

The Legal and Economic Questions posed by the German Constitutional Court's decision in the Public Sector Purchase Programme (PSPP) Case

By Andrew James Perkins*

This paper seeks to explore the PSPP decision of the German Constitutional Court and its effect on the monetary policy decisions taken by central banks. It begins by exploring the decision and its effect in Germany, together with its wider implications for the European Monetary Union before moving onto consider the standard of review that should be applied by the Courts when they are required to review central banks actions. Conclusions are reached to show that any standard of review should be limited because of the unique economic and political circumstances in which central bank decision making takes place.

Keywords: Central Banking; Judicial Review; Proportionality; European Law; European Monetary Union.

Introduction

In the week in which countries of the European Union celebrated VE Day, the *Bundesverfassungsgericht* (the German Federal Constitutional Court) delivered a landmark Judgment in the *Public Sector Purchase Programme (PSPP) Case*¹ banning fresh purchases of German Bonds through the European Central Bank's Asset Purchase Programme. From an economic perspective questioning the monetary mandate of the European Central Bank at such a crucial juncture is potentially a blow to the European Union's Covid-19 pandemic recovery process. The decision also poses questions of an existential nature in the midst of the Covid-19 crisis concerning the balancing between the authority and primacy of EU law, and national competences and sovereignty beyond budgetary matters².

This paper seeks to examine this decision from three core perspectives. Firstly does the *Bundesverfassungsgericht* decision effectively insist for the independence of the *Bundesbank* (the German Central Bank) on bond purchases as well as upon broader financial issues? Secondly if this is so could other national courts seek to declare that the PSPP provisions are incompatible with their own national laws? Finally to demonstrate that from the perspective of financial regulation this

*Senior Lecturer, Truman Bodden Law School of the Cayman Islands. George Town, Grand Cayman, Cayman Islands. Email: andrew.perkins@gov.ky. My thanks to Mr. Mitchell Davies, Dr. John Epp and Professor Amy Wallace for their comments on this piece. Any errors in drafting are my own.

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

²Konstadinides (2019).

represents a problematic precedent if a central bank needs to persuade a Court of a sufficient proportionality analysis in regulatory monetary and economic matters.

Conclusions will be reached to show that this decision represents a notoriously difficult position to adopt within a monetary union, especially for the *Bundesbank* which is deemed to have a controlling interest within the European Monetary Union. Furthermore this paper will demonstrate that there needs to be a light touch of proportionality applied when courts interact with the decisions of central banks because of the unique economic and political framework in which central bank decision making operates. Any monetary policy decision should be subjected to a limited form of judicial scrutiny.

PSPP and the German Reaction

The global financial crisis and the recognition of the constraints posed by the zero lower bound on the policy rate has led central banks to increase their focus on financial stability and to develop new tools to promote fiscal consistency and to conduct non-conventional monetary policy. Central banking has entered a brave new world in which challenges have become greater and the conduct of policy has become more complex³. Against this background the European Central Bank (ECB) dramatically expanded the scope of its actions particularly in respect of the financial assistance function of the Eurozone⁴. The whole goal following the events of 2007 to 2009 was to weather the financial storm and to keep the Euro afloat.

As part of the redesign of the Eurozone the ECB gained a pivotal role in bank supervision and resolution⁵ and in the macro prudential oversight of the financial system within the European Union⁶. As part of Mario Draghi's infamous "whatever it takes"⁷ dictum the European Central Bank along with other Eurozone central banks began an asset purchase process under which the PSPP was constructed so that the Euro system acquired vast amounts of debt securities from a wide range of professional counterparties to release its liquidity into the market⁸. At the heart of PSPP is the increase of monetary supply and thus support the Eurozone economy through investment and to ultimately return inflation levels close to but below the 2% target threshold⁹. These actions can be attached to the primary objective of the

³Mishkin (2019) at 595.

⁴Dermine (2019).

⁵Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and Regulation 806/2014 establishing uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation.

⁶Regulation 1092/2010 on EU macro prudential oversight of the financial system and establishing of a European Systemic Risk Board 2010 and Regulation 1096/2010 conferring specific tasks on the European Central Bank concerning the functioning of the European Systemic Risk Board 2010.

⁷Draghi (2012).

⁸ECB Monetary Policy Decision 13th December 2018.

⁹Huetras, Schelling & von Berg (2020).

European Union's monetary policy. The actions of the ECB are not unique and follow earlier steps by other high profile central banks namely the US Federal Reserve, the Bank of England and the Japanese Central Bank who all used large scale purchases of government bonds to drive up inflation¹⁰.

Shortly after launch in 2015 a case was brought before the *Bundesverfassungsgericht*. The central arguments advanced by the Plaintiffs were that the ECB had exceeded its competence in the realm of monetary policy by straying into the realm of economic policy in launching PSPP which in principle is left to member states in accordance with Article 119 of TFEU¹¹. This limitation is imposed by firstly Article 123(1) TFEU the prohibition on monetary financing of public debt and Article 125(1) the so called 'no bail out' clause. Naturally, political agreement amongst member states plays into these treaty-imposed limitations with the inevitable consequence of some states benefiting from the current structure of the European Monetary Union and some being disadvantaged¹².

The question framed by the *Bundesverfassungsgericht* was the compatibility of PSPP with both the prohibition on monetary financing and upon public debt mixed with Article 4(2) TFEU namely member states constitutional identity. During the course of proceedings five questions were referred to the CJEU for a preliminary ruling pursuant to Article 267(1) TFEU. From a central bank's perspective questions 3 and 4¹³ are of paramount importance because scrutiny of the proportionality assessment used in its decision making when adopting PSPP was demanded.

In answering those questions, the CJEU in *Weiss*¹⁴ held that the primary objective of the European Union's monetary policy was to maintain price stability and that without prejudice to that policy the ECB is to support the general economic policies in the Union. Following these factors and the low level of inflation in the Eurozone and the exhaustion of the instruments normally used for the conduct of its monetary policy led the ECB to consider the adoption and implementation, with effect from 2015, of an asset purchase programme with the features of the PSPP was necessary both in principle and in its various practical aspects. Monetary policy must be validly adopted and implemented only in so far as the measures that it entails are proportionate to the objectives of that policy and should be suitable for attaining the legitimate objectives pursued by the legislation and not go beyond what is necessary¹⁵.

The findings of the CJEU are in my view cogently reasoned, replying to the preliminary questions with a proportionate outcome that it is clear that PSPP is intended to ease monetary and financial conditions, including those of non-financial corporations and households, thereby supporting aggregate consumption and investment spending in the euro area and ultimately contributing to a return of inflation rates to the levels sought over the medium term. In accordance with

¹⁰Gros (2018).

¹¹Tuori & Tuori (2014).

¹²Komarek (2020).

¹³2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 at paragraphs 146 and 216

¹⁴*Weiss and Others*.

¹⁵*Ibid*.

practices of other central banks the purchase of government bonds can contribute to achieving that objective by means of facilitating asset financing that is conducive to boosting economic activity by giving a clear signal of the inflation target and that therefore the actions of the ECB through the PSPP were proportionate and did not go beyond what was necessary to achieve the objective sought¹⁶.

When the case proceeded back before the *Bundesverfassungsgericht* a surprising outcome occurred. Taking an unexpected tack, the PSPP enacted by the ECB was found to be a manifest and structurally significant exceeding of competences¹⁷ and more surprisingly the CJEU in delivering Judgment in *Weiss* had manifestly failed to give consideration to the importance and scope of the principle of proportionality which also applies to the division of competences, and is no longer tenable from a methodological perspective given that it completely disregards the effects of the PSPP¹⁸. The CJEU Judgment in *Weiss* was found to manifestly exceed the mandate conferred on the CJEU in Article 19(1) TEU and that as the Judgment had resulted in a structurally significant shift in the order of competences it constituted an ultra vires act nullifying the effect of the PSPP within Germany.

The Judgment of the *Bundesverfassungsgericht* is capable of having this effect because the Court has developed a role as guardian of the German constitutional order and has enforced its power over monetary policy measures as a function of constitutional control required in its view to protect the German democratic principle. The democratic principle is used by the Court as a standard which has proved decisive for the control of domestic public authority, particularly administrative decision making within Germany¹⁹. When construing this principle the court views any exercise of public authority being democratically founded, which means citizens must substantively consent to the exercise of political power in conditions of freedom and equality²⁰. In this instance the need by the German Court to enforce constitutional control was because the economic policy effects of the PSPP are disregarded completely by the CJEU and therefore when applying a principle of proportionality such a test cannot fulfil its purpose, given that a key element of the balancing of conflicts of interests is missing. As a result, the review of proportionality in respect of the PSPP is rendered meaningless²¹. The procedural standard was deemed to be insufficient, from the prospective of the Court what is required is a substantive review of the delineation between monetary competences of the ECB on the one hand and the economic competences of the member states, on the other hand because of the substantive fiscal and economic effects of the programme.²²

The effect of this decision within Germany is that it has been mandated by the Court that for the purposes of financial instruments and the actions of either the

¹⁶Ibid.

¹⁷*German Constitutional Court PSPP Case 2 BvR 859/15.*

¹⁸Ibid.

¹⁹Jestaedt (2014).

²⁰Violante (2020).

²¹Ibid.

²²Akkermans (2020).

ECB or the *Bundesbank* that a test of necessity is met. This means that the relevant financial policy measure be first suitable to achieve the objective pursued and second, necessary to achieve that objective. In other words, the competent authority could not have obtained the objective with a less onerous measure. When applying this methodology to the PSPP it was found by the Court that the PSPP failed to meet the necessity test because when designing and implementing PSPP, the ECB did not balance the effects of monetary policy with other policy areas of the EU²³.

The *Bundesverfassungsgericht* has insisted for independence for the German Central Bank not only on matters of bond purchases but also on broader financial issues because the *Bundesbank* is required by this decision to ensure that the ECB has taken an appropriate proportionality assessment in accordance with the standards set out above. If there is failure to evidence such to the satisfaction of the Court German Constitutional organs, administrative bodies, and courts may neither participate in the development nor in the implementation, execution or operationalisation of ultra vires acts.²⁴ This is a bold position and effectively puts a caveat on all ECB's actions in respect of Germany which is deemed to have a controlling interest in the European Monetary Union. This is an instance of an extra layer of scrutiny in respect to financial decision making even though this is an area where decisions need to be taken when time is of the essence and sophisticated analysis to a stringent standard of proportionality not possible.

A Difficult Precedent?

From the perspective of monetary policy within the EU and its member states the PSPP decision represents a difficult precedent. The decision has called into question the EU legal order and the very role of the law in governing monetary policy²⁵. The legal meaning of monetary policy within the EU is framed in accordance with Article 3 of TFEU as an exclusive competence of member states yet also Article 127(2) TFEU provides the ECB with the mandate to implement monetary policy within the union.

A dilemma exists for central banks within the union and for the ECB could other national courts apply similar standards as expounded by the *Bundesverfassungsgericht*? And if this be so could this detrimentally affect the way central banks take decisions in relation to monetary policy. This will depend upon two factors firstly how member states apply the principle of proportionality in their standard of judicial review and secondly the relationship of the member state in question as to the status of EU law within their Jurisdiction.

Dealing firstly with the application of the principle of proportionality. Proportionality is a general principle of European Union Law and is found in Articles 5(2) and the second sentence of Article 5(4) TFEU. It has also developed as a common law principle through the jurisprudence of the European Court of Human Rights and the legal orders of Europe. At one level proportionality

²³Solana (2020).

²⁴German Constitutional Court PSPP Case 2 BvR 859/15.

²⁵de Arriba-Sellier (2020).

possesses neutrality, a capacity of rationality²⁶ and the ability to make a legal concept of rights the best it can be²⁷. Proportionality is arguably unavoidable in the process of judicial review as it can be the only rational way to make a judgment²⁸ that appropriately bolsters the role of majoritarian decision making about rights within a constitutional democracy.²⁹

When applying the principle of proportionality to the actions of a public authority which would include a central bank, German law, French law and Spanish law make the assessment based upon the elements of suitability, necessity and appropriateness. Italian law also takes a similar approach with the added element of reasonableness which is also reflected in the Jurisdictions of Austria, Poland, Hungary and even the United Kingdom. Jurisprudence from the CJEU has also developed a doctrine of proportionality which requires that the acts of EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives³⁰. Therefore if macroeconomic actions of a central bank as in the PSPP case were deemed to be disproportionate it is entirely possible that the constitutional principle of proportionality could be used to strike down policies whose outcome is considered disproportionate and unreasonable by a national constitutional court.

Whether a national constitutional court is willing to take such an action will depend upon the primacy in which European Law is held at a national level. Whilst it was held that the reason the *Bundesverfassungsgericht* struck down the PSPP was for a lack of proportionality the court held that it had to make such a finding because the CJEU had exceeded its judicial mandate deriving from Article 19(1) TFEU and had thus acted ultra vires, which was why the Judgment in *Weiss* had no binding force in Germany³¹. This is based upon the doctrine of conferral of powers by European Institutions which can be found in national constitutions, the treaties, and the legislation approving the treaties, the case law of national constitutional courts and the case law of the CJEU. However, whether EU law remains prime law within a jurisdiction will become a constitutional question if courts are willing to perform their own review of the compliance of EU measures³² when organs of the state or the EU exceed the powers conferred upon them. Whilst the PSPP case represents a landmark departure from the supremacy of EU law within member states, it is not the first time that a national constitutional court has declared the actions of an EU institution to be ultra vires and disapply the application of EU law within a jurisdiction.

The Constitutional Court of the of the Czech Republic (*Ústavní soud České republiky*) concluded in the ‘Slovakian Pension Case’³³ that a decision of the CJEU

²⁶Beatty (2004) at 164 & 171.

²⁷Ibid.

²⁸Barak (2012) at 3.

²⁹Gardbaum (2010).

³⁰*Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*.

³¹2BvR 859/15 at 143.

³²Akkermans (2020).

³³*Landtova*.

was *ultra vires*. A finding was reached that the CJEU had overstepped the boundaries in respect of the powers transferred to the EU by the Czech Republic under Article 10(a) of the Czech Constitution. A core reason put forward by the Czech court was that the CJEU applied its principles to the dissolution agreement between the two countries. This judgment marks the beginning of member states displaying domestic judicial disapplication of the primacy of EU Law.

An additional example can be found from the Danish Supreme Court (*Højesteret*) in which the Court took the opportunity to set new boundaries as to the applicability of the CJEU's rulings in Denmark and ultimately the primacy of EU Law. The Danish Court refused to set aside a conflicting provision of Danish law and thus providing national law with precedence over EU law. The Danish Supreme Court held that the law on accession does not provide the legal basis to allow the unwritten principle prohibiting discrimination on grounds of age to take precedence over Paragraph 2a(3) of the Law on salaried employees in so far as the provision is contrary to the prohibition.³⁴ In doing this, the Supreme Court of Denmark concluded that the judge-made principles of EU law, such as the general principle of non-discrimination on grounds of age, were not binding, as they do not have their origin in a specific treaty provision.

A few days after the German Constitutional Court published its decision in the PSPP case, the CJEU handed down Judgment³⁵ in which the CJEU was asked to rule in relation to the treatment of asylum seekers being held in the transit zone at the Hungarian-Serbian border. The case originated from preliminary ruling requests in December 2019 by the Hungarian Constitutional Court (*Magyarország Alkotmánybírósága*) asking the CJEU to rule on whether, among other questions whether its actions in detaining refugees in the transit zone for 464 days and 526 days without being able to leave in a lawful manner. The CJEU ruled that being held in a transit zone for such period amounted to detention under EU law³⁶ and that such detention cannot extend beyond four weeks. However, the Hungarian prime minister has referred to the judgment as part of a 'coordinated attack' by the EU on Hungary. Significantly, the prime minister stated that, if the CJEU issues a judgment that conflicts with the Hungarian Constitution, then the constitution must have priority. This statement clearly echoes the sentiments of the Judgment in the PSPP Case in which it was expressed if there is a conflict between EU law and national constitutional traditions those traditions may prevail.

Therefore, it is entirely possible based on the intensity of judicial control in relation to monetary policy decisions that the Courts of member states could if it considers it necessary to construe the principle of proportionality as a principle of delimitating competences³⁷ strike down a decision of a national central bank or the ECB should it find that a policy decision has sufficiently reached a threshold to trigger *ultra vires* censorship. Furthermore should a national constitutional court find that the CJEU's procedural and therefore limited approach to the standard of review of central banks actions fails to provide a credible standard of control

³⁴*Dansk Industri*.

³⁵*Commission v Hungary*.

³⁶Namely Directive 2013/33/EU.

³⁷Wendel (2020).

which prevents an effective scrutiny of central banks decisions and fails to provide credible enforcement of the division of competences between monetary policy and the Member States powers over economic and fiscal choices³⁸ disapply the decision of the CJEU as the *Bundesverfassungsgericht* did in the *PSPP Case* in disapplying *Weiss* and make a ruling based on their own national standards of proportionality.

This represents a concerning situation for Central Banks in that there appears a case where complex financial decisions could be subject to different standards of review in different jurisdictions based on differing constitutional traditions. This is concerning because the euro continues to be heavily rules based without a clear account of the role of the Court therein and the haphazard development of euro crisis law³⁹ could lead to a situation where differing interpretations lead to a lack of control action by ECB. Therefore, a common standard of proportionality is required at a national and European level to prevent member states constitutional courts from hampering the development of the monetary union in times of financial uncertainty.

The Standard of Proportionality that should be applied to Central Banks

The financial and euro area crisis have painfully illustrated the consequences of the lack of a credible fiscal backstop for sovereigns in the euro area⁴⁰. The function of a lender of last resort through fiscal tradition has in most states fallen to the central bank. The European Monetary Union was however, not built upon this principle. Two distinct treaty provisions fly in the face of the traditional role of a lender of last resort firstly *Article 123 TFEU* which prohibits monetary financing and secondly *Article 125(3) TFEU* referred to as the no bail out clause. Furthermore, the European Central Bank has only been given exclusive competence in accordance with the treaties for monetary policy decisions and not economic ones which are left to the exclusive competence of the member states central banks.

The European financial order has had to come to terms with this reality through ensuing litigation in the cases of *Gauweiler*⁴¹, *Pringle*⁴², *Weiss*⁴³ and the *PSPP Case*. Each of these decisions has resulted in a standard of proportionality being applied by the CJEU and by a National Constitutional Court in relation to monetary policy measures being enacted by a Central Bank. There needs to be an end to the judicial dialogue concerning the evolving powers of the ECB and national central banks and, more broadly the structural changes to the European Monetary Union since the euro area crisis⁴⁴. *Article 125 TFEU* has been held to include the provision of support provided it is indispensable to safeguard the

³⁸Violante (2020).

³⁹van der Sluis (2019).

⁴⁰De Grauwe (2012).

⁴¹*Gauweiler and Others v Deutsche Bundestage*.

⁴²*Pringle v Government of Ireland*.

⁴³*Weiss and others*.

⁴⁴Hinarejos (2019).

financial stability of the euro area as a whole and of its member states and if it is subject to strict conditionality⁴⁵. If those conditions are met, it needs in spite of political agendas and a lack of treaty change to be recognised that the framework of the European Union allows for the euro area member states to create a vehicle capable of providing unlimited assistance in order to prevent sovereign default⁴⁶ and that monetary policy does not have a precise definition but provided that a policy measure falls within the Central Bank's mandate in terms of both instrument and objective⁴⁷ that such actions are lawful provided they satisfy a standardised test of proportionality.

From the perspective of the CJEU a test of proportionality has been applied on a consistent basis through the financial policy jurisprudence in *Gauweiler, Pringle and Weiss*. An assessment balancing the suitability and necessity of a measure. Whilst at face value this seems uncontroversial, we need to examine the level of intensity that this balancing should take. It needs to be ensured that a central bank is able to operate effectively and to perform their economic functions with a degree of flexibility and autonomy. It is essential for the monetary union that the powers of central bankers and the courts are delineated in such a way as to allow efficient and flexible monetary policy whilst at the same time ensuring the respect of legal limits⁴⁸. The *PSPP* judgment suggests that in making the assessment of proportionality a central bank should assess the effects of its actions on other policies, in particular those within member states. This shows a divergence in the standard of what is proportionate.

The intensity with which EU Courts will examine the legality of a decision is indicated by the applicable standard of review. The European Courts have two standards of scrutiny from which to choose: full review and marginal review⁴⁹. In principle, full review is the prevailing threshold of judicial control with respect to questions of law and fact and represents the strictest form of scrutiny that EU Courts may exercise⁵⁰. Such standards are exercised by the European Court when individual's rights must be protected against discretionary interferences by firms with their fundamental freedoms. By contrast, marginal review is engaged where the decision touches upon policy matters or entails complex economic assessments and is thought to connote a more relaxed standard of control under which judicial intervention is confined to instances of "manifest errors of assessment" in the decision taken. Such a standard it is arguable may include other considerations with the Court being less willing to intervene to challenge the exercise of an EU body's discretion. In reviewing the exercise of such powers, the Court cannot substitute its own assessment for that of the Community legislature, but must confine itself to examining whether that latter assessment contains a manifest error or constitutes a misuse of powers or whether the authority in question clearly

⁴⁵*Pringle v Government of Ireland* at paragraph 142.

⁴⁶Editorial (2015).

⁴⁷*Gauweiler and Oth. v Deutsche Bundestage* and *Pringle v Government of Ireland* at paragraph 53.

⁴⁸Lehmann (2017).

⁴⁹Türk (2013).

⁵⁰*Tetra Laval BV v Commission of the European Communities* and *Pfizer Animal Health SA v Council of the European Union*.

exceeded the bounds of its discretion⁵¹. The principle requires that acts of the EU institutions be appropriate for attaining legitimate objectives sought by the legislation at issue and that such measures do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued⁵². Under this standard the EU body must be allowed broad discretion in an area such as that involved in the main proceedings, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.⁵³

Decisions of the ECB should be seen as an admixture of a general legislative act and an individual decision⁵⁴ as the ECB has a mandate to exercise a degree of discretion when making economic and policy choices within its mandate as provided for in *Articles 127 to 129 of TFEU*, The Statute of the ECB and the ECSB to act in areas of monetary policy. What standards of review should be applied to their actions? Central bankers need credibility to exercise their mission because their task is to a large extent psychological.⁵⁵ An overly stringent standard of review could be detrimental to market confidence if there was ex post facto reversal of a decision of a central bank in court. In any standard of review it also needs to be recognised that monetary policy decisions are technical and complex and also require a careful balance of the pros and cons and consist of a value judgment, this is different from other areas where competent authority's actions are narrowly defined by statute.

Any monetary policy decision should be subjected to a limited form of judicial scrutiny, a court should firstly look at whether the ECB or a national central bank has the competence to take a certain measure and then to categorise in accordance with the European Treaties whether the decision is part of monetary policy or not⁵⁶. However, Courts should appreciate that in order to keep central banking as adaptable as possible monetary policy should be understood as a broad and open concept. When assessing the proportionality of a decision made the

⁵¹*The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd, and Omega Air Ltd, Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority*.

⁵²See, to that effect, judgments in *British American Tobacco (Investments) and Imperial Tobacco* at paragraph 122; *ERG and Others* at paragraph 86; and *Gauweiler and Others*, at paragraphs 67 and 91.

⁵³See, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco* at paragraph 123.

⁵⁴Öberg (2020).

⁵⁵Blinder (2000) at 15-16 provides empirical evidence that credibility is even more important than central bank independence; Rochon & Rossi (2015) discuss the theoretical basis of central bank credibility.

⁵⁶*Gauweiler and Others v Deutscher Bundestag* at para 40 “The ECSB must act within the limits of the powers conferred upon it by primary law and it cannot therefore adopt and implement a programme which is outside the area assigned to monetary policy by primary law”.

standard that should be applied is very light and should lead to the annulment of a monetary policy measure only where the measure exceeds what is necessary to achieve its objective in such an obvious way that it can be said to lack a rational basis⁵⁷.

The Practical Effect

The practical effect of the *PSPP* Judgment required the German Federal Government and the Bundestag to address the shortcomings of the ECB's decision-making process as to the assessment of proportionality when setting up the PSPP. This led to the ECB providing the Bundesbank with supplementary unpublished documents that contained information that was used when it assessed the proportionality of the PSPP prior to its implementation. This information was passed to the Bundestag who passed a resolution on 2 July, 2020 considering the requirements of the PSPP Judgment to have been fulfilled. This arguably is a middle of the road solution which satisfies the limitations imposed by the PSPP Judgment and allows for the European financial order to continue unhindered in a time of great uncertainty.

From a European perspective the Judgment was met with great consternation. The European Court of Justice issued a press statement in which it made it abundantly clear that when the court gives a preliminary ruling it is binding upon the court for the purposes of the decision to be given in the main proceedings and that divergences between courts of the members states as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty⁵⁸.

Conclusions

Arguably this decision has set a bomb under the EU legal order⁵⁹ in respect of its financial institutions. Taking the reasoning of the *Bundesverfassungsgericht* at its most stringent any participation by the Bundesbank in an ECB asset purchase programme as a form of quantitative easing will require an extra layer of scrutiny from a German Perspective to ensure that a sufficiently German standard of proportionality has been applied. If it has not then Germany may be excluded from participating in the relevant measures, this represents an untenable position in an economic and monetary union especially for Germany which has a controlling interest. More practically this decision has put a halt to an expansion of powers for the ECB at a time when the pandemic emergency programme needs innovative solutions to prevent a return to significant financial crisis. This could also inhibit the ability of the European financial order to adapt quickly to future emerging

⁵⁷Lehmann (2017).

⁵⁸Press Release 58/20 following the Judgment of the German Constitutional Court of 05 May 2020.

⁵⁹Sandbu (2020).

financial challenges. Effectively this may represent the outer edge of what maybe constitutionally possible under the current framework⁶⁰, with negotiations as to what a new financial order may look like, an ongoing pandemic and emerging fiscal difficulties this will be the wrong time to embark on such a review.

European and national courts have also been called upon time and time again to assess whether a decision of a central bank is proportionate, whilst recognising that it is difficult for courts to decide whether a given monetary policy is consistent with a treaty based upon the principle of proportionality. However, it needs to be recognised that this is the situation that the treaty structure leaves us with. Courts need to be urged to use their proportionality review to enhance the legitimacy of Central Bank's activities in the area of monetary policy and to build confidence within the market. If there must be a review of a financial measure such as the PSPP which will have been enacted under unique political and economic circumstances, the standards applied should be limited. A court should check there is a treaty competence to enact the measure and view the actions of monetary policy broadly to appreciate the technical nature of the measures and provided there is a balance of the pros and cons which has been conducted in a rigorous way by a Central Bank the measure should be found to be proportionate. To do otherwise would give the impression of prejudice or preconceptions about the limits of the European financial order which is unacceptable in a monetary union.

References

- Editorial* (2015). 'On Courts of Last Resort and Lenders of Last Resort' in *European Constitutional Law Review* 11(2):227-238. doi:10.1017/S1574019615000206
- Akkermans, J. (2020). Five remarks on the ruling of the Bundesverfassungsgericht in the PSPP Case: *Corporate Finance Lab*. <https://corporatefinancelab.org/2020/05/27/five-remarks-on-the-ruling-of-the-bundesverfassungsgericht-in-the-pspp-case>
- Barak, A. (2012). *Proportionality; Constitutional Rights and their Limitations* (translated from Hebrew by Doron Kalir). Cambridge University Press.
- Beatty, D.M. (2004). *The Ultimate Rule of Law*. Oxford: Oxford University Press.
- Blinder, A.S. (2000). 'Central-Bank Credibility: Why Do We Care? How Do We Build It?' in *American Economic Review* 90 (5):1421-1431.
- de Arriba-Sellier, N. (2020). Is Monetary Policy Too Important To Be Left To Judges? *Leiden Law Blog*. <https://leidenlawblog.nl/articles/is-monetary-policy-too-important-to-be-left-to-judges>
- De Grauwe, P. (2012). *Economics Of Monetary Union*. 11th ed. Oxford: Oxford University Press.
- Dermine, P. (2019). 'Out of the Comfort Zone? The ECB, financial assistance, independence and accountability' in *Maastricht Journal of European and Comparative Law* 26(1):108–121.
- Dermine, P. (2020). 'The Ruling of the Bundesverfassungsgericht in PSPP- An Inquiry into its Repercussions on the Economic and Monetary Union' in *European Constitutional Law Review* 16(3):525-551.
- Draghi, M. (2012). Speech at the Global Investment Conference in London (26 July). www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html

⁶⁰Dermine (2020).

- Gardbaum, S. (2010). 'A Democratic Defence Of Constitutional Balancing' in *Law & Ethics of Human Rights* 4:78.
- Gros, D. (2018). 'Euro Area Quantitative Easing: Large Volumes, Small Impact?' *Suerf Policy Note, Issue no. 27*.
- Hinarejos, A. (2019). 'Ongoing Judicial Dialogue And The Powers Of The European Central Bank: Weiss' in *Revista de Derecho Comunitario Europeo* 63(may-august): 651-668.
- Huetras, M., Schelling, H. & C. von Berg (2020). 'German Federal Constitutional Court issues ultra vires verdict on ECB's bond buying program on the grounds of Ultra Vires' <https://www.dentons.com/en/insights/articles/2020/may/12/german-federal-constitutional-court-issues-ultra-vires-verdict-on-ecbs-bond-buying-program>
- Jestaedt, M. (2014). 'Democratic Legitimation of the Administrative Power- Exclusive versus Inclusive Democracy' in H. Pünder & C. Waldhoff (eds.) *Debates in German Public Law*, pp. 181-202. London: Hart Publishing.
- Komárek, J. (2020) 'Position Paper concerning PSPP ruling of 05 May' prepared for the standing committee of the House Of Representatives of the Netherlands.
- Konstadinides, T. (2019). 'The German Constitutional Court's decision on PSPP: Between mental gymnastics and common sense' *U.K. Const. L. Blog* at <https://ukconstitutionallaw.org>
- Lehmann, M. (2017). 'Varying standards of judicial scrutiny over central banks actions' in *ECB Legal Conference 2017* pp. 112-132. <https://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf>
- Mishkin, F.S. (2019). 'Modern Central Banking' in A.N. Berger, Ph. Molyneux & J.O.S. Wils (eds.), *Oxford Handbook of Banking* 3rd ed. *Oxford University Press*, at 595.
- Öberg, J. (2020) 'The German Federal Constitutional Courts PSPP Judgment Proportionality Par Excellence' in *European Law Blog*. <https://europeanlawblog.eu/2020/06/02/the-german-federal-constitutional-courts-pspp-judgment-proportionality-review-par-excellence>
- Rochon, L.-Ph. & S. Rossi (ed.) (2015). *The Encyclopedia of Central Banking*. E. Elgar publishing.
- Sandbu, M. (2020) 'German Court Has Set a Bomb under the EU Legal Order' *Financial Times* (05 May).
- Solana, J. (2020). 'A reminder from the courts for the European Central Bank to take climate change seriously' in *LSE Commentary*. <https://www.lse.ac.uk/granthaminstitute/news/a-reminder-from-the-courts-for-the-european-central-bank-to-take-climate-change-seriously/>.
- Tuori, K. & K. Tuori (2014). *The Eurozone Crisis - A Constitutional Analysis*. Cambridge University Press.
- Türk, A.H. (2013). 'Oversight of administrative rulemaking: Judicial review' in *European Law Journal* 19(1):126-142.
- van der Sluis, M. (2019) Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in *Weiss (C-493/17)*, *Legal Issues Of Economic Integration* 46(3):263-284.
- Violante, T. (2020). 'Bringing Back The Politics: The PSPP Ruling In Its Institutional Context' in *German Law Journal* 21(5):1045-1057.
- Wendel, M. (2020). 'Paradoxes of Ultra Vires Review: A Critical Review of the PSPP Decision and its Initial Reception' in *German Law Journal* 21(5):979-994.

Cases

- British American Tobacco (Investments) and Imperial Tobacco, *C 491/01*, *EU: C:2002:741*, paragraph 122.
- Commission v Hungary. *C-808/18*.
- Dansk Industri. *C-441/14*.
- ERG and Others. *C 379/08 and C 380/08*, *EU:C:2010:12*.
- Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community. *Case 8-55*, ECR 1956, I-302.
- Gauweiler and Others v Deutscher Bundestag Case *C-62/14.C-62/14*, *EU:C:2015:400*.
- German Federal Constitutional Courts Decision in the Public Sector Purchase Programme *Case 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16*.
- Landtova. *Pl. ÚS 5/12* of 31 January 2012
- Omega Air Ltd, Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority (*C-122/00*). *2002 I-02569*.
- Pfizer Animal Health SA v Council of the European Union European Court Reports *2002 II-03305*.
- Pringle v Government of Ireland (2012). *C-370/12*, *ECJ 27 2012*.
- Tetra Laval BV v Commission of the European Communities European Court Reports *2002 II-04381*
- The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd (*C-27/00*).
- Weiss and Others *C-493/17 EU:C:2018:1000*.