**Karlsruhe Bites Back: The German Federal Constitutional Court’s PSPP Judgment**

On 5th May 2020, the German Federal Constitutional Court (GFCC) upheld a series of constitutional complaints that the German Federal Government and Bundestag had violated the Basic Law’s guarantees on democratic legitimation by failing to challenge the validity of the European Central Bank’s (ECB’s) Public Sector Purchase Programme (PSPP) – an initiative established in 2015 authorising the purchase of Eurozone government-issued securities on secondary markets.

This post summarises the GFCC's decision (available in English [here](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2020/05/rs20200505_2bvr085915en.pdf;jsessionid=75797C8233F6C0EAF01FC1EE471D0689.2_cid392?__blob=publicationFile&v=5)) and discusses its broader implications with respect to the relationship between EU and Member State law. Those implications extend far beyond the Court’s specific order that, within three months, the German Government and Federal Parliament take steps to ensure the ECB brings its PSPP scheme into conformity with the EU Treaties. The centrepiece of the GFCC’s judgment is, without doubt, its determination that the Court of Justice of the European Union’s (CJEU) prior decision upholding the legality of the PSPP in [C-493/17 *Weiss*](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-493/17) did *not* have binding effect within Germany. Denying CJEU case law domestic effect is a first for the German Court and directly challenges two fundamentals of the EU legal order: (i) the supremacy of EU law and (ii) the CJEU’s jealously guarded competence to rule conclusively on the validity of acts of the EU institutions.

**Factual Background**

The PSPP is a complex instrument of quantitative easing. It is based on [Decision 2015/774 EU of the European Central Bank of 4 March 2015](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.121.01.0020.01.ENG&toc=OJ:L:2015:121:FULL) (as amended) and, in simplified terms, enables the ECB to purchase bonds issued by Eurozone governments on secondary markets with the aim of maintaining price stability and steering inflation within the Eurozone towards a target rate of 2%. It sits alongside a series of similar bond-buying initiatives adopted in the wake of the Eurozone crisis. The value of these instruments is eye-watering even in the present climate of extraordinary fiscal easing to tackle the COVID19 pandemic. Between March 2015 and March 2016, for example, the monthly asset purchases under the PSPP averaged EUR 60 billion.

The complainants in the GFCC judgment, a group of around seventeen hundred German citizens, argued that the German Federal Government and the Bundestag had violated the Basic Law’s guarantees on minimum standards of democratic legitimation ([Art 38(1)](https://www.btg-bestellservice.de/pdf/80201000.pdf) in conjunction with [Arts 20(1),(2)](https://www.btg-bestellservice.de/pdf/80201000.pdf) and [Art 79(3)](https://www.btg-bestellservice.de/pdf/80201000.pdf)) by failing to challenge the validity of the PSPP under EU law. That argument rested on the claim that the ECB did not in fact have any competence under the EU treaties to establish the PSPP. The complainants asserted that, rather than sanction its adoption, the EU treaties expressly precluded the ECB from engaging in this form of government bond-buying. In particular, [Art 123(1) TFEU](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E123:EN:HTML)prohibits the ECB (as well as Member State central banks) from engaging in initiatives that facilitate the direct purchasing of debt instruments issued by Member State governments.

In July 2017, the GFCC suspended proceedings and issued a preliminary reference to the CJEU requesting that the Court rule on the legality of the ECB decisions establishing the PSPP. The Grand Chamber of the EU Court subsequently upheld the validity of the PSPP in its judgement in *Weiss*, delivered on 11 December 2018. It ruled that the PSPP did not fall within the express prohibition on the direct purchase of Eurozone government debt instruments in Art 123(1) TFEU. The Grand Chamber concluded that the ECB decisions establishing the PSPP fell within the Union’s exclusive competence in the field of monetary policy and, moreover, were proportionate to the achievement of the objectives of EU monetary policy. The Court also dismissed arguments that the ECB had failed in its duty to give reasons to support its adoption of the PSPP. The CJEU’s reasoning, particularly on the delineation of EU monetary policy and the interpretation of Art 123(1) TFEU, remained broadly faithfully to its earlier decisions in [Case C‑370/12 *Pringle*](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0370&from=EN) and [Case C-62/14 *Gauweiler*](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CJ0062&from=EN).

**The GFCC’s Judgment**

The CJEU’s decision in *Weiss* upholding the compatibility of the PSPP with the EU treaty framework would ordinarily have effectively marked the end of the dispute. That Court had given the GFCC a definitive answer and the German Court’s obligation was simply to implement that response. However, the GFCC was entirely unconvinced by the CJEU’s assessment of the validity of the PSPP. In an historic first, the GFCC flatly refused to recognise the binding effect of the CJEU’s decision. Rather, in a striking move, it concluded that, by failing properly to scrutinise the proportionality of the PSPP, the CJEU in *Weiss* had *itself* exceeded the boundaries of its judicial mandate under the EU Treaties.

The GFCC did not hold back in its criticism of the CJEU’s review. It concluded that the CJEU’s reasoning in *Weiss* was ‘simply not comprehensible’ [56] and based on a ‘manifest’ disregard for ‘recognised methodological principles’ of interpretation [112]. The GFCC was particularly scathing of the CJEU’s assessment of the proportionality of the PSPP. The German Court took the view that the CJEU had rendered the application of that principle ‘meaningless’ as a key instrument to safeguard Member States against competence creep by the EU institutions, including in the areas of economic and fiscal policy [133].

The GFCC’s damning verdict on the CJEU’s standard of judicial review prompted it to rule that the Luxembourg Court had overstepped its mandate to ensure ‘the law is observed in the interpretation and application of the treaties’ (Art 19(2) TEU). The effect of that milestone determination was to render the CJEU’s ruling in *Weiss* inapplicable within Germany. Invoking its established jurisprudence on the domestic control of ‘ultra vires’ acts of the EU institutions, the GFCC concluded that the CJEU’s decision failed to meet the minimum standards of democratic legitimation required under the Basic law. Consequently, it had no binding effect in the German legal order; in other words, the supremacy of EU law did not apply. As the Court put it,

‘the Judgment of the CJEU of 11 December 2018 manifestly exceeds the mandate conferred upon it in Art. 19(1) second sentence TEU, resulting in a structurally significant shift in the order of competences to the detriment of the Member States. To this extent, the CJEU Judgment itself constitutes an *ultra vires* act and thus has no binding effect [in Germany].’ [119]

The GFCC’s dismissal of the CJEU’s ruling as an ‘ultra vires’ act left the German Court free to engage in its own assessment of the legality of the PSPP under the Treaty framework. Dissecting the CJEU’s reasoning forensically, the GFCC concluded that, in its present form, the PSPP also qualified as an ‘ultra vires’ act on account of the ECB’s failure comprehensively to assess the proportionality of that bond-buying scheme [165]. At the same time, however, the German Court withheld judgment on the potential compatibility of the PSPP in modified form; in other words, following a robust application of the proportionality principle, which identified, weighed and balanced the programme’s monetary and policy objectives in a manner that safeguarded Member State competences [165]. Accordingly, the Court did not, therefore, consider a suitably tailored bond-buying scheme along the lines of the PSPP as fundamentally incompatible with the prohibition on the direct purchasing of government debt instruments set out in Art 123(1) TFEU [180]. It gave the German Government and Federal Parliament three months to take steps to ensure the ECB brings its PSPP scheme into conformity with the EU Treaties [232-235].

**Striking Gold or Missing the Target?**

Last week’s GFCC judgment on the legality of the PSPP is a landmark ruling on the relationship between EU and Member State law. It marks the first time that Court has operationalised its well-established jurisprudence on ‘ultra vires’ acts of the EU institutions to withhold binding effect from a judgment of the CJEU. In so doing, the GFCC has mounted a direct challenge to two cornerstones of the EU legal order: (i) the supremacy of EU law and (ii) the CJEU’s competence to rule conclusively on the validity of acts of the EU institutions. Its decision to deny domestic effect to a ruling of the EU’s top court also leaves Germany technically in breach of its EU treaty obligations and vulnerable to a potential Art 258 TFEU infringement action.

A key strength of the German Court’s established case law on ‘ultra vires’ acts has always been its recognition that, as an institution of the Union, the CJEU is also bound, as a matter of principle, to exercise its functions in compliance with the EU treaty framework. That fact is often overlooked, including by the Luxembourg Court itself, with detrimental effects on the legitimacy of European integration. As I, along with others, have [argued elsewhere](https://www.cambridge.org/core/books/court-of-justice-of-the-european-union-as-an-institutional-actor/AD94A143F46894D99F00820653B5E5BB), much of the legal discourse on EU integration has never been especially troubled by the fact that the CJEU remains the sole EU institution whose activities are not routinely scrutinised for compliance with the treaty framework. That remains a problem.

At the same time, however, the GFCC’s judgment prompts us to reflect on whether it should fall to that Court (or any Member State court) to ‘push back’ against the CJEU in defence of the limits the EU treaties impose on European integration. The GFCC’s decision to initiate its first strike against the CJEU in this judgment is also arguably weakened by its particular choice of target: the proportionality principle. The GFCC is correct to conclude that proportionality is a key instrument in the EU treaty framework that is designed to protect Member States against ‘competence creep’ by the EU institutions. But as any public lawyer knows, it is also a flexible tool that is capable of adjustment to defend a range of legitimate legal outcomes in particular cases. The GFCC unquestionably disagrees fundamentally with the CJEU’s approach to assessing the proportionality of the PSPP in the strongest of terms, but there is certainly scope to question its conclusion that the Luxembourg Court’s approach is ‘manifestly’ unlawful as a matter of Union law.

The GFCC’s attack strategy also carries broader systemic risks. The German Court is highly respected and has long occupied the position of an institutional leader among European constitutional courts. Indeed, a number of its counterparts in other Member States have integrated, explicitly or implicitly, its jurisprudence on the domestic control of ‘ultra vires’ acts of the EU institutions into their respective national legal systems. Examples include the [Danish Supreme Court](http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Documents/15-2014.pdf), [Czech Constitutional Court](https://www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i-1/) and (now historically) the [UK Supreme Court](https://www.supremecourt.uk/cases/docs/uksc-2013-0150-judgment.pdf). The GFCC’s decision to activate that case law will likely further embolden these and other Member State constitutional courts to contemplate initiating similar action in the future. This may have a positive impact on EU competence control if it prompts the CJEU to pay greater attention to the limits EU law imposes on the activities of EU institutions, including the ECB, as well as in relation to the exercise of its own judicial functions. But it is also open to potential abuse. The risk of such abuse is very real when considered against the backdrop of ongoing challenges to the rule of law within several Member States, notably Poland and Hungary.

There is a lot more in this judgment for constitutional law scholars to unpack. By accident or design, it was also the final decision of Germany’s highest court delivered under its outgoing President, Andreas Voßkuhle. The phrase ‘going out with a bang’ certainly springs to mind.