



The German Constitutional Court's *Weiss* judgment is a Failure of German Constitutionalism

Policy Brief

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May 2020

Policy Brief #116/2020

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Summary

The German Federal Constitutional Court's judgment regarding the ECB's bond buying programme is an unprecedented revolt against the law of the European Union. The Court departs from its prior case law and especially the well-established precedents in *Lisbon* (2009) and *Honeywell* (2010) where the Court had expressed the openness of the German Constitution to European Union law. The Court's new judgment is based on a new and uniquely statist set of doctrines of 'popular sovereignty' and 'budgetary autonomy'. The Court's arguments seem to ignore, however, the clear constitutional obligation created by Article 23 of the German Constitution to comply with EU law in all matters, except in the exceptional case that there was a serious constitutional reason not to do so. The judgment relies on an idiosyncratic theory of the 'constitutional identity' of Germany, which is supposedly more important than the text of the constitution itself. It requires the vigilant protection of the continuing 'popular sovereignty' of the German people, which according to the Court, can only be expressed through the present Bundestag and – it appears - cannot be delegated, shared or exercised in common with other nations, especially when it touches 'budgetary' matters. With these novel and ill-judged theories, which seem to derive from Carl Schmitt's dark musings about national identity and 'popular sovereignty' (and which seem to have emerged at precisely the time when Germany was invited to bear some of the burdens of the Eurozone financial crisis) the German Constitutional Court has placed itself well outside the mainstream of European constitutional law.

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The judgment of the German Federal Constitutional in [Weiss](#), 2 BvR 859/15 and others of 5 May 2020, is an unprecedented decision. It holds that the ECB and the Court of Justice of the EU have violated EU law by failing to apply correctly the principle of proportionality. It declares their decisions unlawful and effectively non-existent in Germany. It departs from EU law in a radical way, because it refuses to follow the Judgment of the Grand Chamber of the Court of Justice of the EU in [Case C-493/17 Weiss](#) of 11 December 2018, which was the response to the German Court's preliminary reference under Article 267 TFEU. The Court issued a decision that requires the ECB to re-issue a Decision with better reasoning, even though the ECB was not a party to the case. The judgment is also written in an ill-tempered style very rarely seen in judicial decisions of that status. How did this happen?

The Judgment

The case concerns a very substantial bond buying programme known as Public Sector Asset Purchase Programme (PSPP), which has been pursued by the ECB in various ways since 2015. The PSPP is part of a broader programme of bond buying by the ECB, which is called 'Expanded Asset Purchase Programme' (EAPP), which aims to expand the money supply in the Eurozone in order to stimulate consumption and to increase the inflation rate to just below the limit of 2 per cent. Under that programme the ECB and the National Central Banks purchase government bonds and similar debt instruments issued by the governments of the members of the Eurozone, international organisations and multilateral development banks. It is reported that by late 2019 the ESCB had acquired bonds totalling approximately EUR 2,5 trillion under the EAPP, of which more than EUR 2 trillion were part of the PSPP.

The case arose by four separate applications to the German Constitutional Court by Eurosceptics politicians, including a former leader of the nationalist AfD party. They argued that the PSPP was in violation of their individual rights under the Constitution, because it was a breach of the prohibition of monetary public sector financing in Article 123 TFEU, of the principle of conferral of powers of Article 5(1) TEU and of the principle of proportionality. The German Court stayed the case and referred it to the Court of Justice of the EU (CJEU) for a preliminary ruling. In its judgment, in [Case C-493/17 Weiss](#), the CJEU agreed with the earlier Opinion of the Advocate General and found that the PSPP did not go beyond the ECB's mandate, did not violate the prohibition of monetary public sector financing and did not violate the principle of conferral. The Court also found that the ECB Decisions satisfied the principle of proportionality.

The judgment of 05 May is the response of the German Court. In its more than one hundred pages of text, the judgment holds that the ECB's decision to launch the PSPP programme was legally flawed in having not taken into account the full economic consequences this programme it was likely to have. The German Court adds that the same failure was repeated by the Court of Justice of the EU which in its own judgment also failed to apply proportionality correctly. The German Court found that the PSPP constitutes a violation of the strict mandate of the ECB to pursue monetary policy, unless its own assessment on proportionality can show that the 'economic' effects are 'proportionate' to its monetary aims, in some way. It gave the ECB three months to correct the error, if possible.

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The question of 'Proportionality'

The case turned in the end on the application of proportionality to the competences granted to the ECB by Article 127(1) TFEU. This Article is not at all easy to interpret since it includes this permissive provision: 'Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union'. It is not clear how proportionality applies here.

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In the normal case, proportionality organises restrictions to some overriding right, for example a human right or one of the four freedoms of the Treaties. There is a presumption there in favour of some freedom. Here, the various economic considerations do not seem to be organised in such a way. There is no presumption for or against any given purpose. What needs to be done is to promote monetary and not economic policy. As a result, the Court of Justice performed a review that was in practice closer to what English lawyers call 'rationality' review, which gives the decision maker very wide leeway to make policy decisions. After noting that the 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' (par. 76) the CJEU concluded giving it a clean bill of health in terms of 'proportionality' and saying that the Decision is not 'vitiating by a manifest error of assessment' (par. 78).

The German Constitutional Court disagreed. It considered that the court had to decide matters by 'balancing' the economic arguments more fully. Remarkably, the German Court was very clear on the differences between the EU and the German accounts of proportionality. In a very detailed discussion the German Court cited *thirty six* different judgments of the CJEU that confirm the differences of approach (par. 126). Nevertheless, rather than accepting that proportionality applies in a slightly different way in Luxembourg, the German Court demanded that the CJEU – and by extension all other jurisdictions of the EU - adopt the *German* sense as the only 'methodologically' acceptable. This by itself shows that the Court was not willing to tolerate any departure from German law at all.

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The Strange Doctrine of 'Budgetary Autonomy'

One may find the reason for the Court's insistence, if one looks at another novel and strange doctrine that the Court added to proportionality. The doctrine of 'budgetary sovereignty' or 'budgetary autonomy' means that the *current* German Parliament must have complete control over all 'financial matters' that concern the state. It cannot share decision making powers with any foreigners nor can it share risks with them.

This doctrine is stated in *Weiss* as follows:

'Art. 38(1) first sentence, Art. 20(1) and (2) and Art. 79(3) GG protect, in particular, the budgetary powers of the German Bundestag ... and its overall budgetary responsibility as indispensable elements of the constitutional principle of democracy ... It is for the German Bundestag, as the organ directly accountable to the people, to take all essential decisions on revenue and expenditure; this prerogative forms part of the core of Art. 20(1) and (2) GG, which is beyond the reach of constitutional amendment' (par. 104, emphasis added).

This is in my view the strangest part of *Weiss* because it directly contradicts the idea that Germany should be a member of the Eurozone at all.

As is well known the European Union's main principle is that states should share economic decision-making with one another. They do so either through the Treaties, and the freedoms established there, or through secondary law. This is the basis of the single market. For example, the free movement of goods, services, persons and capital exposes all member states to economic uncertainties that are caused by the free and uncontrolled movement of goods, persons and capital. The Union is based on these shared risks and the associated transfers of wealth from one country to another. The EU member states joined willingly on the basis of the treaties, having considered that the benefits of openness in the single market – economic, political and ethical - outweighed the costs.

This is even more clearly so in the case of the EMU, where the members of the Eurozone have decided to give up something extremely valuable to them, namely their monetary and exchange rate policies. All states are now exposed to the decisions of the ECB which they cannot fully control, although they are being represented in its Governing Council. They have made a democratic decision to share economic and fiscal powers. This the whole point of the European Union. How can you enjoy budgetary 'autonomy' when your budget is written in a currency you have no control over?

How then did Germany manage to join the single market and the EMU? The answer is that this doctrine did not exist at the time. The *Weiss* judgment cites only the [Lisbon](#) judgment of 2009 as the original statement of the principle, but the principle there was something entirely different. The contrast is rather striking.

In [Lisbon](#) (BVerfGE 123, at par. 256) the Court had stated that the Bundestag only needed to have 'overall responsibility'. The Court said:

“The main reason, therefore, why the proportionality review of the CJEU was inadequate from the German point of view was that it did not consider the potential ‘losses’ of the PSPP bond buying programme, from the point of view of ‘budgetary autonomy’.

‘The openness to legal and social order and to European integration which the Basic Law calls for, include an adaptation to parameters laid down and commitments made, which the legislature responsible for approving the budget must include in its own planning as factors which it cannot itself directly influence. What is decisive, however, is that the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German Bundestag’ (Lisbon judgment, par. 256, emphasis added)

That was in 2009, at a time of openness. The current Court takes a very different view.

The main reason, therefore, why the proportionality review of the CJEU was inadequate from the German point of view was that it did not consider the potential 'losses' of the PSPP bond buying programme, from the point of view of 'budgetary autonomy'. One of the losses was precisely the impact to the 'budgetary autonomy' of the states, as the Court explains:

‘In that regard the CJEU does not make it clear which opposing interests 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, as follows from Art. 126 TFEU. However, it

appears that other opposing interests are not taken into consideration' (par. 132, emphasis added).

“Member states normally accept the primacy of EU law through an understanding of the required division of labour among courts and through a principle of ‘institutional tolerance’ [...] They accept that they have to recognise the primacy of EU law in all cases, unless something is required of them that violates a deeper principle of the constitution”

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In this respect, the idea of ‘budgetary autonomy’ was also at the very heart of the case.

The German Court has abandoned the European mainstream

This brief description of the case shows that the German Constitutional Court has abandoned the established way that most European courts understand the primacy of EU law. Member states normally accept the primacy of EU law through an understanding of the required division of labour among courts and through a principle of ‘institutional tolerance’ (as I explain in detail at ch. 4 of my recent book [A Union Peoples, OUP, 2020](#)). They accept that they have to recognise the primacy of EU law in all cases, unless doing so violates some important principle of the constitution. This means that EU law has effect *equal* to the rest of the constitution. Precisely this is recognized by the German Constitution in Article 23(1). Until recently this was also recognized in Germany under the [Honeywell](#) judgment of 2010, which reserved an ‘ultra vires’ review only on what we could loosely call ‘constitutional essentials’. Very surprisingly, the German Constitutional court has now turned its back on this case. The Court cites it, but it is now pursuing an entirely different path.

The court now overlooks Germany’s constitutional obligations to the EU and focuses instead on a strange construction of a principle of ‘constitutional identity’ that relies on a mystical idea of the ‘sovereignty of the people’ (and whose intellectual origins go back to Carl Schmitt). It lies ‘beyond the reach’ of any requirements of EU law, even though those requirements are explicitly included in the constitution’s text. The *Weiss* judgment says:

‘The democratic legitimation by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law’s constitutional identity protected in Art. 79(3) GG; it is therefore beyond the reach of European integration in accordance with Art. 23(1) third sentence in conjunction with Art. 79(3) GG’.

This is a very strange doctrine indeed. Why is Germany’s constitutional ‘identity’ dependent on the unidentified object of the ‘sovereign people’? Why is ‘constitutional identity’ not a matter of the *constitutional text*, which has been created through democratic processes over many years? Why does ‘constitutional identity’ not involve a moral duty to cooperate with the other member states on the basis of reciprocity according to the terms of EU law, as required by Article 23(1) of the Basic Law?

Conclusion

If this analysis is correct, then *Weiss* marks a very serious departure of the German Constitutional Court from its earlier case law, which was open to the transnational institutions of the EU as required by Article 23. It would thus be wrong for the other member states to believe that the problem will just go away. It will not go away, as long as the German Court refuses to accept that sharing power and risks with transnational institutions do not compromise ‘popular sovereignty’, democracy or ‘constitutional identity’, but are ordinary and principled features of a liberal and democratic constitution.

There is, thus, no other alternative, in my view, to having the European Commission launch infringement proceedings against Germany before the Court of Justice for the violation of EU law. This may not solve the problem, of course, since the German Constitutional Court may still choose to disobey the resulting judgment of the CJEU. But it may be an opportunity for German legal scholars to discuss openly and frankly the strange and novel doctrines of the Constitutional Court. It may be a chance for the judges themselves to see that these doctrines are paradoxical and false. They have been rejected – I believe – by all other senior courts in Europe. The judges' duty is to interpret the Constitution as it is, on the basis of its text, not to make it up as they wish according to their public policy preferences. The cause of this crisis lies firmly within the German Constitutional Court's strange and misguided doctrinal innovations.