

ARTICLES

SOME CONTRADICTIONS IN THE *BUNDESVERFASSUNGSGERICHT* JUDGMENT ON QUANTITATIVE EASING OF THE EUROPEAN CENTRAL BANK

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Abstract

The decision of the *Bundesverfassungsgericht* of May 5th 2020 on ECB has already been criticized from different point of views. The majority of the critics are focused on the institutional consequences of the judgment. This article aims at highlighting some intrinsic contradictions of the decision that make it unsustainable. The inconsistencies regard various profiles: the addressee of the decision, the definition of the CJEU ruling as an ultra-vires judgment, the nature of the functions of ECB, the denied repercussions on the Purchase Program related to the Coronavirus crisis. Finally, the article tries to draw some hypotheses about what the reactions and the consequences of this decision might be.

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1. Introduction

This is not the first time that the German Constitutional Court has issued a controversial high-impact ruling on European integration (highlighting its limitations or counter-limits)¹. Just a few days after its publication, the decision of 5 May was already subject to numerous criticisms, especially regarding the ensuing institutional and economic consequences. In this short essay, I

¹ There is an extensive bibliography on the numerous judgments of the *Bundesverfassungsgericht* regarding constitutional identity, *Ewigkeitsklausel* and democratic principle in relation to European Union law. For a recent interpretation of the relationship between the *Grundgesetz* and EU law in terms of the loss of the centrality of the GG as a benchmark, see F. Wollenschläger, *Constitutionalisation and deconstitutionalisation of administrative law in view of Europeanisation and emancipation*, in 10 Rev. Eur. Adm. L. 7 (1/2017). In his essay *Die zweite Phase des Öffentlichen Rechts in Deutschland: Die Europäisierung des Öffentlichen Rechts*, in 38 Der Staat 495 (4/1999), R. Wahl specifically defined the Europeanisation of public law as a "Second Phase" in German public law. The "Marginalisation" of the constitution has been highlighted by numerous scholars; see, for example, G.F. Schuppert and C. Bumke, *Die Konstitutionalisierung der Rechtsordnung* (2000), and M. Jestaedt, *Verfassungsgerichtsbarkeit und Konstitutionalisierung des Verwaltungsrechts. Eine deutsche Perspektive*, in O. Jouanjan and J. Masing (ed.), *Verfassungsgerichtsbarkeit*, (2011).

would like to highlight some of the contradictions inherent in the judgment.

2. The judgment of 5 May 2020

The decision of the Second Senate of the German Constitutional Court concerns the Public Sector Purchase Program (PSPP)² adopted by the European Central Bank (ECB) on 4 March 2015 and subsequently amended on several occasions.

The PSPP allows national central banks to purchase government bonds on the secondary market. This measure aimed to bring the rate of inflation to approximately what is considered the optimal 2% level by injecting money, thus lowering interest rates on the debt securities of States in financial difficulties.

Many private individuals in Germany turned directly³ to the *Bundesverfassungsgericht* (BVG), complaining about the breach of their constitutional rights, namely those deriving from the principle of democracy, sovereignty of the people, and the budgetary sovereignty of the *Bundestag*.

The decisions of the ECB play a key role in the judgment on constitutionality, and it is the Court of Justice of the European Union (CJEU) that has jurisdiction to pronounce on their validity. The BVG therefore requested referral for a preliminary ruling, asking the European Court of Justice whether the ECB's decisions breached the Treaties (specifically, the prohibition on monetary financing under Article 123 TFEU and the principle of attribution under Article 5 TEU, exceeding the ECB's mandate on monetary policy and the budgetary policy mandate reserved to States).

² For an analysis of the PSPP from the purely monetary point of view, please refer to W. Arrata, B. Nguyen, I. Rahmouni-Rousseau, M. Vari, *The Scarcity Effect of Quantitative Easing on Repo Rates: Evidence from the Euro Area*, in IMF Working Papers, December 2018.

³ Applicants include Bernd Lucke, one of the founders of *Alternative für Deutschland*, Peter Gauweiler, politician and former member of parliament for the CSU, and entrepreneur Heinrich Weiss.

With its decision of 11 December 2018⁴, the CJEU answered the BVG's questions, stating that the purchase programme as decided on by the ECB is legitimate because it does not exceed the ECB's sphere of authority and does not breach the prohibition of monetary financing⁵.

However, in a sensational (but not entirely unexpected) judgment of 5 May 2020, the BVG considered that it was not bound by the decision made by the CJEU in its preliminary ruling and stated that the ECB's decisions regarding the purchase programme were unlawful because they violated the *Verhältnismäßigkeitsprinzip*⁶ (deeming that the unlawfulness could be remedied with an additional ex-post statement of reasons, to be provided within three months).

Regardless of any political assessment or judgement, the ruling – in the writer's view – is marked by a series of contradictions on a purely legal level.

3. The contradictions in the judgment

3.1 The formal and substantive addressees of the judgment

The first contradiction lies in the difference between the formal addressees of the judgment and those who, in effect, appear to be the substantive recipients.

The formal addressees of the decision are the German Federal Government and the *Bundestag*. According to the Court, these German constitutional bodies infringed the constitutional

⁴ Court of Justice of the European Union, Grand Chamber, judgment C-493/17 of 11 December 2018.

⁵ There have been numerous somewhat critical reactions to the judgment, especially regarding loose control over the principle of proportionality, see M. Dawson and A. Bobic, *Quantitative easing at the Court of Justice - Doing whatever it takes to save the euro: Weiss and Others*, in 56 *Comm. Mkt. L. Rev.* 1005 (4/2019). The conflict between the two courts arising from the judgment on the referral for preliminary ruling had already been highlighted by S. Dietz, *Die gerichtliche Kontrolle der EZB durch den EuGH und das BVerfG - ein Konfliktfall im Verfassungsgerichtsverbund und Eurosystem?*, in 30 *Europäische Zeitschrift für Wirtschaftsrecht* 925 (22/2019).

⁶ For an historical view of the principle of proportionality in German law, starting from the *Polizeirecht*, see P. Lerche, *Übermaß und Verfassungsrecht – zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit* (1961).

rights⁷ of the applicant German citizens because they failed to take action to verify that the ECB's PSPP decisions complied with the principle of proportionality. The BVG's judgment is therefore meant to sanction the inaction of the German Government.

There can be doubt, however, that the substantial recipients are (not only but at least also) the bodies of the European Union, first and foremost the ECB. According to the Court, the German bodies should have required the ECB to make known all the assessments it carried out in setting up, and then proceeding with, the purchasing programme in order to subject the ECB's decisions to careful scrutiny in the light of the principle of proportionality. Thus, it is inferred that the ECB, for its part, failed to provide such information from the start.

The BVG does not have the authority to assess the lawfulness of the actions of EU bodies (including the ECB) as this is the prerogative of the CJEU. However, the German Court circumvents this limitation by censuring the German Government's inaction in reviewing the actions of the ECB.

The confusion regarding the addressees of the judgment emerges in all its contradictoriness in § 235, where the Court orders the Bundesbank to no longer give effect to the purchase programme, i.e. to stop purchasing securities (granting a transitional period of three months, deemed sufficient for the necessary coordination with the central bank system). However, the BVG establishes a resolute condition for this prohibition imposed on the *Bundesbank*: it may continue with the purchase programme if, during the three-month transition period, the ECB Governing Council adopts a new decision suitably explaining and justifying the weighting given to monetary policy objectives and

⁷ Specifically, the Court considers the violation of the following constitutional rights: Article 38(1) (Members of the Bundestag shall be elected by direct, free, equal and secret universal suffrage. They are the representatives of the people as a whole, are not bound by any mandate or directive and are subject only to their conscience) in conjunction with Article 20(1) (The Federal Republic of Germany is a democratic and social federal state) and (2) (All state power emanates from the people. It shall be exercised by the people by means of elections and voting and by special bodies with legislative, executive and judicial powers), in conjunction with Article 79(3) (No changes may be made to this Basic Law that affect the division of the Federation into Länder, the principle of the participation of the Länder in legislation or the principles set out in Articles 1 and 20).

the consequences for economic and fiscal policies by demonstrating its proportionality. It is interesting to note that the German text of the judgment states that the new ECB decision must be *nachvollziehbar* (“comprehensible”), while the English version published on the BVG’s website (which, for obvious reasons, is the most widely read version abroad) felt the need to specify that the new decision must not only be comprehensible but also “substantiated”.

It is clear that the direct addressee of the ban on the purchase of government bonds (the Bundesbank) in reality hides the true (indirect) addressee of the judgment, the Governing Council of the ECB, upon which the Court attempts to impose not only an obligation to adopt a new decision but also a stronger obligation to state reasons.

3.2. The relationship between the *Bundesverfassungsgericht* and the CJEU

a) The contradiction in requesting a referral for a preliminary ruling and then failing to abide by it

The BVG made a referral for a preliminary ruling to the CJEU, specifically requesting that it assess the constitutionality of the ECB’s decisions, thus affirming the (exclusive) jurisdiction of the CJEU as to the validity of the actions of EU bodies. However, upon receiving a response that diverged from its opinion, it decided to disregard the CJEU’s decision. It would appear that the BVG requested an “opinion” from the CJEU, hoping to obtain a convergent decision on which to base its conclusion with greater certainty. Moreover, the Italian Government itself had objected that referral for a preliminary ruling to the CJEU was inadmissible, pointing out that it was more a matter of a request for an opinion than a referral for a preliminary ruling to a court with the authority to hand down a final decision on the matter.

b) The contradiction in defining the CJEU judgment as *ultra vires* only to hand down an *ultra vires* judgment itself.

The BVG states verbatim that the judgment of the European Court of Justice is “*schlechterdings nicht mehr nachvollziehbar*”

(absolutely not comprehensible⁸) and was made “ultra vires” (§ 116). The judges of the Second Senate in Karlsruhe consider that the CJEU had not fully exercised its powers, adopting unjustified self-restraint regarding the ECB. The BVG devotes many complex pages to the argument that a judgment deemed to express excessive self-restraint can be described as ultra vires. The key steps can be summed up as follows.

The German Court accuses the Court of Justice of having carried out its proportionality check on the ECB’s decisions too loosely, having merely verified the absence of “*offensichtlich außer Verhältnis*” (“manifestly disproportionate”) measures (§ 156).

This erroneous (weak) application of the principle of proportionality allegedly leads to a failure to monitor compliance with the principle of attribution under Article 5 TEU. In this way, the ECB could extend its powers beyond those conferred on it by the Treaty. By failing to apply a standard of intensive scrutiny, the CJEU has allowed undue extension of the ECB’s powers, acting against the task assigned to it by the Treaty. The last passage of this complex statement of reasons can be found in paragraph 154, where (if not in a flight of fancy, at least, stretching the limits of logic) the Court states that the interpretation of the principle of proportionality undertaken by the CJEU in its Judgment of 11 December 2018 and the determination of the ESCB’s mandate based thereon manifestly exceed (“*überschreiten offensichtlich*”) the judicial mandate conferred on it by Article 19(1) TEU and leads to a transfer of authority to the detriment of the Member States. Therefore, the BVG states that the decision of the CJEU is an ultra-vires act which is not binding on the BVG in this case⁹.

Consequently, the BVG itself considers that it must exercise the (unexercised) powers of the CJEU, thereby acting ultra vires since it has no such power.

⁸ Actually the official translation of the decision published on the BVG website translate *schlechterdings nicht mehr nachvollziehbar* with “simply not comprehensible”, but in my opinion it is preferable the translation “absolutely not comprehensible”.

⁹ § 154 of the judgment, the original German is: “*Es stellt sich deshalb als Ultra-vires-Akt dar, der das Bundesverfassungsgericht in dieser Frage nicht bindet*”.

In a meaningful paragraph (§ 164), the BVG disregards a number of fundamental principles of Union law¹⁰. The German Court states that, in order to be able to decide on the alleged inaction of German bodies, a preliminary question must be raised, namely the validity of ECB decisions. For the reasons set out above, the Court cannot rely on the decision of the CJEU. The BVG therefore considers that it must re-examine the ECB's decisions itself, adopting the rules of the Treaties as a yardstick for lawfulness.

Lastly, the Karlsruhe Court states that the ECB's decisions on the purchase programme “*mangels hinreichender Erwägungen zur Verhältnismäßigkeit*” (do not contain sufficient grounds to demonstrate their proportionality), and thus exceed the powers conferred by Article 127 TFEU, which are limited to monetary policy and to “supporting competence regarding the Member States’ economic policies”. The BVG further stresses that the European System of Central Banks can support economic policies within the European Union but cannot set and pursue its own economic policy agenda.

The BVG therefore defined the European Court’s ruling ultra vires (as it applied excessive self-restraint) and consequently decided to ascribe to itself the power to judge the validity of the ECB’s acts, thus adopting an ultra vires decision itself.

3.3 The functions of the ECB: an independent or political body?

The judgment under examination contains further contradictions with regard to the ECB’s functions.

The BVG devotes several paragraphs (namely §165 to §179) to the examination of the various economic, social and fiscal components that the ECB ought to have considered and balanced with the purely monetary objective underlying the PSPP. In particular, according to the German court, the ECB should have examined and assessed the impact of the purchasing plan on the fiscal and budgetary policies of the Member States (§§ 170-171),

¹⁰ Moreover, infringement of EU law by a court of last instance may lead to infringement proceedings under Article 258 TFEU, as was the case in *Traghetti del Mediterraneo*, Case C-379/10, decided by the Court of Justice with its judgment of 24 November 2011.

the banking sector (§ 172), and individuals suffering numerous indirect effects as property owners, tenants, etc. subject to the risk of creating real estate bubbles, as well as substantial losses for savers (§ 173), unprofitable companies that can continue to survive by asking for low-cost loans while not being profitable (§ 174), and the role of the ESCB itself which is gradually becoming more and more dependent on the Member States (§ 175).

On closer inspection, two contradictory aspects emerge in relation to the ECB's functions.

Firstly, the ECB, an independent body¹¹ – according to the reasoning of the decision claiming to be impervious to government pressure – allegedly receives instructions from a national constitutional court on the merits of its decisions, following the reasoning of the ruling.

Secondly, the BVG criticises the ECB for failing to take into account the consequences of the purchasing programme on economic and fiscal policy, thereby infringing the principles of attribution and proportionality. However, the ECB has no authority in matters of economic and fiscal policy. The reasoning is almost paradoxical: taking only monetary policy (regarding which it has authority) into consideration, the ECB acts *ultra vires* because it fails to consider other aspects (over which it has no authority).

Furthermore, the Second Senate points out that purely monetary choices have important consequences in economic and social terms (e.g. “helping” States that issue debt through the PSPP means lowering interest rates and therefore causes disadvantages for savers). The Court does not say this explicitly, but by fully developing this concept it seems possible to read a very significant invitation between the lines: in adopting the purchasing plan, the ECB has made choices of a not merely monetary but also economic and social nature. The ECB therefore made not merely technical, but also “political” choices, and this should have been made explicit. Balancing an apparently technical objective such as the level of inflation on the one hand, and any economic and social impact on savers, tenants, property owners,

¹¹ On the nature and role of the ECB we refer to C. Zilioli, A.L. Riso, *New tasks and Central Bank independence: The Eurosystem experience*, in P. Conti-Brown, R.M. Lastra (ed.), *Research Handbook on Central Banking* (2018).

policyholders, etc., on the other implies a political evaluation and choice that must be presented as such, explicitly stating all the terms and effects of the question and adequately substantiating the choices. Making the economic and social evaluations public would have allowed national governments and the governors of national central banks to take up a position regarding the purchasing plan. The German Court specifically fears “monetary dominance” (actually using the English term in § 171 of the German text) by the ECB, which might influence the fiscal policies of the Member States, which would effectively lose the possibility of autonomously establishing good budgetary policies.

3.4. The (denied) implications for Covid-19 operations.

The text of the judgment never refers to the Pandemic Emergency Purchase Programme (PEPP) or discussions on possible action to counter the financial emergency caused by the Covid-19 outbreak. Time constraints meant, of course, that it was not possible for new and possible programmes to be addressed.

However, the first paragraph of the press release summarising the main facts and reasoning regarding the judgment (published on the BVG website) states that “The decision published today does not concern any financial assistance measures taken by the European Union or the ECB in the context of the current coronavirus crisis”¹². Such an *excusatio non petita* requires a particularly careful reading of the paragraphs that the BVG devotes to the description of the PSPP’s risk-sharing mechanisms in order to see whether the conditions set out in this decision might in any way prefigure a trend for future decisions.

In reality, there are some passages in the grounds that may well constitute the basis for a possible subsequent decision on new purchasing programmes (including the various solutions currently under discussion to address the financial consequences of the Coronavirus pandemic).

¹² “Aktuelle finanzielle Hilfsmaßnahmen der Europäischen Union oder der EZB im Zusammenhang mit der gegenwärtigen Corona-Krise sind nicht Gegenstand der Entscheidung” The English version of the press release is available at www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html

Noting that the ECB has gradually eased the requirements for access to the purchasing programme, the BVG then provides an extremely precise clarification. It states that “any further lowering of the criteria below a rating complying with at least Credit Quality Step 3” (§ 208) would lead to an excessive lowering of standards. This clarification was made for the future, and if the Court considers it applicable to the current PSPP, there would be no reason not to apply it to any future purchasing programmes.

Even more precise is the reasoning set out in §§ 222 to 228. Here, the BVG states that the PSPP risk-allocation scheme does not breach the principle of budgetary responsibility and autonomy of the *Bundestag*. The Court follows its own previous case law¹³, citing “*die vom Senat entwickelten Grenzen der haushaltspolitischen Gesamtverantwortung des Deutschen Bundestages*”, i.e. the limits set by the Second Senate of the *Bundestag*’s general budgetary responsibility (§ 227, citing its own precedents from 2012 and 2019). According to this doctrine, the democratic principle requires the German Parliament to be responsible for the budget. International treaties that could have major financial consequences may not therefore be signed without the approval of the *Bundestag*.

The German Constitutional Court specifies that the *current-risk allocation structure* of the PSPP is compatible with the democratic principle (§ 228) as there is no redistribution of sovereign debt between Member States. The Court lists all the limitations on the redistribution and sharing of losses between Member States, stating that these limitations protect and enable the *Bundestag*’s control over general budgetary policy. The current risk-sharing regime is a determining factor in this (§ 225).

Lastly, the *Bundesverfassungsgericht* clearly states that “in light of the volume of bond purchases under the PSPP, which amounts to more than EUR 2 trillion, such a risk-sharing regime, at least if it were subject to (retroactive) changes” would run counter to the principle of the budgetary responsibility of the *Bundestag* as outlined by this Senate “As this could possibly entail

¹³ Lastly, the judgment of the *Bundesverfassungsgericht* of 30 July 2019, but even before that, the judgment of 12 September 2012 on the ESM, for which kindly see A. Ferrari Zumbini, *La sentenza del Bundesverfassungsgericht sul Meccanismo Europeo di Stabilità e sul Fiscal Compact*, in 27 *Rivista giuridica del mezzogiorno* 43 (1-2/2013).

a recapitalisation of the Bundesbank, it would essentially amount to an assumption of liability for decisions taken by third parties with potentially unforeseeable consequences, which is impermissible under the Basic Law” (§ 227). It is difficult not to see in these grounds some reference to the current discussions on purchasing programs to deal with the coronavirus health emergency, and, perhaps, the semblance of a precedent of the Court to refer to in future decisions.

4 The possible consequences of the judgment

What the real consequences of this judgment will be is not currently foreseeable. Some assumptions can be made, however.

Possible institutional reactions can come from two parties: the European Court and the ECB.

4.1. The CJEU’s possible reactions

The Court of Justice has already published a press release following the *Bundesverfassungsgericht’s* judgment¹⁴, in which it responds categorically, pointing out that its judgments handed down as a preliminary ruling are binding on the referring court and that only the CJEU has jurisdiction to assess the legality of acts of European Union institutions.

Moreover, it seems likely that in its future case law the CJEU will find a way to “respond” to two *obiter dicta* from the judgment by the German courts in this regard.

First, to justify its disagreement with the European Court, the BVG states that the CJEU has “the mandate to interpret and apply the Treaties and to ensure uniformity and coherence of EU law” (§ 111), while the German Constitutional Court has the task of judging any *ultra vires* acts of the European institutions. In fact, such acts fall outside the authority of the European Union and breach German constitutional principles: first and foremost the democratic principle that political choices must be made by democratically legitimated actors (“it requires that any act of public authority exercised in Germany can be traced back to its

¹⁴ Press release of 8 May 2020, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058it.pdf>

citizens ", § 99). In essence, the Karlsruhe judges state that the European Court assesses the lawfulness of EU acts in the light of European law, whereas the constitutional perspective is alien to it. Therefore, the BVerfG must do this in the light of constitutional principles. Sometimes these two perspectives (*verfassungsrechtliche* vs. *unionsrechtliche Perspektive*) do not coincide, which explains the different conclusions reached by the two judges.

Secondly, the German Court states that the European Court must apply shared constitutional traditions. These do not, and cannot, coincide with the principles developed and applied by each national constitutional court. However, it adds, the ECJ cannot manifestly ignore a general constitutional principle common to the Member States (§ 112).

4.2. The ECB's possible reactions

As we have seen, the German Constitutional Court (indirectly) asked the ECB to adopt a new suitably substantiated decision explicitly setting out all the elements (in terms of consequences on economic, social and fiscal policies) assessed and balanced before reaching the decisions that gave rise to the PSPP. Only with this additional reasoning will it be possible to truly assess the proportionality of the measures taken.

The ECB might (in the abstract) follow up Karlsruhe's requests, but in this way it would give the BVerfG, if not jurisdiction, at least a power of control over its acts, which are not provided for by the Treaty. Moreover, it would set a dangerous precedent as future decisions of the ECB could be scrutinized by the constitutional courts of each country, which might reach different conclusions, making it impossible for the mechanism to work.

The ECB could also decide, on the other hand, not to respond to the BVerfG in any way, thus giving a strong signal, but risking a difficult *impasse*, given that the President of the Bundesbank, Jens Weidmann, declared¹⁵ on 5 May itself that he will make every effort to obtain explanations from the ECB, and that after the end of the three-month transitional period the

¹⁵ www.bundesbank.de/de/presse/presenotizen/erklaerung-von-bundesbankpraesident-jens-weidmann-zum-urteil-des-bundesverfassungsgerichts-832412.

Bundesbank would not be able to buy government bonds according to the PSPP.

An intermediate solution seems more plausible, namely that the ECB will find a way to explain how it arrived at its conclusions, perhaps referring to the acts already adopted (with some minor clarifications) but without following up the BVG's requests to the letter.

It is interesting to note that the ECB too (which had decided not to participate in the oral discussion before the BVG on 30 July 2019) issued a rather piqued press release on 5 May 2019¹⁶.

It states that the Governing Council of the ECB remains fully committed to its mandate to do whatever is necessary to ensure that inflation reaches its target levels. It adds that it will do its utmost to ensure that its monetary policy is implemented in all eurozone countries. It concludes by pointing out that the Court of Justice has already decided, with its judgment of December 2018, that the ECB has acted within the limits of its competence.

5. Conclusions

As we have seen, even through this brief analysis, the contradictions and criticalities of the judgment of 5 May emerge clearly. These contradictions partly reflect some fundamental issues that have long constituted a point for discussion.

Specifically, the judgment addresses two fundamental and widely debated issues – and not only in Germany. Firstly, the Court points out that the States are still *Herren der Verträge* and that the European Union has never evolved into a Federal State (§ 111). Second, the BVG holds that when a European institution or body acts *ultra vires*, i.e. beyond the powers conferred upon them by the Treaties (of which only the Member States are the 'masters', so that an extension of powers can only come from them), there is a lack, at least in respect of Germany, of the minimum necessary democratic legitimacy required by German constitutional law (§ 113).

However, in this case too, the Court's response to these legitimate questions is contradictory.

¹⁶ www.ecb.europa.eu//press/pr/date/2020/html/ecb.pr200505~00a-09107a9.en.html.

After clarifying that cases where EU bodies act ultra-vires are very rare and need to be resolved in a “cooperative manner”, the BVerfGE basically grants itself the authority to decide such cases. According to the Karlsruhe courts, while it is true that the primacy of EU law would be undermined if each State could examine the legitimacy of EU acts, it is also true that “if the Member States were to completely refrain from conducting any kind of ultra vires review, they would grant EU organs exclusive authority over the Treaties” (§ 111).

Essentially, the BVerfGE states that it also exercised ultra-vires control in the interest of all other Member States (which would otherwise have lost control over the Treaties and the powers to be conferred on the EU). However, the other Member States have never given Germany this mandate; on the contrary, some of them have taken legal action before the CJEU to defend the work of the ECB.

Moreover, in the context of judicial review of ultra-vires acts, the BVerfGE refers to general principles as defined in its case law (similarly, when defining the principle of proportionality, it complains that the CJEU has not explicitly adopted the three-phase scrutiny that has evolved in relation to this matter, distinguishing between *Geeignetheit*, *Erforderlichkeit*, and *Angemessenheit*, i.e. suitability, necessity, appropriateness¹⁷).

Such an approach, ascribing a pre-eminent role to national courts in resolving European issues, is certainly welcomed by some, and probably by the Germans first and foremost (or at least a large part of them). Nonetheless, in the European context as a whole it could also lead to a heterogenesis of goals, with the gradual diminution of the importance of this judgment, whose most sensational element is not sustainable at European level. The *Bundesverfassungsgericht* could thus find itself – at least partially –

¹⁷ The Court refers to the roots of the principle of proportionality, finding them not only in German law but also in the Common Law. Indeed, when it refers to the three-phase proportionality test model, it states that it is now widespread not only in the case law of the European Court of Human Rights and the CJEU but also in all European national courts. On this point, the Court cites (in the German text, while such quotations are not reported in the English text) the works of English-speaking authors, such as P. Craig, *Proportionality, Rationality and Review*, in 10 *New Zealand L. Rev.* 265 (2/2010), and the volume by A. Stone-Sweet and J. Mathews, *Proportionality Balancing and Constitutional Governance* (2019).

isolated in the European context, and the consequences of its sensational elements could be reduced.

In the end, it will be interesting to see the direction the Second Senate will take with the investiture of its new president, as the former president, Andreas Voßkuhle, ended his term of office just a few days after the publication of the ruling.