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Dit *KwartaalSignaal* Europees recht is bijzonder. Normaliter worden meerdere voor het Unierecht belangwekkende zaken besproken. Echter, in de afgelopen periode is een bom ontploft. De hoogste Duitse (constitutionele) rechter (het Bundesverfassungsgericht) heeft, nadat het Hof van Justitie zijn prejudiciële vragen had beantwoord, uitspraak gedaan in een zaak over de rechtmatigheid van het opkoopprogramma (PSPP) van de Europese Centrale Bank. Deze uitspraak raakt aan de fundamenten van de EU-rechtsorde en verdient daarom extra aandacht.

ECJ's *Weiss* and the Bundesverfassungsgericht's PSPP: two courts speaking two different languages

I Introduction

On 5 May, the German Constitutional Court delivered a seminal judgment pronouncing two acts of EU law partially *ultra vires:* the so-called Public Sector Purchase Programme of the European Central Bank, and the *Weiss* judgment of the Court of Justice declaring the same programme compatible with EU law. It is the first time the German Constitutional Court decided, after years of sharp judicial dialogue and tensions, to openly disagree with the Court of Justice on interpretation of EU law.

II Facts of the case

In 2015, the European Central Bank (ECB) introduced a public sector asset purchase programme (PSPP). The PSPP, simply put, allows primarily the national central banks, belonging to the European System of Central Banks (ESCB), to buy government bonds of their own Member States on the secondary market. The German Constitutional Court (the Bundesverfassungsgericht) received several constitutional claims concerning the implementation of the PSPP by the German Central Bank (Bundesbank), and the involvement of the German government and the federal parliament (Bundestag) in the process. The Bundesverfassungsgericht referred several preliminary questions to the Court of Justice regarding, essentially, the compliance of the PSPP with various provisions of the EU Treaties. This contribution focuses in particular on the questions regarding the mandate of the ECB, and the proportionality principle.

III The Court of Justice's Weiss *judgment*

In order to determine whether the PSPP falls within the scope of EU monetary policy, the Court in its *Weiss* judgment (C-493/17, ECLI:EU:C:2018:1000) needed to primarily assess the objectives pursued by the programme. It stated that 'the purpose of [the PSPP] is to contribute to a return of inflation rates to levels below, but close to, 2 % over the medium term' (§ 53-54). In other words, the purpose of the programme can be attached to the primary objective of EU monetary policy, which is price stability (cf. Art. 127(1) and Art. 282(2) TFEU) (§ 57). It is true that the PSPP can also have an impact on the balance sheets of commercial banks and on the financing of the Member States – which are effects that can be sought not only through measures of monetary policy but also measures of economic policy (§ 59). Yet, the conclusion that the PSPP pursues an objective of monetary policy cannot be called into question 'for the sole reason that it might have indirect effects that can also be sought in the context of economic policy' (§ 61). In sum, the Court determined that the PSPP is a tool of monetary policy because its ultimate objective is price stability, while admitting that the programme also has effects on economic policy (§ 59).

In the proportionality assessment, the Court first focused on the fact that the ECB makes choices of a technical nature and undertakes complex forecasts and assessments and must, thus, be allowed a broad discretion (§ 73). The Court then continued with the suitability analysis. It stated, in essence, that at the time when the PSPP was adopted, the annual inflation rates in the eurozone were far below the target of 'below, but close to, 2%' (§ 76). This target was determined by referring to the practices of other central banks, which showed that a large-scale sovereign bond-buying programme could contribute to attaining that objective. In sum, there is no 'manifest error of assessment' with regards to the suitability of the PSPP (§ 78).

As the next step, the Court assessed the PSPP's necessity by, first, stipulating that it would not have been possible to counter the risk of deflation by other means, such as by lowering key interests rates or by purchasing private sector assets (§ 80-81). The features of the PSPP are set up in a manner that guarantees that the programme's effects are limited to what is necessary to achieve the set objective. This refers to, in particular, the following features: the PSPP is not selective, the purchases are subject to strict eligibility criteria, the programme is of a temporary nature, the volume of bonds to be purchased is limited, priority is given to bonds issued by private operators, the PSPP framework sets out purchase limits per issuer as well as per issue (§ 82). Moreover, based on the information provided by the ECB, it is not apparent that an asset purchase programme of either more limited volume or shorter duration would have been as effective as the PSPP. Given the complexity of monetary policy questions, nothing more can be required of the ESCB apart from it using its economic expertise and the necessary technical means at its disposal (§ 90).

Finally, the Court stated that the ECB has weighed up the various interests involved, so as to effectively to prevent, upon implementation of the programme, disadvantages which are manifestly disproportionate to the objectives pursued (§ 93). This entails, in particular, the risk of losses. However, according to the Court the ECB has adopted measures aimed at circumscribing that risk

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(§ 94). These measures are, in particular, rules on loss allocation that stipulate that in any case of losses of a national central bank related to the PSPP, the only losses to be shared are those generated by securities issued by eligible international organisations (§ 97). Based on all these elements, the Court considered the PSPP proportionate.

IV The Bundesverfassungsgericht's PSPP judgment

Upon receiving the ruling in *Weiss,* the Bundesverfassungsgericht (Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915) decided not to follow the assessment of the Court of Justice, despite the fact that, under EU law, a preliminary ruling ex Article 267 TFEU is binding on the requesting court. The Bundesverfassungsgericht justified its decision, first, by arguing that the 'delimitation of competences undertaken by the CJEU is simply untenable' (§ 117). The Court of Justice submitted that the PSPP falls within the scope of ECB competence, yet this view 'manifestly fails to give consideration to the importance and the 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 actual effects of the PSPP' (§ 119). According to the Karlsruhe judges, the *Weiss* judgment manifestly exceeds the mandate conferred upon the Court in Article 19(1) TEU, which is why not only the PSPP but also the judgment itself constitutes an *ultra vires* act, meaning it has no binding force in Germany (§ 119).

The Bundesverfassungsgericht took an issue with the Court's reasoning that the PSPP cannot be treated as equivalent to an economic policy tool just because it may have indirect effects which could also be sought in the context of economic policy. It argued that any effects of the programme 'that were knowingly accepted and definitely foreseeable by the ESCB when the programme was set up should not be regarded as (merely) indirect effects of the programme' (§ 122). The Bundesverfassungsgericht further stated that

> '[t]he CJEU's approach to disregard the actual effects of the PSPP for the purposes of assessing the measure's proportionality and to refrain from conducting an overall assessment and appraisal in this regard does not satisfy the requirements of a comprehensible review [...] Applied in this manner, the principle of proportionality cannot fulfil its corrective function for the purposes of safeguarding the competences of the Member States, as provided for in Article 5(1) second sentence and Article 5(4) TEU. The interpretation undertaken by the CJEU essentially renders meaningless the principle of conferral set out in Article 5(1) first sentence and Article 5(2) TEU' (§ 123).

This argument is followed by an overview of the meaning of the principle of proportionality. The Bundesverfassungsgericht acknowledged that the way this principle is applied in EU law differs from its application in German jurisprudence. On the one hand, under German law, the proportionality principle (*Verhältnismäßigkeitsgrundsatz*) consists of the elements of suitability (*Geeignetheit*), necessity (*Erforderlichkeit*) and appropriateness/proportionality *stricto sensu* (*Angemessenheit / Verhältnismäßigkeit im engeren Sinne*). On the other hand, under EU law, the proportionality analysis consists of the elements of appropriateness/suitability, and necessity, while 'little to no consideration' is paid to the proportionality *stricto sensu* (§ 126).

The Bundesverfassungsgericht then returned to the case at hand and argued that

> '[t]he specific manner in which the CJEU applies the principle of proportionality [...] renders that principle meaningless for the purposes of distinguishing, in relation to the PSPP, between monetary policy and economic policy, i.e. between the exclusive monetary policy competence [...] and the limited conferral upon the EU of the competence to coordinate general economic policies, with the Member States retaining the competence for economic policy at large' (§ 127).

As a result, the review of proportionality is rendered meaningless, because the suitability and necessity of the PSPP are not balanced against any effects the PSPP has on economic policies (apart from the risk of losses). Put differently, the beneficial effects the PSPP aims to achieve are not weighted against the adverse effects the programme has on Member State competence. 'Ultimately, [the Court of Justice] allows the ESCB to conduct economic policy as long as the ECB asserts that it uses the means set out or provided for in the ESCB Statute (cf. Art. 20(1) ESCB Statute) and that it aims to achieve the inflation target fixed by the ECB itself' (§ 133). The Bundesverfassungsgericht then extensively analysed the effects the PSPP could have on economic policy (§ 166-176).

Finally, it came to the conclusion that due to the lack of balancing, and insufficient reasons provided by the ECB to justify the PSPP, the programme violated Article 5(1) second sentence and Article 5(4) TEU and, in consequence, exceed the monetary policy mandate of the ECB (§ 177-178). The Bundesverfassungsgericht identified the German government and the federal parliament (Bundestag) as being responsible for ensuring that the ECB makes a (new) proportionality assessment, 'which must be substantiated with comprehensible reasons' (§ 179).

V Comments

The reasons why the legality assessment of the PSPP ended up causing an open conflict between the Court of Justice and the Bundesverfassungsgericht are manifold. The tension between these two courts has been appreciable since the early years of European integration. On the one hand, the Court of Justice has established in cases such as *Van Gend en Loos* (26/62, ECLI:EU:C:1963:1), *Costa / ENEL* (6/64, ECLI:EU:C:1964:66), and *Internationale Handelsgesellschaft* (C-11/70, ECLI:EU:C:1970:114) that EU law stems from an autonomous source – the EU Treaties – and, as such, cannot be overridden by any norms of national or international law, however framed, without being deprived of its unique character. The Court of Justice sees itself as the guarantor of EU law autonomy and must therefore be the final judicial 'instance' deciding

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questions on validity and interpretation of EU law (Opinion 2/13, Accession of the EU to the ECHR, ECLI:EU:C:2014:2454).

On the other hand, the Bundesverfassungsgericht, and some other national constitutional courts, have their own jurisprudence on the interpretation of EU law autonomy and primacy. The Bundesverfassungsgericht identifies as the guardian of the German Constitution. It has determined several limits to the degree of EU integration Germany can agree to, and the scope of competences it can confer on EU institutions (Solange I Beschluss vom 29 Mai 1974, Az.: 2 BvL 52/71 and Solange II, Beschluss vom 22. Oktober 1986, Az.: 2 BvR, the Maastricht judgment, Urteil vom 12. Oktober 1993, Az. 2 BvR 2134, 2159/92, Honeywell Beschluss vom 06 Juli 2010. Az.: 2 BvR 2661/06) and the Lisbon judgment (Urteil vom 30 Juni 2009, 2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208). One of those limits, the ultra-vires lock stipulates, in essence, that EU institutions cannot act beyond the scope of competences conferred on them by the Treaties, and that it is the role of the Bundesverfassungsgericht to control that. This mandate originates in the German Constitution, and in its protection of the democracy principle, which limits the power of the German government and the Bundestag to agree to adoption of EU acts which breach the principle of conferral (the eternity clause, Article 79(3) in conjunction with Article 20(2) Basic Law).

The tension between the two courts has culminated in recent years against the background of the changes to the Economic and Monetary Union, in particular the activities of the ECB during the euro crisis. In 2014, the Bundesverfassungsgericht sent its historically first set of preliminary questions to the Court of Justice regarding the Outright Monetary Transactions programme (OMT) announced by the ECB. This referral gave rise to the notorious *Gauweiler* judgment (C-62/14, ECLI:EU:C:2015:400). In this case, the Bundesverfassungsgericht finally settled for the analysis of the Court of Justice, yet it has clearly indicated that it had its difficulties with the Court's method of delimiting the scope of monetary policy, as well as its proportionality assessment.The tension between the two courts now for the first time grew into an open conflict in the Weiss/PSPP case. This has prompted many commentators to (again) suggest institutional and structural changes, such as creation of a new appeal jurisdiction within the Court of Justice, which would allow for a peaceful judicial dialogues to be restored, and which could mitigate potential conflicts between the Court of Justice and national constitutional/supreme courts in the future.

Another option which might help to resolve the conflict would be creating more transparency and clarity in the analysis of the ECB mandate. Looking at the Court's judgment in Weiss, and the Bundesverfassungsgericht's decision in PSPP, it seems as though the two courts are speaking two different languages, and are not able (or willing) to fully understand one another. Given the fact that the ECB mandate and the policy tools the ECB is using or will use in the future will likely again become subject to judicial disputes, it is worth considering how the judicial dialogue between the Court of Justice and the Bundesverfassungsgericht about monetary policy could be led more with more clarity. This contribution – without being able to conduct an in-depth analysis – wishes to highlight two points. The first point refers to the delimitation of the scope of monetary policy, while the second one focuses on the identification of protected interests in the proportionality assessment of bond buying programmes.

When assessing the legality of a measure adopted by an EU institution, it has to be first determined whether the EU institution had competence to act. This requirement is enshrined in Article 5(1)(2) TEU as the principle of conferral. Second, if there is a competence, it has to be determined whether the competence has been exercised correctly, in particular whether its exercise complies with the principles of subsidiarity (Art. 5(3) TEU) and proportionality (Art. 5(4) TEU).

In case of the PSPP, the first step is thus to assess whether the ECB has competence to adopt such a programme. Article 3(1)(c) TFEU stipulates that monetary policy is an exclusive competence of the EU. Furthermore, Article 127(1) TFEU states that price stability shall be the primary objective of the ESCB. Article 127(2) TFEU stipulates that one of the basic tasks of the ESCB shall be to *define* and implement the monetary policy of the EU. Monetary policy is thus defined only in an abstract and general manner in the Treaties, without precise instructions how the objective of price stability shall be achieved in quantitative terms (*Weiss*, § 55). In general, the ECB has defined that price stability means maintaining inflation rates in the eurozone below, but close to, 2% over the medium term.

Yet, against the background of the principle of conferral, it is crucial to define the scope of monetary policy, in particular in relation to economic policy. While the former is an exclusive competence of the EU, the latter is still to a great extent in the hands of the Member States (cf. Art. 119 TFEU). In practice, however, these two policy areas overlap, and a clear distinction between them, as is theoretically prescribed by the EU Treaties, is difficult to attain. The method the Court of Justice has adopted to assess whether a measure falls within the scope of either monetary or economic policy is based first on the determination of the objectives pursued by the measures at hand, and, second, on the instruments the measure employs and ties to other measures of EU law. This method was first developed by the Court in *Pringle* (C-370/12, ECLI:EU:C:2012:756), and later on applied by analogy in *Gauweiler*.

In *Pringle* the Court had to assess legality of the European Stability Mechanism (ESM) envisaged by Article 136(3) TFEU (*Pringle*, § 53-60). The ESM Treaty was concluded by the Member States and the question asked to the Court was, essentially, whether the content of the ESM Treaty fell under the scope of economic policy, or whether it affected the exclusive monetary competence of the EU. The Court came to the conclusion that the fact that the stability of the euro area as a whole, which was the

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objective of the ESM, could have repercussions for price stability, did not suffice to turn such a mechanism into a monetary policy measure. An economic policy measure cannot be treated as an equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the single currency (*Pringle*, § 56, 97).

In *Gauweiler,* the Court chose to employ by analogy the *Pringle*-reasoning in order to assess whether the OMT programme falls within the scope of monetary policy. The Court used the formula developed in *Pringle,* taking first the objectives, and then the instruments employed by the OMT programme as a determining factor. The Court found that the OMT programme's objectives were, first, safeguarding the singleness of monetary policy, and, second, an appropriate transmission of monetary policy, which both contribute to its primary objective to maintain price stability (*Gauweiler*, § 48-49). In analogy to *Pringle,* the Court stated that just because the OMT programme has indirect effects on economic policy, it cannot be treated as equivalent to an economic policy measure (*Gauweiler*, § 52).

In *Weiss,* the Court went even further and became more explicit about the difficulty of distinguishing between monetary and economic policies. It stated:

'It must be emphasised in that regard that Article 127(1) TFEU provides, inter alia, that (i) without prejudice to its primary objective of maintaining price stability, the ESCB is to support the general economic policies in the Union and that (ii) the ESCB must act in accordance with the principles laid down in Article 119 TFEU. Accordingly, […] the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies' (*Weiss*, § 60).

The Bundesverfassungsgericht clearly takes an issue with the Court's method of defining the scope of monetary policy. In reaction to *Gauweiler* as well as to *Weiss,* the Bundesverfassungsgericht criticised the Court for 'downplaying' the indirect effects both bond buying programmes might have on economic policies of the Member States, while arguing that such indirect effects have no impact on the classification of the measure as one of either economic or of monetary policy (*Gauweiler*, § 52, *Weiss,* § 61, 2 BvR 859/15, § 122).

Instead of building on its reasoning in *Pringle*, the Court could have chosen a different, and arguably clearer way to assess whether measures such as the OMT programme and the PSPP fall within the scope of monetary policy (V. Borger, 'Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler*', *Common Market Law Review (53)* 2016, p. 139-196, 180). In both, *Gauweiler* and *Weiss,* the Court refers to Article 18.1 of the Protocol No. 4 On the Statute of the ESCB and the ECB, which explicitly clarifies that the ECB may buy and sell outright marketable instruments in order to achieve the monetary policy objective and carry out its tasks (*Gauweiler,* § 54, *Weiss,* § 69). The Court could have used Article 18.1 of the Statute directly as a legal basis legitimising adoption of bond buying programmes by the ECB as an exercise of its competence. The Statute is part of primary EU law and it closely defines monetary policy and tasks falling thereunder. Admittedly, this would have required departure from the objective-based approach the Court adopted in *Pringle.* Yet, *Pringle* was a case focused mainly on the scope of economic policy. *Gauweiler* and *Weiss* are judgments dealing with the scope of monetary policy and tools used by the ECB in order to fulfil the aims pursued by it. By focusing on Article 18.1. of the Statute, the Court would not have to define bond buying programmes as being part of monetary policy by juxtaposing it with economic policy (Borger, p. 181).

The second brief point this essay relates to the principle of proportionality. First of all, it often appears as if either the Court of Justice or the Bundesverfassungsgericht would confuse defining the scope of monetary policy with the assessment of its exercise. Put differently, neither of the courts clearly separated their assessments under the principle of conferral from the assessments of the principle of proportionality (V. Kosta, 'The Principle of Proportionality in EU Law: An Interest-based Taxonomy', in: J. Mendes*, EU Executive Discretion and the Limits of Law*, Oxford: Oxford University Press 2019, accessible also on https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3368867, p. 16-21). Second, another misunderstanding arises between the courts due to the fact that they have different understandings of what the protected interests are that the bond buying programmes and their effects need to be weighed against.

Article 5(4) TEU stipulates that '[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. What Article 5(4) TEU does not specify are the protected interests that the action of the EU measure has to be proportionate to. Yet this is problematic because 'balancing competing interest is inherent to proportionality' (Kosta, p. 1). Neither in *Gauweiler* nor in *Weiss* is the Court transparent in defining the interest or interests that the bond buying programmes have to be weighed against in order to determine whether the latter are proportionate or not.

While it is true that the Court could limit its assessment to the elements of suitability and necessity only, by doing so, it clearly opens up the possibility for the Bundesverfassungsgericht to 'finish' the proportionality assessment for it and define the protected interests itself. In the PSPP judgment, the Bundesverfassungsgericht attempted to identify the interests the Court is balancing the effects of the PSPP against. It stated that

'the CJEU does not make it clear which opposing interest these two safeguards serve, objectively, it can be assumed that they serve the budgetary autonomy of Member States and thus promote fiscal policy interests, which do not fall within the ambit of monetary policy […] However, it appears that other opposing interest are not taken into consideration.' (2 BvR 859/15, § 132)

As became obvious in the lengthy proportionality analysis, the Bundesverfassungsgericht understands proportionality to mean a balancing of the EU's monetary policy with

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the Member States' economic policies. The Bundesverfassungsgericht employs the last step of the proportionality analysis in order to, in fact, return to the question of conferral and delimitation of competences. It is however questionable whether the interests protected by Article 5(4) TEU are the competences of the Member States. Such use of the proportionality principle reminds more of the assessment of subsidiarity in case of shared competences, ex Article 5(3) TEU. Article 5(3) TEU is concerned with balancing the protection of Member State powers with the achievement of the EU objectives (Kosta, p. 5). Article 5(3) TEU is however not applicable to exclusive competence, such as monetary policy. Still, the Bundesverfassungsgericht argues that the manner in which the Court of Justice conducted the proportionality analysis, 'cannot fulfil its corrective function [of that principle] for the purposes of safeguarding the competences of the Member States' (2 BvR 859/15, § 133). It seems that the Bundesverfassungsgericht interprets Article 5(4) TEU as a tool that can limit the exercise of EU competence in the field of exclusive competence (T. Tridimas, *The General Principles of EU Law*, Oxford: Oxford University Press 2006, p. 176). By using this logic, the question of defining the scope of monetary policy is to be answered, first, when identifying the competence, and, then again, when assessing the exercise of the same competence in light of the proportionality principle. It is possible that this is how the Bundesverfassungsgericht comes to the conclusion that the PSPP (potentially) constitutes an *ultra vires* act. In general, an *ultra vires* act is an act which was adopted by an institution overstepping the boundaries of its competence. In contrast, an act which does not satisfy the proportionality test is 'simply' disproportionate. Yet, when the assessments of the principle of conferral and the principle of proportionality get mixed up, a disproportionate measure might be classified as *ultra vires.* Such logic is, however, confusing and ill-advised. Therefore, it is crucial that the Court of Justice not only engages in the assessment of suitability and necessity of bond buying programmes, but that it also clearly identifies which interests are to be balanced against such programmes within the framework of Article 5(4) TEU.

In effect, by confusing the question of competence with the question of its exercise, and by not defining clearly the protected interests, the two courts might nominally use the same legal principles, yet, in fact, they are conducting completely different assessments. It would shed some light on the analysis if the Court of Justice were to, first, adjust its analysis of the nature of bond buying programmes, second, clearly separate the assessment of the scope of monetary policy from the proportionality assessment, and, third, within the proportionality assessment, clearly define the protected interests. This does not necessarily contradict the need for a limited judicial review stemming from the broad discretion awarded to the ECB. It would merely allow for the two courts to come closer to speaking one language.

Naturally, an adjustment to the method of analysis of bond buying programmes will not in itself ease the tensions between the two courts. The conflict has much deeper roots going beyond the methods of interpretation of EU law. However, as long as there is no clear solution in place which would clarify the question on how to structurally solve conflicts between the Court of Justice and the national constitutional/supreme courts, a first step could be the creation of transparent and clear methods of assessing validity of ECB action. ◂

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