Making sense of the use of proportionality in the Bunderverfassunsgericht's PSPP decision[1]

Toni Marzal
Lecturer at the University of Glasgow

Upon reading the Bunderverfassunsgericht's (BVerfG) bombshell 5 May 2020 decision[2] on the legality of the European Central Bank's (ECB) Public Sector Purchase Programme (PSPP), one cannot but be struck at how little it thinks of the quality of the legal reasoning of the Court of Justice of the European Union (CJEU) in its previous *Weiss* decision[3]. The Court in Karlsruhe was particularly unimpressed by the CJEU's application of the proportionality principle, and this is the why it condemned the EU court's decision, for the first time in history, as *ultra vires*. The choice of words signals that the German court intends its rebuke to be nothing short of humiliating. The CJEU's application of proportionality renders this principle "*meaningless*"[4], manifestly contradicts its own case law and that of domestic courts[5], is not "*tenable from a methodological perspective*"[6], and ultimately is "*simply not comprehensible and thus objectively arbitrary*"[7]. If the BVerfG is the teacher and the CJEU the pupil, the grade dispensed is a miserable fail.

There are several ways to try to make sense of the German decision's reasoning on proportionality. The first is to judge it in the terms proposed by the Constitutional Court itself. That is, is its understanding and application of proportionality as technically sound as it claims, particularly when compared to the CJEU's? If one is to judge others so harshly, it is wise to make sure that one's own position is irreproachable. We will see, however, that the BVerfG's reasoning on proportionality is not without flaws. A closer reading reveals questionable oddities and inconsistencies. It makes one wonder if it is not rather its own reasoning that is "*simply not comprehensible*" (Part I).

A second approach is nevertheless possible. Beyond condemning the German Constitutional Court's decision as simply wrong, one can try to understand why it chose to issue its historic rebuke to the CJEU on the basis of a highly questionable application of proportionality. The BVerfG's ultimate rationale appears more clearly if we approach its ruling on proportionality as inextricable from its dismissal of the other argument that had been levelled against the ECB and the *Weiss* decision, the supposed incompatibility between the PSPP and the prohibition of monetary funding contained in art. 123 TFEU. We will see that the focus on proportionality allowed the BVerfG to avoid the disruptive effects of applying that clear-cut prohibition whilst at the same time integrating its function in the proportionality review of the ECB's competence to adopt the PSPP (Part II).

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[1] The following article builds on a previous blog post: T. Marzal, "Is the BVerfG PSPP decision 'simply not comprehensible'?: A critique of the judgment's reasoning on proportionality", *Verfassungsblog,* 9 May 2020, https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/, DOI: https://doi.org/10.17176/20200509-133222-0.
[2] BVerfG, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15.
[3] Case C-493/17, *Proceedings brought by Heinrich Weiss and Others*, ECLI:EU:C:2018:1000.
[4] BVerfG, 5 May 2020, para. 127.
[5] *Ibid.*, para. 124-126.
[6] *Ibid.*, para. 141.
[7] *Ibid.*, para. 118.

Finally, we will conclude by taking a step back and situating the BVerfG's decision in the broader context of a dispute. The conflict between the CJEU and the BVerfG is not one between the German and EU legal orders (or at least not only that), but one that is internal to EU law, and at the heart of which is the proper role of the judiciary vis-à-vis the ECB. Indeed, the recourse to proportionality by the German judges can be seen as a vindication of judicially-enforced legality against the practically limitless administrative discretion that the CJEU has granted the ECB (3).

I. Is the BVerfG's reasoning on proportionality "simply not comprehensible"?

The BVerfG's rebuke of the CJEU reasoning on proportionality is, as we have already pointed out, extremely stern. The German Court's own reasoning, however, is deeply flawed. Three main aspects of it are questionable. The first is its parochial understanding of proportionality: it presents as universal what is simply a certain German approach to this principle (1). The second is the very relevance of proportionality to the question of whether the ECB had exceeded its mandate: proportionality is usually not useful when deciding issues of distribution of competence (2). The third is the BVerfG's understanding of the final component of the proportionality principle, the so-called balancing test: proportionality normally involves balancing universal values, whereas the BVerfG weighed the interests of particular groups (3).

1. A parochial understanding of proportionality

One of the key arguments of the BVerfG is that the CJEU's application of proportionality in *Weiss* goes against both the CJEU's own case law, as well as that of the constitutional courts in every Member State. The BVerfG explains that proportionality includes three cumulative sub-tests: the measure under review must advance a legitimate purpose (suitability), that purpose cannot have been attained just as effectively through less costly means (necessity) and the benefit obtained must be proportionate to the cost incurred (proportionality *stricto sensu*). It reproaches the CJEU for failing to include a balancing stage in its reasoning, i.e. the third and last sub-test, since it abstained from weighing the benefits of the PSPP against other (non-monetary) interests. In the BVerfG's own words: "*The application of the principle of proportionality by the CJEU cannot fulfil its purpose, given that its key element – the balancing of conflicting interests – is missing*"[8]. Such criticism assumes, rather parochially, that the German understanding of proportionality is universal. This is far from true.

The BVerfG's assessment is ironic as the CJEU can only be described as a champion of proportionality. Internationally, it is often referred to as one of the courts who have most enthusiastically embraced this principle[9]. However, its use of proportionality is as varied as it is widespread. In some cases, it does include some form of a balancing assessment. The *Schmidberger* case is a famous example. Here the CJEU explicitly weighed the free movement of goods against the freedom of expression, measuring the importance of both in the case at hand and balancing one against the other[10]. Frequently, however, the CJEU shirks from carrying out any such evaluation[11]. In

[8] *Ibid.*, para. 138
[9] See e.g. A. Stone Sweet & J. Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Colum. J. Transnat'l L.*, p. 68-149 (2008).
[10] Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659.
[11] T. Marzal, "From Hercules to Pareto: Of bathos, proportionality, and EU law", (2017) 15 *International Journal of Constitutional Law*, p. 621–648.

most cases, proportionality only means checking whether the measure under review serves to advance a legitimate purpose and whether there are no less costly alternatives that would be just as effective (suitability and necessity). Other times, proportionality is a less intrusive review that involves only the first aspect (suitability). Which form proportionality will take depends on the circumstances.

In *Weiss*, the CJEU stated that "*the principle of proportionality requires that acts of the EU institutions should be suitable for attaining the legitimate objectives pursued by the legislation at issue and should not go beyond what is necessary to achieve those objectives*"[12]. It also emphasised that, given the complexity and highly complex nature of monetary policy, the ECB should be allowed "*broad discretion*"[13]. It is therefore clear that the review did not involve any balancing and that it was a rather light-touch review. Is also certain, however, such an application of proportionality is not in any way exceptional: there are numerous similar examples in the review of both national[14] and EU[15] measures. It is also undeniable that there are good reasons for judicial self-restraint: after all, is any court, well-placed to compare apples and oranges, and decide if, say, environmental protection outweighs in a certain set of circumstances the free movement of capital? This problem is arguably even more acute in the case of the CJEU, given the absence of a clear common hierarchy of values across Member States.

It is a bold assertion of the BVerfG that the CJEU's mandate to ensure the right interpretation and application of EU law is exceeded "*where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded*"[16]. This claim is a dubious one – what are those traditional methods and what would be the basis for controlling the CJEU's famously idiosyncratic approach to interpretation? In any case, the irony here is that, even if proportionality developed early in Germany, it only made its way into many other EU jurisdictions because of the influence of EU law as interpreted by the CJEU. In the UK, for example, proportionality is very much perceived as a civil law doctrine imported from the continent, and judges often underline just how exotic (and how German) it is from the perspective of the common law tradition[17]. In France, the *Cour de cassation* has since 2013 pushed judges to review the proportionality of the application of French legislation, arguing that this is necessary to comply with EU law[18] – again much to the chagrin of many in that country who see proportionality as alien to French legal culture[19].

This does of course not mean that the *ideas* of proportionality or balancing are unknown to the common law or French traditions. Indeed, who could be against such universal ideals? However, different legal systems provide different answers to the question of *how*, *when* and *by who* proportionality should be applied. This is why this principle is still today perceived as somewhat of a foreign transplant in France and the UK. For one, it runs against tradition to allow judges to discard the application of legislation if found to be disproportionate. It is however the balancing stage of proportionality that is

[12] *Weiss*, para. 72.
[13] *Ibid*., para. 73.
[14] See e.g. Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609.
[15] See e.g. Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-04023.
[16] BVerfG, 5 May 2020, para. 112.
[17] Lord Hoffmann, "A Sense of Proportion" (1997) 32 *Irish Jurist*, p. 49–61.
[18] On this process, see generally: "Regards d'universitaires sur la réforme de la Cour de cassation. Actes de la Conférence débat 24 novembre 2015", *JCP G*, Supplément au N° 1-2, 11 janvier 2016.
[19] T. Marzal, "La Cour de cassation à 'l'âge de la balance'. Analyse critique et comparative de la proportionnalité comme forme de raisonnement", *Revue Trimestrielle de Droit Civil* 2017, p. 789-810.

seen as most problematic: is weighing the importance of the interests at stake not a legislative function, rather than a judicial one? It is therefore common to see national adjudicators censor nothing but the most "manifest" lack of proportionality and engage in balancing only with the utmost care[20]. Herein, therefore, lies one of the fallacies of the BVerfG: to infer from the general recognition of proportionality in the EU and in the legal system of Member States that the CJEU should have applied it in a particular (German) way when reviewing the ECB's decision.

2. Is proportionality even relevant to the distribution of competence?

Another reproach made by the BVerfG is that *"[t]he specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principle meaningless for the purposes of distinguishing, in relation to the PSPP, between monetary policy and economic policy*"[21]. To put it otherwise, the CJEU's misapplication of the principle of proportionality (i.e. not including a balancing test) prevented it from monitoring whether the ECB had illegally ventured outside the field of monetary policy. The BVerfG is here open to two fundamental challenges.

The first is that it is simply not true that the CJEU in *Weiss* purported to rely on the principle of proportionality to distinguish the monetary from the fiscal. It distinguished two issues, which the BVerfG seeks to confuse. The first was whether the adoption of the PSPP was indeed a monetary measure, and here the CJEU did not make any use of proportionality. The second was whether, *as a monetary measure*, the decision was substantively proportionate, per art. 5 TEU. This provision explicitly relates only to how EU institutions *use* their competence – and not to the limits of these competences[22]. It is an extremely broad and self-standing requirement, since it does not depend on any impact on fundamental rights: *all* measures adopted by EU institutions must be proportionate. It seems therefore natural that the CJEU usually conducts a very light-touch review on the basis of art. 5 TEU[23], as it did in *Weiss*. The BVerfG itself does not disagree with this – it states in its decision that deference should be afforded to the ECB in the "*substantive exercise*" of its powers[24].

The second mistake is to assume that proportionality, whether it includes a balancing test or not, can actually be of use to distinguish a monetary measure from a fiscal one. The BVerfG is right to point out that across Europe proportionality has become a staple methodology in determining whether restrictions of fundamental rights can be justified on behalf of the public interest, or more generally if a certain measure is substantively a rational one. It is not true, however, that proportionality has generally been accepted as a good tool for the purpose of allocation of competence. On the contrary, it is generally accepted that proportionality is of little use when it comes to that[25]. In fact, proportionality destroys the very idea of a division of competence, since it would a lead a judge to

[20] For the example of the French *Conseil constitutionnel*, see V. Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel, technique de protection des libertés publiques ?", *Jus Politicum*, 2012, no. 7 [http://juspoliticum.com/article/Le-controle-de-proportionnalite-exerce-par-le-Conseil-constitutionnel-technique-de-protection-des-libertes-publiques-456.html].

[21] BVerfG, 5 May 2020, para. 127.

[22] Article 5.1 TEU states: "*The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality*". Art. 5.4 further provides: "*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*".

[23] T. Tridimas, *The General Principles of EU Law*, 2nd ed., OUP, 2007, chap. 3.

[24] BVerfG, 5 May 2020, para. 143.

[25] See e.g. V.C. Jackson, "Being Proportional About Proportionality", (2004) 21 Const. Comment., p. 803-859.

accept the adoption of a measure justified, not on the basis of the domain in which it belongs, but because on the whole it brings about beneficial consequences.

It is therefore perfectly understandable that the CJEU did not rely on proportionality to determine if the PSPP was a monetary measure (or indeed that it generally does not resort to proportionality to resolve competence disputes between the EU and Member States). So, if proportionality is not relevant, how should the CJEU approach such cases? This is a common problem. To pick a well-known EU case, is a smoking advertisement restriction an economic measure health (and therefore within the remit of EU competence) or one related to health (and thus ultra vires)?[26] How such cases should be approached is not easy. If one focuses on the avowed objectives, it allows EU institutions to easily circumvent the limits of their competences. If one focuses instead on the effects, however, as the BVerfG seems to suggest, it becomes immediately clear that the effects of any measure are invariably multifaceted. The CJEU in general opts for a half-way approach, as it did in *Weiss*: a measure is monetary if it *objectively* pursues monetary objectives, i.e. it not only claims to do so, but in reality contributes to that objective. The opposite, an assessment based purely on effects, would have been tricky – which is why the CJEU's approach certainly is not completely unreasonable. Indeed, how does one classify a certain effect as "monetary" as opposed to "fiscal"? And, more importantly, how can one of the two be said to be preponderant? Is not the problem precisely the fact that the two cannot be distinguished? That is why the CJEU pointed out in *Weiss* that trying to separate monetary from fiscal effects would make it impossible for the ECB to exercise its competence[27] (an argument that the BVerfG failed to respond to).

3. Weighing particular interests rather than universal values

The BVerfG was not only wrong to insist on a proportionality assessment to determine whether the PSPP was a monetary measure. The manner in which the balancing stage should have been conducted, according to the BVerfG, is also profoundly questionable, and at any rate significantly at odds with how that operation is usually carried out by courts.

When the application of proportionality does include a balancing assessment, the object of that assessment are considerations that can be described, following Duncan Kennedy, as "universalisable". That is, they must be in the interest of all rather than of particular individuals or groups[28]. This means that the judge will usually weigh a universal value (say, privacy or equity) against another such value or a public policy goal (say, security or foreseeability), rather than the interests of capital against workers, of Christian against Muslims, of homeowners against renters, etc. Thus, to return to the example of *Schmidberger*, the two considerations that were balanced by the CJEU (freedom of speech, free movement of goods) were universalisable in this way. That is not of course to say that certain groups or individuals did not stand to gain from its decision. The point here is about how judges frame their decisions when conducting a balancing assessment within a proportionality review.

The BVerfG, however, moved away from this standard approach to balancing. To start with, the only interests that it considered as relevant to that operation were certain fiscal considerations. Why this restriction? If one is to assess any action of the ECB from a balancing perspective, surely we should

[26] Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECR I-08419.
[27] *Weiss*, para. 64-67.
[28] D. Kennedy, "A Transnational Genealogy of Proportionality in Private Law", in R. Brownsword, H.-W. Micklitz, L. Niglia & S. Weatherill (eds.), *The Foundations of European Private Law*, Hart Publishing, 2011, p. 185-220.

not stop at *fiscal* considerations. Instead, we ought to weigh also non-fiscal ones. For instance, there is recently significant talk about whether the Eurosystem should integrate environmental considerations within its decision-making[29]. Why should those concerns be excluded when deciding whether the ECB's decisions are proportionate?

More importantly, the considerations that, according to the BVerfG, the CJEU ought to have taken into account when reviewing the adoption of the PSPP, were very specific costs and material interests. The decision is remarkably transparent about this. Indeed, the BVerfG picks out the following "*economic and social policy effects*" of the PSPP[30] as relevant to the balancing assessment[31]: improving the refinancing conditions of the Member States (who may therefore not implement the "*necessary consolidation and reform measures*"), improving the credit rating of banks (and incentivising them to increase lending), creating risk of losses for private savings, and allowing economically unviable companies to stay on the market. All of these effects ought to have been weighed against the monetary benefits that supposedly followed from the PSPP. It is obvious, however, that none qualify as universalisable considerations.

Universalisability is a key feature of balancing/proportionality because, without it, it becomes impossible to claim that the judge's assessment is in any way legal rather than political. It is of course very difficult to say that, in any particular set of circumstances, free speech 'weighs' more than national security, or that the protection of the environment is weightier than the preservation of private property. The judge can nevertheless claim, with some credibility, that those are values that are enshrined in the legal order, and ranked in importance within that legal order's hierarchy of values. That possibility disappears, however, if what the judge weighs are nothing more than the material interests of particular groups. What legal authority can the adjudicator claim to have, to conclude that the interests of homeowners trump those of renters?

That is precisely the challenge that the BVerfG has opened itself up to, by rebuking the CJEU for not engaging openly in the balancing of the interests of private savers or of the costs of interfering with market discipline for States and private companies. In this sense, it is perhaps ironic how the BVerfG argues that its approach is the only one that preserves the independence of the ECB from "political pressure"[32]. Given its insistence, against the widespread tendency of judges when applying proportionality, on the need to subject the PSPP to a balancing assessment that includes only very particular concerns (which also happen to be clearly favourable to German interests), this claim lacks some credibility.

II. Proportionality and the prohibition of monetary funding

We have laid out the various aspects of the 5 May 2020 decision that render its reasoning on proportionality profoundly questionable, at least from a technical perspective. This is even more so, given the harsh language that the BVerfG uses to characterise the CJEU's application of proportionality as "*simply incomprehensible*". That said, beyond its obvious flaws, the reasoning of the

[29] J. Solana, "The power of the Eurosystem to promote environmental protection", (2019) 30 *European Business Law Review*, p. 547-575.
[30] BVerfG, 5 May 2020, para. 176.
[31] *Ibid.*, para. 168-175.
[32] *Ibid.*, para. 161.

court in Karlsruhe in relation to proportionality can be better understood if read in parallel to its dismissal of the other ground of the challenge against the PSPP and *Weiss*, that of art. 123 TFEU. Indeed, censoring the CJEU for failing to review the proportionality of the PSPP has the advantage of leaving open the programme's viability, which would have been excluded had the BVerfG found instead that it violated art. 123 TFEU (1). Moreover, its approach to proportionality should be taken seriously as an original attempt at reconciling the prohibition on monetary funding of States with the broad powers of the ECB (2).

1. The practical advantage of proportionality

Because the BVerfG's putdown of the CJEU is so stern, one may easily forget that the German court dismissed the second key argument against *Weiss*, based on the prohibition of monetary funding found in art. 123 TFEU, which was probably more convincing than the one based on the distinction between monetary and fiscal policy.

According to that provision, the ECB is prevented from providing assistance to public authorities as well as directly purchasing debt issued by the Member States[33]. It escapes no-one that the prohibition is clearly in tension with the PSPP, since the latter was adopted in response to the soaring cost of borrowing for certain Member States and consisted precisely in acquiring their debt in order to bring down those costs. The fact that the debt was acquired in secondary markets rather than at the moment of issuance was the somewhat arbitrary circumstance that allowed the CJEU to argue that the PSPP did not contravene art. 123. The reality is, however, that the ECB has indeed been funding Member States on a massive scale, which is what art. 123 TFEU precisely sought to outlaw. No doubt it can be argued that it was extremely foolish to wish to subject States unconditionally to market discipline rather than create mechanisms of solidarity[34], or that the circumstances of the sovereign debt crisis justified an exceptional intervention on the part of the TFEU. But that is not what the CJEU claimed in *Weiss*, where it more simply ruled that the specific design of the PSPP meant that it was not covered by the prohibition on art. 123 TFEU.

All of this suggests that it would have been easier for the BVerfG to present the CJEU interpretation of art. 123 TFUE as a clear-cut case of illegality, rather than to follow the convoluted route of distinguishing the fiscal from the monetary or holding a particularly flawed approach to proportionality review as incontrovertible truth. So why did the BVerfG choose that path?

The first answer is more practical, but also speculative. As the German constitutional court points out, art. 123 TFEU "*sets out an absolute prohibition of monetary financing*"[35]. In the manner of a categorical rule, no exceptions are possible: "*It does not leave room for interferences on the grounds that the relevant measures are necessary and justifiable*"[36]. If the BVerfG had concluded that the PSPP violated art. 123 TFEU, it would have had no choice but to rule that the German authorities, and in particular the Bundesbank, were

[33] Art. 123.1 TFEU reads: "*Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as "national central banks") in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments*".
[34] See generally A. Menéndez, "The False Commodity in the European Game of Legal Chairs: Between the Ideal of Regulatory Competition and the Practice of Capitalism Triumphant", *European Papers*, Vol. 4, 2019, No 1, p. 127-155.
[35] BVerfG, 5 May 2020, para. 196.
[36] *Ibid.*

legally precluded from participating in the programme. The consequences would therefore have been much more dramatic than ruling as it did that the ECB was obliged to justify its proportionality.

Indeed, proportionality does not operate in the manner of categorical rules, but rather requires that the judge examine whether a particular measure is justified under the circumstances[37]. The BVerfG's decision to censor the CJEU only for failing to apply a relatively intrusive proportionality review, rather than for concluding that the PSPP was not a violation of art. 123 TFEU, means in practice that the legality of the ECB's programme can still be salvaged. The same applies to the more recent Pandemic Emergency Purchase Programme launched in March by the ECB: it is not unlawful per se, but only if not appropriately justified as proportionate to its legitimate goals. Thus, the focus on proportionality, instead of the more obvious path of art. 123 TFEU, can be seen, perhaps counter-intuitively, as evidence that the BVerfG did not intend its decision to be fundamentally disruptive.

2. The integration of the function of art. 123 TFEU within the review of proportionality

Beyond the BVerfG's potential concern about offering a way out of this institutional clash for German and EU institutions, and allowing for the survival of the ECB's quantitative easing programmes, there is an added dimension to the German court's decision to choose the path of proportionality rather than of art. 123 TFEU. This second answer relates to how the Federal court specifically interprets the principle proportionality, and in particular the originality of its position.

Recall that the requirement of proportionality means, in this context, that the monetary benefits of the ECB's measures should not be outweighed by certain economic costs. Those costs, as we explained above, do not include any value that could potentially clash with the ECB's interventions, but are instead limited to very specific concerns. In particular, the BVerfG requires that the ECB consider the risk that the purchase of public debt may result in those States not implementing the "*necessary consolidation and reform measures*"[38]. That risk is highly relevant here since, the German magistrates emphasise, it was foreseeable at the time of adoption of the PSPP that several Member States would "*increase new borrowing in order to boost the economy with investment programmes*"[39]. Ultimately, the BVerfG concludes, the PSPP's proportionality depends on whether it may "*prevent Member States from adopting own measures to pursue a sound budgetary policy*"[40].

In this way, the BVerfG's approach results in integrating the function of art. 123 TFEU within the review of the boundaries of the ECB's monetary competence. The decision should therefore not be read as giving in to a reading of that provision that deprives it of much of its effectiveness. As the Federal court itself points out, all of the above considerations related to the impact of the PSPP on the budgetary policy of Member States are "*matters governed by Art. 123 TFEU – which fall within the area of fiscal policy*". The function of that provision is, as already stated, to ensure that Member States are disciplined by markets, very much in accordance with ordoliberal assumptions. In the 5 May decision, that function does not disappear. Even if it is not enforced through the categorical prohibition of monetary funding, it is nevertheless imposed as a key interest that must be weighed against the

[37] T. Marzal, *La dynamique du principe de proportionnalité. Essai dans le contexte des libertés de circulation*, Institut Varenne, LGDJ, 2014.
[38] BVerfG, 5 May 2020, para. 170.
[39] *Ibid.*, para. 171.
[40] *Ibid.*

monetary benefits of the ECB's programme. To put it otherwise, the latter's mandate is exceeded when its intervention jeopardises the objective of art. 123 TFEU.

Thus, the recourse to proportionality can be seen as reflecting the BVerfG eagerness to attain a coherent reading of the EU treaty system. Indeed, it allows the court to balance two fundamental and equally legitimate goals of that system, market discipline and price stability, when found to be in conflict as in the circumstances of the sovereign debt crisis.

III. Conclusion: proportionality and the role of the judge in the EU economic constitution

It is tempting to frame the conflict between the CJEU and the BVerfG as a conflict between the German legal order and the EU one. In this vein, one could see that the clash between the courts reflects the tension between German constitutional principles (such as the principle of democracy), and key principles of EU law (such as the principle of primacy). Some aspects of the dispute suggest that this is so: whereas the starting point of the reasoning of the BVerfG's is the fundamental guarantee of democracy under art. 38 of the German Basic Law[41], the CJEU's brief press release in response to the 5 May decision insists on its supreme authority to decide on the proper interpretation of EU law[42]. It would therefore seem that this affair is ultimately about the limits of EU law vis-à-vis those of national law.

What we have been arguing until now, however, suggests that the clash between the courts in Luxembourg and Karlsruhe can be read differently. Rather than as a reflection of a conflict between two autonomous legal orders, the clash ought perhaps to be read more appropriately as internal to EU law, as the two courts stand for profoundly different approaches to its proper interpretation. In particular, the two differ as to the role that the judge ought to play with regards to the interventions of the ECB.

The CJEU's approach, as illustrated by *Weiss* (and the earlier *Gauweiler* decision[43]), has consisted in granting the ECB exceptionally broad powers, to the extent that judicial review becomes practically meaningless. The key argument used by the CJEU to justify that ECB's margin of discretion is the technical nature of the assessments on the basis of which monetary policy is dictated[44]. Ultimately, though, the legitimacy of the ECB rests on the fact that the its interventions, since Mario Draghi's famous "*whatever it takes*" speech in 2012 and the yet untested OMT programme that came with it, are widely perceived to have saved the euro. The CJEU's extremely light-touch approach to the review of the various programmes of the ECB reflect its willingness to allow it all the flexibility it needs in the pursuit of that mission[45], which is seen by many as inextricably tied to the survival of the EU as a whole[46].

Against this, the BVerfG recourse to proportionality reflects an insistence on judicial enforcement as opposed to administrative discretion, on legal reasoning as opposed to technical assessment. The

[41] *Ibid.*, para. 99.
[42] Press release following the judgment of the German Constitutional Court of 5 May 2020, No 58/20, 8 May 2020.
[43] Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400.
[44] *Ibid.*, para. 63; *Weiss*, para. 73.
[45] M. Goldoni, "The Charisma of Central Banking: From Sacrifice to Rituals" (June 6, 2018). Available at SSRN: https://ssrn.com/abstract=3191957 or http://dx.doi.org/10.2139/ssrn.3191957
[46] M. Wilkinson, "Authoritarian Liberalism in Europe: A Common Critique of Neoliberalism and Ordoliberalism", (2019) 45 Critical Sociology, p.1023-34.

ECB's wings are significantly clipped: regardless of the threat to the survival of the monetary union, its interventions cannot overstep the boundaries and guarantees contained in the treaties. In other words, the preservation of the euro cannot come at the cost of excessive fiscal indiscipline. It is the judge's role to make that this is so: even though the CJEU is censored by the BVerfG for going beyond its mandate (*ultra vires*), the real reproach is having done too little (*infra vires*), by falling short of its judicial responsibility to conduct a proper review of the legality of the PSPP.

Nevertheless, it is perhaps ironic that the vindication of the role of judiciary takes place via the principle of proportionality, rather than by enforcing clear-cut rules such as art. 123 TFEU. After all, judicial recourse to proportionality is criticised for blurring the distinction between legal adjudication and political decision-making, particularly because of the balancing test[47]. This criticism is even more justified where, as we saw is the case in the BVerfG's decision, the balancing assessment takes as its object concrete costs to specific groups rather universalisable considerations. Thus, even if the intention of the court in Karlsruhe was really to affirm the need to approach the quantitative easing programmes in a legal manner, its ultimate contribution, by so transparently exposing the interests at stake, may have been to politicise even more the discussion around the role of the ECB.

[47] T.A. Aleinikoff, "Constitutional Law in the Age of Balancing", (1987) 96 *Yale Law Journal*, p. 943-1005.