Enel*, which, as is well known, enshrined the principle of primacy which the judgment we are commenting calls into question. The German Karl Roehmer, a former

¹¹ See in this connection the comparison between the general principles of law drawn up by the *Conseil d'Etat* (and the *Conseil constitutionnel*) and those drawn up by the CJEU: J. Ziller, *Hierarchy Norms: Hierarchy of Sources and General Principles in European Union Law*, in *Verfassung und Verwaltung in Europa – Festschrift für Jürgen Schwarze zum 70. Geburtstag* 334–352 (U. Becker, A. Hatje, M. Potacs & N. Wunderlich eds, Baden-Baden, Nomos 2014).

judge in Cologne, then lawyer in Berlin and Saarbrücken, was appointed Advocate General a few months after Lagrange and remained in office for twenty years; however, his opinions are hardly typical of the traditional *Staatsrechtslehre*'s *Dogmatik*. It should also be remembered that Community law came into being as supranational administrative law with the ECSC Treaty.¹²

In contrast to *Dogmatik* – a term that has no pejorative implication, unlike the word dogmatism – pragmatism does not have a good reputation in traditional German legal culture, whereas it is considered a positive value in the public law culture of other countries, such as France or the UK. In particular, Léon Duguit (1859–1928) introduced ‘legal pragmatism’ in Europe, which, according to him, is different from both the traditional French individualist doctrine and the German subjectivist doctrine.¹³ Duguit is particularly well known, including in Germany – notably with the thesis of Dieter Grimm, who was a judge in Karlsruhe from 1987 to 1999–¹⁴ for his doctrine of public service, influenced by his discussions with his colleague at the University of Bordeaux Émile Durkheim (1858–1917), one of the founders of modern sociology.

This reminder is particularly important in order to understand the teleological and functionalist approach of the CJEU case-law and the fact that the opposition between *Dogmatik* and pragmatism is an important and long-standing source of friction between, on the one hand, the case-law of the Court of Luxembourg (including the German judges and Advocates General) and the EU law scholarship (including in Germany) and, on the other hand, the traditional German legal scholarship and the *BVerfG*; this opposition explains, among other things, the conflict between the two courts in the *Weiss* case.

In the commented judgment, the judges of the *Zweiter Senat* dress up as *Dogmatik* a reasoning which is in fact particularly pragmatic and hardly corresponds to the criteria of legal logic. In order to demonstrate that the CJEU did not respect the ‘limited individual delegation of power’ for the interpretation of Union law conferred on it by Article 19 TEU, the Karlsruhe judges state that the reasoning of the Luxembourg judges is ‘no longer at all intelligible’ (*schlechterdings nicht mehr nachvollziehbar*) and therefore ‘objectively arbitrary’ (*objektiv willkürlich*) (paragraph 118 of the grounds). These are the terms set out in the *BVerfG* judgment of 21 June 2016 *Gauweiler* (see below II. C.) to justify *a contrario* its acceptance of the previous year’s judgment of the CJEU: without really explaining why, the judges of the *Zweiter Senat* stated in that judgment that there was no arbitrary interpretation of its own powers by the CJEU in that case.

¹² See P. Reuter, *La Communauté européenne du charbon et de l’acier*, LGDJ (1953).

¹³ L. Duguit, *Le pragmatisme juridique*, Paris, Éditions La Mémoire du Droit (2008).

¹⁴ V. D. Grimm, *Solidarität als Rechtsprinzip: Die Rechts – und Staatslehre Léon Duguits in ihrer Zeit* (Frankfurt, Athenaeum 1973).

When asked about the use of the terms ‘no longer at all intelligible’ and ‘objectively arbitrary’, the judge-rapporteur, Professor Peter M. Huber, in an interview with the *Frankfurter Allgemeine Zeitung* of 13 May 2020, said that ‘[such expressions] may seem harsh. But they are not, because they are the ones that allow the Federal Constitutional Court to carry out ultra vires review’. This comment for the general public says it all: the only important thing was to be able to counteract a presupposed excess of power by the CJEU; legal reasoning was only a tool for this purpose, whether or not in conformity with *Dogmatik*. Justice Huber added in the same interview that ‘the same criteria are used to distinguish the jurisdiction of the Federal Constitutional Court from that of the *Bundesgerichtshof* (Federal Supreme Court in civil, criminal and commercial matters) or the *Bundesverwaltungsgericht* (Federal Administrative Court)’. It could not be emphasized more clearly that the *Zweiter Senat* considers itself in the same (hierarchically superior) position vis-à-vis the Court of Justice of a Union of twenty-seven states as the Constitutional Court – on the basis of specific provisions of the Constitution and the Court Act – vis-à-vis the German supreme courts.

2.2 THE PRINCIPLE OF CONFERRAL, PRINCIPLE OF ‘LIMITED INDIVIDUAL DELEGATION OF POWER’

The principle of conferral is known in German as *Grundsatz der begrenzten Einzelermächtigung*, which can be translated literally as ‘principle of limited individual delegation of power’. In contrast to the expression ‘principle of conferral’, *principe d’attribution*, *principio di attribuzione*, the German wording, because of the addition of *begrenzt* (limited) and *einzel* (individual), suggests to non-specialists an extremely narrow interpretation that does not correspond to that of international treaty law, as German internationalists are well aware. Suffice it to recall Article 31 (1) of the 1969 Vienna Convention on the Law of Treaties on the ‘General Rule of Interpretation’: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in *their context and in the light of its object and purpose*’ (emphasis added).

It is an understatement to say that the ‘principle of limited individual delegation of power’ is a German obsession. In the judgment of 5 May, the words *begrenzte Einzelermächtigung* appear twenty-two times in the grounds of the judgment, and once in the *Leitsätze*. The word *Ermächtigung* also appears twice, in connection with the ‘individual delegation of power limited to the coordination of economic policies reserved to the Member States’ (paragraph 127 of the grounds), and (paragraph 163) in connection with the ‘delegation of power’ to the CJEU ‘of the task of ensuring that the law is observed in the interpretation and application of the Treaties’, with a reference to Article 19(1)(2) TEU. It should be noted that the

judges of the *Zweiter Senat* are accustomed to merging the issue of the competences of the Union with that of the powers of its institutions.

The authors of the Treaties of Paris and Rome, and then of Maastricht, as well as the EU lawyers of all countries, always knew that the European Communities and the EU were governed by the principle of conferral, a principle intrinsic to multilateral treaties establishing intergovernmental organizations; that seemed to go without saying. It was the governments of the German *Länder* who first referred to the ‘limited individual delegations of power’ granted to the EEC in the preparation of the Single European Act of 1986; it is clear that the German language wording particularly inspired them. After the *Länder*, it was then the constitutional law scholarship which took up this *Leitmotiv*, followed by many German representatives in Intergovernmental Conferences (ICG). Since then they have constantly insisted on the need to include in the Treaties an exhaustive and precise list of competences of the Communities and the Union, in order to counter the so-called phenomenon of ‘creeping extension of competences’ (*schleichende Kompetenzerweiterungen*) of which the Union institutions would have long been guilty, and to which the judgment of 5 May also refers in paragraph 156.

The reality of that phenomenon has never, in our view, been convincingly demonstrated. At the Congress of *International Federation of European Law* (FIDE) in 2016, one of the themes was precisely ‘Division of competences and regulatory powers between the European Union and the Member States’. As general rapporteur, one of the authors of this comment had at his disposal twenty-two national reports, including that of Germany. While many of the national reports referred to the recurrence of accusations of ‘creeping extension of competences’ in the political world, none of the national rapporteurs mentioned any documentation or scholarly writings based on solid studies that would support such an accusation.¹⁵ The report on the UK referred to the considerable work undertaken by British government in view of a possible referendum, with an official report explaining in detail that the extension of Community competences was (only) the consequence of treaty changes since the Single European Act of 1986.

2.3 THE EVOLUTION OF THE BVERFG’S CASE-LAW ON PRIMACY FROM SOLANGE TO WEISS

The reasoning behind the judgment of 5 May 2020, as we shall see, surprises specialist of the *BVerfG* jurisprudence by its logical weakness; it is however hardly

¹⁵ V. J. Ziller, *General Report*, in *Division of Competences and Regulatory Powers Between the EU and the Member States – FIDE Congress Proceedings* (J. Czuczai, P. Darák, P. Lánkos, M. Szabó, A. Zs. Varga dir., Budapest, Wolters Kluwer 2016), vol. 3, as well as the national reports.

surprising in substance for those who know how German constitutional judges have argued on European integration since the famous judgment on the ratification of the Maastricht Treaty of 1993¹⁶ and the judgment on the ratification of the Lisbon Treaty of 2009.¹⁷ Looking back on the development of this case-law, one may have the impression that the overruling of the CJEU by the judgment of 5 May 2020 was to some extent premeditated since at least the preliminary reference ruling of 18 July 2017 in *Weiss*, or even since that of 14 January 2014 in *Gauweiler*; it is therefore essential to retrace this development.

First, the *Solange* Doctrine (in German: ‘as long as’) should be briefly recalled. In short, according to this jurisprudential doctrine, the *BVerfG* accepted the principle of primacy (*Vorrang*) affirmed in *Costa v. Enel*, and considered that there was a presumption of compatibility of EU law with the German constitution as long as it was not shown that an EU norm was contrary to the fundamental rights protected by the Basic Law of 1949 (*Grundgesetz*, hereafter GG), or the so-called ‘eternity clause’ (*Ewigkeitsklausel*)¹⁸ of Article 79 (3) GG, which prohibits interfering with the division of the Federation into *Länder* and the participation of the *Länder* in federal legislation, the fundamental rights enshrined in Articles 1 to 19 and Article 20 GG.¹⁹ Let us note in passing that the word *Vorrang* appears only once in the judgment commented here, which is certainly no coincidence: it appears only as a reminder of the supremacy of the Constitution, which:

‘obliges the constitutional institutions to participate in the implementation of the [European] integration programme and to ensure that its limits are respected in its implementation and further development. They therefore have a permanent responsibility to ensure that the integration programme is respected by the institutions, bodies, offices and agencies of the European Union’ (paragraph 106).

The arrogance presumptuousness of this statement is (unintentionally) highlighted in the English version, which uses the term *supremacy* instead of the word *primacy* enshrined since the Treaty of Lisbon.

¹⁶ Judgment of 12 Oct. 1993, *BVerfGE* 89, 155. See C. Grewe, *L’arrêt de la Cour constitutionnelle allemande du 12 octobre 1993 sur le traité de Maastricht: l’Union européenne et les droits fondamentaux*, in *Revue universelle des droits de l’homme* 286 ff. (1993)

¹⁷ Judgment of 30 June 2009 2 BvE 2/08. See J. Ziller, *The German Constitutional Courts Friendliness Towards European Law*, 16(1) Eur. Pub. L. 53ff. (2010).

¹⁸ The term eternity is somewhat misleading, since Art. 146 GG would allow the Basic Law to be entirely replaced by a new constitutional text approved by referendum. See K. Rode, *Verfassungsidentität und Ewigkeitsgarantie: Anmerkungen zu einem Mythos der Deutschen Staatsrechtslehre* (Peter Lang, Berlin 2011).

¹⁹ (1) The Federal Republic of Germany is a democratic and social federal state. (2) 2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available. (Translation of the *Bundestag*).

In a judgment of 29 May 1974, known as *Solange I*,²⁰ the *BVerfG* declared itself competent to rule on a conflict between Community law and the German constitution and stated that the GG should prevail as long as a level of protection of fundamental rights equivalent to that of German constitutional law was not guaranteed by Community law. In a second judgment of 22 October 1986, known as *Solange II*,²¹ it reversed the burden of proof, without changing the principle. Since then it has not accepted to undertake judicial review as long as the applicant does not show that the protection of fundamental rights under EU law does not correspond to the protection guaranteed by the GG. In essence, therefore, this was an approach comparable to that of the Italian Constitutional Court with its *contro-limiti* (counter-theory).²² In the rare cases where the *BVerfG* has since then accepted the admissibility of a constitutional appeal based on the argument of non-compatibility with the GG, it rejected the appeal on merits, for instance in the *Bananenurteil* of 2000²³; or it has asked the German legislator to make better use of the margin of implementation left by EU law, as in the case of the European Arrest Warrant in 2005.²⁴

In its judgment of 12 October 1993 on the ratification of the Maastricht Treaty in *Brunner*,²⁵ the *BVerfG* added, while maintaining its *Solange* doctrine, and basing itself on the new wording of Article 23 GG, that its review would not be limited to the protection of fundamental constitutional rights and principles, but could include the extension of the Union's competences resulting from an amendment to the Treaties. Let us point out in this connection that, until reunification in 1990, Article 23 GG was devoted to the possibility of the various *Länder* (those of the East and Berlin) to join the Federal Republic of Germany (FRG). With a view to the ratification of the Maastricht Treaty the provision was replaced by paragraph 1 of the current Article 23 GG.²⁶ Until 2009 the *BVerfG* had also rejected appeals

²⁰ *BVerfGE* 37, 271.

²¹ *BVerfGE* 73, 339.

²² See D.-U. Galetta, *General Principles of EU Law as Evidence of the Development of a Common European Legal Thinking: the Example of the Proportionality Principle (from the Italian Perspective)*, in *Common European Legal Thinking Essays in Honour of Albrecht Weber* 221 ff. (H.-J. Blanke, P. Cruz Villalón, T. Klein & J. Ziller eds, Heidelberg, Springer 2016).

²³ *BVerfGE* 102, 147.

²⁴ *BVerfGE* 113, 273.

²⁵ *BVerfGE* 89, 155 of 12 Oct. 1993.

²⁶ With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union i.e., committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paras (2) and (3) of Art. 79. (Translation of the Bundestag).

concerning the review of the Union's competences. It is not well known, even in German legal literature, that the *BVerfG* rejected an appeal against the law ratifying the Treaty of Amsterdam in 1999, in application of a filtering procedure by a three-judge sub-committee which does not require the reasons for the decision to be given.²⁷ The *Maastricht* judgment refers for the first time to the EU as *Staatenverbund*, a term which is difficult to translate as it creates a new category, different from a federal state (*Bundesstaat*) and a confederation (*Staatenbund*). Although originally presented as *Europafreundlich*, the use of the term *Staatenverbund* by German constitutional judges has increasingly served to emphasize that the Union is not a state and therefore cannot determine the limits of its own competence (*Kompetenz-Kompetenz*), a power which belongs to the Member States alone as 'Lords of the Treaties' (*Herren der Verträge*) and cannot therefore be exercised by the CJEU.

In September 2008, a campaign against the CJEU was launched by a manifesto entitled *Stoppt den EuGH* (Stop the ECJ!)²⁸ signed by Roman Herzog, former President of the Federal Republic and former President of the *BVerfG*, as well as of the Convention which drafted the Charter of Fundamental Rights of the Union in 2000. It was a pamphlet denouncing in particular the judgment of 22 November 2005 in *Mangold*, C-144/04. This pamphlet clearly shows the confusion made by its authors, like many non-specialists do, between the absence of a specific sectoral competence of the Union (in this case the regulation of retirement age) and the fact that a given matter falls within the scope of Union law (in this case free movement of workers), which implies the application of general principles of Union law (in this case the prohibition of discrimination on grounds of age). Far from being isolated, this type of reasoning is the work of many public law scholars and of most of the judges of the *BVerfG*, and that leads to a dialogue of the deaf between Karlsruhe and Luxembourg.²⁹ The *BVerfG* then expressed its opinion on the possibility for Germany to ratify the Lisbon Treaty on 30 June 2009, before the referendum in Ireland (2 October 2009).³⁰

From the point of view of the *Solange* doctrine, the judgment on the Lisbon Treaty contained at first sight only two innovations. The *BVerfG* reserved the right to review not only the extension of the Union's competences through treaty amendments, but also a breach of the division of competences by the EU institutions (*ultra vires*). The concept of '*ultra vires*' used by the *BVerfG*'s case law has a

²⁷ Unpublished ruling, available on written request from the Registry of the *BVerfG*. The committee of judges was composed, inter alia, of Judge Paul Kirchhof, rapporteur for the *Maastricht* judgment.

²⁸ Published in the *Frankfurter Allgemeine Zeitung* of 9 Sept. 2008.

²⁹ See J. L. Da Cruz Vilaça, *The Judgment of the German Constitutional Court and the Court of Justice – Judicial Cooperation or Dialogue of the Deaf?*, Rivista CERIDAP, <https://ceridap.eu> (5 June 2020).

³⁰ *BVerfG*, 2 BvE 2/08, 30 June 2009.

different meaning than it has in English law, because it is only used as equivalent to ‘lack of competence’ in Article 263 TFEU. It is with the Lisbon judgment that the above-mentioned self-arrogating formula appears, according to which the German institutions are responsible for ensuring that the EU institutions, bodies, offices and agencies comply with the European integration programme. The *BVerfG* also reserves a new case of review, namely the EU’s respect for the constitutional identity of the Member States – which would be expressly guaranteed by Article 4 (2) TEU after the entry into force of the Lisbon Treaty. Germany’s constitutional identity is equated by the *BVerfG* with the ‘eternity clause’, so that only the *BVerfG* may check whether acts of the Union’s institutions comply with the ‘German constitutional identity’. At the time of issuing, the judgment could have very different interpretations, more or less unfavourable to the opening towards European integration.³¹ With the judgment of July 6 of the same year in *Honeywell*,³² the *BVerfG* established that a preliminary reference was necessary before proceeding to a declaration of ultra vires, as well as drastic conditions for declaring ultra vires, so that one had the impression of a mere virtual statement, on the line ‘Barking Dogs Never Bite’.

Let us also point out that with the case-law initiated by the *Maastricht* judgment, the *BVerfG* has reversed the logical interpretation of the new provision of Article 23 GG.³³ Instead of considering it as a provision opening the German Constitution to deeper European integration, which was the primary intention of the provision, the *BVerfG*, while using the term *Europafreundlichkeit* (friendly attitude towards Europe) at all times, has in fact developed a closing jurisprudence, centred on the eternity clause and the notion of constitutional identity.³⁴

The *Zweiter Senat*, on the other hand, does not draw any conclusions with respect to EU law from Article 25 GG on public international law and federal law³⁵ and in particular from Articles 27 and 46 of the Vienna Convention on the Law of Treaties. According to Article 27 ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. Article 46 (1) provides that ‘[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding

³¹ See F. Mayer, *Rashomon à Karlsruhe*, in *Revue trimestrielle de droit européen* 77 ff. (2010)

³² 2 BvR 2661/06.

³³ See C. Calliess, *70 Jahre Grundgesetz und europäische Integration: “Take Back Control Oder “Mehr Demokratie wagen”*”, in *Neue Zeitschrift für Verwaltungsrecht* 684 (10/2019)

³⁴ Other constitutional or supreme courts invoke constitutional identity, but without reference to an ‘eternity clause’ in their constitution. See in particular *National Constitutional Identity and European Integration* (A. Saiz Arnaiz & C. Alcobarro Llivina eds., Cambridge, Intersentia 2013).

³⁵ The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory. (Translation of the Bundestag).

competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance'; this could in the extreme justify the jurisprudence of the *Zweiter Senat*. But according to Article 46 (2), '[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'. The judges of the *Zweiter Senat* most probably consider Article 23 GG as a *lex specialis* in relation to Article 25. In addition, the *BVerfG* has also developed a parallel jurisprudence that denies the democratic character of the EU on the grounds that the principle 'one man, one vote' is not respected for the election of the European Parliament – due to the considerable differences in population between Member States.

We will not dwell on the various episodes (mentioned in detail in the judgment of 5 May 2020) by which the *Zweiter Senat* has, little by little, developed its argumentation and raised the bar of ultra vires review, except to recall the *Gauweiler* case. With their order for a preliminary reference, the judges of the *Zweiter Senat* had agreed for the first time on 27 January 2014 to proceed to such a reference; but at the same time, they threatened the Court of Justice, in a rather menacing manner, to refuse to apply its future decision if the EU judges did not endorse their own reasoning. The issue had been raised as ancillary during the examination of a constitutional action against the ratification of the Treaty establishing the European Stability Mechanism. The applicants had taken advantage of that procedure to also request the *BVerfG* to declare the unlawfulness of the announcement by ECB President Mario Draghi of the OMT (*Outright Monetary Transactions*) programme and the general framework published on the internet, which might be intended to support Greece in order to prevent the weakening of the euro zone. Among the many curiosities of this ancillary action, let us point out that it was not directed against an ECB decision within the meaning of the Treaties. An action for annulment of those announcements was brought by 5,217 applicants residing in Germany to the General Court, which dismissed it on several grounds of inadmissibility, including the nature of the disputed 'acts'.³⁶

To keep the dialogue with the *BVerfG* open, the CJEU accepted the referral, despite the hypothetical nature of the questions asked, on the grounds that the referring Court considered them necessary for the solution of the pending dispute. It looked as if *BVerfG* had eventually accepted the grounds of the CJEU's judgment of 16 June 2015 in *Gauweiler*, C-62/14³⁷ with its own judgment of 21 June 2016.³⁸ The latter judgment had gone largely unnoticed since the focus of

³⁶ Trib. EU, 10 Dec. 2013, *von Storch*, T-492/12 DEP, ECLI:EU:T:2013:702.

³⁷ CJEU 16 June 2015, *Gauweiler*, C-62/14 ECLI:EU:C:2015:400.

³⁸ 2 BvR 2728/13.

attention on European integration was the referendum on *Brexit*, held on 23 June 2016. The seemingly conciliatory attitude of the *BVerfG* in that judgment – which is largely explained by the fact that the OMT programme had not been implemented – concealed from all those who did not analyse it in detail that the judgment contained a time bomb.

Indeed, our initial relief did not take into account the *Zweiter Senat*'s will to tussle, which was nevertheless clear in the 2014 order for reference, nor the stubbornness of Mr Gauweiler and his colleagues 'serial applicants' (many applicants in *Gauweiler* also presented requests in *Weiss*). The judgment on the Treaty of Lisbon had opened up easy access to the *BVerfG*, by accepting a very broad definition of standing. This definition is based on the idea that Article 38 (1) GG gives every voter standing for constitutional appeal to protect the *Bundestag*'s freedom of policy choice, and therefore also applies to restrictions of sovereignty which lead to the extension of the Union's competences by means of amendments to primary law and/or the adoption of acts of the Union institutions. This means drawing very far-reaching consequences from a provision on the election of Members of Parliament and the prohibition of imperative mandate.³⁹

The time bomb finally exploded with the judgment of 5 May 2020, preceded by the order of reference for a preliminary ruling of 18 July 2017 (see I. A. above). That explosion caused serious damage in the form of flagrant, deliberate, and premeditated breaches of Union law. The explosion has probably also caused damage to the reputation of the German Constitutional Court.

3 FLAGRANT AND DELIBERATE BREACHES OF EU LAW BASED ON 'UNINTELLIGIBLE' AND 'ARBITRARY' GROUNDS

Beyond its immediate practical effects, which were defused within two months thanks to the concerted action of the *Bundesbank* and the ECB, as well as the German *Bundestag* and Federal Government, the judgment of 5 May 2020 remains particularly conspicuous as a challenge to the Court of Justice of the Union. Far from being based on a solid and clear argument, this challenge is founded, we submit, on extremely serious errors of reasoning regarding the delimitation of the Union's competences and the use of the principle of proportionality.

³⁹ Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience. (Translation of the Bundestag).

3.1 INFRINGEMENTS OF EUROPEAN UNION LAW BY THE OPERATIVE PART AND THE GROUNDS OF THE JUDGMENT

The operative part of the judgment of 5 May 2020 consists of five points. The first one concerns the joinder of the actions and the second the dismissal of certain parts of the applications. The judgments of the *BVerfG* are not subject to appeal, but in view of the content of the judgment, it could not be ruled out that at least some of the appellants may submit new applications, this time concerning the manner in which the judgment of 5 May was executed by the German federal institutions. Indeed, Mr Gauweiler and other applicants lodged such an application in August 2020.

By the third point, the judgment condemns the Federal Government and the *Bundestag* for breach of the right guaranteed to the applicants by Article 38 paragraph 1 GG in conjunction with the Articles 20 and 79 GG, in that they failed to take the necessary measures against the fact that the ECB Council ‘neither verified whether, nor explained that the measures in question correspond to the principle of proportionality’.

By the fourth point, the remainder of the applications are dismissed, and by the fifth the Federal Republic of Germany is ordered to pay the costs.

The third point of the operative part clearly breaches the Treaties both in its wording and by the clarifications given in the grounds. The condemnation of the Federal Government and the *Bundestag* is as such a violation of Article 130 TEU, since it implies that those German institutions have the power to take measures to influence the Council of the ECB, whereas that article prohibits the ECB, the member banks of the ESCB and the members of their decision-making bodies from ‘seeking or taking instructions’, in particular ‘from the governments of the Member States or from any other body’, and, moreover, provides that ‘the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB [...]’.

The grounds add further infringements since they contain injunctions against these two federal institutions as well as against the *Bundesbank*, a member of the ESCB, with a sanction indirectly directed against the ECB. It is true that the judgment does not specify the form of the measures to be taken, which might suggest that it would be sufficient for the Federal Government simply to request information from the ECB Council and for the *Bundestag*, or, for example, to invite the President of the ECB to a hearing, as it did with President Draghi. This lack of precision on the form of the measures does not prevent an infringement, which simply results from their purpose, since the *BVerfG* orders national institutions to review the ECB’s policy and, if necessary, to oppose it.

Moreover, the wording of the sanction contains a double, undeniable and manifestly deliberate infringement of several fundamental provisions of the Treaties. Indeed, the injunction to the *Bundesbank* forces it to breach Article

14.3. of the Protocol (No. 4) on the Statute of the ESCB and of the ECB, according to which central banks ‘shall act in accordance with the guidelines and instructions of the ECB’. This injunction also breaches, at least indirectly, Article 35.6 of the Protocol, which establishes the competence of the CJEU ‘to rule on disputes concerning the fulfilment by national central banks of obligations under the Treaties and this Statute’.

The injunctions furthermore incite the Federal Government and the *Bundestag* to a breach of Article 130 TEU since, according to this article, ‘the governments of the Member States undertake’ not to seek to influence the members of the decision-making bodies ‘of the national central banks in the performance of their tasks’.

Finally, all these injunctions constitute a deliberate breach of Article 4(3) TEU on the duty of sincere cooperation. They are in fact contrary to the third indent of paragraph 3, according to which Member States ‘shall refrain from any measure which could jeopardize the attainment of the objectives of the Union’, since the purpose of Article 130 TFEU is to guarantee the independence of central banks which the authors of the Treaty consider necessary to safeguard the objectives of monetary policy laid down in Article 119 paragraph 2.

The injunctions are also in breach of Article 4 paragraph 3, 2nd indent TEU, according to which the Member States – and thus their institutions – ‘shall take any general or specific measures [...] resulting from acts of the institutions of the Union’, which means an obligation for the *BVerfG* to execute the judgment of 11 December 2018.

The judgment is furthermore in breach of Article 267 TFEU, since in the presence of an act of a Union institution that it cannot understand, the Constitutional Court, as ‘a national court or tribunal whose decisions are not subject to judicial review under national law’, was ‘required to refer to the Court’ two questions: the interpretation of the 2018 judgment – since the *BVerfG* declared it ‘unintelligible’ –, and the annulment of the ECB’s decisions. The fact that the CJEU had already ruled on the questions raised in the first reference for a preliminary ruling did not in any way exempt the *BVerfG* from making a new reference. On the contrary, the very wording of the judgment of the CJEU allowed the *BVerfG* to accept that the decisions of the ECB should not be annulled retroactively, in the absence of a manifest error of assessment, but to ask if they should be annulled for their continued application from December 2018. Such a referral was in fact not conceivable for judges of the *Zweiter Senat* from the moment they had decided to sentence the CJEU for limiting its review to manifest error.

Finally, the injunction against the *Bundesbank* contains a potential breach of a general principle of Union law by threatening to deprive the ECB’s decisions of

effectiveness on the territory of the Federal Republic of Germany if the ECB were not to comply convincingly with the request that reasons be given for its decisions in the light of the principle of proportionality. A deliberate infringement of the principle of the uniform application of Union law was thus announced by the *Zweiter Senat*. As the CJEU stated in its judgment in *Hagen*, 49–71, ‘unless reference is made, explicitly or implicitly, to national law, the legal concepts used in Community law must be interpreted and applied uniformly throughout the Community’.⁴⁰ One may add that, unless there is an explicit derogation, secondary EU law applies in all Member States and must be applied in the same way, as is the case with the relevant ECB decisions.

The judges of the *Zweiter Senat* defend themselves indirectly in the text of the judgment, and directly in their various public statements by invoking the theory that these obligations are only valid as long as the Court remains within its mandate, with a reasoning which we shall see is ‘unintelligible’, to use the vocabulary of these judges.

3.2 THE UNINTELLIGIBLE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY TO THE DELIMITATION OF COMPETENCES

The first and main criticism against the judgment of 5 May 2020 is that the *BVerfG* is for the first time enacting its threat not to apply the rulings of the CJEU, a threat already made in several of its previous judgments, notably the one on the Lisbon Treaty, and in the text of its references for preliminary ruling in *Gauweiler* and *Weiss*. Whatever they may say, the judges of the *Zweiter Senat* arrogate to themselves the power to assess as a last resort the legality of an act of the European Union, in flagrant contradiction with Article 19 TEU. The German constitutional judges do not limit themselves to reasoning on the basis of their own law – the Basic Law of 1949 as interpreted by their own jurisprudence – which would be in conformity with the institutional mandate of their Court; they claim to impose their way of reasoning in EU law on the CJEU.

The reasoning of the judges of the *Zweiter Senat* can be summarized as follows. Of course, they recognize that under Article 19 TEU the CJEU has a monopoly on the authentic interpretation and assessment of the legality of acts of the institutions, bodies, offices and agencies of the Union, of which the ECB is a member. They point out that the *BVerfG*, for its part, is responsible for the authentic interpretation and assessment of the constitutionality of acts of the institutions of the Federal Republic, which is indisputable. On the basis of Articles 23 GG, the *BVerfG* verifies that, when applying Union law, the

⁴⁰ ECJ 1 Feb. 1972, *Hagen*, 49–71, ECLI:EU:C:1972:6, para. 6.

institutions of the FRG do not violate fundamental rights, the fundamental principles of the German constitutional order or its constitutional identity; it also verifies that they do not apply acts of the institutions of the Union which do not have a 'limited individual delegation of power' as basis (*ultra vires*). In its judgment the *Zweiter Senat* declares the relevant acts of the ECB and the ruling of the CJEU *ultra vires*.

In the German legal and political debate on the Union's *Kompetenz-Kompetenz*, the main target has long been the Court of Justice, which has been accused of always wanting to have the last word and of behaving arrogantly. In this connection, we can only refer to the former German judge at the European Court of Human Rights Angelika Nussberger,⁴¹ who refers as *Basta-Rechtsprechung* ('enough jurisprudence') to the attitude of all supreme courts that claim to have the last word, as the *BVerfG* does. As she points out, all these courts have simply a functional competence, which implies that one must accept, whether one likes it or not, the competence of Luxembourg to interpret Union law in the last resort, that of Strasbourg for the ECHR, just as one accepts that of Karlsruhe for the German Constitution.

In their judgment, the judges of the *Zweiter Senat* take the view, as they already stated in their reference for a preliminary ruling, that compliance with the principle of conferral depends on compliance with the principle of proportionality, which is an interpretative principle constituting a constitutional tradition common to the Member States. That reasoning does not hold water.

The judgment of 5 May 2020 in fact states that the CJEU did not respect the principle of conferral because it merely verified if there was a manifest error of assessment of the proportionality of the ECB's decisions. The judgment refers to Article 5(1) and (4) TEU and to paragraph 66 et seq. of the judgment of the CJEU *Weiss*. However, the CJEU never stated that the principle of proportionality applies to the delimitation of powers, contrary to what the judges of the *Zweiter Senat* state through these referrals.⁴² The judges of the *Zweiter Senat*, in their zeal to demonstrate *ultra vires* of the ECB decisions and of the CJEU judgment, do not comment on the first sentence of Article 5(1) TEU: 'The limits of Union competences are governed by the principle of conferral'. They refer only to the second sentence: 'The use of Union competences is governed by the principles of

⁴¹ A. Nussberger, *Die Crux des letzten Wortes – Basta? Die Gerichte haben eine dienende Funktion*, *Frankfurter Allgemeine Zeitung* 6 (20 May 2020).

⁴² Participating in an online seminar organized on 30 June 2020 by the Konrad Adenauer Stiftung, Justice Peter Müller even stated that it was the CJEU itself that had made this connection between proportionality and conferral in its judgment in *Gauweiler*, whereas it is easy to see that the Court of Justice deals with the two questions separately (paras 65 and 66 of the judgment see *supra* n. 36), as Advocate General Cruz Villalón does even more clearly in para. 124 of his Opinion of 14 Jan. 2015 in *Gauweiler* ECLI:EU:C:2015:7.

subsidiarity and proportionality'. The provisions of Article 5(1) of the TEU could not be clearer. However, it is worth dwelling on them briefly, precisely because of the reasoning of the judges of the *Zweiter Senat*, which simply deserves a zero score, or, to use their own expression, is unintelligible. Article 5(2) TEU lays down the principle of conferral, which implies not only that a competence must be conferred on the Union by the Treaties in order for it to legislate on the matter, but also that once a competence is conferred on the Union (by the 'Lords of the Treaties'), the transfer is irreversible unless the Treaties are again amended or repealed; moreover, it is no coincidence that Article 23 GG uses the expression *Übertragung der Kompetenzen* (transfer of powers) to the Union. Only once it has been established that the Union has competence can Article 5(1), second sentence, TEU apply, which refers to the principles of subsidiarity and proportionality.

While the principle of proportionality also applies to the exercise of the Union's exclusive competences – contrary to the principle of subsidiarity – it has absolutely nothing to do with the scope of competence, but only with the way in which the Union exercises the competences conferred on it. According to Article 5(4) TEU, to which the judgment of 5 May also refers: 'Under the principle of proportionality, *the content and form* of Union action shall not exceed what is necessary to achieve the objectives of the Treaties' (emphasis added). Also, German scholarship expressly uses the terms *Kompetenzausübungsschranke* (limits to the exercise of competence).⁴³ On this fundamental point of their reasoning the judges of the *Zweiter Senat* commit a very serious error of law. As most of the critical comments to the judgment have pointed out, particularly in Germany, it is not clear how it would be possible that, once the Union's competence has been established on the basis of the principle of conferral, using that competence in a manner which does not comply with the principle of proportionality could deprive the action subject to review of its legal basis, rendering the corresponding act 'ultra vires'.⁴⁴ Only a question of a lack of legality of the measure arises, which could therefore lead to its annulment under Article 263 TFEU; an annulment which, in any event, could only be pronounced by the General Court or the Court of Justice of the EU; this is indeed the reason why the judges of the *Zweiter Senat* place themselves on the ground of competence and not on that of legality. However, not

⁴³ See a.o. I. Härtel, *Die Zuständigkeiten der Union*, in *Europarecht. Grundlagen und Politiken der Union* 447 (2d ed., M. Niedobitek ed., Brussels De Gruyter 2019).

⁴⁴ As stated earlier in this comment, the concept of 'ultra vires' in the BverfG's case law has a different meaning than it has in English law, because it is only used as equivalent to 'lack of competence' in Art. 263 TFEU. For judicial review on the basis of the other grounds cited in Art. 263, German Scholarship uses the words 'intensity of regulation benchmark' (Maßstab für die Regelungsintensität): *Kompetenzabgrenzung und Kompetenzausübungsschranken: Prinzip der begrenzten Ermächtigung. Subsidiaritätsprinzip. Grundsatz der Verhältnismäßigkeit*, in R. Streinz, *EUV/AEUV Kommentar* (3d ed., Munich, Beck 2018), § 43.

only is the premise of their reasoning on the principle of proportionality unfounded or even ‘unintelligible’, but their application to the case of this principle is flawed, as we shall see below.

The judges of the *Zweiter Senat* accept the competence of the CJEU to rule on its own competences, which were conferred on it by Article 226 of the EC Treaty, now Article 19 TEU, but only ‘provided that its judgment can be related to recognized methodological principles and does not appear objectively arbitrary’ (paragraph 112 of the grounds). The novelty of the judgment of 5 May is the effective application of principles developed in the *Honeywell* and *Gauweiler* judgments, i.e., the application of the *Solange* reservation to methods of legal interpretation.

Assuming that the notion of ‘constitutional tradition common to the Member States’, as recognized by the Charter of Fundamental Rights and Article 6 TEU, can be extended to methods of interpreting the law, which is neither obvious nor demonstrated by the judges of the *Zweiter Senat*, the way in which they proceed in comparative law is highly questionable, as we shall see below. Criticizing their comparative law method would be devoid of interest in positive law if the judges of the *Zweiter Senat* had not used comparative law precisely to affirm that the principle of proportionality is an indispensable tool for the review of the delimitation of the competences of the Union. Far from applying a *Dogmatik* – which implies the construction of a structured and solid legal reasoning based on the best scholarship – the judgment of 5 May merely cites a rather limited and debatable selection of scholarship considered to be relevant (paragraph section 124–125). By way of example, the judgment states that the principle of proportionality ‘has been taken up in all (partial) European legal orders’ by referring to the chapter on Finland in a volume on constitutional review in Europe.⁴⁵ The judgment refers seven times to a publication of which the judge-rapporteur, Professor Huber, is co-editor.⁴⁶ The judges of the *Zweiter Senat* engage in the perilous exercise of demonstrating that all the constitutional courts apply the German three-step method of interpretation of the principle of proportionality. As far as the French Constitutional Council is concerned, the judgment refers to the chapter on France in the above-

⁴⁵ K. Tuori, *Verfassungsgerichtsbarkeit in Finnland*, in *Ius Publicum Europaeum – VI Verfassungsgerichtsbarkeit in Europa: Institutionen 190* (A. von Bogdandy, C. Grabenwarter & P. Huber eds, Karlsruhe, C.F. Müller 2016).

⁴⁶ These are Volumes I – Foundations and Fundamental Features of State Constitutional Law, II – Open State – Science of Constitutional Law, and VI – Constitutional Jurisdiction in Europe: Institutions of the *Ius Publicum Europaeum* series, published by the prestigious Karlsruhe C publishing house. F. Müller. No reference is made, moreover, to Volume VIII – Administrative Jurisdiction in Europe: Institutions and Procedure, although it contains useful references on the way in which the supreme administrative courts reason, inter alia, on proportionality.

mentioned volume.⁴⁷ However, the text in question explains, before referring to the three-step review, how the French constitutional court only reviews manifest disproportionality in most cases, which would, on the contrary, justify the *Weiss* judgment of the European Court of Justice. These are only venial sins of the *BVerfG* judgment, differently from its argumentation on the delimitation of competences.

The whole reasoning of the judges of the *Zweiter Senat* is based on the distinction between monetary policy, an exclusive competence of the Union, and economic policy, a competence of the Member States. In fact, as we shall see, their reasoning is only intended to pave the way for the need to review the ESCB action and the decisions of the ECB on which it is based, and for their condemnation of the *Weiss* judgment of the CJEU, which they find unlawful on the basis of its application of the principle of proportionality.

3.3 ARBITRARY APPLICATION OF THE VERHÄLTNISMÄSSIGKEITSGRUNDSATZ TO EUROPEAN UNION LAW

Assuming that the premise of the *Zweiter Senat*'s reasoning is admissible and that the principle of proportionality is indeed relevant for the review of the delimitation of the Union's competences – which we believe is obviously not the case, by virtue of the very provisions of the EU Treaties – the question would arise as to whether the criticism of the CJEU's judgment in *Weiss* is well-founded.

The judges of the *Zweiter Senat* are stating that methods of interpretation may differ from one Member State to another. They also argue that only a 'manifest error of methodology' in the use of the principle of proportionality could lead to ultra vires. They then try to prove, by questionable comparative law reasoning, that the German method of interpretation is entirely shared by the other constitutional and supreme courts. Indeed, they proceed in a surprisingly superficial way, judging by the scholarship cited in the judgment, but also by the substance of their reasoning.

The principle of proportionality takes the lion's share of this judgment. The term *verhältnismäßig/unverhältnismäßig* appears sixty-seven times: fifty times in the grounds of the judgment and five times in the *Leitsätze* (the other twelve times in the parties' claims). This is a clumsy and poorly disguised attempt to lecture the CJEU on what this principle is and how it should be applied. This being said, what the judges of the *Zweiter Senat* want to apply is not the principle of proportionality as developed by the case-law of the CJEU as a general principle of EU law, but the German *Verhältnismäßigkeitsgrundsatz*.⁴⁸

⁴⁷ O. Jouanjan, *Verfassungsgerichtsbarkeit in Frankreich*, in IPE VI (see *supra* n. 43, at 245).

⁴⁸ See amongst many others: Galetta, *supra* n. 22.

Although imparted from the benches of the *Zweiter Senat*, the lesson begins with a reference to Anglo-American scholarship: even German constitutional judges are not spared the recent mania of many academics to cite literature mainly in English, even when it is irrelevant. The assertion that the principle of proportionality ‘has its roots in the common law’ (paragraph 124), far from corresponding to what British or American scholarship generally says, is contradicted by the traditional case-law of common law courts, which have long limited themselves to the application of the *Wednesbury* reasonableness test and have only recently and reluctantly accepted the application of the principle of proportionality.⁴⁹ The reference to *the common law* ‘roots’ no doubt serves the judges of the *Zweiter Senat* to dispel the suspicion that they want to impose their own traditional method of applying the principle of proportionality, which is quite different, for example, from the method applied by the French administrative judge in policing matters after the First World War.

Of course, we do not mean that the Anglo-American literature mentioned in the text of the judgment is entirely irrelevant. However, it is remarkable that these references are accumulated in the text of the judgment to the detriment of references to the great masters of German public law who expressed themselves on the content of the principle of proportionality: Fritz Fleiner, but also Ruppert von Krauss, Klaus Stern, to name but a few.⁵⁰ This is perhaps to conceal the attitude of cultural domination, which, on the contrary, in our opinion, clearly appears in the whole reasoning of the *Zweiter Senat* concerning the principle of proportionality, and the need, which has been emphasized on many occasions, for the decisions adopted in the context of the PSPP programme and the case-law of the CJEU to comply with it.

This being said, and this is why the grounds of the judgment are a clumsy attempt to apply the German pattern of reasoning on proportionality to the CJEU, the *Zweiter Senat* is making a manifest error: it simply forgets that, although the CJEU has taken its inspiration from the German model of judicial review of the principle of proportionality, this does not make the German Federal Constitutional Court the guardian of the way in which the Court of the Union applies this principle in its case-law. The *Zweiter Senat* criticizes the way in which the Luxembourg Court has applied the principle of proportionality so far, as being incorrect from the point of view of method; and it does not accept that the CJEU drafts its judgments differently from the *BVerfG*. In the first place – and this is not insignificant – the Luxembourg Court, like many constitutional or supreme courts

⁴⁹ See D.-U. Galetta, *Il principio di proporzionalità tra diritto nazionale e diritto europeo (e con uno sguardo anche oltre i confini dell’Unione Europea)*, in *Rivista Italiana di Diritto Pubblico Comunitario* 903 ff. (2019/6)

⁵⁰ Only the 1961 work by P. Lerche, *Übermaß und Verfassungsrecht, Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit*, is mentioned.

in Europe, does not refer to scholarship in the reasons of its judgments, contrary to what the German Constitutional Court does in abundance. The more concise style of the judgments of the CJEU, as well as the absence of reference to scholarship, can easily generate ambiguity: the more widely argued *BVerfG* judgments on proportionality, supported by references to the scholarship, would therefore be better in substance.

It should be stressed, perhaps more than ever, that the European Union, like the Court of Justice, which is one of its main institutions, is the result of mediation between different national traditions: those of the Member States, each of which has contributed something, thus avoiding the domination of one (legal) culture over the others. This of course also applies to the way in which judgments are drafted, which is largely shaped by the national tradition of each country. This applies *a fortiori* to general principles of law. Although they often originate in the national traditions from which they are borrowed by the European judges, once they have become part of the Court's case-law they become autonomous with respect to the original systems and become general principles of EU law.⁵¹

According to the judgment of 5 May 2020, the Governing Council of the ECB 'has neither verified nor explained that the measures decided upon comply with the principle of proportionality' (paragraph 116). It goes without saying that the judges of the *Zweiter Senat* cannot know whether or not the Governing Council has verified the proportionality of its measures, since the meetings of the Council are not public, which is justified by the sensitivity of the markets to news about its decisions. What the *Zweiter Senat* obviously means in a clumsy way is that there is a lack of reason giving for these measures; if so, it was exclusively up to the Court of Justice to review those grounds. The judges of the *Zweiter Senat* arrogate themselves the power to review the action of the Governing Council of the ECB and to delegate the exercise of such a reviewing power to the Federal Government and the *Bundestag*. Thus they claim to replace the CJEU. According to the judgment of 5 May, the latter breached its mandate, the 'limited individual delegation of power' conferred on it by Article 19 TEU, by confining itself to the review of manifest error of assessment rather than explaining in detail how it applies the three stages of the review of proportionality, adequacy, necessity and proportionality in the strict sense.

The difference in style and drafting of judgments between German and European judges has a decisive weight in their assessments. In the judgments of the CJEU on proportionality – to which the *Zweiter Senat* refers at length in paragraph 126 – often only the essential passages of the Court's reasoning are

⁵¹ V. D.-U. Galetta, *Le fonti (del diritto amministrativo europeo)*, in *Diritto amministrativo europeo* (M. P. Chiti ed., Milan, Giuffrè, 2d ed.); See also Ziller, *supra* n. 11, at 334ff.

highlighted: for example, the review of adequacy of a measure is generally carried out quickly and is hardly explained. Moreover, the reconstruction of the facts and, above all, the reconstruction of the legal frame of reference already takes a large place in the judgments of the EU courts, for the simple reason that they must take account of the different national legal systems, whose rules must be correctly combined or cross-referenced with the rules of Union law relevant to each case. For the same reason, the proportionality review of the EU courts is sometimes apparently carried out by changing the order of application of its constituent elements compared to what the German courts do. Moreover, it is often the concise way the reasoning of the CJEU is presented in law that leads scholarship to criticize logical leaps in the Court's reasoning.

That is not all: the judges of the *Zweiter Senat* forget that when the EU judges apply the principle of proportionality, they often act in their capacity of administrative judge and not of judge of legislation; and that limits the possibility of a predictive assessment of proportionality, as German administrative law scholars are well aware; in fact, and we will come back to this point, the judgment is based on an inadequate premise, namely that German judges and scholars share a common and unambiguous vision of how to apply the principle of proportionality, and of the density of judicial review in this area.⁵²

The *Zweiter Senat* takes no account of all that has just been indicated when it criticizes the case-law of the Court of Luxembourg for not following exactly the pattern of reasoning on the principle of proportionality that would be applied by the German constitutional court. It is noteworthy that in paragraph 126 the judgment explicitly notes with a critical tone that '[i]n the case-law of the Court of Justice, the terms "adapted" (*geeignet*), "required" (*erforderlich*) or "necessary" (*notwendig*) often characterize the application of the principle without being in full conformity with German terminology and *Dogmatik*'.

According to the judgment (paragraph 127):

the way in which the Court of Justice has applied the principle of proportionality in the present case is inappropriate or without function (*ungeeignet, beziehungsweise funktionlos*) for the delimitation between monetary policy and economic policy as regards the PSPP, i.e. between an exclusive competence of the European Union (Article 3(1)(c) TFEU) and the delegation of power to the latter materially limited to the coordination of economic policies reserved to the Member States (Article 4(1) TEU; Article 5(1) TFEU).

In this respect, it is questionable whether the judges of the *Zweiter Senat* really understood that competences in the field of economic policy, although not falling within the concurrent competences set out in Article 4 TFEU, are also

⁵² See W. Leisner, *Der Abwägungsstaat: Verhältnismäßigkeit als Gerechtigkeit* (Berlin 1997); M. Albers, *Gleichheit und Verhältnismäßigkeit*, in *Juristische Schulung* 2008/11, at 945 ff.

competences of the Union: not only because, as provided for in Article 5 and 119 TFEU, the Council, an institution of the Union, has the power to adopt measures appropriate for the coordination of the economic policies of the Member States, but also and above all because Articles 121 and 126 TFEU provide for procedures for overseeing the economic policies of the Member States, with the possibility of sanctions decided by the Council by qualified majority on a proposal from the Commission. It is true that, in paragraph 163 of the judgment, the *Zweiter Senat* refers to these latter provisions as ‘exceptions’; but it does so by blithely shifting from the Union’s competence in the area of economic policy (which exists) to the mandate of the ECB and the ESCB, which is merely a support for economic policy. The *Zweiter Senat* emphasizes that this is ‘economic policy within the Union’ (and therefore not ‘of the Union’), referring to Article 127 TFEU, but without dwelling on the fact that Article 127(2) deals with ‘the basic tasks to be carried out through the ESCB’, which means that the list is not exhaustive.

As for the limitation of judicial review to manifest error of assessment, which is at the heart of the German judges’ criticisms of the CJEU, we think that supreme and constitutional courts – including the German federal and *Länder* courts – often limit themselves to a review of manifest error, as we noted above in the case of the French Constitutional Council, and as Professor Huber is well aware.⁵³ It would also be possible to show that the choice of fields for which the judges limit themselves to this type of review varies from one area to another and, above all, from one legal system to another, which deeply undermines the criticism of the *Zweiter Senat*.

Looking at the argument of the judges of the *Zweiter Senat*, on how EU judges apply the principle of proportionality, and assuming that it is intelligible, one cannot help thinking that it is somewhat arbitrary. It should be noted in this connection that, by their refusal to make a further reference for a preliminary ruling combined with a three-month period for the ECB, the judges of the *Zweiter Senat* are establishing, as it were, an irrebuttable presumption of incorrect application of the principle of proportionality against the Court of Justice, and only a rebuttable presumption against the ECB.

3.4 THE UNINTELLIGIBLE AND ARBITRARY OVERRULING OF THE CJEU’S WEISS JUDGMENT ON THE BASIS OF THE DEMOCRATIC PRINCIPLE

As the basis of their power to review the distribution of competences between the Union and its Member States, the judges of the *Zweiter Senat* do not only invoke the ‘principle of limited individual delegation of power’, but also the democratic

⁵³ See *supra* notes 45 to 47.

principle, as pointed out by Judge-Rapporteur Huber and former President Vosskuhle in their already quoted press interviews.

In the debate on the jurisprudence of the *BVerfG* concerning the action of the ECB, it is often said that the Constitutional Court protects democracy because the ECB has no democratic legitimacy. Let us digress here to point out that there is, to our knowledge, no other important example of a court giving or being able to give injunctions to a central bank, either in the Member States of the Union or in other comparable national contexts; judicial review, if any, is limited in most countries to the formal legality of individual acts and does not impinge on the determination and conduct of monetary policy.⁵⁴ Where central banks are dependent on political power, as was the case in many European countries with the de facto or de jure nationalization of central banks after the Second World War, in particular for the Banque de France, the Banca d'Italia and the Bank of England, it is generally the government that can give injunctions to the central bank and not parliament.⁵⁵ Although the ECB is clearly not politically accountable to the European Parliament, let us remember that the members of its Governing Council, including its President, regularly report to the EP on their actions.⁵⁶ They also accept invitations from the parliaments of the Member States, as Mario Draghi did, for example, on 28 September 2016 before the *Bundestag*'s Committee on European Affairs, which invited him to a hearing behind closed doors for a debate on the PSPP programme.⁵⁷

This being said, it is not the lack of democratic legitimization of the ECB which is called into question by the *BVerfG* in its case-law and in particular in the judgment of 5 May, since it is a consequence of the Treaties. The *BVerfG* argues (see II. C. above) that Article 38(1) GG is not limited to the formal legitimization of the *Bundestag* through elections, but also applies in the context of European integration and serves to ensure that the legislature does not see its political choices too narrowly limited. In paragraph 104 of the grounds, the judgment of 5 May 2020 states that this provision protects voters against the loss of substance of their 'power of government' (*Herrschaftsgewalt*):

⁵⁴ V. J. Kleineman, *Central Bank Independence: The Economic Foundations, the Constitutional Implications and Democratic Accountability* (Stockholm, Brill 2001).

⁵⁵ *Ibid.*

⁵⁶ V. A. Giovannini et J.-F. Jamet, *Matching Accountability with Independence: The ECB's Experience*, in *Il Politico – Rivista italiana di scienze politiche*, n° 1–2020, at 103 ff.

⁵⁷ V. Le Monde, 29 Sept. 2016 The *Bundestag* has recently welcomed Mario Draghi, who explains that the president of the ECB, anxious not to lose the battle of communication, hastened to make his opening speech public, before lingering with journalists at the exit. Mario Draghi has often been the subject of fierce attacks in the German press, e.g., in the *Bild Zeitung* of 13 Sept. 2019, which ran the headline *So saugt Graf Draghila unsere Konten leer* (This is how Count Draghila sucks our bank accounts dry).

In particular, the *Bundestag*'s Finance Act and its general responsibility for budgetary policy are protected as an indisputable element of the principle of democracy [...] According to Article 20, paragraph section 1 and 2 GG, which is immutable, the *Bundestag* is responsible to the people for deciding on all major revenues and expenditures [...] It must decide on the total sum of the burdens on the citizens and the essential public expenditure [...] For this reason, there is in any case a transfer of sovereign rights which violates the principle of democracy if the determination of the nature and amount of the levies is substantially supranationalised and the *Bundestag*'s decision-making power in this area is thus lost [...].

We are not here debating or assessing the merits of a case-law based on a provision of the Constitution relating to the election of federal MPs and the prohibition of mandatory mandates; we only intend to underline the expansive nature of a theory which gives the constitutional judge, and not the democratically elected parliament, the power to restrict the conferral of competences to the European Union, and indeed to any intergovernmental organization. In the present case, this also explains why the plaintiffs in the *Weiss* case were so easily followed by the judges of the *Zweiter Senat* in their request to subject the ECB's decisions to a proportionality test designed to protect their savings. Contrary to the judgment in the so-called *Banana* case,⁵⁸ the judgment of 5 May does not mention the (saver's) right of ownership under Article 14 GG (and Article 17 of the EU Charter); in our opinion, this is explained in particular by the fact that the protection of fundamental rights on the basis of a *Verfassungsbeschwerde* is normally the responsibility of the First Chamber of the *BVerfG* and not of the Second, whose case-law was well known to the plaintiffs. The judgment of 5 May refers, in paragraph 173, to the 'risk of bubbles in property and shares and the economic and social consequences for almost all citizens, affected *at least indirectly* as, for example, shareholders, tenants, owners, savers and insured persons'. The words '*at least indirectly*' should be underlined: they make it clear how far away we are from a situation where there would be a problem with the protection of inalienable human rights.

A further digression is necessary: in our opinion, with the judgment of 5 May 2020, the *Zweiter Senat* blithely jumps from reality – namely that it is the governments of the Member States that have concluded the Community and Union Treaties – to an abstract concept according to which 'the peoples' of the individual Member States would be the 'Lords of the Treaties', in accordance with the democratic principle. Such a concept is in no way confirmed by public international law or by Union law: on the contrary, it may be useful to recall that the ICG of 2003–2004, which drew up the Treaty establishing a Constitution for Europe, did not wish to take up as it stood the Preamble drawn up by the European Convention, which contained the words 'Grateful to the members of the

⁵⁸ See *supra* n. 22.

European Convention for having prepared this Constitution on behalf of the citizens and States of Europe [...]’⁵⁹

The reference to the principle of democracy simply means that the *Zweiter Senat* is carrying out a review of respect for constitutional identity, but without having mentioned it in its questions referred to the CJEU, contrary to the requests of the applicants to the *BVerfG* in *Gauweiler* and *Weiss*. The constitutional judges presumably wanted to reserve exclusively for the *BVerfG* the possibility of determining the contours of German constitutional identity. Is there not some arbitrariness in the choice thus made by the *Zweiter Senat* in its order of 18 July 2017?

To use the very vocabulary of the *Zweiter Senat*, the grounds of the judgment of 5 May 2020, which, let us recall it, result in flagrant and deliberate breaches of EU law, can therefore, in our opinion, be qualified at least in part as unintelligible. For the rest, these grounds also contain somewhat flawed analyses.

4 FLAWED ANALYSES IN GERMAN LAW AND ECONOMIC (AND MONETARY) POLICY

Assuming that one were to accept that it is for the constitutional and supreme courts of the Member States to prevent a violation of the principle of conferral by the institutions of the Member States – which we don’t – and to accept also that applying the principle of proportionality differently in method and intensity than the German constitutional court is in breach of the CJEU’s mandate – which we don’t – let us point out that the judges of the *Zweiter Senat* themselves make a very flawed application of the principle of proportionality in the judgment of 5 May 2020, both in relation to the relevant German scholarship and to the economic policy arguments which they use to demonstrate an infringement.

4.1 A FLAWED APPLICATION OF THE PROPORTIONALITY TEST UNDER GERMAN PUBLIC LAW

To apply the strictest version of the German proportionality test to the case, the Karlsruhe judges should have verified as a first step – appropriateness test – whether the measures chosen by the ECB were appropriate for the result sought in order to show, if needed, that they were not or could no longer achieve that result.⁶⁰ As second step – necessity test – they should have checked whether alternative

⁵⁹ <https://www.statewatch.org/media/documents/news/2003/jul/cv00850.en03.pdf> (accessed 3 Aug. 2020).

⁶⁰ See inter alia, *BVerfG* 18 Dec. 1968, cited in *BVerfGE* 25, at 1. More recently, see *BVerwG* 02 May 1995, in *DVBl*, 1996, at 38; *BVerwG* 01 Feb. 1996, *Neue Juristische Wochenschrift*, 1996, at 1487; *BVerwG*, 21 Mar. 1996, *Agrarrecht*, 1997, at 18 et seq.

measures were available and whether they would have achieved the objective with the same intensity.⁶¹ For the third step – proportionality in the strict sense test – once the two criteria of adequacy and necessity had been met, they should have taken into account the urgency and essential importance of the primary interest to be protected (stability of the eurozone) before concluding whether or not the sacrifice of conflicting interests was avoidable. The judgment of 5 May 2020, as a matter of fact, is essentially limited to the third stage of the review.

For this assessment of proportionality in the strict sense, it would have been necessary to balance the advantages of the measure chosen to rescue EU countries hit by the sovereign debt crisis with the disadvantages for German savers. The *Zweiter Senat* confines itself to the latter disadvantage. As a matter of fact, economists' opinions on the effects of low interest rates are completely contradictory: some of them submit that the PSPP has had a much more limited impact on the economy than is usually asserted in the German debate.⁶² In such conditions of uncertainty the final choice could only be made by the judge through a review of opportunity, since the decision does not depend on objective parameters, but on subjective ones. The judges of the *Zweiter Senat* forget that even in the context of a proportionality review on the 'German model' the judge must refrain from assessing the alleged negative effects of a measure that are not based on duly ascertained facts, but concern an ongoing process. Such a review inevitably ends up assessing *ex post* whether a measure can be qualified as contrary to the principle of proportionality, on the basis of elements of assessment which the decision-maker could in no way have at his disposal *ex ante* ... as if the ECB had a crystal ball .

According to the typical reasoning of a German judge, these would be '*prognostische Entscheidungen wertenden Charakters*' (*prognostic decisions of an evaluative nature*) for which the margin of appreciation is beyond his review.⁶³ In such a case the administrative or political authority must choose and not the judge, or else the very existence and value of separation of powers is being negated.⁶⁴ Such a well-

⁶¹ V. E. Grabitz, *The Principle of Proportionality in the Case Law of the Federal Constitutional Court*, in *Archiv des öffentlichen Rechts*, 1973, at 568 ss.

⁶² A. Belke, D. Gros, *Anleihkäufe: viel Lärm um Nichts*, in *Frankfurter allgemeine Zeitung* (25 May 2020). The authors summarize their numerous publications on the subject in various macroeconomic periodicals.

⁶³ V. E. Pache, *Tatbestandliche Abwägung und Beurteilungsspielraum* 141 ff. (Mohr Siebeck, Tübingen 2001). and, more recently, C. Hille, *Die gerichtliche Kontrolle von Wirtschaftlichkeit im Vergaberecht* 500 ff. (Nomos, Baden-Baden 2018), which explains well the problem of the margin of appreciation (*Wertungsspielraum*) which is beyond the review of the German court.

⁶⁴ See C. Calliess, *Schriftliche Stellungnahme von Prof. Dr Christian Calliess zur Öffentlichen Anhörung des Ausschusses für die Angelegenheiten der Europäischen Union des Deutschen Bundestages am Montag, den 25. Mai 2020 zum Thema 'Urteil des Bundesverfassungsgerichts vom 5. Mai 2020 (2 BvR 859/15) in Sachen Staatsanleihenkäufe der Europäischen Zentralbank'*, <https://www.Bundestag.de>. who discusses the internal relationship between *BverfG*, the Federal Government and the *Bundestag*.

understood assessment of proportionality according to proper German law standards, far from being in support of the claim of the *Zweiter Senat*'s seven judges that the reasoning of the Court of Justice in the *Weiss* is 'unintelligible' and 'arbitrary', would on the contrary fully justify why the Court of Luxembourg's fifteen judges limited their review to manifest error of assessment. The judges of the *Zweiter Senat*, arrogate the power to replace the competent institution's assessment (by the ECB) of the measures taken to deal with the crisis, with their own assessment. In so doing, they clearly exceed their judicial function according to the very standards applied in this respect by German scholarship, exercising a function which is not theirs: that of public decision-maker.

Moreover, the assessment of those measures in the judgment of 5 May 2020 is based on a very limited number of scholarly contributions and grey literature, almost all of German origin;⁶⁵ in particular, it takes no account of ECB documents explaining its policy – which were accessible before their judgment –,⁶⁶ which are showing how the ECB proceeded in its analyses and weightings prior to the adoption of the decisions on the CSPP.

4.2 A PROPORTIONALITY CHECK BASED ON FLAWED ECONOMIC POLICY REASONING

The centrale debate in *Weiss*, as already in *Gauweiler*, and even before that in *Pringle*,⁶⁷ has shown how difficult the distinction between monetary policy and economic policy is: although it appears in the Treaties, in particular in Article 119 TFEU, it is not based on clear and established economic definitions. There is little point in criticizing the poor drafting of the Treaty, as not only a large part of the scholarship but also many politicians do, because it is the result of a conscious choice of the 'Lords of the Treaties'.

The provisions on economic and monetary union were drawn up at the 1991 ICG⁶⁸ in the relevant Group of State Representatives, composed of representatives of the governments of the then twelve Member States and the eleven central

⁶⁵ See e.g., para. 139 of the judgment; this is obviously not apparent from the English translation, which does not include the references which form an integral part of the grounds of the judgment.

⁶⁶ See the summary by the Bundesbank's representative on the ECB Council, presented to the members of the *Juristische Studiengesellschaft*: I. Schnabel, *Narrative über die Geldpolitik der EZB – Wirklichkeit oder Fiktion*, Karlsruhe (11 Feb. 2020), https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200211_1~b439a2f4a0.de.html, with also an English-language version, accessed on 1 June 2020. If the judges of Karlsruhe had taken notice of this presentation, they would have known that their statement according to which the ECB 'has neither verified nor explained that the measures decided upon comply with the principle of proportionality' was wrong, because it shows that it had indeed verified proportionality.

⁶⁷ CJEU 27 Nov. 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756.

⁶⁸ See J. Cloos, G. Reinesch & D. Vignes, *Le traité de Maastricht: genèse, analyse, commentaires* (Brussels, Bruylant 1993).

banks,⁶⁹ among which the *Bundesbank* representatives were particularly active. It is also noteworthy in this connection that in *Pringle* the CJEU referred for the first time to the preparatory work of the Treaties as a means of interpretation.⁷⁰

At the ICG, there was a clash between French and German representatives: France called for setting up an ‘economic government’, including strengthening institutional arrangements for the entire economic policy, not just for monetary policy. On the other hand, German politicians and the *Bundesbank* saw this as an attempt by France to transpose to the Community level its traditional economic interventionism dating back to Colbert, the minister of Louis XIV, and to introduce economic policy planning. Some even said that France wanted to introduce a kind of Soviet-style *Gosplan* into the European Community, just as East Germany had finally got rid of it with reunification. For the French representatives there could hardly be a total separation between economic policy on the one hand and monetary policy on the other, since – at least since the nationalization of the Banque de France in December 1945 – the latter was considered as one branch of economic policy alongside fiscal policy, price policy and spatial planning through investment. In Germany, on the other hand, since Ludwig Erhard’s monetary reform of 1948 it had been clear that the stability of the *Deutsche Mark* was the result of the independence of the *Bundesbank* and that the two policies were separated. German jurists largely share the prejudices regarding French *étatisme*, as they ignore that France practiced a kind of public private partnership since the middle of the XIXth century with its *concessions de service public* and *concessions de travaux public*. It is also largely ignored that the only historical precedent to the EEC’s state aid regime is the *Conseil d’Etat*’s case-law on the *liberté du commerce et de l’industrie*. It may also be useful to recall that at the 1991 ICG, the Italian Government was the only one to have an indisputable democratic mandate as a result of the consultative referendum held on 18 June 1989, in which 80% of the voters, with a turnout of 88%, were in favour of giving the European Parliament a mandate for the establishment a new framework for common policies, including economic policy.

The drafting of Article 119 TFEU is nothing more than the result of a compromise between the French and German positions, which postponed until later the rebalancing between the action of the ECB – which first had to be built and to gain the confidence of the markets – and the ‘economic governance’ of the Union, with the participation of the directly elected European Parliament. It therefore makes little sense to analyse these provisions and their application

⁶⁹ At that time there was only one central bank for Belgium and Luxembourg, which had been in monetary union since 1922. A *Banque centrale du Luxembourg* was created in 1998 to implement the ESCB provisions.

⁷⁰ *Pringle*, C-370/12, para. 135.

according to a traditional *Dogmatik* rather than by applying the functional and teleological analysis favoured by the Court of Justice since the 1950s. As indicated earlier, the entire reasoning of the judges of the *Zweiter Senat* is presented as a flawed *Dogmatik* of the distinction between monetary policy as an exclusive competence of the Union, and economic policy as a competence of the Member States (see supra III C.).

The judgment of 5 May 2020 admits, in line with the *Gauweiler* case-law of Karlsruhe and Luxembourg, that monetary policy can have consequences in terms of economic policy and that it therefore falls under the primary law of the Union. Nevertheless, rather than sticking to the judicial restraint in matters of ‘technical discretion’, as one says in Italian administrative law, and thus limiting themselves to a review of material error or at best of manifest error of appreciation as French administrative judge would do, the judges of the *Zweiter Senat* do not hesitate treading in the field of economic analysis.

It appears from the relevant developments in the judgment that the judges are convinced that for contemporary economic scholarship the only acceptable objective of monetary policy is maintaining price stability; in so doing, they give a reductive interpretation of Article 119(2) TFEU. Admittedly, contrary to some of the applicants and their supporters, the judges of the *Zweiter Senat* refuse to condemn the ECB’s fixing of the definition of price stability at 2% inflation. For the rest, however, they criticize the ECB’s choices for the allegedly negative effects of a low interest rate such as applied in response to the financial crisis of 2008 and to the sovereign bond crisis of 2010, as indeed also did the US Federal Reserve.

A careful reading of the judgment reveals a convoluted line of reasoning based on unsupported prejudices in the field of economic policy; those prejudices are, moreover, in conflict with other objectives of the Union such as economic, social and territorial cohesion. It suffices to quote an extract from the judgment: ‘It was already foreseeable at the time of the adoption of Decision (EU) 2015/774 that several Member States in the euro zone would again increase their debts in order to stimulate the economy through investment programmes’ (paragraph 117); the judgment refers to a Commission document with no legally binding relevance.⁷¹ Moreover, the judges of the *Zweiter Senat* do not show that the financing of investment programmes would be contrary to the Treaty. As a matter of fact we submit, in the medium term the opposite could be expected, as many economists argue, who are not mentioned in the judgment of 5 May.⁷²

⁷¹ Document of the European Commission’s Directorate-General for Economic and Financial Affairs, <https://ec.europa.eu> (accessed 1 June 2020).

⁷² See E. Venizelos, *Passive and Unequal: The Karlsruhe Vision for the Eurozone*, *Verfassungsblog* 27 May 2020, <https://verfassungsblog.de/passive-and-unequal-the-karlsruhe-vision-for-the-eurozone/> (accessed 1 July 2020).

5 CONCLUSION

The *Zweiter Senat* of the *BVerfG* hit the EU like a *tsunami*, which was tested by the health emergency of the Covid-19 pandemic and the ensuing economic crisis. Beyond the specific content of the judgment itself what was striking was its date of publication; far from fading behind the urgency, the judge-rapporteur Peter Huber and the President of the *BVerfG* Andreas Voßkuhle, who was on the last day of his term of office,⁷³ hastened to comment on their judgment, acknowledging that in this context it could be ‘somewhat irritating’,⁷⁴ but insisting that they were not making politics.

Thanks to the goodwill of the ECB, the Federal Government and the *Bundestag*, this injunction has ceased to apply, at least temporarily. On 2 July 2020, the ECB, while stressing that it was subject only to the jurisdiction of the CJEU, authorized the *Bundesbank* ‘in the spirit of European integration’⁷⁵ to disclose to the Federal Government and the *Bundestag* confidential documents showing how the ECB had assessed the effects of its measures. On 26 June, the Federal Minister of Finance wrote to the President of the *Bundestag* that, after examining the documents, he had concluded that the ECB’s decisions satisfied the requirements of the *BVerfG*⁷⁶ and on 10 July the *Bundestag* adopted a motion to the same effect⁷⁷; in its meeting of 3–4 June, the *Bundesbank* Council came to the same conclusion, as was announced to the Press two months later.⁷⁸

However, there is no guarantee that these statements are the end of the story. At the beginning of August, the serial applicants in *Weiss* indeed applied to the *BVerfG* for an injunction to implement its judgment and as a first step requested communication of some of those documents, which had been classified, because they would be dealing with German saver’s interests. Nothing guarantees that there will not be other challenges of the assessment of the German federal authorities; and it is not said that their appeals would be dismissed as inadmissible.⁷⁹ On 15 June 2020, the *BVerfG* did indeed dismiss appeals against another ECB

⁷³ R. Müller, *Andreas Voßkuhle’s Term of Office Will End Soon: With the Historic Decision on the ECB’s Bond Purchase Programme, the President of the Federal Constitutional Court ends his Term of Office as Spectacularly as he Began It*, *Frankfurter Allgemeine Zeitung* (5 May 2020).

⁷⁴ Interviews of Judge Huber, published on 13 May 2018 by the *Frankfurter Allgemeine Zeitung* and of President Voßkuhle in an interview of the same date, published by *Die Zeit*, No. 21/2020.

⁷⁵ Introductory remarks by Yves Mersch, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, at the Salzburg Global webinar, accessible sur, <https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200702~87ce377373.en.html> (consulté le 5 juin 2020).

⁷⁶ *Federal Government: ECB has Fulfilled Judgement from Karlsruhe*, *Frankfurter Allgemeine Zeitung* (29 June 2020).

⁷⁷ Text, <https://dip21.bundestag.de/dip21/btd/19/206/1920621.pdf> (accessed 15 June 2020).

⁷⁸ *Weidmann sieht Forderungen des Verfassungsgerichts als erfüllt an*, *Frankfurter Allgemeine Zeitung* (3 Aug. 2020).

⁷⁹ *Die EZB-Kläger lassen nicht locker*, *Frankfurter Allgemeine Zeitung* (3 Aug. 2020).

programme, the *Corporate Sector Purchase Programme*, on the ground that the applicants had not sufficiently developed their arguments, but explained why it was quite possible that that programme was ultra vires.⁸⁰ Moreover, it is quite likely that new appeals will be brought before the BVerfG against the ECB's interventions since the outbreak of the pandemic, or even against the position of the federal government which allowed the agreement on the *Recovery Fund to be reached at the European Council of 18–21 July 2020*.⁸¹ The result apparently obtained by the conditional injunction of the judgment of 5 May indeed encouraged potential claimants in the idea that such appeals are worth undertaking:

If the claim of the judges of the *Zweiter Senat* to assess the legality of the ECB's decisions on the basis of the principles of conferral and proportionality is unintelligible from the point of view of EU law, it is also very dangerous.⁸² It is dangerous not only because the *BVerfG* rejects the principle of uniform application of EU law on the basis of the democratic principle and the principle of conferral, but also because it is as a flagrant demonstration of the intolerable arrogance that characterizes the approach of certain Member States in the management of the economic emergency linked to the Covid-19 pandemic.

Even if the injunction against the *Bundesbank* and the deprivation of effect of the ECB's decisions on the territory of the Federal Republic of Germany does not eventually materialize, the breaches of EU law resulting from the judgment of 5 May 2020 are not erased. The question of launching an infringement procedure necessarily arises. It is obvious that the choice of whether or not to open a procedure, as well as the successive choices during the pre-litigation and litigation phases, is at the discretion of the Commission; even if the European Parliament adopts a resolution to this effect. It was an MEP's question that led to a statement by the President of the Commission on 10 May, according to which the next steps "may include the option of infringement proceedings",⁸³ and to the hearing of experts organized on 14 July by its Constitutional Affairs and Legal Affairs Committees.⁸⁴

In their interviews with the press, Judge Rapporteur Huber and outgoing President Voskuhle also referred to the precedents of the judgments of the Czech Constitutional Court of 31 January 2012 in the *Landtová Pl. ÚS 5/12*⁸⁵ and of the

⁸⁰ 2 BvR 71/20; the text of the ruling is only available in German.

⁸¹ In this respect, Calliess, *supra* n. 64, notes that the judgment is full of 'warning messages' with reference to the ECB's *Crown-Programm*.

⁸² See Cruz Vilaça, *supra* n. 29.

⁸³ https://ec.europa.eu/commission/presscorner/detail/fr/STATEMENT_20_846 (accessed 11 May 2020).

⁸⁴ See the programme on, https://www.europarl.europa.eu/cmsdata/209860/JURI-AFCO_Judgement%20German%20Constitutional%20Court_programme.pdf (accessed 14 July 2020).

⁸⁵ J. Komárek, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 Jan. 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, 8(2) Eur. Const. L. Rev. 323 ss.

Danish Supreme Court in *15/2014, Ajos*⁸⁶ as a further arguments for claiming the right not to enforce a judgment of the Court of Justice. Many commentators and some judges of the *BVerfG* have also pointed out that the Commission did not initiate infringement proceedings in those cases – which may have been a mistake. The judgment of the CJEU in *Landtovà*, C-399/09 was answering a preliminary question referred by the Czech Supreme Administrative Court, not the Constitutional Court, so that a reference for interpretation should have been made by the latter in order to be able to present its position to the CJEU, as the Italian Constitutional Court did in *Taricco bis*.⁸⁷ In *Ajos*, the Danish Supreme Court was the referring court seeking confirmation that, given the lack of horizontal effect of the Directives, its interpretation of Danish legislation, not in conformity with the prohibition of discrimination on grounds of age, could be upheld. The Supreme Court did not accept applying a general principle of law where there was a relevant directive and therefore did not draw the necessary consequences from the judgment of the Court of Justice in the case.⁸⁸ These two precedents are anyway different in their practical outcome from the *BVerfG* judgment of 5 May 2020 because they concerned issues of limited scope: the pensions of certain Slovak nationals in the Czech Republic and the settlement of a specific dispute between individuals in Denmark. On the other hand, the *BVerfG* judgment of 5 May has serious systemic consequences for EU law and for the Union itself, because the deprivation of effect of ECB decisions in Germany, preventing the *Bundesbank* from purchasing securities on the secondary market, would have immediate repercussions in the other Member States of the Union, first and foremost in those with the weakest financial situation.

As most commentators have noted, recourse to the democratic principle also encourages governments and supreme or constitutional courts to do the same, particularly in the case of Hungary and Poland, where governments may have a sizeable majority in parliament. The judges of the *Zweiter Senat* reply that they are not responsible for the effects of their case-law abroad, which may be right from a legal point of view, but is contradicted in practice by the fact that the *BVerfG* has taken care since at least its *Maastricht* judgment to publish immediately a press release in English, as well as a translation into that language of the judgments and orders illustrating its position on European integration. On the other hand, it is worthwhile noting that two other constitutional Courts have on the contrary made statements after the *BVerfG*'s judgment in *Weiss*, which clearly signal that they do

⁸⁶ U. Šadl & S. Mair, *Mutual Disempowerment: Case C-441/14 Dansk Industri, acting on behalf of Ajos A/s. v. Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/s. v. The estate left by A.*, 13(2) Eur. Const. L. Rev. 347 ss.

⁸⁷ CJEU 5 Dec. 2017, *Criminal proceedings against M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936.

⁸⁸ CJEU 19 Apr. 2016, *Dansk Industri*, C441/14-, ECLI:EU:C:2016:278.

not intend to tread on the path opened by Karlsruhe: on 8 July 2020 the Italian Constitutional Court decided to refer to the CJEU a question for preliminary ruling on the interpretation of Article 34 Charter on Social security and social assistance vis-à-vis the status of third-country nationals that ‘it cannot be ruled out that a number of further references for a preliminary ruling by the ordinary courts may be made’⁸⁹; on 15 July, the Portuguese Constitutional Court specified that it was not competent to assess the validity of an EU norm on the basis of the principles consecrated by the Portuguese constitution.⁹⁰

In press interviews the two judges of the *Zweiter Senat* referred to France and the CJEU because the *Conseil d’Etat* had failed to make a reference to the Court of Justice.⁹¹ The *Conseil d’Etat* had wrongly thought there was an obvious interpretation ‘while it could not be certain that its reasoning would be equally obvious to the Court’.⁹² As far as is known, the error was not subsequently repeated. Either the German constitutional judges admit by such statements that it is normal for infringement proceedings to be opened against Germany and that Germany will have to comply with the eventual CJEU judgment, or they consider that the German Federal Constitutional Court, the *Bundersverfassungsgericht*, cannot be put on the same level as the French Supreme Administrative Court, the *Conseil d’Etat*.

In our view, it would be appropriate for the Commission to initiate infringement proceedings against Germany. The argument often put forward that this would put the German Government in the awkward position that the independence of the *BVerfG* is guaranteed by the Constitution (and indeed also by Union law and the case-law of the Court of Justice itself) is hardly convincing. It may be useful to point out that in the operative part of its *Ajos* judgment, the CJEU took care to specify that ‘[n]either the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter’ the obligation of interpretation in conformity nor the principle of primacy.⁹³ There is no doubt

⁸⁹ *Corte Costituzionale*, Ruling n° 182, 2020.

⁹⁰ See J.-L. da Cruz Vilaça, *O acórdão n.º 422/2020 do Tribunal Constitucional português e a inibição de acesso ao direito da UE: um ponto final no ‘diálogo de surdos’?*, <https://www.cruzvilaca.eu/pt/noticias/O-acordao-n-4222020-do-Tribunal-Constitucional-portugues-e-a-inibicao-de-acesso-ao-direito-da-UE-um/107/> (accessed 3 Aug. 2020).

⁹¹ CJEU 4 Oct. 2015, *Commission v. France*, C-416/17, ECLI:EU:C:2018:811.

⁹² Paragraph 111 ‘the judgment of 15 Sept. 2011, *Accor* (C-310/09, EU:C:2011:581), being silent in that respect, the *Conseil d’État* (Council of State) chose to depart from the judgment of 13 Nov. 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707), on the ground that the British scheme at issue was different from the French tax credit and advance payment scheme, while it could not be certain that its reasoning would be equally obvious to the Court’.

⁹³ See *supra* n. 88, para. 43.

that the principle of loyal cooperation applies to all institutions and authorities of the Member States and that the latter therefore incur an objective liability which is not contrary to the independence of such institutions or authorities, as the CJEU recently recalled for the vicarious liability of Member States for failures to act by the authorities of their Overseas Countries and Territories.⁹⁴

An infringement proceeding would revive the debate on the implications of the duty of loyal cooperation in German scholarship, which is particularly divided on the judgment of 5 May 2020, a debate that might gradually lead to an adjustment of the *BVerfG's Dogmatik*. Litigation would give an opportunity to the CJEU to recall these consequences, while taking into account all the points of view which could be presented in the form of interventions or observations by Member States. The inherent length of an infringement procedure and, above all, the various stages preceding a reasoned opinion also remove the force of the argument that such a procedure would add fuel to the fire. As a matter of fact, in the absence of an infringement procedure, the judges of the *Zweiter Senat* could be strengthened in their claim to have the power to review the application of the principle of conferral within their own parameters, and German institutions and citizens could be at risk of being convinced that the *BVerfG's* argument in this matter is admissible, with all the perils that this poses for the uniform application of EU law.

In conclusion, whether the attempt at cultural legal domination characteristic of the text commented on here was intended or not, and regardless of its political impact in the midst of the economic crisis triggered by the Covid-19 pandemic, the decision of 5 May 2020 of the *Bundesverfassungsgericht* deserves to remain at the forefront of comparative constitutional jurisprudence, as a perfect illustration of an 'unintelligible' and therefore 'objectively arbitrary' judgment.

⁹⁴ CJUE 31 Oct. 2019, *Commission v. United Kingdom*, C-391/17, ECLI:EU:C:2019:919 and *Commission v. The Netherlands*, C-395/17 ECLI:EU:C:2019:919. See J. Ziller, *Vicarious Liability of Member States for their Overseas Countries and Territories: Commission v. United Kingdom and Commission v. The Netherlands*, 57(6) CMLR 1887 – 1908 (2020) forthcoming.

