Editorial

In this issue

The editors are pleased to present issue 2020/I of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

In this issue's Articles section, Petra Perisic addresses the complex questions related to attribution of conduct in UN peacekeeping operations. Zsuzsanna Rutai elaborates upon the role of the Lanzarote Committee, the monitoring body of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Péter Budai describes a new theoretical framework of the law of intergovernmental organizations and ponders its applicability to the European Union. Phet Sengpunya introduces the ASEAN perspective regarding online dispute resolution schemes for e-commerce, whereas István Szijártó analyses the efficiency of Joint Investigation Teams and the role of Europol and Eurojust in this context.

In the case notes section, Ágoston Mohay gives a concise analysis of the Dorobantu judgment of the Court of Justice of the EU from the perspective of the relationship between EU law and the European Convention on Human Rights.

As for this issue's paper focusing on legal developments in the Western Balkans, Sandra Fabijanić Gagro analyses the concept of 'Junction Area' in the context of the Final Award in the arbitration proceeding between Croatia and Slovenia.

Finally, in the reviews section, István Tarrósy reviews the edited volume "Refugees and Migrants in Law and Policy. Challenges and Opportunities for Global Civic Education" published by Springer in 2018, while Bence Kis Kelemen reviews Harold Hongju Koh's monograph entitled "The Trump Administration and International law" (Oxford University Press, 2019).

A word of sincere gratitude is of course due to the anonymous peer reviewers of the current issue.

We encourage the reader, also on behalf of the editorial board, to consider the PJIEL as a venue for publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and European law issues. The next formal deadline for submission of articles is 15 October 2020, though submissions are welcomed at any time.

The editors

I came in here for an argument! The German Federal Constitutional Court's ruling on the PSPP programme and the authority of EU law

The judicial dialogue between the Bundesverfassungsgericht and the Court of Justice of the EU revolving around questions of constitutional identity has taken a new turn at an already very difficult time for Europe. On 5 May 2020, the Federal Constitutional Court of Germany (BVerfG) ruled that the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) was contrary to the German Federal Constitution, the *Grundgesetz*.[1] The PSPP is, in simplified terms, a so-called quantitative easing programme involving the purchase of euro-denominated marketable debt securities issued by central governments of Eurozone Member States[2], a measure of substantial significance spinning out of ECB responses to the European sovereign debt crisis – it is in fact seen as the most important measure.[3]

If this weren't enough, what makes this ruling even more noteworthy is that it was passed following a preliminary ruling by the Court of Justice of the EU requested by the BVerfG in the course of the same national constitutional complaint procedure. The questions related essentially to whether the relevant decisions of the ECB amounted to *ultra vires* acts and were infringing German constitutional identity. In its *Weiss* preliminary ruling delivered in December 2018, the Court of Justice upheld the validity of the ECB decisions[4]; the Court *inter alia* conducted a proportionality analysis (in line with its previous findings in Gauweiler[5]) and found that Decision 2015/774 did not run counter to the proportionality principle.[6]

Yet in its 2020 judgment, the BVerfG found that the ECB measures did infringe the principle of conferral and the delimitation of competences between the EU and its Member States, and were thus *ultra vires*: in essence, the deciding issue was whether the PSPP could be seen as a monetary policy measure or a measure of economic policy – and as the ECB's competences related only to monetary policy, economic policy measures should be seen as falling outside the competence of the EU's central bank.[7] The BVerfG held that if the distinction between monetary policy and economic policy is to be made on the basis of the proportionality principle, then the *effects* of the ECB measures in question, i.e. the PSPP scheme (which may very well have economic effects) should be taken into account when assessing proportionality.[8] It is at this point that the BVerfG becomes rather critical in its ruling and frankly dismisses the proportionality analysis conducted by the CJEU in *Weiss* as unsatisfactory and "meaningless" for the attainment of the purpose (i.e. the abovementioned distinction) that it was apparently meant to serve.[9] The BVerfG stated that the CJEU afforded the ECB way too broad discretion and at the same time did not provide the standard of review that would have been necessary, thus by not scrutinizing this competence issue sufficiently, the CJEU authorised the ECB "to pursue its own economic policy agenda." This lead the German court to

[1] BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15. The Editorial comments rely on the English translation provided here: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html (11 May 2020)

[2] Decision 2015/774/EU of the European Central Bank on a secondary markets public sector asset purchase programme (OJ 2015 L 121/20), Art. 3.

[3] M. Frangakis, *The ECB's Non-standard Monetary Policy Measures and the Greek Financial Crisis*, in The Internal Impact and External Influence of the Greek Financial Crisis, J. Marangos (Ed.), Palgrave Macmillan, 2017, p. 64.

[4] Case C-493/17 Weiss and Others [EU:C:2018:1000].

[5] Case C-62/14 Gauweiler and Others [EU:C:2015:40].

[6] Ibid. paras. 71-100.

[7] F. C. Mayer, *Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG*, Verfassungsblog, 7 May 2020 https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/ (10 May 2020).

[8] 2 BvR 859/15, para. 139.

[9] Ibid. paras. 123-124.

the conclusion that the CJEU "acted ultra vires, which is why, in that respect, its Judgment has no binding force in Germany."[10] The Federal Constitutional Court proclaimed that no German state organ – including the Bundesbank – may participate in the development or implementation of *ultra vires* acts such as the PSPP.[11]

Much has been said in recent years about judicial dialogue and judicial comity (or the lack thereof) between national constitutional or supreme courts and the Court of Justice in the context of constitutional identity and *ultra vires* review. The interpretation of what constitutional identity actually means (or even what it should precisely be called) is itself debated.[12] Neither primacy over national constitutions, nor the relationship between the Court of Justice and national constitutional courts are clear cut issues, and this is certainly not the first sing of conflict – see, for recent examples the Dansk Industri[13] and Landtová[14] sagas.[15]

Even though the reference in the title of this editorial comment to the classic Monty Python sketch attempted to strike a humorous note regarding the back-and-forth between the BVerfG and the CJEU, the consequences of the judgment may be all the more serious. Firstly, in a theoretical sense: together with direct effect, the primacy of EU law over national law is an essential foundational concept of the EU's autonomous legal order, and the same goes for the CJEU's exclusive jurisdiction regarding the validity of EU law. (One could also say that these are core elements of the constitutional identity of the EU itself.) The professional authority of the BVerfG is also of relevance here: already before, constitutional courts have taken note of and even referred to BVerfG jurisprudence on the relationship between EU law and national constitutions in the identity review context.[16] It is not hard to see why such judgments undermine the autonomy of the EU legal order. Secondly, in a practical and economic sense, the judgment could very well disrupt the PSSP programme – and what is more it comes at the time of a global Covid-19 pandemic to which the ECB has among other things responded with a rather similar initiative, the Pandemic Emergency Purchase Programme (PEPP).[17] Although her the BVerfG itself stated in its communiqué that the ruling did not pertain to the PEPP[18], it is difficult to imagine that the same challenge will not potentially be brought against that measure.[19]

There is nevertheless a possible escape route built into the bastion of constitutional identity in the BVerfG ruling: the German court has determined a provisional period of no more than three months, during which the European Central Bank could adopt 'a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the pro-

[10] Ibid. paras 153-163.
[11] *Nota bene*: the question of the compatibility of the measures with the prohibition of monetary financing as per Article 123 TFEU was also raised but the BVerfG found utlimately that „a manifest circumvention" of that provision could – „despite the concerns" – not be ascertained (para. 216).
[12] See e.g. T. Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach.* German Law Journal, Vol. 21, No 2, 2020, pp. 105-130.
[13] See Case 15/2014 DI, acting on behalf of Ajos A/S v Estate of A. Judgment of the Supreme Court, 6 December 2016 and Case C-441/14 Dansk Industri v Rasmussen [EU:C:2016:278]
[14] Case C-399/09 Landtová [EU:C:2011:415].
[15] As pointed out by D. Kyriazis, *The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango*, European Law Blog, 6 May 2020 (11 May 2020).
[16] As did for example the Hungarian Constitutional Court. For an analysis of the relevant judgment see Á. Mohay & N. Tóth, *Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law*, American Journal of International Law, Vol. 111, No. 2, 2017, pp. 468-475.
[17] Decision 2020/440/EU of the European Central Bank on a temporary pandemic emergency purchase programme (OJ 2020 L 91/1).
[18] https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html
[19] Kyriazis 2020.

gramme."[20] This is not uncontroversial either as thereby the BVerfG intends to lay down rules for a decidedly independent and decidedly EU-level institution, one which operates on the legal basis of EU law – which in turn can only be judicially reviewed by the CJEU. In this light, the suggestion that the German Government and the Bundestag are to influence the ECB (granted, only to conduct a thorough proportionality analysis) is also somewhat perplexing[21], even if the BVerfG reassures all that this does not conflict with said independence. [22]

Following the German decision, the CJEU issued a rather succinct press release recounting in no uncertain terms the binding nature of its preliminary rulings and the pivotal role that they play in the uniform interpretation and application of EU law, but – understandably – without any further comment or evaluation.[23]

It has been suggested that the constitutional identity clause in Art. 4(2) TEU may be utilized to re-conceptualise the relationship between EU law and domestic constitutional law, paving the way to a more nuanced interpretation of the relationship between EU law and national constitutional law, going beyond the absolute primacy doctrine applied by the CJEU.[24] Perhaps this BVerfG ruling – which will no doubt become one of the most analysed judgments in the field of European Union law – signals among other things a need for the CJEU to engage in a more elaborate interpretation of the identity clause and its effects and limits. Of course, that will only be of any use if the other actors in the judicial dialogue do not feel the need to necessarily take up a contrary position.

[Ágoston Mohay]

[20] 2 BvR 859/15, para. 235. The Bundesbank should further ensure that the bonds already purchased are sold in a method coordinated within the European System of Central Banks.
[21] Mayer 2020.
[22] 2 BvR 859/15, para. 232.
[23] https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (10 May 2020)
[24] A. von Bogdandy & S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, Common Market Law Review, Vol. 48, No. 5, 2011, pp. 1417-1454.