A Game of Thrones: The Battle for the Supremacy of EU Law Following *Weiss II*

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Abstract

This paper examines the *Weiss II* judgment delivered by the Federal Constitutional Court in Germany. The Weiss saga began with a legal challenge to the European Central Bank's Public Sector Purchasing Programme on the grounds that its economic effects were outside the scope of the bank's mandate. Following this, the German Federal Constitutional Court ruled, for the first time in its history, that the preliminary ruling of the Court of Justice of the European Union in *Weiss I* was ultra vires. This article analyses the judgment's implications in relation to European Union supremacy and considers whether it forms part of a wider trend, drawing upon cases in the Czech Republic and Denmark. It also examines the effect this judgment may have if Member States in the future are in dispute with the European Union. The paper concludes with the view that given the current socio–political climate, particularly in Member States such as Poland and Hungary, this judgment may have set a dangerous precedent.

1 Introduction

On 5 May 2020, the Second Senate of the German Federal Constitutional Court (FCC) delivered its judgment (*Weiss II*) in response to the preliminary ruling of the Court of Justice of the European Union (CJEU) in the *Weiss and others* case (*Weiss I*).[1] The case concerned the mandate of the European Central Bank (ECB), which, according to the initial judgment delivered by the CJEU, was managed proportionately. Despite this assessment, the FCC declared, for the first time in its history, that the preliminary ruling in *Weiss I* was ultra vires (beyond the CJEU's powers).

This paper will first provide a background to the *Weiss* saga. Following this, it will analyse the implications of the judgment for the supremacy of European Union (EU) law and will consider the extent to which this judgment is part of a wider trend. Lastly, it will conclude with some observations regarding the potential future impact this judgment may have, particularly in reference to EU Member States such as Poland and Hungary. The overall argument presented is that, given the current socio-political climate, especially in these Member States, this judgment may have set a dangerous precedent and, unless the EU take decisive, lawful action, they may not be well placed to respond to these challenges.

2 How Did We Get Here?

Controlling inflation is essential in every economy and, by keeping prices stable, central banks – the institutions managing the monetary system of a state or union of states – are able to ensure that jobs are safe and economies grow.[2] Independent central banks, such as the ECB, are

[1] BVerfG, *Judgment of the Second Senate of 05 May 2020* — 2 BvR 859/15 (*Weiss II*); Case C–439/17 *Weiss and others v Bundesregierung* [2018] EU:C 114 (GC, 11 December 2018) (*Weiss I*).

[2] European Central Bank, 'Why Are Stable Prices Important?' (European Central

able to stabilise inflation efficiently as they are politically insulated.[3] In the EU, Article 130 of the Treaty on the Functioning of the European Union (TFEU), one of the EU's constitutional treaties, provides the ECB with almost complete independence from political interference and exclusive competence on matters of monetary policy, with its main objective being price stability.[4]

As a result of the Global Financial Crisis, it was no longer possible to lower interest rates to effectively control inflation.[5] To avoid risks of deflation, the ECB introduced non-standard measures, including the Asset Purchase Programme (APP), which sought to introduce price stability to firms and households across Europe, and was extended in 2015 by the introduction of the Public Sector Purchasing Programme (PSPP).[6] The PSPP can be thought of as a specific tool used by the APP, to purchase bonds issued by Eurozone governments, agencies and European institutions. Together, the APP and the PSPP seek to increase inflation, which was a notable challenge following the Global Financial Crisis.

Bank — Eurosystem, 2021) <https://www.ecb.europa.eu/explainers/tell-me-more/html/stableprices.en.html> accessed 27 February 2021.

[3] Jon Faust, 'Why Do Societies Need Independent Central Banks?' (2016) 3 Sveriges Riksbank Economic Review 21, 22.

[4] Statute on the ESCB and ECB, art 2; 'European cooperation' (*European Central Bank*) <https://www.ecb.europa.eu/ecb/tasks/europe/cooperation/html/index.en.html> accessed 26 May 2021.

[5] Athanasios Orphanides 'European crisis and its implications for global inflation dynamics' in Settlement, Bank for International (eds) *Globalisation and inflation dynamics in Asia and the Pacific* (2013, Bank for International Settlements) 131.

[6] European Central Bank, 'How Does the ECB's Asset Purchase Programme Work?' (*European Central Bank — Eurosystem*, 28 February 2019) <https://www.ecb.europa.eu/explainers/tell-me-more/html/app.en.html> accessed 27 February 2021; Peter Conti-Brown and Rosa M Lastra, *Research Handbook on Central Banking* (Edward Elgar 2018) 202.

The ECB's ability to pursue such measures is derived from the monetary policy, codified in TFEU, Chapter 2, Title VIII.[7] In contrast, Article 119 of TFEU reserves the powers of economic policy to Member States.[8] Distinguishing between the two policies permits Member States to focus on taxation and spending, and central banks to focus on price stability and interest rates. Despite there being a distinction in principle between economic and monetary policy, that is not to suggest that economic and monetary policy can be easily differentiated, as the boundaries between the two are often blurred. It is for this reason that the monetary policy has the potential to encroach on economic policy.[9] This factor, along with the existence of tensions between Member States and the ECB which were underpinned by the financial crisis, formed the basis of a legal challenge to the PSPP, in a case that has come to be known as *Weiss I*. The claimants asked the FCC to decide whether:

a the ECB went beyond its monetary policy mandate and pursued an economic policy through the PSPP; and
b the ECB violated the German constitution by preventing the Parliament from controlling the country's public finances.[10]

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[7] Dražen Rakić and Dirk Verbeken, 'European Monetary Policy' (*Europarl*, December 2020) <https://www.europarl.europa.eu/factsheets/en/sheet/86/europaische-geldpolitik> accessed 28 April 2021.

[8] 'EU Economic and Monetary Union' (*EUR-Lex*, 15 September 2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aec0015#:~:text=Article%20119%20states%20that%20the,lays%20down%20some%20guiding%20principles> accessed 28 April 2021.

[9] There is substantial overlap between the monetary and the economic policy and this is recognised by the ECB Statute. For instance, the statute states that the Eurosystem shall 'support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union'. See Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E%2FPRO%2F04> accessed 06 April 2021.

[10] *Weiss II* (n 1) para 80; Hoai-Thu Nguyen and Merijn Chamon, 'The Ultra Vires Decision of the German Constitutional Court' (2020) Hertie School Policy Paper

To answer the first question posed by the claimants, the FCC pursued the preliminary reference procedure, asking the CJEU if the ECB had breached Article 123 of TFEU and if it had violated its mandate regarding monetary policy.[11] In its judgment, the CJEU ruled that the PSPP was compatible with EU law and there was no breach. [12] Furthermore, adopting a purposive approach, the CJEU held that the provisions within the TFEU did not intend to make a complete separation between economic and monetary policies. [13] It suggested that, in practice, some overlap between these policies was necessary for the ECB to pursue its objectives.[14] Finally, the CJEU found that the measures enacted as part of the PSPP were proportionate and did not go beyond the necessary means to achieve its objectives. [15]

This legal saga reached its climax when the FCC delivered its judgment in *Weiss II*, which ultimately disagreed with the preliminary ruling of the CJEU. This action alone was extreme. The purpose of the preliminary reference procedure is solely to facilitate cooperation between the CJEU and national courts.[16] Instead of interpreting EU law in cases of doubt, a national court must refer questions to the CJEU. When the judgment returns to the national court, that court must uphold it. However, in *Weiss II*, the FCC did quite the opposite and declared the judgment of the CJEU and the PSPP ultra vires.

<https://opus4.kobv.de/opus4-hsog/frontdoor/index/index/docId/3524> accessed 27 February 2021.

[11] *Weiss II* (n 1) para 80; Annelieke AM Mooij, 'The Weiss judgment: The Court's Further Clarification of the ECB's Legal Framework' (2019) 26(3) Maastricht Journal of European and Comparative Law 449, 451.

[12] *Weiss I* (n 1) paras 100, 144, 158.

[13] *Weiss I* (n 1) para 60.

[14] *Weiss I* (n 1) para 67.

[15] *Weiss I* (n 1) para 100.

[16] Michal Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice' (2008) 45(6) CMLR 1611.

In what some may deem an attack on the CJEU's application of proportionality in *Weiss I*, the FCC held that 'suitability and necessity [were] not balanced against the economic policy effects', meaning its application of proportionality was flawed.[17] The FCC criticised the CJEU for its failure to consider the economic effects of the PSPP; this, according to the FCC, resulted in the ECB having freedom to choose any measures within its mandate, even if such measures were harmful to Member States.[18] Consequently, the failure of the CJEU to properly undertake the proportionality analysis meant it exceeded its competences; it was for this reason that the FCC declared the preliminary ruling ultra vires.[19]

The FCC adopted a similar approach in relation to the second question posed by the claimants. In considering the remit of the ECB, the FCC held that it did not balance the economic effects of the PSPP with its monetary policy objective; it was on this basis that the FCC constituted the creation of the PSPP as being an ultra vires act.[20] As a result, the FCC held that the German government must require the ECB to conduct a comprehensive proportionality assessment of the PSPP.[21] Following *Weiss II*, this assessment was successfully carried out, thus permitting the continuation of the PSPP in Germany.[22]

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[17] Franz C Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's Ultra Vires Decision of May 5, 2020' (2020) 21(5) German LJ 1116, 1117; *Weiss II* (n 1) para 133.
[18] *Weiss I* (n 1) para 140.
[19] *Weiss I* (n 1) headnote 2.
[20] *Weiss I* (n 1) para 176.
[21] Although it has been argued that there was no basis in the German Constitution for the Federal Constitutional Court to legally instruct the government and parliament 'to ensure that the ECB conducts a proportionality assessment in relation to the PSPP'. See Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German LJ 979, 983.
[22] Birgit Jennen, 'German Parliament Backs ECB Bond-Buying After Court Standoff' (*Bloomberg*, 2 July 2020) <https://www.bloomberg.com/news/articles/2020-07-02/german-parliament-backs-ecb-bond-buying-ending-court-standoff> accessed 27 February 2021.

3 A Wider Trend

Prima facie, it would appear that the matter is settled — the German government was able to conclude that the adoption of the PSPP satisfied the proportionality analysis, just as the FCC ruled. However, this only considers the judgment as a sum of its facts. Looking at the judgment more closely, and considering what it represents, we can identify the significant challenges it presents for EU law. The decision in *Weiss II* was the result of a national court declaring a judgment delivered by the CJEU, and a programme legally mandated by EU law, ultra vires, which may have significant consequences for the supremacy of EU law.

The principle of supremacy was established by case law. In *Costa v ENEL*, the CJEU stated that, by joining the Community, Member States 'have limited their rights'.[23] It was later confirmed in *Simmenthal* that the principle of supremacy principle applies to any piece of national law that contradicts EU law.[24] This means that even the constitution of a Member State must be displaced if it is in conflict with EU law.

In *Solange I*, the FCC considered the principle of supremacy, but had difficulty in accepting that EU law would prevail over the national constitution.[25] As a result, the FCC placed numerous conditions on the supremacy of EU law when in conflict with national issues to protect and uphold constitutional rights. Following this decision, the FCC considered the case of *Solange II* and seemingly took a more moderate approach.[26] It was held that, so long as EU law protected the fundamental rights of German citizens, it would not be subject to any

[23] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 614, para 3.
[24] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.
[25] Case 11–70 *Internationale Handelsgesellchaft mbH v Einfuhr- & Vorratsstelle fur Getreide & Futtermittel* (17 December 1970) (*Solange I*).
[26] Case 69–85 *Re Wünsche Handelsgesellschaft* (22 October 1986) para 339 (*Solange II*).

review by the national judiciary.[27] However, if EU institutions, such as the ECB, were found to exceed their powers codified by the treaties, any subsequent acts made by those institutions would not be legally binding in Germany.[28] Nevertheless, the FCC also held that the CJEU would always be given an opportunity to provide a preliminary ruling in cases where national law conflicted with EU law.[29] In the light of this, it should not be too surprising that the FCC came to the conclusion they did in *Weiss II*.

Notwithstanding the history underpinning the judgment in *Weiss II*, it is also possible that the decision was part of a wider trend. Interestingly, it is not the first time a national court has taken a decision that has undermined the supremacy of EU law. We perhaps first saw the beginning of this trend in 2012, when the Czech Constitutional Court declared a judgment delivered by the CJEU ultra vires. This case concerned a dispute between the two succession states, following the dissolution of Czechoslovakia, whereby the Czech Republic sought to award special pension increments only to Czech citizens.[30] This was not only in breach of the agreement come to by the two succession states but, according to the CJEU in *Landtová*, it also contravened EU law surrounding the protection from discrimination on the grounds of nationality.[31] In response, the Czech Constitutional Court held that the CJEU went beyond its competences as it omitted to give due consideration to the unique legal situation created by the dissolution of Czechoslovakia.[32]

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[27] ibid.
[28] Case 9–72 *Brunner v The Federal Republic of Germany* (4 October 1972).
[29] *Weiss II* (n 1).
[30] Jan Komárek, 'Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII' (2012) 8 EuConst 323, 325.
[31] Case C–399/09 *Marie Landtová v Česká správa socialního zabezpečení* [2011] ECR I–5596.
[32] *Pl. ÚS* 5/12 of 31 January 2012.

Only four years later, in 2016, the Supreme Court of Denmark heard the *Ajos* case, which concerned a conflict between a Danish statute, permitting an employee's allowance to be revoked based on their age, with the protection against age discrimination enshrined in EU law.[33] In its preliminary ruling, the CJEU held that a national court cannot claim it is unable to interpret national law in a manner compatible with EU law merely because that court had earlier applied national provisions that were inconsistent with EU law.[34] The Danish Supreme Court disagreed with this assessment and held that, at the time of Denmark joining the Community, protection from discrimination on the grounds of age was not codified in the treaties, thus permitting them to disapply the regulation.[35]

Both cases in the Czech Republic and Denmark represent a departure from the principle of EU supremacy. In both circumstances, the European Commission would have been permitted to bring infringement proceedings against the Member States in violation. Infringement proceedings are used as a tool that requires Member States to comply with EU law, usually through the form of a formal request. Where Member States choose not to comply, the case may be referred to the CJEU to consider the imposition of financial penalties.[36]

Surprisingly, neither Member State has faced any consequences for contravening the principle of EU supremacy. In both cases, it is unclear why no further action was taken. However, it is arguable that, by

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[33] Case C–15/2014 *Ajos A/S v Estate of A* [2016] OJ C211/12; Nguyen and Chamon (n 10) 8.

[34] Case 441/14 *Dansk Industri v Rasmussen* (GC, 19 April 2016); Sim Haket, 'The Danish Supreme Court's Ajos Judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order' (2017) 10(1) REA Law 135, 138–39.

[35] *Dansk Industri* (n 34).

[36] 'Infringement procedure' (European Commission) <https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en> accessed 6 April 2021.

omitting to initiate infringement proceedings, the EU may have facilitated a wider trend whereby national courts have rejected the supremacy of EU law in favour of national measures. Inevitably, this is problematic, as Mayer rightly notes: 'if every Member State claimed the final word on EU law, we could kiss the European community of law and the idea of a common legal system good-bye'.[37]

Of course, in the context of the *Weiss* saga, bringing infringement proceedings against Germany would no longer be reasonable as the matter has already been settled by the German government. However, this should act as a warning to the European Commission that they should be ready to adopt a tougher stance against Member States who infringe EU law. Without further action, we may observe a continuing trend whereby Member States, such as Poland and Hungary, two Member States currently experiencing challenges to the rule of law from within their national governments, are able to selectively apply EU law at national level.

4 A Dangerous Precedent

One does not need to look much further beyond the socio-political climate in Poland and Hungary to conceive the potential consequences of the *Weiss II* judgment. In both countries, a rule of law crisis has emerged amidst the actions of right-leaning governments.[38] It has been argued elsewhere that it would be difficult to apply the *Weiss II* judgment to the context of Poland and Hungary, as the rule of law crisis is a matter completely distinct from the issues raised by the PSPP.[39]

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[37] Mayer (n 17) 1118.

[38] James Shotter and Valerie Hopkins, 'Hungary and Poland Stand Firm against EU Rule of Law Conditions' *Financial Times* (London, 18 November 2020) <https://www.ft.com/content/6868477d-38a2-464e-b1c4-188fd0a62b1a> accessed 6 April 2021.

[39] Von Matthias Jestaedt, 'Keine Handlangerdienste' *Frankfurter Allgemeine Zeitung* (Frankfurt, 14 May 2020) <https://www.faz.net/einspruch/exklusiv/das-ezb-urteil-ist-kein-handlangerdienst-fuer-populisten-16770506.html> accessed 27 February 2021.

However, it is argued here that the principle of undermining EU law is easily transferable and it is plausible that Poland and Hungary will adopt the principles underpinning the *Weiss II* judgment to their benefit. Indeed, in May 2020, Hungary's justice minister stated that 'the fact that [the] CJEU has been overruled is extremely important' and Poland's deputy justice minister claimed that 'the EU says only as much as we, the Members States, allow it'.[40]

It is difficult to predict with precision the context in which *Weiss II* may be used in both Member States. However, the context may centre around the judicial independence crisis in Poland and the 'Stop Soros' laws in Hungary. In Poland, the creation of the Disciplinary Chamber of the Supreme Court by the Law and Justice Party, the largest party in the Polish parliament, is thought to have displaced an independent judicial system.[41] Owing to the enactment of recent legislation, the Chamber has the authority to prosecute members of the judiciary or deprive them of their judicial mandate if they are found to criticise the government.[42] In the context of Hungary, the Parliament has passed the 'Stop Soros' legislation, which 'criminalises activities that support asylum and residence applications and further restricts the right to request asylum'.[43] This legislation has been condemned by the

[40] Imre Csekő, 'Mindenki Legyen Bátor és Hűséges a Saját Elveihez' (*Magyar Nemzet*, 9 May 2020) <https://magyarnemzet.hu/belfold/mindenki-legyen-bator-es-huseges-a-sajat-elveihez-8096054/> accessed 6 April 2021.

[41] Maria Wilczek, '"The Courts Are Destroyed for at Least 20 Years": Poland's Supreme Court Chief Looks Back on Her Term' (Notes from Poland, 3 April 2020).

[42] Dz.U.2021. 154, Art 27.

[43] 'Stop Soros' legislation includes: Bill T/19776 on the permits for organisations supporting migration; Bill T/19774 on the immigration restraint order; and Bill T/19775 on the immigration funding fee. See the translated version at <https://helsinki.hu/wp-content/uploads/Stop-Soros-package-Bills-T19776-T19774-T19775.pdf> accessed 30 April 2021; The European Commission, 'Commission Takes Hungary to Court for Criminalising Activities in Support of Asylum Seekers and Opens New Infringement for Non-Provision of Food in Transit Zones' (European Commission, 25 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260> accessed 20 April 2021.

European Commission for having breached numerous EU Directives.[44]

The European Commission invoked infringement proceedings against the Member States, but received no satisfactory response, and have since referred the matters to the CJEU.[45] Whatever conclusion the CJEU reaches, it may be that the lack of cooperation shown by Poland and Hungary in the initial phase of the infringement proceedings forms part of this growing trend of Member State non-compliance.

Perhaps the most significant question posed by this paper is how *Weiss II* will influence the response of the Polish and Hungarian governments with respect to the future judgments delivered by the CJEU. Even though neither Member State would be acting in a novel way by disapplying EU law, they may, as a result of the judgment in *Weiss II*, feel especially empowered to do so. Indeed, there persists a view that the judgment will permit both governments to set aside the decisions of the CJEU where this conflicts with a political agenda — a view difficult to quash considering the initial failure to ameliorate the concerns of the European Commission.[46]

It remains to be seen how the CJEU will proceed in relation to the measures adopted by the Member States, and equally how the Member States will respond to the judgments. However, it is conceivable that,

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[44] ibid.

[45] European Commission, 'Rule of Law: European Commission Refers Poland to the European Court of Justice to protect independence of Polish judges and asks for interim measures' (31 March 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524> access 27 May 2021; European Commission, 'Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones' (25 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4260> accessed 27 May 2021.

[46] Daniel Mooney, 'The EU in Danger? What the German Constitutional Court's Weiss Ruling Might Mean for Europe' (European Student Think Tank, 21 June 2020) <https://esthinktank.com/2020/06/21/the-eu-in-danger-what-the-german-constitutional-courts-weiss-ruling-might-mean-for-europe/> accessed 7 April 2021.

following the lack of action taken by the European Commission in respect of *Weiss II* and the earlier cases in Denmark and the Czech Republic, the EU may have inadvertently facilitated the Polish and Hungarian governments to not comply with CJEU decisions, despite their supposed legal paramountcy over Member States.

5 Conclusion

This paper has analysed the *Weiss* saga, in which a national court overruled the CJEU. The judgment itself has the potential to disrupt longstanding concepts in EU law. This is not the first time a national court has disagreed with a ruling of the CJEU, and it appears that the *Weiss* saga has continued a growing trend whereby Member States have felt empowered to displace areas of EU law in conflict with national agendas. In the examples outlined in this paper, no Member State has been sanctioned by the EU for their infringement of EU law. We will never know whether invoking the relevant procedures at the time would have effectively brought an end to the apparent trend. However, this paper has argued that, by taking lawful action against Member States who seek to infringe EU law, the EU is better placed to uphold the principle of supremacy, particularly in light of the challenges posed by Member States such as Poland and Hungary.