# Taking the Law Seriously?

## Observations on the PSPP Judgement and the Quest for Infringement Proceedings

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*Pour encourager les autres*: On 9 June 2021 the European Commission sent a letter of formal notice to Germany explaining that it, or rather the Bundesverfassungsgericht in its PSPP Judgment of May 5, 2020 was in breach of fundamental principles of EU law, "in particular the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the respect of the jurisdiction of the European Court of Justice under Article 267 TFEU".Seemingly, the Commission is falling over itself to treat all jurisdictions alike, the large as well as the small.[1] The inference to be drawn, it seems, is one that "little" Hungarian and Polish regimes would laugh off all infringement proceedings against them for their breaches of the rule of law, were "Big Germany" to be left in peace. Writing on a day like today (7th July), when the European Parliament has yet again despaired of the Commission's failure to take appropriate action against Hungary and Poland for numerous infringements of a European rule of law, one might wonder whether the Commission's attack on its "friends" in Germany is designed simply to detract attention away from its impotence in the face of growingly-explicit authoritarianism in the Orbán and Kaczyński orbits. But politics is politics, and we might dismiss the matter with a wry smile were it not for that fact that in attacking its friends – so very flawed as they might be – the Commission is also attacking honest efforts to solve the rule of law dilemmas posed by the original sin of the construction of Economic Union, as well as the well-meaning judicial search for solution to the impossible supremacy-sovereignty conundrum. The PSPP Judgment is far from perfect and has unleashed sometimes rough controversies, here on the *Verfassungsblog* and elsewhere[2]; however, the tacit approval given to the Commission by so many in their silence about the new proceedings can surely only act to shore up authoritarian egos, concomitantly foreclosing creative judicial responses to our on-going European dilemma of how to maintain and strengthen the rule of law in integration.

To date, arguments unleashed on both sides of the anti and pro PSPP-*Bundesverfassungsgericht*-position oscillate back and forth between the ringing of alarm bells about the potential of the Judgment to deepen disagreement about and to damage the reputation of the integration project[3], and more relaxed predictions that, with time, all will be well, and all manner of things will be well. And indeed, since everything has seemingly been said, albeit not by everybody, we would not in the normal course of things, or in the German idiom, worry our pretty heads over this "Hornberger Schießen"[4] had not the Commission intervened in such a cack-handed manner. In addition, Ulrich Haltern's reflections on the contradictions underlying the controversy[5] remind us of the enduring significance of the PSPP Judgment through his efforts both to address the flaws in the German Court's reasoning and also to continue to sketch out judicial-legal pathways through the morass of the supremacy-

[1] "No Member State is More Equal than Others" is the leitmotif of Judge Lenaerts' explanations of the primacy doctrine, posted on 8 October 2020 on *Verfassungsblog* and invoked thereafter in many further comments.

[2] See, e.g,, J Basedow et al., European integration: Quo vadis? A critical commentary on the PSPP judgment of the German Federal Constitutional Court of May 5, 2020, (2021) 19 I•CON (2021), 188.

[3] See, e.g., "Die Sebstbehauptung Europas! Das *Vertragsverletzungsverfahren* der Kommission darf nicht betrieben werden. Es legt die Axt an die Integration. Ein Aufruf von 29 Staatsrechtlehrern", 04.07.2021 – *Frankfurter Allgemeine Zeitung*. Einspruch, 4 July 2021; see, likewise, *Frankfurter Allgemeine Zeitung*, 5 July 2021, page 1.

sovereignty dilemma. He thus gives us courage to approach the core issue anew. Why is PSPP so important for maintenance of the European rule of law?

The "doctrinal" conflict between Europe's most powerful courts concerns the delimitation of national and European competences over fiscal and economic policies on the one hand, and monetary policy on the other – as well as the question of who has the authority to decide upon their reach. This dichotomy was engraved on EMU provisions as established by the Treaty of Maastricht in 1992. Monetary policy became an exclusive competence of the Union (Article 3(1)c TFEU). That conferral, however, did not include fiscal and economic policy. The signatories to that unfortunate split in competences were fully aware of their interdependence and the tensions inherent to their assignment to different "levels of governance". This constellation is an inherently precarious one. The long forgotten doctrine of "preemption"[6] provides, at best, inconclusive answers. The conflict is neither a "horizontal" one between actors on an equal footing nor a "vertical" one to which the supremacy doctrine would be a proper response. The conflict is instead "diagonal", extending over two levels of governance and two actors which must coordinate their powers across these levels. Such constellations are omnipresent within the Community System and more often than not resolved prudently by affected actors. The Member States nevertheless chose to leave these tensions in limbo within EMU's institutional design – and this for good reason: Not a single signatory was prepared to transfer their budgetary powers to the Union, sticking strongly by the old adage that the "power of the purse" is a core democratic power. They choose instead to shove their heads in the sand, or proceed with the culture of unlimited optimism that European politics has so often relied upon.[7] This optimism also seemed well founded – until in financial crisis, tensions surfaced. The constitutional weakness of the Maastricht Treaty was fully revealed – it lacked provision for legitimate conflict resolution. In other words, conflict exhausted the "muddling-through capacities" of European politics. Europe responded with its turn to a "new economic governance" culminating in Mario Draghi's Machiavellian courage in announcing that the ECB was prepared to do "whatever it takes to preserve the Euro", but of course, as always, "within its mandate".

But what exactly is the "mandate" of Europe's "overmighty citizen"?[8] To answer this question, we would need to substantiate the individual realms of fiscal and monetary policy; the exact same thing that the Maastricht Treaty failed to do. Maastricht was instead all about identification of the instruments of a monetary policy that is, in global as well as European discourse, now no longer what it appeared to be back in the mists of time, or in 1992. Monetary policy has been "modernized" within debate such that the whole distinction has become obsolete, the normative assignment of fiscal and economic powers to nation states notwithstanding. Whatever it takes indeed: we are left wondering what all these people are doing in the very corporeal Economic and Finance Ministries in Berlin in the absence of autonomous powers. Everything other than monetary policy? Everything under the term of monetary policy?

This, then, is the crux of the matter: Who is entitled to answer the question of what is and what is not monetary policy? "We are at the End of the Law", we read on *Verfassungsblog*. "It's the political economy . . .!", the same authors clarify in the *International Journal of Constitutional Law*.[9] Is it the discipline of economics that is keeper of the decisional gates? Do we now live under the "Rules of Economics" as Dani Rodrik has argued so persuasively?[10]

[4] Google it, dear reader.

[5] "Revolutions, real contradictions, and the method of resolving them: The relationship tween the Court of Justice of the European Union and the German Federal Constitutional Court", (2021) 19 I•CON, 208.

[6] For a reconstruction of this principal's legal history cf. A. Arena, "The Doctrine of Union Preemption in the EU Internal Market: Between Sein and Sollen", (2011) 17 *Columbia Journal of European Law* 477.

[7] See G. Majone, "The deeper euro-crisis or: The collapse of the EU political culture of total optimism, *EUI LAW Working Paper*, 2015/10.

[8] The term is P. Tucker's; see his *Unelected Power*. The Quest for Legitimacy in Central Banking and the Regulatory State, Princeton NJ: Princeton University Press, 2019, 525-545.

[9] (2021) 19 I•CON (2021), 309.

At this point, it seems apposite to recall a very famous judicial dissent: "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law".[11] The statement is as famous as it is difficult. To transpose it to our purposes: Should the law defend what economists often concede is a simple fiction? Are courts entitled to treat constitutional provisions, supposedly of fundamental importance to their authors, as blank sheets, or as *papier maché* masks to be moulded to new temporal and political contours as convenience may demand, and, if yes, what should be the basis for these decisions? Ashoka Mody, a Princeton economist and author of a widely appreciated monograph, as yet disregarded in Community law circles,[12] opines in a comment on the OMT controversy: "The legal and economic question of interest is whether the OMT tried to bypass the intent of the Treaty by creating a de-facto fiscal union (a liability or transfer union in Bundesbank terminology). If so, without their explicit authorization, countries had become fiscally responsible for the mistakes of other member countries".[13] Mody has a further query: "Can such a fiscal union be implicitly located in the ECB in the absence of a political willingness to achieve that elusive goal in a transparent manner?"[14] Is it sufficient to explain that monetary policy is "a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB"?[15]

As noted, Ulrich Haltern has characterized our "diagonal" conflict as a "real contradiction in European integration DNA", submitting in addition that this contradiction addressed by law or institution-building. But, he continues, and we agree, the preliminary ruling procedure under Art. 267 TFEU does provide a focal point around which the conflict can be focused, can move around and can – if we are lucky – resolve itself through judicial negotiation rather than by judicial fiat.[16] Our agreement with Haltern has a different source however: rather than dwell upon a cultural embeddedness ascribed to a national constitution that is distinct from the functional rationalism of the European jurisdiction, we are informed in our views by the interdependence of EU economies, by the duty of member states to recognize their neighbors', as well as to take account of the external effects of their policies. Viewed in this light, the Union surely possesses a legitimacy to mitigate and to settle these differences. Nevertheless, like Haltern we question the adequacy of the orthodox understandings of supremacy. Europe's supervisory and reconciliatory tasks are better served if the concerned actors cease to overburden law with tasks lying beyond its mandate and abilities. "Taking the law seriously" also entails and effort to protect Law's integrity by respecting its limits.[17]

[10] D. Rodrik, *Economics Rules*: The Rights and Wrongs of The Dismal Science, New York, W.W. Norton, 2015.
[11] Justice Holmes in Lochner v New York, 198 U.S. 45, 76 (1905).
[12] A. Mody, *EuroTragedy*. A Drama in Nine Acts, Oxford: Oxford University Press, 2019.
[13] A. Mody, "Did the German Court do Europe a Favor? ", *Bruegel Working Paper* 2014/09, 6.
[14] Ibid., at 4.
[15] Opinion of Advocate General Cruz Villalón in Case C-62/14*Gauweiler*, para 111.
[16] U. Haltern, n. 5, at 238.

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[17] See, exemplary, the Dissenting Opinion of Justice Lübbe-Wolff on the Order of the FCC's Second Senate of 14 January 2014.