

## **“The Never-Ending Story”: Reflections on the Powers of the European Central Bank**

Judgment of the German Constitutional Court of 5 May 2020 (*Weiss II*),  
2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16

**In the light of Articles 119 and 127 *et seq.* TFEU, as well as Articles 17 *et seq.* Statute of the ESCB, the decision of the Governing Council of the ECB of 4 March 2015. (EU) 2015/774 and subsequent decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 must be qualified as *ultra vires*. While it is true that the CJEU expressed a different position in its answers to the third and fourth preliminary questions of Senate II and that the interpretation provided by the CJEU is in principle binding on the Federal Constitutional Court, in this case, the delimitation of competence undertaken by the CJEU is simply untenable. Ultimately, the objections arising from the order of competence in respect of the ECB Governing Council’s PSPP decision of 4 March 2015. (EU) 2015/774 and subsequent decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 have not been overturned.**

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<https://doi.org/10.26881/gsp.2024.1.12>

### **Commentary**

The judgment of the Federal Constitutional Court (FCC) under review (*Weiss II*) originates from the European Central Bank’s (ECB) activity in connection with the financial turmoil initiated in late 2007 and early 2008. As a result of the ECB’s involvement in restoring financial stability, a group of German politicians filed several constitutional complaints under the procedure for examining the constitutionality – the competence of state authorities – addressed to the FCC against the German laws stabilising the euro area. The FCC, by the order of 17 December 2013, excluded for separate examination the allegations concerning the compatibility with EU law of the ECB Council docu-

ment of 6 September 2012 on Outright Monetary Transactions (Technical features of Outright Monetary Transactions, OMT).<sup>1</sup> In contrast, by the order of 14 January 2014, the FCC made the determination to halt the proceedings in this matter and forwarded inquiries to the CJEU for a preliminary assessment of the legality of the actions taken by the ECB. Following this request, the CJEU, in the *Gauweiler* judgment ruled that the ECB's actions were compatible with EU law.

In subsequent years, the ECB's involvement in the functioning of the EU financial market increased, which resulted in several more constitutional complaints being brought before the FCC against the ECB's 2015 decision on the Secondary Markets Public Sector Asset Purchase Programme (PSPP).<sup>2</sup> In brief, this document involved the authorisation, specifically for national central banks (in proportions reflecting their respective shares in the capital key<sup>3</sup>) and for the EU central bank itself to be able to make outright purchases of eligible marketable debt securities from eligible counterparties in secondary markets.<sup>4</sup>

As a consequence of the ECB's act being issued and implemented, the CJEU was again referred to the CJEU for a preliminary ruling in 2017 by the FCC.<sup>5</sup> The FCC again asked the court to answer several questions for a preliminary ruling, which in their content included doubts about the compatibility of the ECB document with the TFEU provisions on economic and monetary policy and the provisions contained in the Protocol on the Statute of the European System of Central Banks and the European Central Bank (ESCB and ECB).<sup>6</sup> In addition, the complainants pointed to a violation of the division of competences between the EU and the Member States provided for in the TFEU. The issues in dispute mainly related to the provisions regarding the implementation of monetary policy by the ECB and the prohibition of deficit coverage by the central banks of EU Member States.

Undoubtedly, the background of the judgment under review is the earlier CJEU judgment in the *Gauweiler* case, which fits into the context of the following considerations. Firstly, the reference for a preliminary ruling was referred again to the CJEU by the FCC in the context of a procedure which seeks to establish that the ECB act is clearly *ultra vires* and contrary to German constitutional identity. Secondly, both acts

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<sup>1</sup> Press release, *Technical features of Outright Monetary Transactions*, 6 September 2012.

<sup>2</sup> Decision of the European Central Bank (EU) 2015/774 of 4 March 2015 on a programme for the purchase of public sector assets in secondary markets. Since its adoption on 4 March 2015, this Decision has been amended by Decisions 2015/2101, 2015/2464, 2016/702 and Decision 2017/100. This programme is one of the four sub-programmes of the *Expanded Asset Purchase Programme* ("APP") announced by the ECB.

<sup>3</sup> The distribution of purchases between jurisdictions is based on the ECB's capital subscription key as referred to in Article 29 of the ESCB and ECB Statute.

<sup>4</sup> Article 1 of Decision 2015/774.

<sup>5</sup> Reference for a preliminary ruling from the Bundesverfassungsgericht (Germany) lodged on 15 August 2017 – *Heinrich Weiss and Others* (Case C-493/17), Official Journal of the EU, 27.11.2017, C 402/9.

<sup>6</sup> Chapter IV Monetary functions and operations of the ESCB, Articles 17–24 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank, Official Journal of the EU, 07.06.2016, C202/238.

considered in *Weiss* and the one at issue in *Gauweiler* are related to the ECB’s unconventional programmes,<sup>7</sup> which, in the FCC’s view, do not fall within the scope of monetary policy and violate the prohibition on lending set out in Article 123 TFEU.<sup>8</sup>

It is worth noting that the judgment in the *Gauweiler* case concerned an ECB press release reporting on a decision approving a programme for the purchase of government bonds issued by euro area Member States, which was not then nor has it ever been implemented subsequently. By contrast, the programme considered in *Weiss*, that for purchasing public sector assets on secondary markets (PSPP), was formally adopted and implemented.<sup>9</sup> The *Gauweiler* case resulted in a ruling in which both the CJEU and the FCC ruled in favour of the ECB. The case also marked an important procedural turning point since the FCC, for the first time in its history, referred to a preliminary ruling of the CJEU to reduce the risk of inconsistencies in the interpretation of the treaties and to maintain an open and productive dialogue between the two courts.

In the initial phase of the proceedings before the CJEU in the *Weiss* case, the doubts of the German constitutional court were confronted by Advocate General Melchior Wathelet, who, in his opinion of 4 October 2018, proposed that the CJEU should answer the preliminary questions submitted by the FCC as follows: the examination of Decision 2015/774 on the programme for the purchase of public sector assets on the secondary markets did not reveal anything that could call its validity into question.<sup>10</sup> Consequently, after reviewing the position of the Advocate General, the Luxembourg judges on 11 December 2018 announced their judgment in the *Weiss* case, in which they shared the position of Advocate Wathelet.<sup>11</sup>

The judgment of the FCC of 5 May 2020, is, as it were, a response to the position of the CJEU in the above-mentioned *Weiss* case; in the literature this judgment is referred to as *Weiss II*.<sup>12</sup> In its final decision, unlike in the *Gauweiler* case, the FCC disagreed with the CJEU judgment, which has drawn criticism.

In *Weiss II*, the CJEU found the ECB programme to be lawful, unfortunately, the FCC disagreed and held that the CJEU judgment was not binding in Germany and that the programme in question was unlawful and required further action by the ECB to bring it into conformity with German law.

In its judgment, the FCC seems to seek to maintain its position as the final arbiter in constitutional matters, while disregarding the role of the CJEU as the highest judicial authority in the EU and the process of financial market integration. By conceding to itself, in particular, but also indirectly, to the other constitutional courts of the Member

<sup>7</sup> A programme of this kind is usually considered to be ‘Quantitative Easing’ (QE) because of the increase in the central bank’s money supply, to which the purchase of a significant number of bonds leads.

<sup>8</sup> Paragraph 3 of the opinion of Advocate General Melchior Wathelet presented on 4 October 2018, Case C-493/17 *Weiss and Others*.

<sup>9</sup> Point 4 of the Advocate General’s opinion.

<sup>10</sup> Paragraph 154 of the Advocate General’s opinion.

<sup>11</sup> Judgment of the Court of Justice of the European Union of 11 December 2018, in Case C-493/17 *Weiss and Others*.

<sup>12</sup> BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15, paras. 1-237.

States the power to carry out *ultra vires* review in areas that undoubtedly fall within EU competence, the FCC fails to recognise that only the CJEU can declare invalid acts of EU law that violate the principle of proportionality.<sup>13</sup>

The judgment under review does not deserve approval as it contributes to destabilising judicial dialogue, which is based on the idea of avoiding escalation. It also increases challenges to the principle of the primacy of European law in the Member States. In doctrinal terms, the FCC judgment is based on a critique of the CJEU's understanding of the principle of proportionality. Well, in the judgment under review, the principle of proportionality plays an essential role in assessing whether sufficient safeguards have been provided by implementing the ECB programme; for example, a difficult economic situation justifies fewer safeguards, but in conducting its monetary policy the ECB should take into account the principle of proportionality.<sup>14</sup>

In addition, the FCC ruling raises several fundamental questions as to the state of judicial dialogue in the EU and the institutional position of the CJEU, the authority of European law and the sustainability of the above principles.<sup>15</sup> *Weiss II* may also have an impact on the Economic and Monetary Union (EMU) and its legal and institutional order. It cannot be denied that the impact of this judgment on the future integration of the financial market in Europe will be felt in the coming years.<sup>16</sup> The FCC, by challenging some of the most deeply rooted principles of Union law, sets a dangerous precedent for the long-term stability and effectiveness of the EU legal and political system.<sup>17</sup> The ruling of the FCC could become a milestone in the history of the EMU and its laws. Moreover, the decision by the German court directly undermines the integrity of Union law.<sup>18</sup>

*Weiss II* ends with an unusual, if not highly controversial solution; it orders the ECB to adopt a new decision within three months.<sup>19</sup> The problem, however, is that the FCC does not have the power to order the ECB to take a new decision, and the ECB is not obliged to comply with the FCC's request. Indeed, the ECB is not subject to the jurisdiction of any courts other than the CJEU. Moreover, the above would be tantamount to accepting some form of direct control of the ECB by national judges, in contrast to the independence conferred on the ECB by Article 130 TFEU.<sup>20</sup> The main manifestation of this functional independence is the ECB's exclusive competence to formulate

<sup>13</sup> A. Śledzińska-Simon, *The end of the German Legal Culture? Authority v. Justification* [in:] *German Legal Hegemony?*, "MPIL Research Paper Series" 2020, no. 43, p. 2.

<sup>14</sup> Ch. Andersson, *Whatever it takes ECB's Mandate of Purchasing Government Bonds on Secondary Markets*, LAGF03 Essay in Legal Science, 2018.

<sup>15</sup> P. Dermine, *The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union Bundesverfassungsgericht 5 May 2020, 2 BvR 859/15 and others, PSPP*, "EuConst" 2020, no. 16, p. 526.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, pp. 550–551.

<sup>18</sup> J. Baquero Cruz, *Karlsruhe and its Discontents*, "LAW Working Paper" 2022, no. 10, p. 2.

<sup>19</sup> F. Annunziata, *Cannons over the EU legal order: The decision of the BVerfG (5 May 2020) in the Weiss case*, "Maastricht Journal of European and Comparative Law" 2021, vol. 28(1), pp. 140–141.

<sup>20</sup> F. Annunziata, *Cannons...*, p. 141.

and implement monetary policy. For this purpose, the ECB is endowed with appropriate decision-making and operational powers.<sup>21</sup> The ECB formulates monetary policy in the countries that have entered the third stage of the EMU. It also determines the instruments for its implementation. Its powers concern the shaping of liquidity levels in the countries that have entered the third stage of the EMU.<sup>22</sup> The ECB can influence the value of money through legally permissible means (methods, instruments of monetary policy) and by using existing experience in this area. This makes central banks a peculiar link in the system of public finances since currency has a great influence on the real sphere of the economy and its performance, and it is not without justification that they are often referred to as monetary authorities.<sup>23</sup>

The *Weiss II* case is also crucial when it comes to the line delimiting the respective competences of the Union and its Member States. The EU derives its competences and powers by delegation from its Member States, in accordance with the Treaties, its *de facto* constitution.<sup>24</sup> By creating a community for an indefinite period of time, with its own institutions, its own personality, its own legal capacity and ability to represent itself on the international stage, and in particular the real power deriving from the limitation of sovereignty or the transfer of state powers to the Union, the Member States have limited their sovereign rights and thus created a body of rules that bind both their citizens and themselves.<sup>25</sup>

From the *Gauweiler* case to *Weiss II*, we see the development of standards for judicial review of ECB decisions, both in the field of monetary policy and banking supervision.<sup>26</sup> However, it seems that, both with regard to liability cases and judicial review of actions, there are now more frequent problems than in the past in sorting out the ECB activity in question.<sup>27</sup> Looking at the growing body of case law, one can find parallels that seem to indicate that general standards for judicial review of ECB decisions are developing and consolidating. Obviously, the application of these standards follows a different logic, as different levels of scrutiny have to be adopted if one considers, on the one hand, monetary policy decisions (where the absolute independence of the ECB has to be preserved) and, on the other hand, decisions on banking supervision and/or resolution. One might therefore think that this experience might even result in a more transparent, meticulous legal justification of the monetary policy measures adopted by the ECB in the future.<sup>28</sup>

<sup>21</sup> J. Gliniecka, *European System of Central Banks* [in:] *System prawa finansowego...*, vol. 4, p. 159.

<sup>22</sup> *Ibid.*, p. 180.

<sup>23</sup> E. Fojcik-Mastalska, *Bank centralny* [in:] *System prawa finansowego...*, p. 99.

<sup>24</sup> J.H.H. Weiler, D. Sarmiento, *The EU Judiciary After Weiss – Proposing a New Mixed Chamber of the Court of Justice*, "EU Law Live", 1 June 2020, pp. 2–3.

<sup>25</sup> G. Barrett, *Reflections on the Revolution in Karlsruhe: the Bundesverfassungsgericht Ruling in Weiss*, "UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper" 2020, no. 18, p. 2.

<sup>26</sup> F. Annunziata, *Cannons...*, p. 123.

<sup>27</sup> M. Fedorowicz, *New tasks and functions of the European Central Bank in ensuring financial stability in the light of the European Banking Union regulations*, "Zeszyty Natolińskie" 2016, no. 62, p. 135.

<sup>28</sup> G. Anagnostaras, *Activating Ultra Vires Review: The German Federal Constitutional Court Decides Weiss*, "European Papers" 2021, vol. 6, no. 1, p. 827.

The analysis of the judgment in question also gives grounds to conclude that *Weiss II* represents a breaking point in the long-standing dialogue between the FCC and the CJEU. It should be pointed out that if every constitutional court or supreme court in each Member State were to follow the German example, this could spell the end of the EU as an integrated legal area of justice and the rule of law and damage the single market.<sup>29</sup> The FCC's decision seeks to undermine the fundamental principles on which EU law is based and creates a breeding ground for dangerous imitators whose activity could have a lasting impact on the EU legal system, particularly in the area of the financial market.

It is crucial to emphasize that after the FCC judgment, there are new challenges for the ECB in the implementation of monetary policy, the ECB Mandate does not provide clear guidance on many of the recent challenges facing the central bank, even more so, the *Gauweiler* and *Weiss* cases have made the ECB Mandate unclear and vague,<sup>30</sup> which may generate more disputes in the future regarding the legal uncertainties of the ECB's activity.

Summarising the judgment under review, it should be pointed out that the FCC judgment deserves a negative response. An analysis of the voice of German jurisprudence gives rise to the following concluding statements:

1. The judgment under review deals with an issue much broader than the scope of the ECB's competence. The FCC seems to have overlooked the extremely important historical context and conditions for the creation of the EMU in Europe with the particular role of the ECB at the present time.<sup>31</sup>
2. The ECB's programmes are certainly a controversial measure used by the central bank, but probably the most effective,<sup>32</sup> especially with regard to problems such as the turmoil in the financial system, pandemics, climate change and the war in Ukraine.

## Literature

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<sup>29</sup> J.H.H. Weiler, D. Sarmiento, *The EU Judiciary...*, p. 1.

<sup>30</sup> Ch. Andersson, *Whatever it takes...*

<sup>31</sup> Cf. A. Nowak-Far, *Unia Gospodarcza i Walutowa w Europie*, Warsaw 2001 and H. Gronkiewicz-Waltz, *Europejska Unia Gospodarcza i Walutowa*, Warsaw 2009.

<sup>32</sup> Editorial Comments, *An unintended side-effect of Draghi's bazooka: An opportunity to establish a more balanced relationship between the ECJ and Member States' highest courts*, "Common Market Law Review" 2014, vol. 51, issue 2, pp. 376–377.

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## Summary

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### "The Never-Ending Story": Reflections on the Powers of the European Central Bank

Since the financial crisis of 2007–2008, we have been dealing with a special dialogue between the European and German courts at the level of the European Union. The subject of this dialogue is the decisions of the European Central Bank on the programme for the purchase of public sector assets on secondary markets. The ECB's activity, as well as the involvement of the national central banks of the Eurosystem in the implementation of these decisions has been met with dissatisfaction by German politicians, culminating in the title judgment of the Constitutional Court of the Federal Republic of Germany. In the paper, the author analyses the judgment and passes critical commentary on the *Weiss II* judgment.

**Keywords:** European Central Bank, PSPP, *Weiss*, commentary.

## Streszczenie

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### „Niekończąca się opowieść” – refleksje na temat uprawnień Europejskiego Banku Centralnego

Od kryzysu finansowego z lat 2007–2008 mamy do czynienia – na poziomie Unii Europejskiej – ze szczególnym „dialogiem” między sądami europejskimi i niemieckimi. Przedmiotem tego „dia-

logu" są decyzje Europejskiego Banku Centralnego w sprawie programu skupu aktywów sektora publicznego na rynkach wtórnych. Działalność EBC, a także zaangażowanie krajowych banków centralnych Eurosystemu w realizację tych decyzji spotkało się z niezadowoleniem niemieckich polityków, czego kulminacją było tytułowe orzeczenie Trybunału Konstytucyjnego RFN. W artykule autor analizuje wyrok i odnosi się krytycznie do wyroku *Weiss II*.

**Słowa kluczowe:** Europejski Bank Centralny, PSPP, *Weiss*, komentarz.