The EU Judiciary After Weiss

Proposing A New Mixed Chamber of the Court of Justice

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There is little point in rehearsing in length, yet again, the all too justified laments about the unfortunate decision of the German Federal Constitutional Court ('BVerfG') of 5 May 2020 in the case of *Weiss* on the European Central Bank's public asset purchase programme.

Given the trivial nature of the BVerfG's substantive 'beef' with the European Central Bank (ECB), the economic impact will be correspondingly trivial. A simple question by an MEP to the ECB which, it seems someone needs reminding, is only answerable to EU Institutions, will enable it to point to its publicly available records which will demonstrate, *Urbi et Orbi*, the breadth and depth of its deliberative process. And, ironically, in a spectacular twist of the Law of Unintended Consequences, many believe that the dramatic shift in Merkel's approach to the crisis, is due in no small part as a reaction to the *Weiss* decision.

But the profound damage to the integrity of the EU's legal order and its rule of law cannot be overstated. Yes, there can be, though hardly in this case, legitimate concerns about jurisdictional overreach of the EU. It is the ease with which the BVerfG brushed aside a decision of the Court of Justice and the grounds given for such, given the reputation (previously) enjoyed by the BVerfG, which will leave indelible traces with a potentially grave spill-over effect.

If every constitutional or high court of each of our Member States were to emulate the German example, it would really spell the end of the EU as an integrated legal space of justice and the rule of law and fatally damage the single market.

In the name of the rule of law, the rule of law was breached; in the name of proportionality, the German court trammeled all over the exigencies of proportionality in the delicate, dialogical, relationship between Member State courts and the Court of Justice; and complaining about the alleged 'incomprehensibility' of the Court of Justice's decision, the BVerfG issued a decision of which even Germany's most authoritative commenters regard the reasoning, though clear as a matter of language, incomprehensible in its legal logic.

The toothpaste cannot, alas, be pushed back into the tube. So the pressing questions now are two: How to address and mitigate the damage, and how to prevent its repetition.

Infringement proceedings are no panacea and come with certain risks – in this case it will be mostly of a symbolic nature. But symbols sometimes are powerful and necessary. A failure to start such a procedure against Germany will be widely seen as an instance of 'One Law for the Rich and Powerful' and 'One Law for the Meek'. We would advocate limiting such a procedure to that part of the German ruling which concerns the Court of Justice and declares the *Weiss* judgment ultra vires in Germany. This is the most damaging effect of the ruling which deserves an immediate reaction from the Commission, since it goes well beyond the intricacies of monetary policy and has systemic effects in the entire EU legal order. This would also allow the Commission to position the ruling in its proper context, pointing out and fighting the most damaging and threatening part of the judgment. An infringement in such terms would leave the underlying case of *Weiss* in a secondary place, focusing on the (lack of) dialogue of the BVerfG when dealing with a matter of EU constitutional relevance.

Prominent in the EU definition of the violation should be the failure of the German Court, faced with what it considered an incomprehensible decision, to make a second preliminary reference to the Court of Justice seeking clarification.

The Italian Constitutional Court, not long ago, in the *Taricco* saga gave an exemplary lesson to all its brethren in the EU of how that must be done. It faced a judgment of the Court of Justice which, in its eyes, if followed would compromise a fundamental human right guaranteed by the Italian Constitution. Let it also be said that the issue was far graver than the alleged lack of reasons in the ECB's Public Asset Purchase Programme.

The Italian Constitutional Court, setting aside superficial concerns of ego and prestige, and before resorting to the Nuclear Button of Defiance, referred a second preliminary reference to the Court of Justice, explaining its concerns and offering, in the most delicate and dignified manner, a ladder by which the Luxembourg court could climb down from the tree in which it had found itself. In this way it showed itself not only to be the guarantor of legality within the Italian legal order, but also a deep understanding of the indispensable dialogical imperative in the relationship between the highest courts of the European Union.

Just imagine how different things could have been if the BVerfG had adopted this, legally required, approach before resorting to defiance.

Be this as it may, there are also limits to this approach. The Italians did indeed speak softly, but they were at the same time carrying a big stick. Had the Court of Justice's ruling not given satisfaction and, instead, insisted on a European norm that would upend a fundamental right guaranteed by the Italian constitution, the threat of defiance was unmistakable.

Although dealt with in Panzer fashion, the problem the BVerfG faced was real and acute: What is a national constitutional court, which has ultimate responsibility for ensuring the rule of law, human rights, and the principles of democracy within its jurisdiction to do, when faced with a EU measure which in its view violates such? And what should that court do when a judgment of the Court of Justice, the guarantor of all those values within the sphere of competences of the EU, legitimates that EU measure in a manner which the national court regards as inadequate?

The matter is at its most acute when at issue is the line delimiting the respective competences of the EU and its Member States. After all, the EU derives its competences and powers by delegation from its Member States as enshrined in the Treaties, its *de facto* constitution. So even if procedurally the Court of Justice is the sole court empowered to pronounce as a matter of European Union law on such issues, is it not, at least partially, a matter of national law to define what could constitutionally be delegated?

The matter is further complicated by several additional considerations.

First, in its preliminary reference jurisdiction, the European Court of Justice, like several other international and national tribunals, is a court of first and last instance. There is no appeal to a higher court from its decisions. This is an uncomfortable legal situation. After all, *errare humanum est*. We live more comfortably with uncomfortable decisions if they are reviewed and affirmed by a higher court of appeal. In the ECHR system a decision of a Chamber can be appealed to the Grand Chamber with a different composition of judges. But we have already underlined the untenability of each and every national court acting as a Court of Appeal in matters concerning the delimitation of EU competences.

Second, despite its fundamental and indispensable contribution to European integration, the European Court of Justice has shown itself over the years to have one blind spot. It has not proved to be a strict guarantor in policing the limits to EU competences and jurisdiction. The very limited number of cases where it has flagged a breach of competence have been the exception that proves a very general rule of broad EU competence. This is probably due to a misconceived vision of federalism, in which the federal vision is (wrongly) associated with a centralist understanding of the EU. The case-law of the Court of Justice can be interpreted as setting a straightforward rule: in case of doubt, the competence is of the EU in order to ensure the *effet utile* of EU law, in the same way that in the logic of fundamental rights, in case of doubt, the judge must rule for the benefit of individual freedom. This is an ill-sighted approach that rightly raises the concerns of national courts, particularly of those with a more acute sense of the logic of federalism.

How, then, in the long run, is one to resolve the structural dilemma of a jurisdictional conflict of this nature? It seems a circle that cannot be squared. And yet with no solution the specter of *Weiss* will continue to hover and threaten the integrity of the EU.

It is for this reason that we propose that in the Conference on the Future of Europe serious consideration be given to the establishment of a new appeal jurisdiction within the Court of Justice, strictly and narrowly confined to *Weiss* type cases, where at issue is the delineation of the jurisdictional line between the Member States and their EU.

We believe that this appeal procedure should remain within the province of the Court of Justice and the obvious forum would be its Grand Chamber.

There can be many permutations to the specific configuration of this new jurisdiction, but underlying all such permutations will be one fundamental principle: It is to be composed by sitting Members of the Court of Justice alongside sitting Members of the constitutional or equivalent supreme courts of the Member States. It is this composition, above anything else, which will give its decisions an authority and legitimacy which, if enshrined in the Treaties, it will be a lot more difficult to contest. True, a determined national court could still stick its heels in, but if the new procedure is enshrined in a Treaty Revision which reaffirms the role of the Court of Justice in deciding such cases, the barrier to such action would be raised very considerably indeed.

In these limited cases, we propose that its composition should be six judges of the Court of Justice (though, obviously, not the judges whose decision is being appealed) and six judges from the Constitutional or Highest Courts of the Member States in a predetermined order reflecting the rich legal diversity of European legal systems. The Mixed Grand Chamber would be presided by the President of the Court of Justice (the thirteenth judge unless he or she participated in the decision under appeal in which case another judge of the Court of Justice, such as a president of a five-judge chamber would act as replacement). In this proposal the Mixed Grand Chamber would only rule on the distribution of competences between the EU and its Member States and it shall have jurisdiction to declare null and void an EU act – reversing a prior decision of the Court of Justice validating such – that entails a serious breach of the principle of conferral. The standard of review will be limited to cases of 'serious breach', in similar terms to the Court of Justice's jurisdiction in the review procedure, also in line with the standard articulated by the BVerfG itself in its prior jurisprudence (though sadly disregarded in the *Weiss* case itself).

It is our belief that in the current circumstances, the principle *In Dubio Mitius* should apply. A decision *validating* a contested EU measure should be supported by at least eight judges and perhaps even nine. It seems to us imprudent and counterproductive to validate an EU measure if all six national constitutional court judges in the Mixed Grand Chamber believe it to be ultra vires.

The Mixed Grand Chamber could be seised either by the Constitutional or Supreme Court of a Member State in a *Weiss*-like situation, as well as by a Member State government and/or national parliament within a year from the date of delivery of the Court of Justice's ruling on the validity of the challenged EU act.

Among the constitutional and supreme court judges, their participation would be made dependent upon a rotation system, but the President of the court or Member State which seised the Court of Justice should be part of the Member State component of the Mixed Grand Chamber.

The proceedings should allow the intervention of Member States and EU Institutions, certainly the Council of the European Union and the European Parliament to defend their proposal, but also of the ECB if the matter concerns any of the areas of EU policy in which it exercises competence.

The workings of this chamber should provide maximum transparency. The hearings should be streamed live and the written submissions of the interveners shall be made public. We believe, however, that the question of dissenting opinions is delicate. In principle, they should be possible. But the rules allowing for renewable mandates of the judges of the Court of Justice make it difficult to preserve their independence

if dissents are available. As long as the mandates of the members of the Court of Justice remain renewable, dissent should not be considered, but should however be introduced if the Member States ever decide to amend the current appointment system of judges and Advocates General of the Court of Justice.

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This is a preliminary Position Paper designed to provoke discussion. Many details would need to be worked out. We ask our readers to use their experience and wisdom not simply to pick holes and show why this may not work, but instead to make suggestions how it could be made to work, since the post-*Weiss* status quo is not viable in the long term. Paradoxically, the knowledge and security that the jurisdictional boundaries of the EU are policed rigorously will take the sting out of many Eurosceptic critiques and help rebuild trust in the European Union.

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