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# Crisis, Opportunism, and Opportunity: How the Pandemic has Exacerbated Pre-existing Constitutional Tensions in the European Union

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## I. Introduction

The global Covid-19 pandemic arrived at a time of pre-existing and overlapping constitutional crises in the European Union, and exacerbated them. Two are the particular subjects of this contribution. First, several Member States had been sliding into authoritarianism long before the pandemic hit.<sup>1</sup> The rise of ‘post-fascism’<sup>2</sup> in Hungary in particular was already a matter of serious concern, as was the EU’s failure to respond to it. Covid-19 has made this crisis worse, as Hungary has responded with a law suspending its Constitution and allowing the government to rule by decree, while the EU has continued to merely wag its finger. This calls into question the Union’s commitment to its claimed foundational values, amongst which are democracy and the rule of law.<sup>3</sup>

Secondly, tensions between ‘northern’ and ‘southern’<sup>4</sup> Member States over fiscal discipline and economic solidarity have remained unresolved since the last Eurozone crisis. The EU’s response to the crisis beginning in 2008 revealed the deep conflicts between the debtor and creditor states of Europe, and raised complex legal and political questions as to how the Union could and should assist Member States in financial distress. These questions have now resurfaced in the context of Covid-19, with ill-tempered arguments between the so-called ‘frugal four’ (Austria, Denmark, the Netherlands, and Sweden) and hard-hit states such as Italy and Spain as to how the Union should respond to the pandemic in monetary, financial, and economic terms.

Just as the pandemic (or at least its first wave) looked to have peaked in Europe, the German *Bundesverfassungsgericht* (Federal Constitutional Court, BVerfG) delivered a significant judgment<sup>5</sup> that ties these two threads together. The BVerfG found in *Weiss* that the European Central Bank (ECB) had exceeded its authority by embarking, since 2015,

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<sup>1</sup> See, generally, Wojciech Sadurski, *Poland’s Constitutional Breakdown* (OUP 2019); András L Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy* (Routledge 2018); Nor is such backsliding confined to Central Europe, as demonstrated by the recent electoral success of the far-right in France and Italy.

<sup>2</sup> Gáspár Miklós Tamás, ‘On Post-Fascism’ (*Boston Review*, 1 June 2000) <<https://bostonreview.net/world/g-m-tamas-post-fascism>>. This is a term I altogether prefer to the more common, more reductive, and less helpful ‘populism’, and to the ‘illiberalism’ preferred by Viktor Orbán himself.

<sup>3</sup> Art 2 TEU.

<sup>4</sup> This is itself a problematic binary, with undercurrents of stereotyping and sectarianism. For an example of such bigotry, see the sentiments expressed by Jelte Wiersma, ‘Geen Stuiver Extra naar Zuid-Europa’ [‘Not Another Penny for Southern Europe’] *Elsevier Weekblad* (Amsterdam, 28 May 2020) <[www.elsevierweekblad.nl/economie/achtergrond/2020/05/geen-stuiver-extra-naar-zuid-europa-207225w/](http://www.elsevierweekblad.nl/economie/achtergrond/2020/05/geen-stuiver-extra-naar-zuid-europa-207225w/)>, and the accompanying illustration, which was also the front cover of that week’s edition.

<sup>5</sup> German Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, available in English at <[www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2020/05/rs20200505\\_2bvr085915en.pdf?\\_\\_blob=publicationFile&v=5](http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2020/05/rs20200505_2bvr085915en.pdf?__blob=publicationFile&v=5)>. In this paper, the judgment is referred to as *Weiss*, or *Weiss (BVerfG)* where necessary to distinguish it from the CJEU’s earlier ruling in the same proceedings, which will be referred to as *Weiss (CJEU)*.

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on a programme of purchasing Member State assets in an attempt to tackle low inflation rates; and that the Court of Justice of the European Union (CJEU) had not properly supervised the ECB's design and implementation of this programme. *Weiss* goes against the CJEU's conception of the doctrine of the primacy of EU law: that EU law trumps national law—including national constitutional law—in cases of conflict between them in the areas of the Union's competence; and that national courts cannot tell EU institutions what to do. The decision also complicates the EU's two ongoing constitutional and institutional crises, outlined above. First, critics allege—I think wrongly—that the judgment provides cover for democratic backsliding in Member States such as Hungary and Poland: if the BVerfG can challenge the primacy of EU law, then why can't the courts of other Member States do the same? Secondly, it calls into question the legal and political viability of attempts by the Union—and in particular by the ECB—to provide assistance to states badly economically hit by the pandemic. In this way, Covid-19 has provided yet more evidence of the unsuitability and unsustainability of the current legal, institutional, and constitutional architecture of the Eurozone.

This contribution therefore seeks to place the Covid-19 crisis in the context of a Union well-used to crisis, and already dealing with at least two when the pandemic hit. Will the Union muddle through as it has historically done, or do the structural tensions at work mean that a more radical rethink is needed? It begins by outlining the Hungarian government's response to the crisis: an 'Enabling Act', allowing for rule by decree. This approach, and in particular the cowardly European response, is here portrayed as a significant threat to democracy and the rule of law throughout the Union. Next, it deals with the effect of the BVerfG's judgment holding the Public Sector Purchase Programme (PSPP) of the ECB ultra vires.<sup>6</sup> The judgment would have been a bombshell at the best of times, but its arrival during the pandemic threw things into even sharper relief: if the PSPP was ultra vires, there is no way that the ECB's new Pandemic Emergency Purchase Programme (PEPP) is within the Union's powers, and this raises serious questions about the ability of the Union and its Member States to mitigate the economic chaos wrought by the pandemic. The judgment is in many respects theoretically coherent and compelling (which is why those who accuse the BVerfG of giving succour to autocrats are mistaken), but its worrying political background raises serious questions about the ability of the Union to provide and co-ordinate the kind of action needed to stave off or alleviate post-Covid economic crisis. Finally, a way forward is sketched, involving the Union finally having the honesty properly to grapple with the inherent structural flaws of the Union in general, and the Eurozone in particular. In short, the Treaties<sup>7</sup> must be amended, and it should not have taken a deadly pandemic to prove it.

## II. On the Hungarian Enabling Act and the Democratic Crisis in the Union

The Hungarian Fundamental Law of 2011<sup>8</sup> regularly contemplates its own negation: Articles 48–54 establish a total of six 'special legal orders' through which 'normal' constitutional rules can be set aside. These are the 'state of national crisis', the 'state of

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<sup>6</sup> Or, more accurately but less directly, holding *the CJEU's decision to classify the PSPP as lawful* ultra vires.

<sup>7</sup> Two treaties form the legal and constitutional basis of the EU: the Treaty on European Union (TEU, originally the Treaty of Maastricht) and the Treaty on the Functioning of the European Union (TFEU, originally the Treaty of Rome).

<sup>8</sup> A document of highly questionable democratic credentials: see Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press 2012).

emergency', the 'state of preventative defence', the 'terror-threat situation', 'unexpected attacks', and the 'state of danger'. It is through this last provision, defined as 'a natural disaster or industrial accident endangering life and property' that Viktor Orbán's Fidesz<sup>9</sup> party initially channelled its legal response to the Covid-19 pandemic. However, chafing under Article 53 (3)'s imposition of a 15-day limit on decrees under the 'state of danger', at the end of March Orbán used his two-thirds parliamentary majority to pass what we can rightly call an Enabling Act,<sup>10</sup> allowing him to rule by decree for an indefinite period. Others have written cogently of the Act as a 'constitutional moment';<sup>11</sup> of how it fits perfectly with Orbán's long-established patterns of behaviour;<sup>12</sup> and of the dim prospects of EU law being any use against it, at least in the short- to medium-term.<sup>13</sup> What is important for present purposes is to contrast the brilliant opportunism of Orbán's move with the lumpen foolishness of the European response.

On 31 March, Commission President Ursula von der Leyen tweeted that:

[i]t's of outmost importance that emergency measures are not at the expense of our fundamental principles and values. Democracy cannot work without free and independent media. Respect of freedom of expression and legal certainty are essential in these uncertain times.<sup>14</sup>

She added that the Commission:

will closely monitor, in a spirit of cooperation, the application of emergency measures in all Member States. We all need to work together to master this crisis. On this path, we'll uphold our European values & human rights. This is who we are & what we stand for.<sup>15</sup>

Such dishwater platitudes are to be expected from a President who owes her position to the votes of MEPs from Fidesz and from Poland's ideologically-related ruling PiS<sup>16</sup> party, and who thought it a clever idea to try to appoint a Commissioner for 'Protecting Our European Way of Life',<sup>17</sup> a post later made no less nonsensical and insulting by being changed to one of 'promoting' this alleged 'way of life'.

Only very slightly less disappointing was the following day's joint statement from 17 Member States expressing 'deep concern' about 'the risk of violations of the principles of

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<sup>9</sup> *Fiatat Demokraták Szövetsége*, 'Alliance of Young Democrats'. Founded as a liberal student activist movement in the late 1980s, the party has shifted dramatically to the right.

<sup>10</sup> Krista Kovács, 'Hungary's Orbánistan: A Complete Arsenal of Emergency Powers', *Verfassungsblog*, 6 April 2020, <<https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>>.

<sup>11</sup> Renáta Uitz, 'Pandemic as Constitutional Moment', *Verfassungsblog*, 24 March 2020, <<https://verfassungsblog.de/pandemic-as-constitutional-moment/>>.

<sup>12</sup> Kim Lane Scheppele, 'Orbán's Emergency', *Verfassungsblog*, 29 March 2020, <<https://verfassungsblog.de/orbans-emergency/>>.

<sup>13</sup> Niels Kirst, 'How a Public Health Crisis Became an Aggravation of the Rule of Law Crisis in the European Union', *DCU Brexit Institute Blog*, 2 April 2020, <<http://dcubrexitinstitute.eu/2020/04/how-a-public-health-crisis-became-an-aggravation-of-the-rule-of-law-crisis-in-the-european-union/>>.

<sup>14</sup> Ursula von der Leyen, Twitter, 31 March 2020, <<https://twitter.com/vonderleyen/status/1244960501085491202?s=20>>.

<sup>15</sup> Ursula von der Leyen, Twitter, 31 March 2020, <<https://twitter.com/vonderleyen/status/1244960502385688576?s=20>>.

<sup>16</sup> *Prawo i Sprawiedliwość*, 'Law and Justice'.

<sup>17</sup> Tom Flynn, 'Undermining Our European Way of Life: The von der Leyen Commission Takes the Low Road', *DCU Brexit Institute Blog*, 19 September 2019, <<http://dcubrexitinstitute.eu/2019/09/undermining-our-european-way-of-life-the-von-der-leyen-commission-takes-the-low-road/>>.

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rule of law, democracy and fundamental rights arising from the adoption of certain emergency measures'.<sup>18</sup>

A striking aspect of both these responses was their unwillingness—their seeming inability—to *name* Hungary, and to specifically state that Orbán's power grab would be resisted and challenged. The consequences of this diplomatic squeamishness soon became clear: just a day later, on 2 April, in an act of the purest, most distilled chutzpah, the Hungarian government had the gall to *join* in adopting the statement issued by the 'deeply concerned' 17 Member States.<sup>19</sup> Whatever his other flaws, we can credit Viktor Orbán with being a master of comic timing.

Subsequently, the decrees came in thick and fast.<sup>20</sup> The plan to build a 'museum quarter' in Budapest's City Park, held up by the unexpected victory of the opposition in last year's mayoral elections, will go ahead. A person's legal sex will now be fixed at birth, and cannot be legally altered. Municipal theatres—rare islands of intellectual independence and the possibility of artistic and political dissent—will be brought under central government control. Quite what these measures have to do with stopping the spread of the coronavirus and managing the crisis is not clear. What *is* clear is the Enabling Act is mere opportunism, seizing on a deadly threat to permit the government to go about its agenda with the very minimum of political, legal, and press scrutiny.

The idea of 'naming and shaming' as an enforcement method only works if you *actually name* offenders, and if the offenders are *actually capable of feeling shame*. The refusal of the Commission and the Member States to name Hungary and to specifically condemn Orbán's behaviour illustrates the extent to which senior figures in Europe are beholden to a kind of comity of idiots, where each is afraid of being undiplomatic to the other, just in case the other might one day be undiplomatic to them.

This apparent reluctance of European heads of state and government to 'interfere' in one another's 'domestic' affairs is a relic of a bygone age, a time when we really could draw such bright lines between the 'national' and the 'European'.<sup>21</sup> The Enabling Act adopted in response to the Covid-19 crisis does not just endanger Hungary and Hungarians, but Europe and Europeans: the rot can spread from the Member States to the Union, from the Union to the Member States, and from one Member State to another. Orbán's pollution of the Hungarian body politic; PiS's degradation of Poland; and the murders of Daphne

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<sup>18</sup> Government of the Netherlands 'Statement by Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden', 1 April 2020, <<https://www.government.nl/documents/diplomatic-statements/2020/04/01/statement-by-belgium-denmark-finland-france-germany-greece-ireland-italy-luxembourg-the-netherlands-portugal-spain-sweden>>.

<sup>19</sup> Government of Hungary, 'Statement by Hungary', 2 April 2020), <<https://www.kormany.hu/en/ministry-of-justice/news/statement-of-hungary-02042020>>.

<sup>20</sup> 'Decrees That Have Nothing to Do with the Coronavirus Pandemic', *Hungarian Spectrum*, 1 April 2020, <<https://hungarianspectrum.org/2020/04/01/decrees-that-have-nothing-to-do-with-the-coronavirus-pandemic/>>.

<sup>21</sup> Tom Flynn, 'Triangular Constitutionalism: Some Consequences of Constitutional Pluralism for Domestic Constitutional Thought' in Gareth Davies and Matej Avbelj (eds), *Handbook on Legal Pluralism in the EU* (Edward Elgar 2018).

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Caruana Galizia in Malta<sup>22</sup> and Ján Kuciak in Slovakia<sup>23</sup> are not directly related, but taken together they are all indicative of a Union sliding ever further into the mire, where the *appearance* of unity is more important than any actual substantive commonality of democratic standards, or those beloved ‘values’ of which we hear so much.

There has recently been at least some movement in terms of legal sanction for Orbán and those like him. In March, Advocate-General Kokott advised<sup>24</sup> the CJEU to find Orbán’s ‘lex CEU’, by which the Central European University was hounded out of Budapest, in breach of EU and WTO law. In April, the CJEU held that Poland, Hungary, and Czechia had failed in their obligations under Union law to join in the EU’s relocation programme for the distribution of asylum-seekers across the Union.<sup>25</sup> But these victories are partial, reactive, and belated, and have met with scorn from Fidesz.<sup>26</sup> Union law in general, and the EU Treaties in particular, are simply not geared towards the rectification of the kind of authoritarian opportunism of which Orbán is the standard-bearer.

In the present state of Union law, the solution must be, and can only be, political. The Hungarian Enabling Act exposes the idea that European conservatives can curb the excesses of their most obviously authoritarian bedfellows as the delusion it has always been. Nor are the EPP alone in sheltering undesirables: the Social Democrats and the Liberals are both happy to rely on the votes of members with questionable records and intentions.<sup>27</sup> Remediating the authoritarian drift in the Union requires concerted political action, both within and between Member States.

The Hungarian reaction to the Covid-19 crisis—and the European response—exposes the EU’s historical baggage about what it is, what it does, and what it is meant to be. From bailouts to borders to non-interference in ‘domestic’ politics, we must stop pretending that the EU can exist as a kind of rarefied space of apolitical technocracy. In this sense, we can learn a valuable lesson from Orbán: opportunities ought not be wasted.

It is to another instance of Covid-19 revealing politicians hiding behind technocracy, rather than engaging in difficult negotiations and attempting to gain electoral approval for the results, that we now turn.

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<sup>22</sup> Jean Claude Cachia and André P DeBattista, ‘The Malaise of Malta: Social Divisions, Weak Institutions, and Political Partisanship’, Political Studies Association 68th Annual International Conference, Cardiff, March 2018, available at <[www.psa.ac.uk/sites/default/files/conference/papers/2018/20180328%20-%20Conference%20Paper.pdf](http://www.psa.ac.uk/sites/default/files/conference/papers/2018/20180328%20-%20Conference%20Paper.pdf)>.

<sup>23</sup> Zora Bútorová and Martin Bútorá, ‘The Pendulum Swing of Slovakia’s Democracy’ (2019) 86 Social Research 83.

<sup>24</sup> Case C–66/18 *Commission v Hungary* (AG’s Opinion) ECLI:EU:C:2020:172.

<sup>25</sup> Joined Cases C–715/17, C–718/17 and C–719/17 *Commission v Poland and Others* ECLI:EU:C:2020:257.

<sup>26</sup> See the comment of Orbán’s Justice Minister, Judit Varga: ‘#EU compulsory relocation system of migrants is dead and today’s #CJEU judgement won’t change that. It must be lonesome in the saddle since the horse died,’ Twitter, 2 April 2020, <[https://twitter.com/JuditVarga\\_EU/status/1245653581262286848?s=20](https://twitter.com/JuditVarga_EU/status/1245653581262286848?s=20)>.

<sup>27</sup> Jean Morijn and Israel Butler, ‘EPP More Likely to Expel Fidesz if Rival Groups Also Ditch Troublemakers’, *Euractiv*, 12 March 2019, <<https://www.euractiv.com/section/future-eu/opinion/epp-more-likely-to-expel-fidesz-if-rival-groups-also-ditch-troublemakers/>>.

### III. PEPP talk: the BVerfG's judgment in *Weiss*

In March 2015, the ECB launched the Public Sector Asset Purchase Programme (PSPP),<sup>28</sup> under which it would purchase government and other public bonds of Eurozone Member States under certain circumstances and subject to certain conditions, in an attempt to get inflation rates—then very low—back to the ECB's target of being below, but close to, 2%. Five years later, on 18 March 2020, the ECB announced a Pandemic Emergency Purchase Programme (PEPP), whereby €750bn would be spent on purchasing public sector securities to shore up European economies during the Covid-19 pandemic.<sup>29</sup> The ECB was clear that the PEPP's architecture is based on that of the PSPP, but with fewer restrictions and conditions in order to enhance its effectiveness. The ECB must have been confident that it had the legal power to launch the PEPP: after all, the CJEU had held in 2018 that the PSPP complied with EU law, and was within the powers of the ECB.<sup>30</sup> However, just a few weeks after the launch of the PEPP, the BVerfG handed down its judgment in *Weiss*, responding to the CJEU's greenlighting of the earlier PSPP. The German court's judgment would have triggered a constitutional crisis—or something close to one—at the best of times. However, coming as it did while the pandemic raged across Europe, it raised serious questions not only about the ability of the EU to respond to the pandemic in monetary, financial, and economic terms, but about the very makeup and architecture of the Union in general and the Eurozone in particular: questions of long standing, surely, but ones thrown into new relief by the urgency and seriousness of the pandemic.

The question of the legality of the PSPP arose in 2017, when the programme was subject to a constitutional challenge in Germany. The applicants argued that the PSPP contravenes the Treaties' prohibition of lending to or otherwise financing the Member States,<sup>31</sup> and the principle of conferral<sup>32</sup> (under which the Union is not a body of unlimited competence, but has only the competences specifically bestowed upon it by the Member States in the Treaties). As such, the German state and its institutions would be prohibited from taking part in the PSPP, it being an illegal exercise of power by the Union. Under EU law, if any national court from which there is no appeal finds that the legality of an action of a Union institution is called into question in a case before it, the national court must refer the question to the CJEU for decision. Only the CJEU is competent, under the Treaties, to determine whether a Union institution has acted illegally.<sup>33</sup> This being such a case, the BVerfG referred the issue to the CJEU.

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<sup>28</sup> Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), as amended by Decision (EU) 2015/2101 of 5 November 2015 (ECB/2015/33), Decision (EU) 2015/2464 of 16 December 2015 (ECB/2015/48), Decision (EU) 2016/702 of 18 April 2016 (ECB/2016/8), Decision (EU) 2016/1041 of 22 June 2016 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic and repealing Decision (EU) 2015/300 (ECB/2016/18), and Decision (EU) 2017/ 100 of 11 January 2017 (ECB/2017/1).

<sup>29</sup> European Central Bank, 'ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)', 18 March 2020,

<[https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318\\_1~3949d6f266.en.html](https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html)>.

<sup>30</sup> Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:815 (hereinafter *Weiss (CJEU)*).

<sup>31</sup> Art 123 (1) TEU.

<sup>32</sup> Art 5 (1) TEU, read in conjunction with Arts 119 and 127–133 TFEU.

<sup>33</sup> Art 267 TFEU, known as the preliminary ruling procedure.

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In December 2018, the CJEU delivered its judgment,<sup>34</sup> holding that the PSPP is within the competences of the Union. This was perhaps to be expected: the CJEU is famous for the expansive approach it takes to determining Union competence. The Court held that the PSPP does not involve the ECB straying from the realm of monetary policy (which is an exclusive Union competence for those Member States in the Eurozone<sup>35</sup>) to that of economic policy (which is an area primarily for the Member States, in which the ECB has only a supporting role<sup>36</sup>). The CJEU held that in dividing competences between the Union and the Member States in this way, ‘the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies.’<sup>37</sup> Here is the root of the problem: though the separation may not be *absolute*, it is clear: monetary policy is for the Union, economic policy is mainly for the Member States. However, such a division is plainly impossible, monetary and economic policy being so utterly intertwined and inextricable.<sup>38</sup> The presence of such an unworkable distinction at the very heart of the Eurozone’s legal constitution is the result of political cowardice by those who wanted a shared currency but not a shared budget and shared liabilities—the very definition of having one’s cake and eating it.

Nevertheless, on the CJEU’s conception of the principle of the primacy of Union law, its judgment ought to have been the end of the matter: the BVerfG, as a court of a Member State and thus as a court of the Union, would have to accept this decision loyally, and dismiss the complaints in the domestic proceedings.

However, the CJEU’s conception of the primacy of EU law is not shared by the Constitutional and Supreme courts of numerous Member States, including Germany. In a long line of case law, the BVerfG has held that as the Union is a body of limited competences, and as the CJEU is a Union institution, both the Union as a whole and the CJEU in particular lack *Kompetenz-Kompetenz*: the ability to determine the limits of their own powers.<sup>39</sup> It cannot be left to the Union and its institutions to mark their own homework, and there remains a role, even if only a residual one, for the Member States and their courts to determine in a given case whether the Union has overstepped the bounds of the authority granted it in the Treaties.

It was mere coincidence that the BVerfG’s reaction to the CJEU’s judgment in *Weiss* came as the pandemic was at its peak in Europe, but the coincidence is a revealing one, and illustrates the precarity of the constitutional and institutional architecture of the Eurozone. The single currency may well be able to plod along when times are good, but as soon as things go bad (as they have now done twice, and very suddenly, first with the onset of the Eurozone crisis and then with the pandemic), the inability of the Union to react to events with the necessary speed and firepower is revealed.

For the BVerfG, the ECB had acted *ultra vires* by embarking on the PSPP without having conducted a proportionality review, in order to determine whether the programme was

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<sup>34</sup> *Weiss (CJEU)* (n 30).

<sup>35</sup> Art 3 (1) (c) TEU.

<sup>36</sup> Art 127 (1) TFEU.

<sup>37</sup> *Weiss (CJEU)* (n 30) [60].

<sup>38</sup> Benjamin Braun, Daniela Gabor, and Benjamin Lemoine, ‘Enlarging the ECB Mandate for the Common Good and the Planet’, *Social Europe*, 8 June 2020, <<https://www.socialeurope.eu/enlarging-the-ecb-mandate-for-the-common-good-and-the-planet>>.

<sup>39</sup> See Tom Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU, and the ECHR* (Hart 2019) 2–4.

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suitable, necessary, and appropriate for achieving aims that are within the ECB's competence, and whether a different programme, with fewer effects on economic and fiscal policy, could achieve the same monetary aims.<sup>40</sup> More than this, the failure (as the BVerfG sees it) of the CJEU properly to conduct such a proportionality review in the exercise of its judicial review functions rendered the CJEU's purported review 'meaningless',<sup>41</sup> and its judgment '[in]comprehensible'.<sup>42</sup> Accordingly, on the BVerfG's conception of the relationship between EU law and German law (which, let us remember, does not mirror that of the CJEU), the CJEU's judgment has no binding force in Germany. Therefore, the BVerfG, in the absence of effective judicial control of a Union institution by the CJEU, declared the PSPP *ultra vires*. The *Bundesbank* was ordered not to take part in the programme, though the BVerfG stayed this last order for three months, in order to give the ECB time to conduct the proportionality review it had failed to engage in. It is possible that, if it (or, more likely, the Bundesbank on its behalf) does so to the satisfaction of the BVerfG, the German court will revisit its verdict.

This was a momentous decision. In term of its theoretical fundamentals, though not the specific methods employed, I agree with it entirely: the kind of unqualified 'supremacy' (rather than the more circumspect 'primacy')<sup>43</sup> of EU law, and of the CJEU as its interpreter, for which some scholars advocate<sup>44</sup> has no basis in the Treaties or in constitutional theory, and fails to respect both the specific nature of the Union as a *sui generis* non-state legal order and the constitutions of the Member States. The more contingent, relational conception of the school of thought known as constitutional pluralism, where the Member States and the Union inhabit a legal heterarchy rather than a hierarchy,<sup>45</sup> is both more descriptively accurate and more normatively desirable.

However, though grounded in the best interpretation of the relationship between EU law and that of the Member States, the judgment should still give us pause in other respects: the case was brought by an array of academics, industrialists, and politicians with close links to right-wing political parties: not merely Angela Merkel's CDU and its Bavarian sister party, the CSU, but also the crypto-(and sometimes not very crypto-)fascist *Alternative für Deutschland*. Undergirding the applicants' case is a deeply unsavoury logic whereby the Union in general, and the Euro in particular, are a kind of German charity project, whereby Germany (and other 'frugal', 'thrifty', 'industrious', generally 'northern' states) graciously lets less 'responsible' ('lazy', 'dishonest', 'southern') Member States come along for the ride. Widespread across the German right, this worldview bears no relation to economic or social reality, and fails to acknowledge that the current setup of the Eurozone and the internal market is one from which Germany profits nicely.

Of course, politically distasteful applicants can still have a good legal case, as was the case here. The trouble is that in several passages, the BVerfG repeats ordoliberal

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<sup>40</sup> Though note that here the BVerfG is engaging in the same pretence as the CJEU and the Eurozone's architects: that such aims are in fact severable.

<sup>41</sup> *Weiss (BVerfG)* (n 5) [127].

<sup>42</sup> *Ibid* [133].

<sup>43</sup> 'Supremacy' implies and requires an *erga omnes* hierarchy between norms or institutions within a single, integrated system or order. 'Primacy' is concerned with the *in casu* preference given to one norm or institution over another in the context of interacting but distinct systems or orders: see Matej Avbelj, 'Supremacy or Primacy of EU Law—(Why) Does it Matter?' (2011) 17 *European Law Journal* 744.

<sup>44</sup> See R Daniel Kelemen, 'The Dangers of Constitutional Pluralism' in Gareth Davies & Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Elgar 2018) 403.

<sup>45</sup> See generally Flynn (n 39) and references therein.

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bromides about the risk of the PSPP reducing the incentive for ‘certain’ (ha!) Member States<sup>46</sup> to pursue ‘sound’ budgetary policies,<sup>47</sup> as if the question of budgetary ‘soundness’ were an objective standard capable of guiding legal action, rather than an entirely contingent concept, which varies according to the particular politics and economic approach of the person doing the sums.

The BVerfG’s judgment concerns matters that long predate the pandemic, and would have ruffled feathers in any circumstances. However, its publication during the pandemic has had two consequences.

First, it has consequences to the rule of law crisis discussed in the previous section of this chapter: it has been used by those who criticise constitutional pluralism—and argue for the untrammelled hierarchical superiority of EU law—as further evidence that whatever its theoretical rigour, and regardless of the good intentions behind those who developed it, constitutional pluralism is now a useful tool of autocrats, whereby they can justify their deviation from European norms of democracy, rights, and the rule of law.<sup>48</sup> After all, if the BVerfG (or the Italian *Corte Costituzionale*<sup>49</sup> or the Danish *Højesteret*<sup>50</sup>) can contradict the CJEU, then any national court can, and there is nothing to stop Hungary or Poland from simply declaring ultra vires any CJEU judgment with which they disagree. The problem with this objection is that it regards all national courts—and all questioning of CJEU orthodoxy—as being essentially the same. Neither is the case. The German, Italian, and Danish courts, whatever one may think of their decisions, are legitimate, independent judicial bodies operating in functioning *Rechtsstaaten*. The same is absolutely not true of, say, the Hungarian *Kúria* or the post-‘reform’ courts of Poland. The opportunistic misuse of legitimate jurisprudence by government hirelings acting as judges in courts ‘captured’ by the executive does not discredit that jurisprudence. Besides, one may agree or disagree with the reasoning of the German, Italian, or Danish courts, but the reasoning is at least defensible: this is in contrast to some of the CJEU verdicts which have triggered Member State rejection, and similarly in contrast to the abusive jurisprudence and threadbare reasoning of, for example, the *Kúria*.<sup>51</sup>

Secondly, the BVerfG judgment raises significant questions about the viability of the PEPP, a key element of the EU’s economic and financial (not monetary: let us be honest) response to the pandemic. It is true that a programme such as the PEPP may satisfy the CJEU,<sup>52</sup> but it is also true that it does not take much to satisfy the CJEU where the question of the Union acting within its competences is concerned. The PEPP being subject to even fewer and looser safeguards, conditions, and restrictions than the PSPP, it cannot satisfy

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<sup>46</sup> *Weiss (BVerfG)* (n 5) [137].

<sup>47</sup> *Ibid* [171].

<sup>48</sup> See R Daniel Kelemen, Piet Eeckhout, Federico Fabbrini, Laurent Pech, Renáta Uitz, ‘National Courts Cannot Override CJEU Judgments’, *Verfassungsblog*, 26 May 2020, <[verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/](http://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/)>.

<sup>49</sup> Judgment 115/2018 (*Taricco II*) (available in English at [https://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S\\_2018\\_115\\_EN.pdf](https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf)).

<sup>50</sup> Case 15/2014 of 6 Dec 2016, *Dansk Industri (Ajos)*, available in English at <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>.

<sup>51</sup> Hungarian Constitutional Court Decision 22/2016, available in English at <[https://hunconcourt.hu/uploads/sites/3/2017/11/en\\_22\\_2016.pdf](https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf)>.

<sup>52</sup> Sebastian Grund, ‘The Legality of the ECB’s Pandemic Emergency Purchase Programme’, Delors Institute Policy Brief (draft), March 2020, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3558677](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3558677)>.

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the BVerfG in the light of its decision regarding the PSPP. This does not mean that the PEPP, or something like it, is impossible, but it does mean that the ECB will need to take a rather different approach if it is to satisfy the BVerfG that it is acting within the terms of its mandate and not infringing on areas rightly or wrongly (I think wrongly) hived off from Union competence. One might say that as a Union institution, subject only to the CJEU, the ECB should simply not concern itself with what the BVerfG has to say, and on the CJEU's reading of Union law and its relationship with national constitutional law, one would be right. However, the reality of European integration is more complex, and, one way or another, the contradiction will have to be resolved.

#### IV. The Way Forward

The Covid-19 crisis, aside from its own terrible toll, has exposed pre-existing tensions in the EU like never before.

It has given the EU's most authoritarian national government the perfect opportunity to pursue its agenda with the barest minimum of scrutiny, and the response from the Union and the other Member States is exactly the kind of dispiriting shrug to which we have become accustomed.

It coincided with a German court judgment of Union-wide importance, which brings to the very fore political, legal, and economic tensions within the Union—a judgment which came at perhaps the most inopportune time possible, just as the ECB was embarking on another round of asset purchases in an attempt to assist the Member States, particularly those doubly affected both by the Eurozone crisis and by the pandemic.

The solution, in both instances, should not—perhaps cannot—be legal (or, rather, judicial). It must be political.

As regards the rule of law crisis, the non-authoritarian Member States must finally live up to their responsibilities, and stop pretending that the abuse of democracy and constitutionalism in Hungary, Poland, and elsewhere is a merely 'national' problem. This may include Art 7 TEU's procedure in defence of the rule of law being deployed to its full extent, but cannot be limited to this alone: heavy political pressure must be brought to bear.

As regards the ECB's actions, those of us who are not beholden to 1950s ordoliberal fantasy visions of political economy must recognise two contradictory truths. It is true that the PEPP, like the PSPP before it, is an important and necessary step (but only a step) in correcting the foundational and fundamental flaw in the Eurozone: that is a monetary union, but not a fiscal one. It is also true that the PEPP is arguably illegal under the Treaties as they currently stand. On this question, the CJEU is simply wrong, and the BVerfG is right, no matter how much we may disagree with those who took the case, or with the German court's underlying political-economic assumptions. The only way to deal with this contradiction and reconcile these two truths with legal integrity and intellectual honesty is by Treaty amendment. This does not have to mean full-scale economic or fiscal integration. But it does mean some undoing of the unworkably bright line drawn between monetary policy on the one hand and fiscal and economic policy on the other. The Franco-German

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proposal for a €500bn ‘recovery fund’ as part of the current EU budget negotiations<sup>53</sup>—announced not long after the BVerfG judgment, but not in response to it—is a very small step in the right direction, but further demonstrates the limits of what can be achieved within the framework of the Treaties as they currently stand.

Both of these solutions require the Member States to stop covering behind the CJEU (in the context of democratic values and the rule of law) and the ECB (in the monetary and fiscal context), and to live up to their responsibilities as ‘Masters of the Treaties’. With 27 Member States, each with their own treaty ratification procedures and particular national sensitivities, no doubt this will be difficult. That is not an excuse not to try: Covid-19 has shown us that crises will not wait for us to get our act together.

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<sup>53</sup> ‘Initiative franco-allemande pour le relance européenne face à la crise du coronavirus’, French Presidency, 18 May 2020, <<https://www.elysee.fr/emmanuel-macron/2020/05/18/initiative-franco-allemande-pour-la-relance-europeenne-face-a-la-crise-du-coronavirus>>; ‘Deutsch-französische Initiative zur wirtschaftlichen Erholung Europas nach der Coronakrise’, German Federal Government, 18 May 2020, <<https://www.bundesregierung.de/breg-de/aktuelles/deutsch-franzoesische-initiative-zur-wirtschaftlichen-erholung-europas-nach-der-coronakrise-1753760>>.