Article

The BVerfG PSPP/Weiss *Urteil* and the Euro Area: a Constitutional Crossroads, a Dead-End… or Perhaps Not So Much?

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ABSTRACT:

This article comments on the BVerfG Second Senate's PSPP/Weiss *Urteil*, which declared as *ultra vires* the Decisions of the European Central Bank on a Public Sector Purchase Programme (PSPP), on the previous BVerfG's case-law on such *ultra vires* control of EU derivative legislation, as well as on the EUCJ's Weiss Judgement which upheld such Decisions, in response to a preliminary reference submitted by the aforementioned Second Senate in the same case. The paper also reviews whether such EU legal acts truly breached the fundamental right to vote of the complainants before the BVerfG, as the Judgement found, or if it was rather an abstract claim due to an economic and political discrepancy in relation to the contested acts but lacking any actual legal relevance. The conformity with EU law of the BVerfG's doctrine of its *ultra vires Kontrolle* on EU secondary law is also discussed, noting that its PSPP/Weiss *Urteil* has been the first German ruling to annul EU legal acts in application of such doctrine. The article concludes reflecting on the formal legal effects, if any, as well as on the unformal ones (maybe many), of this BVerfG' Second Senate judgement over the future of the Euro Area.

PALABRAS CLAVES:

PSPP, BVerfG, UEM, proporcionalidad, derechos fundamentales, control *ultra vires*

RESUMEN:

Este artículo lleva a cabo un comentario acerca de la Sentencia PSPP/Weiss de la Sala Segunda del BVerfG que declaró *ultra vires* en Alemania las Decisiones del Banco Central Europeo sobre un Programa de Compra de Deuda Pública (PSPP), acerca de la previa jurisprudencia de dicho Tribunal germano en relación con ese tipo de control jurisdiccional interno del Derecho derivado de la UE, así como, en la medida precisa, acerca de la Sentencia Weiss del Tribunal de Justicia de la Unión Europea, que validó tales Decisiones en respuesta a una cuestión prejudicial planteada, asimismo, por la citada Sala Segunda, en el mismo caso Weiss. El estudio también examina si tales actos jurídicos de la UE realmente vulneraron el derecho fundamental de voto de los recurrentes ante el BVerfG, tal y como concluyó la Sentencia de este, o si se trataba, más bien, de una reclamación abstracta debida a una discrepancia económica y política en relación con los actos impugnados, realmente carente de relevancia jurídica. La conformidad con el Derecho de la UE de la doctrina del BVerfG acerca de su control *ultra vires* sobre el Derecho derivado de la Unión es también objeto de discusión, teniendo en cuenta que la Sentencia PSPP/Weiss del BVerfG ha sido la primera en anular actos jurídicos de la UE en Alemania haciendo aplicación de tal doctrina. El artículo concluye reflexionando sobre los efectos jurídicos formales, si es que tiene alguno, así como acerca de los informales (puede que muchos), que esta Sentencia de la Sala Segunda del BVerfG alemán puede tener en relación con el futuro de la Eurozona.

MOTS CLES :

PSPP, BVerfG, UEM, proportionnalité, droits fondamentaux, contrôle ultra vires

RESUME :

Cet article commente l'arrêt PSPP/Weiss du Deuxième Sénat du BVerfG, qui a déclaré *ultra vires* les décisions de la Banque Centrale Européenne sur un Programme d'achat du secteur public (PSPP en anglais), la jurisprudence antérieure du BVerfG sur un tel contrôle *ultra vires* de la législation dérivée de l'UE, ainsi que l'arrêt Weiss de la CJUE qui a confirmé ces décisions, en réponse à un renvoi préjudiciel soumis par le deuxième sénat susmentionné dans la même affaire. L'article examine également si ces actes juridiques de l'UE ont réellement violé le droit fondamental de vote des plaignants devant le BVerfG, comme l'a constaté l'arrêt, ou s'il s'agissait plutôt d'une réclamation abstraite due à une discordance économique et politique par rapport aux actes contestés, mais dépourvue de toute pertinence juridique réelle. La conformité avec le droit européen de la doctrine du BVerfG concernant son *ultra vires Kontrolle* sur le Droit secondaire de l'UE est également discutée, en soulignant que son PSPP/Weiss Urteil a été le premier arrêt allemand à annuler des actes juridiques de l'UE en application de cette doctrine. L'article conclut avec une réflexion sur les effets juridiques formels, s'il y en a, ainsi que sur les effets non formels (peut-être nombreux) de ce jugement du Deuxième Sénat du BVerfG sur l'avenir de la Zone Euro.

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1 THE BVERFG'S PSPP/WEISS *URTEIL*: A DISRUPTIVE JUDGEMENT (WITH LEGAL INCONSISTENCIES)

The PSPP/Weiss and others *Urteil*, rendered on 5 May 2020 by the Second Senate of the *Bundesverfassungsgericht* (BVerfG)[1], has struck both legal and economic worlds like an earthquake. It resolved an individual constitutional complaint (*Verfassungsbeschwerde*) filed by several German citizens against the European Central Bank's (ECB) Decisions on a Public Sector Purchase Programme (PSPP)[2], and also against the *Weiss* prejudicial Judgement of the European Union's Court of Justice (EUCJ).

The complainants contended that the aforementioned Decisions breached their individual rights to vote, as enshrined in Article 38.1 of Germany's *Grundgesetz* (GG). The BVerfG's Second Senate delivered this judgement after addressing a preliminary reference to the EUCJ, whose Grand Chamber responded with its Judgement of 11 December 2018, supporting the conformity of the contested Decisions with EU law[3]. The BVerfG's Second Senate then granted the plaintiffs the opportunity to extend their challenge to that EUCJ ruling.

In order to rule on such individual constitutional complaints, an *ultra vires* control of both the contested ECB Decisions and the EUCJ Weiss Judgement was carried out in the BVerfG's PSPP/Weiss and others Judgement. The BVerfG's Second Senate was thus acting *de facto* as a higher-level court (which is not *de jure*) than the EUCJ. On one hand, the PSPP/Weiss and others *Urteil* considered whether the alleged incompetence in the contested ECB Decisions and EUCJ Judgement was due to the breaching of the proportionality principle enshrined by EU law. On the other hand, it examined whether the aforementioned EU acts circumvent the prohibition of the monetary public budgeting of Member States, as provided for by Art. 123.1 of the Treaty on the Functioning of the European Union (TFEU).

The latter complaint was declared unfounded, albeit with no little amount of legal, and even economical, criticisms of the EUCJ's Weiss Judgement, something which does not seem typical of a judicial ruling. In contrast, the former claim (the ECB incompetence in the enactment of the PSPP for failure to comply with the proportionality principle), in a certainly singular judgement, was considered to not have been breached, but also as yet unfulfilled.

Basing on these findings, the Second Senate of the BVerfG's *PSPP/Weiss Urteil* closed by addressing a mandatory injunction to the ECB to issue a new Decision, motivating the PSPP's fulfillment of the principle of proportionality in accordance with the legal parameters of EU law as they were (surprisingly) established by the same BVerfG' Second Senate, and not by the EUCJ itself. Moreover, the latter's Weiss Judgement was declared *ultra vires* and devoid of legal binding force in Germany for breaching the communitarian principle of proportionality and, with it, that of limited conferral of powers to the EU.

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[1] BVerfG 5 May 2020, 2 BvR 859/15 (*PSPP/Weiss*), available in German at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html (last visited 17 February 2022). A partial and not completely accurate translation into English is available at https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html (last visited 1 October 2020). A private complete translation from German into Spanish may be found at http://idpbarcelona.net/docs/actual/caso_weiss.pdf (last visited 17 February 2022).

[2] Decision of the Governing Council of the European Central Bank of 22 January 2015 on an expanded asset purchase programme, press release available at https://www.ecb.europa.eu/press/pr/date/2015/html/pr150122_1.en.html (last visited 17 February 2022),

Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme [2015] OJ L 121/20, and its successive amendments by the ECB's Decisions (EU) 2015/774 [2016] OJ L 303/106, (EU) 2015/2464 [2015] OJ L 344/1, (EU) 2016/702 [2016] OJ L 121/24, (EU) 2016/1041 [2016] OJ L 169/14, and (EU) 2017/100 [2017] OJ L 16/51.

[3] Case C-493/17, *Weiss* [2018].

This verdict, as well as its legal grounds, is inconsistent in many respects with its own self-declared premises. The *ultra vires control* that it carried out is contrary to EU primary law and to the case law of the EUCJ, as well as, in various ways, even to the German *Grundgesetz* itself. Moreover, the triggering legal factor of that control in the case (the breach of the plaintiff's fundamental right to vote) was not actually such due to the abstract, preventive, and merely discursive nature of the alleged infringement.

All these aspects will be discussed in the following sections, while the final one concludes by focusing on the legal impact (if any), as well as the (not so little) factual influence of this Judgement on the EU Economic and Monetary Union (EMU).

2 THE BVERFG'S *ULTRA VIRES* CONTROL AND THE CONDITIONAL ANNULMENT OF EU DERIVATIVE LAW IN PSPP/WEISS

Many legal scholars are extremely critic with this Judgement (Amelie Champsaur, Cleary Gottlieb Steen, & Hamilton, 2020; Editorial Comments, 2020; Marzal, 2020; Meier-Beck, 2020). In PSPP/Weiss, the Second Senate of the BVerfG declared legal acts of derivative EU Law void in Germany for the first time ever. This was all due to the BVerfG's auto-labelled as "*ultra vires* control" on the national constitutionality of EU derivative law. Such control, however, was not established by the BVerfG in PSPP/Weiss and others. With a remote precedent in its Maastricht *Beschluss*, it was defined in its Lisbon Treaty *Urteil*, refined in its Honeywell Decision and confirmed in its OMT Judgement[4].

The BVerfG's Lisbon Treaty *Urteil* settled its *ultra vires* control on evident EU's excesses of competence, as follows: "When legal protection cannot be achieved at Union level, the Federal Constitutional Court checks whether the legal acts of the European institutions and bodies comply with the subsidiarity principle of Community and Union law (Article 5(2) TEC; Article 5. 1 sentence 2 and Article 5(3) TEU Lisbon version), to the limits of the sovereign rights that have been transferred to them by virtue of the principle of singular and restricted conferral of competences (…). The Federal Constitutional Court also checks whether the inviolable core content of the constitutional identity of the Basic Law is respected in accordance with Article 23 (1) Sentence 3 in connection with Article 79 (3) GG" (§ 240).

The BVerfG's Honeywell *Urteil* added, firstly, that this national *ultra vires* control must be reconciled with the role of the EUCJ in order to keep uniformity and coherence of EU law throughout the Union. Secondly, it noted that it must be conducted by the BVerfG in such a way that reflects the openness of German constitutional and legal system, giving the EUCJ the chance to previously adjudicate on the validity and interpretation of European law, while allowing it a margin of tolerance for error (*sic*: with this pejorative word, "error", the German court is patronizingly referring to what is merely a technical discrepancy between judges of similar highest level, each belonging to different, albeit coordinated, legal systems).

Maastricht, Lisbon, and Honeywell *Urteilen* did not actually come to anything substantial, in terms of EU secondary law concrete annulments. Furthermore, the manner in which the BVerfG judgements were made surrounded "friendliness" clauses in relation to the European integration, and in a spirit of cooperation with the EUCJ, appeared sufficient to pacify any potential friction, and this may be what led to the inaction of the European Commission in relation to the infringement procedure.

But the seeds were sowed, the weeds were not reaped, and finally the ticking time bomb blasted, showing in all its crudeness, not only that the very idea of a national

[4] BVerfG 12 October 1993, 89, 155 (*Maastricht Treaty*); BVerfG 30 June 2009, 123, 267 (*Lisbon Treaty*); BVerfG 6 July 2010, 126, 286 (*Honeywell*); BVerfG 14 January 2014, 134, 366 (*OMT*).

continuous *ultra vires* control of EU derivative law opposes to the European integration, but also the deep legal (and even economic) destructive effects of such national judicial control for the very factual existence of that integration, in the shape of the Economic and Monetary Union, which was arranged and established by, and because of, the Member States' reciprocal legal commitment. This is not, of course, beneficial, for a united Europe, the fostering of which is for Germany a constitutional obligation (Article 23, and Preamble, of the German GG).

An invalid measure of EU secondary law was rendered equivalent by the BVerfG in Weiss/PSPP to an undue amendment of EU primary law, or to the transferal to the EU of the *Kompetenz-Kompetenz* (§§ 102 and 136). However, the ECB Decisions establishing the PSPP did not actually amend the Treaty nor the ECB Statutes, let alone confer new monetary powers on the ECB. Such Decisions were enacted as secondary law and aimed to create a situation of price stability, which is a core principle of the ECB/EBCS's mandate, according to the Treaties.

Another issue concerns the fact that the PSPP may, or may not be, disproportionate or excessive with regard to the achievement of such an objective, in breach of the communitarian principle of proportionality. If this is the case, the corresponding EU secondary legislation would then be definitively invalid, but the competence in controlling and declaring such invalidity has been clearly transferred to the EUCJ by every EU Member State. Furthermore, this has been achieved by all of them conjointly and in equal terms, as such transfer was made through the joint legal instrument that all of them convened on: the EU primary law, particularly Articles 19 TEU and 267 TFEU.

That an *ultra vires* EU measure of secondary law involving a lack of competence is not an amendment of the constitutive Treaties *stricto sensu*, but, more accurately, their unfulfillment, results from the fact that these ones only admit their explicit amendment according to the procedures that themselves establish to the effect. In a nutshell, the EU Treaties forbid their tacit amendment by way of the simple enactment of antinomic secondary EU law, what amounts to the absence of the *Kompetenz-Kompetenz* in the hands of the EU.

The respect to EU primary law, including the principle of conferral, as well as, accordingly, the compulsory foundation of each measure of EU derivative law on at least one legal basis in EU primary law, is among the main validity communitarian parameters of EU law legislation to be monitored by the EUCJ, as part of its generic mandate to ensure that the law is observed in the interpretation and application of the Treaties (Article 19 TFEU).

Annulments of EU secondary law measures, moreover, are not lacking in the ECJ case-law[5] (even if they certainly do not abound). But that can be explained to a large extent, as the same BVerfG's Second Senate put it in its PSPP/Weiss and others Judgement (§ 111), because the EU Treaties provide a set of guarantees to render such infringement as an infrequent situation. EU primary law establishes a complete system of control of secondary and tertiary legislation by the EUCJ, chiefly through the validity's prejudicial referral and the action of annulment.

A united Europe (as Article 23 of the German *Grundgesetz* puts it) is incompatible with 27 national *ultra vires* controls dependent on at least the same number of national Courts, and each with varying national constitutional detailed parameters, according to which an EU legal derivative measure might be constitutional in some Member States and not in others. That would lead to the break of uniformity of EU law.

[5] For instance, Case C-376/98 *Germany v. European Commission* [2000], which annulled Directive 98/43/EC, on Advertising and sponsorship of tobacco products.

This breach of EU law amounts, by the way, to the violation of the very German *Grundgesetz* (particularly, of its aforementioned Article 23), since the annulment in Germany of EU legal acts, and of an EUCJ Judgement, carried out for the first time by the BVerfG's Second Senate in PSPP/Weiss and others, is clearly contrary to a "united Europe".

That the Member States cannot have given up the *ultra vires* control of EU legislation, as contended by the BVerfG's Second Senate in PSPP/Weiss and others (*Ibid*), is plainly denied by Articles 344, 262-264 and 267 TFEU. *Tertium non datur*: either the *ultra vires* control is supranational, or it is national (both things, at the same time, are mutually incompatible, and thus legally untenable).

The *ultra vires* control of EU derivative legislation has necessarily to be not only unique but also centralized in the ECJ's hands. If it is abandoned in those of one (or few) national Courts, that simply breaks EU law unity and uniformity in a different way to those that may be jointly established by the Member States in the own EU primary law (special statutes of derogation in specific Protocols, or similar rules enshrined in the body of the Treaties).

The second assumption upon which the BVerfG based its *ultra vires* control in PSPP/Weiss and others (§ 11), that the Member States are Masters of the EU Treaties, simply does not hold. Or at least, not in that way. Masters of the Treaties are, in common, the sum of all the EU Member States, not only a single one of them alone (Germany in the instance), nor each of them one by one.

The expression "Masters of the Treaties" really implies that the EU Member States drafted (or adhered to) the EU constitutive Treaties, by means of which those very States decided to commit one another, and that EU Member States are free to amend or terminate the Treaties by mutual consent. There ends their collective mastery of EU Treaties, only to be exerted jointly by all of them according to the procedures provided for by the own EU Treaties.

A single Member State is Master of the EU Treaties in the form of its freedom to provide or refuse consent to amendments of such Treaties, or to withdraw from them. Be it according to the general rules of international law (Vienna Convention) if the corresponding Treaties lack provisions on such withdrawal, be it according to the specific rules which they actually have established to that respect (Article 50 TEU).

For all the rest, as long as there is no explicit primary law convened by all Member States that excludes one or more of them from the fulfillment of certain parts of the EU Treaties (and there is no special Protocol on Germany and the EMU, or on Germany and the EUCJ), those parts are as compulsory on that Member State as they are for the other ones. Germany cannot unilaterally apart itself from the fulfillment of EU law and EUCJ judgements regarding the EMU without an infringement of the rules it committed itself, as an EU Member State, to respect *bis-à-bis* the rest of the EU Member States (that, by the way, did the same).

This lack of the two basis upon which the BVerfG supported its *ultra vires* control of the ECB Decision on the PSPP, and of the EUCJ's Weiss Judgement, makes such control simply untenable, while at the same time constitutes an infringement of EU law, thus liable to the procedures provided for in Articles 258 and 259 TFEU (whatever it may actually happen in the praxis).

3 TAKING RIGHTS SERIOUSLY? FROM SOLANGE TO PSPP/WEISS

The BVerfG's Solange Judgements, in a positive step forward for European integration, prompted the filling of an important gap in the original EEC Treaty: the initial lack of a European Community's Bill of Rights. This story is well known (firstly, by their praetorian definition as general principles of communitarian law ever since the EEC Court's

Internationale Handelsgessellschaft Judgement, and ultimately through their constitutionalization in the EU Charter of Fundamental Rights and the Lisbon Treaty).

In a nutshell, such contribution of the BVerfG to a united Europe may be labelled as "altruist". The main purpose were fundamental rights by themselves. Regrettably, it does not seem to have happened the same with the BVerfG's Second Senate PSPP/Weiss and others *Urteil*. It has been economy (and maybe even prejudice).

EU has nowadays a wide and complex system to protect fundamental rights within the scope of its own legal acts. In this instance, a violation of a fundamental right was merely the path to reinforce (even legitimize) the foundations of the BVerfG's national *ultra vires* control over acts of EU derivative law, leading to their annulment. The alleged violation was of a purely abstract nature, without actual damage to the plaintiffs' concrete faculties, powers or legitime interests legally protected by such fundamental right.

Namely, the BVerfG's Second Senate, as the plaintiffs claimed, built in PSPP/Weiss and others its *ultra vires* control chiefly upon the basis of the German electors' fundamental right to vote, enshrined in Article 38.1 GG (§§ 98-101). It happens, however, that the right to vote cannot act as an internal constitutional brake for ECB's supranational decisions that could be made by the *Deutsche Bundesbank* if the EU wouldn't exist (or if Germany were not one of its Member States, or, at least, if it were excluded from the EU's Monetary Policy by a specific Protocol or a similar arrangement of EU primary law). Otherwise, Art. 88 of the German Basic Law, envisaging the autonomy of the *Deutsche Bundesbank*, and -moreover- requiring such autonomy to the ECB, would also be itself plain and simply unconstitutional.

Etsi Europa non daretur ("as if Europe wouldn't exist", paraphrasing Grotius), there would simply not be violation of that very fundamental right of the plaintiffs if the same program to purchase German State's bonds would have been decided, established and implemented by the sole action of the *Deutsche Bundesbank*, and not by way of implementing a Decision coming from the ECB, in which the Deutsche Bundesbank has, moreover, a quota of participation. In view of that, the German participation in European integration (which is an internal constitutional obligation to Germany according to Art. 23 GG) must not (and cannot) add an additional ground of substantial unconstitutionality to a decision that could be made by German institutions in compliance with its national Constitution, should Germany not be a Member State of the European Union. Art. 23 GG (the "Europe clause" in the German Constitution) forecloses such legal finding, so that the substantial constitutional parameter cannot be more stringent, as far as fundamental rights is concerned, for the law of the European integration than that constitutionally required to acts and decisions exclusively made and implemented within the national or internal legal sphere, with no EU connection.

Article 23 GG demands an equivalent (but not necessarily identical) protection of fundamental rights by the European Union to that provided by the *Grundgesetz* itself outside the realm of the integration's law. Bearing in mind that the EU is made up of 27 States, it cannot simply be required to provide the same level than the one given by each and one of the 27 national Constitutions at the same time. Therefore, the connection with a basic core of the German *Grundgesetz*, by means of the right to vote, declines.

Moreover, the BVerfG Second Senate's PSPP/Weiss and others *Urteil* does not actually remedy any individual violation of a concrete fundamental right, but simply upheld an abstract, *a priori* and hypothetical political and economic dissent of the plaintiffs against the contended EU acts. This actually amounted to put a non-constitutionally required bridle to the present and future of European integration, in breach of the own Article 23 of the German Basic Law, and to go beyond the BVerfG's constitutional mandate of repairing actual, direct violations of individual fundamental rights.

Any measure (not only the PSPP) adopted in a context of economic integration will logically have economic effects. Hence, the only case in which those economic effects may be legally detrimental to fundamental rights occurs where and inasmuch such effects have a direct, measurable and illegal impact on the appellant's specific economic and legal patrimony, in terms of the actual content constitutionally defined of the affected fundamental right.

The BVerfG Second Senate's PSPP/Weiss and others Judgement simply responded to the abstract, political and economic fears of the plaintiffs, which they sought to give an appearance of legal coverage by claiming that such fears were included within the content of their voting rights as constitutionally recognized by the German *Grundgesetz*, while indeed there actually not existed any effective connection with such rights, since the complainants were not in fact prevented from voting, nor their national parliamentary representatives were lacking the capacity of national political control over their Government (the German *Bundesregierung*) in all what is related to European affairs.

That the plaintiffs cannot influence the ECB with their vote[6] is just as true as with regard to the *Deutsche Bundesbank* under the German Basic Law itself (Article 88 GG), according to the patterns of the German ordo-liberalism. So, if the latter situation is in accordance with the national Constitution and does not infringe the plaintiffs' voting rights, exactly the same applies to the former one, in legal terms.

The PSPP/Weiss and others Judgment simply concurred with the purely abstract fears of the plaintiffs. Or at least, it did so partially: not on grounds of a circumvention to the ban of monetary State financing according to Article 123.1 TFEU, as the appellants pointed out, and the BVerfG's Second Senate rejected in Weiss/PSPP. But, certainly, it admitted their additional claim about the lack of a sufficient motivation on the fulfillment of the communitarian principle of proportionality by the contested ECB Decisions, and by the very EUCJ Weiss Judgement that upheld such ECB Decisions.

This complaint, as well as the content of the PSPP/Weiss and others Judgement, are expression of also abstract and preventive fears on the possibility that the PSPP's ECB Decisions, as well as their confirmation by the EUCJ's Weiss Judgement, could potentially have been opening the door to future decisions of the ECB (not yet actually adopted, beyond the PSPP itself) affecting the fiscal and economic policy.

Such a claim, rather than a genuine legal one, simply represents the mere expression of a political (and economic) disagreement (or even personal fears) directly against the ECB and the EUCJ, because of the PSPP. At the same time, it is only a hypothetic and preventive claim. And, by the way, it is also an expression of a political or economic disagreement against other German citizens that, because of their agreement (or simply, their lack of explicit disagreement) with those EU legal acts, didn't challenge them before the BVerfG.

A mere lack of political agreement does not violate anyone's fundamental right to vote; it is rather its natural fulfillment, for it does not only prevents the existence of legitimate disagreements, but also presupposes such disagreements within a free community of citizens. That is just the political process which the right to vote generates, as (incomprehensibly, as compared to its verdict) the very BVerfG's Second Senate PSPP/Weiss Judgement put it in its legal grounds.

[6] Maybe not directly, but indirectly, for the German Government has a share in the appointment of the members of the Governing Council of the European Central Bank, according to Article 283 TFEU.

4 THE BVERFG'S PSPP/WEISS *URTEIL*: A DIRECT CONTROL AND ANNULMENT OF EU SECONDARY LAW ACTS… IN VIOLATION OF THE OWN BVERFG'S CASE-LAW?

Evoking previous case-law of the BVerfG, this Judgement states that "acts of institutions, bodies, offices and agencies of the European Union cannot be directly challenged before it (cf. BVerfG 142, 123)". But surprisingly, the same BVerfG ruling deprived of any legal effect in Germany to the ECB Decisions on the PSPP as well as the Weiss EUCJ as *ultra vires* acts (§ 234), and ordered the *Bunsdesbank* to no longer participate in the implementation and execution of the ECB Decisions on the PSPP (§ 235).

Both things at a time (unchalleangeability and annulment) are antinomic, and consequently untenable. If the contended EU acts are not challengeable before the German Court, it necessarily follows that the German Court cannot deprive them of legal effect in Germany. Consistent with the premise, instead, would have been any legal declaration by the BVerfG's Second Senate making the Federal Government, or even the *Deutsche Bundesbank*, liable of the hypothetic violation of the appellants' fundamental right caused by those EU acts, owing to the participation of the former in the endorsement or the implementation of the latter.

Likewise, the aforementioned German Constitutional Judgement could not have derived from such internal liability any legal consequences in the benefit of the appellant's violated right in terms of the annulation of those EU legal acts in Germany. Not only out of the suitable accomplishment of EU law, but simply out of mere coherence with the well-established BVerfG's case-law on such direct, internal unchallengeability of EU legal acts.

5 THE PSPP/WEISS CONCEPTION OF THE EUCJ'S MANDATE DISREGARDS ARTICLES 267 AND 344 TFEU

The BVerfG's PSPP/Weiss and others Judgment not only penetrates into the communitarian interpretation of EU primary law on the monetary, economic, and fiscal policies. It does the same with the interpretation of procedural rules on the competences (or, as the Second Senate put it, on the mandate) of the EUCJ, with the self-declared aim to extend what the German judicial organ labels as its *ultra vires* control also against the EUCJ Weiss Judgement, on the grounds of the support that the latter gave to the contested ECB Decisions establishing and amending the PSPP.

Oddly enough, the German Court did not base its *ultra vires* control on the EUCJ's Weiss prejudicial Judgement upon the EU primary law governing the preliminary reference (Article 267 TFEU), but instead solely did so upon Article 19 TUE, which regulates the general role of the CJEU as EU institution and simply mentions, but does not lay down the law on, the prejudicial referral as such. Article 19 TFEU states that the EUCJ's mission is to ensure the respect of law in the interpretation and application of EU Law, and refers, among others, precisely to Article 267 TFEU the procedural and substantial concretion of the EUCJ's role as far as the preliminary reference is concerned.

Significantly, the PSPP/Weiss and others *Urteil* omitted any mention to the fact that Article 267 TFEU confers to the EUCJ the (exclusive) competence to adjudicate on the validity of EU secondary law. Nothing was said about Article 267 TFEU as well, which obliges national courts of last instance to address the prejudicial reference to the EUCJ if they wish to obtain a validity control over EU secondary law which might conclude with its eventual annulment (something that can only happen by means of a ruling of the EUCJ).

It is also well-established doctrine of EUCJ's case-law (starting from its *Foto-Frost* Judgement of 22 October 1987, affair C-314/85, marginals 14-18) that the Member States' judicial organs cannot consider EU law legal acts as non-compliant with EU primary law, nor declare them invalid, precisely (as the BVerfG's Second Senate itself acknowledged in

Weiss/PSPP) because such isolate judicial finding in one Member State would break the unity of EU law as well as the coherence of its judicial control.

The BVerfG's Second Senate in PSPP/Weiss said that the EUCJ's Weiss Judgement was an *acte eclairé* (§ 225), but also that such EUCJ's Judgement was an incomprehensible ruling (§§ 116, 153 and 214). Such apparently contradictory contention is of no surprise. It could simply be an attempt to justify the fact that the BVerfG had not readdressed a prejudicial referral on the subject again to the EUCJ. However, it has been accurately objected that the core of the BVerfG's Second Senate PSPP/Weiss Judgement's grounds that led it to declare the annulment, as *ultra vires* EU acts, of the contested ECB Decisions, and of the own EUCJ's Weiss Judgement, simply were not raised by the former in its prejudicial referral to the latter, or at least, that they were not at the core of the referral itself (Editorial Comments, 2020).

If the corresponding EUCJ's prejudicial judgement is deemed as incomprehensible by the *a quo* national court, the latter should not simultaneously claim (as the BVerfG's Second Senate PSPP/Weiss Judgement did) that such incomprehensible preliminary EUCJ's judgement constitutes, in the sense of EUCJ's case-law, either an *acte claire* (according to the EUCJ's rulings in *Da Costa en Schaake* of 27 March 1963, affairs C-28, C-29 and C-30/62, paras. 6 and 7, and of 6 October 1982, *Cilfit*, affair C-283/81, marginals 13-15), or an *acte eclairé* (EUCJ's *Cilfit* Judgement, cit., paras. 16-20), which relieves national courts of last resort from the communitarian obligation (currently *ex* Art. 267 TFEU) to address -or even readdress- the preliminary reference in such circumstances.

Quite on the contrary, the BVerfG's Second Senate was legally compelled by EU law to try at least a second preliminary reference that might had allowed the EUCJ to shed (more) light (*éclairer*) on the points of its *Weiss* judgement that the Second Senate did not simply comprehend, or regarded as obscure. Once again, it is well established doctrine by the EUCJ that the same national court which has made a prejudicial referral is entitled to submit again any new information which might lead the own EUCJ to give a different answer (Orders of 5 March 1986, C-69/85, *Wünsche Handelsgesellschaft*, para. 2, of 28 April 1998, C-116/96 REV, *Reisebüro Binder GmbH*, paras. 9, and of 30 June 2016, Case C-634/15, *Sokoll-Seebacher*, para. 19).

The EUCJ's doctrine in *Wünsche Handelsgesellschaft* also underlines that it is not permissible for a national court to use such right to refer further preliminary references as a means of challenging the validity of a previous prejudicial judgment, since that would amount to call into question the distribution of competences between national courts and the own EUCJ, as set forth by Article 267 TFEU (again, Order of 25 March 1986, C-69/85, *Wünsche Handelsgeschelschaft*, para. 15). Prejudicial judgements of the EUCJ become *res iudicata* for national courts when they have to decide the national principal *a quo* procedure (once more, Order of the EUCJ of 5 March 1986, C-69/85, *Wünsche Handelsgesellschaft*, paras. 12 y 13).

Other than this only kind of cases, in which the same *a quo* national court can try a further preliminary reference within the same principal judicial procedure before the latter is settled, the EUCJ's case-law does not allow all the other national courts to challenge the validity of an existing prejudicial judgement. Nor even does it allow such thing to the same national court within any other principal national procedure than that which gave place to the corresponding prejudicial Judgement of the EUCJ.

The EUCJ's Weiss judgement has already become *res iudicata* to the BVerfG. This means that the right to resubmit the prejudicial referral to the EUCJ turns into an obligation to the national court *a quo* against whose decisions there is no judicial remedy under national law (in this instance, the BVerfG's Second Senate was such), before giving resolution to the national principal procedure (that's to say, the constitutional individual complaint filed

before it by the German plaintiffs), should such Court not comprehend any aspect of the EUCJ's prejudicial Sentence already delivered.

On the other hand, having referred the plaintiffs (and the Federal Government) to the action of annulment provided for in Article 263 TFEU was already of no legal effect in the instance, because the time to bring such action to the (General) Court (two months ever since the official publication in the EU Journal of the contested measure, according to such TFEU Article) had largely expired by the time the Second Senate's PSPP/Weiss and others Judgement was delivered. And, of no minor importance, Article 263 TFEU requires, for a private citizen's standing to appeal, that the contested EU act be addressed to that person, or be of direct and individual concern to her or him, and moreover, if that contested act is a regulatory act, it must not entail implementing measures.

The aforesaid abstract complaint of the plaintiffs, and the lack of an illegal individual negative direct effect deriving for them to the contested EU measures, which would have been an unsurmountable obstacle to the communitarian admissibility of an action of annulment filed by the plaintiffs, may help understand the procedural way chosen by them, before the BVerfG, and not before the EU's General Court (which is the competent organ to adjudicate at first instance the actions of annulment, according to Article 256.1 TFEU).

6 THE BVERFG'S PSPP/WEISS AND THE LEGAL FUTURE OF THE EMU

Prima facie, the constitutional future of EMU, as well as its constitutional present, could have been seriously affected (or at least, hindered) by the BVerfG's Second Senate PSPP/Weiss Judgement of 5 May 2020. According to it, the own PSPP, due to its huge macroeconomic coupled effects, seemed to be unconstitutional in Germany, the demographically and economically largest Member State of the EU.

In this sense, PSPP/Weiss could be regarded not simply as a constitutional crossroads, but rather as a dead-end for the EMU, and with it, to a large extent, for a united Europe, despite what's provided for by Art. 23 of the own German *Grundgesetz*. In turn, the PSPP and, in general terms, eventual future huge monetary measures, will certainly not be able to be decided and implemented by the *Deutsche Bundesbank* alone, since the monetary policy has been transferred, as an exclusive competence, to the EU.

But, regardless of all that, the conclusion of the deadlock is simply untenable. There are ways of overcoming the predicament. In legal terms, there seems to even exist more than one path to manage it, and the praxis offers additional ones.

The first one lies in the EU infringement procedure. Within the context of the EMU, Germany has already been warned for its excessive deficit against EU law, although with no sanction effectively imposed for it. But in the BVerfG's Second Senate PSPP/Weiss and others *Urteil*, the infringement of EU law was even more serious. It has been a "rebellion", and as already seen, it is not grounded on legally tenable grounds, differently from the Solange saga (especially Solange I, in the face of the then inexistent EC-wide declaration of fundamental rights).

There now exists the EU Charter of Fundamental Rights, as well as other communitarian resources to protect fundamental rights. Moreover, the main legal foundations of the BVerfG's PSPP/Weiss and others Judgement do not lie in an actual, effective violation of any individual's specific fundamentals rights, but in a merely political, legal and economical discrepancy on the part of the plaintiffs (which was shared, or at least upheld, by the own BVerfG's Second Senate) against the ECB and the EUCJ's contested acts (as well as against non-complainant German citizens).

In this case, a sole EU admonition may not be sufficient, given the huge macroeconomic transcendence of the violation, its consequential systemic risk for the whole

euro area (including Germany), as well as the economic and reputational damages that the German retiring of the PSPP could entail. Nevertheless, EU law in general, and EUCJ case-law in particular, are of a high dynamic nature, and have proved to find ways to adapting to drawbacks or barriers coming from national constitutional imperatives, be it directly by means of EUCJ case-law (*Internationale Handelsgesschelschaft*, "*Taricco* saga"), or through amendment of EU primary law (Lisbon Treaty and the EU Charter of Fundamental Rights).

The path followed by the "*Taricco* saga", in which the Italian Constitutional Court clearly placed the national constitutional identity at the core of its preliminary referral to the EUCJ, but at the same time gave the latter the chance to transactionally solve the problem (Editorial Comments, 2020), seems to have been closed by the BVerfG. The EUCJ's Weiss Judgement is *res iudicata*, and it legally forecloses a repetition of the preliminary referral within the same *a quo* national judicial procedure, as demanded by the EUCJ's *Wunsche Handelsgeschellschaft* doctrine.

In terms of EU law, primacy still resists. Besides, all the other German national courts (which act as lower Courts in what regards the BVerfG's doctrine established in its PSPP/Weiss and others Judgement) cannot be deprived of the power to address to the EUCJ a preliminary reference because of a legal provision of national law by virtue of which the assessments made by the higher court are binding on them.

According to well-established EUCJ case-law, any lower national court is free to refer a question to the EUCJ for a preliminary ruling if the former considers that a legal assessment made by its national superior court could lead to give a judgment contrary to the EU Law (EUCJ Judgements of 9 March 2010, C-378/08, *ERG and Others* vs. *Commission of the European Communities*, paragraph 32, of 5 October 2010, C-173/09, *Elchinov*, para. 27, and of 15 January 2013, Case C-416/10 *Jozef Križan and Others*, paras. 68 and 69).

The general binding effects and the primacy of the EUCJ Judgments over antinomic national judicial rulings also apply to all other German non-judicial institutions, bodies, and agents, under the penalty of incurring, otherwise, in violation of EU Law. Especially, but not only, because of Articles 4.3 (Member States' commitment to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising from the Treaties or resulting from the acts of the institutions of the Union, to facilitate the achievement of the Union's tasks, and to refrain from any measure which could jeopardize the attainment of the Union's objectives) and 344 TFEU (Member States' undertaking to not submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein).

As regards what has factually happened, the ECB did release additional documents motivating the principle of proportionality's fulfillment by the PSPP within the term (three months) given by the BVerfG's Second Senate PSPP/Weiss Judgement (Utrilla, 2020). There seems to occur, accordingly, that the EMU lives on, and will live, as also does the EU's monetary policy which has been laid by the Member States (including Germany) on the hands of the ECBS, headed by the ECB (accordingly with what Article 88 of the German *Grundgesetz* provides for, by the way).

However, the BVerfG's Second Senate PSPP/Weiss and others Judgement added *de facto* dissuasive elements. Those elements certainly will not act within the EU's legal system as any more than an additional element within the factual context surrounding the decisions of the European legislator. And maybe also for the European Judge, amounting somehow to what has actually happened with the *Taricco* saga: that finally, the blood did not reach the river. Or at least, maybe not so much … for the time being.

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